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Women's earnings and personal injury – A Canadian perspective: Wynn v NSW Insurance Ministerial Corporation

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Women's Earnings and Personal Injury – A Canadian Perspective: *Wynn v NSW Insurance Ministerial Corporation*

New South Wales Court of Appeal, 11 August 1994

by Ken Cooper-Stephenson *

Torts - assessment of damages - future economic loss - female plaintiff - professional occupation - married with one child after accident - possibility of maternity leave - deduction for childcare and homemaking help - reduction for contingencies and vicissitudes of life - positive and negative contingencies

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Headings in this case note:

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1. The facts

{1} The plaintiff in *Wynn v NSW Insurance Ministerial Corporation* [1] had been an employee of American Express. If a rubric is needed for the case, it might be: "Don't leave work ... (Without It)" [2]. This note will focus on particular issues raised in the case concerning the assessment of damages for personal injury. A summary of the facts relevant to those issues includes the following. The plaintiff was injured in an automobile accident in 1986 when she was approximately 30 years old. Prior to the accident she had established herself as a successful high-salaried businesswoman with American Express, it was "abundantly clear from the entirety of her evidence that she was very much career oriented..." [3]. Her pre-accident salary netted in excess of $60,000 per year. Furthermore, her health was excellent despite a previous accident; and during the period prior to 1986 she had been an active and vigorous participant in a range of fitness and sporting activities, both competitive and social. After the accident the plaintiff struggled to retain her pre-accident job, but because of her injuries was unable to do so. Instead, she had been working in a family business on a limited basis, and had subsequently married and had a child.

{2} The trial judge found that on the evidence it was "very probable that the plaintiff ... would have worked within the American Express organisation at least until the age of sixty years." [4]. Furthermore, in considering the contingencies and vicissitudes of life, the trial judge carefully balanced potential negative and positive contingencies, including, on the one hand, the possibilities of occasional health problems and short periods of maternity leave [5],

and, on the other, the plaintiff's very real prospects of promotion to a vice presidential position in the company. The evidence showed that American Express was a leader in its field, and was also "well and truly oriented towards equality of the sexes", and was a company which had a policy "to promote people from within the organisation rather than recruit them from outside it" [6]. In result, the judge reduced the award by 5% for contingencies, "reflecting those negative matters ... mentioned, balanced with the positive matters." Computing the overall loss, based on an assessment of the degree of probability of the occurrence of hypothetical and future events as required by *Malec v JC Hutton* [7], and deducting the amount the plaintiff was now likely to earn following her injuries, the judge awarded $705,980 for future economic loss. This was the discounted value of an annual loss of approximately $50,000 per year in 1992, to continue until age 60.

2. Court of Appeal decision

{3} The unanimous New South Wales Court of Appeal substantially reduced the trial judge's award. In a judgment delivered by Handley JA, the court upheld the trial judge's finding with respect to the plaintiff's residual earning capacity of $440 per week -- or just under $23,000 per year -- said to be "generous to the defendant" [8], but reduced the overall award by 28% through a reevaluation of the vicissitudes of life [9]. In particular, the court concluded that the trial judge had not only failed to take into account the possibility of maternity leave, but had also failed to consider that the plaintiff would have had to hire "domestic help for any children and for other household duties". The deduction for the former was made on the basis of a full two years of leave [10], despite the appeal court's recognising that the trial judge's conclusion that there was merely "the possibility that ... the plaintiff may have undertaken maternity leave on one or two occasions for several months or perhaps even a year" [11]. The deduction for childcare and homemaking help was made on a lifelong basis at $250 per week, "with the plaintiff and her husband bearing half each" [12]. In addition, the appeal court negatively assessed the plaintiff's potential future earnings and promotion, and held that an allowance should be made "for the prospect that the plaintiff would be unable or unwilling to remain in her job which placed such heavy demands on her time, energy and health and the love and patience of her husband", recognising, however, that the plaintiff "could have worked ... in a less demanding job but would then have earned substantially reduced salary and benefits" [13].

