Potential Value:
A Challenge to the Quantification of Damages for Loss of Earning Capacity for Female and Aboriginal Plaintiffs

by

CORINNE LOUISE GHITTER
B.A. (Honours), Queen's University, 1990
LL.B., The University of Calgary, 1994

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ABSTRACT

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This thesis questions why young female and aboriginal plaintiffs consistently receive lower damage awards for loss of future earning capacity than young white male plaintiffs. I argue that due to the social construction of law, and specifically tort law, the dividing line between public and private law should be challenged. The effect of tort is partially "public" in nature due to the broad impact tort has on valuing the potential of individual plaintiffs. When damages for female and aboriginal plaintiffs are assessed on a reduced scale due to gender and race, a message is sent that the potential of these plaintiffs, and the potential of the groups to which they belong, is somehow less. Due to the "public" impacts of damages quantification, principles of equality derived from the Canadian Charter of Rights and Freedoms should be considered in the quantification process.

I argue further, that the current practice of damages quantification has been the result of the court's over-reliance on "formalist" notions of tort law which has insulated the area from the social context of law. In addition, I suggest that the acceptance by courts of economic evidence, which is often reflective of discriminatory norms in the labour market and our society generally, has had the effect of de-valuing certain members of Canadian society; in particular women and aboriginal plaintiffs. I demonstrate this analysis through an examination of cases dealing with young, catastrophically injured, female and aboriginal plaintiffs. Finally, I suggest that, though an imperfect solution, currently the only equitable method of quantifying damages for loss of future earning capacity is to adopt white male earning tables for all young plaintiffs with no demonstrated earning history.
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1.1 Introduction

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 the understandable wishes that society, on 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.\(^1\)

This statement from the dissent of Chief Justice MacEachern in *Tucker v. Aselson* very clearly articulates the problem faced by women, poor people and aboriginal people when they go to the court seeking redress for personal injuries.

In the majority of personal injury trials in Canada one of the main heads of damages the courts must assess is loss of future earning capacity. If the plaintiff is so severely injured that she will never again be able to work or her capacity to work will be limited, the court has the task of quantifying that loss. For women, aboriginal men and economically disadvantaged Canadians who have been injured, chances are they will receive a significantly smaller damage award for loss of their earning capacity than will the white male plaintiff.

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The purpose of this thesis is to investigate how courts arrive at damage awards for loss of future earning capacity and to attempt to determine why these awards are routinely low for female and aboriginal plaintiffs.²

I have chosen the words "Potential Value" as part of my title because both the concept of "potential", and the concept of "value" are vital to this thesis. First, in discussing "value" in the context of damages for loss of earning capacity, I mean the value of an individual's potential. What could an individual plaintiff accomplish or achieve if they were free to seek their goals free from the impact of social inequity? This is a key point. In my view, when a court is assigned the task of quantifying damages for loss of future earnings of a young plaintiff, with no relevant earning history, the court should resist placing limits on the potential of that young person. To do otherwise, as I argue throughout, is to ignore the principle of equality which should inform the operation of tort law.

The other reason for the selection of the phrase "Potential Value" is that, in my view, there is potential value in the reform of damages quantification. While I understand the limits of law to effect social change, I argue that reform in the way these damages are assessed does have the potential to make private law, and tort in particular, more equitable. In looking for ways more equitable methods for quantifying damages I am

²Throughout this thesis I will be referring to "women and aboriginal people", to avoid any confusion on the point I mean to include aboriginal women in both of these categories. The particular situation of aboriginal women in this context will be discussed in more detail in Chapter 4.
seeking realistic short term solutions that will work within the current tort framework. As a result my proposals for change, the adoption of white male earning tables for female and aboriginal plaintiffs, are strategic in nature and do not preclude more radical long term reform.

1.2 Torts and Social Justice

The questions raised in this thesis are of interest to me because I view the law’s treatment of women and aboriginal people as problematic, and in many circumstances oppressive. My general interest is in the role that law plays in either promoting or undermining social justice. I recognize that there are some contradictions in my interest in social justice and my decision to focus on a seemingly narrow question of tort law. Social justice issues in the law are more routinely associated with the criminal justice system, the Charter of Rights and Freedoms or Canada’s human rights framework, but in my view they also come into play in tort law. All aspects of law, both public and private, can operate to oppress and perpetuate sexist and racist norms and thus all aspects of law must be challenged.

In the last 15-20 years some progressive legal scholars have viewed law in general as very limited in its capacity to assist in social change. Some of this perspective is derived from the work of critical legal scholars who question the myth of law and in particular the myth of rights discourse. Sherene Razack, citing the work of Duncan
Kennedy and David Kairys, describes this critique of the law in the following terms:

CLSers attacked the myths of law with vigour. Emphatic that the trouble with the legal system went beyond its failure to enforce rights guaranteed in the law, they condemned rights discourse itself as “inconsistent, vacuous and circular” Law was not the objective application of the letter of the law to the facts but a “wide and conflicting variety of stylized rationalizations from which the courts pick and choose.

In presenting itself as neutral arbiter, as both natural and necessary, law embodied Gramsci’s concept of hegemony, where both the dominant and dominated believed in law’s role and value.

The inescapable conclusion after unmasking, was that legal reform was pointless, unless it could somehow address the myths of law itself.3

While I do not wish to delve into the nuances of Critical Legal Theory I do wish to point out that I understand the limitations of law as a tool for social change. It is the old problem of using the master’s tools to dismantle the masters house. Yet, I still feel the law is a valid site of struggle. The law impacts on women and other groups in profound ways and operates to take rights and benefits away from people.4 If law has the power to oppress and de-value, then in my view it also has the ability to combat oppression.

Challenging the oppressive aspects of law is thus an important way of fostering change.5

4Ibid, at 48-49.
5See for example: Judy Fudge, “What Do We Mean by Law and Social Transformation?” (1990), 5 Canadian Journal of Women and the Law 47.
My work in this thesis is narrow in the sense that I am dealing with one aspect within the broad context of tort law. As I will argue however, the context is an important one because of what it says about the value of individuals and groups in our society. Quantification of damages and in particular damages for loss of earning capacity has had the effect of telling women and aboriginal people that their lives are worth less than that of other Canadians and this message sent by the law of tort can not remain unchallenged. So, while the limitations of the law for fostering social change are in my mind as I write, I believe that as a site of struggle, law, and in this case tort law damages, is valid.

1.3 The Scope of Argument

I want to make clear from the outset that the focus throughout my thesis is on damages awarded to young plaintiffs with no relevant earning history. I feel I must simplify my parameters in this way in order to clearly frame my argument. As I address briefly in Chapter five, these issues do become more complex when plaintiff's have a significant earning history on which the court can rely. While I am not avoiding the complications which arise with these types of plaintiffs, for the purposes of clarity of argument I have limited my discussion to young plaintiffs with no relevant earning history.

Much has been written by Canadian commentators, and others, on the inequitable
way in which damages for loss of earning capacity are awarded to women. In addition some commentators have begun the task of bringing race and class into the discussion of these damages. In particular commentators such as Jamie Cassels, while critiquing these types of damage awards for women has also begun to question the way these awards operate for aboriginal plaintiffs. My objective in this thesis is to synthesize some of this excellent work and add my voice to the chorus challenging the way these damages are awarded.

My contribution to the discussion is to look at tort in a social context and argue that because of the effects of tort law it contains elements of “public” law. I argue that these public elements, specifically the perpetuation of social inequity, create space for the application of traditionally public law values, such as equality, to make their way into tort law. In addition, my discussion below updates the case law in this arena and attempts to further expand on the discussion of race, class and gender.


8 Ibid, “Inequality and the Law of Tort”.
A review of the cases in this area reveals that the courts are making some attempt to deal with the inequities in the way that damages for loss of earning capacity are awarded. Interestingly, even in recognizing these inequities, the courts are primarily, with some notable exceptions, continuing on the same course of awarding lower damages to women and aboriginal plaintiffs.

In order to address some of the reasons that courts may be resistant to changing the way that these damages are quantified, and to highlight why I believe this is an important area of reform, I will address the operation of tort law on several fronts. First I will assert that law is both socially constructed and plays a role in constructing society. In other words, inequities present in society find their way into tort law. Further, I assert that law influences society. When damages are assessed at lower levels for women and aboriginal plaintiffs, existing social inequities are reproduced and perpetuated. This, in turn, sends a clear message that the potential of women and aboriginal plaintiffs is less valuable. Reform of the manner in which tort damages are assessed could alter that message and cease the reproduction and perpetuation of inequities.

I find further support for this position in the traditional distinction between public and private law. In my view the divide between these two arenas is artificial because both are socially constructed and both play a role in perpetuating inequities in our society. As a result, I will argue, that it is necessary to apply principles of equality to the arena of private law just as we have applied it to public law.
Having set the basis for why I believe reform is justified in the tort arena, I will then move on to discuss two main factors which have constrained the courts from reforming the way in which damages for loss of earning capacity are quantified. First I will review the “formalist” approach to tort law as represented by the work of Ernest Weinrib. This approach to tort law focusses exclusively on the bipolar relationship between the plaintiff and the defendant and generally disregards any social context in the operation of tort law. Second I will critique the economic evidence which is traditionally relied on in personal injury cases. In my view this evidence is unreliable because it too is socially constructed and derives from an inequitable labour market.

Embarking on this argument I am well aware of the criticisms I may face. It could be argued that tort, being a private law arena, is not set up do deal with social inequity, and more specifically, does not have the tools to do so. In my view this argument avoids the fundamental point that tort, and private law, already deal with social inequity. Tort makes judgments regarding who will have a cause of action, what type of duties will be imposed and who will be held responsible for harms. All of these judgments are derived from the operation of society and reflect social inequities. An important point here is that tort has shown it has the flexibility to adapt to social conditions and can, in fact, assist in recognizing social wrongs. A prime example is the recent decision in *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*.

*Metropolitan Toronto (Municipality) Commissioners of Police*. Here, the court

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essentially created a new duty on the Toronto Police Department, reflecting that their previous practice had a discriminatory impact on women.\textsuperscript{10} I point this out merely to highlight the fact that tort is flexible enough to deal with social inequities; to argue that tort does not have these tools, in my view, ignores what tort already does.

Another criticism, which will be discussed more fully in the body of my thesis, is the notion that tort damages are meant to put a plaintiff back to the position they would have been in had the injury not occurred. Therefore, if the earning capacity of the plaintiff was limited by social constraints prior to the accident, the plaintiff’s damages should not be quantified as if those social constraints did not exist. This is particularly so because defendants should not have to pay damages rectifying social conditions they did not create.

In response to this approach I argue first that, as indicated above, damages should be quantified based on a plaintiff’s potential. Allowing damages to be limited by social inequality is not an assessment of potential and, when a young person with no earning history is catastrophically injured, it is their potential, free from the impact of an inequitable labour market, that should be assessed. Second, and perhaps most importantly, principles of equality should inform the quantification of damages. In my

\textsuperscript{10}Ibid. This case involved a woman who had been raped by a serial rapist. The police were aware the rapist was operating in the plaintiff’s neighbourhood and knew that the plaintiff, and other women, were at particular risk because they lived in apartments with balconies. Despite this knowledge the police decided not to warn the women because they feared the women would become hysterical and their investigation would be compromised. The Court here found that the police failed in their duty to the plaintiff and to the other women in the neighbourhood.
view it is simply inequitable to award damages based on the race, class or gender of a plaintiff.

As to the argument that it is wrong to place the burden of paying for social injustice on the individual defendant, I argue that we do not have the same concern when a plaintiff is a white male and damages are assessed at a higher level. Thus, in the interest of equality, a concern for the burden of high damages should not inform the quantification of damages for women and aboriginal plaintiffs. I also assert, that it is improper to require an injured plaintiff to bear both the burden of their injury and the inequities of discriminatory damages quantification.

1.4 Chapter Outline

Chapter two of my thesis will set out the theoretical framework which will inform the discussion of case law to follow. This chapter will elaborate on my argument regarding the social construction of law and the arbitrary distinction between public and private law. In this context the messages sent by tort about the value of human potential will be discussed. Finally, Chapter two will include a brief discussion of equality principles before moving into a critique of the “formalist” approach to tort law and the nature of the economic evidence relied on in personal injury cases.

In Chapter three I will review cases dealing with young non-aboriginal female
plaintiffs and I will critically discuss how the damages for loss of earning capacity are awarded in those cases. Although there has been a lot of comment on cases dealing with female plaintiffs, these cases, and the commentary about them, demonstrate how female plaintiffs have been dealt with in contrast to white male plaintiffs. These cases also provide a useful backdrop for analysing cases dealing with aboriginal plaintiffs.

In Chapter four I will discuss personal injury cases where young aboriginal men and women are the plaintiffs. Through these cases I will argue that our tort system assesses damages for these plaintiffs based on discriminatory norms and problematic evidence. In particular I will draw attention to any particular considerations that arise when a young aboriginal woman is the plaintiff in a personal injury action.

Finally, I will conclude with a discussion of alternative methods courts may consider in quantifying damages. For this purpose I will draw on the work of scholars who have considered these questions and I will also take a brief look at how some alternate systems have evolved in other commonwealth jurisdictions. I will assert that equality principles can be successfully employed in the quantification of damages for loss of earning capacity. More precisely I will strategically argue that the best short term solution for dealing with inequities in the quantification of damages is to adopt white male earning tables for all young plaintiffs with no relevant earning history.
CHAPTER TWO

2.1 Introduction

In this chapter I set out the theoretical framework which informs my case analysis in subsequent chapters. I will argue in this chapter that because of the interactive relationship between law and society, the traditional divide between public law and private law is arbitrary. I will use the example of the impact tort, and the assessment of tort damages, has on valuing potential to demonstrate this point: in essence law has constructed the female and aboriginal plaintiff as less valuable. In order to contest this construction I will argue that principles of equality must inform this quantification process.

