A Woman's Worth: Gender Bias in Damage Awards

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In the 25 years since the U.S. Supreme Court first invalidated a statute containing a gender-based classification, the use of explicit gender distinctions in statutes has decreased dramatically.[1] In virtually all contexts, the equal protection principle has prohibited the use of gender as a basis for differentiation. The prohibition against gender-based classifications was designed to challenge traditional sex-role assumptions about women, assumptions that reinforced women's roles as wives and mothers and downplayed their roles as wage earners.

One prominent exception to the hostility against the use of explicit gender distinctions is the practice of relying on gender-based tables to determine loss of future earning capacity in personal injury and wrongful death actions.

This practice dramatically reduces some damage awards for women, perpetuates and magnifies employment discrimination on the basis of a person's gender, and is arguably unconstitutional on equal protection grounds.

In this country, gender bias in the computation of these damages has largely escaped the notice of the courts and commentators.[2] I first became aware of it when I served as a member of a statewide task force examining gender and race bias in the Iowa court system. From our survey responses and informal committee discussions, we discovered that litigators and judges generally accepted the legitimacy of economic projections made about the future earnings of female plaintiffs even though they were based on statistics reflecting economic patterns for women only.

My later research showed that it was not uncommon for an attorney for a female plaintiff to introduce gender-specific data, although this was likely to decrease the plaintiff's award. In a few cases, the future earning capacity of African American plaintiffs was calculated by reference to explicitly race-based tables, although race-based classifications are even more greatly disfavored in the law.

I learned that what economists regard as an accurate measure of loss of future earning capacity has dominated how lawyers and judges determine these damages. There has been little discussion of the equity of the practice and little awareness that predictions about future earning capacity involve social as well as economic judgments.

Calculating Lost Potential

An award for the loss of future earning capacity compensates for the ability to earn money when an injury has impaired the plaintiff's earning power. Authorities generally agree that these damages compensate for loss of potential: what the plaintiff *could* have earned, not what the plaintiff *would* have earned. This approach provides a theoretical basis for authorizing awards for people who do unpaid labor in the home or whose work is not otherwise compensated through the market. One leading commentator has described lost earning capacity as "an award for the value of the time of the injured person, measured by a more or less objective measure."[3]

The most common starting point for calculating lost earning capacity of an adult is to consider the plaintiff's established earnings record. Current earnings are then used as a basis for projecting future earnings. To do this, it is necessary to estimate how many years the plaintiff would have worked if she had not been injured (work-life expectancy) and the amount the plaintiff would have earned each year, reduced to present value.

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These calculations are complicated enough to justify expert testimony on the issue. Typically, before trial, an economist will prepare a formal report that summarizes the calculations, including a statement of the assumptions used and copies of government documents providing statistical information.[4]

When a female plaintiff has an established work history, economists often use gender-based tables to estimate work-life expectancy. These tables incorporate the assumption that women spend fewer years in the labor force than men.

Work-life expectancy is distinct from life expectancy. Work-life expectancy is derived from the past working experience of all people in a person's gender and racial group. It incorporates rates of unemployment, both voluntary and involuntary, as well as expected retirement age. Although women as a group live longer than men, the work-life expectancy of women of all races is typically shorter than that of men, in part because in the past women spent years out of the workforce for childrearing and other family-related reasons.

Based on data from the U.S. Bureau of Labor Statistics that compare work-life patterns, the work-life expectancy for a white man injured at the age of 30 is estimated to be 29.5 years. The same estimate for a white woman is 20.8 years.

Minority women are at even a greater disadvantage. A minority woman injured at age 30 has a work-life expectancy of 20.3 years—0.5 years less than that of a white woman, 9.2 years less than that of a white man, and 4.2 years less than that of a minority man. The five-year disparity between white men and minority men also demonstrates that both race- and gender-specific data penalize certain groups of plaintiffs in damage awards.[5]

Economists also rely on gender-based tables where the injured party has only a limited, or nonexistent, work history. Most of these cases involve children who have suffered catastrophic injury.

