11

Assessing Redress Claims

11.1 Introduction

Programme assessors decide what injuries to redress and how much money to pay. Both judgements can be difficult. Some observers insist that it is impossible to set a monetary value on injurious care experiences. '[N]othing could repair the impact of institutional child sexual abuse on their [survivors'] lives, . . . no amount of money could compensate them adequately for the abuse' (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 93). However, those arguments rarely proceed to the conclusion that if quantification is impossible, then survivors deserve nothing. Chapter 13 addresses how policymakers can set values on injuries. This chapter looks at the tools and procedures used to assess claims once those tariffs are specified. Since people will reasonably disagree about how much to pay, good procedure is essential. To restate values introduced in Chapter 3, a good redress programme will be transparent, impartial, and fair while protecting survivors' privacy and well-being. In addition, assessment should be lawful, public, effective, and efficient.

11.2 Assessment Tools

Assessors use various tools to decide what information will count as evidence, how that evidence will be interpreted, and how much to pay survivors. The tools they use shape programme operations and the survivors' redress experience. This section focuses on the primary tools of rules and factors, the secondary use of categories and guidelines, and the tertiary functions of matrices. Assessors can use these tools to build pathways to redress that include or avoid certain benefits and barriers.

Rules specify how information will be used in advance. When using rules, an assessor functions like a Turing machine, putting evidence through a sequence of tests. When rules prescribe how claims will be

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assessed, survivors can know in advance what they can expect to obtain. As a result, rules-based assessment has significant advantages in both transparency and accountability. To illustrate, in the Magdalene programme, every month of residence at a scheduled institution was valued at a specific sum (Appendix 3.3). In the ideal situation, once an assessor decided how long a survivor had resided at a scheduled institution, simple rules of addition determined how much they received. The process was mechanical. Moreover, the programme used a single and simple metric of residence duration: if a survivor knew how long they had been in a laundry, they knew how much they were due.

Transparency enables efficient applications. If survivors know what evidence is relevant, they can focus their applications accordingly. Using rules reduces the amount of information that programmes need, helping assessors avoid superfluous and intrusive investigations, which, in turn, speeds up the process and limits its financial and psychological costs. Turning to fairness, rule-based transparency allows survivors to understand how claims are assessed. Assessors can easily explain how they apply rules to the evidence. Similarly, applicants can discover errors when rules have been misapplied, decreasing assessors' discretionary power and promoting fairness. If the same rules apply to all similar claims, then rules help programmes avoid discrimination.

Rules are predictable, quick, fair, and cost-effective. But they are not flexible. Rules determine how programmes will use information prior to (and abstracted from) actual cases. That means what the rules require may not accord with what is relevant to survivors or what justice requires. Rule-based assessment cannot weigh all the components of a complex injurious experience. And the capacity of rules to eliminate discretion and create fairness can be overstated. For example, recall how the CEP's strict assessment rules led to some claims being rejected in whole or in part despite the staff believing the applicant's claim (Fabian 2014: 248). At other times, assessors will need to judge what facts a certain piece of evidence supports, if testimony is reliable, or what its content, which might be circumstantial, entails for residence duration. These judgements create opportunities for discretion. And they are often made using factors.

A factor of assessment is a relevant consideration for which no *ex ante* rule stipulates an outcome. To illustrate, Redress WA graded applications according to severity (Appendix 3.7). There were four categories: moderate, serious, severe, and very severe. When assigning a claim to a category, assessors considered a diverse set of factors including: the

number of abusive incidents, their duration, the degree of harm sustained, the length of recovery, and the age of the survivor when the abuse occurred. Such factors weigh in favour or against certain decisions; they require assessors to make judgements. Although Redress WA specified some potentially relevant factors *ex ante*, assessors ultimately had to decide how each would bear upon their decisions. Moreover, assessors can have discretion to address novel considerations. The result is greater flexibility and comprehension. Factor-based analysis enables programmes to engage with what survivors say is most important to them.

The disadvantages of factor-based assessment mirror the advantages of using rules. As the range of potentially relevant information widens, factors make programmes more complicated and harder to understand. The volume of data rises as claimants are induced to submit more potentially relevant information. Assessors need to work with more information and decide what weight to give it. They also tend to collect more evidence. Because factors require assessors to make subjective judgements, the need for justified (defensible) decisions may encourage extensive, costly, and potential harmful investigations. That, in turn, means that survivors need more support. Factor-based assessment will, therefore, tend to be slower, more intrusive, and cost more.

