

CHIEF ADJUDICATOR'S GUIDANCE PAPER

PREPARATION FOR OTHER WRONGFUL ACTS (OWA) CLAIMS

A. Introduction

Due to the complexity of claims for Other Wrongful Acts, claimants are strongly encouraged to retain legal counsel to assist with such claims. This Guidance Paper is written on the basis that legal counsel will be involved.

B. General Principles

1. The Independent Assessment Process (IAP) states, at page 8:
 - ii. The complex issues track is for those continuing claims where the Claimant seeks an assessment of compensation for proven actual income losses resulting from continuing claims, *and for other wrongful act claims* (category OWA on page 3). [Emphasis added]
2. The Compensation Rules at page 3 of the IAP, [**Schedule 1**], set out the complete list of acts of abuse that are eligible for consideration for compensation.¹ The top of the page lists all of the specific forms of sexual and physical assaults [referred to in this paper as "enumerated acts"] that, if they meet the other criteria in the IAP, are eligible for compensation. Claims for these enumerated acts are dealt with in the Standard Track of the IAP.²
3. Below the list of enumerated acts of sexual and physical assaults on page 3, the IAP recognizes "Other Wrongful Acts" ("OWAs") that can be considered for compensation. This paper is intended to provide assistance to claimants and their counsel considering advancing claims for OWAs and to other users of the IAP.

¹ The IAP contains additional instructions regarding physical assaults at page 33.

² The exception to this is where such a claim also includes a claim for Actual Income Loss, in which case the matter is also dealt with in the Complex Track. See Chief Adjudicator's Guidance Paper 2 –Preparation for Actual Income Loss (AIL) claims.

4. The IAP at page 3 defines OWAs as follows:

- Being singled out for physical abuse by an adult employee or other adult lawfully on the premises which was grossly excessive in duration and frequency and which caused psychological consequential harms at the H3 level or higher. [Referred to in this Paper as “**Persistent Physical Abuse**”]
- Any other wrongful act committed by an adult employee or other adult lawfully on the premises which is proven to have caused psychological harms at the H4 or H5 level. [Referred to in this Paper as “**Undefined OWAs**”].³

5. The IAP does not contain a definition of what is included in the second category of OWA claims. Claimants are therefore in uncharted waters in advancing such claims as it cannot be said with certainty what types of claims will be allowed.

6. The IAP does, however, provide the following instructions for adjudicators at pages 33 and 34:

D. Other Wrongful Acts

This category is intended to provide compensation for wrongful acts not listed within the Compensation Rules which have caused the defined level of psychological consequential harms. If the basis for a claim being asserted in this category is described in another category, the latter must be applied to the claim.

Because of the novel nature of these claims, and the importance of establishing a clear causal connection between such acts and the defined level of psychological consequential harms, these claims are handled only in the complex issues track.

For the purpose of this category, a wrongful act, other than the specified act of physical abuse of grossly excessive duration and frequency, is one which

- a) was committed by an adult employee or another adult lawfully on the premises,
- b) is outside the usual operational practices of the IRS at the time in question, and,
- c) exceeds recognized parenting or caregiving standards at the time.

³ There is no hierarchy of OWA claims.

Once an act or series of acts have been found to be wrongful, and not to be captured in another part of the Compensation Rules, then unless the parties consent to the contrary, the adjudicator must order the psychiatric or medical reports necessary to determine whether harms at the H4 or H5 level were caused by the act or acts.

In all OWA claims, the standard for proof of causation and the assessment of compensation within the Compensation Rules is the standard applied by the courts in like matters. [Emphasis added]

7. Claimants and their counsel are encouraged to consider a number of important questions that arise from these IAP passages, in deciding whether to proceed in the Standard Track or in the Complex Track.

C. OWAs are dealt with in the Complex Track – What are the implications of this?

8. Unlike claims for enumerated forms of sexual and physical assaults, which are dealt with in the Standard Track,⁴ claims for OWAs are dealt with in the Complex Track. While it is possible for an adjudicator to consider both specified physical or sexual abuses and OWAs as part of the same claim, if OWAs are alleged, even if they are only part of the claim, ***the entire claim must be dealt with in the Complex Track.*** There are significant implications associated with handling claims in the Complex Track that claimants should carefully consider before deciding to pursue a claim for OWAs. In Complex Track cases, the “plausible link” test does not apply. Instead, adjudicators are instructed to apply the more stringent causation standards applied by the courts, in cases such as *Athey*, *Blackwater*, *Resurfice*, *H.L* and others. This means that if claimants had factors in their lives other than residential school abuse that caused or significantly contributed to their harms or opportunity loss, adjudicators must consider these factors in their decisions.

