
Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies

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The author challenges the application of the principle of *restitutio in integrum* in awarding tort damages to individuals from historically marginalized groups, as it often results in undercompensation and unfairness between claimants who sustain similar injuries in similar circumstances. The current system works to the detriment of claimants from disadvantaged groups as they are awarded depressed damages by the courts, thereby sanctioning and reinforcing their marginalization in society.

The author examines the extent to which issues of substantive equality are factored into the assessment of damages for female plaintiffs and identifies the current methods used for assessing the future income potential of young female claimants, as well as the factors that influence the adoption of a particular approach and its underlying assumptions. By focusing on the assessment of damages for the impaired earning capacity of women, the author explains how the current system replicates and perpetuates societal inequities experienced by women and other marginalized groups by reinforcing injustices inherent to their "original" position.

Rather than reinforcing and perpetuating inequalities, our compensation system should aspire to eliminate, or at least mitigate, their effects. Modern tort law should strive for substantive, rather than formal equality at every stage of the analysis. The author advocates a principled substantive justice approach to compensation, which is consistent with human rights law and the *Canadian Charter of Rights and Freedoms*, and which avoids differential valuation of loss of human potential based on arbitrary and discriminatory factors as well as stereotypical assumptions about marginalized groups.

L'auteur remet en cause l'application du principe du *restitutio in integrum* dans le cas des groupes historiquement désavantagés. D'après l'auteur, il existe souvent des injustices et des différences de compensation entre des demandeurs présentant des dommages semblables subis dans des circonstances semblables. Le système actuel tend à sous-compenser les demandeurs désavantagés, ce qui sanctionne en cour et accentue la marginalisation dont ils souffrent déjà.

L'auteur examine dans quelle mesure des questions d'égalité substantielle sont incluses dans l'évaluation des dommages-intérêts de demandeurs féminins. Elle identifie les méthodes utilisées à ce jour pour évaluer les revenus futurs potentiels de jeunes demanderesse, de même que les facteurs affectant le choix d'une méthode d'évaluation particulière et les suppositions qui sous-tendent ce choix. En se concentrant sur l'évaluation des dommages-intérêts résultant d'une capacité salariale diminuée chez les femmes, l'auteur soutient qu'en renforçant les injustices inhérentes à leur «position originelle», le système traditionnel répète et perpétue des inégalités sociales qui désavantagent les femmes et d'autres groupes marginalisés.

Selon l'auteur, plutôt que de répéter et perpétuer des iniquités, notre système compensatoire devrait éliminer les effets, ou du moins les atténuer. Le droit des *torts* devrait aspirer à l'égalité substantielle plutôt qu'à l'égalité formelle à chaque étape de son analyse. L'auteur propose une approche de la compensation fondée sur des principes de justice substantielle, conforme aux droits de la personne et à la *Charte canadienne des droits et libertés*, et qui évite des différences d'appréciation de pertes de potentiel humain fondées sur des facteurs arbitraires et discriminatoires et des suppositions sur les groupes marginalisés qui relèvent du stéréotype.

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Introduction

In this article, I focus primarily on the assessment of damages for impaired earning capacity of women and draw conclusions on how the current regime affects other historically marginalized groups. I challenge the justice of the principle of *restitutio in integrum* as it relates to plaintiffs from equality-seeking groups, which often results in undercompensation and unfairness among claimants who sustain similar injuries in similar circumstances. Under the traditional approach the value of a person's loss is assessed by reference to what they would have earned in the labour market, but for their injuries. What is troubling about this process are the bases that courts have traditionally relied on as a measure of success in the market, such as gender, race, and family background. The system works to the detriment of claimants from historically marginalized groups by awarding them depressed damages and by subsidizing plaintiffs with seemingly more favourable characteristics. By so doing, the courts sanction and reinforce the marginalization of underprivileged groups in society. They also project such marginalization into the future. These difficulties are exacerbated when a claimant lacks educational and/or employment history at the time of injury that could serve as a benchmark for predicting her future income potential, which is typical of young plaintiffs.

The traditional view is that tort damages are based on corrective justice. Emphasis is placed on the plaintiff's actual loss due to the defendant's tortious conduct. The plaintiff must only be restored to her status quo ante. In assessing lost earning potential courts routinely take account of "realities" that a plaintiff would have experienced in her working life had she not been injured. Inequalities in earnings that the plaintiff would have experienced due, for example, to her gender, race, ethnicity, physical and mental abilities, or sexual orientation must therefore be reflected in the damages awarded. To do otherwise would arguably run contrary to the goal of tort damages by making the plaintiff better off because of the defendant's wrongdoing. Factors such as financial need or desire for substantive equality¹ in light of the plaintiff's disadvantaged status in society are thus not relevant considerations in the assessment of damages.

In support of the traditional approach, it has been argued that quantification of damages for personal injury is not an appropriate forum for redressing social

¹ Scholars like Cassels and Gibson have argued that in order to achieve substantive equality in accident compensation, the assessment of damages should be based on need rather than by reference to the market: Jamie Cassels, "Damages for Lost Earning Capacity: Women and Children Last!" (1992) 71 Can. Bar Rev. 445 at 489 [Cassels, "Women and Children Last"]; Elaine Gibson, "The Gendered Wage Dilemma in Personal Injury Damages" in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory* (Toronto: Captus Press, 1993) 185 at 209-11 [Gibson, "Gendered Wage Dilemma"] (arguing that whereas post-accident needs should undoubtedly determine recovery for cost of future care, they should not be the basis for assessing the value of lost productivity).

injustices because, among other reasons, it is contrary to the *restitutio in integrum* principle that informs tort damages. As well, departures from the traditional position would produce unjust results for defendants, and also as between claimants. Traditionalists have also questioned why individual defendants have to bear the cost of redressing societal problems that are not only pervasive but predate the defendant's encounter with the plaintiff. This line of reasoning underlies practices such as reliance on female earning statistics to predict the income potential of female claimants and discounting awards for female-specific contingencies to reflect the "reality" of women's lives. Ostensibly, the dominant position is intended to ensure fairness, predictability, and uniformity in compensation for impaired working capacity.

I argue that the traditional method of damage quantification is detrimental to the interests of disadvantaged groups because it achieves only formal equality while revictimizing marginalized groups. It also replicates and perpetuates societal inequities experienced by marginalized groups, including bias in the market, by reinforcing injustices inherent to their so-called original position through depressed awards to the benefit of tortfeasors or, more accurately their insurers. Yet social and economic disadvantage is not invoked to argue that equality-seeking groups should pay less for goods and services generally or lower damages awards when they are tortfeasors. Social reformers have denounced the revictimization of disadvantaged groups in the assessment of damages, mostly in relation to female claimants and, to some extent, racial minorities.² Also, there does appear to be some optimism about judicial reform to eliminate discriminatory practices in the assessment of damages in personal injury claims.³

The objectives of this article are to: (1) examine the extent to which issues of substantive equality are factored into the assessment of damages for female plaintiffs, (2) identify current methods for assessing future income potential for young female claimants and, (3) identify both the factors that influence the choice of a particular approach and the assumptions underlying that choice. Although there have been some positive developments in the quantification of damages for lost productivity for young female claimants and female plaintiffs generally, this has largely been in line with statistical predictions about women's labour force participation. I also explore the implications of these developments for women's equality and their effect on other equality-seeking groups. I point to some internal inconsistencies in the statistical

² See e.g. Cassels, "Women and Children Last", *ibid.*; Gibson, "Gendered Wage Dilemma" *ibid.* at 209-11; Elaine Gibson, "Loss of Earning Capacity for the Female Tort Victim: Comment on *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*" (1994) 17 C.C.L.T. (2d) 78 [Gibson, "Comment on *Toneguzzo-Norvell*"]; Elizabeth Adjin-Tettey, "Contemporary Approaches to Compensating Female Tort Victims for Incapacity to Work" (2000) 38 Alta. L. Rev. 504.

³ See e.g. Jamie Cassels, "(In)Equality and the Law of Tort: Gender, Race and the Assessment of Damages" (1995) 17 *Advocates' Q.* 158 at 177-90 [Cassels, "Gender, Race and the Assessment of Damages"]. The author observes that courts have begun to be sensitive to the problem of gender bias in the assessment of damages in personal injury cases.

predictions framework that continue to disadvantage female claimants in the assessment of damages. Although courts recognize the changing role of women in the labour market due mostly to educational attainment, they sometimes ignore other developments in society that also enhance women's participation in paid employment. Similarly, courts have not given sufficient attention to the possibility of plaintiffs from disadvantaged groups achieving higher socio-economic status than their predecessors. As well, using statistical predictions in the quantification of damages focuses on formal equality because of their reliance on the current organization of society without recognizing the effect of discrimination on equality-seeking groups. This methodology is inconsistent with the growing awareness of the importance of substantive equality in tort litigation. I recognize the difficulties in convincing courts to completely reject the compensatory principle of *restitutio in integrum*, at least in relation to older claimants with established work records or a sufficient indication of the same. I argue however, that there is no reason to make predictions about a young plaintiff's future income potential based on her gender, race, or socio-economic background. I favour the use of average earnings, at least with respect to young claimants. Before exploring these issues in detail, I briefly canvas some arguments for substantive equality and what an egalitarian computation of damages would entail. This discussion will be a benchmark for determining the extent to which any of the current methods of valuation achieves distributional goals, if at all.

I. Substantive Equality in the Valuation of Impaired Earning Potential for Female Claimants: Rejecting *Restitutio in Integrum*

Proponents of reform have called for a rejection of reliance on the principle of *restitutio in integrum* in the assessment of lost earning potential.⁴ The argument is that since the so-called original position of some claimants is discriminatory, which is typical for most female claimants, a strict adherence to the principle of *restitutio in integrum* perpetuates their disadvantaged status in society and should be rejected. The traditional approach values a person's loss based on the socio-economic status they would have achieved in society, but for their injury. The differential outcome seems inevitable so long as compensation for lost earning capacity continues to be individualized, and it is believed that there are differences in ability among human

⁴ See e.g. Cassels, "Gender, Race and the Assessment of Damages" *ibid.*; Cassels, "Women and Children Last" *supra* note 1; Ken Cooper-Stephenson, "Damages for Loss of Working Capacity for Women" (1978-79) 43 Sask. L. Rev. 7; Gibson, "Gendered Wage Dilemma" *supra* note 1; Gibson, "Comment on *Toneguzzo-Norvell*", *supra* note 2; Martha Chamallas, "The Architecture of Bias: Deep Structures in Tort Law" (1998) 146 U. Pa. L. Rev. 463 [Chamallas, "Architecture of Bias"]; M. Chamallas, "Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument" (1994) 63 Fordham L. Rev. 73 [Chamallas, "A Constitutional Argument"]. See also Ken Cooper-Stephenson with Iwan Saunders, *Personal Injury Damages in Canada*, 2d ed. (Toronto: Carswell, 1996) 288-349 [Cooper-Stephenson & Saunders, *Personal Injury Damages in Canada*] who also promote a more progressive method of damage assessment.

beings. Also, the individualized assessment is a function of reliance on the market as the basis for the computation of damages. A lasting solution would be to simply ignore the market altogether in the valuation of lost earning capacity, in favour, for example, of conventional sums based on the nature and extent of disablement. Cassels, one of the chief proponents of reform in the computation of damages for lost earning capacity, would prefer complete abandonment of reference to the market, but recognizes that this might be problematic and is unlikely to gain judicial support, at least in the short-term. Ultimately, he advocates modest reforms aimed at eliminating the objectionable aspects of the current system and giving appropriate recognition to the steady narrowing of wage differentials between men and women.⁵ This article moves the debate forward by challenging some of the contradictions within the current system. I point out the detrimental effects of these inconsistencies on female claimants as well as how they affect other equality-seeking groups.

A truly egalitarian computation of damages for female claimants would be one that focuses on the plaintiff's injury. Persons injured in similar circumstances and/or who sustain similar injuries should be compensated at the same level without reference to statistical predictions about the particular plaintiff's future income potential and without discounting the award for contingencies seemingly based on the "realities" of the claimant's preaccident situation. In the context of female claimants, this would mean using male earning statistics or, more appropriately, common statistics for all claimants and without discounting the award to reflect women's lower labour force participation rates. To do otherwise sanctions and perpetuates historical inequities between men and women's earnings and systemic factors that militate against women and other marginalized groups in the labour market and society generally.⁶ In *Cho v. Cho*,⁷ involving a brother and sister who sued their mother for her physical and emotional abuse of them when they were children, the Ontario Superior Court of Justice adopted an egalitarian approach, at least in relation to gender as between siblings, in assessing their potential income loss due to the abuse. Molloy J.

⁵ See Cassels, "Women and Children Last", *supra* note 1 at 485, 489; Cassels, "Gender, Race and the Assessment of Damages", *supra* note 3 at 182, 184. See also Cooper-Stephenson & Saunders, *Personal Injury Damages in Canada*, *ibid.* at 295-98.

⁶ Some advocates of reform support using gender-neutral earning statistics for both male and female claimants. See Chamallas, "A Constitutional Argument", *supra* note 4 at 123; Tsachi Keren-Paz, "An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness" (2003) 16 Can. J.L. & Juris. 91. I do not necessarily share this view because, as will be shown subsequently in this article, blended statistics can in fact result in undercompensation. Among other things, this is because those statistics include the depressed incomes for disadvantaged groups, including women, and therefore the ultimate figures may not be a true reflection of the income potential of members of that group. The situation would be different if it was not only accepted that higher levels of income for men are earned at the expense of women but that they are also inflated, in which case the blended statistics would be a true reflection of the income potential of members of the relevant group.

