"Tell Me Where It Hurts": Workplace Sexual Harassment Compensation and the Regulation of Hysterical Victims

Finn Makela*

Informed by a feminist analysis, the author examines a new development in the legal responses to workplace sexual harassment in Quebec. Sexual harassment has been recognized as a psychological injury, compensable through the province's *Commission des accidents de travail*. This classification was confirmed in the *Béliveau-St-Jacques* case, in which an alleged victim of workplace sexual harassment filed a civil suit seeking damages from her employer based on both the civil liability regime and the antidiscrimination and anti-harassment clauses of the Quebec *Charter of Human Rights and Freedoms*. The Supreme Court of Canada found that Quebec's *Act Respecting Industrial Accidents and Occupational Diseases* ("AIAOD") extinguishes the right to all civil remedies for workplace injuries, including punitive damages in cases of intentional and illegal violations of a protected right. This approach was subsequently entrenched in the new psychological harassment provisions of the *Labour Standards Act*.

The author discusses the implications of *Béliveau-St-Jacques* for victims of sexual harassment, particularly women. While the decision goes far in recognizing the systemic nature of sexual harassment in the workplace, it also somewhat illogically includes violations of fundamental rights within the ambit of "occupational hazards." Responding to sexual harassment through the no-fault workplace compensation scheme causes the distress and anguish experienced by sexual harassment victims to be assessed as a medical condition. Women become the objects of an administrative regime that causes them to suffer further affronts to their dignity. The author contrasts the legal treatment of sexual harassment with that of a different harm to dignity—defamation, which constitutes a narrow exception to the exclusion of civil remedies under the AIAOD.

L'auteur, inspiré par une analyse féministe, étudie une nouvelle addition à l'arsenal juridique disponible aux victimes de harcèlement sexuel au travail au Québec. Depuis 1996, le harcèlement sexuel a été reconnu comme un dommage psychologique, duquel la victime peut être indemnisée par la voie d'un recours devant la Commission des accidents du travail. Cette classification trouve sa source dans l'affaire *Béliveau-St-Jacques*, dans laquelle une personne, supposément victime de harcèlement sexuel au travail, a entamé une poursuite judiciaire contre son employeur en se basant sur le régime de responsabilité civile et les clauses anti-discriminatoires et anti-harcèlement de la *Charte québécoise des droits et libertés*. La Cour suprême du Canada a statué que la *Loi sur les accidents du travail et les maladies professionnelles* du Québec privait la victime de tout droit à une réparation pour les dommages subis basée sur le régime de responsabilité civile, incluant tout dommage punitif pour une atteinte illicite et intentionnelle à un droit garanti par la *Charte*. Par la suite, cette approche a été solidifiée dans les nouvelles dispositions de la *Loi sur les normes du travail* visant le harcèlement psychologique.

L'auteur discute des implications de l'arrêt *Béliveau-St-Jacques* pour les victimes de harcèlement sexuel, particulièrement les femmes. Bien que l'arrêt reconnaisse la nature systémique du harcèlement sexuel au travail, il classifie également, quelque peu illogiquement, les violations de droits fondamentaux dans la catégorie des «accidents du travail». Tenter de redresser les dommages du harcèlement sexuel par le biais d'un système de compensation des accidents du travail sans égard à la faute mène à l'évaluation de la souffrance des victimes en tant que condition médicale. Par ce fait, les femmes deviennent les objets d'un régime administratif les obligeant à subir de nouvelles atteintes à leur dignité. L'auteur contraste le traitement juridique du harcèlement sexuel avec un type différent d'atteinte à la dignité : la diffamation, qui constitue une exception restreinte à l'exclusion des réparations basées sur le régime de responsabilité civile.

* Attorney at the firm Melançon, Marceau, Grenier et Sciortino (Montreal); B.A., M.A. (philosophy), LL.B./B.C.L. I wish to thank Prof. Desmond Manderson of McGill University and the two anonymous reviewers for their helpful comments on earlier drafts of this paper.

To be cited as: (2006) 51 McGill L.J. 27

Mode de référence : (2006) 51 R.D. McGill 27

Introduction

In 1987, Catharine MacKinnon remarked: "Sexual harassment, the event, is not new to women. It is the law of injuries that it is new to."[1] In Quebec, almost twenty years later, a new development in legal responses to sexual harassment has emerged. Sexual harassment is a workplace injury. It is the consequences of this development and the assumptions about women and their bodies that underpin it that I will explore in what follows.

I begin with a historical overview of the workplace accident regime in place in the province of Quebec, paying particular attention to the treatment of psychological injuries in relation to the civil law category of moral damages. I then provide a critical reading of the Supreme Court of Canada's decision in *Béliveau-St-Jacques v. Fédération des employées et employés de services publics inc.*,[2] in which it was decided that the statutory compensation regime displaces the remedies that would otherwise be available to victims of workplace sexual harassment under Quebec's *Charter of Human Rights and Freedoms*.[3]

My reading of the *Béliveau-St-Jacques* decision forms the basis of a feminist critique of the workplace accident compensation scheme. The critique mobilizes Michel Foucault's concept of a disciplinary discourse that regulates individuals, in order to make the argument that the compensation system is part of an administrative apparatus that symbolically and materially constitutes women in such a way that their emotional life is inseparable from their bodies.

In the final section, I interrogate the only currently accepted exception to the displacement of *Quebec Charter* remedies established in *Béliveau-St-Jacques*: damage to reputation. This exception, I argue, bolsters my earlier claims about the workplace accident compensation regime, in that it allows compensation for a uniquely un-embodied harm.

---

[1] Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987) at 103 [MacKinnon, *Feminism*]. MacKinnon was among the first to argue that tort law provides an inadequate legal response to sexual harassment and that a statutory antidiscrimination scheme would better protect victims of sexual harassment. See Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven, Conn.: Yale University Press, 1979) [MacKinnon, *Harassment*].

[2] [1996] 2 S.C.R. 345, 136 D.L.R (4th) 129 [*Béliveau-St-Jacques* cited to S.C.R.].

[3] R.S.Q. c. C-12 [*Quebec Charter*].

