A Principled Approach to Battery in Forced Sterilization Cases

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Abstract

Many Indigenous women have experienced forced sterilization, a procedure that removes one's capacity to reproduce without their consent. This paper explores how the tort of battery may provide redress for these victims. Battery does not require proof of harm, but the difficulty lies in recognizing the nature and full extent of the injury, which calls for a discussion about the scope and substance of bodily integrity—the interest protected by the tort. One possible view of bodily integrity focuses on the physical body and would treat sterilization as a one-time interference whose outcome may or may not be significant, depending on the plaintiff's personal circumstances. This view trivializes the Indigenous women's identity and dignity losses. Given stereotypes of Indigenous mothers, it also fails to steer clear of the eugenic and paternalistic motivations behind targeted sterilization.

I borrow Drucilla Cornell's conception of bodily integrity to formulate a view of the tort oriented in personal autonomy: bodily integrity includes the projection of one's future parenthood; and the body is a site for the idiosyncratic construction of one's identity and communal membership. Under this view, the wrong in wide-spread forced sterilization lies in the targeting of Indigenous identities and in the instrumentalization of the women's bodies for the perpetrators' own purposes. My proposed view thereby reconciles the collective cultural loss caused by institutionalized medical practices with private law's traditional focus on the individual. This view is consistent with jurisprudence on other types of medical batteries. Applying it to the forced sterilization cases, courts should not over-scrutinize the lack of tangible loss to each individual but instead focus on the systemic attack on the Indigenous women's collective identity.

Section I. Introduction

> "For many, many years, I was in denial; I wouldn't accept it because I wanted children."
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> — Leilani Muir, *Eugenics Archive*

It is no secret that Canada has a troubled history with its Indigenous peoples. Forced sterilization is both part of this troubled historical and an ongoing process of colonization and marginalization. Indigenous women have been disproportionately targeted through both formal legislation and institutionalized practices in the healthcare system. The permanent deprivation of parenthood is humiliating and traumatizing at an individual level; and for Indigenous peoples, it is an assault on their collective identity. This paper explores what the tort law of battery can do for the victims of forced sterilization. Specifically, I argue that courts should view bodily integrity, which the tort seeks to protect, through the lens of personal autonomy. This view properly accounts for the nature of the identity and dignity losses experienced by the Indigenous women. Although arguably no legal remedy is commensurate with the gravity of these losses, my proposed view is more likely to lead to a fair-*er* outcome in litigation.

Section II of the paper reviews the factual and legal background of forced sterilization. Courts have assisted individual victims of forced sterilization by the government, but the litigants in recent class actions hope to reveal the systemic nature of the wrong in targeting their Indigenous identity. This is difficult because jurisprudence has not been consistent on the nature of what sterilization takes away from a person and whether it even differs from other medical procedures that have gone wrong.

Section III characterizes the wrong in forced sterilization as the instrumentalization of women's bodies for the perpetrator's own purposes. An outcome-based approach that focuses on the mere loss of a bodily function does not adequately capture the victims' identity and dignity losses. On the other hand, focusing on the loss of parenthood invites heavy scrutiny on causation and may undermine access to justice by activating stereotypes against Indigenous mothers.

Section IV proposes an autonomy-based approach based on Drucilla Cornell's conception of bodily integrity, which extends beyond the physical body to the construction of one's identity. This approach aligns with existing jurisprudence on medical batteries and enhances access to justice for the Indigenous women.

Section II. Background and the Law on Forced Sterilization

A. *Victims of sterilization campaigns have received individual cost awards*

The history of forced sterilization in Canada can be viewed in two phases: a phase of state-sanctioned campaigns involving formal legislation and a subsequent phase of informal practices that are nevertheless wide-spread and condoned by the government. Eugenics thinking and systemic racism permeates both phases.

In the state-sanctioned phase, two provinces, Alberta and British Columbia, passed formal legislation authorizing forced sterilization. The Alberta Eugenics Board, created by the province's *Sexual Sterilization Act* in 1928, approved throughout itself history an increasing number of

sterilization applications involving people who did not give consent.[1] Although not explicitly targeted in the formal legislation, Indigenous women were disproportionately subject to forced sterilization in comparison to their per capita population in the province.[2] The racist motivation behind the Eugenics Boards was clear. Emily Murphy, a settler suffragette and the first female magistrate court judge, endorsed the policy of eugenics towards Indigenous peoples as follows:

> "One hardly knows whether to take the Indian as a problem, a nuisance, or a possibility […] Regarding his future we may give ourselves little uneasiness. This question is solving itself. A few years hence there will be no Indians. They will exist for posterity only in waxwork figures and in a few scant pages of history."[3]

The Eugenics Boards were abolished in the 1970s. In 1996, Leilani Muir, whose sterilization was approved by the Alberta Eugenics Board, won a landmark lawsuit against the provincial government. She was deemed mentally defective and sterilized as a teenager.[4] Although the action was launched after limitation period has passed, the Alberta government admitted fault and only asked the court to assess damage. With evidence of the procedure's catastrophic impact on her life, Ms. Muir convinced the court to award her the maximum possible for pain and suffering, with aggravated damage for stigmatizing her as a moron.[5]

The success of the *Muir* case is constrained by the individual nature of the cost award. Veit J was clear that "this is an individual award based on the evidence in this case", which "does not necessarily provide a guide for other cases for sterilization, or for forced sterilization."[6] There was evidence of "systemic biases in the operation of the [Eugenics] Board," and Ms. Muir's mother's "subcultural background" as a Polish and Roman Catholic immigrant might have played a role in how Ms. Muir was treated, but Veit J declined to award punitive damage.[7] It would be too costly in Veit J's view, and the government's choice to not invoke the limitation defence and defeat the claim signaled a much-encouraged apology.[8]

