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# REPRESENTING ABORIGINAL PLAINTIFFS IN PERSONAL INJURY ACTIONS

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## **A. Introduction**

In assessing personal injury damages, the goal is to put the injured person in the position he or she would have been in if he or she had not been injured. For aboriginal people, this “original position” is not a satisfactory starting point. This should come as no surprise. Since first contact with Europeans, traditional economies have been undermined, populations have been ravaged by the introduction of European disease, aboriginal people have been excluded from fully participating in the majority economy, First Nations have been shunted onto reserves that are grossly inadequate to sustain the people, and cultures have been undermined through the residential school experience and other paternalistic government policies. For these reasons, aboriginal people have disproportionately lower educations, higher incidences of substance abuse and violence, shorter lifespans, higher incidences of health problems and higher levels of poverty.

As the courts have traditionally accepted statistical evidence that perpetuates these historic social and economic inequities, many lawyers, experts and judges undervalue the pecuniary aspects of personal injury claims made by aboriginal people.<sup>1</sup>

The purpose of this paper is to provide practitioners representing aboriginal people who have been injured with some tools to ensure their clients get full value for their claims.<sup>2</sup> The strategies involve:

1. Focussing on your particular client;
2. Challenging the use of race-based statistics; and
3. Counteracting race-based statistics with positive contingencies unique to aboriginal people.

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<sup>1</sup> This topic has received some academic attention. For a recent analysis, see J. Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law Inc., 2000), Ch. 4, Part F, s. 7.

<sup>2</sup> Dealing with the complex issues unique to residential school cases is beyond the scope of this paper.

## **B. Identification of the Problem**

The “race” issue arises when dealing with pecuniary earning capacity claims.<sup>3,4</sup> Any discussion of earning capacity claims must start with the 1978 decision of the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*<sup>5</sup> where Dickson J. (as he then was) dealt with claims for prospective loss of earnings, at p. 251 as follows:

We must now gaze more deeply into the crystal ball. What sort of a 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 was its value?

In the context of critiquing the use of lump sum awards (rather than “some system whereby payments would be subject to periodic review and variation in light of the continuing needs of the injured person and the cost of meeting those needs”), Dickson J. accepted the use of actuarial evidence at pp. 236 – 237 :

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid, and a sharper tool than the “multiplier – multiplicand” approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump-sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount...

In assessing the value of a lost or impaired earning capacity, our Court of Appeal has approved a number of considerations, including whether:

1. the Plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the Plaintiff is less marketable or attractive as an employee to potential employers;
3. the Plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

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<sup>3</sup> Race should not be a factor negatively affecting non-pecuniary damage awards. It would, however, be interesting to comprehensively compare non-pecuniary awards made to aboriginal and non-aboriginal plaintiffs with similar injuries. As well, race should not be a factor in cost of care awards where awards are based on post-accident life expectancy. Practitioners should, however, be wary to ensure that post-accident life expectancies for aboriginal plaintiffs are realistic and not negatively influenced by the mere fact of aboriginal status.

<sup>4</sup> In family compensation actions, aboriginal status can be a positive factor. For example, higher awards have been justified for the loss of love, guidance and moral support: *Hink v. Myers*, [1988] B.C.J. No. 1604 (S.C.) and for the loss of household services: [*Cahoose v. ICBC* (1999), 63 B.C.L.R. (3d) 265; [1999] B.C.J. No. 1047 (C.A.) ] following the death of an aboriginal person.

<sup>5</sup> [1978] 2 S.C.R. 229.

4. the Plaintiff was less valuable to himself as a person capable of earning income in a competitive labour market.<sup>6</sup>

This list is not exhaustive.

In a true capital asset assessment, the court awards compensation based on what the plaintiff could have earned but for the injury. Normally, the award is adjusted downward to take into account various negative contingencies such as future illness or unemployment.

On the other hand, some courts prefer a “loss of earnings” approach “where the court is asked to determine the likelihood of some future event leading to loss of income.”<sup>7</sup> An award for loss of future income may be made if there is a “real” or “substantial” possibility of such a future event,<sup>8</sup> for example, successfully establishing a chosen career. In this approach, an appropriate deduction is made to take into account the degree of probability of the future earning event occurring.

