THE GENDERED EARNINGS PROPOSAL IN TORT LAW

Mitchell McInnes*
Ontario

In a number of recent cases, courts have considered the "gendered earnings" proposal which quantifies compensation for female plaintiffs on the basis of male income statistics. In essence, that proposal turns on the perceived injustice of awarding damages that are based on female income statistics and that consequently replicate societal inequities that discriminatorily depress female income levels. This paper examines the benefits and dangers inherent in the "gendered earnings" proposal.

Dans un nombre de cas récents, certains tribunaux ont considéré la proposition sur les revenus basés sur le genre, qui évalue les compensations des demanderesses sur la base du revenu mâle moyen. Essentiellement, cette proposition se base sur la perception de l'attribution des dommages qui sont basés sur le revenu féminin moyen et conséquemment, reproduise la discrimination fiscale qui réduise le niveau de revenu des femmes. Cet article examine les bénéfices et dangers propres à la proposition.

I. *Introduction* 153
II. *Commentary and Cases* 156
A. *Commentary* 156
1. *Professor Cooper-Stephenson* 156
2. *Professor Cassels* 157
3. *Professor Gibson* 158
B. *Case Law* 160
1. *Toneguzzo-Norvell* v. *Burnaby Hospital* 161
2. *Tucker* v. *Asleson* 161
3. *Beaudry* v. *Hackett* 163
4. *Cherry* v. *Borsman* 164
5. *Morris* v. *Rose* 164
6. *D.* v. *F.* 165
7. *Terracciano* v. *Etheridge* 166
8. *Wheeler Tarpeh-Doe* v. *United States* 167
III. *Analysis* 168
A. *Which Female Plaintiffs?* 168
B. *Other Groups of Plaintiffs?* 172
C. *Would Female Plaintiffs Ultimately Benefit?* 176
1. *Likelihood of Non-Discriminatory Awards* 176
2. *Inhibition of More Meaningful Reform* 178
Conclusion 179

* Mitchell McInnes,of the Faculty of Law, University of Western Ontario, London, Ontario. I would like to thank Ms Alison Hughes and Professor Jamie Cassels for their helpful comments on earlier drafts of this paper.

I. *Introduction*

Tort law increasingly is becoming informed by feminist analyses. While the focus of such developments is on substantive rules that determine whether or not a defendant is liable,[1] remedial issues similarly are affected. One of the most intriguing remedial issues to have emerged in recent years concerns the proposal to allow female plaintiffs to recover, under the heading of loss of future earnings, damages quantified on the basis of *male* income tables.

The "gendered earnings proposal" (for want of more elegant terminology) arises from the fact that females do not fare well in the marketplace. While the income gender gap is less pronounced today than it was previously,[2] women still earn only approximately 64% of what men earn.[3] That inequality of income is mirrored in the quantification of damages in tort law. Because the aim of compensation is to place the plaintiff in the position that she would have enjoyed but for the fact that she wrongfully was injured by the defendant, the courts generally rely upon either pre-accident earnings records (in cases involving adult female plaintiffs) or actuarial evidence regarding average lifetime earnings of women (in cases involving infant female plaintiffs) when assessing compensation for loss of future earnings. The principle of *restitutio in integrum* thereby effectively replicates in damages the forces that depress female income levels in the marketplace.[4] The gist of the gendered earnings proposal is that, in

---

[1] A theme of this paper is that perception must be distinguished from reality. Developments popularly perceived to advance feminist causes in fact may not do so. That observation may hold true, for example, with respect to apparent changes to the substantive rules governing the standard of care in negligence. While courts now commonly refer to the "reasonable person", rather than to the "reasonable man", it is debatable whether or not adoption of the new terminology has been accompanied by a meaningful adjustment of analysis: L. Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 3 J. of Legal Education 3; L. Finley, "A Break in the Silence: Including Women's Issues in a Torts Course" (1989) 1 Yale J of Law & Feminism 41. If not, the new language may actually work to the detriment of women by further masking inequalities that operate within the law and hence by further diminishing the prospect of meaningful change.

[2] In 1961, women in full-time employment earned 49% of what their male counterparts earned. By 1971, the gap had closed to 59%: G.C.A. Cook *Opportunity for Choice: A Goal for Women in Canada* (Ottawa: 1976) 121-125.

[3] Taken as a whole, female earners in 1992 received an average $18,923; the same cohort of male earners received an average of $29,652. The same pattern, though somewhat less pronounced, similarly occurs among higher income earners. Thus, women in full-time, full-year employment earned 71.8% ($28,350 as opposed to $39,468) of what their male counterparts earned. And among university educated, full-time, full-year workers, women earned 74.1% ($41,228 as opposed to $55,567) of what men earned: Statistics Canada, *Earnings of Men and Women* (Ottawa: 1993). While incomplete, recent data reveals that the trend toward earning parity continues: Statistics Canada *Earnings of Men and Women* (http:\WWW.StatCan.CA\Daily\English\d970127.htm#ART1).

[4] The underlying logic of the gendered earnings proposal applies not only to women, but also to other socially disadvantaged groups. For example, many of the same types of forces that depress income levels (and hence damages awards) on the basis of sex also depress income levels (and hence damages awards) on the basis of race and social class. The implications of that fact are discussed below: Section III(B).

so far as such forces are unfairly discriminatory, they should not be countenanced in employment, much less endorsed in the judicial process. Accordingly, the argument concludes, female plaintiffs in tort actions should receive damages quantified on the basis of (discrimination-free) male income levels.[5]

Though implicit in the preceding paragraph, it is important to explain what the gendered earnings proposal is *not* about. For a variety of reasons, tort law often fails to achieve its stated goal of placing the victim in the position that she would have enjoyed but for the defendant's wrong. In the present context, the most pertinent illustration[6] of that failure arises from the fact that the actuarial evidence relied upon in the quantification of damages for loss of future earnings, even if historically accurate, often is incapable of facilitating true restoration. Because female income levels measurably and consistently have been on the rise, statistical evidence is cogent only if it is recent. Most counsel and judges appreciate that fact. What they commonly overlook, however, is the need to project that trend into the future. While it clearly would be inappropriate to calculate damages for a permanently incapacitated infant female on the basis of income tables compiled in, say, 1978, it similarly would be unfair simply to rely upon current earnings levels. There is every reason to believe that greater income parity will continue to be achieved as women increasingly receive equal pay for work of equal value and as employment barriers continue to fall. Accordingly, while inevitably speculative, it is necessary to factor that trend into any computation of loss of future earnings in order to provide compensation for the deprivation of an opportunity to participate in an evolving employment market.[7] Such an attempt to take the principle of *restitutio in integrum* seriously and more accurately achieve restoration undoubtedly benefits female plaintiffs. However, as long as discrimination occurs and income disparities remain, it does not diminish the rationale motivating the gendered earnings proposal. By placing the plaintiff in the precise position that she would have enjoyed but for the defendant's wrongful conduct, the courts replicate and reinforce existing societal

---

[5] If taken to its logical conclusion, the gendered earnings proposal might demand that damages be quantified on some other basis: Section III(B).

[6] Illustrations easily can be multiplied. "Double-discounting" is a commonly cited example. Courts occasionally employ statistical evidence of average female earnings, only to make further deductions to reflect contingencies that may impinge upon a woman's income level, such as marriage and child birth. That practice obviously is unfair in so far as *average* earnings statistics already reflect such factors. While attitudes are changing, courts traditionally were also reluctant to recognize work done in the home as being worthy of compensation: cf *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 (Sask C.A.); leave to appeal to S.C.C. refused (1992) 87 D.L.R. (4th) vii. For an excellent overview of the factors that depress damages available to female plaintiffs, see J. Cassels, "Damages For Lost Earning Capacity: Women and Children Last!" (1992) 71 Can. Bar Rev. 445 (hereafter Cassels "Women and Children Last!").

[7] Courts increasingly are appreciative of the need to take such trends into account: see eg *Tucker* v. *Asleson* (1993), 102 D.L.R. (4th) 518 at 534 per MacEachern CJBC (B.C.C.A.); *Toneguzzo-Norvell* v. *Burnaby Hospital* (1994), 110 D.L.R. (4th) 289 at 294-95 per McLachlin J. (S.C.C.).

inequalities. Simply stated, restoration of the *status quo* is no solution because the *status quo* is the problem.

The gendered earnings proposal potentially is of immense significance, both in terms of plaintiffs' quality of life and in symbolic terms. Particularly in cases of catastrophic injury, loss of future earnings is apt to be the largest head of recovery. If awarded damages on the basis of higher male income levels, female plaintiffs would (to the extent that money has such power) be better placed to enjoy fulfilling lives notwithstanding the losses wrongfully inflicted upon them.[8] Moreover, in compensating both males and females at the same rate, tort law would make a dramatic statement regarding the type of equality to which it aspires. No longer would it adhere to the formal equality of (superficially) treating all plaintiffs alike, of consistently quantifying damages with reference to the marketplace regardless of the inequities inherent in that standard. Rather, it would promote substantive equality by consistently compensating losses at the same rate regardless of inequities existing in society.[9]

The thesis of this paper, however, is that the gendered earnings proposal contains hidden dangers and must be approached with caution. The fact that wealth is distributed unevenly within Canadian society demands some response, but not every response is appropriate. More specifically, though based on a feminist identification of the means by which damage awards replicate inequalities of income, the gendered earnings proposal ultimately may not advance feminist concerns. Indeed, implementation of the proposal might constitute something of a Pyrrhic victory; while some female plaintiffs would receive higher measures of damages, more fundamental difficulties facing women might be exacerbated.

