

IN THE MATTER OF THE FEMALE MIND: AN ANALYSIS OF THE SUPREME COURT OF CANADA'S APPROACH TO WOMEN AND MENTAL HEALTH

EN CE QUI CONCERNE L'ESPRIT FÉMININ : UNE ANALYSE DE L'APPROCHE DU COUR SUPRÊME DU CANADA ENVERS LES FEMMES ET LA SANTÉ MENTALE

Odelia Bay

According to the Supreme Court of Canada's most recent equality law ruling in *Withler v. Canada (Attorney General)* (2011), considerations of context must be central to a discrimination analysis. As the jurisprudence evolves, discrimination cases in Canadian courts are becoming increasingly complex and some legal experts predict that we will see a rise in the number of disability rights claims. To date, very few cases involving women and mental health have made their way up to Canada's highest court. This paper uses a gendered analysis of disability to examine three Supreme Court of Canada decisions: *University of British Columbia v. Berg* (1993), *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* (1997), and *Gosselin v. Québec (Attorney General)* (2002). The results indicate that in cases where gender and mental health intersect, the Court is unwilling or unable to deal with issues of intersectionality in order to recognize the gendered experience of mental illness. Yet, the Court continues to point to one of these cases, *Gosselin*, as an example of how to get the contextual analysis right. When it comes to women and mental health, it appears that equality and justice may continue to give way to decontextualization and stereotype.

Keywords: disability, gender, women, mental health, Supreme Court of Canada

Les cas de discrimination dans les cours canadiennes deviennent de plus en plus complexes, et quelques experts légaux prédisent que le nombre d'actions légales concernant l'handicap augmentera. Jusqu'à présent, la Cour Suprême du Canada n'a considéré que quelques cas qui impliquent les femmes et la santé mentale. Cet article utilisera donc une analyse engendrée de l'handicap afin d'examiner trois décisions prises par la Cour Suprême du Canada : *Université de la Colombie-Britannique c. Berg* (1993), *l'Office des services à l'enfant et à la famille de Winnipeg (Région Nord-Ouest) c. G. (D.F.)* (1997), et *Gosselin c. Québec (Procureur général)* (2002). Les résultats indiquent que dans les cas où le genre et la santé mentale se croisent, la Cour Suprême soit ne veut pas, soit ne peut pas traiter les problèmes d'intersectionnalité afin de reconnaître l'expérience engendrée des maladies mentales. L'analyse démontre aussi qu'il semble que la Cour Suprême défend et protège ses intérêts personnels. Il paraît que l'égalité et la justice sont plus faibles que la décontextualisation et les stéréotypes.

Mots clés : handicap, genre, femmes, santé mentale, Cour Suprême du Canada

We attribute a myriad of myths and pre-conceptions to people diagnosed with a mental health condition. At the same time, there are factors at play that we do not often acknowledge: the complexities of what it means to live with a disability, the social stigma, and how all of these things intersect with other forms of oppression.

This paper does not attempt to deal with the legitimacy of mental illness nor the validity of diagnoses.¹ Rather, the purpose of this paper is to critically examine how the Supreme Court of Canada deals with discrimination and mental illness and, in particular, to try and understand if, and how, gender impacts their analysis. This examination is broken down into the following steps: Part I addresses the reasons why now is an important time to look at how the Court deals with women and mental health; Part II attempts to contextualize women's mental health issues within an historical, Canadian context; Part III sets out an analytical framework for examining the Court's decisions; Part IV applies the analytical framework to three cases involving women and mental health: *University of British Columbia v. Berg* (1993), *Winnipeg Child and Family Services v. G. (D.F.)* (1997), and *Gosselin v. Québec* (2002); and, Part V attempts to briefly deal with the question of what lies ahead. The results indicate that in cases where gender and mental health intersect, the Court is unwilling, or unable, to deal with complex issues of intersectionality in order to recognize the gendered experience of mental illness.

PART I: Why look at women and mental illness in the courts?

In the wake of *Withler v. Canada* (2011), the time is right to reflect on equality law as set out in section 15 of the *Canadian Charter of Rights and Freedoms* (1982). Our justice system seems most able to deal with the simple comparisons, those based on a binary distinction: the citizen versus the non-citizen in *Andrews v. Law Society of British Columbia* (1989), or the Deaf versus the hearing in *Eldridge v. British Columbia* (1997). Discrimination analysis often requires the fracturing of our complex identities and the abandoning of intersectional understandings. Daphne Gilbert (2006) writes, the analysis “asks claimants to say: ‘it is because of my race, my gender, my religion, my nationality that I have suffered unequal treatment’” (p. 227). While the Supreme Court has said that a discrimination claim can rest on intersecting grounds (*Law v. Canada*, 1999, para. 94), claimants are generally made to pick one aspect and focus on how that ground results in adverse, differential treatment when compared to others. The law seems able to look at one issue at a time and make a comparison, but finds it

¹ Wording such as “mental illness” and “mental health condition” are used interchangeably throughout the text. Conventional language is used in this paper to reflect the common understanding of mental illness that inevitably underlies the thinking of the courts. In doing so, there is no intent to diminish in any way the argument that mental illness is a legally enforced social construct designed to pathologize and control rather than a real medical condition. Having said that, I am not entering the debate, nor do I have the expertise to do so.

difficult to deal with more complex types of discrimination. This lack of contextualization has been seen in the selection of grounds as well as when analyzing comparator groups. It has resulted in the essentialization and oversimplification of claims (Gilbert & Majury, 2006). Two stark examples of how the Court has limited its comparator analysis with simplistic and detrimental results can be found in the cases of *Hodge v. Canada* (2004), an action by a common law spouse seeking Canada Pension Plan survivor benefits, and *Auton v. British Columbia* (2004), a case about funding for autism treatment.