However, neither the formal abolition of Eugenics Boards nor the *Muir* decision ended the wide-spread practice of forced sterilization. Multiple proposed class actions are underway for Indigenous women who have been sterilized without consent in more recent years.[9] These women were asked to sign off on tubal ligation while being rushed into emergency C-section operations. Some doctors performed sterilization over their patients' objection to the procedure. The lead plaintiff in the class action in Alberta, May Sarah Cardinal, despite being healthy and planning to

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[1] National Inquiry, "Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a" (2019) at 266-267, online (pdf): *National Inquiry* < https://www.mmiwg-ffada.ca/> [perma.cc/LR8A-MGTU].
[2] *Ibid* at 267.
[3] *Ibid* at 266.
[4] *Muir v Alberta*, 132 DLR (4th) 695, 1996 CarswellAlta 495 at paras 38-42.
[5] *Ibid* at paras 1-2.
[6] *Ibid* at para 169.
[7] *Ibid* at paras 130–32.
[8] *Ibid* at para 3.
[9] "Sask. Indigenous women file lawsuit claiming coerced sterilization", *CBC News* (October 10, 2017), online: <https://www.cbc.ca/news> [https://perma.cc/EEE2-QZFG] [*CBC News*]; "Class action lawsuit proposed on coerced sterilization in Alberta", *CBC News* (December 19, 2018), online: <https://www.cbc.ca/news> [https://perma.cc/BA8V-CHHR].

have more children, was led to believe that a decision to undergo a tubal ligation should be made by a doctor; and the lead plaintiff in the British Columbia class action, Jessica Horne, was also required to undergo sterilization by hospital staff for no medical reason. Both women only realized after being sterilized that they should have been allowed to make their own decisions.[10] In a report by the Saskatoon Health Region Authority, many Indigenous women described similar experiences of coercion and a complete lack of information from healthcare providers before being sterilized.[11]

These recent class actions are explicitly about systemic wrongs against Indigenous women, which makes them different from the *Muir* case and other individual claims that followed *Muir*. The pertinent question therefore is: what unites the individual plaintiffs' experiences and how does the unifying factor relate to the search for justice? The answer is likely some form of systemic prejudice against Indigenous women. The rest of this paper explores how the tort law of battery, through an autonomy-based view of bodily integrity, can treat such systemic prejudice as a cognizable harm and award damages accordingly.

B. Canadian courts have taken a generous view of bodily integrity in medical batteries

Forced sterilization is an act of battery,[12] a tort involving non-trivial interference with a person's body. The Supreme Court majority in *Non-Marine Underwriters, Lloyd's London v. Scalera* affirmed that battery is a rights-based tort.[13] In rejecting the suggestion that plaintiffs should be required to establish fault, the Court's majority on this issue held that the tort is rooted in "personal autonomy" and "physical integrity," which are engaged with the very act of bodily interference.[14] Such acts have "high demoralization costs" attached to them in the sense that the victims tend to experience a loss of "personality and freedom" and feel resentment and insecurity if the wrong is uncompensated for.[15]

Given the right-based nature of the tort of battery, no proof of harm is required either.[16] In the medical context specifically, patient autonomy overrides doctors' judgement of a patient's best interests, even if refusing treatment means blood poisoning and losing one's hand[17] or imminent

[10] *Cardinal v Alberta* (18 December 2018), Calgary, Alta QB 1801-18051 (Statement of Claim) at 6, online (pdf): *Koskie Minsky* <https://kmlaw.ca/cases/> [https://perma.cc/NHD7-8H3U] [*Cardinal Statement*]; *Horne v British Columbia* (25 October 2019), Vancouver, BCSC S-194010 (Amended Notice of Civil Claim) at 4, online (pdf): *Koskie Minsky* <https://kmlaw.ca/cases/> [https://perma.cc/DC2R-BP3E] [*Horne Amended Notice*]

[11] Yvonne Boyer & Judith Bartlett, "External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women" (22 July, 2017) at 17-19.

[12] *Re Eve*, [1986] 2 SCR 388 at para 29 [*Eve*].

[13] 2000 SCC 24 at para 15 [*Scalera*].

[14] *Ibid* at para 10.

[15] *Ibid* at para 14.

[16] Allen M. Linden et al, *Canadian Tort Law*, 11th Ed (Toronto: LexisNexis Canada, 2018) at §2.39.

[17] *Mulloy v Hop Sang*, [1935] 1 WWR 714, [1935] AJ No. 8 (Alta CA) [*Hop Sang*]. A doctor amputated a patient's hand because any delay in treatment would cause blood poisoning and loss of his hand. The patient advised before anaesthetization that he wanted to seek another doctor's opinion.

death.[18] The onus is on the medical practitioner to prove that the patient consented to a procedure or that it was reasonable to infer so.[19]

It is almost impossible to establish consent or a reasonable inference of consent given the factual matrices of forced sterilization cases. Many of the Indigenous women did not even know they had a decision to make before the procedure was performed on them. Case law from as early as 1949 was clear that tubal ligation without consent could not be justified on the basis of anything falling short of medical necessity—even if the majority of patients in the plaintiff's situation would have wanted the procedure.[20] Therefore, the victims of forced sterilization will likely have no trouble making out the claim of battery.