Finally, the court might take a “hybrid” approach which combines a measurement of the loss of capacity with the use to which the individual suffering the loss would have put that capacity. In the trial decision in *Tucker v. Aselson*, Finch J. (as he then was) described this approach as follows:

The object of any damage award is to attempt to compensate a plaintiff for what she has lost. It is an attempt to put the Plaintiff back in the position she would have enjoyed, but for the injury.

In the case of a plaintiff who has not yet entered the workforce there are many unknowns. The Supreme Court of Canada has said that the starting point in such a case is the loss of capacity. In measuring that loss of capacity, the Court may look to any statistics offered in evidence. However, identifying the value of lost capacity is not the end of the exercise. That merely defines the outer limit of what the Plaintiff, uninjured, might have been able to achieve as an income earner.

There are other unknowns to be resolved before one can say what loss the Plaintiff has suffered. One would need to know the degree of likelihood that the Plaintiff would have taken advantage of her opportunities, or the extent to which she would have achieved or fulfilled her potential. In effect, the Court is asked to value the Plaintiff’s lost opportunity to fulfil or achieve her capacity. To award damages equivalent to the value of the lost capacity would be to assume a 100% chance of its fulfilment.

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<sup>6</sup> *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393; [1991] B.C.J. No. 3344 (C.A.) quoting with approval from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353; [1985] B.C.J. No. 31 (S.C.).

<sup>7</sup> Eg. *Arnold v. Teno*, [1978] 2 S.C.R. 287; 83 D.L.R. (3d) 609.

<sup>8</sup> *Pallos v. ICBC* (1995), 100 B.C.L.R. (2d) 260; [1995] B.C.J. No. 2 (C.A.) at para. 27.

In other words, I think the proper approach under this head is to attempt to assess what the Plaintiff *would* have earned, but for her injuries. In making that assessment it is proper to start from a consideration of what the Plaintiff *could* have earned, but for her injuries. [Emphasis added.]<sup>9</sup>

However the approach is classified, the results tend to be consistent. For aboriginal plaintiffs, the results are consistently poor. After all, it is not the approach itself that is problematic. Rather, it is the use of race-based statistics that is problematic.

A stark example is the 1990 family compensation case of *Parker v. Richards*.<sup>10</sup> The deceased, Cheryl Lynn Parker, was a 17 year old single mother of aboriginal ancestry with a Grade six education from a broken home. She had never worked. In assessing the claim made by Cheryl Lynn's by then four year old daughter, the court accepted the "expert" opinion of a sociologist who summarized his findings as follows:

All of the factors enumerated in this report, including gender, age, education, marital status, ethnicity and family background indicate that the future financial prospects of Cheryl Lynn would probably have been bleak, most likely below the poverty line. The composite picture of a single, lone parent female of Native ancestry, with a Grade six education and never having held a job, and coming out of a broken home would be one that would rank in Canada as one of the lowest socio-economic prospects possible in the country.

The court awarded Cheryl Lynn's daughter \$200.00 per month for the loss of future financial support.

### **C. Strategy No. 1 – Focus On Your Client**

In responding to lost earning capacity claims, defendants will advance all negative contingencies and unfavourable statistical inequities. The starting point for counteracting these arguments is to focus on your particular client. After all, "statistics may provide little assistance in predicting the future of a particular...plaintiff."<sup>11</sup>

If you are representing a bright, educated, hard working aboriginal plaintiff from a stable family with no history of substance abuse problems and who lives off reserve, there is no reason to enter the race-based statistics debate. In *Johnson v. Olsen*<sup>12</sup>, the Plaintiff was a 48 year old woman of aboriginal ancestry who had been married for nearly 30 years and lived off reserve. She had been steadily employed for a number of years. The Plaintiff suffered a variety of physical injuries and, later, from Post Traumatic Stress Disorder. In awarding her \$150,000.00 for "future loss of income", the Plaintiff's aboriginal ancestry did not appear to factor into the court's analysis.

<sup>9</sup> [1991] B.C.J. No. 954 (S.C.) aff'd (1993), 78 B.C.L.R. (2d) 173; [1993] B.C.J. No. 837 (C.A.).

<sup>10</sup> [1990] B.C.J. No. 1824 (S.C.).

<sup>11</sup> *Terracciano (Guardian Ad Litem of) v. Etheridge* (1997), 33 B.C.L.R. (3d) 328; [1997] B.C.J. No. 1051 (S.C.).

<sup>12</sup> [1987] B.C.J. No. 1933 (S.C.).

Even when your client lives on reserve and has less than stellar waged earnings, there are a number of specific issues to address.