Complexity, however, is what is needed. It is the recognition of how power relationships interplay and inequalities co-exist simultaneously that provides real insight into disadvantage and discrimination (Pothier, 2001). The social context of distinction matters. Dianne Pothier (2001) writes, “people at the intersection of grounds are not just more vulnerable to discrimination, they also experience discrimination in different ways and/or in such a different context as to add an entirely new dimension to the problem” (p. 62). The Women’s Legal Education and Action Fund (LEAF) agrees:

Some litigants will experience multiple forms of discrimination simultaneously that are integral to their claim. Discrimination suffered on the basis of one’s sex, Aboriginal identity and poverty, for example, is lived as interactive, and is neither reducible to a single inequality nor simply additive (2010, para. 7).

Maintaining “watertight compartments”, to borrow the language of Justice L’Heureux-Dube (*Egan v. Canada*, 1995, para. 80), is unhelpful, even harmful. In *Withler v. Canada* (2011), The Supreme Court articulates a need for the “flexibility required to accommodate claims based on intersecting grounds of discrimination” (para. 63). While it is unclear how the ruling will be applied in the future, it may end the rigid adherence to comparator groups and pave the way for a more contextual approach. But then again, it may not.

As equality jurisprudence continues to evolve, the issues are becoming more complex. The prediction is that we will see an increasing amount of disability rights litigation (Gilbert, lecture, University of Ottawa, March 9, 2010). Cases in which gender and a non-visible disability intersect are particularly interesting. If the Court must first be able to recognize the harm in order to recognize any form of discrimination, what will result when part of the essence of the problem cannot be seen? When it comes to women and mental health, it seems that the courts do not recognize the gendered experience of mental illness. More than that, the courts are party to the perpetuation of myths about women and mental health.

PART II: How is mental health gendered?

I would do anything to have breast cancer over mental illness. I would do anything because I [would] not have to put up with the stigma.

— Helen Forristall
(Senate, Standing Committee, 2006, p. 1)

The experience of mental illness, like all forms of disability, will vary depending on whether you are a man or a woman. To better understand how mental health is gendered, some context is needed.

Context – The Past

Our culture has a deep history of pathologizing women. A striking example of this is the diagnosis of hysteria. Literally derived from the Greek for “uterus”, it was originally a psychological diagnosis given only to women and believed to be caused by sexual abnormality (Hamilton, 2002). Eventually, the term was used to label both genders, although it was still applied with much greater frequency to women who were thought to have physiologically weaker nerves (Hamilton, 2002).

While it is not a formal diagnosis in the *Diagnostic and Statistical Manual of Mental Disorders*, commonly referred to as the *DSM*, the concept of hysteria still exists and is now defined as, “behavior exhibiting overwhelming or unmanageable fear or emotional excess” (*Merriam-Webster’s*, 1998, p. 572). Hysteria is the polar opposite of reason and rationality, and persists in Canada’s courtrooms (Hamilton, 2002). Jonnette Hamilton conducted a text search of Canadian case law. Of the cases surveyed, she found that 80% of the people labeled as hysterics were female. When the term is applied to males, it is usually to describe minors, immigrants, and those without post-secondary education. It is still a feminizing term (Hamilton, 2002).

Another example, with deep Canadian roots, is feeble-mindedness (Stephen, 1995). This diagnosis was, once again, mostly applied to women. Aside from its misogynist underpinnings, it was clearly classist, racist, and ableist. Indicators of this “disorder” were tied to family history and heredity, when a person started walking and talking as an infant, morality and sexual behaviour, the onset of menstruation, employment history, standardized intelligence test scores, and even the presence of a cleft pallet. The diagnosis of feeble-mindedness was used to legally justify community and institutional supervision as well as deportation (Stephen, 1995).

Context – The Present

What does it mean to be a woman with a mental health disability today? These statistics provide context for the analysis that follows:

- Women are twice as likely as men to be at risk of depression (Ad Hoc Working Group on Women, 2006);
- Doctors are more likely to diagnose depression in women who present with symptoms identical to those of men (World Health Organization, n.d.);
- Women are more likely than men to be prescribed psychotropic drugs (WHO, n.d.);
- 31% of women in federal penitentiaries report emotional or mental health problems compared to 15% of federally incarcerated men (Riordan, 2004);
- Women with serious mental illness are more likely to be unemployed and live in poverty (Canadian Mental Health Association, 2005);
- One study found that 83% of women in an inpatient psychiatric hospital had been physically or sexually abused in childhood (Morrow, 2002);
- Women are three to four times more likely to attempt suicide than men, and there is also a significant correlation with a history of sexual abuse (Pollett, n.d.);
- Life events that cause “a sense of loss, inferiority, humiliation or entrapment” are predictors of depression (WHO, n.d.); and,
- The risk factors that impact women’s mental health include: sexual and violence, socioeconomic disadvantage, income inequality, poverty and hunger, subordinate social status, and responsibility for the care of others (Pollett, n.d.; WHO, n.d.).