The discussion that follows is divided into two parts. The first examines the literature and case law that is related to the gendered earnings proposal. It will be seen that while the courts occasionally have toyed with the notion of quantifying female damages for loss of future earnings on the basis of male income levels, they have resisted expressly endorsing academic calls for reform. The second part of the paper analyzes the implications of adopting the gendered earnings proposal. It will be seen that while that proposal has obvious merit, it also raises practical and theoretical concerns and, if adopted, ultimately might work to the detriment of the feminist cause.

---

[8] Implementation of the gendered earnings proposal also would benefit some women who are not injured. Because compensatory damages commonly are insufficient to meet a victim's needs (DW Harris et al *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984) at 92-123), the burden of caring for an injured party frequently falls upon family members or other volunteers. Such caregivers typically are female. If damages were awarded in amounts that facilitated the hiring of professional attendants, such women would be emancipated from a form of "volunteer" servitude that historically has tied them to the home and depressed their income levels.

[9] For a discussion of the extent to which notions of substantive equality inform tort law, see eg K. Cooper-Stephenson "Corrective Justice, Substantive Equality and Tort Law" in K. Cooper-Stephenson & E. Gibson *Tort Theory* (Toronto: Captus, 1993) 48; R. Wright "Substantive Corrective Justice" (1992) 77 Iowa L. Rev. 625.

II. *Academic Commentary & Case Law*

A. *Commentary*

1. *Professor Cooper-Stephenson*

Ken Cooper-Stephenson, a pioneer of the gendered earnings proposal, argued in 1976 that,

> ...the depressed evaluation of the earning power of women [must] be terminated forthwith. Even though the low level of awards may sometimes reflect current socio-economic reality, the general picture appears to evidence a discriminatory attitude on the part of the judiciary towards women, and certainly perpetrates [sic] a philosophy of inequality in their job-opportunity and remuneration in the labour force.[10]

He reasoned that just as damages should not be awarded to compensate a loss of illegal earnings,[11] so too damages for loss of future earnings should not be assessed with reference to statistics skewed by illegality. Female income statistics are so skewed, he continued, because they reflect the fact that, contrary to human rights legislation, women earn less than men for performing work of the same value.[12] He accordingly concluded that the courts should measure a female plaintiff's earning capacity on the basis of "an estimation of what pay scale would be applied to a man with similar skills and training".[13]

---

[10] K. Cooper-Stephenson "Damages For Loss of Working Capacity For Women" (1978- 79) 43 Sask. L. Rev. 7 at 13 (hereafter Cooper-Stephenson "Loss of Working Capacity For Women").

[11] See eg *Burns* v. *Edman* [1970] 2 Q.B. 541.

[12] Strictly applied, Cooper-Stephenson's reasoning suggests that the gendered earnings proposal should extend only so far as female incomes are depressed by that type of discrimination: cf K Cooper-Stephenson *Personal Injury Damages in Canada* (2nd ed) (Toronto: Carswell, 1996) at 296 (hereafter Cooper-Stephenson *Personal Injury Damages*). There are, however, many interrelated factors that adversely affect female earnings: E. Gibson "The Gendered Wage Dilemma in Personal Injury Damages" in K. Cooper-Stephenson & E. Gibson (eds) *Tort Theory* (Toronto: Captus, 1993) 185 at 199-202 (hereafter Gibson "The Gendered Wage Dilemma"). And, in fact, Cooper-Stephenson's initial position supported a broad proposal that took into account various forms of discrimination. Thus, while not characterizing such discrepancies as "illegal", he believed the fact that women enjoy fewer job opportunities in some fields to similarly demand remedial reform: Cooper-Stephenson "Loss of Working Capacity For Women" *supra* footnote 10 at 14.

[13] Cooper-Stephenson "Damages For Loss of Working Capacity For Women" *ibid* at 14. See also K. Cooper-Stephenson & I. Saunders *Personal Injury Damages in Canada* (Toronto: Carswell, 1981) at 206-27. Cooper-Stephenson expressly applied his reasoning to female plaintiffs claiming short-term income losses. While his reasoning also logically extended to female plaintiffs suffering long-term injuries, he appears to have considered the gendered earnings proposal less necessary in such cases because of the trend toward equalization of income levels. However, as explained above, that trend is not a substitute for the gendered earnings proposal: above at text accompanying footnotes 6-7. Moreover, Cooper-Stephenson's hopes have not been fulfilled; though the situation has improved, the gender gap has not been substantially eliminated since 1976: *supra* footnotes 2-3.

Cooper-Stephenson, however, has grown cautious. He continues to believe that "the layperson would be shocked and offended by the obvious inequality in the results of damage assessments as compared between men and women".[14] Moreover, he remains convinced that "serious consideration should be given to the proposal that there be a movement away from replication of the discriminatory market as the proper measure of damages for loss of working capacity" and a concomitant movement toward gender-neutral assessments.[15] Nevertheless, he now ultimately concludes that tort law is not an appropriate mechanism for reform.[16] With obvious reluctance, he states that courts should content themselves with ensuring that actuarial evidence relied upon in the computation of damages reflects the trend to larger female incomes, and with recognizing economic value in functions historically performed by women (eg "homemaking").[17]

2. *Professor Cassels*

While similarly sympathetic to the gendered earnings proposal, Jamie Cassels' criticism of the current approach to damage assessment is more profound.[18] Working within the context of a larger investigation into the relationship between notions of equality and private law, he laments the extent to which the common law "constitutes and reflects the norms of the capitalist market-place" and takes up the challenge of "reconcil[ing] the desire to achieve a degree of substantive legal equality, with the fact that economic inequality is both pervasive, and to a great degree, socially accepted."[19] His concerns easily are translated into the language of the gendered earnings debate.

> [T]he issue [is] whether the law of damages should seek to replicate with precision the results that would have been achieved in an inegalitarian and unfair society. While there may be good reasons to rely on market pricing in the allocation of resources in the market, should this system be extended in its entirety to the way in which society provides care for the victims of accidents? Why should the concern, care and respect to which an injured person is entitled turn on a guess about how they would have fared in the unfair lottery of life?[20]
>
> ...
>
> [It] may be argued that gendered ... statistics incorporate objectionable features that should simply be rejected in favour of equality. No sound purpose is served by

---

[14] Cooper-Stephenson *Personal Injury Damages supra* footnote 12 at 290-91, quoting S.A. Griffin "The Value of Women —Avoiding the Prejudices of the Past" (1993) 51 The Advoc. 545 at 547 (hereafter Griffin "The Value of Women").

[15] Cooper-Stephenson *Personal Injury Damages supra* footnote 12 at 297.

[16] His reasons for doing so pertain primarily to the fact that the gendered earnings proposal seeks to achieve distributive justice, whereas tort law is based on a principle of corrective justice. That argument is considered *supra* footnotes 81-82.

[17] Cooper-Stephenson *Personal Injury Damages supra* footnote 12 at 297-98.

[18] J. Cassels, "(In)Equality and the Law of Tort: Gender, Race and the Assessment of Damages" (1995) 17 Adv. Q. 158 at 182 (hereafter Cassels "(In)Equality and the Law of Tort"); Cassels, "Women and Children Last!" *supra* footnote 6.

[19] Cassels, "(In)Equality and the Law of Tort" *ibid* at 159.

[20] Cassels, "Women and Children Last!" *supra* footnote 6 at 485.

> spending such effort (and money) replicating injustice. Perhaps the time has come to filter out objectionable factors entirely... .[21]

Given his broader concerns, Cassels is uncertain as to the proper avenues of reform. Ultimately, he advocates the radical solution of rejecting reliance upon the market in the computation of damages. "[O]ne option would be to abandon the effort to individualize compensation for lost earning capacity altogether. Instead, conventional sums could be fashioned with an eye to need."[22] Less ambitiously, he also offers proposals that retain reliance on the market, but that eliminate its most egregious inequities. Adult female plaintiffs who were in full-time employment prior to being injured, he suggests, should receive a modest "gross-up" to offset the gender gap.[23] Where work was done in the home, and hence an income history is lacking, he supports compensating adult plaintiffs on a replacement cost basis that recognizes the value of such work.[24] And finally, in the case of infant female plaintiffs, he favours an approach that eliminates the discriminatory elements inherent in actuarial evidence, although he equivocates on the question of whether the courts should award compensation with reference to the average income of men or rather to the average income of men and women combined.[25]

3. *Professor Gibson*

Elaine Gibson's support for the gendered earnings proposal assumes a slightly different focus.[26] The reasons for the income gender gap, she notes, are varied: "female-male differences in number of hours worked, in education, training, and experience, in unionization rates, in occupational segregation, and in direct wage discrimination".[27] Ultimately, however, she attributes all inhibitors of female earnings to the stereotyped "biological role of woman as childbearer and societal role as primary caregiver to her family".[28] To allow such a factor to influence the quantification of damages, she concludes, is contrary to modern

---

[21] Cassels, "(In)Equality and the Law of Tort" *supra* footnote 18 at 182.

[22] Cassels, "Women and Children Last!" *supra* footnote 6 at 489.

[23] The basis of such a "gross-up" is considered *intra* footnote 74.

[24] See e.g. *Fobel v. Dean, supra* footnote 6.

[25] Cassels, "Women and Children Last!", *supra* footnote 6 at 485, 488-491; Cassels, "(In)Equality and the Law of Tort" *supra* footnote 18 at 182. That question is addressed below: Section III(B).

[26] E. 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 (hereafter Gibson "Loss of Earning Capacity"); Gibson, "The Gendered Wage Dilemma", *supra* footnote 12 at 185.

[27] Gibson, "Loss of Earning Capacity", *ibid* at 85.