I. Historical Background

A. The Workplace Accident Compensation Scheme

The *Act Respecting Industrial Accidents and Occupational Diseases*[4] constitutes a no-fault regime similar in nature to an insurance scheme. The first step in the scheme's creation was the 1909 adoption of the *Act respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom*.[5] This act withdrew workplace accidents from the general law of civil responsibility, which was unsuited to the problems posed by industrialization.[6] The concept of fault was replaced with the notion of "occupational risk", described by one commentator as "[l]e résultat d'un compromis social historique entre des forces contradictoires."[7] Workers were relieved of the burden of showing that their employers were at fault for injuries sustained in the workplace. In exchange, they renounced the right to full compensation, receiving instead a partial indemnity, the cost of which was distributed across employers.

In 1928, application of the scheme was dejudicialized with the creation of the *Commission des accidents de travail* ("CSST").[8] The accident fund, consisting of employer contributions, became the source of indemnification in 1931 with the passing of the *Act Respecting Workplace Accidents*.[9] After more than fifty years of relative stability, the regime underwent a major revision in 1985.[10]

B. Compensation for Psychological Injuries

Unlike in the common law,[11] psychological injury has not historically been problematized in the civil law tradition. Thus, rather than basing compensation for harm on a Cartesian view of the self, in which body and mind are treated as radically distinct aspects of personhood justifying differential treatment by the law, the subject

---

[4] R.S.Q. c. A-3.001 [*AIAOD*].

[5] S.Q. 1909, c. 66.

[6] See generally Jean-Louis Baudouin & Patrice Deslauriers, *La responsabilité civile*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2003) at paras. 941-45. See also Katherine Lippel, *Le droit des accidentés du travail à une indemnité: analyse historique et critique* (Montreal: University of Montreal, 1986); *Béliveau-St-Jacques*, *supra* note 2 at 398; Jean-Claude Paquet, "L'affaire Béliveau-St-Jacques: L'équilibre entre l'integrité du régime de réparation des lésions professionnelles et le droit à des dommages exemplaires en vertu de la Charte des droits et libertés de la personne" in *Développements récents en droit de la santé et sécurité au travail* (Cowansville, Qc.: Yvon Blais, 1997) 121.

[7] Paquet, *ibid.* at 131.

[8] *Béliveau-St-Jacques*, *supra* note 2.

[9] S.Q. 1931, c. 100.

[10] *Workers' Compensation Act*, R.S.Q. c. A-3.

[11] See *e.g.* Joanne Conaghan & Wade Mansell, *The Wrongs of Tort*, 2d ed. (London: Pluto, 1999) at 34-44.

of the civil law is an organic whole bearing "personality rights" whose integrity is recognized as inviolable.[12] Commission of a civil fault entails liability for reparation of the injury caused, whether it is "bodily, moral, or material."[13]

Early doctrinal treatment of European workplace accident legislation in civilian jurisdictions[14] illustrates that developing compensation schemes recognized psychological injury, despite textual reference to "l'intégrité ou à la santé *du corps humain*."[15] The flexible concept of "moral damages" was consequently not transposed without adaptation. Instead, psychological injury related to workplace accidents was described in medical terms, viewing the brain rather than the mind as the site of damage. Thus, "[l]a folie est une altération du cerveau, un traumatisme, au même titre que la rupture d'un muscle, la perforation d'une artère ou la fracture d'un os."[16] As a corollary, moral injuries were described as medical conditions such as dementia, hysteria, hypochondria, neurasthenia, et cetera.[17]

Despite this historical willingness to recognize psychological injuries within the framework of workplace accident compensation schemes, acceptance of claims based on harassment came relatively late in Quebec.[18] Early jurisprudence often dealt with the traumatic effects of witnessing violence (as in the case of police officers[19] and prison guards[20]), though illnesses resulting from a work environment poisoned by harassment were the basis of at least some of the early claims.[21]

The first case in which a psychological injury caused by workplace harassment was indemnified was decided in 1984.[22] The appeal board of the CSST eventually

---

[12] See *e.g.* art. 4 C.C.Q.

[13] Art. 1457 C.C.Q.

[14] See *e.g.* Adrien Sachet, *Traité théorique et pratique de la législation sur les accidents du travail*, t. 1, 6th ed. (Paris: Sirey, 1921) for an analysis of Austrian, German, Swiss, and French legislation.

[15] *Ibid.* at paras. 256, 266 [emphasis added].

[16] *Ibid.* at para. 265.

[17] See *ibid.*

[18] See generally Reine Lafond, "L'indemnisation des lésions psychologiques liées au travail: dernières tendances" in *Développements récents en droit de la santé et sécurité au travail* (Cowansville, Qc.: Yvon Blais, 1997) 245.

[19] See *e.g. Bouchard c. Sûreté du Québec*, [1988] C.A.L.P. 702.

[20] See *e.g. Linch c. Canada (Ministère du Solliciteur générale)*, [1987] C.A.L.P. 590.

[21] See *e.g. Re Leduc* (1983), Longueuil 2335 (BRCSST), cited in Maurice Drapeau, *Le harcèlement sexuel au travail* (Cowansville, Qc.: Yvon Blais, 1991) at 192; *Re Nadeau* (1986), Côte Nord 8023 195 (BRCSST). For an exhaustive review of the jurisprudence, see Bernard Cliche *et al.*, *Le harcèlement et les lésions psychologiques* (Cowansville, Qc.: Yvon Blais, 2005).

[22] *Leduc c. Les Centres d'accueil du Haut St-Laurent* (1982), 8518466 (BRCSST), cited in Katherine Lippel, "Droit et statistiques : réflexions méthodologiques sur la discrimination systémique dans le domaine de l'indemnisation pour les lesions professionnelles" (2002) 14 C.J.W.L. 362 at 370, n. 22. See also Status of Women Canada, *L'accès à la justice pour des victimes de harcèlement sexuel : l'impact de la décision Béliveau-St-Jacques sur les droits des travailleuses à l'indemnisation pour les dommages* by Katherine Lippel & Diane Demers (Ottawa: Status of Women Canada, 1998) at 17. But see *Accidents du travail—76*, [1983] C.A.S. 641, cited in Drapeau, *ibid.* at 192-93 (where

confirmed that workplace harassment could lead to a psychological injury justifying indemnification in 1988.[23]

II. *Béliveau-St-Jacques*

A. Background

In *Béliveau-St-Jacques*, the Supreme Court pronounced on the fit between the *AIAOD*, the *droit commun*[24] of the civil law, and the *Quebec Charter*. The result, as has often been remarked,[25] was to introduce as much confusion as clarity in situating cases of psychological injury generally, and sexual harassment specifically.