Sadly, it is possible to summarize all of the above facts by stating that the experience of gender oppression, along with other forms of subordination, are major predictors of mental illness.

These truths are rarely recognized. Instead, women must face the realities listed above along with the myths and stereotypes built on a history of oppressive ignorance. Susan Wendell (1996) writes about how society contributes to the disabling of people by misconstruing what it means to have a disability. This process of othering occurs in two ways: firstly, through omitting the real, lived experiences of people with disabilities from social discourse; and secondly, through stereotyping. This stereotyping is characterized by the following:

selective stigmatization of physical and mental limitations and other differences...the numerous cultural meanings attached to various kinds of disability and illness, and the exclusion of people with disabilities from the cultural meanings of activities they cannot perform or are expected not to perform (pp. 42-43).

PART III: What is “a legal theory of gendered disability”?

I can never experience gender discrimination other than as a person with a disability;

I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me.

— Dianne Pothier (2001, p. 59).

Dianne Pothier (2001) describes the interrelationship between gender and disability:

I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination. Even when only one ground of discrimination seems to be relevant, it affects me as a whole person. If I am excluded or marginalized from something because of my disability, I am also excluded or marginalized as a woman and vice versa (p. 59).

An acknowledgment of the interplay between gender and disability is critical to informing an equality analysis of the kind and degree of discrimination women with mental health disabilities face.² To do this, we can look to Fiona Sampson (2005) for a framework of what she calls, “A Legal Theory of Gendered Disability”. Sampson explains this approach as follows:

Gendered disability is not the “additive” experience involving a multiplicity of relations of subordination. The relations that inform this experience are non-divisible... Gendered disability is an experience in which the identity features of gender and disability are fused together in such a way as to create a specific experience, distinct from other lived experiences (p. 4).

In other words, it is the confluence of factors that defines the unique character of the discrimination, and not simply a number of separate and distinct elements of

² I am aware that in talking about women and disability and mental illness, I am using language that may universalize experiences and mask difference, something that must be acknowledged in a paper that is attempting to look at issues of intersection and respect for contextualization. I do this, however, to limit the scope of the discussion, not to discount the ways in which an individual’s experience is shaped by myriad factors (see Wendell, 1996).

disadvantage that add up to result in oppression (Razack, 1998). Not only does an additive approach not account for the dynamics at play in systemic oppression, the additional danger is that elements can also be subtracted in an analysis, both reducing the nature of a discriminatory act into something far more simplistic and less insidious, and essentializing the identity of the claimant. Sampson (2005) writes that it is “impossible to dissect an experience such as gendered disability discrimination into neat, separate categories of gender and/or disability, just as it is impossible to dissect the claimant into neat, separate components of gender and/or disability” (p. 45).

Sampson (2005) does not purport to create a gendered disability legal theory. Instead, building on a mix of disability theory, feminist legal theory and critical race theory, she works to “initiate the preliminary steps in the development of a theory...by exploring the nature and extent of the subordination of disabled women within both society and the law” (p. 94).

Through detailed analysis of case law, Sampson (2005) demonstrates that the distinctive and gendered nature of discrimination and disability is not something the Supreme Court has been able to perceive. She finds a lack of judicial consciousness with respect to gendered disability: either gender or disability is brought to the foreground in a claim, one serving as the basis for the equality analysis and thereby rendering the other useless in the Court’s view. Because of this, she concludes that claims made by women with disabilities are less likely to succeed in comparison to claims made by women without a disability or men with a disability (Sampson, 2005).

Sampson (2005) identifies four factors that influence how a court may approach a disability rights claim:

[T]he kind of disability at issue, the context within which the claim is advanced, the degree of risk that the women with disabilities will get subsumed within the category of the essential, non-disabled woman, and the cost attached to remedying the discrimination (p. 407).

I use Sampson’s factors to pose the following questions for analysis:

- What is the nature of the disability? In other words, what kind of mental illness is at issue?
- Is the disability eclipsed by gender, or vice versa, and what impact does this have on the Court’s approach?
- How does the severity, or perceived severity, of the disability impact the outcome?
- Is the source and effect of the discrimination addressed?
- Does the Court engage in any contextualization with respect to the person’s circumstances?
- What myths and stereotypes, if any, are at play? For example, does the Court buy into any of the following mischaracterizations of

women with mental illness: oversexed, dangerous, infantilized, feeble-minded, malingerer, unruly, etc.?

- Whose interests is the Court protecting?