Some of these challenges are ineliminable. But some, like inconsistency, can be mitigated. The weighting of factors may differ from case to case and from assessor to assessor, making the process more inconsistent and less transparent. Inconsistencies create risks of invidious discrimination (Pearson, Minty, and Portelli 2015: 30). But programmes can take consistency-improving steps. Canada's IAP ran training programmes for assessors, both at the outset of the programme and periodically afterwards. Programmes can also use panels instead of individuals. As Chapter 10 notes, having assessors work as panels of two or more means that decisions have to be mutually justified, thus reducing discretion and helping to develop common practices. Moreover, policymakers should consider developing accessible databases that include (de-identified) exemplar judgements that demonstrate how representative factors are valued so that assessors and survivors can understand the process and apply those weightings and considerations to novel claims.

As other consistency-promoting devices, programmes use secondary tools to organise the use of factors and rules. Categories and guidelines can be composed of either factors or rules or both. A category is rule-like in that its satisfaction specifies a particular outcome. In practice, some categories are, in fact, fulfilled by rules. For example, Redress WA did not

accept psychological reports as evidence – that prohibition was a rule prescribing how a category was defined and used. Other categories contain one or more factors that require assessors to exercise judgement – recall how Redress WA categorised applications into four standards of severity. Categories are retrospective, they classify existing data and judgements. By contrast, guidelines indicate how assessors should proceed. Some guidelines use rules to limit discretion. An example appears in Ireland's RIRB, which divided the survivors' injurious experience into four categories, each corresponding to a limited points range (Appendix 3.1). Once assessors pegged a set of facts into a category, they used factors to assign a specific points value within the corresponding range. That guideline used the rule 'stay inside the range' to restrict discretion. Guidelines can also be presumptive rules operating in the absence of certain considerations. So, for example, the maximum payment in the RIRB was €300,000, but in exceptional cases (a category) assessors could add up to 20 per cent to the payment. That discretion turned what would otherwise be a rule (no claimant will receive more than €300,000) into a guideline, with assessors deciding what factors constituted an exceptional claim.

By structuring how assessors use rules and factors, categories and guidelines help decompose complex procedures into discrete components, making assessment easier to perform and understand. These secondary techniques make assessment fairer and more accurate, while reducing costs for survivors and states. However, just as categories and guidelines produce certain advantages, they bear the trade-offs involved in applying the rules and factors from which they are constituted.

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As processes become more complex, assessors need tertiary structuring techniques. A common example of a tertiary tool is the matrix. To return to the Magdalene programme, its two-step matrix (Appendix 3.3) converted residence duration directly into payment values. More complex programmes use a three-step (or more) process. Canada's IAP disaggregated four grounds of eligibility: the experience of abuse, aggravating factors, psychosocial harms, and consequential loss of opportunity. For each ground, assessors used a matrix comprised of guidelines and categories that applied rules and proposed relevant factors. To illustrate, using the consequential harms matrix (Appendix 3.9), the IAP provided more points to survivors who experienced a 'severe post-traumatic stress

disorder' than those assessed with a 'mild traumatic stress disorder'. These two standards (severe and mild) were part of a rule: claims for severe post-traumatic stress disorder were assigned to a higher category. And IAP assessors used factors to distinguish between the categories of severe and mild stress disorder.

A good matrix clearly displays what information is relevant to the various parts of a complex process. That transparency helps reduce the costs borne by survivors and promotes speedier assessment. Insofar as matrices enable applicants to understand how the process should operate, they can help identify errors and reduce discretion. Matrices promote fairness by fostering consistency, prompting assessors to treat similar cases in the same way. A step-by-step process ensures that survivors are all similarly prompted for information and assessors use consistent procedures.

Matrices help programmes to be more comprehensive when they require assessors to look at different aspects of each application. For example, Queensland Redress divided its Level 2 assessment into seven different categories (Appendix 3.4). Having seven categories encouraged assessors to look at each claim from multiple standpoints, making the programme more comprehensive. Assessors examined claims for evidence in each category and then assigned a point-value to each. They then added up the total score. That score was then put into another five-row payment matrix (Appendix 3.5). Fourteen points or less resulted in no payment (or, rather, the claimant simply received the Level 1 payment), while higher scores were slotted into progressively higher-paying categories. The matrix makes the process simple to understand but its rule-based aggregation is inflexible, which reduces the programme's ability to respond to the distinctive experience of the survivor (Sunga 2002: 52). To illustrate, Queensland Redress gave in-care injuries more weight than post-care damage. I suspect that did not correspond to the experience of many survivors living with the debilitating consequences of injurious care.