One technique for calculating future earning capacity in these cases is to predict the level of education that the plaintiff would have achieved. This can be done by examining a number of factors, such as the plaintiff's scores on aptitude tests, the socioeconomic status of the plaintiff's family, and parents' and siblings' education levels.

Gender enters the calculation when economists refer to tables of average earnings, broken down by sex and education, to estimate the plaintiff's lifetime earnings. Where data are available for specific racial groups, economists may further target their projections based on the plaintiff's race.

Negative Consequences

Using gender-specific data can have enormous negative consequences for plaintiffs in tort actions. The projected lifetime earnings, discounted to 1990 present value, of a female college graduate have been estimated to be $1,174,772—of a male college graduate, $1,815,850.[6] This means that if two children, a boy and a girl, with the same education prospects were each permanently disabled by an injury, the girl's award would be only 65 percent of the boy's award, a disparity attributable solely to gender.

Using gender-specific data can have enormous negative consequences.

The size of the male-female disparity is not surprising given the size of the current wage gap between men and women of all races. In 1991 the median income of white women employed full time was 69 percent of the median income of white men. African American women received 62 percent of the median income for white men; Hispanic women, 54 percent; African American men, 74 percent; and Hispanic men, 65 percent.[7]

Relying on current wages means that predictions about future wages will be tied to present disparities. Use of these data also allows discrimination in one area—setting pay rates—to influence valuation in another area—calculating personal injury awards. Using current wages also further impoverishes members of low-income groups, most notably women, who find themselves disabled from severe injuries.

Until as recently as seven years ago, courts seemed to accept the premise that awards to female plaintiffs could properly be based on gender-specific economic data and estimates. A traditionalist line of cases approved of estimates of work-life expectancy for women that were substantially lower than estimates for similarly situated men.

One dramatic example is *Frankel v. United States*,[8] which involved a woman injured after she had completed two years of a four-year course in commercial art. Although she was on her way to a career in commercial art, the court in a nonjury trial concluded that she would have become a wife and mother, leaving the workforce for a substantial period of time.[9] The projection of future earnings for a commercial artist working continuously until retirement was $237,630. The plaintiff, however, was awarded only $125,000 for lost earning capacity after the court took a hefty discount for marriage and motherhood.[10]

In other cases, courts have approved the use of statistical calculations based on the lower average earnings of employed women.[11] In these cases, plaintiffs received lower awards than men would have received even though it was assumed that the women would stay in the workforce as long as men would.

In wrongful death cases involving children, courts have typically instructed juries to consider "the age, sex, and physical and mental characteristics of the child. . . ."[12] This signals that sex is relevant as a good predictor of earning capacity. The assumption is that, all things being equal, female children have less economic worth to their parents than male children. The instruction perpetuates, in diluted form, old notions that daughters are liabilities while sons can be expected to increase a family's wealth.

Constitutional Attack

The traditionalist approach to earning capacity has yet to be attacked as unconstitutional, gender-based discrimination. Two recent cases, however, have questioned the propriety of using gender- or race-based data as a matter of common law policy. The first is *Reilly v. United States*,[13] where the defendant introduced work-life tables from the Bureau of Labor Statistics indicating that women who had 15 or more years of education would work only 28 years between the ages of 22 and 70, a 40 percent reduction from the plaintiff's figures.

The court rejected the assumption that the past could be used as an accurate guide to the future. It characterized the assumption underlying the gender-based tables as "sexist" and "antiquated" and expressed doubt concerning the "the probative value of such a statistic with respect to twenty-first century women's

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employment patterns. . . ."[14]

Reilly is notable for its recognition that women's work patterns are dynamic and that projections that do not take into account the trend toward greater labor force participation among women are inaccurate and unfair. Perhaps because no constitutional challenge was raised, however, *Reilly* stopped short of questioning the use of more refined gender-based statistics that are sensitive to employment trends but that nevertheless lead to disparate results for men and women.

The most far-reaching case to confront these issues is *Wheeler Tarpeh-Doe v. United States*,[15] a 1991 case involving the use of both gender- and race-based statistics. The dilemma facing the court in that case was how to categorize the earning potential of a male child whose father was black and whose mother was white. The plaintiff's expert used census tables to determine the income of U.S. male college graduates; the defendant's expert argued that the appropriate measure to use was the "average earnings of black men. . . ."[16]

The court refused to decide the child's race and rejected statistics premised explicitly on gender or race. The court ruled that only gender-neutral and race-neutral data should be used. It based its calculation on the average earnings of all U.S. college graduates, without regard to sex or race.