Ms. Béliveau-St-Jacques claimed that she had been the victim of sexual harassment in her workplace, perpetrated both by her immediate supervisor and by her employer, who refused to believe her complaints regarding the matter and eventually fired her. Allegedly, as a consequence of the initial harassment and her employer's actions, Ms. Béliveau-St-Jacques suffered from (what was diagnosed as) anxiety, insomnia, and asthenia. She filed for compensation with the CSST and was rejected. A review board found her eligible for compensation, but by that time, Ms. Béliveau St-Jacques had already filed a civil suit in the Superior Court seeking compensatory and punitive damages.

The civil suit was based on the civil liability regime of the *Civil Code of Lower Canada*[26] as well as sections 10 and 10.1 of the *Quebec Charter*, which are the anti-discrimination and anti-harassment clauses respectively. Compensatory damages were sought for moral harm, injury to physical and psychological health, and lost wages. Punitive damages were sought under the second paragraph of section 49 of the *Quebec Charter*, which provides for them in case of intentional and illegal violation of an enumerated right.

The defendants filed a motion to dismiss by way of declinatory exception for lack of jurisdiction *rationae materiae* on the grounds that section 438 of the *AIAOD* excludes civil remedies for employment injuries compensated by the no-fault regime. The section states:

---

the *Commission des affaires sociales* found that, in principle, psychological trauma is covered by the *Act* but that there was no link between the illness and the workplace on the facts of the case).

[23] *Anglade c. Montréal (Communauté urbaine)*, [1988] D.T.E. 88T-730 (CALP) (confirming indemnification of a police officer who suffered depression due to racial harassment at work). See also *Sauveteurs et victims d'actes criminels—69*, [1988] C.A.S. 694 (in which the *Commission des affaires sociales* allowed an indemnification for harassment). See *Société canadienne des postes c. C.A.S.* (21 October 1994), Montreal 500-090-01481-894 (C.A.) (confirming an indemnification for harassment).

[24] To avoid the obvious potential confusions, I use the French term "droit commun" here to indicate the *ius commune*, often translated in English as the "common law."

[25] See *e.g.* Paquet, *supra* note 6; Lippel & Demers, *supra* note 22.

[26] Art. 1053ff. C.C.L.C. (now art. 1457ff. C.C.Q.).

> No worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury.[27]

The Superior Court rejected the motion, saying that even though some compensatory damages were precluded, the court had jurisdiction to hear a claim for moral and "exemplary" (punitive) damages.[28] This decision was confirmed by a divided bench on appeal,[29] and an appeal from that decision was filed to the Supreme Court.[30]

B. The Supreme Court Decision

On behalf of the majority of the Supreme Court, Justice Gonthier dismissed the appeal, finding that the *AIAOD* extinguishes the right to *all* civil remedies for workplace injuries, including punitive damages for discriminatory harassment.

At the heart of the decision is the analysis of the second paragraph of section 49 of the *Quebec Charter*, which provides for punitive damages in cases of intentional and illegal violations of a protected right.[31] Justice Gonthier found that this second paragraph is dependent on the first paragraph of the same section, which provides for compensatory damages. Unlike the Canadian common law of torts,[32] violation of a right protected by the *Quebec Charter* is a fault that engages civil liability for any damages suffered as a consequence of the violation. Thus, since the remedy in the first paragraph of section 49 of the *Quebec Charter* is coextensive with civil remedies, and since civil remedies are displaced by the *AIAOD*, the *Quebec Charter* remedy is also displaced.[33] Furthermore, since an award of punitive damages under the second paragraph of section 49 is dependent on the award of compensatory

---

[27] *AIAOD*, *supra* note 4, s. 438.

[28] *Béliveau-St-Jacques c. Fédération des employées et employés de services publics inc.* (17 April 1989), Saint-François (Sherbrooke) 450-05-000524-880 (C.S.).

[29] *Béliveau-St-Jacques c. Fédération des employées et employés de services publics inc.*, [1991] R.J.Q. 279 (C.A.) [*Béliveau-St-Jacques (Appeal)*].

[30] Though the employer desisted after receiving leave to appeal, Ms. Béliveau-St-Jacques filed a motion to continue the appeal, which was granted. It is for this reason that Ms. Béliveau-St-Jacques is the appellant. Ironically, had she not filed to continue, the Court of Appeal's decision to allow her claim for punitive damages would have stood.

[31] Though punitive damages are generally foreign to the civil law, they can be claimed in cases where specifically provided for by statute. See art. 1621 C.C.Q. See also Pierre-Gabriel Jobin with Nathalie Vézina, *Baudouin et Jobin: Les obligations*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2005) at paras. 875-77.

[32] Compare *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193. In this decision, the Court found that violation of a protected right is not in itself an actionable tort independent from the underlying conduct that constitutes the violation. See generally Lippel & Demers, *supra* note 22 at 7 for a comparison of the common law of torts and Quebec civil liability with regard to violations of fundamental rights.

[33] *Béliveau-St-Jacques*, *supra* note 2 at 408-10.

damages under the first paragraph, and since the compensatory damages are displaced by the *AIAOD*, punitive damages are also displaced.[34]

It should be noted that the judgment did not pronounce on the definition of sexual harassment, nor was it found that sexual harassment suffered at work constitutes a compensable workplace injury under the *AIAOD*.[35] Invoking the fact that the review board decision was not contested, Justice Gonthier begins his judgment by claiming that he will "assume that sexual harassment and harassment in the workplace may be the basis for a claim to the CSST under the *AIAOD*."[36]

C. Consequences: Intentional Harassment as Accident

Béliveau-St-Jacques has significant consequences both in the law and in the lives of women. Despite Justice Gonthier's explicit refusal to decide whether injury suffered as a result of sexual harassment in the workplace is covered by the *AIAOD*, the judgment is seen as a confirmation of the nascent trend to compensate for harassment.[37] The implications of sexual harassment falling under the rubric of "employment injury" are varied, and feminists can reasonably disagree about their desirability.