Because redress programmes offer survivors acknowledgement, the procedures they use are communicative. To take a simple example, recall how Redress WA's matrix assigned claims to one of four categories of severity, each associated with a payment value (Appendix 3.7). Learning how their claim was assessed told the survivors both how the programme labelled their experience and how it was valued. Programmes should consider the labels they use carefully, for the wrong terms can be insulting. The lowest tier on Redress WA's matrix was labelled

'moderate'. This category included a loss of family contact, multiple physical assaults, and diminished educational opportunities – it is clearly unacceptable to describe these injuries as moderate (AU Interview 8). More generally, matrices reduce human suffering into discrete figures and cells abstracted from survivors' lives. Survivors often disapprove of how matrices construct/present hierarchies of victimhood (Pembroke 2019: 53; Feldthusen, Hankivsky, and Greaves 2000: 109; Daly 2014: 179–80). These critics object to the comparative grading of injuries like 'meat' (Miller 2017: 127) and argue that assigning points to different experiences turns redress into 'some kind of diabolical board game' (Cherrington 2007: unpaginated). The result, Robyn Green argues, is that quantifying injury through rigid processes undermines a programme's capacity to reconcile or heal (Green 2016: 130).

Cindy Hanson offers a related concern regarding gender. She observes that assessing injuries according to severity involves judging which injuries are worse than others. Her analysis of Canada's IAP found that it used a masculinist and hetero-normative framework when defining severity. As evidence, she points out that more severe forms of sexual abuse were defined by penetrative assaults with a penis or object. She argues that served to minimise the severity of assaults by female perpetrators because the programme was less likely to assess their offences as among the most severe (Hanson 2016: 8). Hanson further notes that the word 'breast' does not appear in the IAP's matrices (Appendices 3.8–3.12). Although assaults involving the survivors' breasts were included in the categories of fondling and touching, the larger point is that there should be a gender, and one might hastily add, a cultural analysis, of the assessment categories to ensure that they are fair and non-discriminatory.

In summary, different ways of organising the use of rules and factors through categories, guidelines, and matrices have different benefits and drawbacks. Carrying forward the argument for flexibility, programmes should have at least one pathway to redress in which a simple rule-based process works quickly and transparently to redress the maximum number of survivors. As models, the Magdalene programme, Canada's CEP, and Queensland Redress Level 1 used simple residence-based rules for eligibility and processed most claims quickly. Queensland Redress Level 1 was the simplest. With every validated claim receiving the same amount, the pathway did not need a matrix. Although they were more sensitive to residence duration, the CEP and Magdalene programmes' matrices made no effort to quantify the survivors' injuries, instead, they

set out simple rules for converting residential duration into payment values. However, their inflexible and narrow character made it impossible to acknowledge the severity of injury comprehensively. To do that, a programme needs one or more pathways that assess applications using factors, making the programme more complicated, more demanding of information, slower, and less transparent. Greater use of categories and guidelines creates complexity that, in turn, demands tertiary structuring techniques. And while observers criticise those techniques, it is noteworthy that programmes using matrices attract applications from large numbers of survivors. The factor-dominated RIRB, Queensland Level 2, IAP, and New Zealand Redress all received much larger than expected application numbers – indicating that a large percentage of survivors chose to participate in these programmes. To respect and enable their decisions, better programmes support survivors to choose whether they will pursue redress through rule-based processes, or through factor-dominated procedures, or both.

11.3 Fast and Slow Tracks

Just as the tools that assessors use are important, so are the processes in which they use them. Because survivors in poor and declining health need to have their claims processed quickly, Chapter 9 argues that programmes should assess all claims for prioritisation when they are submitted. Not only is it in the survivor's best interest, assessing survivors while they are alive helps programmes avoid the administrative challenges entailed by posthumous claims. Interim payments are a similar technique to get money to survivors as quickly as possible. For example, Scottish Redress paid £10,000 to all applicants with a terminal illness or aged sixty-eight or older. It may be tempting to treat interim payments as conditional (and repayable) if a full assessment later finds an overpayment. But attempting to recover money from survivors is unlikely to be effective (many will not have any money to repay), will detract from their well-being, and harm the programme's public reputation. Potential overpayments could be minimised if the interim payment derives from a simple rule-based pathway.