9. Adjudicators will in all cases use their training, experience and judgment to ensure that the hearing offers opportunities to claimants for healing and reconciliation. However, claimant counsel are cautioned that claims for OWAs will unfold much differently than those where OWAs are not claimed. In particular, the obligation on the part of adjudicators to apply the court causation standards in deciding OWA claims is such that a great deal of questioning is required in areas that are not as critical when the standard is “plausible link”. Of necessity, OWA hearings will be more time consuming. Adjudicators will have

⁴ Except for cases in which Actual Income Loss is claimed, which are dealt with in the Complex Track,

to delve in greater depth into questions of other potential causes / factors relating to a claimant's harms and opportunity loss. In other words, before advising a claimant to check off "OWA" in the application, claimant counsel should carefully consider the availability of evidence to support an OWA claim, as well as the potential repercussions to the claimant in terms of:⁵

- (a) The nature and quality of a "causation" hearing, compared to a "plausible link" hearing;
- (b) The high likelihood of delays associated with expert assessments in OWA cases, which may present difficulties for claimants with serious medical problems;
- (c) The possible negative impact of a causation hearing on opportunities for healing and reconciliation; and
- (d) The additional health or emotional risks to the claimant associated with being subjected to the more rigorous questioning regarding causation.

10. Unlike Standard Track cases, Complex Track cases require a pre-hearing teleconference involving the adjudicator and representatives, before a hearing date is set. The intent of the teleconference is to ensure that the Claimant does in fact wish to pursue an OWA claim and if so, to determine if the case is ready to proceed to a hearing. [Chief Adjudicator's Directive 5 (CAD-5) - Pre-hearing Teleconferences – Complex Track - **Schedule 2**]. An adjudicator, on his or her own initiative or upon the request of any party, may also arrange one or more Early Track Assessment (ETA) teleconferences to assist in managing the claim where OWAs are alleged or raised in the Application.

11. Where a claim for OWAs is not proven or is withdrawn during or following a hearing, a claim for enumerated forms of physical and sexual assaults, if such a claim exists, may still be considered under the Standard Track, applying the "plausible link" test.⁶

12. Before claiming OWAs, claimants and legal counsel are strongly encouraged to carefully consider whether a claimant's interests are best served:

⁵ Note that if a claimant is also claiming Actual Income Loss, all of these considerations apply in any case.

⁶ In this case, the evidence that had formed part of the OWA claim testimony may still be considered by the adjudicator in assessing Aggravating Factors in accordance with paragraph 3, page 36, IAP. Please note that if a claim for Actual Income Loss is included, the claim remains in the Complex Track.

- In the Standard Track, where both harms and consequential loss of opportunity are available under the compensation grid based on the more relaxed “plausible link” standard; **OR**
- In the Complex Track, where both harms and opportunity loss (or actual income loss) must be established on the higher causation standards established by the courts.

13. All cases now coming into the system that contain OWA claims will be screened into the Complex Track. The claimant will be allowed to abandon/withdraw his/her OWA allegations and “opt down” to the Standard Track at any time. However, if the Claimant does not choose to do so, any claim that alleges an OWA will proceed in the Complex Track.

14. Applications that are already in the system that raise OWA allegations *and* enumerated acts of abuse may have been screened into the Standard Track. Claimant Counsel and Canada’s Representatives (as well as adjudicators) are therefore encouraged to flag these claims well in advance of the hearing, so as to ensure that a Pre-hearing teleconference (Complex Track) is held before the hearing and that the case is ready to proceed to hearing. If no adjudicator has been assigned to the file, any party may ask a Deputy Chief Adjudicator to assign an adjudicator to preside over an Early Track Assessment teleconference.

15. Where claims containing OWA allegations were not screened into the Complex Track, all efforts should be made to clarify in which track the claimant wishes to proceed. Confirming well in advance of the hearing will allow the Complex Track steps to take place; namely, document production and a pre-hearing teleconference, to ensure that all participants are able and prepared to deal with the claim as a Complex Track matter, so as to minimize the risk of having the hearing adjourned and/or the claimant recalled. The intent is to avoid showing up at the hearing of a case that has been screened into the Standard Track only to learn that the claimant does indeed wish to proceed with an OWA claim, in the Complex Track. That said, all participants in the IAP are strongly encouraged to take steps to permit hearings to take place as scheduled when it is practical and fair to everyone to do so. Where claims containing OWA allegations were not screened into the Complex Track, the adjudicator may nevertheless choose to proceed with the hearing and gather the claimant’s testimony. In such cases, in the interests of justice, the adjudicator may recall the claimant to provide further testimony.