First, one might regard the decision as long-overdue judicial recognition of the systemic nature of sexual harassment in the workplace. On this reasoning, it is a step away from the gendered nature of the *AIAOD* regime, extending its application to the specific forms of injury suffered by women. The concepts of industrial injury and occupational disease in the statute are gendered, in that they are based on a conception of the workplace as a neutral terrain where dangers to workers are found in objects (e.g., machinery, chemicals, etc.). This conception belies the everyday reality of many women who experience the workplace as constitutively hostile, not because it is some distinctive site of oppression, but because it is embedded within the social structures and relations of a patriarchal society.[38] Thus, including compensation for women who suffer injuries due to this aspect of the workplace may be a step forward.

Conversely, it may appear illogical to bring intentional violations of fundamental rights within the ambit of a no-fault insurance scheme. On a symbolic level, it is tantamount to legal recognition of workplace harassment as being the normative

---

[34] *Ibid.*

[35] See Paquet, *supra* note 6 at 126ff.

[36] *Béliveau-St-Jacques*, *supra* note 2 at 398.

[37] This view is not necessarily wrong. Since the Supreme Court cannot err as to jurisdiction, its deference to the administrative tribunal should be interpreted as affirming that no jurisdictional error was made. Thus, despite Gonthier J.'s statement, it appears that the judgment implicitly accepts the trend as, at a minimum, not patently unreasonable.

[38] See *e.g.* Lippel & Demers, *supra* note 22 at 10-11. But see Lucie Lamarche, "Définition du harcèlement sexuel prohibé sur les lieux de travail en droit canadien" (1986) 2 Rev. jur. femme dr. 113.

equivalent of industrial accidents and occupational diseases. Thus, getting harassed is just like getting your hand caught in a machine: an unfortunate accident. Evidently this shifts attention away from the harasser and from the environment in which harassment is made possible or even facilitated.[39]

Another consequence of the decision is the differential juridical treatment that harassed workers are subject to, which depends exclusively on the impact of the harassment on the victim. Women who are harassed but, for whatever reason, do not suffer from effects that are expressible as a medical diagnosis, retain the full panoply of civil recourses, including punitive damages. Victims who are diagnosed with a medical condition caused by the harassment are limited to the indemnity provided by the *AIAOD*. Thus, it is arguably those who suffer the most who are compensated the least.[40] Of course, the decision also raises the question of differential treatment of women who are harassed in the workplace and those who are harassed elsewhere.[41]

Even more perverse is the incentive structure that this sets up for potential harassers. The vicarious liability regime of the civil law[42] does not apply to punitive damages under section 49 of the *Quebec Charter*.[43] Thus, if the harassment does not constitute a workplace injury, the victim retains civil recourse not only against the employer but also against the harasser. On the other hand, if the harassment results in an injury, then the harasser (and not only the employer) is completely insulated by section 442 of the *AIAOD*, which prohibits actions against other employees covered by the regime.[44] The lesson for harassers is: "If you're going to harass, you better make sure it hurts, lest you be liable!"

D. Expansion of the Doctrine

There was considerable confusion within legal circles upon the reception of the *Béliveau-St-Jacques* decision.[45] Most important among them was the question as to the scope of the exclusion of civil remedies for the violation of fundamental rights suffered in the workplace. Is the civil recourse extinguished only if the victim is indemnified, or is it the *possibility* of indemnification that displaces other remedies?[46]

---

[39] See *e.g.* Paquet, *supra* note 6 at 150-51. See generally Lippel & Demers, *supra* note 22 at 10ff. (arguing that human rights tribunals are more suited to dealing with sexual harassment).

[40] See Drapeau, *supra* note 21 at 196-98.

[41] See Lippel & Demers, *supra* note 22 at 11-12. See also *Béliveau-St-Jacques (Appeal), supra* note 29, Mailhot, J.A.

[42] Art. 1463 C.C.Q.

[43] See Louis Perret, "De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec" (1981) 12 R.G.D. 121 at 140, n. 48.

[44] *Supra* note 4, s. 442. See Lippel & Demers, *supra* note 22 at 31.

[45] See generally Lippel & Demers, *ibid.*

[46] See *ibid.* at 25.

This question was definitively answered by the Quebec Court of Appeal in *Genest v. Commission des droits de la personne et des droits de la jeunesse*.[47] The complainant in this case was sexually harassed by her employer and sought psychiatric treatment for the ensuing suffering. After taking sick leave, she eventually resigned on the advice of her psychiatrist. She filed an action at the *Commission des droits de la personne et des droits de la jeunesse*, which was then referred to the *Tribunal des droits de la personne*.[48] The tribunal claimed jurisdiction on the grounds that the complainant had not been indemnified by the CSST and that therefore section 438 of the *AIAOD*, as interpreted in *Béliveau-St-Jacques*, did not apply. In addition to compensatory damages, the tribunal awarded $2,000 in punitive damages and ordered the harasser to write a letter of apology.

The Court of Appeal reversed the tribunal's decision on the following grounds:

> La prohibition de recours multiples contre l'employeur d'une victime de lésion professionnelle ne saurait découler du choix de cette dernière de recourir ou non à l'indemnisation en vertu de la LATMP. Cette option ne lui est pas offerte puisque l'article 438 LATMP lui défend d'intenter une action en responsabilité civile en raison de sa lésion professionnelle. Toute autre interprétation aurait pour effet de rendre optionnel le régime d'indemnisation de la LATMP et de contourner l'interdiction énoncée à l'article précité.[49]

The court confirmed that the exclusion, as interpreted in *Béliveau-St-Jacques*, only applies to civil liability, and that other remedies such as orders and injunctions are not displaced.[50] This must have been cold comfort for the complainant, since the court went on to say that an order to write a letter of apology is "too vague" to be enforced and therefore overturned this aspect of the tribunal's decision as well.[51]

Whether the courts' expansive interpretation of the exclusion of civil liability in favour of the integrity of the workplace accident regime accurately represents the intention of the legislator at the time section 438 of the *AIAOD* was adopted is, of course, open for debate. What is clear, however, is that this approach has now been entrenched by legislation. The new psychological harassment provisions of the *Labour Standards Act*[52] leave no doubt as to the legislator's desire to see the *AIAOD* take jurisdictional precedence with respect to awards of damages.[53] As soon as a commissioner of the *Commission des relations du travail* (or arbitrator in the case of

---

[47] [2001] AZ-50082198 (Azimut), D.T.E. 2001T-99 (C.A.) [*Genest* cited to Azimut], leave to appeal to S.C.C. refused, [2001] 2 S.C.R. vii.