On that foundation I will then demonstrate two specific ways in which judges in tort cases have been constrained from recognizing inequities in the way damages are quantified; first by discussing the formalist approach to tort law and second, by exploring the nature of the evidence relied on by courts in quantifying damages for loss of earning capacity. This latter point will then lead into the discussion of case law in Chapters 3 and 4.

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2.2 The Social Construction of Law

The process of the production of modern legal systems is part of an ongoing production of social life. A country’s jurisprudence is a specific representation of a socially constructed order of things - a construction that is not the prerogative of ruling classes of men, but which is struggled for, negotiated, compromised and redirected every step of the way. ²

This statement by Valerie Kerruish articulates the idea that law reflects the social order and suggests the potential in law to reconstruct the social order. Law both reflects on and is impacted by, existing inequities in our world.³ In other words, law is drawn from societal norms and then in turn influences what those norms will be. For me, this means that law is fully integrated in our society. Law is part of a circle whereby it responds to what is “going on” in society and then in turn influences the social order. Both of these ideas are important for the purposes of my argument.

First, I assert that because tort law is socially constructed it can be seen to reproduce social inequality. An elaboration of this reproduction of inequity will be seen in my discussion of case law in Chapters three and four. There, it is clear that young female and aboriginal plaintiffs are awarded lower damages than young white men, in


³Margo Stubbs touches on this when she argues that law must be understood as not autonomous from society but as a form of practice through which existing sex and economic relations are reproduced. See: Margot Stubbs, “Feminism and Legal Postivism” (1986), 3 Aust. J. of Law and Society 63, also reproduced in part in D.Kelly Weisberg ed., Feminist Legal Theory - Foundations (Philadelphia: Temple University Press, 1993) at 454.
part, because the norms of society (reflected in economic data) have dictated this is appropriate.

Perhaps more important to my argument is the other half of the circle which suggests that law impacts on the construction of society. John Brigham articulated this idea well in saying:

Ideas about law give meaning to social relations, and as law "in action" they must be understood as significant parts of the legal order. To attend to this aspect of law is to illuminate a part of law's social reality. Law that forms social life is real in the most elemental sense; its reality is evident in life's choices. More specifically, to look at law in this form is to see law informing social action in a new way. Such ideas and the relations they create are law in society.4

As will be articulated below, I am arguing that the distinction between public law and private law is arbitrary. This is, in part, because of the effect that law, both public and private law, has on society. Specifically, because tort law and the quantification of damages actively play a role in social relations, it is important to ensure these areas of the law operates in accordance with equitable principles.

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2.3 Equality Principles

Throughout this chapter, and this thesis in general, I will be referring to "equality principles". It is not my intention to embark on a lengthy discussion of the debates around equality as that is beyond the scope of my project. However, it is necessary for me to clarify what it is I mean when I am talking about the application of equality principles to private law, tort law and the damages quantification process.

In essence when I talk about equality I am drawing from the conception of equality articulated in s. 15 of the *Charter of Rights and Freedoms*. Section 15 of the *Charter* guarantees that every individual is equal before and under the law and has the right to equal protection and benefit of the law, without discrimination based on characteristics such as sex, race, and age. The Supreme Court of Canada has elaborated the meaning of these terms over the years through a variety of landmark cases. The basic principle I wish to draw on, is that the application of the law should not, due to irrelevant personal difference, have a more burdensome or less beneficial impact on one person

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6 *Ibid*, s.15(1).

over another.  

While there are many nuances in applying the principle, this simple expression of equality is sufficient for my purposes. I only wish to argue that the way courts quantify damages for loss of earning capacity should not have a burdensome or less beneficial impact on women and aboriginal plaintiffs than it does on other members of society. The compensation of women and aboriginal plaintiffs at a reduced level, compared to white male plaintiffs, infringes this principle and must be considered illegitimate.

2.4 The Distinction between Public and Private Law

In referring to a public/private divide, scholars are often discussing the division between what has traditionally been deemed the “public” sphere of business, government and work, as opposed to the “private” sphere of family life and individual relations. However, in this thesis when I refer to the divide between the public and private, I am referring to the distinction between public law and private law. Broadly speaking, this is the division in law between those causes of action involving the public, such as the criminal law or when the government is a party, and private causes of action between two non-governmental, ‘private’ actors.

This divide has also reflected the idea that areas of public law deal with the public

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interest. Criminal law or *Charter* litigation are generally thought to be areas where society in general has an interest in the outcome because society is impacted by the result. This rationale has, in part, justified the application of equality principles, derived from the *Charter*, to the public law arena. On the other hand, private law has been seen as only impacting the individuals bringing their cause of action before the court. This supposed lack of societal interest has, in my view, allowed the private law arena to largely avoid any application of equality principles. Tort, of course, has traditionally fallen within the realm of private law.

I argue that the distinction between public and private law is arbitrary because the private law, no less than public law, is derived from and constructed by society. In addition, private law reproduces and perpetuates inequities in a very real way. For example, as this thesis will demonstrate, women and aboriginal people seeking redress in a tort action cannot currently expect to receive damages for loss of earning capacity at the same level as a white male. This is largely because of assumptions about the earning potential of women and aboriginal people which are derived from historical patterns. The law has come to reflect those assumptions in the way damages are quantified. As such, I argue that a “bright line” divide between public and private law should be blurred and the principles of equality should have a role in the application of tort and private law.

The notion that private law should be informed by *Charter* ideals is not novel, nor
without precedent. The Supreme Court of Canada in *RWDSU v. Dolphin Delivery*\(^9\) found that the common law must be interpreted in a manner that is consistent with the *Charter*.

Addressing the effect of this statement, one commentator has noted:

> This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values... Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*... Therefore, in the context of civil litigation involving only private parties, the *Charter* will “apply” to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.\(^10\)

I am arguing here that the issue of how damages are awarded to women and aboriginal plaintiffs is an equality issue, involving public, *Charter* values, in a traditionally private law context. I want to suggest that bringing equality principles to bear in private law mandates a rejection of earning tables used in the quantification of damages which are specific to gender, race or class.

The work of Jamie Cassels has further problematized the distinction between


public and private law.\textsuperscript{11} Cassels takes the view that the development of private law has been motivated largely with a view to the protection of property emphasizing the value of individual autonomy. For Cassels the common law tends to reflect the norms of the capitalist marketplace and, as a result, it reflects and perpetuates social inequality present in the market. In identifying some of the problems of incorporating equality theory into private law analysis, Cassels argues that there is still room for “equality-promoting initiatives in private law”.\textsuperscript{12} This is where Cassels argues that the distinction between private and public law should be challenged. He states:

\begin{quote}
Deriving from classical liberal political theory, [law] assumes a sharp distinction between public and private, the state and civil society. On this view, private law is somehow pre-political. It defines an area of unfettered interplay between individuals, free from state interference. This is of course, somewhat misleading. Private law, no less than public law, is based on certain collective choices about how society is to be organized. Its norms are articulated by legislatures and courts, and are enforced by public agencies. We ought not, therefore, deny responsibility for ensuring that this body of the law promotes social justice.\textsuperscript{13}
\end{quote}

The public law, private law distinction becomes grey and unworkable because the impacts of tort are public; the effect of decisions is not limited to those whose names appear on a statement of claim.


\textsuperscript{12} Ibid, at 161.

\textsuperscript{13} Ibid, at 162.
2.5 The Value of Potential

One of the key "public" impacts of tort and the quantification of damages is the message damages assessment sends regarding the value of a plaintiff's potential. When the court assesses the earning capacity of a young plaintiff, with no earning history, they are making a judgment about the potential of that individual. When the tools used to determine that potential are specific to the plaintiff's race or gender, a message is sent to society about the potential of that gender or that particular race. For example, if a young female plaintiff's damages are determined by a reliance on her gender then a message is sent first to her about the value of her own potential and second about the value of women's potential generally.

Jane Larson explores this issue and points out that tort chooses which aspects of human existence to protect and which ones to value. For Larson, tort articulates a view of moral personhood. She says:

The protections of tort exist to provide bodily security and to ensure the social bases of self-respect. They are guarantors not only of social peace and cooperation, but also of moral personhood. Conventionally seen as a vehicle for expressing the negative side of experience (the experience of doing wrong or being injured), tort also can serve as a language for defining those personal and social interests that make up a humane and good life, and as a means to extend that life to persons previously excluded.
from the full measure of social respect.  

In Larson’s view, tort identifies the elements of a humane and good life. In other words, tort values those aspects of life that allow for a full and fulfilled existence. This valuation process is done in both selection of causes of action and is fundamental to tort’s role in society.

Martha Chamallas has extensively explored the way in which tort can operate to de-value groups of people. Chamallas, working in an American context, has done considerable work on damages awarded to women and people of colour. This research has revealed to her a “deep bias” in tort law which is based on an implicit hierarchy of values. Women and people of colour rank lower in the hierarchy and thus receive lower damages. In particular, with regard to damages for loss of earning capacity, Chamallas recognizes how lower damages for particular groups of people in this area reflects where these groups fall within the hierarchy. She says:

Loss of future earning capacity is a “big ticket” item of damages, which can make the difference between a modest and a sizable award. Because it is the measure of human potential, moreover, the price the law attaches to lost earning capacity tells us something about societal judgments concerning worth, specifically the worth of the individual plaintiff and the groups to which the individual belongs. It is an important way by which the law measures

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“promise” particularly the promise of our children.\textsuperscript{16}

When these damages are lower for certain groups of people it implies an acceptance that these people are lower in our social hierarchy and therefore the value of their potential is less. This is a message with broad implications that can resonate throughout society.

The cases in this area demonstrate that the judiciary has not completely ignored the issue of inequitable damages quantification and has, to some extent, recognized that damages for loss of future earning capacity are routinely lower for female and aboriginal plaintiffs.\textsuperscript{17} Interestingly, despite this recognition judges have, with a few exceptions, shied away from any rectification of the situation. It is almost as if the courts have seen the inequitable result and yet, within the confines of private law and civil evidence, they have not been able to address the problem.

In order to analyse the reasons why courts in personal injury cases have resisted challenging the quantification of these damages, I must now move from an analysis of tort and law as the terrain\textsuperscript{18} of social injustice, to a discussion of tort law as a tool. I have argued that not only does tort reflect social inequality, but tort, using its tool of damages, plays a role in perpetuating inequities. By arguing that the tool of tort damages can and should be utilized in a more equitable manner, I am not suggesting that this will somehow

\textsuperscript{16}Ibid, at 480.

\textsuperscript{17}See discussion of cases in Chapter 3 and Chapter 4.

\textsuperscript{18}I am indebted to Ruth Buchanan for this descriptive and accurate language.
cure tort law of all its discriminatory elements. However, I do believe that, by using the tools presently available in tort law, the de-valuation of particular groups of people can be avoided.

In my view there are several possible explanations for why judges have struggled to deal with the inequities in the assessment of damages for loss of future earning capacity. In some cases it may be as simple as plain bias, but, more fundamentally, I believe there are elements of the operation of tort that constrain the courts from approaching these questions with a view to equality. The first is that because of the perceived fundamental division between public law and private law, the courts have focussed on the specific relationship between plaintiffs and defendants when quantifying damages rather than allowing for social context to enter into their analysis. Second, courts have been limited by their reliance on the evidence of expert economists in quantifying damages.

I will begin the next several sections by introducing the principles of quantification of damages in a tort context. In the following sections I will contest first the bipolar approach to tort law and second, the reliance on the evidence of expert economists. In my view an examination of these issues shows how the current approach taken by the courts prevents the equitable use of the tool of damages.
2.6 Torts and the Quantification of Damages

In order to understand how tort damages fail to adequately compensate female and aboriginal plaintiffs, some basic understanding of the principles informing the quantification of tort damages is required.

The Latin phrase *restitutio in integrum* is most often used to explain the purpose of tort damages. This “Compensatory Principle” was explained in the frequently cited 1880 judgment of Lord Blackburn in *Livingstone v. Rawyards Coal Ltd.*\(^\text{19}\) where he said:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation...\(^\text{20}\)

The Compensatory Principle is problematic when the position the plaintiff occupied prior to the injury was a position of disadvantage. To put a plaintiff back into a position of social disadvantage is to perpetuate that disadvantage. I argue that a strict application of the compensatory principle as articulated in *Livingstone* is not compatible with equality principles. In my view, however, the approach taken by the Supreme Court of Canada allows for a more flexible interpretation, making space for equality. I am not, therefore,

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\(^{19}\) *Livingstone v. Rawyards Coal Ltd.* (1880), 5 A.C. 25 (H.L.).

\(^{20}\) Ibid at 39.
arguing for a wholesale rejection of the Compensatory Principle, but rather an expansion of its interpretation.

The Compensatory Principle has been incorporated in the modern quantification of tort damages through the Supreme Court of Canada decisions in *Andrews v. Grand & Toy Ltd.*\(^{21}\), *Arnold v. Teno*\(^{22}\) and *Thornton v. Prince George Bd. of Trustees*\(^{23}\). These three rulings changed the focus in tort damages from a global approach, to awards which specifically set out the various heads of damages. These decisions also gave some guidance as to how damages under each head are to be determined. Most importantly, the Supreme Court divided tort damages into pecuniary and non-pecuniary damages, the former representing actual financial loss and the latter representing intangible losses such as pain and suffering.

The SCC further divided the pecuniary damages head into other categories, including prospective loss of earnings or loss of future earning capacity. In discussing this head of damages the Court said:

> We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made... A capital asset has


been lost: what is its value?24

This conception of the compensatory principle, in my view, can be interpreted broadly to mean that the plaintiff’s true potential should be evaluated. In other words, “earning capacity”, in its purest sense, should be valued according to what an individual could achieve without the presence of discrimination. In this sense I equate “earning capacity” to the “potential” of the plaintiff and I argue, in accordance with the principles of equality, that courts should exclude discriminatory norms when quantifying potential.