16. Where OWA issues arise in a Standard Track hearing that are not contained in the application, a claimant is still entitled to pursue the OWA claim, but must recognize that the case may have to be adjourned, in order to ensure that all participants are able and prepared to deal with the claim as a Complex Track matter.

B. What are the harms thresholds that must be met for OWAs?

17. Physical harms that would otherwise fall within H3, H4 or H5, are not relevant in determining whether liability for OWAs is established. If, however, the requisite *psychological* harms necessary to ground an OWA claim are established, an adjudicator may go on to consider physical harms in assessing the harms compensation. If a claim alleges *physical* harms, note that the IAP states at page 33: “This (OWA) category is intended to provide compensation for wrongful acts not listed within the Compensation Rules which caused the defined level of psychological consequential harms. If the basis for a claim being asserted in this category is described in another category, the latter must be applied to the claim.” In other words, if a claim can be characterized as a PL claim, i.e. an allegation that a physical assault resulted in a physical injury, it must proceed as a PL claim rather than as an OWA.

18. A claim must meet the requirement of at least H3 *psychological harms* for claims alleging persistent physical abuse. The IAP summarizes harms at this level as follows:

H3 Continued detrimental impact

Evidenced by: difficulties with interpersonal relationships, occasional obsessive-compulsive and panic states, some posttraumatic stress disorder, occasional sexual dysfunction, addiction to drugs, alcohol or substances, a long term significantly disabling physical injury resulting from a defined sexual assault, or lasting and significant anxiety, guilt, self-blame, lack of trust in others, nightmares, bed-wetting, aggression, hyper-vigilance, anger, retaliatory rage and possibly self-inflicted injury.

19. For cases of undefined OWAs, the Claimant must establish H4 or H5 *psychological harms*. The IAP summarizes the harms at these levels as follows:

H4 Harm resulting in some dysfunction.

Evidenced by: frequent difficulties with interpersonal relationships, development of obsessive-compulsive and panic states, severe anxiety, occasional suicidal tendencies, overwhelming guilt, self-blame, lack of trust in others, severe post-traumatic stress disorder, some sexual dysfunction, or eating disorders.

H5 Continued harm resulting in serious dysfunction.

Evidenced by: psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self- injury suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders.

20. The IAP at page 8, paragraph viii makes reference to the preliminary case assessment. As modified by Practice Direction 1,⁷ there is still a requirement for an adjudicator to make a ruling that there is a *prima facie* basis to support a claim of the nature for which the Complex Track is designed. The IAP goes on to state that “provided the *prima facie* basis has been made out, the adjudicator shall arrange for expert assessments as required by the standards set in this IAP.” The adjudicator should gather all other evidence and make this preliminary assessment of credibility before the expert assessment takes place.

C. What are the Mandatory Materials in Support of an OWA Claim?

21. Where claimants and their legal counsel choose to advance a claim for OWAs, legal counsel are expected to play a significant role in ensuring that the materials and evidence necessary to establish such a claim are brought forward. The reasons for this are straightforward:

- (a) As adjudicators are instructed to decide such claims “according to the same standards as a court would apply in like matters,” adjudicators expect counsel to provide materials and organize them in such a way as would be expected by the courts – this task is especially important as:
- i. There is no examination for discovery process available under the IAP;
 - ii. The IAP embodies an inquisitorial process, in which adjudicators are not entitled to investigate or locate evidence; and
 - iii. Adjudicators should not be expected to organize the evidence.

⁷ Schedule 3 to this Guidance Paper

(b) The burden is on a claimant to establish a claim for OWAs. Applying Practice Direction PD-1 [**Schedule 3**], the adjudicator will make an assessment of credibility and determine whether there is a *prima facie* basis to support a claim within the Complex Track *based on the claimant's case*. In other words, counsel should not expect or anticipate that if the evidence does not establish at least a *prima facie* claim of OWAs by the end of the Claimant's case, it can somehow be shored up by expert evidence (subject to an expert assessment to establish the mandatory harms levels at H4 or H5) or other documents at a later stage. If a *prima facie* case for OWAs is not made out after the Claimant's case, the claim will revert immediately to the Standard Track, if there are other enumerated acts claimed. Otherwise, the claim will be dismissed.