[28] *Ibid* at 86. Recent statistics support that proposition. In 1995, single women in full- time, full-year employment earned, on average, 94% of what their male counterparts earned. Among university educated singles, the figure rose to 96%. In contrast, married women in full-time, full-year employment earned only 69% of what married men earned: Statistics Canada *Earnings of Men and Women* (http:\WWW.StatCan.CA\Daily\English\d970127.htm#ART1).

Canadian conceptions of discrimination and justice; "for both ethical and legal reasons, our contemporary human rights milieu mandates the abandonment of gender-distinct tables in the projection of loss of earning capacity".[29]

While recognizing that the *Canadian Charter of Rights and Freedoms* does not directly apply to private litigation, Gibson urges the judiciary to observe an ethical obligation to render decisions that reflect its spirit.[30]

> Section 15 of the *Charter* grants to women the equal benefit of law without discrimination. Courts are encouraged to provide equal benefit to women wherever possible. Avoiding the use of tables differentiated by sex which disadvantage women as compared to men would be a natural and appropriate application of this concept.[31]
> ...
> [T]he use of gender-based actuarial tables constitutes such a blatant violation of the aims of the *Charter* that, once made aware, judges should readily cease to consider gender as a ground for distinction in their calculations.[32]

More adventurously, she further argues that the orthodox approach to damage assessment violates both the spirit *and* the letter of various human rights statutes. She accordingly suggests not only that the compensatory principles traditionally employed in tort law are inconsistent with the rationale of such legislation, but also that a plaintiff aggrieved by judicial reliance upon gendered income tables could bring action against the offending judge.[33]

Like Cassels, Gibson offers a number of reform proposals. As a radical solution, she echoes his rejection of the principle of *restitutio in integrum* and its reliance upon the market, and argues that damages should be assessed with reference to what the victim needs, rather than to what she has lost.

> Formal equality dictates a fabricated reinstatement to her pre-accident condition; substantive equality seeks the optimal quality of life possible, given her disability and in light of available societal resources.[34]

More modestly, Gibson also endorses the gendered earnings proposal, albeit on difficult reasoning.[35] As she notes, the courts commonly speak of the relevant head of damage not in terms of loss of future income *per se*, but rather in terms of loss of a capital asset — ie income earning *capacity*.[36] The issue is

---

[29] *Ibid* at 89.

[30] *Dolphin Delivery Ltd* v. *RWDSU, Local 580* (1986), 33 D.L.R. (4th) 174 at 198 (S.C.C.).

[31] Gibson, "Loss of Earning Capacity", *supra* footnote 26 at 90.

[32] Gibson, "The Gendered Wage Dilemma", *supra* footnote 12 at 207. Martha Chamallas similarly has argued that the traditional approach to damage assessment violates the American Constitution: "Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument" (1994) 63 Fordham L. Rev. 73.

[33] Gibson, "Loss of Earning Capacity", *supra* footnote 26 at 92; Gibson, "The Gendered Wage Dilemma", *supra* footnote 12 at 203-205.

[34] Gibson, "The Gendered Wage Dilemma", *ibid* at 209-11.

[35] See also Griffin, "The Value of Women", *supra* footnote 14 at 547.

[36] See e.g. *Andrews* v. *Grand & Toy Alberta Ltd* (1978), 83 D.L.R. (3rd) 452 at 469 per Dickson J. (S.C.C.).

said to be not what the plaintiff *would* have earned but for the defendant's wrong, but rather what she *could* have earned if she had not been injured. Gibson argues that if the earning capacity approach is taken seriously, as it should be, female income tables cannot be relied upon. Even if they reflect reality, such tables "do not speak to capacity; they are merely group predictions of income levels".[37]

> Given the chance, women are proving capable of achieving or surpassing male accomplishment levels. The proposal here is that, *whether or not the current gendered wage inequities are addressed* so that wages reflect accomplishment levels instead of gender, women's earning *capacity* should be viewed as equivalent to that of men.[38]

It is questionable whether or not that argument can be sustained. The problems associated with a literal application of the notion of earning capacity are well documented elsewhere and need not be discussed in detail here.[39] Suffice to say that terminology notwithstanding, the courts do not follow the earning capacity approach through to its logical conclusion; relief generally is measured to reflect the manner in which the plaintiff probably would have exercised her earning capacity if she had not been injured.[40] MacEachern C.J.B.C.'s views in *Tucker* v. *Asleson* are representative.[41]

> I do not agree, as some commentators suggest, that the judges in the trilogy and other cases were saying that used or unused capacity, *simpliciter*, can be the measure of an injured plaintiff's damages. In other words, capacity must be considered in relation to other relevant factors such as history, statistics, or reasonably based predictions. In this case, as the [infant] plaintiff [who has suffered permanently disabling injuries] will earn no income, her future loss of earnings is the same loss as her future earning capacity had she not been injured.

B. *Case Law*

As yet, the courts have not shared the academics' enthusiasm for the gendered earnings proposal. That is not to say, however, that judicial comment is uniformly negative.

---

[37] Gibson, "The Gendered Wage Dilemma", *supra* footnote 12 at 208; Gibson, "Loss of Earning Capacity", *supra* footnote 26 at 95-96.

[38] Gibson, "The Gendered Wage Dilemma", *supra* footnote 12 at 208 (emphasis in original).

[39] See e.g. D. Reaume, "Rethinking Personal Injury Damages: Compensation for Lost Capacities" (1988) 67 Can. Bar Rev. 82 (hereafter Reaume, "Rethinking Personal Injury Damages"). As Cooper-Stephenson notes, application of the earning capacity approach could "lead to extraordinary conclusions, such as a high award for the well-educated but non-productive leisure-seeker, and enormous differentials in the valuation of identical work depending upon whether a homemaker would otherwise have been a high-priced lawyer or would have been unemployed": *Personal Injury Damages, supra* footnote 12 at 294.

[40] *Tucker* v. *Asleson* [1991] B.C.J. No 954 at 121-34; Reaume, "Rethinking Personal Injury Damages", *ibid* at 98-106.

[41] (1993), 102 D.L.R. (4th) 518 at 528 (B.C.C.A.).

1. *Toneguzzo-Norvell* v. *Burnaby Hospital*[42]

The Supreme Court of Canada's comments regarding the proposal offer little guidance. In *Toneguzzo-Norvell* v. *Burnaby Hospital*, the female plaintiff suffered catastrophic injuries at birth as a result of the defendant's negligence. At trial, she asked that damages for loss of earning capacity be calculated with reference to income tables applicable to women with non-university, post-secondary education. Although the plaintiff also introduced male income tables, she did so simply for comparative purposes and informed the court that she was not going to rely upon them. While the trial judge accordingly struck that evidence from the record, he agreed with the plaintiff's approach to damage assessment and, indeed, went further. Hogarth J assumed that but for the defendant's tort, the plaintiff would have achieved a non-university, post-secondary education and would have remained in the work force between the ages of 19 and 65. Moreover, although the point had not been argued by counsel, he also recognized the trend to larger female incomes and hence the inequity of relying exclusively upon historical statistics. He accordingly awarded damages that reflected the fact that if the plaintiff had not been injured, she likely would have been employed in an increasingly favourable market.

The award was confirmed on appeal and eventually came before the Supreme Court of Canada. It was not until that final stage of litigation that plaintiff's counsel raised the gendered earnings proposal and argued that compensation should be measured with reference to male income tables. Because the relevant evidence had been struck from the record at trial, McLachlin J. felt compelled to reject the argument and to postpone resolution of the issue.

> Due to the manner in which this case was presented at trial, we are not in a position to entertain the arguments advanced for the first time in this court that female earning tables should be replaced by other alternatives. Consideration of these arguments must await another case, where the proper evidentiary foundation has been laid.[43]

2. *Tucker* v. *Asleson*[44]

The gendered earnings proposal was more fully addressed in *Tucker* v. *Asleson*. The plaintiff, an eight year old female, suffered a severe and permanently disabling brain injury as a result of a motor vehicle accident. She argued that, prior to being injured, she had the potential to achieve any vocation she wished and accordingly claimed that the value of her lost earning capacity equalled the average lifetime earnings of male university graduates in British Columbia: $947,000. The defendants, in contrast, argued that the best evidence of the plaintiff's actual loss

---

[42] (1994), 110 D.L.R. (4th) 289 (S.C.C.).

[43] *Ibid* at 295.

[44] [1991] B.C.J. No. 954; affd (1993), 102 D.L.R. (4th) 518 (B.C.C.A.).

lay in statistics regarding average lifetime earnings of all females in the province: $302,000.[45] Finch J. ostensibly endorsed the plaintiff's position.

> The basic question in this case is whether the measure of the plaintiff's capacity to earn income should be based on statistics for her sex, or whether the measure of her capacity is, as her counsel contends, the same as for a male person.
>
> I accept, as a starting point, that the measure of the plaintiff's earning capacity should not be limited by statistics based upon her sex. Before the accident the plaintiff was a bright little girl growing up in a stable home environment. In Canada, no educational or vocational opportunities were excluded from her. She could have become a doctor, lawyer or business person. Or, in line with her childhood wish, a veterinarian. ...
>
> I have accepted the assertion advanced on the plaintiffs' behalf that the measure of her lost capacity to earn income is the equivalent of the average university educated B.C. male which, statistically is shown to be $947,000.00.[46]

However, having found that male income tables provided the best evidence of the plaintiff's earning capacity, the trial judge assessed the likelihood of the plaintiff achieving her potential and discounted the award by a staggering 63%.

> To award damages equivalent to the value of the lost capacity would be to assume a 100% chance of its fulfilment. ... Experience tells us that not everyone achieves his or her full potential in all fields of endeavour. While all persons with a certain level of intelligence may have the capacity for university education, the potential for a successful career in business or in one of the professions, and the opportunity to earn the highest levels of income, not everyone attains such education, career successes, or earnings.[47]

The final result was an award of $350,000 — a mere $48,000 more than the female average and fully $597,000 less than the average of university educated males.