Besides the broad formulation of its legal test, the tort of battery potentially allows generous damages. Although physical interference, without more, only entitles plaintiffs to a nominal amount, various types of injuries in the medical context can be attached to the initial act of battery. In *Allan v New Mount Sinai Hospital*, the plaintiff developed complications after the doctor administered anaesthesia on the arm that she told the doctor to not touch.[21] She failed on the negligence claim but succeeded in battery. Linden J found the doctor liable for all damages flowing from the unsanctioned procedure, including the plaintiff's extremely rare reaction to it, the subsequent pain, and loss of earnings. This is because while negligence would have limited damages to injuries within the risk created by the defendant, battery as an intentional tort does not require foresight or legal causation.[22]

In the context of sexual assault, the generous threshold for establishing battery has allowed victims to use civil litigation as a healing process, giving rise to "therapeutic jurisprudence".[23] However, a recognition that a legal wrong has been committed does not necessarily lead to the granting of an adequate level of compensation. For Indigenous women who were subject to forced sterilization, litigation is not truly "therapeutic" if the process does not bring to light the full scope of injuries that the plaintiffs have suffered, including identity and relational losses that I will address later.

C. Harms from sterilization are less cognizable than in medical batteries

Case law on sterilization mostly deals with capacity to consent of mentally incompetent persons, which is not at issue in cases of forced sterilization. But these decisions provide insight as to what courts view as being harmed by sterilization.

First, it is unclear whether a sterilized person lost the right to the benefits of parenthood, or a choice to become a parent. The former views parenthood itself as an inalienable privilege and

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[18] *Malette v Shulman et al.*, 72 OR (2d) 417, [1990] OJ No. 450 (QL) (Ont CA) [*Malette*]. An unconscious patient carried a card declaring her to be Jehovah's Witness and refusing blood transfusions. Physician administered blood to save the patient's life, which nevertheless constituted battery.
[19] *Schweizer v Central Hospital et al* (1975), 6 OR (2d) 606.
[20] *Murray v McMurchy*, [1949] 2 DLR 442, 1949 CarswellBC 36 at para 7.
[21] 109 DLR (3d) 634, [1980] O.J. No. 3095 (QL) (Ont HCJ), rev'd on pleading issue [1981] OJ No. 2874, 33 OR (2d) 603n (Ont CA) [*Allan*].
[22] *Ibid* at para 36-37.
[23] Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25 Ottawa L Rev 203.

the latter involves no normative judgment of parenthood. The Supreme Court in *Eve* discussed two approaches to adjudicating an application to sterilize a mentally incompetent person. The first is a a "best interests" test where courts decide what one's best interests are—with judicially-developed guidelines.[24] The second approach is a "substituted judgement" test that enquires into what the person would have chosen were they mentally competent, given their personal values and religious beliefs.[25] La Forest J held that non-therapeutic sterilization will never present enough "benefits" to outweigh "the great privilege of giving birth."[26] In other words, parenthood is such an inherent good that giving it up without medical necessity cannot possibly be in one's best interest. Notably, La Forest J rejected the "substituted judgement" test because however much a court tries to put itself in the patient's place, what they would have wanted is inevitably the court's own speculation. It is therefore "sophistry" to call a court-imposed result the patient's "substituted judgement."[27]

The Court's reasoning in *Eve* signifid a willingness to uphold reproductive autonomy even though it essentially created a judicial default to parenthood as the preferred option. For this reason, *Eve* has been criticized for limiting the right to sterilization for the mentally disabled.[28] Subsequent courts bound by *Eve* sometimes managed to approve requests for non-therapeutic sterilization by emphasizing, ironically, the patient's own competency in understanding the procedure. In *GTM, Re*, another sterilization application, Dunlop J commented that the Alberta legislature had yet to respond to a legislative reform proposal in light of the *Eve* ruling and codify procedures for authorizing sterilization of the mentally incompetent.[29] He then approved the application based on the strength of the evidence that GTM understood what a vasectomy is and demonstrated a desire to have one to approve the application. In his view, the application was GTM's own decision, which does not need to be overridden to protect his "best interests."[30]

Second, courts disagree on whether sterilization should be viewed differently from other medical procedures. This is evident when one compares decisions on whether forced sterilization qualifies for the "sexual assault" exemption to limitation periods. The majority in *E (D) (Guardian ad litem of) v British Columbia* held that it does. Donald JA reasoned that the lack of carnal gratification does not change the nature of the injury—it deprives patients of the reproductive autonomy, which is an essential part of their "sexual integrity."[31]

In *Z (MS) v M*, the Yukon Territory Supreme Court declined to follow *E (D)*. Gower J pointed to legislative intent behind limitation statutes: the long-term psychological trauma and frailties that animated the exemption for sexual assault victims are absent in forced sterilization.[32] The decision therefore does not consider the loss of reproductive autonomy as traumatizing. In fact, Gower J rejected the argument that sterilization should be treated differently from other

[24] *Eve*, *supra* note 12 at para 65.
[25] *Ibid* at para 70.
[26] *Ibid* at paras 79 and 86.
[27] *Ibid* at para 95.
[28] Dwight Newman, "An Examination of Saskatchewan Law on the Sterilization of Persons with Mental Disabilities" (1999) 62 Sask L Rev 329.
[29] 2018 ABQB 450, at paras 20, 25 and 36.
[30] *Ibid* at para 50.
[31] 2005 BCCA 134 at paras 70–78.
[32] 2008 YKSC 73 at paras 21–22.

medical procedures and questioned the wisdom in classifying body parties based on whether they are "reproductive or sexual in nature."[33]

However, sterilization poses tougher questions than other medical procedures. First, it concerns the future use of an organ that is contingent on the person's choice regarding parenthood, whereas the loss of an arm, for example, directly creates foreseeable pain and suffering. Second, the presence of children gives rise to parental responsibilities and certain familial implications. One's personal choice and circumstances in cases of sterilization are thus subject to more scrutiny both socially and judicially. Such scrutiny impacts the scope of bodily integrity—the fundamental interest protected by the tort of battery. The following section discusses an outcome-based view of bodily integrity and its problem in recognizing the nature of the wrong and the extent of the injuries caused by forced sterilization.