⁷ (2003), 36 R.F.L. (5th) 79 (Ont. Sup. Ct. J.) [*Cho*].

rejected statistical projections that assume that males earn more than females, notwithstanding evidence that the male plaintiff had actually earned more money than his sister at the time of judgment. The court determined that based on their family history of academic excellence both plaintiffs would have attained at least community college degrees. They were each awarded the same amount for impaired earning capacity.⁸ The decision may be of limited value for other equality-seeking groups, however, because it is not clear whether the same approach would be adopted in relation to other claimants regardless of socio-economic background or the plaintiff's likely educational attainment.

Another case that comes close to an egalitarian computation of damages is *Audet (Guardian ad litem of) v. Bates*.⁹ The female plaintiff suffered cerebral palsy due to being asphyxiated during birth. The court was presented with statistical evidence of the present values of future earnings for men and women of the plaintiff's age who obtained a university degree, and those who obtained at least one year of post-secondary education. In rejecting the substantially lower female earning statistics as the appropriate measure of the plaintiff's loss, Pitfield J. stated: "I see no logical or compelling reason to differentiate between male and female earning capacity when making an assessment in relation to an infant whose work and education prospects cannot be identified or characterized with any precision."¹⁰ The court assessed her loss based on average earnings for male university graduates and those with two years post-secondary non-university education.

The court did not explicitly give any reasons for the assumption that the plaintiff would have pursued post-secondary education. Unlike cases such as *Cho*, where courts rely on the educational and/or vocational attainment of the plaintiff's family members as a proxy for their loss, there was no reference to such factors to justify the court's choice of income statistics in *Audet*. This, together with the refusal to use female earning statistics, would seem to connote a truly egalitarian approach. However, Pitfield J.'s reference to emerging community standards in his reasoning suggests that he was partly basing the decision on the trends of growing numbers of women pursuing post-secondary education and on wage parity initiatives from which the plaintiff would have benefited in the future. He stated:

There is good reason to subscribe to the opposite view which is that in the context of emerging community standards, an infant who is female will be

⁸ *Ibid.* at 106.

⁹ [1998] B.C.J. No. 678 (S.C.) (QL) [*Audet*].

¹⁰ *Ibid.* at para. 76. For similar reasoning, see the trial decision in *Tucker (Guardian ad litem of) v. Asleson* (1991), 86 D.L.R. (4th) 73, 62 B.C.L.R. (2d) 78 (S.C.), varied (1993) 102 D.L.R. (4th) 518, [1993] 6 W.W.R. 45, 78 B.C.L.R. (2d) 173 (C.A.) [*Tucker* cited to D.L.R.], where the court noted that the income potential of an eight-year-old rendered unemployable should not be limited based on her sex.

afforded the opportunity in the course of her working life to earn income at the same level as an infant who is a male.¹¹

The decision shows recognition of the changing place of women in the labour market and is supported by the statistical predictions approach rather than a commitment to substantive equality in damages assessment per se. Consistent with the statistical predictions approach, Pitfield J. deemed it appropriate to make female-specific contingency deductions to reflect the possibility that the plaintiff "might choose to marry and raise a family,"¹² and thereby interrupt her employment. This aspect of the decision will be explored below.

Notwithstanding these criticisms, both *Cho* and *Audet* are remarkable decisions because they provide a glimpse of what an egalitarian computation of damages might look like. One can still question the court's choice of the likely educational level that the plaintiff would have attained in *Audet* and reliance on family background to determine the plaintiffs' likely educational and vocational achievements in *Cho*. These criticisms illustrate some of the constraints of a truly egalitarian approach to the assessment of damages for personal injuries that will exist so long as the assessment is made in reference to the capitalist market.

II. Current Trends in the Quantification of Damages for Impaired Working Capacity

To date, some courts have recognized that women have been disadvantaged in the labour market through depressed incomes and have resisted replicating these injustices in awarding damages for lost earnings. Similarly, historical female earning statistics are no longer considered satisfactory predictors of future losses of most female claimants, especially younger claimants.¹³ The case law shows at least three methods for assessing lost income potential in personal injury cases: (1) female earning statistics, (2) blended earning statistics (gender-neutral), and (3) male earning tables. I will analyze the various methods, including factors that influence the choice of a particular approach, the assumptions underlying the choice, and whether the approach is aimed at substantive equality for female claimants and other equality-seeking groups. I argue that emphasis on statistical predictions and the "reality" of women's situations does not adequately reflect the changing position of women in

¹¹ *Audet*, *supra* note 9 at para. 76.

¹² *Ibid.* at para. 79.

¹³ Given pay equity initiatives and increasing labour force participation rates among women, it is believed that some female plaintiffs will enjoy income parity in the course of their working lives, and therefore valuation of their loss should reflect this possibility. As well, it is recognized that some women will have earnings that are comparable to men because they will choose "traditional" male occupations and/or follow "typical" male work patterns, and should therefore be compensated accordingly.

society. As well, it fails to challenge stereotypical assumptions about women. To the extent that the assessment of damages continues to be influenced by notions of formal equality, this does not bode well for other equality-seeking groups for whom there is no discernible evidence of improving socio-economic conditions.

A. Female-Specific Actuarial Tables

Although some courts insist on using female-specific earnings data to assess future income loss because it most appropriately reflects a plaintiff's loss, they sometimes gross up the awards because these statistics may not adequately reflect women's income profiles in the future. Greater female participation in the labour force and the possibility of wage parity due to pay equity initiatives are commonly cited in support of this practice. This could be perceived as progressive, at least to the extent that it does not countenance occupational segregation and recognizes that women can earn incomes comparable to their male counterparts doing similar jobs.

The possibility of higher earnings in the future is considered a positive contingency and may be based on statistical predictions about women's pay in particular occupations or the actual situation of particular claimants.¹⁴ There is therefore no automatic "top up" of damage awards based on the possibility of women earning higher incomes in the future. Enhancement is at the court's discretion,¹⁵ and depends on the strength of the plaintiff's case. The evidence necessary to justify enhancement can cause further delays and additional costs for the expert testimony required to discharge the plaintiff's evidential burden. The process also introduces further uncertainty into the computation of damages, without any guarantee that it will yield positive results for the plaintiff. To eliminate the guesswork in this regard, perhaps men's income should be used as a proxy, especially in claims involving very young children, if indeed it is believed that this is the ultimate position of fairness that women should achieve as a matter of substantive equality.

Plaintiffs with a relatively shorter period of loss have sometimes been denied a top up because, while wage convergence might occur in the future, it would not occur quickly enough to benefit the claimant during the period of her loss.¹⁶ This

¹⁴ See *Rewcastle Estate v. Sieben* (2001), 296 A.R. 61 at 81, [2001] 10 W.W.R. 700 (Q.B.), rev'd in part (2003) 17 C.C.L.T. (3d) 286 (C.A.) [*Rewcastle* cited to A.R.].

¹⁵ See *Adjin-Tetty*, *supra* note 2 at 516; see also *Gray v. Macklin* (2000), 4 C.C.L.T. (3d) 13 at 64-65 (Ont. Sup. Ct. J.) [*Gray*].

¹⁶ In *S.M.A.B. v. J.N.H.*, [1991] B.C.J. No. 3940 (S.C.) (QL) [*S.M.A.B.*], the plaintiff was a survivor of sexual abuse who sought damages for, among other things, diminished earning capacity due to the abuse. The period of her loss was relatively short. The court accepted that the disparity between male and female incomes will narrow in the future but that it would not occur quickly enough to benefit the plaintiff during the period of her loss. Thackray J. therefore stuck to female wage statistics of the plaintiff's anticipated earning potential, with a slight upward adjustment to reflect the "progression in female incomes" (at para. 21).

presupposes a judicial mindset that unless there is evidence to the contrary, female earning statistics are the appropriate measure of loss for female claimants. This attitude condones discrimination against women both in the market and in society generally. It also assumes that even if women attain the same educational achievement as men, they will work in “traditional” female occupations where wages are depressed, and that even if they choose the same or similar vocations as their male counterparts, they will continue to earn less.

Average female statistics are the net of all the so-called negative female contingencies, including labour force non-participation rates compared to men. This means that where female earning tables are used as a proxy for the plaintiff’s loss, it would be inappropriate to discount the award for female-specific contingencies, such as withdrawal from the labour market for family reasons. Yet in some recent cases, courts have made such deductions even when using average female earnings. *Crawford (Guardian ad litem of) v. Penney*¹⁷ is one such case. The plaintiff was born with serious disabilities that rendered her unemployable. The court accepted that she would have completed a community college program had she not been injured. It used average earnings of all employed females who work full-time on a full year basis as a measure of the plaintiff’s loss. It noted that female-specific contingencies are already built into the female earning statistics and that some of the income loss anticipated from labour market interruptions would be offset by other factors such as income replacement schemes. Notwithstanding these observations, the court applied a ten per cent female-specific contingency deduction. Since there was no evidence of the plaintiff’s actual career path, it was inappropriate for the court to have assumed that she would have pursued a “traditional” female career or “typical” female work pattern. Leaving aside the question of the plaintiff’s likely educational attainment, she could have pursued any career open to community college graduates. The court should therefore have at least adopted blended income statistics, that is, average future income of community college graduates of the plaintiff’s age.¹⁸

B. Blended or Gender-Neutral Earning Statistics

Increasingly, some courts are using average earnings for particular segments of society as a proxy for assessing income loss in personal injury cases. They tend to use blended average statistics where they recognize the possibility of wage parity in the future, but do not have sufficient evidence to determine the rate of progression, when

¹⁷ (2003), 14 C.C.L.T. (3d) 60 at 145-46 (Ont. Sup. Ct. J.) [*Crawford*].

¹⁸ In *Rewcastle*, the court used the average income of females with undergraduate degrees as the appropriate measure of the deceased’s lost future income, but still discounted the award by 15 per cent to reflect the contingency that the deceased would have withdrawn from the labour market for family reasons as is typical of women who choose to have families (*supra* note 14 at 77). The Alberta Court of Appeal affirmed the assessment of lost future income although it varied some aspects of the trial decision.

the wage gap will be eliminated completely, or both.¹⁹ Courts have also used blended statistics where there is a general agreement about the claimant's potential educational attainment had she not been injured, but there is insufficient evidence about her actual future career path, as in *Walker v. Ritchie*,²⁰ a case involving a seventeen-year-old grade twelve student. The court adopted statistical figures that reflected average earnings of university graduates in Ontario. The court recognized that it was quite likely that Stephanie Walker would have completed university education had she not been injured. Her actual future career path was, however, uncertain at the time of the accident. Since the court could only make educated guesses about her preaccident career path, it was deemed appropriate to use the average income of the group of which she might have been a part.²¹ Brockenshire J.'s justification of the use of blended statistics was that it allows the court to avoid having to choose between male and female earning tables and then making the necessary adjustments, upwards or downwards, to mirror the plaintiff's anticipated earning potential.²² The English Court of Appeal has expressed support for reliance on average statistics in similar circumstances.²³

Ostensibly, using blended income statistics is progressive because, among other things, it acknowledges gender inequality in historical earning data and reflects a desire to reverse that pattern. As well, there are usually no female-specific contingency deductions when courts use this approach.²⁴ The use of blended statistics for women is not a satisfactory solution, however, as the female side of the equation

¹⁹ See e.g. *Shaw (Guardian ad litem of) v. Arnold*, [1998] B.C.J. No. 2834 (S.C.) (QL) [*Shaw*], where a 15-year-old girl sustained permanent brain injury from a motor vehicle accident. Colver J. concluded that but for the accident, the plaintiff would have completed a modelling course or a one or two year post-secondary certificate course. The court recognized that the wage gap between males and females was narrowing but not completely eliminated, and preferred to assess the value of the plaintiff's loss based on the projected mean average lifetime earnings of persons of the plaintiff's age with post-secondary, non-university education (*ibid.* at paras. 66-69). See also *Morris v. Rose Estate*, [1993] B.C.J. No. 2679 (S.C.) (QL), aff'd (1996) 23 B.C.L.R. (3d) 256 (C.A.) [*Morris*].

²⁰ [2003] O.J. No. 18 (Sup. Ct.) (QL) [*Walker*]. The *Walker* decision was heralded as a breakthrough, and by implication, a victory for female personal injury victims. See John Jaffey, "Judge Uses Gender-Neutral Wage Loss Tables in Case of Severely Injured Schoolgirl" *The Lawyers Weekly* 22:35 (24 January 2003) 1 (QL). While the use of blended statistics may be new in Ontario, it is not so new in other jurisdictions. For instance, courts in British Columbia have used this approach at least since the 1990s. See also *S.M.A.B.*, *supra* note 16; *Morris*, *ibid.*; *Shaw*, *ibid.*

²¹ E-mail communication from Mr. Ian Wollach of Rich Rotstein, Chartered Accountants, (7 May 2003) who appeared as an expert witness for Stephanie Walker, emphasized that the use of the blended male and female statistics in that case was influenced by the uncertainty about Stephanie's future career path at the time of the accident. He indicated that they might have used female tables had the circumstances been otherwise.

²² *Walker*, *supra* note 20 at para. 135.