Before critiquing the evidence used by courts to quantify damages, it is also important to understand some of the private law notions that courts use as their foundation in tort cases. In the next section I will attempt to explain this foundation by relying on the work of Ernest Weinrib who, in my view, best exemplifies the extreme “formalist” approach to tort law.

2.7 The Bipolar Approach

One of the fundamental problems for those seeking redress in tort is the view (which may be appropriately termed “traditional”) that tort’s main purpose is to deal with the specific relationship between one individual who causes harm to another individual.

One of the strongest proponents of this position in Canada, and in the common law world

24Andrews v. Grand & Toy Ltd. Supra note 21, at 251.
in general, is Professor Ernest J. Weinrib. Weinrib, a preeminent tort scholar, has written extensively on his concept of formalism and the intrinsic ordering of tort law.25

For Weinrib tort is absolutely coherent and self-contained, and can be explained fully through an analysis of the inherent relationship between the plaintiff and defendant. To explain this bipolar relationship Weinrib relies on Aristotelian notions of corrective justice. Specifically, Weinrib says:

Corrective justice is bipolar. Private law reflects this polarity by connecting the entitlement of one party to the liability of the other. Corrective justice relates the parties directly through the harm that one of them inflicts on the other. It treats the doer and the sufferer of harm as the active and passive participants in a single relationship. Its unifying principle is the sheer correlativeity of harm done to harm suffered. Neither the doing nor the suffering counts independently of the other. The doing of harm is normatively significant only because of the suffering that is correlative to it. For purposes of corrective justice, doing and suffering are not separate events but the correlative aspects of a single event.26

Weinrib rejects what he calls an instrumentalist approach to tort law where tort is understood through an assessment of how effectively it advances particular goals. More specifically he argues that tort can not be justified by looking at goals such as deterrence,


26“Formalism and its Canadian Critics”, Ibid at 10.
compensation, punishment, loss-spreading, and wealth-maximization. For Weinrib these goals avoid the fundamental private law relationship in tort which links the actions of the wrongdoer to the harm suffered by the plaintiff. He relies on the thread of causation to link these two parties:

Causation refers to a sequence stretching from the defendant's act to the plaintiff's injury. The defendant's act is understood from the standpoint of its potential for injuring the plaintiff, and the injury for which the plaintiff recovers is a materialization of that potential. The doing and the suffering of harm constitute a single unbroken process.\(^\text{27}\)

Weinrib argues for an absolute link between the action of the defendant and the injury to the plaintiff but this completely ignores the process of valuation that is also inherent in tort.\(^\text{28}\) Weinrib recognizes that payment of damages is an essential element of tort but offers no explanation of how they should be quantified. The bipolar relationship established by Weinrib would seem to suggest damages should be quantified in relation to the actions of the defendant, or at least with the defendant somehow in mind.\(^\text{29}\)

In my view this is a dangerous approach to quantification as it excludes the social context inherent in law’s operation. In other words, when a judge is asked to quantify a

\(^{27}\) "Understanding Tort Law", supra note 25 at 512.

\(^{28}\) Valuation also occurs in the way tort selects causes of action. Choices are made regarding what type of injury will be recognized and who is considered to have duties. See for example: Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 160 D.L.R. (4th) 697 (Ont. G.D.).

\(^{29}\) In my view this is a natural correlative of corrective justice which says the obligation is on the defendant to correct the harm.
plaintiff's damages they rely implicitly on assumptions about individuals that are unrelated to the defendant's act. This is particularly the case when damages for loss of earning capacity are being calculated, because the court must evaluate the plaintiff's potential.

I am not attempting here to detract from the obvious fact that tort actions involve the wrong of one party causing harm to another party. In some respects the nature of tort has to be bipolar. Rather, it is my position that the bipolar relationship which founds tort liability does not end the discussion. There are elements of distributive justice inherent in tort law that demand recognition. Loss-spreading, for example, is a key element of tort and is intimately tied in with tort's operation; most specifically through the mechanism of insurance. In addition, the private relationship between plaintiff and defendant and the court's treatment of that relationship is influenced by cultural and societal norms; thus the traditional private law realm slides over into the public sphere.

An outspoken critic of Weinrib's approach has been Professor Ken Cooper-Stephenson. In Cooper-Stephenson's view, Weinrib's "formalist" view of law is overly

30 These assumptions are not necessarily made by the judge but are more often contained in the type of evidence the judge is forced to rely on.

31 See discussion of Ken Cooper-Stephenson, infra note 32, and accompanying text.

32 Cooper-Stephenson, a professor at the University of Saskatchewan has written for years about quantification of damages and substantive equality in Tort law. He was in fact one of the first to raise issues of inequities in the damage awards given to women. See: K. Cooper-Stephenson, "Damages for Loss of Working Capacity for Women" (1978-79), 43:2 Sask L. Rev. 7. Other have also been vocal in critiquing Weinrib's formalism although on different grounds than those discussed here. For example see:
bound by notions of corrective justice and fails to place Tort within a distributive justice framework. Cooper-Stephenson argues that in practice, elements of both corrective and distributive justice operate within tort. He says:

In short, a tort remedy is corrective at its core but is set in a distributive egalitarian context which drives its content. Indeed, almost the whole of tort law would be socially irrelevant as a source of compensation were it not for insurance and other loss spreading mechanisms. As discrete moral philosophy of corrective justice on its own would serve almost no useful purpose: it would be an idea without content or context.33

Cooper-Stephenson cannot therefore accept the limitations of Weinrib’s bipolar analysis as it denies the effect of the distribution of loss.

In addition Cooper-Stephenson argues that assessment of damages cannot be ruled by this criteria because “compensation for the plaintiff and just condemnation of the defendant are mutually exclusive objectives”.34 This is an important point as it problematizes the link between plaintiff and defendant vis à vis quantification of damages. A prime example of this problem is evident in the statement of Chief Justice


34Ken Cooper-Stephenson, Personal Injury Damages in Canada (Toronto: Carswell, 1996) at 32.
MacEachern in *Tucker v. Aselson*, as quoted in my introduction:

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 the understandable wishes that society, or 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 underinsured women, to ignore that reality.35

Justice MacEachern’s focus here was on the effect a damage award may have on the defendant. In my view this is completely in line with Weinrib’s bipolar analysis. I agree with Cooper-Stephenson that compensation needs to be addressed separately and in its public context, once liability is established.

While I disagree with MacEachern J.’s statement, the points he raises need to be addressed. A common criticism of attempts to rectify the inequitable quantification of damages is simply that defendants are not responsible for social injustice and should not be required to pay for it.36 In essence this argument articulates the view that private law is not the place to rectify such injustices. My answer to this critique simply harkens back to my position that public law values, such as equality, should be infused into the private law. The reality is that private law, and tort in particular, is both derived from and

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36 See also chapter 5, the discussion of Mitchell McInnes, *infra* note15 and accompanying text.

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influences society as a whole. Because of the public impact of tort, public law values should have a place in tort law. As to the burden that this shift in approach may have on defendants, I simply do not think this is a factor. Tort is not concerned with the impact on the defendant when the plaintiff is a white male receiving higher compensation; thus, concerns about the impact on the defendant should not be employed to justify lower damage awards for female and aboriginal plaintiffs.

Another criticism reflected in MacEachern's quote, is that damages should reflect the “reality” in our society that women and aboriginal people have less opportunity and do, at this point in time, earn less than their white male counterparts. I simply cannot agree that because this “reality” exists, it is somehow permissible to allow tort to perpetuate it. In my view, principles of equality dictate that an individual’s “capacity” or “potential” must be quantified free from the impact of discrimination. This is not in opposition to the compensatory principle; on the contrary, this approach fosters a method of quantification that truly compensates an individual for their lost “capacity”. This issue is not simply about putting a plaintiff back into the position they would have been in had the accident and injury not occurred. Adopting the Supreme Court’s language of “capacity”, it is about compensating plaintiffs for the value of their lost potential.

I turn now to the role of economic evidence and the expert economist in the quantification for damages for loss of earning capacity.
2.8 The Expert Economist

The primary method for assessing damages for loss of future earning capacity, is through the evidence of expert economists who present earning tables to the court. In my view, use of these tables is highly problematic and will be critiqued throughout my thesis. Essentially these tables set out past earning patterns of Canadians, divided into subgroups based on race and gender. These tables have been relied on by courts without sufficient focus on how they are produced and on the type of assumptions they rely on.

In this discussion I am not accusing economists specifically of bias, nor I am suggesting that they misrepresent the data they are working from; rather, I merely want to problematize the data and to suggest that economics as a discipline is also socially constructed and is thus liable to reflect discriminatory norms in society. As it may reflect inequities in society, economic evidence can not be relied on by the courts without a critical analysis.

Expert economists rely primarily on statistical evidence of past earning patterns of particular groups in order to forecast the most probable future earnings of an individual plaintiff. Data taken largely from organizations such as Statistics Canada is used in this process. For example Statistics Canada produces the Public Use Sample Tape (PUST)

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37I am not an economist and I do not purport to have any expertise in this area. My understanding of how economists prepare their expert reports is based on reading a vast number of personal injury cases and of personal dealings with economists while practising insurance defence law.
which is created from census data. The PUST provides statistical information on things such as labour force participation rates, average incomes, hours of work per week and many others.  

The statistical tables produced from this information set out average earnings for different groups such as all men and women, as well as more particularized groups such as aboriginal men and aboriginal women. The tables, sometimes referred to as actuarial or earning tables, are then used to forecast future earnings. For example, if a the average Canadian woman in 1997 earned $30,915, then that figure would be relied on to predict what an average woman could expect to earn in the future. Generally there is no consideration of the fact that male average earnings for that same year were $42,626 nor is there any suggestion that the figures reflect any inequity.

There are many problems in relying on this statistical evidence. First and foremost is the fact that this evidence is derived from a marketplace that is already tainted.


39 The process is not quite that simple as economists take into account contingencies such as inflation, increased or decreased participation rates and other market variables. The impact of contingencies will be discussed further in my examination of the case law.

40 Average earnings taken from Statistics Canada website: http://www.statcan.ca.
with discriminatory practices which impact the accessibility women and aboriginal people to the labour market.\textsuperscript{41} Elaine Gibson has highlighted some the problems with relying on statistical data gathered over the last 50 years in forecasting female earnings.

Actuarial tables are constructed around age-based data collected over the past fifty years. A woman considered permanently disabled today at the start of her working life, age 20, presumably would have her lost earnings projected for the next 45 years. The tables on which this projection would be based were collected from an era when women had less opportunity for higher education and were far less likely to be part of the paid labour force, rendering the available statistical pool diminutive and skewed.\textsuperscript{42}

In her comment on \textit{Toneguzzo Norvell v. Burnaby Hospital}\textsuperscript{43} case she goes on to say:

... these statistics, comprising primarily data related to married women, are based on the traditional family model in which the wife subordinates at least a portion of her earning potential for the sake of investment of time and energy in caring for her family. In recent years, more and more women are staying single, divorcing, or choosing alternate living arrangements such as living with other women; and women in any of these situations are more likely than married women to participate in the paid labour force. As the family dynamic alters, the inaccuracy of the actuarial statistics intensifies.

An additional phenomenon which leads to inaccuracies is that of double discounting. Statistics for average earnings contain deductions for the factors already mentioned,

\begin{itemize}
\item\textsuperscript{41} See: Michael Mendelson and Ken Battle, “Aboriginal People in Canada’s Labour Market” (Caledon Institute of Social Policy, 1999).
\item\textsuperscript{42} The Gendered Wage Dilemma”, in Cooper-Stephenson and Gibson, \textit{supra} note 4 at 197.
\end{itemize}
including unemployment, non-participation, and part-time factors. Each of these deductions is greater for women than for men. These deductions are sometimes applied twice by judges, because although already accounted for in the tables, they are on occasion deducted again as contingency factors.  

Gibson argues that even if the biases present in the actuarial tables were rectified they are still inappropriate measures of earning because of systemic discrimination present in the workplace.

Another important difficulty in relying on actuarial tables has been identified by Martha Chamallas. She points out that the labour market systemically discriminates against women because even as participation rates in the workforce have increased, the jobs performed by women have been de-valued. As Chamallas eloquently describes:

> It is the gender of most of the job holders, rather than the intrinsic demands of the work, that influences its place on the job hierarchy.

The conceptual vicious cycle as it affects wage rates provides an explanation for job-shifting - the lowering of pay or prestige when a particular job or occupation changes from being male-dominated to female-dominated. The best known examples involve cross-cultural comparisons: Being a physician is a high status high paying job in the United States, where men dominate the field; in Russia, where most doctors are women, the job carries less prestige and money. In the United States, this shifting phenomenon took place over time in the occupations of secretary and bank teller, which lost prestige when women entered and

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44 Elaine Gibson, "Loss of Earning Capacity for the Female Tort Plaintiff: Comment on Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital" (1994), 17 C.C.L.T. (2d) 78 at 83-84.
began to dominate the field. Chamallas’ insight here re-enforces the difficulty in relying on wage tables that have been constructed based on past discriminatory practices. It is not simply a matter of reflecting what a woman or an aboriginal man is likely to earn based on what women and aboriginal men have earned. What they have earned in the past has been dictated in large part by what they were allowed to earn and how much education they were allowed to get.

A more fundamental critique of relying on the evidence of economists can also be offered. Women, and any subject other than the white male, have been largely absent from economics as a discipline. Economists have for generations been by and large male and the subject of their study has been male. This focus has had the effect within economics of areas such as household work and the family in general being traditionally

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46Chamallas raises another very interesting point in discussing the use of race and gender based data. The characteristics of race and gender are elevated by the courts to the status of reliable indicators of earnings above other potential traits. She says at *ibid* pg. 483:

The use of race and gender-based data is thus highly selective. And it is this selectivity through which the process of de-valuation takes place. The judgment to focus on race and gender - but not other personal traits - amounts to a judgement that race and gender tell us more about what a person will become, more about what a person is likely to achieve, than other traits that have been correlated in the past with the acquisition of wealth. Put another way, the categories of race and gender are thought to be particularly salient, highly plausible predictors of future earning capacity. *Supra* note?