Section III. Problems with an Outcome-Based View of Bodily Integrity

For clarity of analysis, I will contrast an outcome-based approach to bodily integrity in the context of forced sterilization with my proposed, autonomy-focused approach.

The outcome-based approach treats sterilization as a one-time interference with the physical body, consistent with how Gower J in *Z(MS)* rejected the difference between medical malpractices involving reproductive organs and those that do not. After all, sterilization involves no ongoing physical pain; for women, the procedure was often performed while giving birth and during C-sections that are already intrusive. Based on the discussion in *Eve* about the inherent privilege of giving birth, an outcome-based view may also account for the loss of parenthood: the loss of joy in parenting children, perhaps mitigated by the costs and emotional labour that would have been required to raise them.

A. The Indigenous women's identity, dignity, and relational losses are not captured by an outcome-based view

The disproportionate targeting of Indigenous women—whether intentional or through adverse effects—undermines their sense of cultural identity and dignity. It is first of all demeaning. The Alberta plaintiff described this as a loss of "Indigenous cultures, customs, traditions, language, and spirituality" and "one's ability to pass one's culture and identity to one's children".[34]

Second, a deprivation of reproductive choice also jeopardizes familial and communal connections that are essential for preserving one's cultural roots and sense of dignity. The sterilization practically ended the marriage of a lead plaintiff in the Saskatchewan class action.[35] The statement of claim in the Alberta class action alleges loss of "family and familial relations" and "social dysfunctionality and alienation from family, spouses and children."[36] The damage done through undermining one's support network could be particularly severe for women who are already disproportionately vulnerable to violence and socioeconomic disadvantages.

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[33] *Ibid* at para 19.
[34] *Cardinal Statement, supra* note 10 at 7; *Horne Amended Notice of Civil Claim, supra* note 10 at 8.
[35] *Ibid*.
[36] *Ibid*.

The harm in forced sterilization admittedly operates in a different manner compared to depriving children's cultural identity by "scooping" them from their families and communities, which was the injury recognized in *Brown v Canada (Attorney General)*.[37] Unlike the children who were removed from their cultural context, the women technically retained connections to their families and communities. However, some women regard their ability to reproduce as sacred itself under traditional beliefs that are being erased by state institutions.[38] When historical policies such as residential schools and eugenics boards were in place, wide-spread sterilization amounted to a systemic attempt at dismantling Indigenous communities to destroy their culture and way of life.[39] The systemic character of the sterilization practices does not disappear merely because the formal legislation has been repealed. The medical professionals involved and the government through its alleged condonation continued to engage in a form of cultural genocide.[40]

Importantly, the cultural genocide is carried out by instrumentalizing Indigenous women's bodies for the perpetrators' own purposes. Racism and marginalization of Indigenous women and girls remains part of the social context in which sterilization and its impact on cultural identity must be understood. Even though eugenics thinking may not be the only motivation behind forced sterilization, the perpetrators nevertheless impose what they perceived to be the women's "best interests" or perhaps seek to reduce future costs of state-run programs for mothers and children. This cost-avoidance tendency is recognized in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, where the Supreme Court was asked to decide which level of government is responsible for Métis and non-status Indians. Abella J commented that the federal and provincial governments have engaged in "political football — buck passing," creating a "jurisdictional wasteland" for communities in need of social programs, services, and benefits.[41] The act of sterilization in such social and political context is a declaration that Indigenous women do not deserve to exercise autonomy and their bodily integrity is secondary to the perceived social interest. It is a direct assault on the women's collective identity and human dignity and therefore more offensive than a mere incident of medical malpractice.

This added wrong of targeted sterilization cannot be properly expressed through an outcome-based view to bodily integrity. The outcome of sterilization is simply an inability to exercise some functions attached to one's reproductive organ, which is not qualitatively different from a procedure involving a non-reproductive body part. It would seem quite right for Gower J in *Z(MS)* to question what entitles those who have been wrongly sterilized to an exemption to limitation periods, while other wronged patients have to file suits in time. In fact, if anything, a tubal ligation poses no challenge to one's day-to-day activities; the tangible harms seem less severe compared to losing an arm or a leg due to improper medical treatment.

This raises a practical difficulty for the Indigenous plaintiffs. Courts may use "pain and suffering" as a head of damage to encompass anything from the mere intrusiveness of the medical

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[37] 2017 ONSC 251.
[38] *CBC News*, *supra* note 9.
[39] Karen Stote, "The Coercive Sterilization of Aboriginal Women in Canada" (2012) 36:3 American Indian Culture and Research Journal 117 at 138.
[40] National Inquiry, "A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls" (2019) at 17, 24, online (pdf): *National Inquiry* <https://www.mmiwg-ffada.ca/> [https://perma.cc/RPA8-F7JQ]
[41] 2016 SCC 12 at paras 13–15.

procedure itself to the ongoing trauma from identity and dignity loss. It is the trauma that must be recognized in forced sterilization cases—both as the true consequence of the wrong and in terms of awarding more adequate compensation to plaintiffs. Under an outcome-based view, whether the ongoing trauma is compensable entirely depends on whether the specific plaintiff can prove that she suffered severe psychological harm. This is a fact-sensitive assessment and contingent on the individual. Even if a class proceeding gets certified, the amount of damage each class member is entitled to may not be a common issue and may require individual proof. This makes seeking justice through litigation a costly endeavour. One may be discouraged to participate in the action because it could be traumatizing to re-live the experience by giving individual testimony.