Politicians, survivors, and the media will demand that programmes assess claims quickly. That pressure creates dilemmas. Waiting imposes costs upon survivors. Uncertainty over the outcome of their claim while waiting for a settlement may aggravate financial stress. Survivors who borrow against their future settlement will then watch interest charges

consume ever-greater portions of as-yet-unknown sums (Assembly of First Nations c2017). Turning to the interests of the state, a speedy programme is likely to generate fewer criticisms and cost less to administer. These reasons in favour of speedy assessment may explain some of the unrealistic commitments among the exemplars. For example, Canada committed to processing 80 per cent of CEP claims within thirty-five days, a standard initially met for only 28 per cent. Delays happen for good reasons. Getting the staff, the information management systems, and procedures in place to launch a programme takes time. As previously noted, complex factor-based processes will induce programmes to accumulate information, with each byte adding time to the process.

This trade-off between time and information can be viewed from a different perspective. As programmes progressively accumulate data, the evidence they have improves. The Canadian IAP held back claims identified as likely to fail without supporting evidence from other claims. Such a case might have involved an alleged offender against whom the claimant's testimony was the only available evidence. But if another claimant later accused the same offender (independently), then that second claim would benefit from the prior allegation. Because it can be unfair if early claims are assessed using less developed data, programmes may wish to give survivors the option of a 'slow track' process wherein their claims are held back to permit the programme to amass relevant data on care experiences and similar fact claims. Equally, the programme might assess claims provisionally, and then reassess them should further evidence emerge. To avoid over-payment, the programme might pay a percentage of the provisional assessment, with the complete payment deferred until the process concluded. That would be another way to make interim payments. Provisional payments would ensure that survivors receive some monies promptly without being put at a comparative disadvantage. It would also enable survivors to add evidence progressively. Moreover, a holistic reassessment might stand in place of a case review process, at least in the first instance.

Obviously, a slow track process and similar techniques favour better-off survivors who are willing to wait. For others, the need for a quick settlement may outweigh the desire for greater accuracy. I have already stressed the relative speed advantage of simpler rules-based pathways. But factor-dominated pathways can also use techniques to speed up assessors. Regular procedural reviews can look for inefficiencies and bottlenecks. In some cases, programmes learn from experience. For example, over time, the Canadian IAP began to accept that experiencing

abuse was likely to lead to related psychological disorders. That meant that abused survivors did not have to procure further professional reports confirming that psychological damage was caused by injurious care experiences, and the programme did not have to pay for and assess those documents. Programmes confronting growing backlogs of cases can hire or redeploy staff or they might use processing quotas or bonuses for speedy work. These latter techniques encourage assessors to reduce the time spent on each case, which, in turn, limits the amount of information they can work with. The trade-off is a less accurate and less personal process for survivors.

Another technique promises both faster outcomes and more survivor participation. Both Ireland's RIRB and Canada's IAP made greater use of negotiation as these programmes developed. If the parties agreed on a monetary outcome, then their agreement was evidence of its appropriateness, saving assessors from producing time-consuming adjudicative judgements. Post-hearing judgements can take a long time, the IAP, for example, took between six months and a year. If survivors have an opportunity to say how they would assess their own claim, that is an important way to participate in the process (IR Interview 3). However, no programme can, or should, rely on case-by-case negotiation to resolve claims. That would be non-transparent and unfair, the resulting power imbalances would disadvantage most survivors. Where redress monies have significant, even life-changing potential, the incentive to settle quickly is powerful. One interviewee told me that '[survivors] come to us and say, "I got offered NZD$5000. I took it because I was sick, I was dying"' (NZ Interview 2). Another related,

> I remember a lady in [place] who accepted a fast track payment. She had a young son, a pre-schooler, who had very severe medical problems . . . She was a single mum. She'd had terrible abuse as a child in state homes. She was absolutely on the bones of her backside, and she accepted the fast track payment because it would pay for one year of her son's treatment. (NZ Interview 8)

While clearly respectful of the survivor's agency, negotiation creates a conflictual dynamic between the survivor and whoever is representing the state at the point of settlement. As Chapter 8 notes, it is important to reflect on how the state is represented in the process – is the state represented by the redress programme or by another party, such as the SAO in Canada's IAP? A programme that negotiates with survivors will no longer be a disinterested adjudicator. The logistical costs involved are

also significant, and survivors will need legal representation to mitigate inequalities. It is very likely that such a process would increase the risks of retraumatisation significantly. Still, survivors should not be prevented from choosing a quicker option, if they know that it might have some disadvantages for them. A programme could offer an optional negotiation pathway, overseen by an impartial professional mediator. That professional would be charged with preventing exploitation. Successful negotiation would conclude the procedure. However, if the parties fail to reach an agreement, adjudication might be a secondary option.

11.4 Publicity

No programme can operate without some publicity. Survivors need to know that the programme exists and, at least roughly, what injuries are eligible for redress. But how much information about assessment should be available? At least three reasons militate against publishing procedural details: privacy, truth, and perversity.