²³ *Herring v. Ministry of Defence*, 2003 EWCA Civ 528 at para. 24 (BAILII) [*Herring*].

²⁴ Since negative female specific contingencies are already included in the female component of blended statistics, any further deduction would in fact be double counting.

continues to be gendered. Assumptions about women and their labour force participation rates remain unchallenged. Further, using blended statistics solely for female claimants is discriminatory because male plaintiffs continue to be compensated at higher rates since male-specific statistics are used in the case of male plaintiffs. Using common statistics for both male and female claimants would be a better solution, but so far, courts have been reluctant to do so even in respect of young male plaintiffs.²⁵ While the use of average income may benefit some members of historically disadvantaged groups, it could actually undercompensate others. A case in point is *Wheeler Tarpeh-Doe v. United States*,²⁶ involving a biracial plaintiff. The court adopted average income of all college graduates without regard to race or sex as the appropriate measure of the plaintiff's loss. This resulted in an award that was even less than what the defendant had suggested based on average earnings for Black males. In commenting on this case, McInnes notes that while the plaintiff was spared "the detrimental consequences of being non-white, he was also denied the beneficial consequences of being non-female,"²⁷ and presumably the beneficial consequences of his white heritage.

Average incomes also undercompensate those who would have fared better than that income level had they not been injured. In the interest of fairness, however, and given the fact that differential income status is sometimes caused by systemic discrimination, it would be appropriate for courts to assume that a plaintiff would have at least achieved the average income potential of her group where appropriate, or the average income in the province where there is no relevant group to be used as a proxy for her loss.

The use of average statistics is based on reasonable predictions about the plaintiff's future income potential using labour market indicators, which is in turn premised on an assumption that the gender wage gap is due principally to labour market characteristics. The narrowing of the gender wage gap is attributed to increases in women's human capital, due mostly to higher educational attainment, work experience, increased labour force participation, and job tenure.²⁸ It is therefore

²⁵ See e.g. *Gordon (Next friend of) v. Harmon* (1999), 246 A.R. 305 (Q.B.) [*Gordon*], involving a boy severely injured at the age of seven. The court simply referred to his likely educational attainment had he not been injured and adopted the average earnings of males with post-secondary education.

²⁶ 771 F.Supp. 427 (D.D.C. 1991).

²⁷ Mitchell McInnes, "The Gendered Earnings Proposal in Tort Law" (1998) 77 Can. Bar Rev. 152 at 174.

²⁸ This is the predominant view in the economics literature. See e.g. Jane Waldfogel, "Understanding the 'Family Gap' in Pay for Women with Children" (1998) 12:1 J. Econ. Persp. 137; Jian Cao, Ernst S. Stromsdorfer & Gregory Weeks, "The Human Capital Effect of General Education Development Certificates on Low Income Women" (1996) 31 J. Hum. Resources 206; Richard J. Murnane, John B. Willett & Frank Levy, "The Growing Importance of Cognitive Skills in Wage Determination" (1995) 77 Rev. Econ. & Stat. 251; Michael P. Kidd & Michael Shannon, "An Update and Extension of the Canadian Evidence of Gender Wage Differentials" (1994) 27 Can. J. Econ. 918

expected that the wage gap will be completely eliminated in due course, as women's educational attainment and labour force participation continues to catch up with those of men. Labour market factors do not, however, fully explain the wage gap. Despite increases in women's educational attainment and labour force participation, complete wage parity has not been achieved, even between younger men and women.²⁹ According to the 2001 census data, occupational segregation is still prevalent among university graduates between the ages of twenty-five and twenty-nine. Economists note that although wage convergence is expected to continue over the next thirty years, it will be at a slower rate compared to the experience of the past three decades, notwithstanding the increasing number of women pursuing higher education.³⁰

The continued gender difference is often attributable to factors such as personal and occupational preferences arising, among other things, from different fields of study with the concentration of women in low paying sectors of the economy and intermittent participation in the labour market. What is often masqueraded as personal preference, however, is usually influenced by systemic discrimination and stereotypical gender roles, by which women's choices are constrained by their socially constructed primary caregiving responsibilities within the family.³¹ Labour market discrimination is also to blame for certain "choices" that women make. As Joan Williams observes, the culture and expectations in most well paid jobs are such that women tend not to fare well in those settings because of their real or perceived

at 922-23 [Kidd & Shannon, "Gender Wage Differentials"]; Solomon William Polachek, "Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structures" (1981) 63 *Rev. Econ. & Stat.* 60. See also the 2001 census data from Statistics Canada, which suggests that the increasing numbers of educated women in the labour force accounts largely for the narrowing of the gender wage gap: online: Statistics Canada <<http://www12.statcan.ca/english/census01/products/analytic/companion/earn/canada.cfm#10>> [Statistics Canada 2001 census data].

²⁹ For instance, the number of women in the work force with university degrees in Canada has almost tripled since 1980, yet female university graduates between the ages of 25 and 29, working full-time for the full year, earned slightly more than 81 cents for every dollar earned by their male counterparts. Women with high school education working full-time for the full year, earned 77 per cent of what their male counterparts made. See Statistics Canada 2001 census data, *supra* note 28 at 10.

³⁰ Kelly Rathje, "Male Versus Female Earnings—Is the Gender Wage Gap Converging?" *The Expert Witness Newsletter* 7:1 (Spring 2002), online: Economica Ltd. <<http://www.economica.ca/ew71p2.htm>>; Michael Shannon & Michael P. Kidd, "Projecting the Trend in the Canadian Wage Gap 2001-2031: Will an Increase in Female Education Acquisition and Commitment Be Enough?" (2001) 28 *Can. Pub. Pol'y* 447.

³¹ Although some economists recognize that women's occupational choices may be influenced by systemic discrimination outside the labour market, they are reluctant to accord this significant weight in explaining occupational segregation and/or the gender wage gap. For example, see Kidd & Shannon, "Gender Wage Differentials", *supra* note 28 at 929; Christopher J. Bruce, "MacCabe v. Westlock: The Use of Male Earnings Data to Forecast Female Earning Capacity" (1999) 37 *Alta. L. Rev.* 748 at 749-58. See also *Shaw*, *supra* note 19 at para. 67.

roles as primary caregivers.³² This prevents them from becoming or being perceived as ideal workers and they are therefore less attractive to employers in those sectors.³³ Further, Williams notes that the extent of time commitment expected of the “ideal worker” is possible only if that worker can benefit from a stream of reliable housework from another person, usually a female partner. For the most part, women cannot count on such a flow of housework to enable them to function as ideal workers in the marketplace, unless they hire nannies. Women’s inability to fit that mould therefore becomes a disincentive to participation in the market in the first place, or when they do, they are often relegated to the “mommy track” and are therefore unable to match the performance and income of men.

In summary, notwithstanding its initial appeal, the use of blended incomes for female claimants is not a satisfactory solution to gender discrimination in the assessment of future income loss. It is based on statistical predictions and uncritically accepts historical discrimination against women and assumptions about their work patterns as the “reality” of women’s lives. Given the speculative nature of future losses, it would be preferable to apply the same standard to all plaintiffs, particularly in respect of young claimants with no reasonable indication of future earning potential at the time of their injury.

C. Male Earning Tables

Courts have also used male earning statistics because they are believed to be free of gender bias and/or offer a better prediction of a particular claimant’s future income profile. The courts tend to favour this approach where there is sufficient evidence about the plaintiff’s career choice and/or that her income would have been comparable to male earnings. Use of male earning statistics seems to support substantive equality, as courts tend to denounce the historical discrimination against women both in the labour market and in the assessment of lost earnings when adopting this approach. Like the blended income approach, however, the choice is influenced by labour market statistical predictions based on individual characteristics of a particular claimant, including family background and evidence of her likely labour force participation rate, rather than a desire for substantive equality *simpliciter*.³⁴

³² Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (New York: Oxford University Press, 2000).

³³ *Ibid.*

³⁴ For example, see *Gray* (*supra* note 15 at 66) where the plaintiff was in grade nine at the time of injury. The court found that she was an average to above average student, would likely have obtained a college diploma after high school, and would have earned the average income of a college graduate. Shaughnessy J. noted that wage discrimination is deplorable and should not be sanctioned by the courts. He applauded trends to narrow and eventually close the wage gap between men and women.

In *MacCabe v. Board of Education of Westlock Roman Catholic Separate School District No. 110*,³⁵ Johnstone J. rejected the gendered assessment of damages. She adopted male earning statistics as the appropriate measure of the plaintiff's loss. She also refused to make female-specific contingency deductions despite the plaintiff's intentions to have children and the pattern of significant withdrawal from the market following childbirth in her family. This was, however, successfully challenged on appeal. Johnstone J.'s position was ostensibly motivated by a desire for social justice in the assessment of damages.³⁶ Notwithstanding her unwillingness to countenance gender discrimination in the quantification of damages, the assessment seems to have been influenced by predictions about the plaintiff's career path and the likely nature of her attachment to the waged labour force had she not been injured, which Johnstone J. found to be comparable to her male counterparts. As well, she noted that the plaintiff would likely have worked in settings where pay equity is mandated. Based on those predictions, male earnings in her chosen profession were therefore an appropriate proxy for her loss, a conclusion that the Court of Appeal supported. The refusal to make female-specific contingencies, which was heralded as the most progressive aspect of the decision, and was incidentally successfully challenged on appeal, was arguably at least in part based on statistical predictions about the nature of women's participation in the labour market. Johnstone J. referred to evidence of increasingly limited withdrawal from the market by women following childbirth, especially highly educated women, to justify this position.

MacCabe underscores the observation that male earning statistics are used only where it is found to be appropriate in respect of a particular claimant. In *Osborne*

He chose to use male earning statistics as a proxy for the plaintiff's loss. See also *Terraciano (Guardian ad litem) v. Etheridge*, [1997] 7 W.W.R. 185 at 206-207, 33 B.C.L.R. (3d) 328 (S.C.) [*Terraciano* cited to W.W.R.], where a 16-year-old was rendered a paraplegic in a motor vehicle accident. The court rejected the defendant's proposal that average female earnings were an appropriate measure of the plaintiff's loss. Saunders J. strongly condemned the gender discrimination in the assessment of damages for lost working capacity. Her ultimate assessment of the plaintiff's damages seemed however, to have been influenced by her individual characteristics and family background that suggested that her labour force participation would have been comparable to that of her male counterparts. In *M.B. v. British Columbia*, [2000] B.C.J. No. 909 (S.C.) (QL), rev'd in part on other grounds (2001), 197 D.L.R. (4th) 385, [2001] 5 W.W.R. 6 (C.A.), rev'd in part on other grounds (2002), 211 D.L.R. (4th) 295, [2002] 5 W.W.R. 327, rev'd on other grounds (2003), 230 D.L.R. (4th) 567, 2003 SCC 53, in refusing to use male earning statistics, the court noted that there was no evidence to support reliance on the approach adopted in *Terraciano* (*ibid.* at para. 307).

³⁵ (1998), 226 A.R. 1, [1999] 8 W.W.R. 1 (Q.B.), rev'd in part (2001), 293 A.R. 41, [2002] 1 W.W.R. 610 (C.A.) [*MacCabe* (Q.B.)]. See also *Kemp v. Wittenberg* (2001), 87 B.C.L.R. (3d) 350, 2001 BCCA 687 (C.A.), leave to appeal to S.C.C. refused, [2003] 1 S.C.R. xii.

³⁶ See Bruce, *supra* note 31 at 768, who observes that the decision reflected an egalitarian approach to the computation of damages. See also Derek Aldridge, "The *MacCabe* Judgment: Allowing the Use of Earnings Statistics for Males when Estimating the Future Income of a Female" *The Expert Witness Newsletter* 3:3 (Autumn 1998), online: Economica Ltd. <<http://www.economica.ca/ew33p5.htm>>.

(*Guardian ad litem of*) v. *Bruce (County)*),³⁷ the court rejected the plaintiff's contention that given current pay equity initiatives and the narrowing of the wage gap between men and women, male earnings were a better measure of her lost future income. O'Connor J. stated:

The plaintiffs argue that the incomes of females will increase faster in the future as greater parity between male and female incomes is achieved through legislative initiatives in pay equity. They say male rates should be used to calculate Rachel's loss of future income. I disagree. There has been and there will continue to be a narrowing of the gap between male and female incomes. However, the plaintiffs produced no evidence as to the rate at which this change is happening and when full parity might be achieved. I would decline to speculate in this area without more substantial evidence.³⁸

The application of female-specific contingencies is intended to reflect lower female labour force participation rates³⁹ and uncertainties regarding when the gender wage gap will be eliminated.⁴⁰ In *MacCabe*, the Alberta Court of Appeal applied contingencies that would have affected the plaintiff's earning profile. As noted above, the Court of Appeal did not question the appropriateness of using male earning statistics in this case, given the evidence of the plaintiff's career path. The court found, however, that based on statistical predictions, or what the court referred to as the "reality" of the plaintiff's situation, her lifetime earnings would not have matched that of her male counterparts. The court reasoned that women tend to have lower labour force participation rates than men because of their family responsibilities, and therefore, discounting women's awards to reflect that "reality" is justified.⁴¹ Wittmann J.A., speaking for a unanimous court stated:

Determination of negative contingencies based upon a classification according to sex is not unreasonable in these circumstances. The situation is analogous to the use of actuarial tables based on sex, age or marital status to determine insurance premium rates for drivers of motor vehicles. ... [T]he

³⁷ (1999), 39 M.V.R. (3d) 159 (Ont. Ct. J. (Gen. Div.)) [*Osborne*].