Finch J.'s award was upheld with little comment by a majority of the British Columbia Court of Appeal.[48] In a vigorous dissent, however, MacEachern C.J.B.C. stressed the orthodox goal of *restitutio in integrum* and rejected the gendered earnings proposal.

> While we may strive for social justice, as it is perceived from time to time, the courts must deal with the parties who are before them, plaintiffs and defendants, on the basis of realistic predictions about the future, and not just in accordance with

---

[45] In fact, defence counsel went further and contended that the statistical average of all women in the province was inordinately high in so far as it included university educated women and women in full-time gainful employment. That argument properly was rejected. While it is true that the plaintiff might not have earned a university degree or worked full-time in gainful employment, such possibilities already were incorporated into the provincial average. To have allowed the further deductions on the basis of such contingencies would have constituted inappropriate "double-discounting": *supra* footnote at 6.

[46] [1991] B.C.J. No. 954 at 137-38.

[47] *Ibid* at 135.

[48] (1993), 102 D.L.R. (4th) 518 at 574. Southin J.A. (Proudfoot J.A. concurring) merely likened the calculation of damages for a permanently disabled child to the ancient art of augury and held herself to be in no better position than Finch J. to assess the modern equivalents of birds' flights and animals' entrails — ie sociological, economic and psychological evidence.

> understandable wishes that society, in some of its aspects, were different from what it really is.
>
> At the present time, as the average statistics clearly show, women earn far less than men. Deplorable as that is, it would be unfair to defendants in this and other cases, some of whom are under-insured women, to ignore that reality. The most the courts can do is to ensure, so far as may be possible, that proper weight is given to identifiable societal trends so that the assessment of the plaintiff's future losses will reflect relevant future circumstances.[49]

In his view, the goal of restoring the plaintiff to the position she enjoyed prior to the accident could best be served by starting with the average lifetime earnings of all women in the province and by adding a positive enhancement to reflect the fact that the income gender gap will continue to diminish in the future. While refraining from making the necessary calculation himself, MacEachern C.J.B.C. speculated that the resulting sum would approximate current average lifetime male earnings in the province: $649,000.[50] Ironically, then, the plaintiff would have been better served by the Chief Justice's wholesale rejection of the gendered earnings proposal than by the trial judge's heavily-qualified acceptance of the same argument.

3. *Beaudry* v. *Hackett*[51]

While it has yet to be followed, Finch J.'s decision in *Tucker* v. *Asleson* has been the subject of comment in several cases. In *Beaudry* v. *Hackett*, the 21 year old plaintiff brought an action against her stepfather for physical and sexual abuse that occurred for seven years during her childhood. The trial judge upheld that claim and awarded relief under a number of heads. On the question of loss of future income, statistical evidence based on average earnings of female high school graduates in the province estimated damages to be $52,000. The plaintiff argued, however, that she was entitled to recover the sum applicable to male high school graduates: $134,000. While "not in any way suggesting that Mr J. Finch was wrong in his approach",[52] Thackray J. calculated compensation with reference to "the historical pattern [while] recogniz[ing] that in the future the disparity between males and females will narrow".[53] He ultimately settled on a figure of $40,000 after considering a number of factors that indicated that the plaintiff in any event probably would not have attained a level of income equal to that of the average female high school graduate.[54]

---

[49] (1993) ,102 D.L.R. (4th) 518 at 533-34.

[50] *Ibid* at 536.

[51] [1991] B.C.J. No. 3940 (B.C.S.C.).

[52] *Ibid* at 15. Thackray J. rendered judgment prior to the Court of Appeal decision in *Tucker* v. *Asleson*.

[53] *Ibid* at 15.

[54] Thackray J. took notice of considerations ranging from the fact that the plaintiff was raised in a family that placed little emphasis on education to the fact that her mother routinely played bingo.

4. *Cherry* v. *Borsman*[55]

In *Cherry* v. *Borsman*, the female plaintiff suffered severe and permanently disabling injuries at birth as a result of the defendant physician's negligent attempt to abort her. Skipp J calculated damages for loss of future income on the basis of statistics applicable to females with two years of post-secondary, non-university education. The plaintiff appealed on the ground that her lost earning capacity should be have been measured with reference to the average lifetime earnings of university educated males. The British Columbia Court of Appeal briefly considered the trial decisions in *Tucker* and *Beaudry* and affirmed Skipp J.'s judgment. Disappointingly, it even failed to anticipate MacEachern C.J.B.C.'s comments some nine months later in *Tucker* on the need to ensure the predictive accuracy of statistical evidence. While the plaintiff argued that the trial judge at least should have recognized that the trend toward greater female income levels required enhancement of the historical statistics adduced at trial, the Court of Appeal found no error in the court below.

5. *Morris* v. *Rose*[56]

The female plaintiff in *Morris* v. *Rose* suffered a number of serious, physical injuries at the age of 17 as a result of a motor vehicle accident. She brought an action in negligence against the estate of the driver, claiming, *inter alia*, loss of future income. Hutchison J. found that while the plaintiff would have undertaken post-secondary, non-university training in the theatre if she had not been injured, she was, as a result of the accident, likely to achieve only a general diploma in post-secondary education. Without discussion on point, he then relied upon non-gendered income statistics for "general guid[ance]" and calculated the extent to which the plaintiff's injuries adversely affected her earning capacity. On appeal, Donald J.A. stated that the trial judge had grossly under-stated the extent to which the plaintiff's working capacity had been impaired and held that his resulting award of $110,000 was unreasonably low. The appellate judge accordingly declined to address Hutchison J.'s use of non-gendered income statistics.

> Where, as here, the award is much too low and must be increased it does not much matter whether the trial judge should have used one statistical measure rather than another... . I therefore prefer to leave consideration of the gender issue on earnings statistics to a case where it would affect the outcome.[57]

---

[55] (1991), 75 D.L.R. (4th) 668; affd (1992), 94 D.L.R. (4th) 487.

[56] [1993] B.C.J. No. 2679; affd in part (1996), 23 B.C.L.R. (3rd) 256.

[57] (1996), 23 B.C.L.R. (3rd) 256 at 264.

6. *D* v. *F*[58]

The facts of *D.* v. *F.* are depressingly similar to those in *Beaudry* v. *Hackett*.[59] D, the 19 year old female plaintiff, was subject to repeated sexual assault by her father, F, during her childhood. Humphries J found that while the plaintiff's pre-tort potential to finish high school and undertake one year of post-secondary, non-university training had not been adversely affected, her entry into the work force had been delayed by three years. In calculating damages for that period of lost income, he stated:

> Given my conclusion that D will enter the work force at a functional level in three years, the use of statistics for male versus female workers becomes less important. In any event, I am of the view that I should not take into account possible changes in social policy, especially when the time period, as here, is so short. No matter what job D eventually finds herself in, it is likely to be traditional and not high paying. [The expert evidence regarding vocational rehabilitation] suggested travel consultant, accounting clerk/bookkeeper, secretary/receptionist/office assistant/ or medical office assistant as the most likely possibilities. Most of these jobs have been traditionally filled by females and it would be artificial to apply historical male earning rates to future losses of the plaintiff.[60]

Unfortunately, it is difficult to know whether or not Humphries J. thereby intended to reject the gendered earnings proposal. Indeed, discussion of that issue appears to have been confused throughout the trial. While citing literature relevant to the proposal,[61] the plaintiff argued for the use of male income statistics on the ground that "the data upon which the figures are based are historical and were collected at a time in which inequality in the work force for women was much more prevalent".[62] Similarly, the defendant resisted the use of male income statistics on the basis that "although indefensible, job payment inequality may continue and the damages should not be assessed on an artificial and predictive basis which prejudices the defendant and which may not come to pass".[63] Though ambiguous, the comments of the trial judge and the parties do not appear to pertain to the gendered earnings proposal. Rather, they appear to address the question of whether or not historical statistics, before being relied upon in the computation of damages for loss of future income, should be enhanced to reflect the future trend toward higher female earning levels. If so, then Humphries J.'s decision may be correct; the income gender gap

---

[58] [1995] B.C.J. No. 1478.

[59] Section II(B)(3).

[60] *Ibid* at para. 124.

[61] *Cherry* v. *Borsman* (1992), 94 D.L.R. (4th) 487 (B.C.C.A.); *Tucker* v. *Asleson* (1993), 102 D.L.R. (4th) 518 (B.C.C.A.); Cassels, "Women and Children Last!" *supra* footnote 6; Griffin, "The Value of Women" *supra* footnote 14.

[62] [1995] B.C.J. No. 1478, at para. 108.

[63] *Ibid* at para. 110.

generally is unlikely to close significantly in a three year span.[64] On the other hand, if the gendered earnings proposal was an issue at trial, the court arguably erred in calculating compensation on the basis of female data. Taken seriously, that proposal is aimed at remedying the discriminatory forces that *presently* depress female earnings. It was the very fact that the plaintiff's probable employment prospects entailed low-paying work that called for consideration.

7. *Terracciano* v. *Etheridge*[65]

The plaintiff in *Terracciano* v. *Etheridge*, a female high school student, was rendered paraplegic in a motor vehicle accident caused by the defendant's negligence. At trial, the parties presented starkly contrasting evidence on the issue of loss of future income. The plaintiff urged the court to base its award on the average lifetime earnings of males with more than one year of post-secondary education: $1,155,000. The defendant responded by arguing that the claimant' s pre-accident earning potential more accurately was indicated by the average lifetime income of all females: $350,000.