3. Background: A Canadian Perspective

{4} Canadian courts, prompted in some instances by important Australian decisions, have recently given thoughtful consideration to the assessment of damages for loss of working capacity for women. It is evident that a new approach is being taken which will eliminate many of the past inequities. On a general level, it now seems clear that the head of damages which used to be titled "loss of earnings" or "loss of earning capacity" [14] was under-inclusive of the value of women's work, and should now be styled "loss of working capacity". There are then three sub-heads which make up the loss so characterised: loss of earnings; loss of homemaking capacity; and loss of shared family income. These sub-heads have been given important focus in a trilogy of Canadian appeal court decisions.

{5} (1) The claim for loss of earnings simpliciter was highlighted in *Tucker v Asleson* [15], where McEachern CJ surveyed the literature and considered a range of points that have tended to depreciate awards for women. The case was sent back for retrial in order that the trend toward equal treatment of women be given its proper attention. This is the sub-head which is most prominent in Wynn.

{6} (2) The claim for loss of homemaking capacity was dealt with in similar detail by Vancise JA in *Fobel v Dean* [16], leading to a substantial award in addition to the award for loss of earnings [17]. This sub-head is relevant in Wynn, but only tangentially.

{7} And (3) the claim for loss of shared family income was given interesting and novel treatment in *Reekie v Messervey* [18], where Lambert JA recognised that when a person loses the opportunity to enter a "permanent interdependency relationship" there may be a pecuniary loss derived from the loss of a share in joint family income. This sub-head would only have become relevant in Wynn had there been evidence that the plaintiff's marriage was jeopardised by her injuries and their affects on her career [19].

{8} Overall, of course, the underlying principles of assessment of damages for loss of working capacity are no different because the plaintiff is a woman. Nevertheless, it is now recognised in the Canadian literature that there are a host of critical issues which require independent consideration [20]. Until recently the courts were frequently outdated in their perception of the role of women in the labour force, and often failed to recognise the value of women as working members of the community [21]. The case law revealed a series of problems which were sometimes cumulative in their effect. These included two very general issues involving the under-inclusiveness in the title of the head of damages, and a question whether the compensatory principle should be applied where it replicates market discrimination. The actual damages assessment issues -- those that are potentially relevant to Wynn, include both gender-related evidential problems, and problems in application of substantive doctrine. The first category embraces potential inaccuracy in fact-finding; stale-datedness of statistical data; and a disregard for the accepted standards of proof, particularly on the matter of contingencies. The second includes possible double-counting of negative contingencies; treatment of marriage as terminating women's work; mistaken assessment of the general level of women's earnings; general failure to integrate loss of earnings and loss of homemaking capacity; failure to recognise homemaking as an indirect income-producing function by proper analysis of "permanent interdependency relationships"; overemphasis of the post-accident working capacity of disabled women; treatment of post-accident marriage as a negative contingency; improper off-setting the cost of childcare against projected earnings; and the occasional subsumption of loss of working capacity under the heading of cost of care. In the end, the "hidden biases" in damages assessments for women "contribute to the impoverishment of disabled women" [22].

{9} The general approach in answer to these problems must clearly respond to the pressures for substantive equality from the field of human rights and constitutional law. If traditional assessment is followed, the starting point is the compensatory principle. Applying this principle, human rights legislation and constitutional norms can be predicted to have an overall levelling effect on the job-opportunity and remuneration of women by comparison with men. This should not only eliminate discriminatory wage-rate illegalities, but will likely lead to the increased numerical participation of women in the labour force. Furthermore, the growing desire of a younger generation of fathers to share more equally in child-minding and other homemaking responsibilities, and the more wide-spread availability of daycare, will

undoubtedly lead to a further numerical increase of women in the labour force, and a corresponding equality in opportunity and pay. Indeed, in the recent Supreme Court of Canada decision in *Toneguzzo-Norvell v Burnaby Hosp* [23] McLachlin J approved the trial judge's taking into consideration "the fact that earning tables for women reflect past inequities which have historically resulted in women on average earning less than men."