For cultural, personal and other reasons, many aboriginal people *choose* to pursue traditional activities. Many aboriginal people engage in hunting, fishing and gathering to support themselves, their families and their communities even though they have the ability to earn a decent wage in the mainstream economy. As these traditional activities are unwaged, there is a risk that courts will misunderstand and undervalue these activities in making pecuniary awards. It falls to counsel to assist the court in understanding and properly valuing these sustaining but unwaged activities.

The *choice* of an aboriginal plaintiff to pursue traditional activities should not be seen as reducing the value of his or her earning *capacity*. The same issue arises in the case of a plaintiff who chooses to be a homemaker rather than to pursue waged employment. The homemaker still has the *capacity* to earn income even though she *chooses* to manage a household.<sup>13</sup> Nevertheless, the courts have largely rejected an “opportunity cost” approach in favour of a “replacement cost” approach. In other words, while the courts will not typically make awards on the basis of what the plaintiff homemaker *could* have earned outside of the home, the courts have made awards based on the cost of replacing the services in the home.<sup>14</sup>

In the case of aboriginal people pursuing traditional activities, plaintiff’s counsel should first concentrate on establishing the plaintiff’s particular earning capacity through the use of available employment and academic records, vocational assessments and other evidence. In the alternative, plaintiff’s counsel should lead evidence of the economic value of the traditional activities based on the cost to replace those activities. Otherwise, the loss of the ability to pursue traditional activities may simply be looked at as an element of non-pecuniary damages<sup>15</sup>, or worse, be the subject of no award at all.<sup>16</sup>

Another issue which, if not understood, could result in the court undervaluing an aboriginal plaintiff’s claim, is that aboriginal people employed on reserve may be paid at less than market rate for the work undertaken. This circumstance arises out of the tax exemption provided by s. 87 of the *Indian Act*.<sup>17</sup> Many employers on reserve seek to “split” the benefits of this tax exemption with their employees. By doing so, on reserve employers can pay aboriginal employees less than the off reserve market rate while the aboriginal employee can still take home an equivalent or greater amount than the average worker off reserve. Accordingly, counsel should lead evidence as to the true market value of the aboriginal worker’s employment.

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<sup>13</sup> *Supra* note 1 at Ch. 4, Part G.

<sup>14</sup> *Ibid.* Also see *Fobel v. Dean* (1991), 93 Sask.R. 103; 83 D.L.R. (4th) 385 (Sask. C.A.) leave to appeal refused [1992] 1 S.C.R. vii.

<sup>15</sup> *Plasway v. Abraham*, [1993] B.C.J. No. 172 (S.C.).

<sup>16</sup> *Edzerza v. Blackburn*, [1990] B.C.J. No. 740 (S.C.).

<sup>17</sup> R.S.C. 1985, c. I-5.

The tax exemption provided by s. 87 of the *Indian Act* may also come into play in family compensation actions. For example, in *Williams v. Prince Rupert Regional Hospital*<sup>18</sup>, the deceased earned income on reserve. There were no deductions from the deceased's salary for income tax and certain other usual statutory programs. Because the deceased would have had more income available to support her family than a person earning the same gross income off reserve, the court increased its award for loss of support to the surviving family members.

In sum, it is essential that counsel understand and lead evidence concerning the unique aspects of how their aboriginal clients support themselves.

#### **D. Strategy No. 2 – Attack the Approach**

The unfortunate reality is that sometimes a clear focus on your client may not be particularly beneficial in the battle against the use of race-based statistics. Like Cheryl Lynn Parker<sup>19</sup>, the cards may be stacked against your client.

Faced with an otherwise bleak case, counsel should not be afraid to challenge the use of race-based statistics. Certainly there is some judicial resistance to putting a particular plaintiff at a disadvantage only on the basis of aboriginal ancestry.<sup>20</sup>

Some assistance in this area can be drawn from the experience of women fighting the use of gendered statistics to reduce future income awards to them. In our jurisdiction, there are a number of decisions in which the court has adopted the use of male earnings statistics for female plaintiffs.<sup>21</sup> For example, in *Tucker v. Aselson*<sup>22</sup>, Finch J. (as he then was) wrote:

I accept, as a starting point, that the measure of the Plaintiff's earning capacity should not be limited by statistics based upon her sex. Before the accident the Plaintiff was a bright little girl growing up in a stable home environment. In Canada, no educational or vocational opportunities were excluded to her. She could have become a doctor, lawyer or business person. Or, in line with her childhood wish, a veterinarian.