³⁸ *Ibid.* at 182-83. See also *Bauer (Guardian ad litem of) v. Seager* (2000), 147 Man. R. (2d) 1 at 81, [2000] 11 W.W.R. 621 (Q.B.) [*Bauer*], where the court declined to use male wage tables as suggested by the plaintiff. The court recognized the current trend toward wage convergence for males and females and the likelihood of its continuation, with the result that female incomes will probably be comparable to average male earnings in the future. Despite this recognition, the court refused to use male earning tables as a proxy for the plaintiff's loss, because there was insufficient evidence in this case to reflect the current trend.

³⁹ For example, see *Tucker*, *supra* note 10; *B.I.Z. v. Sams* [1997] B.C.J. No. 793 (S.C.) (QL); *Mozersky v. Cushman*, [1997] O.J. No. 4912 (Ont. Ct. J. (Gen. Div.)) (QL); *MacCabe v. Board of Education of Westlock Roman Catholic Separate School District No. 110* (2001), 293 A.R. 41 (C.A.) [*MacCabe* (C.A.)].

⁴⁰ *Gray*, *supra* note 15 at 66.

⁴¹ *MacCabe* (C.A.), *supra* note 39 at paras. 90, 103-104, 127.

application of female contingencies would not perpetuate or sanction historical and societal discrimination.⁴²

To ignore this reality, according to the Court of Appeal, would be to inflate the plaintiff's loss at the defendant's expense, contrary to the principle of *restitutio in integrum*.

Similarly, in *Spehar v. Beazley*,⁴³ where a sixteen-year-old plaintiff sustained catastrophic injuries in a car accident, the court used average earnings for males with a university degree in British Columbia as a proxy for her loss, subject to a female-specific contingency in respect of her first fifteen years in the labour market, in order to avoid overcompensation. In the court's view, failure to do so would ignore the plaintiff's particular characteristics as a woman, and the likelihood that her labour force participation rate would be lower than the average. Koenigsberg J. noted:

She is a woman who based on her own personality and her family background and history would likely have had at least one child and perhaps more than one. She would likely take time out of the labour force to raise children to school age. She is also likely to be the spouse who would bear the brunt of time off to deal with family emergencies.⁴⁴

Unlike in *MacCabe*, there does not appear to be any concrete evidence to support the court's assessment of the nature of the plaintiff's attachment to the work force, other than her family background and the fact that she is female.

Female-specific discounts may be made in addition to general contingency deductions for labour force interruptions. In *Gray*, the court adopted male income data and applied a twenty per cent general contingency for the general population, plus a further ten per cent female-specific contingency deduction for the gender wage gap. Notwithstanding the progressive position adopted in *Gray*, the court still found it appropriate to make a ten per cent female-specific contingency deduction "to reflect that wage parity has not yet been achieved for females, and will likely not be achieved for several more years."⁴⁵ This is double counting for the same labour force interruptions. The general non-participation contingency deduction takes account of reasons why both men and women would not earn any income for parts of their productive years. If one assumes that for women some of these interruptions or career changes might be due to their caregiving responsibilities, which also partly explains the income gap between men and women, there is no justification for making a separate deduction for the fact that wage parity has not yet been achieved. In criticizing the deductions in *Gray* as unfair, Koenigsberg J. stated:

⁴² *Ibid.* at paras. 94, 124.

⁴³ [2002] B.C.J. No. 1718 (S.C.) (QL) [*Spehar*].

⁴⁴ *Ibid.* at para. 47. See also *Audet*, *supra* note 9 at para. 79, where the court expressed that there was a real likelihood that the plaintiff would have interrupted her work because she would have married and raised a family.

⁴⁵ *Gray*, *supra* note 15 at 66.

[I]n my view there is no basis for deducting 10 percent or any other number as a negative contingency for a catch-up in wage parity ... even if one could make a case for such a deduction philosophically. The application of the general contingency deduction is similarly problematic. ... The case for the application of the general contingency deduction of 20 percent seems to me to be seriously flawed. Since the deduction is to be applied essentially to a starting figure taken from statistics adjusted for all of those contingencies, there's no assurance that the contingencies aren't double counted.⁴⁶

The continued application of female-specific contingencies regardless of educational level, income status, or both is inconsistent with statistical predictions about women's labour force participation.⁴⁷ Even assuming that deductions are justified based on the "reality" of women's labour force participation as constrained by their familial roles, that "reality" as applied in cases like *Spehar*⁴⁸ and *Audet*⁴⁹ may be exaggerated and inconsistent with statistical predictions about women's work, with the result that female claimants are routinely undercompensated. Recent statistics indicate that highly educated women and/or those earning higher incomes tend to follow "typical" male work patterns; these women (1) are delaying childbirth until they are secure in the labour force, (2) have fewer children, and (3) are unlikely to withdraw from the workforce for significant periods of time after childbirth.⁵⁰ In

⁴⁶ *Spehar*, *supra* note 43 at paras. 45-46.

⁴⁷ See e.g. *MacCabe* (C.A.), *supra* note 39 at paras. 101-102. The Alberta Court of Appeal accepted the testimony of Dr. Bruce, an expert witness, and stated that it could not simply accept the plaintiff's testimony as a certain prediction of her future. The evidence was supported by Statistics Canada 2001 census data, *supra* note 28.

⁴⁸ The court seems to have assumed that women tend to marry or form marriage-like relationships with males, have children, are the primary caregivers in families, and that the plaintiff would have raised a family soon after joining the workforce.

⁴⁹ In *Audet* (*supra* note 9), the court discounted the plaintiff's award by 30 per cent for contingencies of lifestyle choice and the possibility of residual earning capacity. Given the nature of the plaintiff's injuries, the court noted that it was difficult to assess her residual earning capacity and that in any event, her condition prevented her from being competitively employable. It is likely that deductions in that respect would be negligible. It appears that most of the 30 per cent discount would be for what the court referred to as "lifestyle choice" (*ibid.* at para. 81). This is a substantial discount and presupposes that she would have been out of the labour market for close to one-third of her working years for family reasons.

⁵⁰ This fact was acknowledged in *MacCabe* (C.A.) (*supra* note 39 at para. 100) where the Alberta Court of Appeal noted that large families are rare in modern Canadian society. See also *Wynn v. NSW Insurance Ministerial Corporation* (1995), 184 C.L.R. 485 (H.C.A.). This fact has also been recognized in the social science literature. See Rathje, *supra* note 30; Shirley Dex & Heather Joshi, "Careers and Motherhood: Policies for Compatibility" (1999) 23 *Cambridge J. Econ.* 641, who note that most women are not only delaying childbirth until such time as they can benefit from maternity leave provisions, but are also increasingly returning to work sooner after having children. See also Martin D. Dooley, "The Converging Market Work Patterus of Married Mothers and Lone Mothers in Canada" (1994), 29 *J. Hum. Resources* 600.

McDonald v. Chambers,⁵¹ the Scottish Court of Session gave due credit for the changing roles of women in society in the assessment of damages for lost earnings. The court noted that although the plaintiff's stated desire was to have had children but for the injury, she was unlikely to have interrupted her career in any significant way given her professional status. The adjustment to the multiplier for possible interruptions in her work was therefore not substantial.

The gender discrimination inherent in female-specific contingency deductions is heightened by the fact that no such assumptions are made in relation to young males. For instance, in *Gordon* the court found it too speculative to assume both that a boy injured at the age of seven would have married and to what type of person.⁵² As such, the court did not consider the impact of marriage, positive or negative, on his future earnings. Given the speculative nature of assessment of future losses and the likelihood of undercompensation, it would be preferable for courts to adopt the *Gordon* position in cases involving young females as well. The Scottish Court of Session took such a principled approach in *Wallace v. Paterson*,⁵³ involving a twenty-year-old female plaintiff who had been rendered virtually unemployable by her injuries. Lady Paton held that given the uncertainties about the claimant's future loss, it was inappropriate to reduce the multiplier to reflect the possibility that the plaintiff might marry and have children.

Assumptions that women's child-bearing and caregiving roles negatively affect their income potential ignores income replacement schemes such as maternity and parental leave benefits that cushion the impact of non-participation in the market.⁵⁴ Top up provisions in some collective agreements make the net pecuniary effect of non-participation negligible or nil in some cases. As well, short-term absences from work for family reasons do not necessarily result in income loss.⁵⁵ Courts are aware of the possibility of cushioning through these mechanisms, but this has not been matched with a willingness to consider these schemes as positive contingencies or as neutralizing losses from non-participation. Some courts have cited difficulties in assessing the value of such anticipated pecuniary benefits as reason to ignore them in

⁵¹ *McDonald v. Chambers*, [2000] S.L.T. 454 (Ct. Sess.). See also Dex & Joshi, *ibid.*

⁵² *Gordon*, *supra* note 25 at 332.

⁵³ [2002] S.L.T. 563 (Ct. Sess.). See also *Hughes v. McKeown*, [1985] 3 All E.R. 284, 1 W.L.R. 963 (Q.B.D.).

⁵⁴ In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, Dickson J. cautioned against negative contingency deductions because not only are they likely to have been considered in arriving at average figures, but also because the impact of negative contingencies on a person's earnings might not be as significant as initially thought. He noted: "in modern society there are many public and private schemes which cushion the individual against adverse contingencies" (*ibid.* at 253).

⁵⁵ It is not uncommon for employees to have paid family emergency days in collective agreements.

the assessment of damages.⁵⁶ Yet, they have not hesitated to make contingency deductions for non-participation that are equally speculative and increasingly unsupported by evidence.

It is now recognized that women benefit financially from their partners' income. The loss of opportunity to form a relationship of financial interdependence is thus a compensable loss. Presumably, this would offset some of the financial losses from non-participation and would likely be available to most infant claimants.⁵⁷ Care, however, must be taken not to obfuscate compensation for loss of opportunity to form a relationship of financial interdependence and income replacement schemes. In *Spehar*, the court noted that pecuniary losses from non-participation in paid work might be offset by pecuniary benefits that the plaintiff could have obtained from her marriage. Loss of opportunity to form a partnership was therefore to be balanced against deductions for non-participation in the work force. This led to a "lower" (ten per cent) deduction for non-participation in *Crawford*. Linking the possibility to offset losses from non-participation to loss of opportunity to form a partnership of interdependence is unduly restrictive and could result in undercompensation. Compensation for loss of opportunity to form a relationship of permanent interdependence is not limited to women or to persons who would have entered into marriage-like relationships. A person's loss in this regard could thus be in addition to income replacement schemes from which she would have benefited in times of non-participation. These losses are different and should therefore be treated separately.

Assumptions about women's lifestyles and primary caregiving roles reinforce the patriarchal family model and entrench heterosexual norms, rigid gender identities, and gendered familial roles and responsibilities. They assert that women by and large live in patriarchal households with a male breadwinner who earns a family wage, and that there is therefore no need for women to engage in paid employment. This marginalizes women's paid work while creating the impression that women's incomes are peripheral, which partly accounts for discrimination against women in the labour market.⁵⁸ Current societal trends do not reflect the patriarchal household model or male breadwinner family. In fact, the male breadwinner family is on the decline,

⁵⁶ See e.g. *Crawford*, *supra* note 17 at 146. See also *Audet* (*supra* note 9 at para. 79), where the court recognized that there could be positive effects that might offset the plaintiff's pecuniary losses for non-participation in the labour market for family reasons, but could not take these into account in assessing the value of her loss, because these benefits have not yet been expressed in economic terms to warrant compensation.

⁵⁷ See *Spehar*, *supra* note 43 at para. 48.

⁵⁸ I have argued elsewhere that this leads to the perception of women as secondary wage earners and thereby devalues women's work, both at home and in the labour market. See Adjin-Tettey, *supra* note 2 at 509-10; see also Gibson, "Gendered Wage Dilemma", *supra* note 1 at 199-202; Regina Graycar & Jenny Morgan, *The Hidden Gender of Law*, 2d ed. (Sydney: Federation Press, 2002) at 143-45.

particularly among low-income and/or non-white families.⁵⁹ As well, not all men fit the traditional mould of sole or even primary provider. The male breadwinner status has been more prevalent among middle to upper-class families. Not all men are privileged socio-economically or earn a family wage. Furthermore, some men resist the traditional equation of masculinity with financial provision.⁶⁰ The modern reality of the necessity of dual earner families, and the possibility of some women earning higher incomes than their partners, challenge the male breadwinner family model.⁶¹ As well, the tendency for most people not to adopt permanent couple lifestyles suggests that the male breadwinner family model does not command as much support today as it might have in the past.⁶² These changes have also prompted expectations of egalitarian roles between partners.

⁵⁹ See Colin Creighton, "The Rise and Decline of the 'Male Breadwinner Family' in Britain" (1999) 23 *Cambridge J. Econ.* 519; Jiping Zuo & Shengming Tang, "Breadwinner Status and Gender Ideologies of Men and Women Regarding Family Roles" (2000) 43 *Soc. Persp.* 29. See also D.W. Livingstone & Meg Luxton, "Gender Consciousness at Work: Modification of the Male Breadwinner Norm Among Steelworkers and their Spouses" in E.D. Nelson & B.W. Robinson, eds., *Gender in the 1990s: Images, Realities and Issues* (Toronto: Nelson Canada, 1995) 172. Whether or not a woman participates in the labour market depends on variables such as her marital status, the socio-economic status of her family, her spouse's level of education and/or income status, et cetera. See e.g. Peter J. Smith & Roderic Beaujot, "Men's Orientation Toward Marriage and Family Roles" (1999) 30 *J. Comp. Fam. Stud.* 471 at 476.