{10} In Canada, the treatment in *Tucker v Asleson* [24] of this general issue is a highlight. McEachern CJ thought it was "highly desirable that a principled approach be adopted" for assessing loss of earnings for women [25]. This was "so that other judgments may conform as closely as possible with future realities as best they can be ascertained at the time of trial." There was then a welcome emphasis by McLachlin J for the Supreme Court of Canada in *Toneguzzo-Norvell v Burnaby Hosp* [26] on the fact that the trial judge in the case had considered "the trend to increase and equalise the salaries of women with those of men." And earlier, in *Cherry v Borsman* [27], the British Columbia Court of Appeal had agreed that an increase was justified for a female plaintiff "to reflect the changing place of women in ... the market place," noting the testimony of an economist that "women's behaviour in the market is changing very quickly, but not fast enough for the statistics to reflect it". Furthermore, in *Tucker v Asleson* [28], McEachern CJ stressed that "trial judges are not limited to conventional statistics and that they should adjust them as may be required in any particular case," and that "the most the courts can do is to ensure, so far as possible, that proper weight is given to identifiable social trends so that the assessment of the plaintiff's future losses will reflect relevant future services." He continued as follows:

> "It is not difficult to predict a continuing trend in society towards equality in both opportunity and economic rewards for women and men. Such is the policy of all levels of government, institutions and professions, as well as most segments of the private sector. Greater equality is not just a Charter value: it is also a realistic goal. Over the expected working life of the plaintiff, starting at about the age of 20, and extending for about 45 years thereafter, it may safely be assumed that the present spread between income for men and women will be greatly narrowed in not eliminated. Legislation requiring equal pay for work of equal value may be enacted during her time. It is to be hoped that equality may be achieved within the plaintiff's pre-employment years."

{11} Assuming, therefore, that the primary task of the court is to estimate the earnings which but for her accident a female plaintiff would have received, and to subtract the value of what will now be earned, what might be the ingredients of a principled approach? Following the example of the leading Canadian judgments in this area [29], an approach might emphasise five focal points: (a) statistical and actuarial evidence; (b) the measurement of average earnings; (c) the impact of relationships; (d) the treatment of contingencies; and (e) the post-accident prognosis.

{12} Each of these points is in some manner relevant to the Wynn case. The impact of statistical studies with respect to women's work prospects is trumped in Wynn by the plaintiff's clearly-established work-pattern prior to her injuries, as supported by the evidential findings with respect to the plaintiff's work ethic as a successful businesswoman, and her evident career prospects in an established company with non-discriminatory policies. However, the background general perception of women's participation in the workforce clearly had a part to play in the assessment of her prospects at the trial level (positively) and on appeal (negatively). Furthermore, the trial judge's findings in the post-accident scenario, although carefully grounded on medical evidence, may have been overly generous to the defendants as admitted by the appeal court. The assessment here certainly respected the plaintiff's sincere but unsuccessful efforts to continue in her employment position. The other three factors -- measurement of the plaintiff's prima facie earnings loss; the impact of

relationships; and the treatment of contingencies -- are intimately connected with each other in Wynn, as they may be in most cases. In light of this, focus here will be on two topics: (a) the treatment of contingencies; and (b) the deduction from the award of the cost of childcare.

4. Contingencies and Vicissitudes for Women

{13} It is arguable that the appeal court judgment in Wynn uses the vehicle of "vicissitudes" to introduce the very "hidden biases" that are now being eliminated from personal injury damages awards for injured women. The plaintiff's pre-accident work record, motivation and future prospects were assessed very positively, and the trial judge appears to have given careful consideration to the whole matter of the vicissitudes of life. Having made the prima facie assessment on the basis of the plaintiff's pre-accident earnings level, the judgment included the very real possibility (probability) of promotion to an even higher-salaried position the consideration of vicissitudes. (The future prospects in that regard might well have been incorporated as part of the basic earning capacity computation.) The possibilities of the plaintiff's withdrawal from the paid workforce were then considered as a counterbalance. In economic terms, one could easily see how these might even out: if there was a 10-20% prospect (the judge certainly put it no higher than that) of a (lifelong) diminished salary because of withdrawal from such a high salaried position, this was surely countered by the more-than-even chance that this very successful woman would have been promoted to a higher-paid position, together with a limited chance that she might perhaps have doubled her income in some very senior executive position.