As Marianne Ferber and Julie Nelson discuss, the lack of gender balance among economist has, until recently, impacted on the types of questions that are asked within the discipline. \(^{49}\)

Ferber and Nelson note that no in-depth investigation of discrimination has traditionally been conducted. I point this out not to suggest that economics as a discipline is flawed because it has neglected a feminist approach, but merely to highlight that the questions asked by economists may have ignored the perspective of the female (and likely non-white) subject and thus the assumptions within economics should be questioned and de-constructed. As with law, economics is socially constructed and cannot completely avoid reflecting discriminatory norms. Contrary to this understanding, law has elevated economics as a discipline to the level of objective science as if it is indisputable and neutral.

Ann Jennings explores this notion of the social construction of sciences and economics. Relying on the work of Sandra Harding, Jennings points out that the sciences, including economics have been given “quasi-religious, authoritarian character”. \(^{50}\) Jennings submits that science and economics have held themselves out as yielding “objective truths”:

\(^{48}\)Ibid at 5.

\(^{49}\)Ibid at 7.

Such practice also denies that scientists’ cultural identities influence their scientific beliefs, as long as they rigorously pursue prescribed methods.

... Harding argues further that science incorporates the dominant gender metaphors of modern society. These metaphors link cultural gender roles and individual gender identities to gendered thought processes that commonly exclude women, women’s questions and feminine valued from privileged social spheres, including science.  

Lisa Phillips has similarly deconstructed the role of expert economists in the context of tax and fiscal policy. She points out “the power of technical discourses (such as economics) in shaping the fiscal order and in reproducing social and economic inequalities”. For Phillips, care must be taken in accepting what economics tells us because it is not objective and can often have a policy objective in the way it assesses data.

I agree with Phillips that care must be taken in elevating the evidence of economists to the level of objective truth. It is vital, particularly when courts are charged with the task of quantifying damages for loss of future earning capacity, that the

51Ibid at 116.


53Ibid, “Discursive Deficits”. 
underlying assumptions used by economists be evaluated. This is particularly important when, as it appears from the cases discussed below, those assumptions have worked to the detriment of women and aboriginal plaintiffs.

In the following two chapters, I will demonstrate the framework I have set out in this chapter through an analysis of personal injury cases involving young female and aboriginal plaintiffs.
CHAPTER THREE

3.1 Introduction

The next two chapters will be devoted to discussing personal injury cases. Through use of the cases themselves I will attempt to demonstrate the struggle courts face in quantifying damages for loss of future earning capacity for women and aboriginal men. I call it a struggle because in my view courts are constrained from applying principles of equality in a tort context by their reliance on a bipolar approach to tort law and through reliance on the evidence of expert economists. Further, I assert that the impact of tort damages quantification sends a powerful message regarding the value of an individual’s potential. When these assessments are based on the plaintiff’s gender, race or class the message resonates throughout that individual’s gender group, racial group and class group.

My intention in reviewing case law is not necessarily to provide a comprehensive look at all personal injury cases in Canada dealing with female and aboriginal plaintiffs, but rather to provide a glimpse of the court’s treatment of these particular plaintiffs. To that end I have attempted to find cases in which the plaintiff is relatively young and the nature of the injuries suffered is severe. Narrowing the cases to those involving young plaintiffs is useful because in those cases the court will seldom have a substantial earning
history upon which to base their damages quantification. Young plaintiffs force the
court to assess capacity or potential as opposed to producing a simple calculation based
on an identifiable earning history. In addition, I have chosen to look at cases involving
severe or catastrophic injury because it is in those cases, where the plaintiff will never be
able to work, that the court is forced to assess the plaintiff's potential over their entire
working life. Through this discussion the courts may reveal whether they are relying on
particular notions of race, class or gender to quantify loss. I have tried to focus my
research on young women, both aboriginal and non-aboriginal, as well as young
aboriginal males in an effort to identify particular difficulties or biases faced by these
plaintiffs.

In total I have reviewed approximately 100 personal injury cases which has led to
a selection of about 30 cases on which I will rely for this discussion. In addition, I have
restricted my case review to decisions made only in the period 1988-1999.

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1 I have chosen to restrict my research to personal injury cases where the plaintiff is under 30 years
old. This decision is based on my own assessment that individuals under that age are not likely to have
established a reliable earning history.

2 My research methods for finding these types of cases included a review of Goldsmiths Damages
for Personal Injury and Death in Canada - Consolidated Table of Damages as well as numerous searches
using QuickLaw. It is important to note that while I have attempted to locate as many cases as possible
dealing with aboriginal plaintiffs who have suffered catastrophic injury it can be difficult to identify these
cases as the judge can not always be relied on to reveal the race of the plaintiff in her decision. However,
simply because the judge has not identified the race or economic background of the plaintiff does not mean
that these factors did not influence the decision of the court.

3 The decision to limit the cases to these dates is simply in an effort to keep my research current
and to avoid any critique on the basis that "things are better than they used to be".
3.2 Framework for Case Discussion

Personal injury cases involving female plaintiffs have been the subject of a considerable amount of academic comment over the last decade. Some of the cases I review below have been extensively dissected in the past and I do not wish to repeat that process here. Other cases, in particular the *MacCabe v. Westlock* decision, are new and have not yet been added to the academic debate on this issue.

I have several purposes in reviewing the cases selected below. First I wish to demonstrate the methods that courts use to quantify damages for loss of earning capacity. There is no question that the courts are burdened with a difficult task in this regard and that they struggle to find appropriate ways to "gaze into the crystal ball" in order to assess individual plaintiff's potential. What becomes crystal clear upon reading the cases is that the courts have come to rely, almost exclusively, on the evidence of expert economists to complete their trying task. Second, the cases reflect that the courts are searching for a

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5*Infra*, note 23.
way to avoid some of the inequities evident in relying on a historically biased labour market to assess these damages. Finally, the cases show that in the face of these attempts to rectify inequity in the quantification of damages, the courts have failed. Fundamentally the courts have assumed that because women have earned less in the past, they will earn less in the future. This distinction makes sense to the courts because they assume women will have children, will take time of work and will end up working part time. In the result women’s labour simply can not be worth as much men’s. As Regina Graycar has said:

\[(\text{the cases) have in common a tendency to treat women’s paid work as marginal, as worthy of comment, and as requiring an explanation, rather than as something that adult, gender neutral people just do}.\]

My other purpose for reviewing cases dealing with female plaintiffs is that they, and the academic comment about them, provide a good backdrop from which to move into a discussion about the treatment of aboriginal plaintiffs. This discussion will evolve further in Chapter Four.

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6 For an excellent comment on these types of assumptions in Australia, see: Regina Graycar, “Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages” (1997), 31 U.B.C. Law Review 17.

7 Ibid, at 23.
3.3 The Young White Female Plaintiff

I will begin my discussion of the case law with a look at several important cases dealing with quantification of loss of earning capacity for young women and female infants. These cases demonstrate the courts' ongoing attempt to grapple with quantifying damages for young women, but they also indicate that by and large the courts have failed to truly rectify inequities in this process. This point is further highlighted by contrasting the methods of quantification used when the plaintiff is a young non-aboriginal male.

One much discussed case in this area is the B.C. decision in Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital. Due to the negligence of the attending physician the plaintiff Jessica Toneguzzo-Norvell suffered severe oxygen deprivation during birth resulting in extreme brain damage. Jessica was rendered deaf, blind, incapable of voluntary motor activity, lacking any cognitive ability and prone to life threatening epileptic seizures. One of the issues was the quantum of damages that Jessica should receive for her lost earning capacity.

At trial the court was presented with several tables of projected earnings as evidence. These included tables forecasting income levels for women with a high school

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9“Loss of Earning Capacity” supra note 4 at 79.
diploma, women with post-secondary non-university training as well as comparable tables for men. These tables included discounts for unemployment, part time and non-participation rates. Tables were also provided for single women in these categories without deducting the “voluntary” part time work for females.¹⁰ The trial court decided to award loss of earning capacity on the basis of the table for women with post-secondary non-university training. Evidence was given at trial that this table represented women who were inclined to focus more on family than on career, whereas the tables for single women represented women who focussed primarily on career.¹¹ The Court here considered that earning levels for women may increase over time to become more on par with male earnings. In the trial judge's view this amounted to a positive contingency which was considered along with other positive and negative contingencies. In the result the court awarded $292,758 under this head of damages. At the court of appeal this amount was reduced by 50% to reflect deductions for living expenses.¹² By the time this case reached the Supreme Court of Canada one of the issues on appeal was whether or not it was appropriate for the trial judge to have relied on the gendered earning tables at all and if the tables for male earnings would have been more appropriate.

The Supreme Court declined to decide on this issue as they found that the appropriate evidence had not been placed before the trial judge and they could not

¹⁰Ibid, at 79.

¹¹Ibid

¹²Toneguzzo, supra, note 8 (B.C.C.A.).
therefore decide whether or not male earning tables should have been used. The Supreme Court restored the trial judges assessment of life expectancy but maintained the 50% reduction implemented by the Court of Appeal against her lost earnings award. Although the courts grappled with questions regarding the reliance on gendered earning capacity tables, no resolution was reached in this case. Arguably, however, Toneguzzo opened the door for the arguments to be made.

The question of the appropriateness of gendered earning tables was more fully addressed in the case of Tucker v. Aselson. Here the plaintiff was an 8 year old girl who suffered a permanent and disabling brain injury as a result of a motor vehicle accident. Counsel for the plaintiff argued at trial that she would have been capable of achieving any goal and any career and thus the appropriate measure of damages was the average lifetime earnings of a male university graduate in British Columbia; $947,000. Counsel for the defendant argued that the appropriate measure was the lifetime earnings of female university graduates in B.C. which the evidence indicated was $302,000. The trial court took the step of accepting that “the measure of the plaintiff’s earning capacity should not be limited by statistics based upon her sex” and as such used as a starting point the figure provided for average male incomes. Surprisingly, though, the trial judge

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13Toneguzzo, supra, note 8 (S.C.C.).


16Ibid at 137-138.
dramatically reduced the award by 63% to reflect the contingency that the plaintiff would not reach her potential and would not attain a university degree. The final award under this head of damages was $350,000, barely over the amount indicated on the female earning tables.\(^\text{17}\)

This decision was upheld on appeal but a strong dissent was written by MacEachern C.J.B.C. in which he rejected the idea of basing a female plaintiff's lost earnings on actuarial evidence of male earnings. MacEachern C.J.B.C. did, however, allow for positive contingency that women will likely move closer to wage parity with men in the future.

The courts have attempted to further grapple with this dilemma in more recent cases. For example in *Terranciano (Guardian ad litem of) v. Etheridge* \(^\text{18}\) a 16 year old girl was rendered a paraplegic in a motor vehicle accident. The defendant urged the court to adopt average female earnings as the appropriate measure of loss of future income. The court rejected this approach saying:

> Apart from the fact that these statistics perpetuate historical inequality between men and women in average earning ability, and that they have hidden in them various discounts for lower and sporadic participation in the labour market which are duplicated by many of the negative contingencies used only by economists to massage the numbers


downward, such statistics may provide little assistance in predicting the future of a particular female plaintiff.19

The plaintiff here suggested that an appropriate measure of damages would be 6% less than the average male earnings which closely approximated the projected earnings of the plaintiff’s sister and amounted to approximately $1,000,000.20 While the court did not explicitly accept the premise upon which the plaintiff’s submitted their quantification, the court awarded $950,000 for loss of future income holding that the amounts submitted by the plaintiff were more reasonable. In addition, the court indicated that this assessment was appropriate because this plaintiff deviated from the usual female model.

In Shaw (Guardian ad litem of) v. Arnold21 the court was more clear in explaining how the damage calculation was determined. The plaintiff here was 15 years old when she sustained permanent brain injury in a motor vehicle accident. The expert economist at trial gave evidence of projected net present value of future income of $1,041,941 for men and $603,092 for women of the plaintiff’s age. Counsel for the plaintiff argued an appropriate measure would be to take the average of these two figures and submitted $822,516.50 as an appropriate amount. While taking note of the decision in Terranciano the court here accepted the average between male and female earnings as appropriate. A further $100,000 was deducted for the plaintiff’s residual earning capacity

19Ibid.

20Ibid.  This amount included the negative contingencies of 16% usually applied to average male earnings rather than the approximately 1/3 deduction usually applied to female average earnings.

and 6-8% was allowed for benefits resulting in a final award of $775,000. It is evident here that the court, and plaintiff's counsel, recognized the inequity of relying on earning tables for women but hesitated to attempt a full rectification of the injustice.

The judges in the above cases were alive to questions of fairness and it is clear that they grappled with the question of whether or not it was appropriate to award damages based only on the female earning tables. They understood, on some level, that there was something problematic in relying on female earning tables. Regardless, they could not bring themselves to equate the earning potential of men and women in this context. The inequitable social context of these tables was not enough to convince the court that the tables should not be relied on. I submit they took this approach because they viewed their role as being within a private law context charged with the task of dealing only with the individual against the individual and not with any social context. In broad terms the potential of these young women was determined to be less than a similarly injured young man.

By critiquing these cases I mean to assert the notion that there should be no distinction made between the earning potential of young plaintiffs. To be clear, when there is no demonstrable earning history of a particular plaintiff due to their young age, it is my position that all plaintiffs in such a position should be assessed as having the same earning capacity; the same potential. Equality should dictate in these cases, and in my

\[\text{Ibid.}\]
view equality in this context means that it will not be assumed that any plaintiff will not make the best of life’s chances. I would much prefer to err on the side of overcompensation in the interest of equality than to risk pre-judging the capabilities and potential of any plaintiff. A recent decision from the Alberta Court of Queen’s Bench in *MacCabe v. Board of Education of Westlock Roman Catholic Separate School District No. 110 et al.* appears to agree with this position.