In discussing the quantification of damages, the trial judge spoke in terms that strongly support the gendered earnings proposal.[66]

> [I]t may be as inappropriately discriminatory to discount an award solely on statistics framed on gender as it would be to discount an award on considerations of race or ethnic origin. I am doubtful of the propriety, today, of this Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behaviour... .[67]

Those comments, however, appear to have been offered in *dicta*. While Saunders J. ultimately did measure relief with reference to the male income

---

[64] Occasionally, however, the gender gap does close quite quickly. For example, there is evidence to suggest that between 1989 and 1993, the earnings of women in full-time, full-year employment rose from 66% to 72.2% of those of men: Statistics Canada *Earnings of Men and Women* (http:\WWW.StatCan.CA\Daily\English\d970127.htm#ART1).

[65] [1997], B.C.J. 1051.

[66] Saunders J. also doubted the value of female income tables based on historical data: [1997], B.C.J. 1051 at para. 80.

> [T]hese statistics perpetuate historical inequality between men and women in average earnings ability, and ... have hidden in them serious discounts for lower and sporadic participation in the labour market which are duplicated by many of the negative contingencies used by economists to massage the numbers downward... .

As previously explained, the problems identified in those comments could be overcome simply by being more attentive to the need to avoid "double discounting" and by enhancing past statistics to reflect the trend toward greater income parity: *supra* footnote 6 and text accompanying footnotes 6-7.

[67] [1997], B.C.J. 1051 at para. 81, citing *Toneguzzo-Norvell* v. *Burnaby Hospital* (discussed above at Section (II(B)(1)). With respect to Saunders J.'s suggestion that awards should not be discounted on the basis of race or ethnic origin, Cassels' analysis indicates that Aboriginal claimants in fact often do receive depressed awards: "(In)Equality and the Law of Tort" *supra* footnote 18 at 190-96.

statistics, she did so, not on the basis of the gendered earnings proposal, but rather (primarily)[68] because such data best reflected the plaintiff's pre-accident earning prospects.[69] At several points in her decision, the trial judge stressed the desirability (when possible) of calculating damages on the basis of a claimant's actual circumstances, rather than on the basis of actuarial estimations. And in that regard, she was guided by the fact that the plaintiff had an established work record before being injured and by the fact that the plaintiff was strongly influenced by her family's positive work ethic. Essentially, then, the claimant's pre-tort earning capacity was approached on a "male" model as a matter of fact, rather than as a matter of justice.

8. *Wheeler Tarpeh-Doe* v. *United States*[70]

Finally, before leaving a survey of the case law, it is instructive to consider *Wheeler Tarpeh-Doe* v. *United States*, a remarkable decision from the District of Columbia. As a result of the defendant's negligence, the plaintiff suffered severe and permanent injuries at birth. The quantification of damages for loss of future income was vexed by the fact that his mother was white and his father was black. The plaintiff argued that he should be awarded a sum representing the average lifetime income of male college graduates: $1,008,434. The defendants, in contrast, argued that relief should be measured in reference to the average earnings of all black men in America. Oberdorfer J. rejected both of those approaches.

> [The] defendant's argument ... cannot be accepted, since [the plaintiff] is half black and half white. Moreover, it would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from lost wages.[71]

At the trial judge's request, the defendants' expert provided statistics reflecting the average earnings of all college graduates in the United States without regard to sex or race. The resulting figure of $573,750 was awarded, no doubt to the plaintiff's dismay.

> The average wages for all persons are lower than average black male wages; thus, the incorporation of women's expected earnings lowers the estimate even further than the defendants' estimate. Nevertheless estimating [the plaintiff's] future earnings based

---

[68] See also *BIZ* v. *Sams* [1997], B.C.J. 793 (*intra* footnote 73).

[69] The decision actually is somewhat equivocal. Saunders J. relied upon a figure (equal to about 6% less than the average lifetime earnings of males with more than one year of post-secondary education) that was calculated by "comparing" average male earnings figures to the projected lifetime earnings of the plaintiff's older sister. It is unclear how much the exercise ultimately was influenced by the male statistics and how much it ultimately was influenced by a prediction of how the plaintiff's life actually would have unfolded if she had not been injured. It seems, however, that the latter factor was determinative. Thus, the trial judge stated that she "consider[ed] the model proposed by the plaintiff to better approximate the realistic, lost life earnings than [did] the model proposed by the defendants": [1997], B.C.J. 1051 at par.a 87.

[70] 771 F. Supp. 427 (D.D.C. 1991).

[71] *Ibid* at 455.

on the average earnings of all persons appears to be the most accurate means available of eliminating any discriminatory factors.[72]

III. *Analysis*

The introductory comments to this paper suggested that while superficially favourable to female tort victims, the gendered earnings proposal contains hidden dangers and, if implemented, ultimately might work to the detriment of women. That suggestion can be explored through three questions:

A. To which female plaintiffs should the gendered earnings proposal apply?

B. Should the rationale of that proposal respond to grounds of discrimination other than sex?

C. Would many women ultimately benefit from the implementation of the proposal?

A. *Which Female Plaintiffs?*

Academic commentary is divided on the question of which female plaintiffs should fall within the scope of the gendered earnings proposal.[73] While Cassels

[72] *Ibid* at 456. The potential for the gendered earnings proposal to similarly work to the detriment of female claimants is examined in greater detail below: Section III(B).

[73] Often, it may seem acceptable to exclude a woman whose income level is equal to that of the average man of similar professional standing. That proposition is illustrated by *BIZ* v. *Sams*: [1997], B.C.J. No. 793. The 28 year old female plaintiff sustained permanently disabling injuries as a result of an automobile accident caused in part by the defendant's negligence. Prior to the accident, she had worked as a financial manager. In quantifying damages for loss of future income, Hunter J. considered actuarial evidence pertaining to both female and male financial managers and preferred the latter: *ibid* at para. 79. In doing so, he relied heavily upon an expert report that indicated that the income gap between men and women is attributable to employment behaviour, rather than to gender *per se*. And in that regard, the evidence suggested that if she had not been injured, the claimant probably would have pursued traditionally "male" employment patterns. For example, although she likely would have had children, she also likely would have arranged for daycare services, rather than disrupt her career by staying at home. Accordingly, while the judge quantified relief with reference to male income tables, he did not do so on the basis of the gendered earnings proposal. Rather, the victim was granted the higher measure because it better reflected her actual, pre-accident earning prospects.

However, even in situations of apparent parity, it may be difficult to state with certainty that a particular plaintiff's level of earnings is not unfairly depressed by discriminatory factors. For example, a female associate at a law firm may have the same annual income as a male colleague who was called to the bar in the same year. Nevertheless, she may feel aggrieved on the basis that although she has had more winning cases and hence is deserving of better pay, she economically is disadvantaged by a perception prevailing among the firm's partners that she is apt to take a lengthy sabbatical for child rearing and hence is not a good candidate for accelerated promotion. Moreover, in other circumstances, a female claimant might legitimately object to being compared to a male of "similar professional standing". Depending upon her situation, it may be possible for her to argue that she would have enjoyed higher standing if her career development had not been inhibited by discriminatory factors.

would formally confine the proposal to infants,[74] the tenor of Gibson's analysis contemplates its application to adults as well.[75] Logic favours the latter approach. If the proposal is appropriate for an infant who, but for her injury, may or may not have experienced the effects of income discrimination when she attained employment age, *a fortiori* it is appropriate for an adult who already has experienced the effects of such discrimination. To the contrary, it might be argued that, unlike an individual who is injured as an adult, an infant who suffers permanent incapacitation is deprived of any opportunity to "succeed" in the market place and to equal or exceed male income levels through employment. However, essentially the same argument may be open to an adult plaintiff. While accepting that she enjoyed a period prior to incapacitation during which she theoretically could have "succeeded" in the market place, she may argue that she practically was precluded from doing so by those very societal forces that depress female earning statistics.

While logical, inclusion of adult claimants raises, or more precisely reveals, difficulties inherent in the gendered earnings proposal. Those difficulties can be illustrated on the facts of *D.* v. *F.*[76] As explained above, the plaintiff was a 19 year old woman who brought an action against her father on the basis of sexual abuse that occurred during her childhood. The trial judge held that the resulting trauma delayed her entry into the work force by three years and calculated damages for loss of future income on the basis of female income statistics applicable to women with one year of post-secondary, non-university education. If he had accepted the gendered income proposal, he presumably[77] would have made reference to male income statistics and consequently would have awarded a greater measure of compensation. Of course, even on that reasoning, the plaintiff would not have enjoyed judicially conferred income equality beyond the three year period to which she was entitled to damages. Once the effect of the gendered earnings proposal was exhausted, she would have returned to her *status quo ante* and thereafter would have been subject to income depressing societal factors.

By considering the gendered earnings proposal in light of *D.* v. *F.*, one can see both its positive and its negative implications. Certainly, the proposal would have benefited the plaintiff financially; she at least would have received the

---

[74] Cassels, "Women and Children Last!" *supra* footnote 6 at 485, 488-91; Cassels, "(In)Equality and the Law of Tort" supra footnote 18 at 182. However, he also suggests that damages for adult female plaintiffs who were in full-time, full-year employment prior to being injured should be "'grossed-up' to eliminate or reduce the gender gap": "Women and Children Last!" at 485, 488-89. Unfortunately, that proposal begs the question as to how the "gross-up" would be quantified. The most obvious means is by reference to male income statistics and by application of the gendered earnings proposal.

[75] Gibson, "Loss of Earning Capacity" supra footnote 26; Gibson, "The Gendered Wage Dilemma" supra footnote 12.

[76] Section II(B)(6).