Not all of these questions may be answered with respect to every case, but they should generally lead to some findings about whether the Court is able to perceive any degree of gendered disability in its approach.

PART IV: How has the Supreme Court dealt with women and mental illness?

What follows is an examination of three cases dealing with women who are seen to have some form of mental illness: *University of British Columbia v. Berg* (1993), *Winnipeg Child and Family Services v. G. (D.F.)* (1997), and *Gosselin v. Québec* (2002). I present the cases in chronological order, but because so few cases dealing with the discrimination of women with mental illness have been heard by the Supreme Court, it is not really possible to determine if there is any progression in the analysis of the Court.

1. *University of British Columbia v. Berg*

This case started as a claim before the British Columbia Human Rights Council and worked its way up to the Supreme Court on judicial review (*Berg*, 1987). Two things are striking about this case. The first is how the tribunal decision is able to so effectively decontextualize the claim. The second is how, even after the Supreme Court finds in the claimant's favour reversing the decisions of the two courts below, it is made clear that the discrimination was seen to be justified, if not legal, based on the stereotypical myth of the dangerous, deranged woman.³

Janice Berg was a university student enrolled in a Master's program at the University of British Columbia School of Family and Nutritional Sciences. She was a good student who dreamed of becoming a dietitian. Berg's academic performance was above average and she was awarded a National Research Council Scholarship (*UBC*, 1993, para. 2). Despite these achievements, Berg was typecast by her program administrators and the courts, not based on her qualifications, but based on her mental health issues and the events of a single day.

In the fall of 1981, an "incident" occurred. Stressed about a meeting with a faculty member, Berg wrote the words "I am dead" on a campus washroom mirror. Fearing the presence of security personnel and police who had been called in because of the writing, Berg ran into a classroom and attempted to jump through a window to get away (*Berg*, 1987, para. 36236). This "incident" led to a change in attitude toward Berg and served as an excuse for the school's discriminatory treatment.

³ I am using pejorative language to reflect pejorative sentiments based on myth and stereotype.

At the tribunal level, Berg put forward eight separate complaints of discrimination:

1. That she was excluded from faculty activities;
2. That she was harassed during the oral defence of her thesis;
3. That the department disclosed her mental illness to a prospective employer;
4. That adverse decisions about her were made at faculty meetings;
5. That she was denied enrolment in two courses;
6. That she was denied computer funds;
7. That she was denied a key to access the faculty building; and,
8. That she was denied a rating sheet required for registration in an internship program (*Berg*, 1987, para. 36239).

All of the complaints, with the exception of the last two, are dismissed (*Berg*, 1987). Part of the reason is that the tribunal parcels out the claims made against the university into what it sees as separate and distinct issues, thus failing to see the discrimination in any kind of full context. In the name of clarity, a myopic approach is taken, rather than an examination of the structural and systemic nature of the problems as well as the total impact on the claimant.

Of the complaints that are dismissed, two in particular deserve closer scrutiny because of the interests at stake: the denial of Berg's enrolment in two courses, and the disclosure of confidential health information to a prospective employer.

Berg attempted to take two classes, Home Economics and Agricultural Economics, neither of which were necessary for her Master's degree but were required for an internship (*Berg*, 1987, paras. 36242, 36275). No discrimination was found, and Berg was eventually able to take both courses (*Berg*, 1987, para. 36284). The adjudicator seems to easily find that testimony of faculty members does not support Berg's claim. But, Dr. Oberg, the Associate Dean of Graduate Studies, is earlier cited as saying, "that 'faculty' felt the complainant should 'get on' with her Masters program rather than become involved with extra courses" (*Berg*, 1987, para. 36257). This demonstrates that there was pervasive ill sentiment toward Berg, that the school wanted to be rid of her, and that there was a willingness to take measures that would impact on her long-term ambitions and well-being.

The same reasoning can be found in the dismissal of Berg's complaint about disclosure of her personal health information to a potential employer. No discrimination was found. Why? Because in the end, Berg did get a position with the employer, albeit an inferior one, and because of concerns about the accuracy of the evidence regarding exactly who spoke to whom (*Berg*, 1987, para. 36281). Yet, the employer testified that Berg's thesis advisor "indicated the complainant had 'mental health problems'". He said that because of this information Berg was hired as a researcher instead of a project coordinator (*Berg*, 1987, para. 36256). The thesis advisor also recalled discussing Berg's "health problems", although not directly with the person doing the hiring (*Berg*, 1987, para. 36281). The

tribunal finds that this is not enough; the evidence is faulty and, therefore, the discrimination unsupported.

In essence, what appears to be happening here is a systemic exercise to protect the faculty from being associated with guilt, conscious or otherwise. Sheila McIntyre (2000) writes about how people in positions of privilege are able to evade having to account for knowledge of systemic inequality. What may have happened in Berg's case is an invocation of the "due-process" paradigm. The focus was shifted from the content and context of the allegations to a narrow focus on process leading to heightened evidentiary scrutiny (McIntyre, 2000). In this way, it was easier for evidence to be viewed as flawed and the perpetrators of inequality to remain innocent. The Supreme Court does not question any of this and instead seems even less willing to challenge the actions of the faculty (*UBC*, 1993).