The plaintiff in *MacCabe* was rendered a quadriplegic while attempting a gymnastics manoeuvre in gym class. The plaintiff was 16 years old at the time of the accident. In assessing her loss of future earning capacity the court discussed the plaintiff’s pre-accident desire to become a physiotherapist and found that the plaintiff would have been able to attain this goal had the accident not occurred. In spite of her very serious injuries the plaintiff here went on to finish high school after her accident and continued on to successfully complete a university degree in Recreational Administration.

As in the cases above, the defendant here urged the court to use female income tables in order to determine the plaintiff’s lost earning capacity. Justice Johnstone, however, refused to take this approach and spent some time explaining why she was refusing to adopt female earning tables. In Justice Johnstone’s view these tables had a

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It is entirely inappropriate that any assessment I make continues to reflect historic wage inequities. I cannot agree with Chief Justice McEachern of the British Columbia Court of Appeal in *Tucker* that the courts must ensure as much as possible that the appropriate weight be given to societal trends in the labour market in order that the future loss of income properly reflects future circumstances. Where we differ is that I will not sanction the “reality” of pay inequity. The societal trend is and must embrace pay equity given our fundamental right to equality which is entrenched in the constitution. The courts have judicially recognized in tort law the historical discriminatory wage practices between males and females. The courts have endeavoured to alleviate this discrimination with the use of male or female wage tables modified with either negative or positive contingencies. However, I am of the view that these approaches merely mask the problem, how can the court embrace pay inequity between males and females? I cannot apply a flawed process which perpetuates a discriminatory practice. The application of the contingencies, although in several cases reduce the wage gap, still sanction the disparity.

A growing understanding of the extent of discriminatory wage practices and the effect of the societal inequity must lead the court to retire an antiquated or limited judicial yardstick and embrace a more realistic and expansive measurement legally grounded in equality. Equality is now a fundamental constitutional value in Canadian society...

...The court cannot sanction future forecasting if it perpetuates the historic wage disparity between men and women. Accordingly, if there is a disparity between the male and female statistics in the employment category I have determined for the plaintiff the male statistics shall be used, subject to the relevant contingencies. Once again if the contingencies are gender specific, then the contingencies applicable to males shall be used except in
the case of life expectancy, for obvious reasons. Justice Johnstone effectively avoided reliance on a purely private law approach here by considering herself obligated to avoid perpetuating historical inequities. Of particular note in these comments by Justice Johnstone is the fact that not only has she recognized the inequities of relying on gendered wage statistics and earning tables but she has rejected gender specific contingencies. In the other cases discussed above it was often the application of gender specific contingencies, such as time taken off for pregnancy and child rearing or increased likelihood of part time work, that negated or lessened any good intentions of the court to avoid gendered statistics. Justice Johnstone rejected gendered contingencies and thus avoided reliance on any gender based assumptions in her approach to quantification. This is in stark contrast to the approach taken by other courts in similar circumstances.

It should of course be noted that the plaintiff in MacCabe had proven her academic abilities as well as her determination to succeed. This most certainly made it easier for the court to give this particular plaintiff the benefit of the doubt when it came to assessing her lost earning capacity. There is no indication in the judgment as to the professional or educational status of the plaintiff nor of the type of community in which

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26See: Tucker, supra note 14, and Terranciano, supra note 18.
she lives.\textsuperscript{27} Without detracting from Justice Johnstone's decision, one could hypothesize that if the plaintiff was from an affluent family or community it would again be easier for the judge to reach the conclusions that she did.

Quite a different approach to negative contingencies than that adopted by Justice Johnstone in \textit{MacCabe} is demonstrated in the recent B.C. Supreme Court decision in \textit{Audet (Guardian ad litem of) v. Bates}\.\textsuperscript{28} In \textit{Audet} the female plaintiff was asphyxiated during birth due to the attending physician's negligence. As a result of the asphyxiation the plaintiff suffered from cerebral palsy. The plaintiff would never be able to work and thus the court was faced with quantifying her loss of future earning capacity. Evidence before the court included earning tables which calculated the present value of future earnings for both men and women. The earning tables presented indicated that a female of the plaintiff's age who obtained a university degree would make $489,000 based on present values while a male would make $833,000. Assuming more than one year of post-secondary education a female would earn $466,000 while a male would earn $766,000\.\textsuperscript{29} The court here found "no logical or compelling reason to differentiate between male and female earning capacity when making an assessment in relation to an infant whose work and education prospects cannot be identified or characterized with any

\textsuperscript{27}It will become evident in the subsequent discussion of quantification of damages for aboriginal plaintiffs that the fact the court did not appear to take into account the professional or educational status of the plaintiff's parents or community is in stark contrast to many cases dealing with aboriginal plaintiffs where the family history is often explored and used to justify lower damages.


\textsuperscript{29}\textit{Ibid.}
Regardless of this conclusion the court was willing to take into account that the plaintiff might choose to marry and raise a family and thus decided to discount the award by 30% giving a total of $560,000. Reasons for the 30% discount were vague in that the justifications for choosing this particular number were not given and the judge merely indicated it represented contingencies with regard to lifestyle choice and the possibility that the plaintiff may at some time engage in some type of employment.  

What do the negative contingencies of marriage and family mean in this case? While historical statistics may support the idea that women are more likely to take time off of work for marriage and family, this plaintiff may not make those choice. Similarly, another male plaintiff may, in fact, choose to make that “lifestyle choice”. The effect of the application of these negative contingencies is to burden this plaintiff and reduce her award because of her gender. This approach is in stark contrast to some cases involving male infant plaintiffs.

In the recent Ontario decision in *Chow (Litigation guardian of) v. Wellesley Hospital* the male infant plaintiff suffered hypoxic brain damage at birth as a result of the attending doctor’s negligence. The brain damage caused the plaintiff to suffer from cerebral palsy as well as be rendered blind, mute and a quadriplegic. As with the *Audet*

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30 *Ibid* at paragraph 76.

31 *Ibid* at paragraph 81.

case above, the Chow infant required constant care and would never be able to work. In fact the injuries to the plaintiffs in Audet and Chow were very similar and both occurred at birth.

In assessing the infant Chow’s damages for loss of future earning capacity the court spent a considerable amount of time discussing the income level of the plaintiff’s parents. In this case both parents were successful dentists with earnings in the hundreds of thousands of dollars per year. Interestingly, the evidence presented by the economists in this case was based on several scenarios ranging from the plaintiff becoming a dentist and purchasing his father’s lucrative dental practice with an yearly income exceeding $400,000, to the plaintiff obtaining a university degree and earning the average yearly income of a male university graduate in Toronto of $123,379.33 Nowhere in this case is there any thought that this young male would not have completed university. While the judge was not prepared to award damages at the level of the father’s income, the court was prepared to assume this plaintiff would have obtained a university degree and would have been successful in obtaining employment which paid him over $120,000/year.

The defence argued that if this amount was accepted there must also be several negative contingencies applied including the probability of illness, unemployment or accidents. The court, however, refused to apply any negative contingencies saying that

33 Ibid at paragraphs 289-294.
those contingencies were already worked into the calculation.  

There are several points about this case I wish to highlight. I do not mean to suggest that the damages for loss of future earning capacity awarded to this male infant were necessarily inappropriate, rather the importance of this case is the contrast it provides to other cases dealing with female infant plaintiffs. It is clear that the economic status of the parents had a profound impact on the award young Chow received. Unlike many other cases, the court here found it completely uncontroversial that this young man would have successfully attended university. In fact completion of a university degree was the very least the court thought this man could have accomplished. A significant factor in the court’s decision here was the income and education levels of the parents.

Perhaps even more significant in this case was the court’s willingness to disregard the defendant’s arguments regarding the application of negative contingencies. Unlike the Audet case where negative contingencies of “lifestyle” and “family choices” were applied to the infant female plaintiff, no such contingencies were applied or even considered for young Chow. In fact no negative contingencies at all were applied in the Chow case. Regardless of any statistical/historical support for this distinction, the

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Ibid, at paragraph 302.

Ibid at paragraph 296. The court here relied on an article by M. Corak and A. Heisz titled “Unto the Sons: The Intergenerational Income Mobility of Canadian Men” [unpublished] which found that when paternal income is in the top percentile there exists a strong likelihood that the son’s income will be high as well. This also raises the question about strong reliance on the father’s income over the mother’s income. Would this have been different if the child had been female?
effect is to impose a burden, or to give less of a benefit to female plaintiffs. It is not only these two cases which demonstrate this dichotomy in treatment between male and female plaintiffs it is merely a glaring example of disparate treatment in two very recent Canadian decisions.  

3.4 Summary

What is so clear from these cases is that courts are attempting to address the obvious inequities that result from over-reliance on earning tables which derive from an inequitable marketplace. Despite this growing awareness courts are still relying very heavily on these tables. In my view courts are also being constrained by a bipolar approach to tort damages allowing judges to remain within a private law context.

As will be explored in the next chapter, these same concerns are evident in cases where the plaintiff is aboriginal. In fact the problem is more profound when the courts are dealing with an aboriginal plaintiff as the inherent inequities in approaching these plaintiffs has not reached the same level of recognition.

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See also: Lusignan (Litigation Guardian of) v. Concordia Hospital, [1997] 6 W.W.R. 185 (Man. Q.B.) where a female infant plaintiff who was catastrophically injured at birth and would never be able to work was awarded $200,000 for loss of future earning capacity. Very little explanation of this low award was given other than the court’s indication it was relying on the low income level of the parents and economic evidence of earnings for female high school graduates. For higher awards granted to young non-aboriginal male plaintiff see also: Stein (Litigation Guardian of) v. Sandwich West (Township), [1993] O.J. No. 1772 (G.D.), Unruh v. Webber (1992), 98 D.L.R. (4th) 294 (B.C.S.C.), and Bains v. Green, [1997] B.C.J. No. 943 (S.C.).
CHAPTER FOUR

4.1 Aboriginal Engagement with the Courts

The previous chapter highlighted the Canadian courts treatment of gender in the award of damages for loss of future earning capacity. In this chapter I intend to further problematize the way these damages are quantified by looking at the treatment of aboriginal plaintiffs. As will become evident below, aboriginal plaintiffs, both men and women, are routinely awarded low damages for loss of future earning capacity. The evidence relied upon by the courts contributes to this problem as do other, more complicated, assumptions about aboriginal people.

I must interject at this stage to comment on my use of language in this section. I struggle with the appropriate language to use when discussing Canada’s indigenous peoples. I am well aware that much of the language used in this context is inappropriate.

1The discussion in this chapter, of necessity, revolves around the award of monetary damages valuing the productive life or earning capacity of aboriginal people. In some ways this discussion is peculiar because I am using for my frame of reference a value laden measuring tool, money. Capitalist society very clearly measures success through the acquisition of money and capital and in my discussion here I am assuming that the award of lower damages reflects the court’s assessment of individual plaintiff’s potential success. I must point out, however, that the measuring tools of money, professional status and other social indicators of success are constructs of traditional white Canadian society and may not resonate within an aboriginal community. In other words as Patricia Monture-Angus has said: “Expecting aboriginal society to be ordered around the same principles as Canadian society ignores the possibility that difference can exist” Patricia Monture-Angus in Thunder in my Soul: A Mohawk Woman Speaks (Halifax: Fernwood Publishing Company, 1995) [hereinafter Thunder in my Soul] at pg 176.
and reflects the labels given to indigenous people by a colonizing Federal government. I am also well aware that to use one descriptive term for a group of people as diverse in culture and tradition as Canada's indigenous peoples is also inappropriate. However, I have chosen to use the term “aboriginal”, because it is not the language used in the Indian Act and it also encompasses the Metis and Inuit which is my intention. My use of one term to describe this diverse group of people is also reflective of how I view the courts' treatment of Canada's aboriginal people. From the perspective of the courts, and the law in general, the distinctions between indigenous cultures are often non-existent.

Issues dealing with aboriginal people's engagement with the courts has been challenged more and more in recent years. In fact the issue of how courts deal with non-white parties before them has been the subject matter of some interesting Supreme Court of Canada comment. For example, in R.D.S. v. The Queen the Supreme Court of Canada has addressed the importance of taking into account the social context in which parties engaged with the justice system and the courts operate.

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3Ibid.

4Patricia Monture-Angus has also adopted this terminology more recently in her work, rejecting the term First Nations as in her view it has come to be used in an exclusionary fashion to include only status Indians under the Indian Act. See: Thunder in my Soul, supra note 1 at pg. 2.


6Ibid, R.D.S. involved an African-Canadian youth who was charged with assaulting a police officer with the intent to prevent the lawful arrest of another person. The case turned on questions of credibility and the trial judge, in her reasons, noted that police officers over-react on occasion and that this is particularly prone to happen when they are dealing with non-white groups. The Crown appealed the
Dealing more specifically with the engagement of aboriginal people with the courts, the SCC has recognized that tremendous discrimination against aboriginal people exists in Canada and that this discrimination has impacted the way in which aboriginal people have been able to access the justice system. In *R. v. Williams* the aboriginal accused was on trial for robbery. The accused requested a jury trial and wanted to ask the potential jurors questions regarding racial bias. Eventually the case reached the Supreme Court and McLachlin J. found that where an accused can establish a realistic potential for partiality the accused is entitled to challenge the jury for cause. In this case she found that the existence of widespread prejudice against aboriginal people could affect the impartiality of the jurors. In addition she recognized the fact that this widespread racism had translated into systemic discrimination against aboriginal accused.