New Zealand officials cited privacy concerns to explain why they refused to publish details of MSD's assessment process, arguing that it would be possible to infer what happened to a survivor if one knows how much they were paid and how that was assessed. In 2017, I received a response to an Official Information Act request explaining that MSD had redacted the descriptions of injuries[1] the HCP used to categorise claims because:

> Release of [that information] would enable people to identify the nature of the abuse and/or harm that a claimant suffered whilst in care, leading to identification of very personal and private information which may negatively affect people who are already vulnerable. (Private Communication, from MSD, 20 September 2017)

The concern is not unfounded. In Chapter 2, I used what survivors said about their Redress WA payments to make such an inference when observing that the survivors who testified at a public hearing in Perth were unrepresentative. If transparency can reveal the nature of a survivor's injuries, that could be a privacy concern.

A further consideration concerns transparency's potential to create untruthfulness. Chapter 10 introduces the problem of inaccurate testimony. Procedural transparency can aggravate that problem. If applicants

[1] The full descriptions are in Appendix 3.14.

know what forms of injury will attract the greatest monetary settlements, that may affect the evidence they provide. One concern is the potential for fraudulent applications. Recall that Redress WA did not advertise its assessment criteria because it did not want to publish a 'cheat sheet' ('Official Committee Hansard' 2009b: 56). But apart from fraud, insofar as the redress process is supposed to provide survivors with an opportunity to have the state acknowledge their experiences, knowing what will get more money may cause survivors to focus on aspects of their experience that are less personally important, or to testify about experiences about which they would prefer to remain quiet. To illustrate the concern, redress programmes often provide more money for sexual abuse than other injuries. Chapter 10 intimates that if it is known that sexual abuse attracts higher payments than physical abuse, survivors may feel – and their lawyers and others with an interest in the financial outcome of the application may put – pressure to accentuate sexualised aspects of their experience. Not only do incentives mould testimony, but they may also encourage survivors to talk about things that they are not ready to discuss, aggravating retraumatisation.

And finally, if survivors know what garners higher payments, that might pervert the potential participatory benefit inherent to the redress process. The participatory value of testimony requires survivors to tell the programme about their injurious experiences and have that experience officially acknowledged and validated. Policymakers might hope to create a process in which survivors come to the redress programme to state on record what happened to them in care and what that has meant for their lives. But knowing what experiences will get more money might encourage survivors to engage with redress instrumentally, with the goal of extracting the maximum monetary value, to the detriment of intrinsic goods inherent to the process.

These concerns confront the general benefits of transparency in making redress fairer and more efficient. When weighed against these values, the concern with privacy appears speculative. I have never heard a survivor complain that publishing assessment criteria interfered with their privacy. In part, this is because those survivors who speak publicly about their redress experiences tend to be activists who also speak about their injurious experiences. Policymakers could mitigate the potential threat to privacy by notifying redress recipients of the potential problem, allowing survivors to make an informed choice about revealing their payment values. Similarly, while the problem of fraud cannot be dismissed, it is balanced by concerns over underreporting, as Chapter 10

notes. And the problem of perverse incentives confronts a powerful counterargument: if survivors wish to engage with redress instrumentally – aiming to maximise their payments – that is their prerogative.

On balance, I think the arguments for transparency outweigh those against, which can, moreover, be mitigated by informing survivors about the potential consequences of disclosing payment values. When survivors have a greater understanding of how the programme works, they can know what to expect. Knowing the rules of the game will enable survivors to be better players. I have already reviewed how transparency enables survivors to focus their testimony on relevant rules and factors. More streamlined applications will make programmes more efficient, benefitting both states and applicants by being faster and cheaper to administer. And knowledge facilitates agency. Greater transparency enables survivors to see themselves as part of the redress process, not merely an object of it. Indeed, knowing how assessment will proceed can help survivors make an informed choice about whether and how they wish to participate. Transparency also makes programmes fairer by reducing the assessors' discretion and enabling survivors to know how redress values are derived.

> When they [survivors] are shown how their settlement offer was arrived at, it is a whole lot easier for them to accept something that they are disappointed with than if they are just not given any information at all – [if] it appears like it has been plucked out of thin air and it is just because they 'don't like me'... (AU Interview 6)

As a last point, transparency enables survivors to make an informed decision as to whether to have their offer reviewed. Survivor-instigated review reduces assessor's discretion while promoting accuracy, fairness, and transparency. External review may be carried out by redress-specific bodies, such as Canada's NAC, or more versatile institutions, such as an Ombudsman/person or the courts.