22. In all cases alleging OWAs, in addition to the mandatory documents necessary to establish claims for Consequential Loss of Opportunity at Levels 2, 3, 4 and 5, claimants must provide the following documents:⁸

- Treatment records which are relevant to the harms claimed (including clinical, hospital, medical or other treatment records, but excluding records of counselling obtained to help ensure safety while pursuing an IRS claim). In the complex issues track, records from general practitioners, clinics or community health centres are deemed to be relevant unless the defendants consent to the contrary.
- Workers' Compensation records, if the claim is based in whole or in part on a physical injury.
- Corrections records (insofar as they relate to injuries or harms).

23. These mandatory documents are the *minimum* documents necessary to establish a *prima facie* OWA claim. Given the lack of definitions as to what might qualify as undefined OWAs, Counsel are strongly encouraged to give consideration to what additional documents may be of assistance in seeking to establish an OWA claim.

⁸ The IAP sets out, at pages 28 and 29, the additional mandatory documents necessary to establish claims for Consequential Loss of Opportunity at Levels 2, 3, 4 and 5.

24. The parties should also be prepared to provide beforehand:
- (a) A list of legal issues that they submit arise from the facts of the case; and
 - (b) Court decisions in like matters that relate to the issues of liability and causation that counsel submit are relevant to the issues to be decided, with relevant portions high-lighted.
25. In order for the adjudicator to properly retain and instruct a psychological expert or if applicable, a medical assessor, Claimant Counsel and the Defendants' representatives should bring to the hearing or supply beforehand:
- (a) Proposals as to what type of medical assessor, if applicable, may be most appropriate;⁹
 - (b) Suggestions as to who the medical assessor, if appropriate, should be; and
 - (c) A list of questions they propose that the adjudicator ask the expert (psychologist or psychiatrist) and/or medical assessor.

Approved by IAP Oversight Committee: August 5, 2009

⁹ Although physical harms are not considered in establishing liability for OWAs, if liability is established based on psychological harms, an adjudicator may then consider physical harms, provided the IAP requirements for establishing physical harms are met. A medical assessment may be required for this purpose.

Schedule 1

II: COMPENSATION RULES

	Acts Proven	Compensation Points	
SL5	<ul style="list-style-type: none"> • Repeated, persistent incidents of anal or vaginal intercourse. • Repeated, persistent incidents of anal/vaginal penetration with an object. 	45-60	
SL4	<ul style="list-style-type: none"> • One or more incidents of anal or vaginal intercourse. • Repeated, persistent incidents of oral intercourse. • One or more incidents of anal/vaginal penetration with an object. 	36-44	
SL3	<ul style="list-style-type: none"> • One or more incidents of oral intercourse. • One or more incidents of digital anal/vaginal penetration. • One or more incidents of attempted anal/vaginal penetration (excluding attempted digital penetration). • Repeated, persistent incidents of masturbation. 	26-35	
PL	<ul style="list-style-type: none"> • One or more physical assaults causing a physical injury that led to or should have led to hospitalization or serious medical treatment by a physician; permanent or demonstrated long-term physical injury, impairment or disfigurement; loss of consciousness; broken bones; or a serious but temporary incapacitation such that bed rest or infirmary care of several days duration was required. Examples include severe beating, whipping and second-degree burning. 	11-25	
SL2	<ul style="list-style-type: none"> • One or more incidents of simulated intercourse. • One or more incidents of masturbation. • Repeated, persistent fondling under clothing. 	11-25	
SL1	<ul style="list-style-type: none"> • One or more incidents of fondling or kissing. • Nude photographs taken of the Claimant. • The act of an adult employee or other adult lawfully on the premises exposing themselves. • Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student. 	5-10	
OWA	<ul style="list-style-type: none"> • Being singled out for physical abuse by an adult employee or other adult lawfully on the premises which was grossly excessive in duration and frequency and which caused psychological consequential harms at the H3 level or higher. • Any other wrongful act committed by an adult employee or other adult lawfully on the premises which is proven to have caused psychological consequential harms at the H4 or H5 level. 	5-25	Persistent Physical Abuse
			Undefined OWAs

Enumerated Abuse - Standard Track

OWAs - Complex Track

Schedule 2

CAD-5

Chief Adjudicator Directive

Pre-Hearing Teleconference (Complex Track)

In the complex issues track, before conducting a hearing (Practice Direction PD-1), adjudicators will conduct a mandatory pre-hearing teleconference with representatives of the parties. The teleconference will be arranged by the Secretariat to take place as soon as practicable after the adjudicator receives the file. The claimant does not need to participate, unless the claimant is self-represented. The teleconference will not be recorded.