Similar considerations were identified by the Supreme Court in *R. v. Gladue* where the Court acquittal on the basis of reasonable apprehension of bias. The trial decision was overturned on appeal but the Supreme Court restored the acquittal. McLachlin J. and L'Heureux Dube wrote a joint decision commenting on the appropriateness of judges taking the context and background of situations into account in their decisions. Here the trial judge was entitled to take into account racial tensions that existed in the community and the role the police played in those tensions. In McLachlin J. and L'Heureux Dube's view taking social context into account assisted in supporting the impartiality of judges. For a discussion of judicial bias see: Regina Graycar "The Gender of Judgments: Some Reflections on 'Bias'" (1998), 32 U.B.C. Law R. 1.

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9 *R. v. Gladue* (1999), 171 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Gladue*]. The Court in this case considered the application of s. 718.2 (e) of the *Criminal Code* which provides that in conditional sentences regard should be had to the particular circumstances of aboriginal offenders. The court set out the following factors which must be considered by the sentencing judge: a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection (pg 423). In describing the systemic factors which the judge should consider the SCC noted years of dislocation, low incomes, high unemployment, lack of opportunities or options, lack or irrelevance of education, substance
considered appropriate sentencing procedures for aboriginal offenders.

These recent comments by the Supreme Court regarding systemic discrimination faced by non-white Canadians and in particular aboriginal people are important for my discussion here. Recognition of systemic discrimination and racism, though trite in some ways, can have the effect of opening the door for all courts to recognize the existence of this discrimination in other areas of the law. My arguments below regarding the difficulties faced by aboriginal plaintiffs in personal injury actions are supported by these statements by the Supreme Court. Systemic discrimination against aboriginal people does not end with their engagement with the criminal justice system, on the contrary it is also highlighted by looking at their treatment by the courts in a tort context.

In an effort to highlight discrimination in aboriginal plaintiff’s interaction with tort law, I have engaged below in an exploration of personal injury cases where the plaintiff is aboriginal. While reading these cases I have attempted to be aware of ways in which the race of the plaintiff has factored into the quantification of damages. As with the gendered cases discussed in the previous chapter, the most obvious way that race plays into these cases is through the use of earning tables which estimate (or more properly underestimate) the earning potential of the plaintiffs. Attention must also be

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abuse, loneliness and community fragmentation (pg. 413).

payed to the unstated ways in which the race, and often the poverty, of the plaintiff impacts the award plaintiffs receive. In this context I also wish to pay special attention to the intersection of race, class and gender in these cases to determine whether a particular result or particular assumptions come into play when a plaintiff is an aboriginal woman.\textsuperscript{11}

Reviewing these cases reveals that aboriginal plaintiffs face many hurdles in personal injury actions including unstated assumptions and stereotypes about aboriginal people. Jamie Cassels identified some of these issues in his survey of tort cases dealing with aboriginal plaintiffs in British Columbia.\textsuperscript{12} Cassels articulates the issues as follows:

First the argument is sometimes made that native plaintiffs suffer less injury because their health or material prospects were in any event diminished by reason of physical or socio-economic factors related to their race. Secondly, individual prospects and value are typically measured against the culturally dominant standard of the market from which First Nations individuals are largely excluded. Thirdly, as in the case of women, gendered and racialized statistical indicators are deployed to prove that plaintiffs' pre-accident life prospects were not favourable (when measured against the market yardstick) and therefore, their economic loss due to the accident was not great.\textsuperscript{13}

\textsuperscript{11}In this regard I have been heavily influenced by the writings of feminists engaged with the intersection of race, class, and gender. For example: bell hooks, “Theory as Liberatory Practice “, [1991] 4 Yale Journal of Law and Feminism 1; Catherine MacKinnon, “From Practice to Theory, or What is a White Woman Anyway?”, [1991] 4 Yale Journal of Law and Feminism 13; Angela Harris, “Race and Essentialism in Feminist Legal Theory” (1990), 24 Stan. L. Rev. 581; Cecilia Green, “Thinking through Angela Y. Davis’ Women, Race and Class” in Himani Bannerji, Returning the Gaze: Essays on Racism, Feminism and Politics (Toronto: Sister Union Press, 1993); and Marlee Kline, “Race, Racism and Feminist Legal Theory” (1989), 12 Harvard Women’s L.J. 115.


\textsuperscript{13}Ibid at 190-191.
The points raised by Cassels will be amply demonstrated in the cases discussed below, however there are other aspects to the cases which I believe need highlighting.

First, aboriginal plaintiffs face the prospect of being subjected to a form of "double discounting." Many commentators have discussed notions of double discounting in a variety of ways. Usually the term implies that discounts already accounted for by the expert in producing an earning table are applied a second time when the judge discusses negative contingencies. For example, an economist may produce an earning table that sets out what a woman working for 25 years can expect to earn. In producing the table the economist will often take account of years the woman may not work for child care, or the likelihood that the woman will work part time for some of that period. Double discounting occurs when the judge takes a number from that earning table and reduces the damages amount further based on the assumption that the woman may take time out for child care or may work part time for some of her working life. This approach has the effect of making the same discount twice.

In addition to these considerations, I highlight the situation where the judge, or sometimes the economist, makes a determination of the education level of a plaintiff which then dictates which set of statistics will be relied on. Application of negative contingencies, such as time out for child care and part time work is then the second

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discount. For example the court may determine that it is unlikely a young aboriginal man would have completed high school or if he did he wouldn’t have attended university or college. This assumption immediately limits the range of damages available to that plaintiff because the court will only consider earning tables which reflect high school graduates. Damages may then be further reduced on the basis of negative contingencies such as aboriginal participation rates in the workforce, time taken off work for pregnancy and child-care, economic or geographic status.

4.2 Male Aboriginal Plaintiffs

The recent case of *Ross (Guardian ad litem of) v. Watts*\(^{15}\) is a prime example of the double discounting problem I have described above. Here, the male, aboriginal plaintiff was struck by the defendant driver’s vehicle while a pedestrian. At the time of the accident the plaintiff was 16 years old. The plaintiff suffered a severe head injury resulting in permanent brain damage as well as several other traumatic injuries. The trial judge determined, after hearing many witnesses, that the plaintiff, but for the accident, would likely have attained a high school diploma and worked at low level jobs throughout his life. Specifically the court said in this regard:

> But for the accident the plaintiff likely would have completed Grade 12 obtaining a GED certificate. At the least he had average intellectual ability. He did not do well in the regular middle school because he was not motivated. He did well in the Projects. I suspect that he would not

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have done well in Grades 11 and 12 at Alberni Senior Secondary School. After graduation he would not have continued with his education but would have sought a good paying job, preferring outside work. No one can predict the work he would have chosen. I suspect it would have been unskilled or semi-skilled work.16

Before arriving at this conclusion the court canvassed a tremendous amount of information about the plaintiff’s family and the plaintiff’s band, the Tsheshaht Band. In reviewing all of this history the trial judge found that the plaintiff had significant positive influences in his life. The majority of his family had a background of continuous employment, his father had taken a number of courses over the years to improve his skills and his band had obtained control over its own economic destiny. Prior to the accident the plaintiff had a history of working part time jobs in the summers and, while he had some difficulty at school, he appeared to overcome many of these problems. The neuropsychologist who reviewed his school records concluded he was of above average intelligence17. The judge viewed all of these elements as positive contingencies.

In addition to reviewing positive contingencies the court engaged in a discussion of whether or not the plaintiff had a drinking problem prior to the accident. There was some evidence that the plaintiff’s father overindulged in alcohol to the detriment of his family. While the evidence disclosed the plaintiff did drink prior to the accident the trial

16Ibid, at para. 25.

17Ibid, at para 54.
judge concluded that this was not unusual for a teenage male.\(^{18}\)

Despite these apparent positive influences in his life and the limited negative influences, the court still concluded that the plaintiff would only obtain a high school education and would work at low skill jobs\(^{19}\). The court here recognized this individual plaintiff's potential and the positive influences in his life but still concluded the plaintiff would only obtain a high school diploma and a low skill job. How or why did the court reach this conclusion? What type of questions did the court ask itself when arriving at this conclusion?

A close reading of this case reveals that the judge was struggling with how to approach this case. When urged by defence counsel to consider the possibility that the plaintiff would have developed a drinking problem, the judge declined to make this assumption and yet the judge still made note of the fact that the reserve did not have an alcohol treatment program\(^{20}\). The trial judge also noted that the plaintiff's band encourages its members to graduate from high school and will assist in post-secondary education. Specific history of the band assisting members attend B.C.I.T. was discussed.

\(^{18}\) Query here whether the question of alcohol abuse would have ever been raised if the plaintiff was not aboriginal. Stereotypes regarding the alcohol abuse of aboriginal people is clearly evident here in the courts willingness to accept that this should even be an issue.

\(^{19}\) Ross, supra note 15.

\(^{20}\) Again, why does the court make note of this fact when the judge has already determined that the plaintiff did not have a drinking problem. This type of statement reinforces that the judge may have certain views regarding alcoholism on reserves.
The learned trial judge looked closely at many potential opportunities the plaintiff would have had but for the accident. In finally assessing the plaintiff's potential, however, the trial judge did not give him the benefit of these opportunities. On the contrary the court, in the end, relied on economists reports and statistical evidence about aboriginal employment rates. Hiding behind the statistical evidence here are assumptions about the likelihood that a young aboriginal male will attain educational and professional success. The plaintiff here was, contrary to principles of equality, denied a benefit on the basis of his race.

At trial both the plaintiff and defendant called their own economists as expert witnesses to testify as to the likely future earning capacity of the plaintiff. The two opposing economists did not vary greatly in their assessment. Taking into account labour market contingencies of part-time work, unemployment and non-participation rates, the court accepted the net present value of the lifetime earnings of a B.C. male with high school graduation at $872,300. This, however is not the figure that the court ultimately awarded. The defence expert urged the court to impose a negative contingency of 29.2% based on the fact that the plaintiff was aboriginal and the unemployment rate for aboriginal men in B.C. was about 10% higher than that of the general population. The court was not prepared to accept this very high negative contingency, but the trial judge did state: “I accept that there is a present and traditional discrepancy between the earnings of a non-aboriginal and an aboriginal B.C. male in the workforce based on
labour market contingencies, which I cannot ignore.” For this negative contingency the court deducted 15%. The final award for loss of earning capacity was $540,000.

The plaintiff in this case was essentially discounted or de-valued twice on the basis of his race. First, despite the many educational and employment opportunities the plaintiff may have explored, the court assumed that the plaintiff would only be able to graduate high school. This conclusion by the court resulted in reliance on earning tables that represented the projected earnings for people with a high school diploma employed at low level positions. Obviously these tables would reflect considerably lower income levels than those the court would have relied on had it concluded the plaintiff would complete university or college. A second level of discounting then occurred when the court added a negative contingency of 15% due to average work rates of aboriginal males. While this “double discounting” is not usual in the sense of discounting for the same thing twice, the court here used the plaintiff’s race to limit his compensation in two different ways.

Unlike some of the cases discussed in the previous chapter, the court here did not explicitly recognize inequities in the earning tables relied on. The court clearly felt no obligation to combat any inequities even in the face of a litany of potentially positive

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21Ross, supra note 15.

22The total negative contingency applied was 25%, the additional 10% representing a pre-accident back injury which may have limited the plaintiff’s earning capacity.
contingencies.

A similar situation is evident in *Martin v. McKinney*\(^2\)\(^3\). In this case the male aboriginal plaintiff was injured after a motor vehicle accident. The plaintiff was a passenger in the car when the driver lost control of the vehicle and collided with a hydro pole causing a live wire to fall. No one was injured in the actual collision but when the plaintiff was walking back towards the road he touched the live wire and suffered severe burns as a result of electrocution. The severity of the burns necessitated extensive skin grafts on the plaintiff's feet and hands. Ultimately the wounds were so severe that the plaintiff had to have his left arm amputated below the elbow. The plaintiff also suffered memory loss and depression as a result of neuropsychological injuries from the electrocution. The plaintiff's activities were severely limited after the accident but he was able to find some employment on the reserve as a farm labourer.\(^2\)\(^4\)

In considering the plaintiff's damages for loss of earning capacity the court heard evidence from an expert economist who presented the court with two scenarios for this plaintiff. Scenario One assumed a potential annual income based on minimum wage. Scenario Two represented a calculation of average employment income of Canadian male workers with a secondary school certificate. The court rejected Scenario Two completely relying on evidence of the 20 year old plaintiff's work history and the employment


\(^2\)\(^4\) *Ibid.*
prospects on the reserve where he resided.\textsuperscript{25}

It is unclear in the decision how the court quantified the plaintiff's residual earning capacity but in the result the court did not accept the full value of Scenario One in assessing loss of future earning capacity. In fact the court instructed the actuarial expert to reassess the plaintiff's loss in this regard based on 20 weeks of employment at minimum wage and 22 weeks of unemployment insurance per year. The final figure presented was $139,468.00 and this was accepted by the court.\textsuperscript{26}

Again in this case we can see how the court is relying on assumptions about the plaintiff's capacity to earn an income due to his status as an aboriginal person and the economic status of the reserve where he lives. The court did have some earning history of this particular plaintiff to rely on but that data was limited by the young age of the plaintiff at the time of the accident. It is difficult to assess the actual monetary award given in \textit{Martin v. McKinney} because the value of the plaintiff's residual earning capacity is not stated, but it is evident that the court relied heavily on the plaintiff's race and socio-economic status when quantifying damages.

\textsuperscript{25}Ibid.

\textsuperscript{26}Ibid.
4.3 Race and Gender - Female Aboriginal Plaintiffs

There are however unique concerns which may come into play when damages for loss of future earning capacity is assessed for aboriginal women.