⁶⁰ See Michael S. Kimmel, "What Do Men Want?" *Harvard Business Review* 71:6 (November-December 1993) 50 [Kimmel, "What Do Men Want?"]; Scott Coltrane, *Family Man: Fatherhood, Housework and Gender Equity* (New York: Oxford University Press, 1996); Frances K. Goldscheider & Linda J. Waite, *New Families, No Families?: The Transformation of the American Home* (Berkeley: University of California Press, 1991) at 203-204; Zuo & Tang, *ibid.* at 31.

⁶¹ Increasingly, women's income is becoming a significant portion of family income and is helping to raise low-income families, including two parent families, above the poverty line and/or to give families a decent standard of living. Most men no longer hold the status of sole or even primary provider. Instead, men are increasingly becoming co-providers, especially in younger families. See e.g. Dooley, *supra* note 50 at 605; Zuo & Tang, *supra* note 59; Smith & Beaujot, *supra* note 59 at 477; Christopher Worswick, "Credit Constraints and the Labour Supply of Immigrant Families in Canada" (1999) 32 *Can. J. Econ.* 152; Jessie Bernard, "The Good-Provider Role: Its Rise and Fall" in Nelson & Robinson, *supra* note 59, 156 at 165-66; Katherine Marshall, "Dual Earners: Who's Responsible for Housework?" in Nelson & Robinson, *supra* note 59, 302. Oppenheimer has observed that men's income has been declining in most industrial societies since 1970. The trend is particularly noticeable among younger men. This makes a spouse's income even more of a necessity for the family unit: Valerie Kincade Oppenheimer, "Women's Rising Employment and the Future of the Family in Industrial Societies" (1994) 20 *Population & Dev. Rev.* 293 at 322-32.

⁶² Statistics Canada notes the current prominence of couples living apart while maintaining an intimate connection. See Anne Milan & Alice Peters, "Couples Living Apart" *Canadian Social Trends* (Statistics Canada) (Summer 2003) 2. See also *Reekie v. Messervey* (1989), 59 D.L.R. (4th) 481, 36 B.C.L.R. (2d) 316 (C.A.), where Lambert J.A. implicitly recognized the decline in marriage in the traditional sense, by holding that compensation for loss of opportunity to form a relationship of financial interdependency should not be limited to those who would have formed traditional

Assumptions about women's work may also contradict evidence of changing sex roles in the family and society, for example, the emerging trend of men assuming more responsibility for domestic work, in particular childcare.⁶³ It also ignores the possibility of egalitarian division of labour in some relationships, both same-sex and heterosexual, such that it would not be necessary or expected that a woman bear the brunt of family responsibilities.⁶⁴ The phenomenon of stay-at-home dads is becoming a mainstay as women enter the waged labour force in greater numbers and achieve higher earning status than their partners. The transformation of family life associated with these changes is likely to increase with rising insecurity in the labour market and the erosion in men's wages and the male breadwinner norm (due to factors such as globalization, privatization, and technological innovations).⁶⁵ To my knowledge, contingency deductions to account for men's possible withdrawals from the waged labour force for family reasons have not been an issue in assessing future income potential for male claimants. It is therefore inappropriate for such deductions to be made in women's claims.⁶⁶

The norm of the heterosexual family is also premised on the concept of the nuclear family as the dominant form of social organization. This does not reflect Canada's multicultural heritage. In some cultures, extended family members, usually elderly grandparents, care for the young children so that the parents of these children

marriages. Emphasis is now on partnerships, however formed. See Adjin-Tettey, *supra* note 2 at 524; Gibson, "Comment on *Toneguzzo-Norvell*", *supra* note 2 at 99.

⁶³ See e.g. Goldscheider & Waite, *supra* note 60 at 113.

⁶⁴ The current division of housework between men and women is far from equal. However, a different pattern of household responsibility sharing may be beginning to emerge, albeit at a slow pace, among certain segments of society. See generally Bernard, *supra* note 61 at 167-68; Marshall, *supra* note 61, 302 at 302-303, 305-306; Ralph LaRossa, "Fatherhood and Social Change" in Nelson & Robinson, *supra* note 59, 365; William J. Goode, "Why Men Resist" in Nelson & Robinson, *supra* note 59, 516 at 522-24; Michael S. Kimmel, *The Gendered Society* (New York: Oxford University Press, 2000) at 148, 264-68 [Kimmel, *Gendered Society*]; Goldscheider & Waite, *supra* note 60 at 208-209.

⁶⁵ See e.g. Smith & Beaujot, *supra* note 59 at 478; Zuo & Tang, *supra* note 59 at 30-31; Joan Acker, "The Future of Women and Work: Ending the Twentieth Century" in Nelson & Robinson, *supra* note 59, 501; Kenneth Clatterbaugh, "Contemporary Perspectives on Masculinity" in Nelson & Robinson, *supra* note 59, 528.

⁶⁶ Traditional definitions of masculinity and femininity and stereotypical gender roles work against widespread acceptance of the changing roles of men and women in society and gender equality. Research indicates that, for the most part, the "new organization man" or "new father" feels his involvement in family life is inconsistent with his traditional, patriarchal, breadwinner role and would be perceived as undermining his commitment to the waged labour market. Men therefore feel a need to conceal their participation at home, for example, by using sick days rather than family emergency leave provisions, lest they be condemned to the "daddy track" and jeopardize their reputation and opportunities for career advancement. See Kimmel, *Gendered Society*, *supra* note 64 at 131; Kimmel, "What Do Men Want?", *supra* note 60. See also Kathleen Gerson, *No Man's Land: Men's Changing Commitments to Family and Work* (New York: Basic Books, 1993) at 244-50.

do not have to withdraw from the waged labour force for extended periods of time.⁶⁷ The dominant ideology thus does not mirror the lived experiences, expectations, or situation of racial, ethnic, or cultural minorities. For the most part, the norms of heterosexuality and the nuclear family reflect white, middle-class values that are projected onto all members of society without recognizing the actual situation of “others” and/or the systemic barriers that prevent marginalized groups from attaining that status or fitting that mould.

Female-specific contingency deductions also disregard the increasing number of lone parent families, mostly headed by females. Lone parents may not benefit from the income of another wage earner. They therefore cannot afford to withdraw from the market for substantial periods of time, even after childbirth. It is time courts recognize that the basis of the perception of women as secondary earners no longer exists, and refrain from making discriminatory assumptions about the place of women in the paid labour force.

Psychologists have found that children who grow up in lone parent households, especially those headed by women, are more likely to hold androgynous gender role perceptions.⁶⁸ The same can be said of children growing up in same-sex parent families. Given the increasing number of children growing up in these families, the possibility of widespread changing views of gender roles and transformation in social stereotypes should not be underestimated. Though it is possible for some children to later realize that their perception of gender roles is different from that of the “dominant” culture, it is not expected that the impact of their upbringing would be entirely ephemeral. Challenges to sex typing, increasing awareness of the social construction of gender, the emerging trend of raising gender-aschematic children, especially among feminist parents, the decline of the male breadwinner family, as well as political and legal commitments to equality, all support an optimistic view that

⁶⁷ Just like the recognition of filial piety in fatal injury claims whereby courts recognize the pecuniary losses of parents upon the death of their children based on their cultural tradition, it is time that courts recognize that caring for grandchildren is also an important part of some cultural traditions. For instances in which the courts have recognized filial piety in the context of fatal injury, see *Lian v. Money Estate* (1996), 15 B.C.L.R. (3d) 1, [1996] 4 W.W.R. 263 (C.A.); *Sum v. Kan* (1995), 8 B.C.L.R. (3d) 91 (S.C.); *Yu v. Yu* (1999) 48 M.V.R. (3d) 285 (B.C.S.C.). Perhaps, like filial piety, courts can demand evidence of such care or expectation that grandparents or other family members would have provided child care, such that the parent would not have interrupted her labour force participation rate in any significant way for family reasons.

⁶⁸ See e.g. Paul R. Amato & Alan Booth, “The Consequences of Divorce for Attitudes Toward Divorce and Gender Roles” (1991) 12 J. Fam. Issues 306; Gary D. Levy, “Relations Among Aspects of Children’s Social Environments, Gender Schematization, Gender Role Knowledge, and Flexibility” (1989) 21 Sex Roles 803.

stereotypical gender roles will be eliminated or at least diminished in the future.⁶⁹ To the extent that courts rely on current patterns of social organization to make predictions about future losses, they should accord weight to these emerging trends in assessing future income potential. This would support the use of common income statistics and also non-deductibility for female-specific contingencies. Although the rate of social change remains uncertain, so too are other variables in a person's future. Courts should refrain from making contingency deductions in the face of inconclusive evidence, even within a statistical predictions framework.

In summary, use of male earnings as a proxy for a female plaintiff's loss appears progressive.⁷⁰ This approach has been used where there is evidence that the plaintiff would have pursued a "traditional" male career, as well as in relation to infants whose education and work prospects cannot be ascertained with any certainty at the time of injury. It also recognizes the trend toward wage parity and the changing place of women in the waged labour force generally. However, the application of female-specific contingencies undermines any promise of an egalitarian computation of damages for lost earnings and broader social change. There is even less justification for making contingency deductions where courts use blended male and female earnings, because even if we assume that male statistics do not reflect typical contingencies that affect women's earnings, this would have already been included in the female data. Female-specific contingency deductions seem to be influenced more by stereotypes about traditional sex roles than by the actual situation of women and are therefore unjustified.⁷¹ These contingency deductions also show how stereotypical assumptions and perceptions about women are impervious to change.⁷² As well, the practice involves uncritical acceptance of past group-based statistics about women's work, without questioning the social construction of gender roles by which women are considered and expected to be primary caregivers, and the assumption that women will continue to fulfill their socially constructed roles into the future.⁷³ In light of the

⁶⁹ For an interesting commentary on raising gender-aschematic children, see Sandra Lipsite Bem, "Gender Schema Theory and its Implications for Child Development: Raising Gender-Aschematic Children in a Gender-Schematic Society" in Nelson & Robinson, *supra* note 59, 83.

⁷⁰ The assumption about the fairness of male earning statistics is premised on homogeneity among men, that is, that no group of male earners experiences discrimination. Yet gender is not the only reason for discriminatory earnings. Factors such as race, ethnicity, national origin, sexual orientation, and physical and mental (dis)ability have also been shown to affect income. Perhaps average incomes should be used as a proxy for all claimants, in order to avoid having to make assumptions about the income potential of individual plaintiffs. Although some plaintiffs could end up with less compensation than under the current system, this is an egalitarian approach and would not perpetuate inequalities if uniformly applied to all claimants.

⁷¹ In *Herring*, *supra* note 23 at paras. 31, 38, the English Court of Appeal cautioned against deductions in the absence of tangible reasons relating to the particular plaintiff.

⁷² See Teresa Joyce Covin & Christina Christenson Brush, "An Examination of Male and Female Attitudes Toward Career and Family Issues" (1991) 25 *Sex Roles* 393 at 395-96.

⁷³ See Chamallas, "Architecture of Bias", *supra* note 4 at 488-89.

speculative nature of assessing future income potential, coupled with the rapidly changing patterns of women's work, full participation should be assumed without requiring the particular plaintiff to adduce evidence of the possibility that she would have followed the "typical" male pattern.⁷⁴

III. Implications of Female-Specific Contingency Deductions for Other Marginalized Groups

Discounting awards for possible non-participation in the labour market can doubly disadvantage claimants who are also marginalized by reason of their race, ethnicity, and socio-economic status. As noted above, expectations of absence from the labour market for extended periods of time often assume that a woman can benefit from her partner's (usually a man) income.⁷⁵ This does not reflect the reality for most members of marginalized groups. Notwithstanding the admonition that compensation should not be influenced by systemic discrimination based on the claimant's personal characteristics,⁷⁶ the impact of race on economic opportunities has sometimes been used to justify depressed awards, at least in relation to Aboriginal claimants.⁷⁷ Damages awarded to survivors of residential schools and other institutions are evidence of this practice in recent times.⁷⁸

⁷⁴ For an example of resistance to such a favourable assumption for female claimants, see *MacCabe* (C.A.) (*supra* note 39 at paras. 109, 126). The court was concerned that to do otherwise would offend the principle of *restitutio in integrum*.

⁷⁵ The maternity leave regime reinforces the male breadwinner model by precluding women receiving benefits from earning any income during the benefit period. Maternity benefits provided are 55 per cent of the woman's income up to a maximum of about \$413 per week. This is hardly enough to sustain most families, yet unlike recipients of regular employment insurance, those receiving maternity benefits cannot supplement their benefits with employment income. This presupposes that women with young children would be living in two parent families and can benefit from their partner's income when in receipt of maternity benefits. The reduced benefits are among the factors that compel low-income or single women to return to work soon after childbirth, because they just cannot survive on the benefit amount.

⁷⁶ See *e.g. Terraciano* (*supra* note 34 at 206), where Saunders J. (as she then was) noted that it would be inappropriate to discount a claimant's award based on considerations of race or ethnic origin.