The result was surprising. Because the average wage for all people was below that of both white and black men, the plaintiff recovered less than even the amount argued for by the defendant. The court took a neutral, inclusive approach that caused the plaintiff to lose the sizeable privilege typically accorded to male plaintiffs, even though he prevailed in his argument that race-specific tables unfairly decreased awards to blacks.

I believe the inclusive approach used by the *Tarpeh-Doe* court is constitutionally mandated.[17] On the merits, the case against using gender-based classifications is very strong. Under the prevailing intermediate scrutiny standard for explicit gender-based classifications, women are supposed to be protected against damaging generalizations about their sex unless the state proves that the classification is substantially related to the achievement of an important government objective.[18]

Using this test, the U.S. Supreme Court has struck down a number of statutes that presumed wives were economically dependent on their husbands and that conditioned financial benefits on a spouse's sex.[19] The Court steadfastly refused to allow gender to be used as a basis for assuming dependency, despite strong statistical evidence that most wives were, in fact, financially dependent on their husbands.

The Court's approach in equal protection cases rejects overbroad generalizations and provides legal support for women in nontraditional roles. The Court has shown its distaste for the very domestic and maternal assumptions underlying the calculation of women's future earning capacity—that women will become stay-at-home mothers and that when they do work, they will have less-demanding and lower-paying jobs outside the home.

Use of gender-based statistics to project future earning capacity closely resembles the economic dependency presumptions invalidated by the Court in the 1970s. In each situation, the gender-based classification is a generalization based on women's historical lack of earning power and represents an attempt to bind individuals to the experience of a group. The Court's reluctance to uphold classifications that might disadvantage women in their nontraditional roles as wage earners should carry over to use of sex-based earnings projections.

Plaintiffs might also rely on the celebrated Title VII case of *City of Los Angeles v. Manhart*[20] when raising a constitutional challenge to gender-based estimates of work-life expectancy. *Manhart* held that an employer could not require women to make larger contributions to a pension fund simply because as a group they live longer than men.[21]

Even though the generalization that women have longer life expectancies was accurate, the Court concluded that the insurance scheme violated antidiscrimination principles because of its tendency "to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."[22] Although *Manhart* was not a constitutional challenge, its concern for individualized equity is a strong theme in constitutional jurisprudence and provides powerful support for an equal protection challenge.

An even stronger challenge can be made against use of race-based statistics that leave minority women and men at a distinct disadvantage. Explicit race-based classifications are treated as inherently suspect and can only be justified in the most compelling of circumstances. The most damning precedent can be found in *Palmore v. Sidoti*,[23] which held

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5. Service by mail on a defendant in a foreign country seldom works, and is never a good idea. The latent hazards (discussed above) to a client or his lawyer, exist in every country where service by mail is improper or illegal.

6. The recent *Schlunk* case stated that U.S. law did not require, in every case, Hague Convention procedures to bring a foreign defendant into a U.S. Court. However, the Court said these procedures **could always** be used; and a lawyer who didn't, ran the risk of finding out that he should have. Additionally, the Court stated that where treaty procedures were not used, a U.S. judgement could be unenforcible abroad.

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that the government may not "neutrally" reflect private prejudice.

The case involved the removal of a child from the custody of her mother, a white woman, upon her remarriage to an African American man. A unanimous Supreme Court held that it was improper to consider the race of the stepparent, even if race were relevant to predicting the difficulties the child would face.[24]

Particularly when a court in a tort action is faced with the odious task of classifying a plaintiff according to race--a situation bound to occur with some frequency in our multiracial society—it may be inclined to rule that the Constitution forbids reliance on race-based economic data.

Requiring courts to use only inclusive, gender-neutral, and race-neutral statistics to determine future income capacity would not raise the aggregate amount of tort damages awarded to plantiffs. Instead, through the equalization process, women of all races would benefit, with the greatest reductions occurring in awards to white men. The awards would be redistributed, but the overall amount of tort damages should not really change substantially.