B. Focusing on the outcome of losing parenthood tends to over-scrutinize causation

One way to understand the significance of sterilization vis-à-vis medical procedures involving non-reproductive organs is to view parenthood as an inherent good, like La Forest J did in *Eve.* This, however, does not explain why the instrumentalization of Indigenous women's bodies is an added wrong beyond the loss of parenthood itself. More importantly, parenthood is a concept already coloured by existing social beliefs as to what it should look like and who is suitable to be a parent; and the experience of parenthood is not, in practice, equally meaningful or enjoyable to everyone. This creates additional barriers to Indigenous plaintiffs.

Although plaintiffs do not have to prove foresight or legal causation to recover under the tort of battery, challenges remain in establishing the cause-in-fact for harms that do not bear a direct connection to the act of battery. Under an outcome-based view, the harm of forced sterilization only materializes when the victim would have enjoyed parenthood but for the wrongful sterilization. Specifically, the mere inability to give birth is insufficient; it needs to be causally connected to the plaintiffs' pain and suffering—with individualized proof and subject to defendants' challenge by raising alternative theories of causation. As provincial governments have acknowledged some of the injustice caused by eugenics boards, the contention will often be the scope of compensation that courts should award. This depends on how they view the causal link between forced sterilization and the harms alleged.

Triers of fact may wonder whether, in the absence of forced sterilization, the plaintiffs would have indeed enjoyed familial and communal support, or the preservation of their cultural identity, given that they face multiple other sources of disadvantage and oppression. Chamallas and Wriggins' analysis is illuminating about how cognitive biases affect courts' findings on causation. Fundamental attribution bias involves attributing harms suffered by plaintiffs to their supposed predispositions, rather than to situational factors brought about by the defendant's conduct.[42] Relatedly, normality biases make it difficult to imagine a better outcome when the harm suffered is regarded as normal or commonplace for someone like the plaintiff, which downplays the causal link between the defendant's conduct and the plaintiff's suffering.[43] For example, in the context of lead paint litigation, Chamallas and Wriggins argued that judges are susceptible to

[42] Martha Chamallas and Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* (New York: New York University Press, 2010) at 125 [*Measure of Injury*].
[43] *Ibid* at 127.

theories that activate stereotypes about poor black mothers and blame their children's learning disabilities on hereditary factors and family environment.[44]

Similarly, both fundamental attribution bias and normality bias could operate against Indigenous women. Under the first type of bias, because most triers of fact do not personally relate to the experience of forced sterilization, they are more likely to attribute its harms to the internal qualities of the plaintiffs. This calls to mind stereotypes of Indigenous women as impoverished and unable to maintain themselves. A normality bias in this case is the perception that Indigenous women already face wide-spread security and health risks.[45] It may be difficult to imagine an "abnormal" world where Indigenous women enjoy the full benefit of a non-sterilized body. Both biases have the effect of trivializing the ongoing pain and suffering that the women have endured, especially in comparison to a non-Indigenous victim of forced sterilization. It is as if the quality of justice that the plaintiffs are entitled to should be reduced because of their pre-existing vulnerabilities.

In addition to difficulties in establishing causation for indirect injuries, courts may not appreciate the full extent of the injuries. Some American courts have devaluated black bodies by reducing awards on the basis that their sufferings are less hard to bear. Chamallas and Wriggins discussed false imprisonment and wrongful death suits involving African American plaintiffs and family members. Their study points out that courts tend to award less damages based on the perception that their pain and loss are less significant compared to white plaintiffs'.[46]

Even without this type of explicit prejudice, a court focusing narrowly on the outcome of childlessness could end up attaching different values to women's reproductive autonomy based on socioeconomic status. In particular, the stereotype that Indigenous women reproduce irresponsibly could become a "rational" cost-benefit consideration: not being able to have more children than they already do only marginally reduces the joy of parenthood while significantly lightening their financial burden. After all, raising children is a taxing undertaking for women who already face socioeconomic disadvantages.

This approach reflects paternalistic and eugenic attitudes: the deprivation of reproductive choice is a blessing to the plaintiffs and society at large. The Supreme Court has recognized in *Eve* that a judicial determination of a disabled person's "best interests" cannot easily steer clear of social motivations.[47] In the case of Indigenous women, this is exacerbated by the contrast that the welfare cheques that they supposedly claim from the public purse represent discernible costs while the losses of their cultural identity and human dignity are harder to grasp—let along quantify—for the average non-Indigenous trier of fact.

Therefore, under the narrow, outcome-based view of bodily integrity, courts may not recognize the full range and extent of the Indigenous women's injuries. Despite the general

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[44] *Ibid* at 151–53.
[45] National Inquiry, "Executive Summary of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls" (2019) at 27–36, online (pdf): *National Inquiry* < https://www.mmiwg-ffada.ca/> [https://perma.cc/5PRR-PJJY].
[46] *Measure of Injury*, *supra* note 42 at 52–62.
[47] Kristin Savell, "Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law" (2004) 49 McGill LJ 1093.

political and social recognition of the wrong in sterilization campaigns against Indigenous women, legal remedies may not be accessible for the victims. The next section discusses an approach to the tort of battery that may facilitate access to justice.