[48] *Commission des droits de la personne et des droits de la jeunesse c. Genest* (1997), R.J.Q. 1488, D.T.E. 97T-509 (T.D.P.Q.).

[49] *Genest*, *supra* note 47 at para. 20.

[50] *Ibid.* at para. 22.

[51] *Ibid.* at para. 24.

[52] R.S.Q. c. N-1.1, ss. 81.18-20, 123.6-16.

[53] *Ibid.* s. 123.16, para. 1.

unionized workplaces[54]) determines that it is probable that an alleged case of harassment entailed an employment injury within the meaning of the *AIOAD*, jurisdiction over all monetary remedies must be reserved but not exercised until the CSST has decided the question.[55]

III. Regulating Victims

The decision in *Béliveau-St-Jacques* and its subsequent expansion in *Genest* radically change the focus of legal responses to sexual harassment in the workplace. Whereas, for all its failings,[56] the civil liability approach directs attention to the actions of the harasser, the workplace accident compensation regime posits the victim as the site of regulation. More specifically, the victim becomes the object of a Kafkaesque[57] medico-legal administrative machine populated by experts whose job it is to diagnose and compensate injury, rather than the subject of a legal structure that recognizes and remedies the wrong that was done to her. The feelings of distress, anguish, and alienation that can result from being victimized by reason of one's sex are transformed into symptoms of mental illness for the purposes of indemnification.[58]

This section will proceed in three steps: first, I will provide a brief outline of the actual functioning of CSST claims; second, I will argue that this process is an example of what Foucault calls "disciplinary discourse", through which individual *subjects* are constituted as the *objects* of a regime; finally, I will draw a parallel with nineteenth-century theories of women's bodies, maintaining that the CSST regime reproduces the conception of women's bodies as canvasses on which their emotional life is painted.

A. The CSST as Castle

Workers who the CSST determines have suffered an employment injury, defined as "an injury or disease arising out of or in the course of an industrial accident, or an occupational disease,"[59] are entitled to an income replacement indemnity equal to

---

[54] *Ibid.* s. 81.20. The application of this section to s. 123.16, para. 2 provides that the labour arbitrator must reserve jurisdiction when he or she "considers it probable" that the psychological harassment led to an employment injury within the meaning of the *AIAOD*.

[55] *Ibid.* s. 123.16, para. 2.

[56] See generally Conaghan & Mansell, *supra* note 11.

[57] Of particular interest is that, during the time he wrote the novels *The Trial* and *The Castle*, Franz Kafka worked in the statistical and claims department of the Workman's Accident Insurance Institute in Prague. For a description of how Kafka viewed his work at the Institute, see Ernst Pawel, *The Nightmare of Reason: A Life of Franz Kafka* (New York: Farrar Straus Giroux, 1984) at 190.

[58] See Lippel & Demers, *supra* note 22 at 2.

[59] *AIAOD*, *supra* note 4, s. 2.

ninety per cent of their net annual salary.[60] In order to collect this indemnity, however, the worker must follow a protracted medico-legal procedure.

The worker must first consult a medical professional (called the "physician in charge"), who must fill out a series of CSST forms attesting to the diagnosis, treatment (if any), and expected date of return to work.[61] The CSST may then require a further examination by a health professional of its designation, to which the worker must submit.[62] The employer also has the right to have the worker evaluated by a medical professional of the employer's choosing.[63] Once again, the worker must submit to such an examination.[64] If either the CSST's or the employer's designated professional disagrees with any aspect of the reports submitted by the physician in charge, then forms attesting to the disagreement and the reasons therefore are submitted to the *Bureau d'évaluation médicale*.[65] Once in possession of the totality of the diagnoses and reports, the *Bureau d'évaluation médicale* either confirms or quashes the diagnosis and other findings of the physician in charge.[66] The decision of the *Bureau d'évaluation médicale* binds the CSST. Note that the existence of a causal relation between the injury diagnosed (if any) and the workplace is not decided by any of these medical instances—only the medical condition that will serve as the basis for the claim is determined.[67]

Once the initial medical steps are taken, the CSST determines whether the worker is eligible for compensation. In doing so, the diagnosis of the physician in charge (if uncontested), or the *Bureau d'évaluation médicale* (if contested), is only one aspect to be considered. The CSST must also find that the injury arose from, or in the course of, employment.[68] Should any interested party disagree with the decision of the CSST, an application for review may be brought before an internal administrative review board.[69] If any interested party disagrees with the review, an appeal lies with the *Commission des lésions professionnelles* ("CLP").[70] The CLP has exclusive jurisdiction over appeals,[71] but as with any administrative tribunal, applications for judicial review may be made at the Superior Court in accordance with the normal

---

[60] *Ibid.* s. 45.
[61] *Ibid.* ss. 199-203.
[62] *Ibid.* s. 204.
[63] *Ibid.* s. 209.
[64] *Ibid.* s. 210.
[65] *Ibid.* s. 212.1.
[66] *Ibid.* s. 221.
[67] *Ibid.* s. 212 *a contrario*.
[68] *Ibid.* ss. 2, 27-31.
[69] *Ibid.* ss. 358-358.5.
[70] *Ibid.* ss. 359, 429.22.
[71] *Ibid.* s. 369.

principles of administrative law.[72] The CLP also has limited powers to review its own decisions.[73]

B. Foucault and the Medicalization of Dignity

Subsequent to *Béliveau-St-Jacques*, commentators expressed concern that the consequence would be the increased medicalization of sexual harassment victims.[74] The process described above illustrates the extent of this significant problem. One explanation is that increased medicalization is the regrettable result of a particular interpretation of a specific piece of legislation. Such a descriptive claim, however, does little to explain the phenomenon. A more satisfying explanation would situate the trend towards medicalization within a historical context.