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<sup>18</sup> [1987] B.C.J. No. 961 (S.C.).

<sup>19</sup> *Supra* note 10.

<sup>20</sup> For example, in *George v. Middlemiss*, [1994] B.C.J. No. 1685 (S.C.), the Defendant argued that the court should not award a management fee on the basis that the Plaintiff could earn interest on her award tax free if invested on reserve. The court rejected this argument as it "might be viewed as a disadvantage to the Plaintiff because she is a Native. No such argument could be made with respect to any non-Native Canadian. If such a position is to be adopted, I will leave that to a higher court."

<sup>21</sup> See for example *Tucker v. Aselson*, *supra* note 9; *Terracciano (Guardian Ad Litem of) v. Etheridge*, *supra* note 11; *B.I.Z. v. Sams*, [1997] B.C.J. No. 793 (S.C.) and *Chu v. Jacobs*, [1996] B.C.J. No. 674 (S.C.).

<sup>22</sup> *Ibid.*

I accept the assertion advanced on the Plaintiff's behalf that the measure of her lost capacity to earn income is the equivalent of the average University educated B.C. male. ...<sup>23</sup>

In *Terracciano (Guardian Ad Litem of) v. Etheridge*<sup>24</sup>, Madam Justice Saunders (now Saunders J.A.) dealt with the Defendant's argument that average female earnings statistics ought to be used to assess the Plaintiff's earning capacity loss as follows:

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 serious discounts for lower and sporadic participation in the labour market which are duplicated by many of the negative contingencies used by economists to massage the numbers downward, such statistics may provide little assistance in predicting the future of a particular female plaintiff ...

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

The trial judge in *MacCabe v. Westlock Roman Catholic Separate School District No. 110*<sup>25</sup> went even further. Johnstone J. wrote:

It is entirely inappropriate that any assessment I make continues to reflect historic wage inequities. I cannot agree more with Chief Justice McEachern of the British Columbia Court of Appeal in *Tucker, supra*, 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 by 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 reduced the wage gap, still sanction a disparity.

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<sup>23</sup> The Court then went on, however, to consider the likelihood of the Plaintiff achieving her capacity. In the end, the Court discounted the Plaintiff's award in the order of 60%, leaving her with an award close to what would have been awarded for an average female. The result was affirmed by the Court of Appeal (*supra*, note 9)

<sup>24</sup> *Supra* note 11 at paras. 79-81.

<sup>25</sup> (1998), 69 Alta. L.R. (3d) 1; [1998] A.J. No. 1053 (Q.B.).

A growing understanding of extent of discriminatory wage practices and the effect of this societal inequity must lead the Court to retire an antiquated or limited judicial yard stick and embrace a more realistic, 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 contingencies applicable to males shall be used except in the case of life expectancy, for obvious reasons.

This insightful decision was, however, overturned on appeal. In doing so, the Alberta Court of Appeal wrote:<sup>26</sup>

(I)n this case, the application of female contingencies would not perpetuate or sanction historical and societal discrimination. Further, wage statistics perpetuate nothing. Valid data reflects historical reality.

In general, tort law and in particular, the quantification of damages necessitates an individual approach. This is where I find the learned trial judge erred. In attempting to rectify potential inequities in the methods for quantifying damages, the learned trial judge neglected to focus on the evidence and the individual actually before her. While principles of equality should inform tort law, the learned trial judge's application of equitable principles resulted in her ignoring some of the relevant material facts.

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(I)t would be inappropriate to apply male contingencies to [the Plaintiff] when there was no evidentiary basis that she would have worked a typical male pattern.

Nevertheless, the Supreme Court of Canada has specifically left the door open for the argument that the use of gendered or race-based statistics be discontinued. In *Toneguzzo–Norvell (Guardian Ad Litem of) v. Burnaby Hospital*, no “gender neutral” evidence was lead at trial. On appeal to the Supreme Court of Canada, the Plaintiff’s lawyer argued that female earnings tables should be replaced by other alternatives. The Court held that “consideration of these arguments must await another case, where the proper evidentiary foundation has been laid.”<sup>27</sup>

Clearly, in order to be in a position to make the argument, counsel representing aboriginal plaintiffs must introduce appropriate earning statistics which are not based on race.