{14} The deduction for a full two-years of maternity leave by the appeal court not only overlaps with the deduction for childcare expenses but runs counter to the findings of the trial judge, who held that there was merely "the possibility that ... the plaintiff may have undertaken maternity leave on one or two occasions for several months or perhaps even a year" [30]. It remains true that on principle the loss of earning capacity should reflect potential withdrawal from the paid workforce - a matter that in a case where the evidence so indicates or on the basis of statistical prediction is likely to affect women more frequently than men. However, in the vast majority of these cases, the void should then be filled with a proper and full pecuniary award for loss of homemaking capacity, so that an injured plaintiff can replace her lost working capacity with paid-for homemaking services covering the full range of activity that that entails. In Wynn, however, there was a specific finding that a withdrawal from the paid workforce would probably be extremely temporary. Furthermore, such a choice of life-plan would almost certainly be supported by statistics in relation to women at a high-salaried income level.

{15} The appeal court's seemingly-unfounded factual assumption with respect to the length of potential maternity leave was then compounded by its contrary opinion as to the plaintiff's income and promotion prospects. It is hard to believe that a court would have made such a negative assessment in the case of a man. Indeed, cases have sometimes used evidence of the support and comfort of a female partner to show lifestyle stability and therefore an enhanced prospect of continued and successful employment. The general depreciation of the plaintiff's award on account of the possibility of her withdrawal from a high-salaried position is thus surely challengeable. The conclusion runs counter to the evidence, and it seems founded on an outdated and stereotypical perception of the current role and prospects of women in the business workforce generally. Given the proven track record of gender equity of the

plaintiff's employer, American Express, it is all-the-more strange that such a perception be introduced without evidence at the appeal court level.

{16} In the end, it seems necessary to return to basics. Such basics here are founded on the internationally respected dicta of Windeyer J in *Bresatz v Przibilla* [31] to the effect that contingencies may work in either direction -- that there may be "positive contingencies" as well as "negative contingencies":

"... the generalisation, that there must be a "scaling down" for contingencies, seems mistaken. All "contingencies" are not adverse: all "vicissitudes" are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."

{17} It is wrong, then, to pick away at one side of the balance, as the appeal court in Wynn appears all-too-readily to have done. That each case must depend on its own facts is well-recognised in Australia as it is in Canada. Contingencies can be considered on a general level or specifically related to the facts, a categorisation now reinforced by the Ontario Court of Appeal in *Graham v Rourke*: [32]

"... contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record."

{18} It is then accepted that for general contingencies awards should be moderate, perhaps in the region of 5%, unless the evidence indicates otherwise. And it is recognised that there should be no reduction for specific contingencies unless they are supported by the evidence. The evidence in Wynn was considered and appraised at the trial level, and there appears nothing of addition that was considered by the New South Wales Court of Appeal. An outdated impression from the bench of a historically long-past stereotypical working life pattern of women is surely not enough.

5. Childcare as a Cost of Earning

{19} Deduction for childcare was once made in Canada in the much maligned case of *Biotin v Newman*: [33] "... if [the plaintiff] did go to work, while still raising a family, it would probably involve the expense of hiring someone to look after the children." However, on the facts, the judgment was reversed by the Supreme Court of Canada, albeit without reasons. And a recent commentary on the general issue by Cassels is careful to restrict any potential deduction within narrow limits [34].

{20} Treatment of this issue in the second edition of *Personal Injury Damages in Canada* [35] will be as follows:

Another argument sometimes raised with respect to the level of women's earnings is that there should be a deduction from the loss of earnings of an amount representing the cost of childcare [36]. However, such a reduction will rarely be appropriate, whether the plaintiff is male or female, and whether the plaintiff was the primary or secondary earner.