11.5 Standards of Evidence

An evidentiary standard determines how certain an assessor must be to accept something as a fact. A standard is a type of category, when something meets a standard it can be judged as belonging to a category – such as being a fact. Relevant considerations for evidentiary standards include the quantity and reliability of information and the presence or absence of contradictory evidence. Lower standards accept facts

supported by poorer quality and/or less evidence; higher standards require better quality and/or more information.

I have frequently observed that non-recent claims tend to lack robust evidence. That is an important reason why redress programmes replace litigation. In civil litigation, the 'balance of probabilities' standard assesses which out of a limited set of factual scenarios is the most likely to have occurred. If plaintiffs need to show that their account is the most probable, then the preponderance of evidence must favour their claim. Few redress programmes require all claims to meet that high standard. Programmes usually advertise lower standards, indicating that claims need only be plausible or that there is a reasonable likelihood of survivors' testimony being true.

Assessors often use multiple standards of evidence. The RIRB applied higher standards to evidence of residence when they could access robust institutional records, but used lower standards when archives were missing or damaged. Some programmes, Queensland Redress is an example, imposed higher standards of evidence upon claims for more serious abuses. However, that may be unfair to those with more serious injuries. Many programmes treat sexual abuse as the most severe form of injury. Yet non-recent claims for sexual abuse are among the least likely to enjoy strong confirming evidence. Therefore, using higher evidentiary standards for more grievous injuries can be unfair to survivors of sexual abuse.

Unfairness also arises from inequalities between survivors. Educated and well-resourced applicants are likely to provide better evidence than applicants who lack those advantages. Redress WA found that application quality was 'strongly linked to the literacy level of the applicant . . . This had the potential to significantly disadvantage applicants with poor literacy skills' (Western Australian Department for Communities c2012: 9). The advantages that better-resourced survivors enjoy can be reinforcing and comprehensive. Better-resourced applicants may be more likely to get expert assistance, obtain their personal records, and receive treatment for physical and psychological complaints. The resulting differences in available evidence could be aggravated if more serious injuries are associated with greater disadvantages, and therefore, lower quality applications. Fairness may, therefore, justify the use of lower standards that all survivors have an equitable chance of satisfying. As evidentiary standards decrease, per-case assessment should speed-up and procedural costs decrease because, if applicants need to provide lesser quality, and lower quantities of, evidence, that data will be less costly to manage and produce.

But lower evidentiary standards entail trade-offs. In programmes that calibrate payments to the severity of injury, lower evidentiary standards would not only validate more claims, but they would also pay more per claim, making the programme more expensive. Lower standards can also damage a programme's integrity, as Chapter 10 observes. Some claimants will provide inaccurate information by mistake. Others will commit fraud. A redress programme needs to test claims so that political authorities and other observers, including the citizenry, can be confident it is not being abused.

Lower evidentiary standards favour fairness at the cost of integrity. But programmes can use their rich databases to alleviate that trade-off. Conventional litigation uses higher evidentiary standards because, in most cases, courts have evidence about a single case only. By contrast, redress programmes can receive hundreds, or thousands, of applications. Moreover, they often follow or accompany public inquiries that investigate injurious care systems. As a result, assessors need not address each claim in isolation, but can look at how claims fit into emerging patterns. Redress WA used information provided by applicants to compile historical dossiers on institutional practices and staffing.

A common evidential pool can strengthen weaker applications while mitigating some integrity concerns, if false claims are discovered by reference to contradictory common evidence. And the fact that many potentially eligible survivors will not claim for all their injuries (or not apply) offers a further counterweight to concerns with fraud. But there is no way to eliminate unfairness. Databases will tend to have more information about some periods and some residences than others. Placements with larger populations, such as large orphanages, are likely to engender more applications, each contributing to a more comprehensive historical picture. Moreover, larger institutions may have more accessible records. By contrast, other survivors will benefit less. A survivor of foster care may be the only applicant with any information about their personal history. Still, if increasing evidentiary standards excludes more meritorious claims than fraudulent ones, programmes may balance the state's interest in protecting the public revenue with its interest in resolving meritorious claims. Better programmes match the appropriate standard to the evidence available.