Foucault argues that one of the unique aspects of modern society is the way in which institutions such as schools, hospitals, and prisons constitute their subjects.[75] Through the process of observation, description, and classification, individuals become "cases" that can be understood and therefore administered.[76] Thus, in contrast with the medieval subjects of a sovereign, members of modern societies are the objects of administration. The power of the state is not exercised by exceptional acts punishing the disobedient, but rather through the everyday acts of disciplining the obedient.

Compare the CSST procedure outlined in the previous section to Foucault's description of the "case":

> Le cas, ce n'est plus, comme dans la casuistique ou la jurisprudence, un ensemble de circonstances qualifiant un acte et pouvant modifier l'application d'une règle, c'est l'individu tel qu'on peut le décrire, le jauger, le mesurer, le comparer à d'autres et cela dans son individualité même ; et c'est aussi l'individu qu'on a à dresser ou redresser, qu'on a à classer, à normaliser, à exclure, etc.[77]

All of the characteristics that Foucault points out as characterizing the case are found in the CSST procedure. The victim must first be described (through the doctors' diagnoses), then these descriptions are compared (at the *Bureau d'évaluation médicale*), and measured according to the standards set out by the regulations (by the CSST). Justice Gonthier, in his summary of the facts, describes the outcome of Ms. Béliveau-St-Jacques' evaluation as follows:

---

[72] See *ibid.* s. 429.59 and arts. 33, 834-46 C.C.P. See also R.A. Macdonald, "Absence of Jurisdiction: A Perspective" (1983) 43 R. du B. 307 at 349-51 for a particularly poignant example of the concrete effects that jurisdictional challenges have on CSST claimants.

[73] Ss. 429.56-429.57. See *Commission de la santé et de la sécurité du travail c. Fontaine*, [2005] R.J.Q. 2203, 2005 QCCA 775 for a discussion of the CLP's powers to review its own decisions.

[74] See *e.g.* Lippel & Demers, *supra* note 22 at 2.

[75] See Michel Foucault, *Surveiller et punir* (Paris: Gallimard, 1975).

[76] See *ibid.* at 186-96, especially 193-94.

[77] *Ibid.* at 193.

> She ... received compensation for bodily injury ... established on the basis of a permanent impairment percentage of 18 percent. The CSST found that she had sustained an anatomicophysiological deficit of 15 percent and suffering and loss of enjoyment of life resulting from that deficit of 3 percent.[78]

What is described, measured, compared, and ultimately judged by the CSST is not an instance of sexual harassment. In fact, the CSST has no jurisdiction to even pronounce on the existence of such a state of affairs, since it only asks if there is a link between the workplace and the accident.[79] Instead, the procedure centres on the true site of regulation: the victim.

The effects of a procedure that regulates victims rather than judging states of affairs are manifold. First, there is the impact on the actual individuals forced to navigate the process. Having suffered affronts to their human dignity, they must submit to a series of tests, examinations, diagnoses, and judicial procedures. The ability to name what happened to them (harassment, violation, etc.) is appropriated by the medico-legal technocracy. As if any evidence were needed to support the proposition that this process is detrimental to those who undergo it, we need look no further than the circumstances surrounding the *Béliveau-St-Jacques* decision. Subsequent to the CSST ruling and the initial civil proceedings, Ms. Béliveau-St-Jacques found herself again in front of the CSST. This time, she sought compensation for a relapse in her symptoms caused by the administrative and judicial process itself.[80]

One might argue, nevertheless, that what Foucault describes is the unfortunate but necessary result of the "historical compromise"[81] that characterizes the CSST, or of no-fault regimes generally. It could also be maintained that even administrative regimes that allow for fault-based liability have the ironic tendency to reproduce the very byzantine rule-structures that they were meant to replace through dejudicialization.[82] But there is a significant difference between these cases and the medicalization of sexual harassment victims. In the latter instance, it is a specific subset of the population (i.e., mostly women)[83] who are (re)victimized by the disciplining discourse. It is to this aspect of the problem that we now turn.

---

[78] *Béliveau-St-Jacques*, *supra* note 2 at 392.

[79] See Drapeau, *supra* note 21 at 194-95.

[80] *Béliveau c. C.S.N.*, [1993] C.A.L.P. 1571.

[81] See Part I, above, for more on this topic.

[82] See *e.g.* Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field", trans. by Richard Terdimen (1987) 38 Hastings L.J. 805 at 836-37 (on the judicialization of labour arbitration boards). See also Charles Dickens, *Bleak House* (New York: E.P. Dutton & Co., 1948) for a fictional account of the complexity of the English Courts of Equity.

[83] See generally Lippel & Demers, *supra* note 22.

C. The Hysterical Turn

Women live their emotional life bodily. Destined by their instincts and bound by their hormones, they do not fit within the Cartesian model of the self that divides body from soul and emotion from reason. Such thinking has a long history both in the domains of psychology and of law. Early treatment of "hysteria" in women often consisted in the medical application of vibrators,[84] since mental illness in women was thought to be directly linked to their embodied sexual nature.[85] In the common law, the gradual judicial recognition of psychological damages started with cases of miscarriage, euphemistically described as "nervous shock".[86]

However far we may believe we have come from these absurd and antiquated views, they may very well underlie the jurisprudential development of indemnification for workplace harassment. As I noted above,[87] the notion that psychological injury could be compensable under workplace accident legislation was accepted at the same time that the first such act was passed in Quebec, almost a century ago. Yet it was not until relatively recently, after women began to occupy a significant portion of the paid workforce and the problem of harassment had been named,[88] that such claims began to be filed at—and recognized by—the CSST.

I am not, of course, suggesting that the commissioners and judges who developed the jurisprudence consciously accepted the idea that women's bodies and emotional life are necessarily linked. Evidently, advances in medical science have made the civilian category of moral damages increasingly problematic, as the physical basis for emotional life became better understood. Nevertheless, the idea is subtly entrenched in our society's conceptions of the ways in which women and men experience affronts to their integrity. This is particularly striking when contrasted with the residual category of moral damages unrecognized by the CSST, and therefore insulated from the *AIAOD*'s displacement of civil remedies: damage to reputation.

