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WARNER V. CALGARY REGIONAL HEALTH AUTHORITY (ROCKYVIEW GENERAL HOSPITAL) *2020 ABQB 172: A NEGATIVE CONTINGENCY FOR PRE-EXISTING HEALTH ISSUES AND HOUSEHOLD COSTS*

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BRIEF CASE FACTS

The *Warner* case involved a 30-year-old plaintiff who had been receiving LTD/CPP disability for 8 years due to pre-existing medical issues before the 2005 incident. This author prepared an economic report responding to the plaintiff's expert report, citing economic studies which showed that someone who had been out of the labour force for so long before the incident (8 years) and who had other sources of income to rely upon (disability benefits from CPP/LTD,[1] plus the husband's income was above-average[2]) was highly unlikely to have resumed working as a teacher if the incident had not happened.[3] Economic studies confirm that "individuals who exit the labour force have a greater propensity to exit again."[4]

The plaintiff's economic expert presented only one scenario that if not for the incident, Ms. Warner would have immediately resumed working full-time as a teacher in the year of the

[1] M. Campolieti, "Disability Insurance and the Labour Force Participation of Older Men and Women in Canada" *Canadian Public Policy* (2001); and David Autor, Andreas Kostol, Magne Mogstad and Bradley Setzler, "Disability Benefits, Consumption Insurance and Household Labor Supply", *American Economic Review*, vol. 109, no. 7, July 2019, pp. 2613-54.

[2] Studies have found that the influence of the husband's income causes a reduction in the wife's "supply" of labour (i.e., the decision to enter the labour market) and a reduction in the wife's income, if she does choose to work (sources: B.G. Spencer, "Determinants of the Labour Force Participation of Married Women: A Micro Study of Toronto Households", *Canadian Journal of Economics* (1973) and F.D. Blau and L. M. Kahn, "Changes in the Labor Supply Behavior of Married Women: 1980-2000", *Journal of Labor Economics* (2007)). In the Warners' case, Mr. Warner's income increased 10-fold from 2003 until 2013.

[3] This assumption was buttressed by the school board's continuation of contributions to Ms. Warner's *Alberta Teachers' Retirement Fund* pension benefits and group insurance coverage (as per the collective agreements) while she was on long-term disability leave from the school board in question.

[4] R. Gronau, "Sex-Related Wage Differentials and Women's Interrupted Labor Careers – The Chicken or the Egg" (1988), 6(3) *Journal of Labor Economics* 277.

incident, and despite her 8-year hiatus from teaching, this expert alleged that the plaintiff would have exhibited a "*greater-than-average* attachment to the work force", even though she and her family had relocated away from the plaintiff's previous school board employer before the incident.[5]

Although our assessment concluded that Ms. Warner had likely not sustained a potential loss of income arising from the 2005 incident,[6] for illustrative purposes (to compare to the plaintiff expert's scenario), we included two alternate scenarios in which if Ms. Warner had been able to resume working, her income *would have been* equivalent to a part-time worker at best, and we included a **negative "health" contingency**, ranging from -13% to -20% per year, to account for Ms. Warner's multiple pre-existing health impediments.

From my (non-legal) review of Macleod, J.'s judgment, it appears that the judge accepted the argument that Ms. Warner would not have gone back to work at all in the absence of the 2005 incident, so he did not award any sums for past or future loss of income. However, Macleod, J. subsequently awarded the plaintiff the sum of $50,000 for "loss of earning capacity" (para [79]) on the basis that the "injuries caused by the Transfer Accident would render her less marketable and less able to take advantage of any arising opportunities, specifically due to her difficulty ambulating and the pain she suffers in her left leg" (para [78]).

Macleod, J. also granted a cost of care award to the plaintiff (just over $1 million – para. [102]).[7] Part of the cost of care fund included sums for household services, to which we again applied the **negative "health" contingency**. The judge accepted the application of this contingency at -20% (para. [87]). Below, I discuss the rationale for and data used to apply a negative "health" contingency.

[5] This fact was important because the plaintiff had testified that in order for her to be paid as an "experienced" teacher (i.e., receive credit for her previous years of teaching), the family would have had to remain in Wetaskiwin, AB, but they moved to Calgary, AB in 2003. Despite this fact, the plaintiff's economic expert estimated Ms. Warner's potential income as an experienced teacher rather than at "step 0" on the salary grid.

[6] Based on Ms. Warner's lengthy hiatus off work before 2005 due to medical issues, receipt of disability benefits (LTD and CPP), and other medical/vocational opinions that indicated the likelihood of her returning to work (in the absence of the 2005 incident) was very low.