This change in the pattern of damage awards would nevertheless be fair because the value of a tort plaintiff's injury should not be tied to past disparities in the earnings or labor force participation of men and women. Use of inclusive statistics goes beyond superficial neutrality because it takes the experience of all people into account in setting the norm and, in the process, eliminates both gender disadvantage and gender privilege.

Using gender-based economic data to determine the future earning capacity of tort victims is one mechanism by which the lives of women are devalued while the appearance of neutrality and rationality is still preserved. I doubt whether most defense attorneys would openly argue today that women are domestic creatures whose labor is not worthy of compensation or capable of being evaluated in dollars and cents. Nevertheless, the potential of women continues to be devalued in a subtle way through gender-based statistics.

Practically, this deprives women of fair compensation for their injuries. Symbolically, it signals that white men are worth more and reinforces the belief that white men will achieve more in their lives. Based on conventional equal protection analysis, the practice should be declared unconstitutional.

Notes

1 Reed v. Reed, 404 U.S. 71 (1971).
2 Canadian commentators, however, have treated these issues more extensively. *See, e.g.*, TORT THEORY 185-211 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Jamie Cassels, *Damages for Lost Earning Capacity: Women and Children Last*, 71 CAN. B. REV. 447 (1992).
3 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 367 (2d ed. 1993).
4 *See* Leo M. O'Connor & Robert Miller, *The Economist Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME LAW. 354, 356-57 (1972).
5 PAUL M. DEUTSCH & FREDERICK A. RAFFA, 8 DAMAGES IN TORT ACTIONS 110.13, tbl. 7b.2 (Matthew Bender 1994).
6 Interview with Professor Richard Stevenson of the University of Iowa, College of Business Administration, in Iowa City, Iowa (Aug. 25, 1993).
7 *Money Income of Households, Families, and Persons in the United States: 1991*, *in* UNITED STATES DEP'T OF LABOR, CURRENT POPULATION REPORTS, P-60 SERIES. The most recent P-60 series includes a breakdown by gender and for white, black, and Hispanic people. There are no separate tables for Asian Americans, Native Americans, or other racial/ethnic groups.
8 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd sub nom.* Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972).
9 *Id.* at 1337.
10 *Id.* at 1337-38.
11 *See, e.g.*, Caron v. United States, 410 F. Supp. 378, 398 (D.R.I. 1975), *aff'd*, 548 F.2d 366 (1st Cir. 1976); Gilborges v. Wallace, 379 A.2d 269, 277 (N.J. Super. Ct. App. Div. 1977), Morrison v. Alaska, 516 P.2d 402, 405 (Alaska 1973).
12 *See, e.g.*, Richards v. City of Cleveland, No. 43909 (Ohio Ct. App. June 17, 1982); Franchell v. Sims, 424 N.Y.S.2d 959 (N.Y. App. Div. 1980).
13 665 F. Supp. 976 (D.R.I. 1987), *modified*, 863 F.2d 149 (1st Cir. 1988).
14 *Id.* at 997.
15 771 F. Supp. 427 (D.D.C. 1991), *cert. denied*, 111 S. Ct. 955 (1991), *and rev'd on other grounds*, 28 F.3d 120 (D.D.C. 1994).
16 *Id.* at 445.
17 The constitutional requirement of state action is present in these cases because, by admitting gender-based data, the court endorses a common law rule of damages that turns on the gender of the plaintiff. *Cf.* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (state action found in exercising peremptory challenge in civil trial).
18 The Supreme Court set out this standard in *Craig v. Boren*, 429 U.S. 190 (1976).
19 *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (rejecting requirement that widowers prove dependency to collect social security benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (rejecting restriction of "mother's" survivor benefits to surviving wives); Frontiero v. Richardson, 411 U.S. 677 (1973) (rejecting requirement that spouses of female soldiers prove dependency).
20 435 U.S. 702 (1978).
21 *Id.* at 711.
22 *Id.* at 709.
23 466 U.S. 429 (1984).
24 *Id.* at 433.

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