In my efforts to identify catastrophically injured young aboriginal women I was able to locate relatively few cases. There is no reason to believe that aboriginal women are injured any less frequently. In fact recent data would lead to precisely the opposite conclusion. The lack of cases could, in part, be due to the emphasis in my research on catastrophic injury as well as the difficulty in identifying the race of the plaintiff in some cases. But, importantly, it may also be due to the fact that the vast majority of personal injury cases settle out of court. While settling a claim prior to trial often saves both parties money in legal, it usually results in a lower damage award for the injured person. In some cases this is an appropriate result because settlement avoids both the financial and emotional costs of proceeding to trial. However settlements can also result if the injured party has difficulty accessing the assistance of a lawyer either due to financial,

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27 I must allow here for the possibility that aboriginal people who are injured may not actively seek redress from the courts due to a longstanding mistrust of the courts and the justice system in general. See for example: Thunder in My Soul, supra note 1 pg 254.

28 The Alberta Motor Association recently attempted to apply a blanket policy denying automobile insurance coverage to native people from the Hobbema area in Central Alberta. The AMA recently sent letters to several clients in Hobbema, where most of the 15,000 population are native, saying that their insurance would not be renewed because accident rates were too high. After enduring public scorn the AMA reversed this decision but media coverage of the issue revealed that the incidents of native people being injured or killed in car accidents was significantly higher than for non-native Albertans. See: Jeff Adams, “AMA retracts stand on Hobbema” The Calgary Herald (October 15, 1999) A9.

29 This somewhat trite conclusion is derived from my personal experience as an insurance defence lawyer as well as from conversations with many colleagues involved in personal injury litigation.
geographic or other cultural barriers. Lack of competent legal advice in negotiating a settlement can lead to inadequate compensation simply because the injured party may not know the various heads of damages they are entitled to and will have little or no frame of reference in arriving at a dollar figure.\(^{30}\)

My concern is that aboriginal women may have more difficulty accessing the necessary resources to wage battle with the insurance company when they are injured. Naturally this is speculative and proving this hypothesis would require substantially more research. If it is the case that aboriginal women are having difficulty accessing resources in this regard, the natural result could be insufficient compensation.

Although I was unable to locate as many cases as I had hoped in this area there are two specifically I would like to address. As mentioned above, Jamie Cassels has reviewed some cases dealing with aboriginal plaintiffs. Without reviewing all of the cases addressed by Cassels I do wish to discuss the B.C. case of *Parker v. Richards* which Cassels identified as problematic in his review.\(^{31}\)

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\(^{30}\)I do not mean to suggest that only lawyers are capable of negotiating reasonable settlements, however, engagement of competent legal counsel can assist an injured person in understanding the nature of their entitlement (I make no comment on the use of contingency fees by counsel).

In *Parker v. Richards*\textsuperscript{32} the plaintiffs were a 3 year old child and her grandmother, who was also the child's guardian. The child's mother had been killed in a motor vehicle accident and the plaintiffs were claiming loss of financial support, loss of mother's services, loss of care, guidance, training and encouragement and loss of inheritance. The court considered that the proper way to deal with these losses was to try and assess both the deceased mother's ability to provide for her daughter and the likelihood she would provide for her daughter. In considering these questions the court accepted the following evidence from an expert sociologist:

... It is recognized that financial awards in court cases such as this one are based on future income prospects of the deceased. It would appear that the relevant factors that would help to estimate future income in this particular instance, and the length of dependency of the child, would be the following: (1) Gender (female) (2) Age (17 years at the time of death) (3) Education (completed grade 6 no longer in school) (4) Labour Force Participation (unemployed, never worked) (5) Marital Status (single mother with little contact with the father of the child) (6) Ethnicity (Native Indian) (7) Socio Economic Status Background...

...All of the factors enumerated in this report, including gender, age, education, marital status, ethnicity and family background indicate that the future prospects of Cheryl Lynn (*the mother*) would probably have been bleak, most likely below the poverty line.\textsuperscript{33}

Relying on this evidence the court adopted a welfare standard in assessing financial loss and concluded that the deceased would have contributed $200/month to her


\textsuperscript{33} *Ibid.*
daughter. In this regard the court accepted that the deceased would have been able to raise her daughter for 30% less than it costs the average Canadian family to raise a child to age 18. This award was partially enhanced by an award for the cost of a nanny to compensate for loss of mother's services as well as some other nominal amounts representing loss of care and guidance and loss of inheritance.

The implications of this case are very troubling on a variety of levels. First, while the court did not spend considerable time debating the question, the judge identified as an issue the question of the likelihood that this young aboriginal mother would care for her child. The fact that this question was raised at all highlights the unique dilemma that may be faced by a poor aboriginal mother in the quantification of damages. Clearly this judge had concerns about the type of care and probability of care this mother would have provided to her child. These concerns are further reflected in the courts following statement:

I am not here to pass judgment on the quality of the care which Amber would have received from her mother but it does not seem to me that apart from the blood relationship the role played by a live-in nanny and that which would likely have been played by Cheryl have basically the same purpose and the same ambit.

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34Ibid.

35This is the aspect of the case that Cassels emphasized in his discussion. "Inequality and the Law of Torts" supra, note 12 at 196.

36Ibid.

37Ibid.
Perhaps the judge here did not intend to pass judgment but that is most certainly what was done. It is difficult to imagine that considerations of the likelihood of a mother caring for her child or the equating of a mother’s care to that of a nanny would have been used had the mother been white and affluent. The court’s willingness to engage in this debate reflects several possible assumptions about young aboriginal mothers. First it assumes that this woman would have had limited interest in raising her child. Second it assumes that this the prospects and abilities of this 17 year old mother were limited. All of these assumptions were reached on the bases of 17 years of this young woman’s life.

In contrast I located an interesting case where the potential of a young aboriginal woman was, in a way, recognized. In the recent B.C. decision in *Sterrit v. McLeod*, the plaintiff was injured in a motor vehicle accident when the car in which she was a passenger hydroplaned and went off the road. The plaintiff was not wearing a seatbelt at the time of the accident and suffered severe injuries including a skull fracture, mild to moderate brain injuries as well as soft tissue injuries. At the time of the accident the plaintiff was 23 years old, training for triathlons and planning to pursue a career in “West Coast” interior design.

The Court spent considerable time in this case reciting the steps the plaintiff had taken in pursuing a career as an interior designer. The plaintiff had completed a fine arts degree specializing in interior design at the reputable University of Manitoba, and since

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the accident had taken some courses at the Emily Carr Art Institute. The court in this case found that the plaintiff was an outgoing, charismatic individual who would have accomplished her goal of owning her own interior design firm had the accident not occurred. Based on this assumption the court assessed the plaintiff’s loss of earning capacity at $1,345,869. This was not the end of the matter however. The court also had the task in this case of assessing what the plaintiff would in fact earn with the limitations of her injuries.

In coming to this number the court was of the view that the plaintiff’s injuries would not prevent her from earning a substantial income and from going on to pursue interior design in some manner. The court thus assessed her likely earnings at 60% of what a full time interior designer would have made being approximately $800,000. Subtracting this amount from the loss of future earning capacity number of $1,345,869, the plaintiff was awarded $545,869 in total for loss of earning capacity.

It must be kept in mind that the plaintiff in this case did recover relatively well from her injuries in that she regained much of her cognitive skill. However, the court was clear that she would not be able to work full time as an interior designer, nor at any other profession as a direct result of her injuries. The court appeared to give the plaintiff in this

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\[^{39}\text{Ibid.}\]

\[^{40}\text{Ibid.}\]

\[^{41}\text{Ibid.}\]
case the benefit of the doubt that but for the accident she would have been able to attain all of her career goals.

While the case had a positive result, one may query whether the court would have had the same approach to this plaintiff if the accident had occurred 4 years earlier before the plaintiff had proven herself and obtained her Fine Arts degree. It is unlikely that the court in those circumstances would have given this plaintiff the benefit of the doubt that she would have attained her stated goals. This again is in contrast to the cases discussed above where young male plaintiffs with no earning or educational history are awarded damages as if their attaining professional status is a foregone conclusion. This case, in fact, provides support for the argument that young aboriginal plaintiffs should get the benefit of the doubt when damages are being quantified.

4.4 Critiquing the Evidence

I would like to bring the discussion back to the issue of the use of expert evidence from economists. In Chapter two I highlighted some of the reasons why reliance on this type of evidence is problematic. Primarily the use of earning tables is based on a marketplace that is already discriminatory. These concerns also apply to cases dealing with aboriginal plaintiffs. In some ways reliance on earning tables is even more problematic when dealing with an aboriginal plaintiff because fewer strides have been made in the marketplace where aboriginal people are concerned. What is interesting
about the approach taken by economists here is the clear acceptance of past earning
statistics as being indicative of future potential.

While there is some understanding in the courts that aboriginal people in Canada
have been economically disadvantaged, economists do not appear to have devoted too
much energy to investigating this problem. Those who have, however, have pointed out
the obvious; aboriginal people in Canada earn less than white Canadians.\(^{42}\) This gap
increases even more when the person is completely aboriginal and not of mixed race.\(^{43}\)
In addition, what also appears somewhat obvious, is that much of this wage differential
can be attributed to educational differences between aboriginal people and white people.\(^{44}\)
What has been mentioned but not evaluated by some economists is the fact that a
proportion of the wage gap can also be attributed to discriminatory practices in the labour

\(^{42}\) P. George and P. Kuhn, "The size and structure of native-white wage differentials in Canada" (1994), 27(1) Canadian Journal of Economics 20 and Arnold DeSilva, "Wage Discrimination Against Natives" (1999), XXV(I) Canadian Public Policy 65. Both of these studies are based on data obtained from Statistics Canada. The approach taken is not really a critical one but rather the economist authors are reporting on the current state of affairs in Canada. Both studies, the first based on 1986 census data and the second on 1991 census data, conclude that much of the wage differential reported between aboriginal and white Canadians is attributable to education. They acknowledge that the wage gap is significantly worse for aboriginal people living on reserve. While both studies mention the potential impact of discriminatory practices in the marketplace they minimize the potential impact of this on earning levels. In essence they find that the main indicator of earning level is education and aboriginal people in Canada are not as well educated (although somewhat ironically both studies note that educational attainment seems to make little difference to earning levels for those aboriginal people living on reserve). I would note that these studies make no mention of the situation of aboriginal people living on reserve but working in urban centers. This possibility, although a reality for many aboriginal people today, is not really considered by the economists. See: Thunder in my Soul, supra note 1 at 181.

\(^{43}\) George and Kuhn, Ibid.

\(^{44}\) Ibid.
market. Add to this the issue of access to education, particularly on reservations, and a significant proportion of the wage gap can be linked to discriminatory practices. What the courts need to address is how the inequities that rest deeply in Canadian society should be dealt with by the courts. As I will discuss in Chapter five, bringing equality principles to bear, I believe that the earning statistics used in these cases should be rejected and tables reflecting the earnings of white males be used instead.

4.5 Summary

Discrimination faced by aboriginal people in dealing with the justice system is widespread. This reality, although clearly evident to aboriginal people for generations, has more recently been recognized by the Supreme Court in a criminal context. The case law discussed above illustrates how this discrimination has translated into tort law as well. An aboriginal plaintiff in a personal injury action faces the uphill battle of trying to have their life and labour valued in an equitable manner. Hurdles along the way include the reliance by the courts on the earning tables produced by economists. These tables are derived from a labour market that has historically prevented the access of aboriginal people. On top of the biased data relied on by the court are assumptions made by the court itself which deny the potential of aboriginal plaintiffs and assume that they will, by

41Ibid.

42See also: Michael Mendelson and Ken Battle, “Aboriginal People in Canada’s Labour Market” (Caledon Institute of Social Policy: 1999).

43Williams, supra note 7 and accompanying text; Gladue, supra note 9 and accompanying text.
nature of their race, accomplish less during their lifetimes. These assumptions are evident in the courts willingness to assume that an aboriginal person is not likely to be educated past high school if they even complete high school and that there is a strong probability that they will not lead productive lives.

These difficulties can be further complicated when the plaintiff is an aboriginal woman as the court may fall into the pattern of asking different questions about the ability of an aboriginal woman to support herself and in particular the impact that childbearing may have on her.
CHAPTER FIVE

5.1 Summary

In my discussion above I have attempted to problematize the distinction between public and private law in an effort to argue that there is room in private law, and in tort, for the application of equality principles. The equality principle I wish to invoke is simply that women and aboriginal plaintiffs should not be burdened, or receive a diminished benefit, when, as personal injury plaintiffs, their damages for loss of earning capacity are quantified. In my view, when they receive lower damages than white male plaintiffs this is precisely the result.

I have attempted to explain why the courts have not treated women and aboriginal plaintiffs completely equitably by exploring the “formalist” approach to tort law and by critiquing the evidence commonly used personal injury actions.

Having reached the conclusion that the way in which the courts arrive at these damage awards is inappropriate, the obvious question which then arises is what would be an appropriate method of quantification? Before addressing potential solutions I want to comment briefly on the intersection of race, class and gender in this thesis.
5.2 The Intersection of Race Class and Gender

The structure of this thesis has been somewhat compartmentalized. I have looked at different sets of plaintiffs, selecting the cases on which to focus based on the category of plaintiff. I used this approach because it provided a straightforward way of identifying specific inequities in the quantification of damages. I do not, however, wish to be seen as shying away from the complex way in which race class and gender intersect to produce distinct effects.

All of the cases I have discussed have a class element to them whether the families were wealthy or poor.¹ This is particularly the case with aboriginal plaintiffs where the type of community the plaintiff is from (on reserve, or off) will certainly impact the damages awarded. *Martin v. McKinney*,² discussed in Chapter four, is a good example of a case where the economic stability of the reserve where the plaintiff lived impacted his damage award. Some would defend this reliance on the economic prospects of the reserve as a reliable indicator of the young plaintiff’s prospects. It is not, however, relevant to his potential and it is not an assessment employing equality principles.

The more specific effect of the intersection of race, class and gender is evident in

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¹See: Chapter 3 and Chapter 4.
Parker v. Richards⁴, also discussed in Chapter four, where the court made assumptions about the type of mother this young woman would likely be and her limited earning potential. The considerations employed by the court in Parker would not likely have been considered if the young mother had been white, or had come from an affluent family.