(a) If the plaintiff would have been a homemaker and is now disabled from homemaking but has or will have a family, the cost of the relevant homemaking services for the family constitutes the award.
(b) If the plaintiff would have been an earner and has children or still will have children following the accident, and is disabled from both earning and homemaking, the award of full earnings will be necessary to produce a sum from which the childcare expenses can be paid: the gross earnings need to be awarded so that the plaintiff can retain the net benefit of earning after the cost of childcare.
(c) If, however, the plaintiff would have been an earner and is now disabled from earning but can now undertake childcare responsibilities instead, then the loss is the net loss of earnings after subtracting what would have been the cost of childcare. This will be a relatively rare situation which might, of course, affect men and women equally.
(d) If, finally, a plaintiff would have earned and paid for childcare in order to do so, but now will likely not have children, then there should probably be a reduction of the damages for loss of working capacity, but a reduction which should be considered under the controversial head of "reduced need" [37], and one which should only be made if there has been an appropriate non-pecuniary award for loss of the opportunity to have children. Again, such a reduction should apply equally to men and women.

{21} The Wynn case appears to fall within the exceptional category (c), but the extent and characterisation of the deduction made by the Court of Appeal appears in error on a number of counts.

{22} In the first place, if a deduction is made at all it should not be made from the head of loss of earning capacity. Childcare is not a "cost of earning" in a category (c) situation any more than it is in the other three categories indicated. As the text suggests, the award of full earnings will be necessary ... “so that the plaintiff can retain the net benefit of earning after the cost of childcare." A disabled person is prima facie entitled to employ paid-for childcare and professional homemaking services in the same manner as he or she would have employed them absent the injuries. This point in gender-neutral: it holds good for men and women alike. If it is right to make such a deduction (which is not clear), it must be standard practice in situations falling within the relevant category, (either (c) or (d) above) wherever an injured man or woman will either now use freed-up spare time for childcare, or where no childcare will now be necessary because there will be no children.

{23} To treat childminding as a cost of earning for women is based on the very stereotyping of gender roles which personal injury damages assessment is currently rejecting. It is, in short, one of those "hidden biases" which "contribute to the impoverishment of disabled women" spoken of by Gibson [38]. Instead, the first situation (c), the one raised in Wynn, is a question of "off-setting advantage" or, as the contract and property damages lawyers would have it, "betterment". The question is whether in the award of pecuniary loss as a whole the value of time which would otherwise not have been available should be set off. The second situation (d), is one of "reduced need", because the tragedy of the accident precludes both the benefit and burden of children.

{24} If, then, a general gender-neutral deduction for the off-setting advantage of freed-up spare time is justified, the question is how to evaluate such an advantage. First, on the facts of Wynn it is arguable that there has been only very limited freed-up spare time. The computation of loss of earning capacity included a considerable deduction for the plaintiff's residual earning power, calculated on the basis of eight hours per week. This embraced "work of a supervisory and/or administrative nature" which the trial judge accepted "as done at a pace, in a manner and at times and places which can accommodate the ongoing symptoms suffered by the plaintiff and her injuries" [39]. If eight hours per week of work of this character was accepted as the maximum the plaintiff was capable of performing (accepting, as the judge must have been, her duty to mitigate), then it seems unlikely that the plaintiff

would be available for any kind of strenuous homemaking or childminding activity in the remaining hours: if she were capable of this, her post-accident earning capacity would surely have been evaluated at a larger sum. (In fact, it does matter at this point in the analysis whether it took the plaintiff 8 or 20 hours per week to complete her post-accident work responsibilities. [40]) If she is now able to perform childminding tasks (which, of course, become less passive after a very short period of a child's life), it is highly likely that any additional childminding activity gained during hours the plaintiff would, absent her injuries, have been working, is off-set by a marked reduction in the length and quality of time she will now be able to allocate to childminding and homemaking during "after-hours" [41]. A vigorous and active worker and sportswoman, such as she was, would likely have attacked the homemaking and childrearing function with equal effort and enthusiasm. If there was something that might have given way, it would likely have been in the area of sport and fitness. In the end, it is not clear that the plaintiff is a "category (c)" person at all. She may more closely resemble a "category (b)" person -- one who is largely "disabled from both earning and homemaking" [42].