At both the tribunal and Supreme Court, the source of the discrimination is never fully addressed. The "incident" served as a convenient excuse for the faculty's discriminatory acts, but the department did not make efforts to undertake any kind of real risk assessment until challenged because they denied Berg a key (*Berg*, 1987, para. 36262). The school's director, Dr. Rogers, admitted that he had "very little" knowledge of Berg's actual health condition (*Berg*, 1987, para. 36287). The evidence presents a very different picture when compared to the stereotypical assumptions made about the nature of her disability. She had no history of injuring herself or damaging university property (*Berg*, 1987, para. 36288). Despite this evidence, Chief Justice Lamer says that Dr. Rogers's concerns may have been reasonable *because* of the incident (*UBC*, 1993, para. 92).

Berg had depression, which was viewed by the courts as severe, and she, in turn, was seen as dangerous. The tribunal adjudicator's reasons indicate that the respondent's counsel worked to play up the myths associated with mental illness. The reference to the fact that Berg would not agree with counsel "that she was alleging a 'conspiracy'" indicates that attempts may have been made to portray her as paranoid (*Berg*, 1987, para. 36238).

There seems to be a pervasive view that women with mental illness are more dangerous than their male counterparts. The courts may be reinforcing this myth. Take, for example, *Starson v. Swayze* (2003), the leading case on capacity and consent to treatment. This time, the Supreme Court deals with the person at its centre, a man, far more respectfully than Berg. The Court ultimately determines that he is capable making his own treatment decisions. The judgment even goes so far as to use Starson's unearned title of professor and false name throughout the decision--his real name is Scott Jeffery Schutzman and he has no claim to any academic title. The Court notes that Starson, a man diagnosed with bipolar disorder, had been admitted to hospital after being found not criminally responsible for uttering death threats, but also that he had never caused harm to himself or others (para. 66). It is as if in *UBC v. Berg* the Court imputes dangerousness out of next to nothing, while in *Starson v. Swayze* it seems to diminish serious threatening behaviour to near nothingness.

The impact of the discrimination on Berg is never addressed by the tribunal, nor by the Supreme Court. The tribunal acknowledges “indignity, humiliation, embarrassment and injury to feelings of self-respect” (*Berg*, 1987, para. 36298), but it never addresses the possible long-term effects. The department’s actions--denying rating sheets and courses for internships, notifying prospective employers about personal medical matters, and limiting her access to university facilities--were potentially devastating to her career, which in turn would impact Berg’s future income, economic well-being, and life circumstances.

Berg does win a partial victory at both the tribunal and the Supreme Court. Still, the Court goes to great lengths to point out in its decision that the verdict was in her favour not because this was the just result, but because the legislative scheme left them no alternative; there was no statutory defence that the university could use to justify its actions. Chief Justice Lamer writes, “I believe that the School and its representatives acted in good faith, and thought that there were good reasons for acting as they did” (*UBC*, 1993, para. 92).

Whose interests is the Court protecting? It is hard to say. Chief Justice Lamer talks about “competing interests, such as safety” (*UBC*, 1993, para. 92). We know from the evidence that this concern about safety is built on stereotype. There seems to be a general interest in maintaining a right to exclude those whom the able norm finds uncomfortably different. *UBC v. Berg* is notable in terms of human rights jurisprudence for defining the term “public” and the phrase “customarily available to the public”. Perhaps the root of the issue is a desire to keep disability in the private sphere of responsibility (Wendell, 1996). Maybe, at some level, it is about ensuring those with privilege continue to be able to determine who is afforded mobility and status and who is not.

2. *Winnipeg Child and Family Services v. G. (D.F.)*

D.F.G. was a young indigenous woman. At 22 years old, G. was pregnant with her fourth child. She was also addicted to solvents and two of her children had already been made wards of the state. Winnipeg Child and Family Services (WCFS) took her to court when she was five months pregnant. WCFS sought an order compelling G. to submit to institutional care and undergo treatment for the remainder of her pregnancy (*WCFS*, 1997).

What makes this case most interesting is the fact that the evidence indicates G. did not actually have a mental illness. Two psychiatrists testified that she was mentally competent and not mentally ill (LEAF, 1997, para. 4; *WCFS*, 1996, paras. 13 16). It is the trial judge, Justice Schulman, who declares that G. has a “mental disorder” when ordering her committal under the province’s *Mental Health Act* (*WCFS*, 1996, para. 21). This finding is made despite the fact that WCFS’s statement of claim makes no mention of the *Mental Health Act* (LEAF, 1997, para. 5).

In effect, this case is an example of a modern day diagnosis of feeble-mindedness. The trial judge imputes mental illness to G. to justify forced institutional supervision and treatment. The Court’s reasons make repeated reference to her sexual behaviour and unstable lifestyle (*WCFS*, 1996, paras. 10,

11, 16). By doing this, Justice Schulman brings disability to the foreground to justify the denial of G.'s autonomy and rights over her own body. Gender equality becomes a background issue--to the degree possible, given that the case deals specifically with pregnancy.