I point to these cases once again only to highlight that race, class and gender interact in the law and in tort to produce unique effects which should not be overlooked. While I have not examined this phenomenon in detail here, I do think is important to note.

I turn now to the proposals for change in this area.

5.3 The Plethora of Proposals for Progress

Commentators working in this area have recognized that dealing with the equitable quantification of damages is a very difficult problem. Arriving at any real solutions involves making a strong effort not to reproduce any of the inequities already present in the system as well as ensure that no new inequities are created. A variety of potential solutions have been proposed.

Perhaps the simplest idea in dealing with these inequitable damage awards has been to look at the particular, identifiable inequities and urge the courts to address them specifically in their damage awards. For example, Ken Cooper-Stephenson has suggested that the courts have already made some headway in dealing with damages for loss of future earning capacity awarded to women by respecting the value and diversity of women's contributions to society. Specifically, Cooper-Stephenson has suggested:

By properly reflecting the current level of earnings to be expected; anticipating the narrowing and even elimination of the gender gap in wages; properly evaluating the effect of interdependency relationships on women's work; appreciating the difficult post-accident prospects for injured women; and awarding damages for loss of homemaking capacity and loss of joint family income, assessments of damages for loss of working capacity for women have begun to reflect the compensatory principle, as they should have done from the outset.

Cooper Stephenson makes some important points here by focussing on some of the specific issues that have prevented equitable damage awards. It appears to me however to be somewhat of a simplistic solution that doesn’t really address the systemic discrimination faced by women and aboriginal plaintiffs. Cooper-Stephenson’s solutions are also of little use generally to male aboriginal plaintiffs as the issues highlighted are gender specific. In fact his solutions may also be inapplicable to female aboriginal plaintiffs as these women may have specific concerns, such as their particular role in their

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5Ibid.
community, which does not fit into Cooper-Stephenson’s model.\(^4\)

Another approach to remedying inequities in the quantification of damages for loss of earnings is to maintain reliance on statistical evidence, but rather than choose statistics that are specific to gender or class, use “neutral”, average statistics. This approach has been advocated by Martha Chamallas in an American context as in her view this takes into account the reality that different groups of people are simultaneously privileged and disadvantaged.\(^7\) For example white women retain race privilege, while minority men benefit from their dominant gender.\(^8\) According to Chamallas, the only truly neutral way of calculating damages, therefore, is to use facially neutral statistics which are derived from inclusive data. In other words, neither privileged, nor advantaged groups are discounted as the statistics include all groups and are truly averages.\(^9\)

Jamie Cassels has, at least partially, adopted a similar approach to that touted by

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\(^4\)By this I mean that the way in which the work of aboriginal women in their home or as mothers and in their communities may have distinct characteristics which are not readily accounted for by courts even if value is placed on a homemaking role. For example in some aboriginal communities women’s roles included such unremunerated things as rule-making where women are responsible for defining “crimes” or setting standards for behaviour in their communities. See for example: Patricia Monture-Angus, “Organizing Against Oppression: Aboriginal Women, Law and Feminism” in Patricia Monture Angus, Thunder in my Soul (Halifax: Fernwood Publishing Company, 1995) 169 at 178.

\(^7\)Martha Chamallas, “Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument” (1994), 63 Fordham Law Review 73 at 123.

\(^8\)Ibid. It is important to note here that Chamallas is working in an American context where there may be a stronger argument that minority men retain the benefit of being in the dominant gender. In a Canadian context the same argument may not or may not apply to aboriginal men.

\(^9\)Ibid.
Chamallas. Cassels is quick to recognize inequities which may be present in the market, but he also allows for the possibility that some individuals with tremendous earning capacity may choose not to work (he uses the example of the lawyer who chooses not to work but instead chooses to read novels all day long). On that basis Cassels suggests, similar to Chamallas, that an appropriate solution may be to use a “sum representing some proportion of average provincial earnings of men and women”.

Clearly Chamallas and Cassels are trying to avoid the mischief of relying only on the best possible scenario. They are taking into account the probability that not everyone will maximize their potential. However, what their analysis avoids is the fact that all of the statistics that would go into arriving at averages would be laden with the inequities of the market place. In my view it is better to err on the side of over-quantification and give each potential plaintiff the benefit of the doubt. Thus incorporating any statistics which may be tainted with bias or a discriminatory labour market must be inappropriate.

Elaine Gibson has addressed a few possible solutions in this area. First she has come to the general conclusion that the only truly equitable, bias free way of calculating damages for loss of earning capacity is to base the calculation for both sexes, and by

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11 Ibid at 485.
extension all people, on male earning statistics. For Gibson, "[t]hese are in effect the only wage statistics that are purged of the deleterious influence of childbearing and home responsibilities on the wages of women." Gibson goes further and argues that not only must male standards be used in quantification, they must also be used in determining what negative contingencies will be applied. While Gibson does not specifically address racialized damage awards in this context, the natural corollary of this proposal is that in assessing damage awards for all plaintiffs, including aboriginal plaintiffs, the male earning statistics should be used. It should be remembered that Gibson was writing about a specific case when she made this suggestion and she may not want to be read as suggesting this proposal has universal application.

A recently published piece by Mitchell McInnes canvasses and critiques the issue of adopting male income statistics for female plaintiffs. McInnes limits his discussion to critiquing the viability of this approach and concludes that the approach is riddled with theoretical problems which may, in the end, be contrary to feminist goals. McInnes' approach differs strongly from that of Gibson. McInnes retains hints of Weinrib in that his focus remains on the private law notion of individual plaintiff v. individual defendant.

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13Ibid.

14Ibid.

His emphasis is on what he sees as the troublesome repercussions of adopting male income statistics for female plaintiffs. As mentioned above Gibson, encourages the adoption of male statistics as the only short term way of addressing inequality in damages awards. McInnes would disagree.

Fundamentally McInnes sees tort's role as one of corrective justice. For him adoption of male income statistics for female plaintiffs (which he refers to as the "gendered earnings proposal") is not concerned with remedying a tort but rather is a method of re-distribution of wealth. He bases this position on the fact that the individual defendant in any given tort case is not responsible for social inequities faced by the plaintiff. Adoption of the gendered earnings proposal would award damages not on the basis of the defendant's wrongful conduct but rather on society's treatment of women.16 This would exacerbate the hardship suffered by defendants, many of whom are women.17

Further, McInnes asserts that the logical result of the gendered earnings proposal would be to remove all discriminatory practice in the quantification of tort damages. This would ultimately result in standardized levels of compensation. According to McInnes, this would have the effect of reducing damages for men, and also for some women,

16 Ibid, at 171.

17 While this concern is a valid one the majority of defendants in personal injury cases are insurance companies as opposed to individuals. In addition I would argue that in the context of a personal injury case it is appropriate that a culpable defendant bear the costs of injury rather than the innocent plaintiff regardless of the gender of the defendant.
depending on their socio-economic position. McInnes also asserts that those most likely to benefit from this proposal would probably not have access to the reform due to barriers in accessing litigation and the strength and litigation experience of insurance companies. Finally McInnes argues that this type of reform could ultimately result in masking the true sources of inequality and the de-valuation of women’s work. He states:

...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 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 the reality - of victory.

McInnes has clearly highlighted some of the theoretical problems inherent in the tort reforms suggested by Gibson. In particular his position that the gendered earnings proposal is something of a band-aid solution that may mask other inequities in society must be addressed. However, in my view McInnes has resisted the notion that tort can be a location of social change and a vehicle for equality. Specifically, by emphasizing the impact of any reforms on the individual defendant, McInnes has glossed over the impact of this de-valuation on the plaintiffs as well as its greater symbolic power. McInnes himself recognizes that transformation in this area of the law could make a dramatic


19 Ibid, at 179.
statement about the allocation of wealth in our country, yet he shies away from this conclusion because he is steeped in a bipolar notion of tort’s operation and thus can not move away from the impact these types of reforms would have on the defendant.

As I have argued above, focussing on the impact on the defendant when damage awards for female and aboriginal plaintiffs are increased as a result of a more equitable assessment is inappropriate. Similar concerns do not come into play when the plaintiff is a white male. Further, this impact on the defendant is part of the distributive framework of tort law. In essence the defendant, as the wrongdoer, is the most appropriate party to bear this financial cost.

Although Gibson’s proposal has been criticized, it has in some instances been used by the courts in order to avoid the obvious inequities in gendered earning tables.20 Gibson has, however, come up with an alternate proposal that does challenge traditional methods of quantifying damages for loss of earnings in a more fundamental way. Gibson has looked at “the trilogy” of Supreme Court of Canada decisions from 197821 which now guide damage awards in Canada, and concluded that the aim of the Supreme Court in those cases was to compensate injured plaintiffs according to their needs.22

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the needs of the plaintiff in areas such as cost of future care could, according to Gibson, lead to the courts establishing an appropriate standard income base, once the needs of the plaintiff are addressed. What I think Gibson has suggested here is a substitution of damages for loss of earning capacity in favour of a broad approach to the needs of the individual plaintiff regardless of their lost potential earning ability.

Gibson's methodology here essentially involves a rejection of loss of future earning capacity as a head of damages. On the one hand she is adopting some of the principles from "the trilogy" in her focus on need, but on the other she is rejecting the distinction between heads of pecuniary damages advocated by the Supreme Court. Gibson's approach is an interesting one because it has the potential for moving away from notions of the marketplace entirely in quantification of damages.

Moving away from the current heads of damages currently used by the courts also brings up the idea that we could, in fact, move away from our reliance on tort law to deal with compensation for injuries. Such a system is not without precedent. In New Zealand, for example, the state has established a mechanism whereby all employers, drivers, and persons who are self-employed, pay into a government run fund that deals with compensation for all personal injury. In this system the government sets standardized

\[23\] Ibid.

levels of compensation. Of course even in such a system there is the strong possibility that the quantification could be based on discriminatory norms. That analysis is beyond the scope of this thesis. Nonetheless, the existence of such a system is interesting and could provide a model for the rejection of quantification of damages as it exists currently in Canada.

5.4 A Strategic Approach

Having reviewed all of the proposals advocated in this area, I find myself agreeing with the first approach taken by Gibson. Practically speaking, it appears that the best solution is to use the earning tables produced for white male plaintiffs to quantify the damages for all plaintiffs regardless of race or gender. As Gibson pointed out, this is the only data which is purged of any of the effects of discrimination in the labour market and thus, in a sense, this is the only data that can be trusted. In essence, I am arguing for a standardization of the way these damage awards are assessed. While I recognize the problems with this approach, such as those highlighted by McInnes above, I find that, bringing equality principles to bear, it is the only way of reforming the quantification process in the short term. I have made a strategic decision by advocating for this type of reform.

As the focus of my thesis has been on damages awarded to young people who are catastrophically injured and will never be able to work again, I only propose this reform
for dealing with damages for young people. By young people I mean people under 25 years of age, with no relevant earning or educational history. This is consistent with my conception of "earning capacity" as a process of valuing potential. It appears glaringly unfair to me, and contrary to principles of equality, to limit the damages awarded to a young female or aboriginal plaintiff based on their race or gender. These young plaintiffs will never have the opportunity to explore their own earning potential; this is what the injury has taken away from them.

While I believe my position to be completely defensible when dealing with young plaintiffs with no relevant earning history, my proposal becomes more complex if it is extended to plaintiffs who are older and do have a considerable earning or educational history. How are the courts to deal with these plaintiffs? The dilemma is that, on my reasoning, the potential of women and aboriginal people has been limited by inequitable social restraints such as a discriminatory labour market. How, then, can their earning history be taken into account even if they have been working for 20 years? The market in which they have been working has limited their earnings. I confess to having no concrete answer to this vexing question, although my inclination would be to advocate for some application of equality principles. However, because I have consistently conceptualized quantification of damages for lost earning capacity as a quantification of potential, I believe I can avoid the dilemma.

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25 In my view even though a person is not on a clear career path before the age of 25 does not mean that they would never have found that path. There are many examples of young people who wander aimlessly until their late 20s when they fix on a particular career path.
In my view it is consistent to advocate for the use of male earning tables to quantify damages for those young plaintiffs who have not yet had the opportunity to explore their potential. These plaintiffs should not have the value of their potential limited because of their race or gender.

Another difficulty is that by proposing to use earning tables for white males, I am still advocating reliance on data produced by economists. This is somewhat problematic given the critiques I have aimed at the use of this data. Again I find myself in the position of having to make a strategic choice for the short term in order to avoid an inequity. In quantifying damages, the fact that we are dealing with dollar values cannot be avoided. The way in which tort compensates, imperfect as it is, is through money. I am, of course, uncomfortable with the notion that a dollar figure can be applied to an individual’s potential, but there is no avoiding this reality in torts. The court has to come up with figures to award the plaintiff. On that basis I conclude that the best case scenario is to rely on evidence that is as free from the discriminatory impacts as possible, and in this context that evidence is the earning tables for white men.

5.5 Conclusion

I have in some ways simplified the issues in my thesis in an effort to demonstrate some of the problems evident in this area. This simplification has allowed me to show how the divide between public and private law is problematic; how equality principles are
relevant in a private law arena, and how courts have been constrained by a bipolar approach to tort law and the nature of the evidence used in personal injury trials.

I have been motivated in this thesis to try and examine a social justice issue arising in a traditionally private law, tort context. Important for this examination is the foundation that tort and law in general is socially constructed. Law in all its forms derives from the society in which it operates; thus law is prone to reproducing injustices and inequities that exist within that society. Beyond this, however, I believe that law also has an impact on society and thus has the ability to be a positive force for social change. This has been evident in traditionally public law arenas such as human rights law and Charter litigation, and I hope it is now evident in the traditionally private law arena of tort.

Reform in the way damages for loss of future earning capacity is not an answer to social injustice, but it does have "potential value" in promoting equality in law's operation.
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