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<sup>26</sup>2001 ABCA 257; [2001] A.J. No. 1278 (C.A.).

<sup>27</sup> [1994] 1 S.C.R. 114.

### E. Strategy No. 3 – Positive Contingencies

Given judicial discomfort with using the law of remedies to address societal ills, counsel representing aboriginal plaintiffs must prepare for the possibility that the Court will apply race-based statistics, or make contingency deductions because of aboriginal ancestry. An example of the latter is *Michelle v. Duncan*. The Plaintiff was a young unemployed man living on reserve. After projecting future earnings, the Court applied a 30% reduction for negative contingencies. The Court reasoned:

I think that the calculation of the present value of future earnings should be reduced by 30% for additional contingencies. This is somewhat more than the “normal” 20% because of factors which will probably reduce the future earnings of this particular plaintiff. I refer in particular to the Plaintiff’s unusual susceptibility to illness or even death through bladder infection, the risk of continuing unemployment, *particularly on the reserve*, and through injury. I see no factors which would operate to offset this deduction. [Emphasis added.]<sup>28</sup>

Clearly, counsel representing aboriginal plaintiffs must lead evidence of positive contingencies, if not to argue for awards higher than statistical race-based calculations, then at least to ensure awards are not eroded by negative contingencies.

It is important to keep in mind that there is really no need to make the “normal” 20% deduction for negative contingencies (which, after all, represents 1 in 5 years of *no* income whatsoever) at all. Dickson J. (as he then was) dealt with this in *Andrews*<sup>29</sup> as follows:

It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression. In the *Bisson* case which also concerned a young quadriplegic, an allowance of 20% was made. There is much support for the view that such a discount for contingencies should be made. There are, however, a number of qualifications which should be made. First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse...As is said in *Bresatz v. Przilla* (1962), 108 C.L.R. 541, in the Australian High Court, at p. 544: “Why count the possible buffets and ignore the rewards of fortune?” Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the Plaintiff’s occupation, but generally it will be small.

Likewise, in *Wipfli (Guardian Ad Litem of) v. Britten*, our Court of Appeal dealt with assessing the earning capacity of a baby born with a profound brain injury due to medical negligence.

<sup>28</sup> [1985] B.C.J. No. 1213 (S.C.) at para. 17.

<sup>29</sup> *Supra* note 5.

After choosing what it considered to be an appropriate figure for future annual income, the Court overturned a 15% negative contingency allocation made by the trial judge. The Court reasoned that “in this highly speculative exercise negative contingencies are likely to be offset by positive contingencies.”<sup>30</sup>

Returning to the gender analogy, even where the courts use gendered statistics to project future earnings losses for female plaintiffs, the courts have tended to increase the awards made on the basis that women are closing the wage gap with men.<sup>31</sup>

In dissent with respect to the use of male statistics for the female Plaintiff<sup>32</sup>, in the appellate decision in *Tucker v. Aselson*, Chief Justice McEachern dealt with the issue 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 age 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 if not eliminated. Legislation requiring equal pay for work of equal value may be enacted during [the Plaintiff's] time. It is to be hoped that equality may be achieved within the Plaintiff's pre-employment years.

Clearly this type of reasoning can be extended to plaintiffs of aboriginal ancestry (and other historically disadvantaged groups).

There are a number of additional factors which come into play when representing aboriginal plaintiffs. For example, in *Hansen v. Erickson*<sup>33</sup>, the deceased had only a Grade six education and sporadic employment history. Prior to his death he had made inquiries about obtaining his (*Indian Act*)<sup>34</sup> status and pursuing training to become a heavy duty mechanic. The court increased its award for loss of support from projections founded on the deceased's actual earnings history on the basis that the deceased would have obtained his status and would then have had access to educational funding through his band.

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<sup>30</sup>(1984), 56 B.C.L.R. 273; [1984] B.C.J. No. 1811 (C.A.) at para. 97 leave to appeal refused (1985), 58 B.C.L.R. xxxvii.

<sup>31</sup> See for example *S.M.A.B. v. J.N.H.*, [1991] B.C.J. No. 3940 (S.C.), *Wassell (Guardian Ad Litem of) v. Pile*, [1994] B.C.J. No. 1837 (S.C.), *Mulholland (Guardian Ad Litem of) v. Riley* (1992), 68 B.C.L.R. (2d) 382; [1993] B.C.J. No. 920 (S.C.) aff'd (1995), 12 B.C.L.R. (3d) 248; [1995] B.C.J. No. 1823 (C.A.).