Sampson (2005) points out that the bodies of women with disabilities are "especially susceptible to coercion" through objectification (p. 410). The more othered they are, the less resistance there may be to denial of their rights. Pregnancy has served as an historical pretext for women's disadvantage (LEAF, 1997, para. 37). "Coercion and force" are recast as "help and care" for those portrayed as vulnerable (LEAF, 1997, para. 50). WCFS premises its application to institutionalize G. on the need to protect her directly, not the fetus (WCFS, 1996, para. 34).

The majority of the Supreme Court sees the inherent inequalities of regulating the bodies of pregnant women. Gender comes to the foreground and the Court is able to apply an analysis that accounts for women's autonomy over their bodies. It does not address issues of disability; it does not have to.

Yet, the Court is still unable to do a full contextual analysis to account for intersecting oppression. The decision does not acknowledge that G. is an indigenous woman. The word "aboriginal" appears seven times in the text of the decision, but never with reference to G. (WCFS, 1997). The effect of this is to eliminate the impact of racism and colonialism from the equality equation. It appears that this exclusion was conscious given that LEAF's submissions to the Court emphasized the need for a contextual analysis accounting for social and historical oppression (LEAF, 1997, paras. 8-13).

Before we congratulate the Court for at least arriving at the right outcome, it is worth noting that Justices Sopinka and Major would have restored the trial judgment (WCFS, 1997, para. 142).

3. *Gosselin v. Québec*

Louise Gosselin's judicial odyssey spanned over three decades. In 1984, the Quebec government changed the province's social assistance scheme, drastically reducing welfare rates for people under the age of 30. At that time, a person 30 or over would receive \$466 per month, an amount already recognized as inadequate to live above the poverty line. People under 30 got just a fraction of that, \$170 per month (Gosselin, 2002, para. 7). Young people could try to raise the amount they received by participating in workfare-type training and education programs. Not everyone could take part due to space constraints and other access issues, and participation still seldom resulted in a top-up on par with those people in the older age bracket. Gosselin was one of these young people. And, on behalf of 75,000 recipients, she challenged the social assistance scheme under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (Gosselin, 2002, para. 4).

As a young adult, Gosselin alternately worked various jobs and received social assistance from 1984 to 1989. She had a history of foster homes and physical and psychological health issues: "As a woman with a low income, she

has struggled to survive socially, emotionally, and economically” (Brodsky, Cox, Day, & Stephenson, 2006, p. 194). Justice Bastarache notes in dissent that Gosselin had a difficult life that led to alcohol abuse, suicide attempts, and depression (*Gosselin*, 2002, para. 164). It even led to prostitution: food and shelter in exchange for sex (*Gosselin*, 1992, para. 64).

The Supreme Court splits 5:4. It is the myth of the malingerer that wins out, not Gosselin, and not the 75,000 young people in Quebec whose disadvantage and economic subordination were exacerbated by the province’s welfare policies.

This case is a stark example of the Court’s lack of contextualization. It is more than just inability to see the layered issues and may be better described as clear unwillingness on the part of the majority. Chief Justice McLaughlin narrows the scope of the claim to be strictly about age, in what seems to be an overt refusal to engage in any kind of an intersectional analysis (*Gosselin*, 2002, para. 35). Had the majority taken the claim to be on behalf of “young social assistance recipients” as compared to members of society in general, as Justice Bastarache articulates in his dissenting reasons (*Gosselin*, 2002, para. 236), it might have resulted in a more contextual analysis with some consideration of the factors that lead to poverty, including disability in all its forms. As the Women’s Court of Canada points out, “it is necessary to deal with poverty as a manifestation of sex, race, and disability discrimination. Entrenched patterns of systemic discrimination are a central cause of poverty” (Brodsky et al., 2006, p. 219). By failing to do this, the Court never addresses the sources of discrimination, and it never deals with the fact that mental illness means women, like Gosselin, are more likely to be unemployed and live in poverty (CMHA, 2005). Troublingly, the Supreme Court cites *Gosselin* in *Withler v. Canada* as an example of a “contextual inquiry” (2011, para. 47).

While I am reluctant to use strong language for fear that I will fall into the historically-gendered trap of pathologizing Gosselin, the fact is that she had been suicidal and even hospitalized at one point (*Gosselin*, 2002, paras. 165, 169). Yet, the words “disability”, “mental disability”, or “mental illness” are never used with reference to Gosselin in the Supreme Court’s decision. There is a general recognition of Gosselin’s “psychological problems”, to use the Court’s language (*Gosselin*, 2002, paras. 1, 8, 48, 164), but the extent of these problems is consistently downplayed by the majority. As Sampson (2005) points out, the perception of a mild disability can be just as damning as the perception of a severe disability for a claimant:

The more severe the claimant’s disability, the less likely it seems that the claim will succeed, while a claimant with a seemingly mild disability may be disrespected by the judiciary so that claim will also fail...[A] person with a mild disability may be considered a malingerer and not entitled to accommodation and equality rights protection” (pp. 411-412).