[77] As discussed below, the gendered earnings proposal may in fact require quantification of damages on some other basis: Section III(B).

equivalent of three years of income equality. However, the fact that she subsequently would have fallen back into a pattern of female earnings reveals some of the argument's limitations. First, it illustrates that under the proposal, a female is better positioned economically if she suffers a long-term or permanent injury. While she is incapacitated, she achieves the proxy of income equality through the medium of damages; once she recovers, she potentially becomes subject to discriminatory societal forces and most likely experiences a substantial decrease in income. There is a real possibility that recognition of that relationship between injury and income could increase the incidence of compensation neurosis and related phenomena.[78] It is not uncommon for tort victims subconsciously to react negatively to the perceived need to exhibit signs of injury; indeed, in some situations, the resulting psychological harm is permanent and far more severe than the initial injury.[79] The fact that damages awarded pursuant to the gendered earnings proposal often would exceed the level of income that a woman could hope to earn through employment could well increase the incidence of such occurrences. If so, financial well-being could be achieved at a cost of psychological well-being.

Perhaps even more significantly, the relationship between injury and income that obtains under the gendered earnings proposal symbolically perpetuates the victimization of females in Canadian society. The struggle of feminism largely has been against a past in which women often were more likely to secure victory by approaching a male-dominated system with cap in hand, than by aggressively pursuing success on their own terms. Consequently, at a time when women increasingly are taking control of their own lives, the gendered earnings proposal paradoxically is regressive in its insistence upon disability. It is bitterly ironic that a proposal ultimately aimed at empowering women through economic parity premises the achievement of equality upon a state of incapacitation.

Application of the gendered earnings proposal to *D.* v. *F.* also illustrates the fact that the compensatory effect of the proposal is not related in any meaningful sense to the injury inflicted by the defendant. To reiterate, the trial judge found as a fact that while the father's sexual abuse delayed his daughter's entry into the work force by three years, it did not detrimentally affect the type of work that she was likely to find. Regardless of the tort, the plaintiff's earning potential was impaired as a result of the combination of her personal history and the societal forces that depress female income levels. To appreciate that point, assume (for the sake of working with convenient figures) that during the period in question,

---

[78] Such phenomena are well-documented and the literature on point is voluminous: see eg D.B. Williams, "Compensationitis —Real or Imaginary" (1977) 127 New L.J. 757; A.D. Bass & M Wright, "An Objective Study of the Whiplash Victim and the Compensation Syndrome" (1975) 6 Manitoba L.J. 333; J. Lloyd & B. Stagoll ,"The Accident Victim Syndrome: 'Compensation Neurosis' or 'Iatrogenesis'" (1979) 13 New Doctor 29.

[79] For a sadly intriguing example of a minor physical injury giving rise to an incapacitating psychological disorder, see *Nader* v. *Urban Transit Authority of New South Wales* (1985) 2 N.S.W.L.R. 501 (C.A.).

a woman of the plaintiff's background would earn $25,000 per year, whereas a man with a similar background would earn $30,000 per year. If damages were calculated on the basis of the gendered earnings proposal, the plaintiff would receive the current value of $90,000. However, the monetary loss actually inflicted by the defendant was only $75,000. He deprived her of the opportunity to be employed for three years at the same rate of pay that she would have enjoyed if he had not committed the tort; he did not create the society which undervalues the work of women.[80] The $15,000 difference between the two measures of relief represents the loss that the plaintiff would have suffered during the three year period as a result of factors that generally operate in the market place. Consequently, that amount pertains not to the father's wrongful conduct, but rather to society's treatment of women.

Several observations flow from the fact that the additional relief provided by the gendered earnings proposal is unrelated to the defendant's conduct. The first is that the proposal essentially is antithetical to the orthodox view of tort law. While it arguably may have occasional reference to notions of distributive justice,[81] tort law clearly is based on a principle of corrective justice. It allows a victim to recover restorative compensation for a particular injury from a party who wrongfully inflicted that injury. More specifically, it formally treats all parties as equals (regardless of their actual backgrounds) and provides reparation only for those hardships suffered by the plaintiff that were created by the defendant's isolated wrong.[82] The gendered earnings proposal obviously sits uneasily within that model. It rejects consistent replication of marketplace values in the computation of damages because such formalism perpetuates substantive inequalities that occur in the marketplace as a result of discriminatory factors. Moreover, because it seeks to liberate the plaintiff from the effects of her *status quo ante*, its aim is progressive, not restorative. Finally, the proposal does not confine the scope of reparation to the effects of an isolated wrong; it seizes upon the tortious infliction of a physical injury as an opportunity to redress wholly distinct, societally created, economic inequities. Simply stated, then, the gist of the gendered earnings proposal is not the correction of a tort, but rather the re-distribution of wealth.

As suggested in the preceding paragraph, recognition of the lack of a causal nexus between the defendant's tort and the plaintiff's compensation also reveals the fact that the gendered earnings proposal would require a tortfeasor individually

---

[80] No doubt, the defendant in *D.* v. *F.* held the types of attitudes that underlie the societal forces that depress female income levels. Given the scale of those social forces, however, his contribution would be *de minimis*. Moreover, as discussed below (text accompanying note 83), in different circumstances, the defendant might be an individual who in no way is responsible for such factors.

[81] For a discussion of distributive justice elements occurring in tort law, see eg P. Benson, "The Basis of Corrective Justice and its Relation to Distributive Justice" (1992) 77 Iowa L. Rev. 515.

[82] See eg E. Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995).

to bear the burden of righting a societally created imbalance. Granted, most Canadians would feel little sympathy if the father in *D.* v. *F.* was subject to an inflated damage award. However, the situation very easily could be different. Rather than being victimized by incestuous abuse, a plaintiff might be injured, for example, in an automobile accident caused by a driver's momentary lapse of attention. Moreover, that driver might be entirely innocent with respect to the forces that depress female income levels; indeed, like the plaintiff, she too might be a woman of limited means.[83] Consequently, given the lottery that is life, there is an obvious danger in holding tortfeasors responsible not only for the injuries that they inflict, but also for injuries that society inflicts. Arguably unfair to any defendant, the gendered earnings proposal could exacerbate the economic hardships to which female defendants already are subject.

Finally, the lack of any meaningful relationship between a defendant's conduct and the additional relief[84] provided by the gendered earnings proposal results in the curious fact that there is no logical reason why a female should have to suffer a tort before being entitled to such compensation. The relief in question responds to income discrimination. Such discrimination is a constant reality that pre-exists any tort: women who will experience physical injury at the hands of a tortfeasor tomorrow already experience income discrimination at the hands of society today. Consequently, if a claim for income equality is to be redressed through civil litigation, there is no obvious, rational reason why it must parasitically be joined to a claim arising in response to a wrongfully created physical injury. The most likely explanation —that the commission of a tort conveniently identifies a party from whom compensation can be sought —is unpersuasive. As suggested above, there is no apparent justification for requiring a defendant, often chosen essentially through the lottery of bad luck,[85] to individually bear the burden of righting society's wrongs.

B. *Other Groups of Plaintiffs?*

While it has enjoyed considerable success re-shaping legal discourse in recent decades, feminism is only the most conspicuous manifestation of a larger movement that seeks to fashion a more egalitarian vision of law. Many arguments commonly advanced on behalf of women apply with equal force to

---

[83] The fact that insurance may spread the burden of liability provides only a partial response to the problem at hand. Not all defendants are (adequately) insured. Furthermore, the loss may not be spread to appropriate parties; depending upon the circumstances, women with unfairly small incomes may, and men with unfairly large incomes may not, fall within the relevant premium-paying pool.

[84] The following comments pertain only to that portion of female damages that arise under the gendered earnings proposal and that would not be awarded on the basis of orthodox principles. For example, returning to the illustration provided above, it would apply with respect to $15,000 of the $90,000 award: text accompanying *supra* footnote 80.

[85] Unlike the tort committed in *D.* v. *F.*, most negligence acts arise largely though bad luck. For example, while all motorists are careless, liability exceptionally occurs only when fate conspires against a driver and such carelessness results in injury.

members of other socially disadvantaged groups. That certainly is true of the gendered earnings proposal, which aims to prevent the replication in damage awards of societal forces that unfairly affect income levels. Such discrimination does not occur exclusively on the basis of sex. Race and ethnic origin clearly are analogous grounds.[86] Moreover, just as women may be socially ghettoized into low-paying employment, so too members of the working class commonly have depressed prospects of financial advancement. Given recurring patterns of governmental allocation of resources and industry, the same may be said of residents of certain geographical areas.[87] The impoverishment of Canadians with physical and mental disabilities is sadly well-entrenched.[88] The list could go on.[89]

---

[86] While the average income among all Canadians employed in 1990 was $17,952 for males and $11,244 for females, the comparable figures for Aboriginal Canadians stood at $12,793 and $8748: Statistics Canada *Profile of Canada's Aboriginal Population* (Ottawa: 1994) at 18, 26-27. Moreover, the employment figures for Canadians over the age of 15 is lower for Aboriginal Canadians than for non-Aboriginal Canadians (43% as compared to 61%): Royal Commission on Aboriginal Peoples *People to People, Nation to Nation: Highlights From the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: 1996) at 137 (hereafter Royal Commission on Aboriginal Peoples *People to People*). For examples of cases in which damage awards for Aboriginal plaintiffs appear to have been depressed on the ground of race, see Cassels, "(In)Equality and the Law of Tort", *supra* footnote 18 at 190-196.

[87] For example, in 1990, 85% of Newfoundland residents over the age of 15 received employment income, at an average of $18,769 per person. In contrast, 92% of Ontario residents received employment income, at an average of $26,216 per person: Statistics Canada *Selected Income Statistics* (Ottawa: 1993) at 12-13. (To some extent, geographical depression of income levels may be offset by geographical depression of costs of living.)