IV. Private Injuries and Public Harms

The distinction between the "male" public realm of business and politics and the "female" private realm of the home and family is not a neutral natural phenomenon.

---

[84] See generally Rachel P. Maines, *The Technology of Orgasm: "Hysteria," the Vibrator, and Women's Sexual Satisfaction* (Baltimore: Johns Hopkins University Press, 1999).

[85] See *e.g.* W.H.R. Rivers, *Instinct and the Unconscious: A Contribution to a Biological Theory of the Psycho-neuroses* (Cambridge, UK: Cambridge University Press, 1922); C. Jung, *Psychological Types*, trans. by H.G. Baynes & R.F.C. Hull (Princeton: Princeton University Press, 1971).

[86] See *e.g.* Martha Chamallas & Linda K. Kerber, "Women, Mothers and the Law of Fright: A History" (1990) 88 Mich. L. Rev. 814.

[87] See Parts II-III, above.

[88] See *e.g.* Lippel & Demers, *supra* note 22 at 10-12. See also MacKinnon, *Harassment*, *supra* note 1.

Many feminists have pointed out that the distinction is partially constituted and reinforced by the operation of the law, which is both gendered and gendering.[89]

If we focus on the phenomenon of legal treatment of sexual harassment in the workplace, problematizing the public/private split does not immediately yield an explanation. On the traditional view of the distinction, virtually all workplace harassment is public by definition, since the workplace is paradigmatically public.[90] If, however, we work from the insight that an important feature of the legal response to harassment is the regulation of victims, then the private or public nature of the harm caused by harassment provides the basis for a trenchant critique.

A. The Defamation Double Standard

Unlike the common law of torts, there is no specific action for defamation under the civil law.[91] Defamation is covered by the general regime of civil liability,[92] though the specific right to the respect of one's reputation that grounds an action in civil liability is found both in the *Civil Code of Quebec*[93] and in the *Quebec Charter*.[94] As with any civil liability claim, physical, material, and moral damages can be awarded in an action based on defamation.[95] Arguably, an extra measure of quasi-compensatory damages for "non-pecuniary loss" makes awards for damage to

---

[89] See generally Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (Sydney: Federation Press, 2002) c. 2. Carole Pateman has argued that the public/private dichotomy is the central question of feminist theorizing: see Carole Pateman, *The Disorder of Women* (Cambridge, U.K.: Polity Press, 1989) c. 6. See also Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497 (claiming that the persistence of the dichotomy has limited the effectiveness of reform efforts geared towards achieving gender equality as well as limited the range of possible reforms). But see Tracy E. Higgins, "Reviving the Public/Private Distinction in Feminist Theorizing" (2000) 75 Chicago-Kent L. Rev. 847 (arguing that the threat to equality posed by the public/private distinction has been overstated by feminists but that it is an important theoretical tool, especially when used to ground a more overarching critique of state power).

[90] Such an analysis may nevertheless be useful if we take into account the gendered nature of work highlighting, for example, ways in which harassment may be more prevalent in "private" workplaces such as childcare and other "domestic" work.

[91] See *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 221 D.L.R. (4th) 115, 2002 SCC 85 for a discussion of the difference between the common law and the civil law on defamation.

[92] See *Devoir inc. c. Centre de psychologie préventive et de développement humain G.S.M. inc.*, [1999] R.R.A. 17 (Q.C.A.).

[93] Arts. 3 and 35 C.C.Q. See also art. 2929 C.C.Q. This provision, specifying when prescription period begins to run, is the only place in the *Civil Code of Quebec* where the term "defamation" is used. The French version refers to "atteinte à la réputation".

[94] *Supra* note 3, s. 4 (protecting "dignity, honour, and reputation").

[95] Art. 1457 C.C.Q.

reputation particularly high.[96] Furthermore, punitive damages under the second paragraph of section 49 of the *Quebec Charter* are also available.

Given the broad scope accorded to the exclusion of civil remedies in *Béliveau-St-Jacques* and the expansive reading of section 438 of the *AIOAD* in *Genest*,[97] one would expect that damage to reputation caused by workplace incidents would be excluded in the same way. Indeed, defendants in defamation cases began invoking *Genest* as the grounds for a motion to dismiss raised by declinatory exception shortly after it was decided.[98] These were unsuccessful, but the question of whether defamation can constitute a workplace accident was not squarely answered, since the motions were denied on other grounds.[99]

When the issue was finally put directly to the Court of Appeal, the *Genest* analysis was rejected. Thus, in deciding *Parent c. Rayle*,[100] the Court of Appeal introduced a double standard shielding defamation from the exclusionary regime. The plaintiff, a management member of a school board, was the subject of a scathing article in the teachers' union newsletter, written by the union's president. Claiming damage to her reputation, she filed an action in the Superior Court. When it was revealed in pre-trial discovery that the plaintiff had been diagnosed with depressive anxiety as a result of the alleged defamation, the defendant immediately filed a motion to dismiss. The court, it was argued, must decline jurisdiction and refer the case to the CSST, which has exclusive jurisdiction to determine whether the incident constitutes a workplace injury. The argument was not accepted by the Superior Court, and the defendant appealed.

In a surprisingly short judgment, the Court of Appeal upheld the Superior Court's decision, finding that the intention of the legislator could not have been to include defamation in the workplace accident compensation scheme. The case is distinguished from *Genest* on the grounds that in that case, the parties had agreed that the incident in question constituted a workplace injury that would have been

---

[96] See *Lafferty, Harwood & Partners c. Parizeau*, [2003] R.J.Q. 2758, R.R.A. 1145 (C.A.) [*Parizeau* cited to R.J.Q.], leave to appeal to S.C.C. granted, [2004] 1 S.C.R., but discontinued (8 February 2005) S.C.C. Bulletin of Proceedings.

[97] *Supra* note 47.