11.6 Consequential Damage

I will finish this chapter by looking at some further difficulties involved in assessing consequential damage and broach an alternative approach

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using collective data and/or collective harms. Recall that relevant harms include a broad range of physical and psychological disorders, illiteracy, family separation, and cultural estrangement, *inter alia*. Exemplar programmes adopt different approaches to assessing consequential damage. The Magdalene laundries programme assessed a single form of harm – damage to the survivors' pension entitlements. Others, like Ireland's RIRB, Canada's IAP, and Redress WA were more comprehensive. More comprehensive programmes tend to make higher payments, enabling greater recognition of the survivors' post-care injurious experiences. Chapter 9 discusses how this approach is both intrusive and costly. Here, I explain why the individuated assessment of consequential damage punishes resilient survivors and confronts serious epistemic uncertainty. The difficulties involved are such that Redress WA's *Key Learnings* report recommends excluding consequential damage from future programmes (Western Australian Department for Communities c2012: 27). I think that recommendation is unwarranted. But before I say why, I will explain the difficulties.

Redressing consequential harm punishes resilient survivors who find it harder to provide evidence of damage than others (Green et al. 2013: 4). For example, resilient survivors may not have evidence of the psychological harm they experience(d). One interviewee said,

> Because I'm a very resilient individual, I went out and got a degree in philosophy, European history, an honours degree. . . Because of that there were points taken off of me. . .and in some ways that is an injustice in itself. Because having been successful in one particular area of your life doesn't necessarily mean that your life is [better] overall from the guy drinking a bottle of wine on the street. Physically you see the difference, mentally you can't and that's the point. (IR Interview 1).

The interviewee's resilience helped him succeed in higher education and prevented him from displaying behaviours typically associated with psychological harms, which he encapsulates as 'drinking a bottle of wine on the street'. That meant that he was unfairly disadvantaged in his capacity to produce evidence of consequential damage.

A second concern comes from the difficulties with counterfactual causal judgements. Because this discussion is a little abstract, I will start with a simple example. Suppose you are walking down the street. Distracted by an oddly shaped cloud in the sky, you trip, fall, and cut your knee. It seems right to say that tripping caused the cut to your knee. That judgement depends on a counterfactual assessment in which you

imagine a plausible counterfactual world in which you walk without tripping. When you replay the same sequence of events, but omit the trip, you would not have cut your knee because no other knee-cutting cause appears in the imagined counterfactual. Causal assessment compares a counterfactual series of events with what actually happened to see what harms exist now that would not have otherwise occurred. Note how the counterfactual is bounded by what might have plausibly happened. When you counterfactually imagined walking without tripping you did not imagine aliens using space lasers to cut your knee. That would not be a plausible alternative sequence of events. In the same way, if a survivor is to claim consequential damage in a redress programme, assessors need to imagine a plausible counterfactual world in which the survivor would not have experienced the relevant harm – they need to suffer damage that they could have reasonably expected to avoid if the injury did not occur.

Using what they know of the survivor and the world in which they live, assessors use a variety of causal factors to construct plausible counterfactuals. Unfairness occurs when cumulatively disadvantaged survivors have a harder time establishing the plausibility of better counterfactuals. A good example appears in the Canadian IAP wherein applicants could claim for actual income losses resulting from abuse experienced in a residential school. Valid claims needed to show how abuse deprived survivors of income that they could have otherwise reasonably expected. That required assessors to imagine counterfactual worlds in which survivors received the income that they claimed to have lost. Very few (eighteen) survivors were successful.[2] These claimants tended to have experienced a psychological event that caused them to lose a job or work fewer hours – their actual career constitutes part of the relevant counterfactual. But the programme did not redress the income lost by those who did not have a well-paid career. Survivors who were persistently unemployed could not point to plausible counterfactual income. That glaring unfairness meant some better-off survivors obtained redress denied to those whose were worse off, whose injuries might have contributed to their economic marginalisation.

The injurious consequences of residential school were comprehensive. One interviewee illustrated the problem as follows:

[2] Beyond the unfairness, it is irrational for a programme to have a pathway for redress using evidentiary standards that only 0.04 per cent of applicants satisfied.

> [The redress programme] considered I did not lose any opportunity of employment or education. I said, 'Yes I did, I should – according to everybody I know, they think I should have been a doctor'. I know I had the ability or I had the capacity and whatever else. I said, 'Why don't they put the measure to what I could have done and should have achieved?' . . . My potential was never measured to a standard of what an average, or whatever non-native [non-Indigenous] person in an average home [would achieve] . . . 'Why don't you measure me against that instead of measuring me against my peers?' We've all been traumatised, we've all been victimised. (CA Interview 2)

In this case, the interviewee, an Indigenous Canadian, argues that the counterfactual for determining what is harmful was unfair. She suggests that the programme should have considered the multi-generational collective damage inflicted by the residential schools. Instead of assessing her educational or employment experiences against the minimum standards of graduating high school and not being unemployed, it should be assessed against what her innate talent could have achieved in a counterfactually less-racist society. For extremely marginalised populations, what is normal may be a consequence of systemic injustice. Programmes that attempt to redress the damaging consequences of injurious care can only partially grasp how pervasively unjust social structures affect how, and what, harms arise (Green 2016: 136).