<sup>32</sup> Former Chief Justice McEachern rejected the trial judge's use of male earnings statistics with large negative contingencies applied in favour of using female statistics adjusted upwards to take into account the narrowing wage gap. See *Tucker v. Aselson* (1993), 78 B.C.L.R. (2d) 173; [1993] B.C.J. No. 837 (C.A.) at paras. 163 – 191.

<sup>33</sup>[1993] B.C.J. No. 1564 (S.C.)

<sup>34</sup> *Supra* note 17

Similarly, in *McGarvey v. Jacobs*,<sup>35</sup> the Plaintiff's aboriginal status opened possibilities for him to secure certain funding to acquire a fishing boat. His future earning capacity loss was then based on his acquiring a fishing boat and hiring additional help to operate the boat.

In addition, there is a real and growing possibility of First Nations acquiring a sufficient land base to provide an economic foundation for sustaining communities through the treaty process or litigation. This should be seen as a positive contingency. As well, there are a number of public and private institutions endeavouring to build bridges with First Nations communities, including by way of diversifying work forces and providing employment opportunities. Evidence of these trends should be introduced as additional positive contingencies.

An excellent example of the introduction of evidence to offset the impact of race-based statistics is *Ross (Guardian Ad Litem of) v. Watts*.<sup>36</sup> The Plaintiff had suffered severe head and other injuries. The defence sought to impose a number of negative contingencies, for example for a shortened life expectancy, unemployment and lower labour participation rates, strictly on the basis of the Plaintiff's aboriginal status. The court found that the Plaintiff likely would have completed Grade 12 and had at least average intellectual ability. The court noted a number of positive factors concerning the Plaintiff, including:

1. the establishment of good standards in his mother's home;
2. a strong work tradition within his family;
3. his membership in a band which had obtained control over its economic destiny and which encouraged its members to get a good education and to work; and
4. that the Plaintiff was a likeable, popular boy with an inquiring mind who was polite, well spoken and well groomed.

The Court specifically rejected the negative contingency for a shortened life expectancy on the basis that:

1. the Defendant's expert conceded that "the historical differences in life expectancy between the aboriginal and non-aboriginal population is likely socio-economic, not genetic";
2. the Plaintiff lived off reserve and, therefore, had a higher earning potential;
3. the Plaintiff had access to medical treatment; and
4. the Defendant's expert conceded "that the gap in life expectancy is ever narrowing and the rate of improvement is probably greater for the aboriginal population than it is for the non-aboriginal."

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<sup>35</sup>[1987] B.C.J. No. 496 (S.C.).

<sup>36</sup>[1997] B.C.J. No. 1998 (S.C.).

The court was also impressed with the Plaintiff's expert who gave evidence of trends. The court found:

Today the aboriginal population is receiving more education than formally. Aboriginals are taking more responsibility for themselves politically and in business. If businesses are operated by Natives, the Natives are more likely to develop managerial and administrative skills and there is a potential for bands to provide employment for its (*sic*) members.

With respect to whether there is any differential in earnings potential "because the Plaintiff is Native", the Plaintiff's expert replied:

I hope for the future there shouldn't be much. I think there is a differential that cannot be explained by structural characteristics, demographic characteristics. It is in the range I think of 10 – 15 %. One hopes that policies over time will eliminate that difference as well. If discrimination is eliminated, then wages should start to converge as it is doing with the male versus female population.

In the result, the court rejected the negative contingency proposed by the defence of 29.2% "based solely on the Plaintiff's aboriginal status." The court found that the negative contingencies proposed by the defence were offset, in part, by the positive contingencies set out above. Nevertheless, the court also accepted that "there is a present and traditional discrepancy between the earnings of a non-aboriginal and an aboriginal B.C. male in the work force based on labour market contingencies, which I cannot ignore." In the end, the court fixed that negative contingency at 15%.

## **F. Conclusion**

The *Ross* case illustrates the difficulties facing aboriginal plaintiffs, even those with reasonably good prospects. After noting many positive contingencies applicable to the Plaintiff, the court still made a 15% deduction on the "reality" of a 10–15% disparity in wages between aboriginal and non-aboriginal males based only on race. Until such disparities disappear, it is up to counsel representing aboriginal plaintiffs to introduce evidence and advance arguments to ensure pecuniary awards for aboriginal people are not undervalued.