⁷⁷ Cassels has observed that race influences the assessment of loss and quantum of damages in personal injury claims in British Columbia, particularly for Aboriginal claimants. He notes that the practice is often justified on the ground that because of their racial background, the material prospects of First Nations claimants would not have been favourable even if they had not been injured. This in turn diminishes their pecuniary losses due to the injury inflicted by the defendant's wrong. Cassels, "Gender, Race and the Assessment of Damages", *supra* note 3 at 190-98.

⁷⁸ See *e.g. Blackwater v. Plint* (2001), 93 B.C.L.R. (3d) 228 (S.C.), varied [2003] B.C.J. No. 2783 (C.A.) (QL) [*Blackwater*]; *H.L. v. Canada* (A.G.) (2002), 227 Sask. R. 165, [2003] 5 W.W.R. 421 (C.A.), leave to appeal to S.C.C. granted (2003) 230 D.L.R. (4th) 735 (Sask. C.A.) [*H.L. v. Canada*].

Part of the problem stems from the courts' reliance on culturally inappropriate and racialized indicators to assess a person's earning potential, which appears to be inevitable so long as *restitutio in integrum*, with its reference to the capitalist market, remains the basis for the computation of damages in personal injury claims. In the context of First Nations claimants, Cassels notes, "individual prospects and value are typically measured against the culturally dominant standard of the market from which First Nations individuals are largely excluded."⁷⁹ Even when courts make favourable assessments about their labour force participation rates, usually based on family history and other situational factors, there is still a tendency to discount the award because First Nations claimants tend to earn less than the average person in their category. In *Ross (Guardian ad Litem) v. Watts*,⁸⁰ the plaintiff was a sixteen-year-old Aboriginal boy. The court found that he was of average intelligence, would have completed grade twelve, and was expected to have had a significant attachment to the waged labour force based on his family's strong work ethic and his own work history. His award was nevertheless discounted by fifteen per cent because of his Aboriginal ancestry to reflect the discrepancy in earnings between non-Aboriginal and Aboriginal males in British Columbia, a fact the court said it could not ignore.⁸¹ While the basis of assessment in this case may appear to be both consistent with reliance on the market and supported by statistical predictions as reflecting "reality", it undoubtedly perpetuates systemic discrimination against Aboriginals and potentially against other marginalized groups. Not only does this approach reinforce racial and ethnic inequalities, but it also puts too much emphasis on race as a reliable predictor of a person's income potential. Visible minority female claimants are particularly disadvantaged in this process because they tend to have much less socio-economic prospects than the average person in Canadian society. They are thus potentially disadvantaged because of their gender, racial or ethnic background, and socio-economic status.

The socio-economic disadvantage of marginalized groups other than First Nations claimants usually influences the assessment of damages in less overt ways, particularly when applying the statistical predictions approach. In assessing the income potential of children had they not been injured, courts often take into account their family history, specifically parental backgrounds, educational and vocational achievements, and include an assessment of the home environment to determine factors such as the level of education the claimant would have attained, as well as her

⁷⁹ Cassels, "Gender, Race and the Assessment of Damages", *supra* note 3 at 191. For example, inability to engage in traditional activities such as hunting, gathering, and fishing have sometimes been compensated for, not as part of impaired capacity to work but as non-pecuniary losses while in some cases they have been disregarded altogether. See *Plasway v. Abraham*, [1993] B.C.J. No. 172 (S.C.) (QL); *Edzerza v. Blackburn*, [1990] B.C.J. No. 740 (S.C.) (QL).

⁸⁰ [1997] B.C.J. No. 1998, (S.C.) (QL) [*Ross*].

⁸¹ *Ibid.* at paras. 257-58.

likely work ethic, nature of participation in the work force, and income level.⁸² Reliance on these factors is arbitrary and assumes that the plaintiff's income potential and life generally would have mirrored that of her family members, notwithstanding evidence that children's educational and vocational attainments do not always match those of their parents.⁸³ This method fails to recognize factors other than the social and economic status of parents that may influence a child's future, which may exceed the educational and vocational achievements of her parents. As well, the practice ignores the developmental theory of resiliency, which recognizes that some children who live under extremely adverse conditions can overcome those risks and exceed expectations and predictions based solely on their biological or psychological status or environment.⁸⁴ Rak and Patterson have noted:

Contrary to the thrust of much current literature, the future for children who are at risk because of poverty, family discord, violence and abuse, illness, parental illness, and many other factors need not be bleak. Protective factors including the temperament of the child, unexpected sources of support in the family and community, and self-esteem lead a majority of at-risk children to succeed in life.⁸⁵

⁸² In *Ross*, the plaintiff suffered severe injuries including permanent brain damage and impaired vision. The court said: "In a case of this character where pre-morbid potential and extent of loss are in issue, it behooves the Court to look at the educational attainment, the work profiles and, if possible, the characters of the plaintiff's family" (*ibid.* at para. 115). In *Terraciano* (*supra* note 34 at 207), the court emphasized that male earning statistics were the appropriate measure of the plaintiff's loss, because, among other things, given her work history, family work ethic, and strong family influence, it was more likely that she would have pursued a "typical" male career. See also *Bauer*, *supra* note 38 at 81; *Gordon*, *supra* note 25; *Webster v. Chapman* (1996), 114 Man. R. (2d) 1 at 38, [1996] 9 W.W.R. 652 (Q.B.), rev'd on other grounds (1997), 155 D.L.R. (4th) 82, [1998] 4 W.W.R. 335, leave to appeal to S.C.C. refused [1998] 1 S.C.R. vii. For a general discussion of the belief that there is a strong correlation between the socio-economic status of parents and future educational, vocational, and hence income potential of children, see Gary S. Becker, *A Treatise on the Family* (Cambridge, Mass.: Harvard University Press, 1981) at c. 5, 6, 7.

⁸³ See e.g. David A. Kodde & Josef M.M. Ritzen, "Direct and Indirect Effects of Parental Education Level on the Demand for Higher Education" (1988) 23 J. Hum. Resources 356.

⁸⁴ See e.g. Linda Datcher-Loury, "Family Background and School Achievement Among Low Income Blacks" (1989) 24 J. Hum. Resources 528. The author observes that a child's potential may be influenced by factors other than the socio-economic status of her parents and that some Black children growing up in extremely adverse conditions have nevertheless attained academic achievements exceeding all expectations. See also Laura Greenberg, "Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards" (2001) 28 B.C. Envtl. Aff. L. Rev. 429.

⁸⁵ Carl F. Rak & Lewis E. Patterson, "Promoting Resilience in At-Risk Children" (1996) 74 J. Counseling & Dev. 368 at 372. See also Timothy F. Dugan & Robert Coles, eds., *The Child in Our Times: Studies in the Development of Resiliency* (New York: Brunner/Mazel, 1989); Warren A. Rhodes & Walu K. Brown, eds., *Why Some Children Succeed Despite the Odds* (New York: Praeger, 1991).

Indicators of success in the labour market reflect values and characteristics of dominant groups in society. Predictions about a person's income potential based on her family history thus favours children from higher socio-economic status and/or with parents considered to be "ideal" workers, while prejudicing those from less economically successful backgrounds.⁸⁶ The majority of persons in the former category tend to be Caucasians while persons in the latter tend to be Aboriginals and other visible minorities. The commitment to equality expressed in the *Canadian Charter of Rights and Freedoms*, in particular section 15, and employment equity initiatives at both federal and provincial levels, suggest that a person's race or ethnic heritage should not influence her labour market opportunities, either positively or negatively. Yet, there is a noticeable gap in earnings between whites and visible minorities or Aboriginals, even when they have comparable educational attainment.⁸⁷

⁸⁶ Courts in England have explicitly increased damages awards for children based on family history and the environment in which the child would be brought up. Generally, the starting point for the assessment of damages for children is to use the national average wage as the multiplicand. Courts have increased the multiplicand based on family background and achievement. For instance, in *Almond v. Leeds Western Health Authority*, [1990] 1 Med. L.R. 370, the court used a multiplicand one-and-a-half times the national average because the child was from an excellent home and the parents would have ensured that he received proper education and training. In *Cassel v. Riverside Health Authority*, [1992] P.I.Q.R. Q168 (C.A.), the court increased the multiplicand significantly based on evidence of the child plaintiff's family background and pattern of effort and successful attachment to the paid labour force. See also *M (A Child) v. Leeds Health Authority*, [2002] P.I.Q.R. Q46; Harvey McGregor, *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell, 1997) at para. 1582. Similarly, a multiplicand lower than the national average wage could be used for children of parents whose incomes are below the national average, with unfavourable family history of labour force participation or where the child would have grown up in a less than "ideal" family environment.

⁸⁷ See e.g. Statistics Canada, *Will They Ever Converge?: Earnings of Immigrants and Canadian-born Workers over the Last Two Decades* by Marc Frenette and René Morissette (Ottawa: Statistics Canada, Analytical Studies Branch, 2003). Although this is a study of the income differences between Canadian born and recent immigrant workers, it also demonstrates the wage gap between Caucasians and visible minorities. As the authors note, most recent immigrant workers, about 75 per cent in the sample group, are visible minorities (*ibid.* at 15). See also Krishna Pendakur & Ravi Pendakur, "The Colour of Money: Earnings Differentials among Ethnic Groups in Canada" (1998) 31 Can. J. Econ. 518; Steven G. Rivkin, "Black/White Differences in Schooling and Employment" (1995) 30 J. Hum. Resources 826; Juliet Howland & Christos Sakellariou, "Wage Discrimination, Occupational Segregation and Visible Minorities in Canada" (1993) 25 Applied Econ. 1413; L.N. Christofides & R. Swidinsky, "Wage Determination by Gender and Visible Minority Status: Evidence from the 1989 LMAS" (1994) 20 Can. Pub. Pol'y 34; Morton Stelcner & Nola Kyriazis, "An Empirical Analysis of Earnings Among Ethnic Groups in Canada" (1995) 32 Int'l J. Contemp. Soc. 41; Kidd & Shannon, "Gender Wage Differentials", *supra* note 28 at 930; Statistics Canada, *The Rise in Low-Income Rates Among Immigrants in Canada* by Garnett Picot & Feng Hon (Ottawa: Statistics Canada, Analytical Studies Branch, 2003), online: Statistics Canada <<http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2003198.pdf>>; Statistics Canada, *Visible Minority Neighbourhood Enclaves and Labour Market Outcomes of Immigrants* by Feng Hon & Garnett Picot (Ottawa:

The disproportionate representation of visible minorities and Aboriginals in lower socio-economic classes has meant that claimants from these groups receive less damages for lost earnings.⁸⁸ This practice is discriminatory and reinforces the racial privilege of whites by assuming that the ethnically based wage gap is justified and will persist in the future.

Using parents' socio-economic status as a proxy for a child's loss is premised on a stratified society with no possibility of class mobility, despite current initiatives to achieve substantive equality and eliminate barriers in the workplace and Canadian society more generally. It also uncritically accepts that the current socio-economic status of a person's family is a sufficient indicator of her future potential, sometimes even despite the fact that evidence available at the time of injury may indicate otherwise.⁸⁹ This approach presupposes that children from poorer backgrounds cannot achieve, and probably should not aspire to anything better than, their parents' conditions. Alternatively, even if class inobility is possible, the odds of upward mobility are so low that it is not worth considering in predicting a person's future income potential. This position fails to recognize that systemic discrimination limits economic opportunities and the labour force participation of marginalized groups. In other words, it ignores the fact that their "reality" is socially constructed.⁹⁰

Claimants from lone parent families, especially those headed by women, are also disadvantaged by the traditional approach to the computation of damages. It is

Statistics Canada, Analytical Studies Branch, 2003), online: Statistics Canada <<http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2003204.pdf>>.

⁸⁸ As noted above, Becker (*supra* note 82 at 137) strongly believes that there is a direct relationship between children's outcome and their parents' backgrounds. Yet he also recognizes that discrimination against minorities can negatively impact their incomes even in spite of their family background.

⁸⁹ For example, in *Rewcastle*, involving a 16-year-old grade 11 girl killed in an automobile accident, there was evidence that at the time of her death the plaintiff was not doing very well in school and had also fallen into bad company. There were therefore some doubts as to whether she would have actually obtained a university degree had she not been killed. Notwithstanding this disturbing evidence, the court was confident that given her home environment and her parents' educational and vocational accomplishments, availability of resources, parenting skills, and parental expectations of success, the deceased would likely have overcome her difficulties and at least completed a Bachelor of Arts degree. That was therefore to be the basis for assessing her future income potential (*supra* note 14 at paras. 28-30, 168). See also *Hamilton (Guardian ad litem of) v. Grubb*, [1992] B.C.J. No. 2796 (S.C.) (QL) [*Hamilton*], where the plaintiff was 14 years old at the time of the accident. He had a C average in his schoolwork. Both his parents were highly educated and full participants in the labour force and expected that the plaintiff would have attended university if he had not been injured. The court took this to be sufficient indication that the plaintiff might have obtained a university degree. In making this determination, Dorgan J. was not perturbed by the plaintiff's academic performance at the time of the accident, noting that he was not working to his full capacity at the time of the accident. For comments on *Hamilton*, see Cassels, "Gender, Race and the Assessment of Damages", *supra* note 3 at 194-95.