The interviewee's argument points towards epistemic concerns with assessing counterfactuals over longer histories. Recall the simple example of your knee-cutting trip. Your trip is what lawyers call the proximate (closest in time) cause of the cut to your knee. The trip and the cut were separated by seconds. Counterfactual causal assessment becomes progressively harder over longer periods. Causation is not lineal; it is a network that grows ever more complex the further one goes back in time. Non-recent claims ask assessors to consider the causes of harms decades after survivors have left care. What should those counterfactual worlds exclude? It can be challenging, or impossible, to distinguish damage experienced as a result of injuries in care, from the consequences of other events experienced prior to, or after, care.

> And the Board [Irish RIRB] then would say, 'Well, hang on a second. You're saying that you were abused in the institutions, but your father abused you for four years before you got into the institution'. So, if you're assessing a damage, then you look at the damage that was already there and the Board, or the institution, can't be responsible for all of it. (IR Interview 6)

Post-care experiences differ as well. Many survivors will have spent time in the military or prison, had an abusive spouse, or other psychopathological experiences. Now middle-aged, they might have an attachment disorder, which is a common consequence of abuse in care. But to what extent is that disorder caused by pre- or post-care experiences? The question may be unanswerable: there may be no way to discover, even approximately, the true consequences of eligible injurious acts.

One common technique to mitigate this problem is to identify certain forms of consequential damage and redress all survivors who experience them. Recognising the harmful potential of structural injury, Queensland Redress accepted any psychological disorder as consequential damage. In a similar approach, the Magdalene programme redressed a specific form of damage (diminished income) by applying a simple rule: all valid applicants received a full pension. While both approaches risk redressing non-meritorious claims, at the aggregate level the experience of structural injuries means that survivor populations exhibit high frequencies of certain harms; therefore, a programme can use a structurally oriented causal analysis to assess some consequential damage.

To summarise, survivors have claims for the redress of consequential damage. But assessing those claims poses serious problems. Programmes that try to assess the exact consequence of injuries experienced in care may create unfairness or impose significant costs in trying to overcome the epistemic challenges involved. As alternatives, programmes may use aggregate population data to redress frequently experienced harms, such as psychological disorders. Or programmes could redress collectively experienced damage, such as the intergenerational harm residential schooling inflicted upon Canada's Indigenous peoples.

11.7 Assessment Recommendations

- Survivors should be able to choose whether they wish to pursue redress through a rule-dominated pathway or through a factor-based process, or both.
- At least one pathway to redress should use rules and simple eligibility metrics. That will make it quick, transparent, and accessible.
- More comprehensive pathways may employ more complex procedures making greater use of factors.
- Categories, guidelines, and matrices can help organise assessment, making it fairer and more transparent. However, programmes should recognise the harmful potential of pejorative labels.

- Applications should be assessed for prioritisation. Alternatively, programmes might provide interim payments, deferring complete payment until after a final assessment. A programme could minimise the potential for overpayments if the interim payment derives from a simple rule-based pathway.
- Because it can be unfair if early claims are assessed using less developed data, programmes may wish to give survivors the option of a 'slow track' wherein their claims are held back to permit the programme to amass relevant data on care experiences and similar fact claims.
- Programmes should undertake regular procedural reviews to look for inefficiencies and bottlenecks.
- Programmes should conduct gender and cultural analyses of assessment processes to ensure that they are fair and non-discriminatory.
- Programmes could offer survivors the option of using a negotiated settlement process mediated by an impartial professional. If mediation is unsuccessful, the claim would be adjudicated.
- Programmes should publish the assessment criteria they use.
- Survivors should be able to have their assessments reviewed by an appropriate body.
- A good evidential database might include exemplar judgements of more common claims explaining (and demonstrating) how representative factors are valued so that assessors and survivors can understand the process and apply those weightings and considerations to novel claims.
- While publicising the programme's assessment criteria risks the survivors' privacy, on balance, programmes should maximise the transparency of their assessment criteria and procedures.
- Programmes should match the appropriate evidentiary standard to available evidence.
- Fairness may justify the use of easier-to-satisfy standards. While lower standards risk validating non-meritorious claims, some of that risk can be offset by using a common pool of evidence.
- It is difficult to assess claims for consequential damage. One common technique to mitigate this problem is to identify certain forms of consequential damage and redress all survivors who experience them.
- Survivors should not be required to apply for individuated consequential damage.