Section IV. An Autonomy-Based Approach to Bodily Integrity and the Tort of Battery

A. A formulation of battery faithful to Cornell's conception of bodily integrity

Based on philosopher Drucilla Cornell's conception of bodily integrity, I propose a view of battery that protects the body as the inalienable medium to manifesting one's self-identity and partaking in social relations. This view is oriented in personal autonomy and extends beyond the physical object of one's body.

Key to Cornell's feminist legal philosophy is to regard "the person" as a project or possibility that must be open to each of us, which requires "minimum conditions of individuation."[48] In other words, a human being is not a "free person" by definition or as a starting point; but rather, the law must provide equal basis for the each of us to transform ourselves into the individuated beings that we think of as persons.[49] The law should do so by protecting what Cornell calls the "imaginary domain," the "psychic and moral space" where individuals "are allowed to evaluate and represent who we are."[50]

Bodily integrity is integral to the process of individuation and the operation of the imaginary domain. For Cornell, the body must be viewed as inseparable from the mind; it is a process central to one's ongoing construction of personality starting from the baby examining their mirror image and becoming aware of their independent existence.[51] Cornell's view of "bodily integrity" thereby captures the present and future projections of one's identities.[52]

Applied to the context of sterilization, the future dimension of bodily integrity highlights the inherent value of reproductive autonomy as allowing a future possibility. Bodily integrity involves one's autonomy to project oneself as capable of parenthood and for some, to ascribe to their bodies the sacredness attached to procreation under traditional beliefs.[53] Taking away this ability to project is itself a harm, because our sense of freedom and personhood depends on the constant renewal of self-imagination.[54] A calculation of the "net benefit" of forced sterilization or parenthood therefore misses the point: what the law of battery protects does not necessarily depend on the particular outcome of actually becoming a parent.

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[48] Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* (New York: Routledge, 1995) at 4–5 [Cornell, *Imaginary Domain*].
[49] *Ibid* at 235–37.
[50] Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex, Equality* (New Jersey: Princeton University Press, 1998) at x.
[51] *Ibid* at 39–40; Drucilla Cornell, "Bodily Integrity and the Right to Abortion" in Austin Sarat & Thomas R. Kearns, eds, *Identities, Politics, and Rights* (Michigan: The University of Michigan Press, 1997) 21 at 28–29 [Cornell, "Bodily Integrity"]
[52] Mervi Patosalmi, "Bodily Integrity and Conceptions of Subjectivity" (2009) 24:2 Hypatia 125 at 129–30 [Mervi].
[53] *CBC News*, *supra* note 9.
[54] Cornell, *Imaginary Domain*, *supra* note 48 at 8–10.

The future dimension of bodily integrity also contrasts with the approach in *Z (MS)* that treats the reproductive system the same as other body parts. People tend to view parenthood as a key aspect of one's identity; some plan their future and organize their lives around it. There is a higher degree of projection involved compared to other body parts whose use is relatively constant throughout one's lifetime and is not marked by milestones like becoming a parent.

Second, Cornell views bodily integrity and its ongoing construction as highly particularized to individual imagination.[55] This aspect of her theory helps explain the wrong in interfering with reproductive decisions. According to Cornell, to deny a woman the right to abortion means that her womb and body are no longer hers to imagine, which amounts to "having her body turned over to the minds of men."[56] A ban on abortion therefore deprives a woman of not only the decision to abort, but also the meaning given to that decision, the ongoing narrative power over her own body, and the legitimacy of her individual projections of personhood.[57]

Although Cornell writes about women's reproductive autonomy in general, the aspiration of individual imagination readily applies to a more intersectional context: one's body is not a standardized and acultural object; the bodies of Indigenous women are the private domain of identity construction, an indispensable part of which for some is the deeply personal desire for motherhood. To restrict the number of children they could have is an attempt to standardize their bodies according to the medical practitioner's notion of what is beneficial or appropriate. Forced sterilization removes Indigenous women's personal autonomy over the process of identity construction and therefore subjugates their bodily integrity.

It is true that women who already have children before being sterilized cannot be said to have totally lost the ability to pass on their cultural identity. However, the cultural loss to Indigenous communities occurred not because of unborn children, but through the targeted standardization and instrumentalization of women's bodies. Their bodies were subjected to interference because of their cultural and racial identity. Sterilization here necessarily takes on an offensive meaning because of the motivation behind it. Even if there is no loss to the victim's cultural lineage because she has other children, the motivation itself is worthy of punitive damage. In other words, even though fault is not required to establish battery, the presence of fault properly informs the nature and scope of the wrong committed and the damage owed.

More importantly, if what bodily integrity protects is the ability to construct one's personal identity, the concept logically extends to protecting the body from interference with the identities one is constructing. Such interference undermines one's autonomy over personal identity by lowering the self-esteem of those who have adopted the targeted identity and by discouraging others who wish to adopt such identity in the future. The harms are more prominent for those who see their cultural background as intrinsic to who they are. When the targeted identity is immutable and cannot be opted out of, such as race, the harm to self-esteem and the sense of helplessness is accentuated. Admittedly, people do not "construct" their own race and often have limited control over their cultural identities, but identities are the products of overlapping group memberships and personal experiences. Individuals still enjoy a high degree of freedom in constructing idiosyncratic

[55] Mervi, *supra* note 52 at 131.
[56] Cornell, *Imaginary Domain*, *supra* note 48 at 47.
[57] Cornell, "Bodily Integrity", *supra* note 51 at 26, 43.

identities within their broader racial and cultural contexts; the imaginary domain of a member of racial minority deserves no less protection.