⁹⁰ Chamallas, "Architecture of Bias", *supra* note 4 at 480-89.

commonplace for young, lone mothers to sacrifice their personal interests and economic prospects for the interests of their children, with the result that they usually have lower socio-economic status.⁹¹ This would appear to limit opportunities for their children. It is unfortunate for claimants from such backgrounds to be "penalized" based on statistical predictions without recognizing systemic factors that constrain their parents' choices and that the parents' sacrifice could result in improved socio-economic opportunities for the children. Further, reference to familial background to determine future income potential can be an unsavoury exercise, especially for historically marginalized groups. Courts entertain testimonies about claimants and their families' unfavourable, even tragic, background and experiences such as alcohol abuse and suicide rates to determine "just" compensation. This practice essentially puts the plaintiff and her family on trial, diverts attention from the gravity of the plaintiff's injuries, and reinforces the marginalization of already disadvantaged groups. This is particularly unfortunate where the marginalization of the group has resulted from systematic government policy, as in the case of Aboriginal people.⁹²

Female claimants from marginalized groups may be doubly disadvantaged. Courts recognize that their personal characteristics would have negatively affected their economic prospects. Yet they fail to take into account the economic vulnerability that makes it impossible for such women to withdraw from the market for significant periods of time, and thus they fail to justify female-specific contingency deductions, even within a statistical prediction framework. Non-participation in the labour market for extended periods is a luxury most marginalized women cannot afford. For instance, because members of visible minorities and other socially disadvantaged groups tend to have lower family income, it is often unrealistic for women from these groups to be absent from the paid work force for long periods of time. They cannot afford the reduction in income while receiving maternity or parental leave benefits and may be forced to resume paid work soon after childbirth.⁹³ Yet this factor is not considered favourably in the assessment of damages because to do so would be perceived as reinforcing and perpetuating discrimination against marginalized groups. To consider socio-economic factors such as race and class, whether directly or

⁹¹ See e.g. Jillian Oderkirk & Clarence Lochhead, "Lone Parenthood: Gender Differences" in Nelson & Robinson, *supra* note 59, 397.

⁹² See e.g. *D.W. v. Canada (A.G.)* (1999), 187 Sask. R. 21 (Q.B.); *H.L. v. Canada*, *supra* note 78; *Blackwater*, *supra* note 78.

⁹³ See generally Nitya Iyer, "Some Mothers Are Better Than Others: A Re-Examination of Maternity Benefits" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) 168. Low-income women either do not take maternity leave at all or do so only for a short period of time. Statistics Canada notes that women who earn a median income of \$16,000 who qualify for maternity benefits return to paid employment within four months, compared to those with a median income of \$28,000 who resume paid work between 9 and 12 months after childbirth: Statistics Canada, "Benefiting from Extended Parental Leave" *The Daily* (21 March 2003), online: Statistics Canada <<http://www.statcan.ca/Daily/English/030321/d030321b.htm>>.

indirectly, in addition to gender in the form of negative contingencies, seemingly to mirror “reality” and in the interest of “just” compensation, is a form of “double jeopardy” and undercompensates women who are already marginalized in society.

Resort to familial background as a proxy for a claimant’s loss also blames victims for their disadvantage as if it results from internal or behavioural factors or characteristics assumed to be typical of the group, such as lack of intelligence, lack of motivation, lack of initiative, or a natural proclivity to domesticity. By focusing on internal factors, attention is shifted from external and systemic factors that influence socio-economic conditions. This justifies the expectation that the same pattern will continue in the future, thereby limiting opportunities for societal responses to systemic inequalities. As Chamallas has observed

[A] focus on dispositional factors can conveniently explain why the ... income gap will persist in the future, in spite of the formal legal commitment to equal opportunity. If this is the case, then negative stereotypes can become self-fulfilling prophecies as predictions about future income potential translate into lower damage awards.⁹⁴

In *Crawford*, the court recognized that reference to family history and work ethic in assessing the future income potential of the plaintiff could be problematic, yet concluded that the assumption that a child’s income potential will closely mirror her parents’ earning history is not unreasonable. Power J. stated:

Consideration must be given to [the plaintiff’s] family’s work ethic ... I used the family’s work ethic as a reference point even though there does not appear to be a definitive study which establishes that, if parents have a strong work ethic it is reasonable to assume that we can ignore or play down this contingency of non-participation for the adult child. I believe it is reasonable to make such an assumption and that it is more reasonable to make the assumption than not to make it.⁹⁵

Courts have discretion in determining the appropriate measure of claimants’ lost income potential.⁹⁶ By accepting historical and current “realities” about different groups without recognizing how these positions have been socially constructed, courts are not only actively reinforcing inequities and stereotypes about marginalized groups, but also projecting them into the future. This does not bode well for equality-seeking groups. As Chamallas has observed

⁹⁴ Chamallas, “Architecture of Bias”, *supra* note 4 at 487.

⁹⁵ *Crawford*, *supra* note 17 at 145-46. See also *Shaw*, *supra* note 19 at para. 65.

⁹⁶ Cassels has observed that “the selection of a remedy is not simply an automatic consequence of a finding of liability in a lawsuit. There is much room for judicial discretion and human choice in the determination of the appropriate remedy. The selection of remedies is every bit as much a part of the law’s quest to do justice between the parties as is the application of the substantive law” (Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000) at 2). For a similar perspective concerning the law of contracts, see L.L. Fuller & William R. Purdue Jr., “The Reliance Interest in Contract Damages” (1936) 46 *Yale L.J.* 52.

Causal attributions can become material reality when perceptions are validated through legal institutions ... Cognitive bias distorts the interpretation of the past to make biased predictions of the future seem rational or fair. Devaluing the potential of women and minorities is thus accomplished in an updated, subtle form that looks more like economic expertise than race or gender bias.⁹⁷

The active participation of courts in constructing a stratified society is contrary to the principle of non-discrimination in federal and provincial human rights legislation including the *Canadian Charter of Rights and Freedoms*. It also ignores the admonition by the Supreme Court of Canada that the development and interpretation of the common law should reflect Charter values.⁹⁸ In *Hill v. Church of Scientology of Toronto*,⁹⁹ Cory J. stated that the judiciary should make such incremental changes to the common law as may be necessary to bring it in line with the fundamental values enshrined in the Charter. This may be taken as an expectation that courts should remedy historical inequities that detrimentally affect claimants on the basis of a prohibited ground of discrimination.

Given that the assessment of damages for lost earning capacity is speculative anyway, it would be appropriate for courts to incorporate some element of resiliency theory in their assessment of damages. Further, given the commitment to equality of opportunities as reflected in the Charter and employment equity legislation, it is not unreasonable for courts to be optimistic that members of historically disadvantaged groups will have better economic opportunities in the future. For example, increasing opportunities for Aboriginals through the treaty and litigation process, and institutional commitments to build bridges with Aboriginal communities are likely to improve the material prospects of First Nations children in the future. This trend deserves positive recognition even in the context of a statistical predictions framework. Consistent with both the theory of resiliency and the commitment to substantive equality, courts should assume that a child claimant would have achieved average income potential, even if her family's current socio-economic status seems to suggest otherwise.

Emphasis on statistical predictions and labour market trends has generally justified higher awards for some female claimants. However, market indicators, even if they are statistically accurate, do not question the fairness of, or attempt to remedy, labour market and societal discrimination, and therefore they perpetuate systemic discrimination against female claimants, who continue to receive less compensation than males in similar circumstances. Reliance on statistical predictions continues to support depressed awards and reinforces the disadvantaged socio-economic position of historically marginalized groups for whom there is no evidence or likelihood of wage parity with the general population either now or in the future. So far, the

⁹⁷ Chamallas, "Architecture of Bias", *supra* note 4 at 489.

⁹⁸ *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 603, 33 D.L.R. (4th) 174.

⁹⁹ [1995] 2 S.C.R. 1130 at 1169, 126 D.L.R. (4th) 129.

available evidence points to a narrowing of the gender wage gap. Yet gender is not the only basis of discrimination in society or the labour market. The lower socio-economic status of marginalized people stems from a number of factors including systemic discrimination in the labour market and society generally. These people are deemed unsuitable for certain types of employment, are not offered well-paying jobs, or are not given the opportunities for advancement open to others.¹⁰⁰ Reliance on market indicators casts doubt on Canada's commitment to substantive equality, at least in the context of damages for lost productivity, and is inconsistent with the expectation that the common law should reflect Charter values.

IV. Is Tort Law Solely About Corrective Justice?

So far, I have argued that courts should assess potential future earnings without speculating about the claimant's background or specific characteristics that would result in lower awards compared to plaintiffs who have suffered similar injuries. One of the obstacles to substantive equality in the assessment of damages is the notion that tort law is premised on corrective justice and not well suited for remedying societal inequities. That is, the goal of tort remedies is simply to restore a plaintiff to her original position. Damages must reflect what her life would have been in fact, but for her injury. To do otherwise would be to put the plaintiff in a better position than her status quo ante, contrary to the compensatory purpose of tort damages. It would also shift the cost of social change to particular tortfeasors, who may not be responsible for the discrimination inherent in plaintiffs' original positions, but only had the misfortune of injuring persons who happen to be members of marginalized groups.¹⁰¹ This would unfairly penalize defendants, who could be made to compensate plaintiffs

¹⁰⁰ Although employment equity legislation and initiatives could change the composition of the workforce by increasing representation of historically disadvantaged groups in specific occupations, it does not necessarily guarantee such persons equality of opportunities within the establishment and/or of earnings. See Kevin T. Reilly & Tony S. Wirjanto, "Does More Mean Less? The Male/Female Wage Gap and the Proportion of Females at the Establishment Level" (1999) 32 Can. J. Econ. 906; Kidd & Shannon, "Gender Wage Differentials", *supra* note 28 at 934-35.

¹⁰¹ This claim is shared by those who subscribe to the view that corrective justice is the only legitimate aim of tort law and criticize attempts to use tort law for distributive justice, among other things because of the random nature of the distribution, both in terms of choice of participants and the partiality of outcome. Keren-Paz responds to the claim of randomness by noting that it is no reason to abandon distributive goals in tort law because, among other things, it results in intergroup justice, and in any event is more progressive than the current system, which supports redistribution in favour of the privileged, and is also random anyway. Since the progressive approach would benefit disadvantaged groups in society who become plaintiffs in the tort system, it is preferable to the status quo, which is regressive, even if its actual impact may be limited in scope. Tsachi Keren-Paz, "An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness" (2003) 16 Can. J.L. & Jur. 91.

in excess of their "actual" loss.¹⁰² This was the defendant's argument before the Alberta Court of Appeal in *MacCabe*. In that case, the court emphasized that tort damages must be based on the compensatory principle of *restitutio in integrum*. Damage awards must therefore reflect the "reality" of the plaintiff's situation had she not been injured and not inflate her loss based on a desire to achieve social justice or equality for women in the labour market. Whittmann J.A., speaking for a unanimous court, acknowledged the suggestion of the Supreme Court of Canada that the common law, and therefore tort law, must be interpreted in a manner consistent with Charter values. At least in the context of assessment of damages in personal injury claims however, it would be inappropriate and inconsistent with fundamental tort principles to apply Charter values. He stated:

While I accept that the common law must try to be consistent with Charter values including equality, this consistency cannot be at the expense of the fundamental purpose of compensatory damages in tort law. ... [T]o strictly adopt the approach taken by the learned trial judge runs the risk of ignoring, or at the very least, minimizing the essential purpose of compensatory damages in tort law.¹⁰³

Hutchinson J. echoed these sentiments in *Rewcastle*, emphasizing that the proper role of the courts in awarding damages is to restore plaintiffs to their original positions and not to use the compensation process as an opportunity to remedy societal injustice:

A court of law, when required to assess the value of lost earnings, should not be asked to correct past or future inequities whether perceived or real which are either gender based or based on segments of the work force which have been historically underpaid. [P]roper compensation [must be] based on [the] reality ... [of] the individual income earner in question[,] ... taking all possible factors into consideration that lead to a realistic conclusion and not what may be considered by some to be a desirable advance towards equality for all based on social objectives.¹⁰⁴

It may appear unfair for any single defendant or random tortfeasor to bear the cost of social reform, particularly when she has not benefited from the status quo. Ideally, the cost should be borne by society as a whole, or more specifically, by the beneficiaries of the current system. Since my proposal pursues equality in the private litigation system, it may appear insensitive to this problem. This criticism is, however, unfair. Emphasis on corrective justice assumes that tort claims are purely about the relationship between the parties *inter se*. According to this view, although tort law may affect social patterns of distribution or holdings in society, this is only consequential to corrective justice. It is therefore inappropriate, the argument goes, for

¹⁰² See e.g. McInnes, *supra* note 27 at 171; Tucker, *supra* note 10 at 533-34, McEachern C.J.B.C.

¹⁰³ *MacCabe* (C.A.), *supra* note 39 at para. 107.