{25} In any event, to assume the off-setting need for childcare and domestic help at the level contemplated by the appeal court - that is, right through to age 60 - is surely counterfactual, or at least counter-intuitive for such an active and motivated person as the plaintiff was. Would one really have made such an assumption for a man, and if so (and it might be so on certain fact-patterns), has a deduction of this kind ever been contemplated for a male plaintiff?

6. Conclusion

{26} Although the pattern and thread of reasoning in the New South Wales Court of Appeal in Wynn are familiar, on closer examination, the trial judge's assessment appears eminently more accurate and in touch with current social reality. It is also responsive the actual evidence adduced in the case. Further appeal in the case appears to provide a golden opportunity for the High Court to reinforce its progressive approaches already evident in the area of personal injury damages assessment, as evidenced, for example, in *Griffiths v Kerkemeyer* [43] and *Van Gervan v Fenton* [44]. A message can be sent to the Australian Courts -- and, indeed, to common law courts generally -- that injured women's loss of working capacity should be assessed to its full potential, reflecting current and anticipated trends in society. Such a message would coordinate with the welcome approach to this issue tentatively voiced in the Supreme Court of Canada by McLachlin J in *Toneguzzo-Norvell v Burnaby Hosp* [45].

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Endnotes:

1. (1992) Dist Ct NSW 37609/86, judgment delivered on 26 Nov 1992, (1994) CA 40745/92 (CA), judgment delivered 11 August 1994, (hereafter referred to as "Wynn").

2. Or perhaps simply: "Don't Leave Home ..."?

3. Ibid at 9(5).

4. Ibid at 22(15).

5. Ibid at 23(15).

6. Ibid at 24(20) - 25(12).

7. (1990) 169 CLR 638 (HC).

8. Wynn, CA 40745/92 at 5(5).

9. The court also reduced the award because the plaintiff failed to prove the discounted value of lost superannuation benefits, although she had claimed on the basis of lost employer contributions, the latter being treated in Canada as a more usual method of assessing the value of such fringe benefits.

10. Note 1 at 13(20).

11. Ibid at 9(20).

12. Ibid at 13(10).

13. Ibid at 13(20).

14. The latter is the preferred description in Australia, although very little of substance turns on the point.

15. (1993) 102 DLR (4th) 518 at 528-36 (BCCA).

16. (1992) 83 DLR (4th) 385 at 395-407 (Sask CA), following inter alia the approach taken in *Hodges v Frost* (1984) 53 ALR 373 (FC), and referring to the leading Australian author, R Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 Sydney L Rev 528. Fobel is now likely the leading common law reference on this sub-head of damages.

17. For the Australian position, see H Luntz, *Assessment of Damages for Personal Injuries and Death* 3rd ed (1990) at 193-194 and cases cited there. As Luntz states (at 193, note 17), the Australian academic writers "strongly support a right of recovery for loss of capacity to

provide household services". The dicta of Murphy J in *Sharman v Evans* (1977) 138 CLR 563 at 598 are a persuasive starting point.

18. (1989) 59 DLR (4th) 481 at 494-500 (BCCA).

19. Recent decisions also recognise the interrelationship of the sub-heads, although the detail of this has yet to be worked out -- partly because the discipline of economics has not yet given proper focus to women's issues.

20. See K Cooper Stephenson, "Damages for Loss of Working Capacity for Women" (1978-79) 43 Sask L Rev (No 27) 7 (largely reproduced in the first edition of KD Cooper-Stephenson & IB Saunders, *Personal Injury Damages in Canada* (1981) at 206-227); E Gibson, "The Gendered Wage Dilemma in Personal Injury Damages" in K Cooper-Stephenson & E Gibson, *Tort Theory* (1993) 185; J Cassels, "Damages for Lost Earning Capacity: Women and Children Last" (1992) 71 Can Bar Rev 445 at 471-473, 489-491; SA Griffin, "The Value of Women -- Avoiding the Prejudices of the Past" (1993) 51 The Advocate 545; E Gibson, "Loss of Earning Capacity for the Female Tort Victim: Comment on *Toneguzzo-Norvell (Guardian ad litem of) v Burnaby Hospital*" (1994) 17 CCLT (2d) 78.