[88] According to the 1991 Health and Activity Limitation Survey, only 48% of disabled Canadians (as compared with 73% of non-disabled Canadians) were employed in either 1990 or 1991. The statistics worsen with the degree of disability: mild (62%), moderate (37%), severe (19%). So too the figures for each group are lower for women than for men: mild (52% to 71%), moderate (34% to 41%), severe (15% to 22%): Statistics Canada *Adults with Disabilities: Their Education and Employment Characteristics* (Ottawa: 1993) xi-xii.

[89] Indeed, adopting a Rawlsian approach to the issue, one could argue that a person should not necessarily be economically disadvantaged by the fact that he or she enjoys less natural ability or talent than do others: J. Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press, 1971). According to Rawls' "difference principle", social and economic inequalities are permissible only to the extent that they work to the benefit of the least advantaged members of society. Thus, the child of wealth and influence should not be permitted to exploit his or her privileged position for personal gain unless in doing so he or she also would improve the condition of the worst situated member of the community (eg by opening a factory and thereby providing jobs to otherwise unemployed individuals). Moreover, just as he believes that social status and material fortune arbitrarily are distributed throughout society, and hence are irrelevant from the perspective of justice, Rawls suggests that individuals do not have any moral claim to ownership of the mental and physical abilities with which they are born. Thus, highly paid athletes no more morally deserved to be born physically gifted than children of privilege morally deserved to be born rich. Consequently, naturally occurring talents and abilities are resources to be exploited by all members of the community: cf R. Nozick, *Anarchy, State, and Utopia* (Blackwell: Oxford, 1974). If Rawls is correct, then the gendered earnings proposal perhaps should be extended to prevent damages from being quantified in a manner that reflects the fact that, regardless of an accident, a plaintiff enjoyed relatively few talents and hence little prospect for financial success.

Arguably, then, the rationale of the gendered earnings proposal should be extended to eliminate all grounds of discrimination from the computation of damages. Ironically, if such an approach was adopted, fewer female plaintiffs would enjoy the benefits of the reform. That is because an instance of detrimental discrimination generally presupposes a corresponding instance of beneficial discrimination; when one person suffers an unfair deprivation, another person enjoys an unfair acquisition.[90] Certainly, that was the view adopted in *Wheeler* v. *Tarpeh- Doe*.[91] The court, it will be recalled, quantified damages for an infant male of mixed race on the basis of income statistics applicable to all college graduates, regardless of race or sex; while the claimant was spared the detrimental consequences of being non-white, he also was denied the beneficial consequences of being non-female. The end result was a compensatory award far below the level of income that the plaintiff probably would have earned if he had not been injured.

The lesson of the preceding paragraph is clear. If female plaintiffs should receive inflated damage awards, male plaintiffs should receive deflated damage awards;[92] but, of course, if that analysis is true with respect to sex, it also must be true with respect to race, ethnicity, class, and physical and mental ability. Consequently, the logical push of the gendered earnings proposal is toward truly non-discriminatory, standardized levels of compensation. Plaintiffs should neither receive smaller damage awards because they fall within grounds of

---

[90] While Gibson argues to the contrary, she does so on the basis that the courts should calculate relief by taking the notion of earning *capacity* seriously: "Loss of Earning Capacity", *supra* footnote 26 at 95-96. However, as previously discussed, that approach seems infeasible: *supra* at text accompanying footnote 39.

[91] Section II(B)(8). See also *Tucker* v. *Asleson* (1993), 102 D.L.R. (4th) 518 at 534 per MacEachern C.J.B.C.

[92] A counter-argument might suggest that the analysis provided in the text is inaccurate to the extent that equalization can be achieved not through simple re-distribution of income, but rather through equalization of opportunity. If employment barriers were levelled, female participation would contribute to the sophistication of the economy. Drawing upon a larger talent pool, the community would develop more advanced forms of production and would have less need for many of the menial forms of labour traditionally performed by women. And as economic sophistication grew, so too would overall societal resources. Consequently, equality of opportunity would facilitate a decrease in the gender gap that would not be accompanied by a decrease in gross male earnings.

While such an argument is sound in economic terms, it is irrelevant to the present discussion. To some degree, the phenomenon described already has occurred; as Canadian societal resources have grown, the gender gap has diminished even though male incomes generally have increased in real terms: Statistics Canada *Selected Income Statistics* (Ottawa: 1993) at 2; cf Statistics Canada *Earnings of Men and Women* (http:\WWW.StatCan.CA\Daily\English\d970127.htm#ART1). Moreover, that trend can be expected to continue into the future. Such observations, however, pertain not to the gendered earnings proposal, but rather to the need to ensure that damages for loss of future income reflect positive contingencies: *supra* at text accompanying footnote 7. For present purposes, the important point is that relief provided under the gendered earnings proposal merely would provide a proxy for non-discriminatory earnings; it would not alter the reality of the market place by positively affecting means of production and hence increasing societal wealth. Consequently, it is illogical under the terms of the proposal to increase female levels of compensation without also decreasing male levels of compensation.

detrimental discrimination (eg because they are female, Aboriginal, working class or physically disabled), nor larger damage awards because they fall within grounds of beneficial discrimination (eg because they are male, white, upper class or able-bodied). A plaintiff should be compensated with reference to the income level of similarly-situated individuals abstracted from all bases of negative or positive discrimination. Of course, depending upon how readily one recognizes discrimination,[93] the abstractions in each case may simply represent the average of *all* Canadians.[94]

Taken to its logical conclusion, then, the gendered earnings proposal has profound practical implications. First, it precludes compensatory restoration of most male plaintiffs because such claimants are apt to benefit from one, if not more, forms of positive discrimination.[95] Certainly, if permanently incapacitated during infancy, the able-bodied son of well-educated, professional parents would receive far less in damages than he likely would have earned but for the defendant's tort. That fact greatly diminishes the likelihood that the gendered earnings proposal will be implemented; the judiciary already has exhibited a marked reluctance to adopt any reform that would detrimentally affect male plaintiffs. In *Tucker* v. *Asleson*, MacEachern C.J.B.C. rejected the use of ungendered income tables for female plaintiffs partially on the basis that such statistics "presumably should be used for all young plaintiffs, and that may be unfair in some cases".[96]

A second result of adopting an expanded version of the gendered earnings proposal is that many female claimants would be adversely affected. Specifically, if a plaintiff's pre-accident, projected future earnings exceeded the truly non-discriminatory average, she would suffer an incompensable loss as a result of the defendant's tort; she would be denied the equivalent of that level of income which, prior to being injured, she was likely to have received. On the other hand,

---

[93] *Supra* footnote 89.

[94] Some grounds of distinction might remain. For example, as Gibson suggests, rejection of sex discrimination in the computation of damage awards does not necessarily require courts to disregard the fact that women tend to live longer and hence may enjoy more income earning years: Gibson, "Loss of Earning Capacity", *supra* footnote 26 at 92-94. Certainly, it is not immediately apparent that the relative longevity of women is attributable to societal forces that unfairly discriminate against men (eg by forcing them into dangerous forms of employment, such as the armed forces). (It *is* questionable, however, whether the additional years that the average female can expect to live are income producing. In most cases, they would be retirement years.) However, it is possible, for example, that discriminatory factors do underlie the fact that the life expectancy of Aboriginal Canadians is seven to eight years shorter than the national average: Royal Commission on Aboriginal Peoples *People to People*, *supra* footnote 86 at 68ff. If so, then the strict logic of the gendered earnings proposal suggests that damage awards for Aboriginals should be inflated and damage awards for non-Aboriginals should be deflated.

[95] A male plaintiff ultimately would benefit from the expanded proposal only if the economic consequences of negative forms of discrimination to which he was subject (eg physical disability) outweighed the economic consequences of the positive forms of discrimination to which he was subject (eg gender). It seems likely, however, that most males would be adversely affected under an expanded version of the gendered earnings proposal: see eg *Wheeler Tarpeh-Doe* v. *United States*, discussed above at Section II(B)(8).

[96] *Tucker* v. *Asleson* (1993), 102 D.L.R. (4th) 518 at 534.

it might be argued that while the expanded version of the proposal would benefit fewer female plaintiffs, it would provide relatively more benefits to the claimants to whom it did apply. That potential exists because, for example, a physically disabled, Aboriginal woman living in an economically depressed region of the country could avoid not only the income gender gap, but also the effects of other forms of discrimination. Arguably, however, an inverse relationship obtains between a claimant's degree of pre-accident discrimination and her prospect of actually securing damages calculated with reference to the non-discriminatory statistics. That possibility is discussed in the next section.

C. *Would Female Plaintiffs Ultimately Benefit?*

Even if the gendered earnings proposal was implemented in a form potentially favourable to many female plaintiffs, there are reasons to doubt that it ultimately would deliver on its promise.

1. *Likelihood of Non-Discriminatory Awards*

To begin with, few potential beneficiaries in fact would receive damages measured with reference to non-discriminatory income tables. The tort system is notoriously under-inclusive; only a small percentage of wrongfully injured individuals commence actions,[97] let alone secure court awarded relief.[98]

---

[97] For a discussion of the obstacles that a tort victim must overcome before commencing an action, see W.L.F. Felstiner, R.L. Abel & A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1981) 15 Law & Society Rev. 631; P. Cane, *Atiyah's Accidents, Compensation and the Law,* 4th ed (London: Weidenfeld & Nicolson, 1987) at 201-203 (hereafter Cane, *Atiyah's Accidents*).

