

PERSONAL INJURY LAW

Will wage differences between male and female plaintiffs be eliminated?

By Christopher Bruce and Kelly Rathje

A number of recent decisions have suggested that estimates of the lifetime earnings of young females should be based on data for males. Two arguments have been made in support of this view.

The first is that, by the time that females who are currently minors become adults, much of the discriminatory differential between male and female earnings will have been removed. In two B.C. judgments, for example, (*B.I.Z. v. Sams*, [1997] B.C.J. No. 793; and *Terracciano v. Etheridge and Fujii*, [1997] B.C.J. No. 1051), the court accepted the use of average earnings statistics for males to estimate the future earnings of female plaintiffs.

In *Terracciano*, Justice Mary Saunders (now of the B.C. Court of Appeal) expressed reservations about the "... Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behaviour."

The second argument is that it would be inappropriate for the courts to institutionalise current wage differentials that are based on discrimination. In the Alberta decision, *MacCabe v. Westlock* [1999] A.J. No. 499, for example,

the court concluded that the "... societal trend is and must embrace pay equity given our fundamental right to equality which is entrenched in the constitution ..."

However, these decisions were silent about the possibility that women might earn less than men even after discriminatory practices had been removed. Importantly, for example, the Court of Appeal in *MacCabe* ([2002] A.J. No. 1555) rejected the trial court's finding that male contingencies (such as for non-participation, unemployment, and so forth) should be used when estimating MacCabe's losses. Specifically, it found that "... it would be inappropriate to apply male contingencies to [MacCabe] when there was no evidentiary basis that she would have worked a typical male pattern."

The decision in *MacCabe* recognised that, even in a world in which men and women experienced equality of opportunity, incomes might differ between the sexes if they made different choices. Most importantly, women might choose to take more time off to care for children; might choose to work fewer hours; and might retire earlier than men.

What these considerations suggest is that if earnings data for men

are to be used as the basis for the estimation of earnings data for women, the former must be adjusted downward for the differences in contingencies. We consider the impacts that each of three such contingencies might have on the male/female earnings differential.

Participation rates

The percentage of any group that is either working or available for work at any time is known as the "participation rate." Primarily because of the impact of child-rearing, women have lower participation rates than do men at virtually every age. Hence, if everything else is equal, women's earnings in an average year will be lower than men's in proportion to the differences in participation rates.

It is commonly found that, among high school graduates, the difference between male and female participation rates is approximately 15 per cent; whereas, among college and university graduates, that difference is approximately 10 per cent. Accordingly, it might be appropriate to estimate the earnings of females by reducing the earnings of comparable males by approximately 15 per cent among high school graduates and by 10 per



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cent among those with post-secondary education.

Part-time employment

Even when they are in the labour force, women earn less than men because they are more likely to work part-time. Currently, in the age group 25-54, approximately 20-25 per cent of women work part-time, whereas only 2-5 per cent of men do so. That is, on average, approximately 20 per cent more women than men work part-time. If part-time is interpreted to mean "half time" this implies that women in the labour force work 10 per cent fewer hours than men. Everything else being equal, therefore, this difference suggests that male earnings should be reduced by a further 10 per cent, in order to obtain an estimate of female earnings.

Retirement

Women retire approximately two years earlier than men at most education levels. Hence, any esti-

mate of female lifetime earnings will have to take this difference into account.

Summary

We have suggested in this article that, even if there was no discrimination in the labour market – that is, even if women received the same hourly wages as men – women's annual earnings would still be substantially lower than men's. Among those with high school education, the differential would be approximately 25 percentage points, due to differences in labour force participation rates (15 per cent) and propensity to work part-time (10 per cent); and among college and university graduates, women's earnings would be approximately 20 per cent lower than men's.

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Review hospital policies

DOCUMENTATION
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Following the fall, documentation in the medical record should include;

- The patient's condition when they were found
- Direct quotes from the patient regarding their condition and the events surrounding the fall and the injury
- A thorough physical assessment and identification of injuries
 - Safety initiatives taken to prevent further harm to the patient
 - Physician notification, communication and examination
 - Diagnostic studies undertaken and their results
 - Family notification
 - Evidence of ongoing monitoring of patient condition
 - Other care and reporting requirements as dictated by hospital policy

Given the many intrinsic and extrinsic factors that can contribute to an injurious fall, medical/legal investigation should include a review of hospital policies followed by examination of the medical documentation for evidence of a fall risk assessment

(and reassessment following a change in health status), development of a safe plan of care and implementation of appropriate safety interventions.

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