This emphasis on person autonomy over one's body gives the private law of battery a group dimension, because what is done to Indigenous women's bodies is also done to their personal and collective identity. The Indigenous plaintiffs have been targeted because of their shared identity and the broader cultural contexts that they are oriented in; this targeting systemically suppresses identities that are seen as alien to mainstream Euro-Canadian culture. When one's broader cultural and communal membership is attacked wholesale as such, the idiosyncratic construction of personal identity is inherently less meaningful because any subset of identities one could choose from has been denounced as alien. There is simply less value attached to personal autonomy if the exercise of it will inevitably result in a version of self that is rejected by the mainstream culture.

Given the focus on the construction of idiosyncratic identities and the targeting of minority groups, one might wonder if my proposed approach to battery means plaintiffs from subcultural backgrounds will be entitled to higher awards. This is perhaps true. The types of injuries flowing from the same act of battery vary because plaintiffs are differently situated within larger structures of socioeconomic and cultural influences. This intersectional approach simply acknowledges that plaintiffs' overlapping identities influence how they use and perceive their bodies.

Finally, Cornell recognizes that the body is not an entirely bounded and autonomous entity; it is susceptible to external influences as one interacts with individuals and institutions in one's life. Cornell calls this the role of the "Other" in constituting the person. In the context of reproductive choice, these "Others" confirm or deny the conditions for one's construction of personhood.[58] Because the self depends on certain "Others" to achieve individuation, negative freedom from interference is insufficient, and the meaningful protection of personhood must encompass positive facilitations from the "Others."[59]

Viewed in this lens, the relational loss suffered by Indigenous women falls squarely within the ambit of bodily integrity. Pregnancy, birth-giving, and childrearing is by no means an independently performed project. To Cornell, this underscores a major flaw in justifying the right to abortion as a matter of privacy: a pregnant woman is simply not along in her privacy.[60] In reality, reproductive decisions often shape a women's social interactions and her position within larger familial and communal structures, which in turn reflects on her self-imagination. The deprivation of one's reproductive capability therefore dislocates a person within their network of relationships and support. Victims of forced sterilization lost the "Others" that are necessary conditions for achieving individuation.

The "correctness" of Cornell's conception of bodily integrity is beyond the scope of this paper. The relevant question is: how far would this seemingly expansive view of bodily integrity stray from the current state of the law? Arguably not much. It is consistent with the majority's understanding of bodily integrity in *Scalera* as oriented in personal autonomy. If the "bodily integrity" merely protected the physical object of the body, it would have been difficult to

[58] Mervi, *supra* note 52 at 131, 135.
[59] Cornell, *Imaginary Domain*, *supra* note 48 at 41–42.
[60] *Ibid* at 59.

understand why the Court considered an act of battery as having a "high demoralization cost" and resulting in a "loss of personality and freedom."[61]

A broad conception of bodily integrity beyond the physical body can be readily found in other types of disputes involving the tort of battery. Adult Jehovah's Witnesses are protected from blood transfusions that would have been administered on a secular body in medical emergencies; in *Malette v Shulman*, the plaintiff was awarded $20,000—a generous amount in 1990—for "mental and emotional" sufferings.[62] These sufferings arose out of the sacred meaning the patient ascribe to her blood. The law can be seen as protecting faith-based identity and the desire to avoid expulsion from one's religious community. It is therefore not new that identity or relational harms from violations of one's physical body receive compensation under the tort of battery. Nor would it be a drastic imposition on the medical profession who are frequently implicated in such disputes. Bioethics scholars have long criticized the development of medicine for "standardizing" the human body to the exclusion of one's subjective perceptions and the autonomy to pursue their own moral ideals.[63]

Furthermore, the proposed view is not an across-the-board expansion of what is recoverable under battery; it can be viewed as simply curing an undesirable inconsistency between sterilization and purely medical batteries. As McLachlin J (as she then was) pointed out in *Scalera*, sexual and medical batteries are comparable, and varying the rule for batteries of a sexual nature could discourage deserving victims from pursuing justice.[64] Therefore, if an injured arm deserves compensation for the inability to work,[65] so does the sterilized reproductive system for the inability to become a mother. To assign compensable value to work but not motherhood would be a moral judgement that is not for courts to make. It is the individual who constructs their own identity and thus chooses between the potential uses of their body—economic productivity or the birth of a child. Admittedly, identity and relational losses are less quantifiable than lost wages, but the difficulty in assessing quantum does not justify denying whole categories of damages.

B. The autonomy-based approach facilitates access to justice

My proposed view more accurately captures the wrong in forced sterilization. As discussed earlier, an outcome-based view focuses on the direct consequences of sterilization—the physical intrusion of the procedure and the psychological harm if the plaintiff can prove it; there is nothing inherently traumatizing with a medical procedure that leaves no scar. In contrast, an autonomy-focused view calls for an analysis of the wrong in its social and historical context, since personal autonomy is itself a fluid and context-dependent idea. Drawing on the legacy of eugenics boards and the ongoing marginalization of Indigenous peoples, sterilization is better viewed as not just a mere medical procedure but also the trivialization of Indigenous women's identity and human dignity. This makes the resulting trauma and dignity loss a direct, cognizable harm of targeted

[61] *Scalera*, *supra* note 13 at para 14.
[62] *Malette*, *supra* note 18 at para 48.
[63] See e.g. Silke Schicktanz, "Why the way we consider the body matters – Reflections on four bioethical perspectives on the human body" (2007) 2:30 Philosophy, Ethics, and Humanities in Medicine.
[64] *Scalera*, *supra* note 13 at paras 27–36.
[65] *Allan*, *supra* note 21.

sterilization. If litigation serves a therapeutic purpose for the victims, the recognition of this harm is crucial in obtaining that purpose.