Gosselin's mental health disability simply is not disability enough for the harm to be recognized. While she was able to get a medical certificate for a disability increase in 1986, Gosselin was usually considered "able-bodied" and given the reduced welfare rate (*Gosselin*, 2002, paras. 168-169). This speaks to a legislative trend of narrowing definitions of disability for benefits and, at the same time, making it more difficult for people to qualify for such support (Brodsky et al., 2006).

Instead of recognizing these realities, Chief Justice McLaughlin bases her reasons on the stereotype of the young and lazy, "of young people as freeloaders--unwilling to seek education or job training unless coerced" (Brodsky et al., 2006, p. 190). If anything, the Chief Justice says that the fact Gosselin participated in welfare-related programs at all demonstrates that "even individuals with serious problems were capable of supplementing their income under the impugned regime" (*Gosselin*, 2002, para. 48).

At most, Gosselin's situation provokes "sympathy" from Chief Justice McLaughlin (*Gosselin*, 2002, para. 19). This is also problematic. As Razack (1998) writes, pity is an emotional response to the vulnerability of those who are othered that leads to neither respect nor "a willingness to change the conditions that hurt people with disabilities" (p. 138). Instead, this sentiment allows people to deny any implication they have in the systemic oppression of people with disabilities and, therefore, any role they might have in progressive change.

The majority never recognizes the effects of the discrimination, that being the perpetuation of disadvantage for the most disadvantaged in Quebec and the exacerbation of disabilities like mental illness. Both Justices L'Heureux-Dubé and Arbour recognize this in their dissents: Justice Arbour writes, "The hardships and marginalization of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction" (*Gosselin*, 2002, paras.130, 376).

Sampson (2005) notes that when the interests on the table are government spending versus economic equality, the deck may be stacked against the claimant with a disability from the start. Indeed, Chief Justice McLaughlin makes no pretense regarding the Court's perspective on the magnitude of this issue early in the decision while at the same time expressing doubt about the public interest in any potential remedy. She writes:

On her submissions, this would mean ordering the government to pay almost \$389 million in benefits plus the interest accrued since 1985. Ms. Gosselin claims this remedy on behalf of over 75 000 unnamed class members, none of whom came forward in support of her claim (*Gosselin*, 2002, para. 4).

Besides, she notes, the purpose of the scheme is not to exclude, but rather to "integrate her into the workforce and to promote her long-term self-sufficiency" (*Gosselin*, 2002, para. 19). Government purpose trumps effects and gendered disability loses again.

PART V: What does this mean as we move forward?

*[T]he stories of women with disabilities must be told,
not as stories of vulnerability, but as stories of injustice*
— Sherene Razack (1998, p. 156)

The case law paints a disheartening picture. In place of a contextualized approach that seeks to understand the distinctive and gendered nature of discrimination and mental illness, decontextualization mixed with myth and stereotype prevail. The judiciary appears unable to contemplate or appreciate what women like Janice Berg, D.F.G., and Louise Gosselin must face. Instead, Berg becomes the dangerous and deranged woman who threatens society's safety; G. becomes the feeble-minded incompetent who must be locked up; and Gosselin becomes the malingerer who is well enough to pull herself up by her bootstraps and make do. What the courts do is "reproduce the discrimination that informs the social construction of gendered disability" (Sampson, 2005, p. 432). Fairness and justice are absent for women who are labeled as mentally ill.

In fact, the oppression that these three women experienced cannot be separated from the use, and social acceptance, of concepts like "mental illness" and related gender-based labels. Thomas Szasz would have described these labels as a "smokescreen" (1990, p. 363); the premise allows the courts to ignore gender issues and objectify, dehumanize, and dismiss rather than engage in the complex analysis required to understand the societal and historical factors involved.

But, if the predictions are correct and more disability rights cases will be appearing before the courts, then what are advocates to do? Is it possible to work toward unthinking the discriminatory reasoning, as Sampson puts it (2005, p. 433)?

Yes, it is possible, but difficult. Just as Sampson (2005) presents us with the problem, she also presents us with a solution. Pointing to the work done by feminists to instill the judiciary with an understanding of how a social construction of gender impacts sexual assault, it may be possible to begin to do the same regarding a gendered disability analysis (Sampson, 2005, p. 432). Of course, this does not imply that the courts have a full understanding in terms of gender and sexual assault. Old stereotypes have a way of rearing their ugly heads, as demonstrated in the recent case of *R. v. Rhodes* (2011), in which the sexual assault victim's provocative dress was seen as a mitigating factor in sentencing (para. 519). Still, overall, there has at least been some recognition of the myths at play in these kinds of cases and ongoing efforts to extract them from legal reasoning. It's a start.

Gendered disability analysis has a lot of catching up to do. Perceived by some as the last civil rights movement, it was just in its infancy when section 15 of the *Charter* took effect (Rosenbaum & Chadha, 2006). It will take time to overcome the myths and stereotypes that have taken hold and undo decades of decontextualized judicial reasoning and case law that reinforces discrimination. The Court's recent iteration in *Withler v. Canada* (2011) on the importance of a

contextual inquiry may be cause for some cautious hope. But, the Court has yet to prove itself able to engage in the sophisticated analysis required in these kinds of cases. One thing is certain: we have a long way to go. Our society and our courts must learn to see the injustices women with mental illness face.