¹⁰⁴ *Rewcastle*, *supra* note 14 at 81.

courts to be directly involved in the distribution of benefits and burden or to consider issues of social policy. But this view fails to recognize factors outside the relationship that may influence the determination of liability and/or the quantum of damages. It also assumes the neutrality of tort law.¹⁰⁵

The view that tort law is solely about corrective justice has been discredited. The proper view is that distributive justice and corrective justice are complementary, and that they both constitute the foundation of tort law.¹⁰⁶ Undoubtedly, corrective justice is central to tort law, for example, by ensuring the correlative rights and obligations between persons who have suffered a particular harm and wrongdoers, exemplified in requirements such as causation, damage, and in some cases, fault. But tort liability and entitlement to damages are also influenced by distributional goals. The overall structure of tort law may in fact reflect distributive justice in the sense that distributive concerns often determine the content of tort law, although the application of the principles in particular cases may reflect corrective justice.¹⁰⁷ The purpose of tort law includes the achievement of broader social policy goals that are intended to benefit society as a whole,¹⁰⁸ including the goal of substantive equality for disadvantaged members of society.¹⁰⁹ In this sense, corrective justice limits the distributive potential of tort law because the latter operates only as between a particular injurer and injured.¹¹⁰

Moreover, to say that tort law is solely about corrective justice is presumptuous because the need to restore a disturbed equilibrium between litigants assumes an

¹⁰⁵ See Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

¹⁰⁶ For instance, see Richard W. Wright, "Right, Justice and Tort Law" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 159 at 171-74. See also Izhak Englard, "The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law" in Owen, *ibid.* 183; Allan C. Hutchinson, "The Importance of Not Being Ernest" (1983) 34 McGill L.J. 233. Hutchinson notes that principles of corrective and distributive justice "interact in the practical world" (*ibid.* at 256).

¹⁰⁷ See generally Peter Cane, "Distributive Justice and Tort Law" (2001) N.Z.L. Rev. 401 at 411-12 [Cane, "Distributive Justice"]; Ken Cooper-Stephenson, "The Fairest of them All: The Supreme Court of Canada's Tort Jurisprudence" (2002) 17 Sup. Ct. L. Rev. (2d) I at 17-19; Ken Cooper-Stephenson, "Corrective Justice, Substantive Equality and Tort Law" in Cooper-Stephenson & Gibson, *supra* note 1, 48 [Cooper-Stephenson, "Corrective Justice, Substantive Equality"]; Hanoach Dagan, "The Distributive Foundation of Corrective Justice" (1999) 98 Mich. L. Rev. 138.

¹⁰⁸ See, for example, the basis for the imposition of a duty of care on a defendant for the plaintiff's benefit articulated by the Supreme Court of Canada in cases such as *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 206 D.L.R. (4th) 193; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 206 D.L.R. (4th) 211; *Dobson (Guardian ad litem of) v. Dobson*, [1999] 2 S.C.R. 753, 174 D.L.R. (4th) 1.

¹⁰⁹ See Cooper-Stephenson, "Corrective Justice, Substantive Equality" *supra* note 107 at 55; Izhak Englard, *The Philosophy of Tort Law* (Aldershot: Dartmouth, 1993) at 11-12.

¹¹⁰ See Cane, "Distributive Justice", *supra* note 107 at 418-19.

antecedent distributive justice that is legally defensible. Viewed in this way, corrective justice is a corollary of distributive justice because its goal appears to rectify deviations in the original position or just distribution. The duty to rectify is perceived as prepolitical and not dependent on any legal or political institutions for enforcement. Corrective justice is only aimed at formal equality. It does not question the justice of the status quo or the relative positions of the parties.¹¹¹ In particular, corrective justice fails to recognize that the original position that it seeks to restore may be discriminatory because it reinforces the privileged position of those who wield power in society and disadvantages plaintiffs from marginalized groups. Failure to recognize the marginalized position of parties in the litigation process, which is key to classical liberalism with its emphasis on individual autonomy, prevents discourse about social disadvantage based on factors such as race, class, gender, disability, sexual orientation, et cetera. It also forces marginalized individuals and groups to abandon their lived experiences of powerlessness, domination, and subordination and to pretend to be on equal footing with the rest of society. Similarly, it requires lawyers and judges to abandon their commitment to substantive equality in deference to legal formalism and to the detriment of disadvantaged groups.¹¹² Clearly some level of "activism" based on distributive justice, other than simply restoring the plaintiff to her "original position" would be required to do justice in particular cases.

The current system creates and reinforces the relative worth of human life and potential. It gives the impression that persons with favourable personal traits and/or socio-economic backgrounds are worth more than others, making it cheaper to injure persons in the latter category. This undermines one of the central aims of tort law, that is, to create disincentives or deterrence for wrongdoing. The situation of lead-poisoned plaintiffs in the United States is a case in point. Lead poisoning is common among African-American and Hispanic children. Given the prevalence of poverty among these groups, which for the most part is itself a result of systemic discrimination, they tend to live in run down houses with lead paint and therefore easily fall prey to lead poisoning. These children are also disadvantaged by the traditional method of assessing income potential, based on, among other things, their race and class and thus receive depressed awards for future income potential. Courts reason that based on their parents' socio-economic status, these children's material prospects would not have been promising even absent their injuries. Reliance on race-based statistics reinforces discrimination against these groups in the labour market and in American society generally.¹¹³ The current system is therefore skewed in favour of the privileged by reinforcing and replicating the supposed "realities" of the capitalist system with its "unequal distribution of resources, which, in a liberal order,

¹¹¹ See generally Wright, *supra* note 106, 159 at 167.

¹¹² See Ted Decoste, "Taking Torts Progressively" in Cooper-Stephenson & Gibson, *supra* note 1, 240 at 250-51, 254-57.

¹¹³ See generally Greenberg, *supra* note 84.

define life chances.”¹¹⁴ It also supports the redistribution of wealth from the poor to the rich. The status quo is therefore engaged in some wealth redistribution, albeit in a regressive way that perpetuates inequalities of wealth and power between the privileged and disadvantaged groups. This perverse use of tort law has rightly been rejected in favour of substantive equality, at least in the determination of civil liability.¹¹⁵ The goal of substantive equality should equally inform the assessment of damages for impaired working capacity.

Emphasis on corrective justice and the concern not to burden individual defendants with the cost of social change also assumes that defendants in personal injury claims personally satisfy damage awards. In theory, tort litigation is between the parties, but in reality, the cost of compensation in most personal injury claims rarely falls on individual defendants. Rather, it is often borne by the general public. Usually, catastrophic injuries result from activities that are required to be insured such as medical accidents, product-related accidents, and automobile accidents. Other machine related injuries tend to occur in work settings where the owners or employers are either insured or self-insurers. Insurers, under liability policies that might not be sensitive to the defendant’s claim record, often defend personal injury claims and satisfy damage awards against tortfeasors. The cost is passed on to the public or particular segments of society (other policy holders, consumers, or shareholders) through insurance premiums, higher prices, or reduced profits.¹¹⁶ Individual defendants are thus often conduits for passing on the plaintiff’s loss to others in society. Although there would still be cases in which defendants may be individuals, and/or not in a position to pass on losses to others, such defendants would often be judgment proof and not worth suing. Incorporating distributional goals in the assessment of lost earnings would not necessarily burden particular defendants with the cost of social justice.

Critics have also argued that given the bilateral nature of tort law, it is not an appropriate mechanism for solving social injustice because it fails to achieve distributive justice in a broader sense. Remedying the plaintiff’s disadvantaged status in the assessment of damages does not necessarily eliminate the group disadvantage or stereotypes about members of the group. The result is that the claimant is preferred

¹¹⁴ Decoste, *supra* note 112 at 249.

¹¹⁵ For instance, the protection of less powerful groups and individuals in society is at the heart of most trespassory torts. Similarly, the contextual analysis of when to impose a duty of care and the appropriate standard of care in negligence suits reflects support for substantive equality. See generally John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 120; Cooper-Stephenson, “Corrective Justice, Substantive Equality”, *supra* note 107 at 58-63.

¹¹⁶ See generally Peter Cane, ed., *Atiyah’s Accidents, Compensation and the Law*, 4th ed. (London: Weidenfeld & Nicolson, 1987) at 212-14 [Cane, *Accidents, Compensation and Law*]; Fleming, *ibid.* at 11-13; W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 16th ed. (London: Sweet and Maxwell, 2002) at para. 1.28.

over all other disadvantaged persons and could potentially be overcompensated.¹¹⁷ The claim that plaintiffs could end up being better off than they would have been had they not been injured values working capacity only in relation to current structures of the labour market. It undervalues the earning potential of members of disadvantaged groups relative to the privileged in society, without recognizing the bias inherent in that system, or the possibility of persons exceeding expectations about their socio-economic prospects. It also ignores initiatives such as diversifying educational institutions and commitments to employment equity that can improve the material conditions of equality-seeking groups. These plaintiffs, because of their injuries, have been deprived of the opportunity to prove themselves and should be given the benefit of the doubt that they would have at least achieved an average income level. Even if defendants end up paying more than they would have under the traditional method of assessment, they are not any worse off, because they would have paid higher compensation had their victims been from privileged backgrounds. Since defendants do not usually select their victims, the socio-economic status of plaintiffs should not make a difference in the defendant's liability, particularly where the defendant's tortious conduct has deprived the plaintiff of the opportunity to have a fair chance in life. The proposal under consideration is simply an attempt to remedy some of the injustices in the status quo and ensure substantive equality particularly among young plaintiffs in personal injury claims. While the result might appear limited in scope because it has no ramification beyond the immediate litigants, it could in fact have far reaching implications. It could set a precedent for subsequent cases involving similar parties and be a catalyst for social change. Such decisions would expose the injustice of the current system and its impact on marginalized groups, as well as the undesirability of the status quo. The proposed approach could also be a blueprint for legislative change with respect to the valuation of work in the market and the assessment of damages for lost earnings generally. At the very least, it could hasten the rate of wage convergence already underway in many sectors and encourage initiatives to eliminate the wage gap in areas where there has hitherto been no wage parity initiatives.

Substantive equality in the assessment of damages is by no means a perfect or comprehensive solution to social inequities or even responsibility for injured persons in society. Egalitarian assessment of damages will not benefit all members of historically disadvantaged groups. Only the "fortunate" few who seek and obtain compensation through the tort system would benefit from the proposal.¹¹⁸ Not all

¹¹⁷ See generally Wright, *supra* note 106 at 177, 180-81; Stephen R. Perry, "Tort Law" in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishers, 1996) 57 at 71-72.

¹¹⁸ Not all victims of accidental injury seek and obtain damages through the tort system. Failure to institute action or succeed with a claim stems from a number of factors including lack of awareness about the right to sue; inability to finance a claim or unwillingness to risk the financial consequences of losing an action; inability to establish the technical requirements of liability such as duty, fault, and

defendants may be adequately insured or in a position to spread the costs, with the possibility that some individuals might disproportionately bear some costs of social reform. But as I have already noted, this is unlikely. The defendant might also be a member of a marginalized group and could be further disadvantaged without regard to her own disadvantaged position under a distributive justice regime.¹¹⁹ Members of disadvantaged groups who are neither victims nor defendants might also have to contribute to the cost of social change, for example through insurance premiums or higher prices, but this does not make them any worse off. The current system already disadvantages members of marginalized groups not only through depressed awards, but also in them having to subsidize the privileged through insurance premiums and the cost of goods and services.¹²⁰ As well, they pay higher awards to their victims from favourable socio-economic backgrounds with no hope of ever receiving such amounts when they suffer similar injuries. Under a substantive justice regime, such defendants and members of equality-seeking groups generally can at least be assured that their losses would be equally valued as those of their privileged counterparts should they be in a similar situation.

Conclusion

Rather than being an avenue for reinforcing and perpetuating inequalities, the tort compensation system should strive to eliminate, or at least mitigate, the effects of current inequalities and not remain complacent and content to support the status quo. This may call for different considerations in the assessment of damages to promote substantive equality as opposed to a commitment to formal equality as dictated by *restitutio in integrum*. Insistence on formal equality in the assessment of damages is also morally reprehensible. As demonstrated in this article, tort law has never been aimed purely at corrective justice. Since the law has generally been an instrument for creating and perpetuating discriminatory inequalities in society, the expectation that the tort system be egalitarian in valuing human potential and awarding just compensation is not unreasonable, even if the market fails to emulate the judicial system. Modern tort law must strive at substantive and not formal equality at every stage of the analysis. This should include considerations of substantive equality both in the determination of liability as well as at the remedial stage. In the context of claimants with established work history, this could mean avoiding the application of female-specific contingencies in the interest of “just” compensation. For younger

causation; and resistance on the part of defendants. These are sufficient reasons to make fundamental changes to our accident compensation system. However, no viable alternative has yet emerged, and it is not the aim of this article to propose a solution. The objective of this article is modest: it is aimed at internal reform of the current tort system to better compensate those few victims “fortunate” enough to have been injured by a solvent tortfeasor regardless of gender, race, ethnicity, class, (dis)ability, et cetera.

¹¹⁹ See McInnes, *supra* note 27 at 172.

¹²⁰ See generally Cane, *Accidents, Compensation and Law*, *supra* note 116 at 172.

claimants, compensation for impaired productivity should be based on average earnings, for example, in the province or region, regardless of gender, race, family background, et cetera. Substantive equality in the assessment of damages is consistent with corrective justice. It is essentially a private, localized solution based on correlativity between the injurer and the injured, although it is influenced by the general problem of societal inequalities. In any event, defendants are not any worse off because they would have been liable for the same amount of damages if they had injured a person with favourable characteristics and/or socio-economic background. This is a principled position as it avoids differential valuation of loss or human potential based on arbitrary and discriminatory factors. It also avoids stereotypical assumptions about marginalized groups. As well, such an approach is consistent with human rights law and the *Canadian Charter of Rights and Freedoms*. It is hoped that judicial change in the valuation of loss in personal injury claims will ultimately influence change in the market and society.