21. A striking exception was the 1966 comment by Clement JA of the Alberta Court of Appeal in *Prather v Hamel* (1976) 66 DLR (3d) 109 at 114 (Alta CA), that he "would not feel justified in differentiating greatly between the future earning capacity of a boy and girl", because "in today's society women are progressing towards an equality of status with men not only in respect of rates of pay, but also in the range of 'job opportunities'".

22. E Gibson, "The Gendered Wage Dilemma in Personal Injury Damages" in K Cooper-Stephenson & E Gibson, *Tort Theory* (1993) 185.

23. (1994) 110 DLR (4th) 289 at 294-5 (SCC).

24. (1993) 102 DLR (4th) 518 (BCCA).

25. (1993) 102 DLR (4th) 518 at 533 (BCCA).

26. (1994) 110 DLR (4th) 289 at 295 (SCC).

27. (1992) 94 DLR (4th) 487 at 527-9 (BCCA). The evidential foundation for this argument has frequently not been laid at trial. See, e.g., *Pittman Estate v Bain* (1994) 19 CCLT (2d) 1 at 173-4 (Ont HC), where, however, as Lang J pointed out, the short-term nature of the loss and the recession would have precluded its having any significant impact.

28. (1993) 102 DLR (4th) 518 (BCCA).

29. Including also those on loss of homemaking capacity, *Fobel v Dean* (1992) 83 DLR (4th) 385 at 395-407 (Sask CA) (Vancise JA); and, on loss of shared family income, *Reekie v Messervey* (1989) 59 DLR (4th) 481 at 494-500 (BCCA) (Lambert JA).

30. Ibid at 9(20).

31. [1963] ALR 218 at 544 (HC). For an update on the Australian position see H Luntz, *Assessment of Damages for Personal Injuries and Death* 3rd ed (1990) at 290-3.

32. (1991) 74 DLR (4th) 1 at 14-15. See also *Tonrud v French* (1991) 84 DLR (4th) 275 at 287 (Man CA). Luntz, ibid, at 285-6.

33. (1963) 42 WWR 677 at 681-82 (Sask CA).

34. J Cassels, "Damages for Lost Earning Capacity: Women and Children Last" (1992) 71 Can Bar Rev 445 at 467-9.

35. Forthcoming, January, 1996. First edition: KD Cooper-Stephenson & IB Saunders, *Personal Injury Damages in Canada* (1981).

36. Boitiz, supra note 33 is referred to here.

37. Reference is made to the relevant chapter of the book, with the comment that "the 'freed up' earnings should likely be awarded so that the plaintiff can use the money for substituted purposes." Children may be an expensive route to happiness, but so are alternative choices.

38. Supra note 22.

39. Wynn, supra, note 1 at 18(15).

40. Cf Wynn, supra, note 1, CA 40745/92 at 4(20).

41. The analysis at this point tangentially brings in the plaintiff's (unassessed it seems) loss of homemaking capacity, and intersects with the treatment of the so-called "marriage contingency". For Canadian cases where large awards were made for loss of homemaking capacity to women who had been fulltime paid employees at the time of their injuries see *Fobel v Dean* (1991) 83 DLR (4th) 385 (Sask CA), and *McLaren v Schwalbe* (1994) 16 Alta LR (3d) 108 (QB). In the latter case Picard J was explicit. She described the plaintiff as "a meticulous homemaker and an excellent cook who looked after three children, a home and worked full-time outside the home."

42. Supra, quote at note 35.

43. (1977) 139 CLR 161.

44. (1992) 175 CLR 327.

45. (1994) 110 DLR (4th) 289 at 294-5 (SCC).