References

- Ad Hoc Working Group on Women, Mental Health, Mental Illness and Addictions. (2006, May 8). Women, mental health and mental illness and addiction in Canada: An overview. Retrieved April 11, 2010, from <http://www.cwhn.ca/PDF/womenMentalHealth.pdf>.
- Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
- Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657.
- Berg v. University of British Columbia* (1987), 9 C.H.R.R. D/4673 (B.C.C.H.R.).
- Brodsky, G., Cox, R., Day, S., & Stephenson, M.K. (2006). *Gosselin v. Quebec (Attorney General)*. *Canadian Journal of Women and the Law*, 18, 189-249.
- Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- Canadian Mental Health Association. (2005, May 2). Mothers with mental illness. Retrieved April 11, 2010, from <http://www.ontario.cmha.ca/women.asp?cID=5693>.
- Egan v. Canada*, [1995] 2 S.C.R. 513.
- Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
- Gilbert, D. (2006). Substance without form: The impact of anonymity on equality-seeking groups. *University of Ottawa Journal of Law and Technology*, 3, 225-248.
- Gilbert, D., & Majury, D. (2006). Critical comparisons: The Supreme Court of Canada dooms section 15. *Windsor Yearbook of Access to Justice*, 24, 111-142.
- Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429.
- Gosselin c. Québec (Procureur général)*, [1992] R.J.Q. 1647 (Qc. Sup. Ct.).
- Hamilton, J.W. (2002). The use of metaphor and narrative to construct gendered hysteria in the courts. *Journal of Law & Equality*, 1, 155-204.
- Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357.
- Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
- McIntyre, S. (2000). Studied ignorance and privileged innocence: Keeping equity academic. *Canadian Journal of Women and the Law*, 12, 147-196.
- Merriam-Webster's collegiate dictionary*. (10th ed.). (1998). Springfield, MA: Merriam-Webster.
- Morrow, M. (2002). *Violence and trauma in the lives of women with serious mental illness*. Vancouver: British Columbia Centre of Excellence for Women's Health.
- Pollett, H. (n.d.). The connection between violence, trauma and mental illness in

- women. Retrieved April 11, 2010, from <http://www.cmhanl.ca/pdf/The%20Connection%20between%20Violence,%20Trauma%20and%20Mental%20Illness%20in%20Women.pdf>.
- Pothier, D. (2001). Connecting grounds of discrimination to real peoples' real experiences. *Canadian Journal of Women and the Law*, 13, 37-73.
- R. v. Rhodes*, [2011] M.J. No. 67 (M.Q.B.).
- Razack, S.H. (1998). *Looking white people in the eye: Gender, race, and culture in courtrooms and classrooms*. Toronto: University of Toronto Press.
- Riordan, T. (2004). *Exploring the circle: Mental illness, homelessness and the criminal justice system in Canada*. Ottawa: Parliamentary Information and Research Service.
- Rosenbaum, P., & Chadha, E. (2006) Reconstructing disability: Integrating disability theory into section 15. In S. McIntyre, & S. Rodgers (Eds.), *Diminishing returns: Inequality and the Canadian Charter of Rights and Freedoms* (pp. 343-365). Markham, Ont.: LexisNexis Butterworths.
- Sampson, F. (2005) The judicial treatment of gendered disability discrimination. (unpublished doctoral dissertation). Osgoode Hall Law School, York University, Toronto.
- Senate, Standing Committee on Social Affairs, Science and Technology (2006). *Out of the shadows at last: Transforming mental health, mental illness and addiction services in Canada*. Ottawa: The Senate.
- Starson v. Swayze*, 2003 SCC 32, [2003] 1 S.C.R. 722.
- Stephen, J. (1995) The 'incorrigible,' the 'bad,' and the 'immoral': Toronto's 'factory girls' and the work of the Toronto Psychiatric Clinic. In L.A. Knafla, & S.W.S. Binnie (Eds.), *Law, society and the state: Essays in modern legal history* (pp. 405-439). Toronto: University of Toronto Press.
- Szasz, T. (1990). *Insanity: The idea and its consequences*. New York: John Wiley & Sons.
- University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.
- Wendell, S. (1996). *The rejected body: Feminist philosophical reflections on disability*. New York: Routledge.
- Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.
- Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)* (1996), 111 Man. R. (2d) 219.
- Withler v. Canada (Attorney General)*. 2011 SCC 12, [2011] 1 S.C.R. 396.
- Women's Legal Education and Action Fund (LEAF) (1997). Factum of the intervener in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.
- Women's Legal Education and Action Fund (LEAF) (2010). Factum of the intervener in *Withler v. Canada (Attorney General)*. 2011 SCC 12, [2011] 1 S.C.R. 396.
- World Health Organization (WHO) (n.d.). Gender and women's mental health. Retrieved April 11, 2010, from http://www.who.int/mental_health/prevention/genderwomen/en/.