Gender and Insurance: when is differentiation a form of unfair discrimination?

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Article 5  Actuarial factors

1. ‘Member states shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals’ premiums and benefits’.

2. ‘Notwithstanding paragraph 1, Member states may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data’. [They shall inform EC] and ‘must ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly updated and available to the public’. [They shall review decision after 5 years and forward results to Commission.]
3. ‘In any event, costs related to pregnancy and maternity shall not result in differences in individuals’ premiums and benefits’.

Member states may defer implementation of the measures necessary to comply with this paragraph until 2 years after 21 December 2007 at the latest. In that case Member states … shall immediately inform the Commission.
QUESTION REFERRED TO EUROPEAN COURT OF JUSTICE

IS THE DEROGATION/EXEMPTION COMPATIBLE WITH PRINCIPLE OF GENDER EQUALITY?

EUROPEAN COURT OF JUSTICE finds on ‘procedural’ grounds:

- EU Legislature decided that principle of gender equality and equal treatment should apply to insurance services.
- Permitted period of transition, because of widespread use of sex as differentiating factor. This was due to end after five year period on 21 December 2012.
- Only EU Parliament has authority to can adjust this end date, not the ECJ.
- As no extension provided for by EU Parliament, no further exemption after 21 December 2012.
IMPLICATIONS FOR SOUTH AFRICA?

- Raises question of whether it is permissable to differentiate on basis of gender in SA.
- Generally avoid differentiation on ‘human rights grounds’ as might discriminate by perpetuating stereotype, stigma & disadvantage based on race, gender etc.
- Approach dependent upon social, legal, constitutional context.
- Two general approaches to determining when gender differentiation is unjustified discrimination:
  - Gender differentiation is ‘universally’ wrong; or
  - Gender differentiation is only wrong in certain circumstances.
Differentiation IS Discrimination

- Equality requires same or identical treatment of individuals.
- Individual differentiation on arbitrary grounds such as race or gender is always arbitrary and immoral.
- USA Equal Protection/Civil Rights jurisprudence
  - No gender differentiation in pension premiums or benefits in workplace because it is wrong to treat individuals on the basis of group characteristics

  “there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based. Many of those individuals will not live as long as the average man.”

CITY OF LOS ANGELES V MANHART (1978) US SC
Differentiation is Discrimination

• European Union (argument of Advocate-General))
  • Same treatment required across states, wrong (discrimination) that unisex rule applied in some and not others.
  • Principle of equal treatment requires treating individuals in the same way. As with race it is ‘inappropriate to link insurance risks to a person’s sex’ … Like race … gender is a characteristic that is inseparably linked to an insured person as an individual and over which he has not influence … unlike … age, [it] is not subject to any natural changes’.
  • Equal pay laws require no gender differentiation in contributions in occupational pensions schemes (pensions an element of equal pay).
The link between gender and life expectancy is more complex that we think

• It is wrong to make the ‘sweeping assumption that the different life expectancies of male and female insured persons – which come to light statistically are essentially due to sex … rather than economic and social conditions’ (Test Achats – Adv Gen)

• ‘The mere statistical correlation between a group and higher risk cannot suffice to justify discrimination on prohibited grounds. Such correlation accepts the very stereotyping that is deemed unacceptable by human rights legislation: prohibited grounds of discrimination are used to ascribe the characteristics of the group to all individuals in the class. Discrimination based on statistical correlation is simply discrimination in a more invidious form. Strong statistical proof is required to demonstrate a rational connection between the discriminatory classification and high risk. This proof, however, must not simply be one of correlation, but one of causal connection.’

ZURICH INSURANCE CO. V ONTARIO 1992 Canadian SC (minority)
Equality and differentiation

Equality can be achieved through both identical and differential treatment. Rely on ‘mediating principles’ to determine whether differentiation is discrimination or not.

• Underlying question is whether is fair and justifiable
• Whether discrimination/differentiation is fair or unfair determined in real life situation taking account of context and impact of differentiation.
  
  Does it remedy or perpetuate disadvantage?
  
  Does it impair dignity? (stigma, stereotype etc)

South Africa

Explicitly egalitarian Constitution promoting fundamental rights and social justice.

Idea of ‘Substantive Equality’ committed to remedying social and economic disadvantage.
PRIVATE INSURANCE GOVERNED BY PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, 4 OF 2000.

SECTION 14 – ‘A BALANCING ACT’

1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
   a) The context;
   b) the factors referred to in subsection (3);
   c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
Balancing Act

3) The factors referred to in subsection (2)(b) include the following:

a) Whether the discrimination impairs or is likely to impair human dignity;

b) the impact or likely impact of the discrimination on the complainant;

c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

d) the nature and extent of the discrimination;

e) whether the discrimination is systemic in nature;

f) whether the discrimination has a legitimate purpose;

g) whether and to what extent the discrimination achieves its purpose;

h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

ii) accommodate diversity.
CASE LAW

VAN HEERDEN V MINISTER OF FINANCE (CC – CONSTITUTION)

- Allowed additional (race-based) contributions to parliamentary Pension Fund to compensate for previous exclusion and disadvantage (defended under 9 9(2)).
- Permits race based differential not tied to actuarial criteria.
- Differential fair as address previous disadvantage.

ROBERTS V MINISTER OF SOCIAL DEVELOPMENT (HIGH COURT – CONSTITUTION)

- Government ‘agreed’ that sex differential in state pension eligibility age is unfair discrimination. Poor old men a disadvantaged group.
- Fairness requires same treatment, both groups disadvantaged.

Case law refers to state rather than private pensions.
No longer business as usual?

- Positive and pro-active, open and accountable insurance industry
- Use of sex/gender a matter of choice or necessity
- As a rule should seek to avoid use of prohibited grounds such as race and gender in setting premiums and benefits
- Should develop alternative criteria as much as possible.
- Cross-subsidisation by gender is not necessarily a bad thing, the stronger always cross-subsidise the weaker.
- By what standards are you judged? Do you justify by statistical correlation or causation? [Even then, there might be countervailing moral imperatives]
SOME PRELIMINARY CONCLUSIONS

- Cannot distinguish on pregnancy, cannot make women alone bear costs of pregnancy and maternity when this is social good.

- ‘Women only’ might be permissible if related to alleviating disadvantage/legitimate aim

- Pensions: Is it time to stop gender differentials? Can you pay women less because of their gender when their race might, in fact, shorten life expectancy? Unequal pensions exacerbate lifelong disadvantage.

- Life Assurance: Is it defensible on the basis of disadvantage? Is that fair?

- MV insurance: Is statistical causation (or a higher standard than correlation) possible?