During the pre-hearing teleconference, in order to have the hearing proceed in a manner that is as efficient and effective as possible, adjudicators are to address procedural issues, which could include the following:

- the nature of the claim and expected evidence, including oral evidence of the claimant on key elements of the claim, including Acts, Harms and Actual Income Loss or Other Wrongful Act;
- whether the documents produced (including the application) support a complex track claim;
- confirmation that the Claimant intends to proceed with a complex track claim;
- whether the case is ready to proceed to a hearing, and whether mandatory documents have been filed;
- what, if any, further documents will be required;
- whether the claimant or defendants anticipate calling any evidence, and if so, the identity or type of witness(es) to be called, the expected nature of their evidence, and when witness statements will be provided;
- preliminary discussion of the type of expert assessment, if any, that may be appropriate;
- indication as to sensitive areas of evidence that may need to be canvassed at the actual hearing;
- agreement, if any, on questions of fact;
- canvassing dates for the hearing;
- discussion of any other matters that may be raised by the adjudicator or the parties.

If, at the conclusion of the pre-hearing teleconference, the parties agree that the complex track is not appropriate, the claim will be set for hearing under the standard track. Otherwise, it will continue in the complex track.

Schedule 3

Practice Direction

PD-1

Re: Complex Track: Preliminary Case Assessments

In the complex issues track, when a case is ready to proceed to hearing:

- **The IAP Secretariat will arrange the initial hearing for the taking of all of the Claimant's evidence. The Claimant will answer all questions put by the adjudicator. Based on the Claimant's evidence, the adjudicator will make an assessment of credibility and determine whether there is a *prima facie* basis to support a claim within the complex track.**
- **If a *prima facie* basis to support a claim within the complex track is not made out, then the claim will continue (in the same hearing) under the standard track unless the only allegation in the claim is in the Other Wrongful Act category in which case the claim will not proceed.**
- **If a *prima facie* basis to support a claim within the complex track is made out, then the adjudicator shall arrange for expert assessments required by the standards set in the IAP. The IAP Secretariat will also make arrangements for hearing the evidence of any witness in relation to the claim or any alleged perpetrator.**
- **On the receipt of expert and/or medical evidence or at any point if such have been waived, the government and the Claimant may attempt to settle the claim having regard to the available evidence, the preliminary assessment of credibility, and all other evidence.**
- **If attempts to settle are not made, or if attempts are unsuccessful, then the claim will proceed to conclusion and decision, including recalling the claimant if appropriate circumstances exist.**
- **It is intended that this direction, or any interpretation of it, should not detract from any procedural or substantive rights of a claimant or other party that are provided in the IAP.**

Commentary:

This proposed Practice Direction is intended to accomplish the following:

- Cases will flow smoothly through the entire IAP. Every case ready for hearing, whether in the standard or complex track, will first proceed with the claimant's evidence. If it turns out that a complex issues track claim should have proceeded under the standard track, it can move in that direction immediately after the

claimant's evidence without the need to recall the claimant or have another hearing.

- In many cases the parties will only have to get together once, for the claimant's evidence, rather than for a preliminary assessment hearing and a final hearing later. This will avoid unnecessary delays due to scheduling of two hearings instead of one. Benefits of this include less time to the conclusion of a case, lower cost hearings, and less potential to re-victimize the claimant.
- The process avoids the unnecessary delays that might result from new or more detailed disclosures of abuses or harms late in the process at the second hearing.
- The process allows for witness and POI testimony to proceed without having to wait for the second hearing with the claimant, which second hearing occurs later in the process under the current b.viii.
- Adjudicators will have detailed evidence with which to assess the claim and on which to instruct experts. Preparation of directions to experts will take less time and will therefore be less costly. Experts will make their assessments based on detailed evidence. Expert assessments will likely take less time because the expert will already have detailed information from the transcript. Directions to the experts will, therefore, be based on concrete evidence already heard rather than possibilities.
- This process results in a proper record of all proceedings, thereby meeting the procedural fairness requirements in administrative law. The proposed process will result in all claimants' having a right of review under the IAP.
- The hearing process will be completely transparent and the risk of inconsistencies will be greatly reduced.
- In addition, a pre-hearing management conference (normally by conference call) is contemplated to allow the parties and the adjudicator to assess the readiness of the claim to proceed in the complex track.

Overall, this amendment will maintain the spirit and intent of the complex issues track provisions while at the same time creating a more streamlined, more sensitive, timelier, and less costly process.

Attached as Appendix "A" is a graphic illustration of the proposed process.

Approved by IAP Oversight Committee: January 15, 2008
Approved by National Administration Committee: January 17, 2008

Schemata of Hearing Process and Options for IAP