[98] See *Dufour c. Syndicat des employées et employés du centre d'accueil Pierre-Joseph Triest (C.S.N.)*, [1999] R.J.Q. 2674, R.J.D.T. 1559 (C.S.) [*Dufour* cited to R.J.Q.]; *Protestant School Board of Greater Montreal c. Williams*, [2002] R.R.A. 1060, D.T.E. 2002T-1010 (Q.C.A.) [*Williams* cited to R.R.A.]; *Kupelian c. Nortel Networks Corp.*, [2002] AZ-50118045 (Azimut), D.T.E. 2002T-377 (C.S.) [*Kupelian* cited to Azimut].

[99] See *Williams*, *ibid.* at paras. 57-58 (declinatory exception raised on valid grounds but prescription had run out and it would be inequitable to leave the plaintiff without a remedy). See also *Kupelian*, *ibid.* at paras. 8-11, 16-19 (declinatory exception raised on valid grounds for all heads of recovery except defamation, which was not factually linked). But see *Dufour*, *ibid.* (the Court found there was no workplace injury on the facts).

[100] [2003] R.J.Q. 6, R.J.D.T. 1 (C.A.) [*Parent* cited to R.J.Q.].

compensable had it been filed at the CSST. Here, the question of whether it was a workplace injury was a question at trial.

The core of the decision is based on the same reasoning that underlies one of the critiques of *Béliveau-St-Jacques*:[101]

> ... [L]'interprétation proposée nous conduirait à des situations pour le moins déraisonnables ou inéquitables. En effet, si un travailleur est diffamé par un collègue de travail et qu'il en résulte anxiété ou détresse requérant un suivi médical, son seul recours sera de s'adresser à la CSST, car il en découlerait une lésion professionnelle ... Qui plus est, si la diffamation ne crée pas chez lui une atteinte permanente, il n'aura droit à aucun dommage moral et encore moins à des dommages punitifs. Par contre, si ce travailleur continue de bien se porter, physiquement et psychologiquement, il pourra réclamer non seulement des dommages moraux pour atteinte à sa réputation et même possiblement des dommages punitifs si l'atteinte était intentionnelle ... En somme, la diffamation qui détruit l'individu pourrait valoir moins que celle qui porte uniquement ombrage à sa réputation.[102]

The court went on to say that defamation is not necessarily excluded from the *AIAOD*; this is up to the CSST to decide. Relying on *Kupelian*,[103] it pronounced that the courts of general jurisdiction enjoy concurrent jurisdiction with the CSST over defamation.[104]

B. Dignity for Some

The consequences of the decision in *Parent* have not yet been felt and it is possible that it may have a beneficial impact. The apparent narrowing of *Genest* could be the source of arguments for future victims of workplace sexual harassment who, for whatever reason, prefer judicial recognition of the harm that was done to them over administrative compensation for their inability to work.

More likely, however, given the specific reliance on *Kupelian*, is that defamation will continue to constitute a narrow exception to the exclusion of civil remedies under the *AIAOD*. This would be unsurprising, given the analysis of the development of CSST recognition of psychological injury as related to the "nature" of women.

Though the moral damages that one can claim for harassment (when not excluded by the *AIAOD*) and defamation are both based on reparation for harm to dignity,[105] the notion of dignity at play is radically different. The first kind of dignity is solipsistic and individualized. A woman who has had her dignity violated, in the eyes of the law, has been harmed in her self-regard. Since affront to dignity is a private experience lived inside the head of the victim, it is also amenable to the kind of medicalization

---

[101] For further discussion of the critique of *Béliveau-St-Jacques*, see 10-11, above.
[102] *Parent*, *supra* note 100 at para. 24 [footnotes omitted].
[103] *Supra* note 98.
[104] *Parent*, *supra* note 100 at para. 29.
[105] See *e.g. Quebec Charter*, *supra* note 3, s. 4.

described in previous sections. The second kind of dignity is externalized in the community. A man who had his reputation violated, in the eyes of the law, has been harmed in the regard of others. Since affront to reputation is a public experience lived in minds of others, it is not amenable to medicalization.

I have sharpened the point somewhat by describing the bearers of dignity and reputation rights as being women and men respectively. Of course, both genders have formal equal protection of both sets of rights (and in fact, the plaintiffs in *Parent* and *Nortel* were both women). Nevertheless, there are at least two serious critiques of the decision based on feminist grounds.

First, whether men and women have formal equal rights is somewhat beside the point. The legal system only decides the cases before it, and the field of possible cases is determined by the situations in which people find themselves before litigation. As a matter of empirical fact, we still live in a society where women are sexually harassed much more often than men, and where men are arguably more likely to have a professional reputation to protect. The former are medicalized in the administrative regime and denied civil remedies, whereas the latter have access to substantial[106] compensatory and punitive damages.

A second, related problem with the distinction is its operation on the symbolic level. The law is an important constitutor of social norms and thus its pronouncements are performative in ways that affect more than just the parties at bar. Thus, not only do the victims of sexual harassment find themselves with an attenuated recourse, but all women are harmed by the law effectively saying: "If you have been harassed you must be sick, but if you have been defamed you have been harmed."

Conclusion

Civil liability is an imperfect system. Fraught with injustices and inconsistencies, it attempts to reduce varied forms of social conflict and individual suffering to a small set of comparable features that can be ultimately translated into monetary terms. Much is inevitably lost in the process. Workplace injury insurance schemes are also imperfect. As in the case of civil liability, compensation is often insufficient, and—despite the ideal—the process of administration can be as complex and dehumanizing as the fault-based liability structures that were replaced.

In Quebec, women who are victims of sexual harassment in the workplace are subjected to the worst aspects of both systems. Unfortunately, this is not a reflection

---

[106] See *e.g. Parizeau*, *supra* note 96 where the Court of Appeal increased the damages awarded at the Superior Court to a total of $100,000 per plaintiff. See also *Rayle c. Parent*, [2002] D.T.E. 2002T-541, AZ-50127086 (Azimut) (C.S.) in which the Superior Court decided the merits subsequent to the Court of Appeal determining that it had jurisdiction to do so. See *Parent*, *supra* note 100 where the court awarded $30,000 in moral damages and $20,000 in punitive (exemplary) damages.

of an imperfect legislative scheme that could be corrected with careful drafting or creative interpretation. Instead, as I have attempted to illustrate, it is the reflection of a society that has yet to eliminate the underlying prejudices and presuppositions that accompany the systemic devaluation of women and their experiences.