Adopting Carol Gilligan's analysis, it is interesting to speculate from the perspective of cultural feminism that women may litigate less frequently than men because they hold to an "ethic of care" rather than to a "logic of justice": *In a Different Voice* (Cambridge, Mass: Harvard University Press, 1982). That is to say, because females tend to be, among other things, less adversarial and more conciliatory, they may be less inclined to commence legal proceedings. Of course, Gilligan's theory has been disputed not only by other psychologists, but by other feminists as well: see eg D. Nails, "Social Scientific Sexism: Gilligan's Mismeasure of Man" (1983) 50 Social Research 643; M.T. Mednick, "On the Politics of Psychological Constructs" (1989) 44 American Psychologist 1118; C. MacKinnon, "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buffalo L. Rev. 11; C. Greeno & E.E. Maccoby, "How Different is the 'Different Voice'?" (1986) 11 Signs 310.

[98] See eg D.W. Harris et al., *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984) at 92-123; Cane, *Atiyah's Accidents ibid* at 15-27, 196-209. It further should be noted that out-of-court settlements would not accurately reflect non-discriminatory statistics, even if the gendered earnings proposal was adopted. To off-set the prospect of failure at trial, a claimant would be required to accept something less than full compensation. Consequently, the relief obtained by a female plaintiff who sought non-discriminatory damages might, for example, be equal to the amount that she would have earned in a discriminatory market place if she had not been injured. Of course, that would constitute an improvement over the current situation, in which female plaintiffs settling out of court accept something less than even the amount that they would have received through employment.

Moreover, following Marc Galanter's influential analysis as to why "haves" tend to come out ahead, even in the context of rules designed to empower "have nots",[99] it seems likely that those female victims who are most apt to suffer the effects of income discrimination would be least apt to receive the benefits of the gendered earnings proposal.

According to Galanter, success in litigation is determined largely on the basis of whether a party is a "repeat player" or a "one-shotter"; the former tends to win and the latter tends to lose. The typical tort action is illustrative. Because the defendant usually is an insurance company, and therefore constantly is engaged in the litigation process, it is apt to be a "repeat player". In contrast, because the plaintiff is unlikely to suffer a large number of tortiously inflicted injuries during her lifetime, and therefore is unlikely to have more than occasional recourse to the court system, she is apt to be a "one-shotter". Those differences result in a pattern of advantages and disadvantages. While it is not possible in this paper to repeat Galanter's analysis in detail, his thesis easily is illustrated on the basis of a few examples.

Repeat players enjoy economies of scale and hence low start up costs. In the present context, for example, an insurance company may have ready and inexpensive access to actuarial experts and statistical data regarding income expectancies. In contrast, unless represented by counsel specializing in personal injury litigation, a one-shotter will be required to develop an evidentiary basis for her claim from scratch. So, too, a repeat player is apt to enjoy greater bargaining credibility as a result of its status. Because it must maximize outcomes over time, it necessarily develops a reputation for potential intransigence; it cannot afford to be perceived as an invariably soft touch. In contrast, because the one-shotter is concerned only with her suit, she may find it more difficult convincingly to adopt a hard line. Because the receipt of *some* measure of relief may have an enormous impact on her quality of life, she is required to be pragmatically flexible.

The pattern of advantages and disadvantages existing between defendant/repeat players and plaintiff/one-shotters is heightened to the extent that the former are "haves" and the latter are "have nots". Of course, if a defendant is an insurance company, it is almost certain to be a "have". And because of its wealth, it is able, among other things, to: (i) maintain a staff of well-trained, specialized lawyers, (ii) engage in expensive litigation tactics, and (iii) aggressively bargain in the confident knowledge that failure at trial will not be financially catastrophic. Plaintiffs, in contrast, may or may not be "have nots". If a claimant is a "have", she may be able somewhat to offset the disadvantage of being a one-shotter by retaining experienced counsel[100] and by resisting

---

[99] M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Society Rev. 95 (hereafter Galanter "Why the 'Haves' Come Out Ahead").

[100] A one-shotter cannot, through the retention of experienced counsel, eliminate all of the advantages enjoyed by a repeat player. For example, while a repeat player tactically can sacrifice one action in order to secure victory in others, a plaintiff-oriented lawyer cannot sacrifice the interests of one one-shotter to further the interests of others.

economic pressures to either settle or abandon a claim prior to trial. Of course, if a female claimant is a "have" and hence more likely to succeed in her action, she also is less apt to be a (potential) victim of income discrimination and hence less in need of the gendered earnings proposal. Conversely, if she is a "have not" and hence less likely to succeed in her action, she also is more apt to be a (potential) victim of income discrimination and hence more in need of the gendered earnings proposal. In other words, the dynamics of the litigation process tend to preclude full application of the gendered earnings proposal for those who most are in need of its reformative effects. If a woman has suffered income discrimination, and consequently is of limited means, she may find it difficult to hire competent counsel, secure persuasive expert opinions or resist the temptation to settle her claim prior to trial for less than its true value.

2. *Inhibition of More Meaningful Reform*

Perhaps more significantly, the gendered earnings proposal might work to the ultimate detriment of women by purchasing a small and haphazard measure of economic equality at the cost of other, more meaningful changes.[101] The danger is twofold. First, the market place of legal reform is much like any other market place. Change (especially legislated change) comes at a price and actors typically have limited resources in terms of moral suasion and institutional goodwill. Considered in those terms, the gendered earnings proposal seems dear. Particularly if implemented in a form that adversely affected male plaintiffs, it likely would bear a significant political cost and consequently might diminish the prospect of further reforms.[102] As evidenced in recent years, an advance secured by the feminist movement often is followed by a backlash against the perception of political correctness.[103] The more radical the advance, the more vociferous the backlash. And while the prospect of such reactions certainly is no reason to give up the general cause, it does call for tactical sophistication. In an increasingly pluralistic system, all actors must accept the need to both give and take. It is necessary to recognize that fact and occasionally to bypass some avenues of potential change in the hope of securing other, more effective reforms. Given its inherent limitations (as described above), the gendered earnings proposal perhaps is one opportunity that ought to be forgone.

More insidiously, implementation of the gendered earnings proposal might work to the ultimate detriment of women by creating a false perception that would further mask social inequities. In the abstract, the gendered earnings

[101] For a discussion of the various means by which female plaintiffs are undervalued in the assessment of damages, see Cassels, "Women and Children Last!", *supra* footnote 6.

[102] The argument certainly can be overstated. Indeed, it might be suggested to the contrary that implementation of the gendered earnings proposal would create an atmosphere of change and would prompt other reforms.

[103] Of course, implementation of the gendered earnings proposal would meet doctrinal, as well as political, resistance. As previously discussed, the proposal is difficult to reconcile with the philosophical basis of tort law: *supra* at text accompanying footnotes 81-82.

proposal makes a dramatic statement about the replication in damage awards of the unequal distribution of wealth throughout Canadian society. However, for a variety of cited reasons, it might have relatively little impact in practice. The danger, then, is that the perception of equality could inhibit the prospect of real change; concerns could be assuaged, and energy for meaningful reform diffused, by the appearance — but not reality — of victory.[104] Groups hostile to the feminist movement might point to the adoption of the proposal as proof positive that equality has been achieved in the area of damage assessment and hence that further reform is unnecessary. Moreover, even if generally sympathetic to the feminist movement, members of the legislature and judiciary might observe the implementation of the gendered earnings proposal and honestly (though mistakenly) conclude that the battle effectively is over and that the time for change has passed.

Conclusion

It has not been the aim of this paper to argue against the implementation of the gendered earnings proposal. The tone of discussion has been cautious only because the academic literature on point arguably is overly optimistic. From a feminist perspective, the gendered earnings proposal clearly has its attractions: it would effect some re-distribution of societal wealth from males to females and it would constitute a dramatic, symbolic statement regarding the type of justice to which tort law aspires. However, as this paper has attempted to illustrate, it also contains dangers that previously have been overlooked or underdeveloped and that ultimately might work to the detriment of women. To reiterate, the gendered earnings proposal:

> (1) would perpetuate the victimization of women in so far as it actually and symbolically premises the promise of income equality upon incapacitation,
> (2) is unrelated in any meaningful sense to the injury actually inflicted upon a plaintiff by a defendant, and therefore
> (a) is inconsistent with the orthodox view that tort law is premised upon a notion of corrective justice, and hence could be implemented only at considerable doctrinal cost,
> (b) would prove unjust to defendants, including female defendants, and
> (c) raises the logical anomaly that such relief should be available regardless of the commission of a tort,
> (3) logically suggests the elimination of other bases of discrimination from the computation of damage awards, and therefore should require

[104] Galanter has suggested that repeat players, by virtue of their expertise and experience, are able to discern which rules are "likely to penetrate the legal system and which are likely to remain merely symbolic commitments";"[t]hey can trade off symbolic defeats for tangible gains": "Why the 'Haves' Come Out Ahead", *supra* footnote 100 at 103. Conceivably, insurance companies might recognize the limited practical consequences of the gendered earnings proposal and consequently concede the point in hope of forestalling more meaningful, and more costly, changes.

(a) not only enhancement of discriminatorily depressed income statistics, but also the depression of discriminatorily enhanced income statistics, and therefore should require

(i) a decrease in the measure of relief available to most males, and

(ii) a decrease in the measure of relief available to some females,

(4) is unlikely, because of the dynamics of civil litigation, to practically be available to female claimants most in need of its reformative effect, and (5) may, because of the political realities of social reform, inhibit the implementation of more meaningful changes to the manner in which the legal system responds to wrongfully inflicted injuries.

Given the Supreme Court of Canada's equivocal response to the gendered earnings proposal in *Toneguzzo-Norvell* v. *Burnaby Hospital*,[105] it can be expected that female plaintiffs will continue to argue that the quantification of damages should be based on male income tables. In evaluating that argument, the courts must look beyond the gendered earning proposal's symbolic attraction and consider its practical limitations.

[105] Discussed *supra* at Section II(B)(1).