The autonomy-focused approach also reveals the systemic dimension of the wrong. The harms to cultural identity and human dignity result from the sterilization being part of a systemic attempt to instrumentalize women's bodies for the perpetrator's own purposes. The women are targeted and demeaned for their group identity. This differs from the individual focus of the outcome-based approach where the impact on each victim is scrutinized in isolation. Therefore, in the context of *targeted* forced sterilization, the answer to "why reproductive organs should be treated differently from others" is that the deprivation of reproductive function is not merely an individual violation but also an assault on the victim's cultural identity and human dignity on a systemic level. Removing one's leg or arm simply does not achieve the same effect of targeting a group identity.

Compared to the outcome-based view, my proposed approach is more likely to prevent the trier-of-fact from over-scrutinizing causation and thereby facilitate access to justice. With the emphasis on personal autonomy, bodily integrity is conceptualized as the ability to put one's body to uses of one's *choice*, present and future. This internalizes the causal link between the inability to procreate and the subsequent loss of cultural identity and familial relationships. The cultural and relational relevance of one's reproductive function is intrinsic to the notion of bodily integrity and needs no separate proof of harm. Therefore, the plaintiffs should only be required to establish through sociological evidence the importance of motherhood to their cultural identity and family structures in a general manner. This reduces the difficulties in proving intangible losses and the risk of re-traumatizing victims when they are deposed and cross-examined on extremely personal experiences. The financial and emotional toll of seeking compensation for wrongful sterilization will hopefully decrease as a result.

Moreover, courts are no longer called upon to imagine the alternative scenario of having children because the dignity and identity losses are principled in nature and not assessed against that particular outcome. This dispenses with the need to interrogate Indigenous women's personal fit for motherhood and reduces the perpetuation of pernicious stereotypes. Importantly, this is achieved not by emphasizing the inalienable "privilege of giving birth," as the Supreme Court did in *Eve*.[66] Instead, the emphasis is on personal autonomy: it is not that courts are expected to take care of Indigenous women's best interests, but simply that courts should recognize that they are capable of deciding their own best interests and are entitled to have their decisions respected by medical practitioners. My proposed approach thereby seeks to discourage the seemingly benign paternalistic attitude towards Indigenous women as well as outright prejudice.

Another potential benefit of the proposed formulation of bodily integrity is the deterrence effect of penalties. Given that formal eugenics legislation has been repealed, the prevention of forced sterilization largely depends on the ability to compel complacent institutions to protect women and girls. For example, the class actions against British Columbia and Alberta concern the governments' and health authorities' inactions and omissions.[67] To force these institutions into action would require large penalties: these should exceed not only the cost of implementing

[66] *Eve*, *surpa* note 12 at para 92.
[67] See e.g. *Cardinal Statement, supra* note 10; *Horne Notice, supra* note 10.

protective measures but also the "savings" in social programs that support mothers and children. A nominal damage under the outcome-based view of bodily integrity would fall short here. But when identity and relationship losses are all recognized—even if each assessed conservatively—they could at least bring the sum closer to the level required. It is also possible that a recognition of the human dignity at stake reveals the high-handed manner in which defendants carried out forced sterilization and thereby convinces courts to award punitive damages.

In addition to economic incentives, sensible governments also respond to the signalling effect of judicial rulings. Here, the court-sanctioned damages can make visible the systemic neglect towards not merely unlucky individuals but entire families, communities, and cultures. This may tip the balance in the political arena towards action. Ms. Muir's case illustrates this possibility. The *Muir* decision inspired hundreds of victims of the Alberta Eugenics Board to file claims, and the Alberta government attempted to introduce a bill that caps compensation to $150,000 per person for forced sterilization claims. But a public outcry forced the government to withdraw the bill. Over the next few years, over 700 claimants received settlements or compensation from the government.[68] For sterilizations that occurred after the abolition of eugenics boards and without formal authorization, it may take another landmark case to spur provincial governments and health authorities into action.

Section V. Conclusion

What is wrong in a forced sterilization is that it is *forced*. To focus on the outcome of *sterilization* either downplays the wrong as a one-time interference of the physical body or relies on the loaded notion of parenthood being an inherent good. These conceptions do not speak to the dignity and identity losses that lie at the heart of the class actions by the Indigenous plaintiffs. Cornell's view of bodily integrity, on the other hand, encompasses not only the physical entity and its biological functions but also the autonomy over one's body and the construction of identities. Adapted to the law of battery, this view would more comprehensively recognize the systemic nature of the wrong and the devastating consequences of wide-spread forced sterilization.

Tort law already tends to fit lived experiences into neat, recognized categories of incidents and legal tests. The adjudication of a tort claim should ideally orient towards the principled interests that the tort seeks to protect. In the context of forced sterilization, the bodily integrity of Indigenous plaintiffs is better understood as a matter of personal autonomy rather than the physical body. After all, victims of forced sterilization are not looking for a recognition of unfortunate medical incidents, and the law should allow them to recover for more than that.

[68] Tu Thanh Ha, "Leilani Muir made history suing Alberta over forced sterilization", *Globe and Mail* (16 March 2016), online: <https://www.theglobeandmail.com/news> [https://perma.cc/KY3W-VLKP].