[7] The plaintiffs claimed $2.282 million for future cost of care (para. [58]). The defendant proposed $0 for future cost of care (para. [58]). but in para. [81], Macleod J. reported Brown Economic's estimate for cost of care ($537,312) and stated that "The Defendant adopted this amount as their position on future cost of care".

DATA RELIED UPON TO APPLY THE NEGATIVE "HEALTH" CONTINGENCY

The concepts of "years of healthy life" (YHL) from the United States, and "disability-free life expectancy" (DFLE) in Canada were developed to recognize that *years of life* expectancy (published in mortality tables) did not entirely capture overall population health. Since 1957, the *National Health Interview Study* (NHIS), conducted by the United States Department of Health and Human Services (DHHS), has gathered information on activity limitation and perceived health to form an operational definition of health-related quality of life.[8] In Canada, the *Canadian Sickness Survey* was conducted in 1950-51[9] and the *Canada Health Survey* followed it in 1978-1979.[10] Both of these sources were mined by Wilkins and Adams in *Healthfulness of Life* (1983) in which these authors compared healthy life expectancy statistics between Canada and the US. Co-author Wilkins subsequently contributed to a Statistics Canada article entitled Disability-free life expectancy by health region in 2002.[11] The latter publication defined disability-free life expectancy (DFLE) as "differentiating between years of life free of any major activity limitations or residence in a health care institution…and years lived with at least one major activity limitation". A "major activity limitation" is one "caused by a long-term physical or mental condition or a long-term health problem; that is, one that has lasted, or is expected to last, six months or more." (p. 53) This 2002 Statistics Canada article is the most recent publication on the topic of healthy life expectancy, or disability-free life expectancy in Canada.[12] However, unlike the American data, this 2002 article does not publish age- and gender-specific annual probabilities as to the likelihood a plaintiff would have remained "free of any major activity limitations".

[8] As per information contained on the Centers for Disease Control and Prevention website (www.cdc.gov/).

[9] Dominion Bureau of Statistics. 1960b. *Illness and Health Care in Canada. Canadian Sickness Survey, 1950-51*. Catalogue 82-518. Ottawa: Queen's Printer.

[10] The *Canada Health Survey* was proposed in 1974 as a means of obtaining information required for planning and evaluating health policies and programs. Statistics had been available for several years describing the principal causes of morbidity and mortality, and the utilization of health care services and their cost. The survey field work commenced in May 1978 in the Eastern provinces, the Central provinces were added in June and the entire survey population was covered from July 1978 onwards. Only data collected during the period July 1978 through March 1979 are available for public use. Because of government-wide budget cuts in August 1978, the decision was made to terminate the survey (source: Statistics Canada. *Canada Health Survey – Data Users' Guide*. (Ottawa: Ministry of Industry)).

[11] Mayer, Ross, Berthelot and Wilkins entitled "Disability-free life expectancy by health region", *Health Reports*, vol. 13, no, 4, July 2002.

[12] Confirmed in communications with Statistics Canada representatives.

Since 2006, *Expectancy Data* in the US[13] has published age- and gender-specific annual probabilities that can be used as annual contingencies in interrupted earnings cases to proxy the *total years of work life an individual can expect to remain free of a "major activity limitation"*, enabling them to work and do household chores. Expectancy Data's *Healthy Life Expectancy* tables have been drawn from the *National Health Interview Study* (NHIS), conducted by the United States Department of Health and Human Services (DHHS), which developed the concept of "years of healthy life" (YHL) explained above, and matches the Canadian definition of being "free of any major activity limitations". The YHL measure has emerged as one of the more commonly used health status measures that include both mortality and morbidity.[14]

To apply the American data to the Canadian population (in the absence of comparable Canadian age- and gender-specific probabilities), we have reviewed a number of studies that confirm the health systems across both countries are similar enough to be able to use the *Expectancy Data* health tables with confidence,[15] and as discussed above, the definitions of "healthy life" in both countries are similar. *Expectancy Data's* year-by-year probabilities are constructed in precisely the same fashion as yearly survival (mortality) probabilities are derived by Statistics Canada and used by forensic economists in virtually all interrupted earnings cases.

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[13] Expectancy Data, a publishing division of John Ward Economics located in Prairie Village, Kansas, repurposes the United States Department of Health and Human Services' years of healthy life data to establish its data are fit for scientific uses in forensic economics or public health economics. John Ward Economics is a forensic economic firm.

[14] P. Erickson, R. Wilson, and I. Shannon. *Healthy People: 2000 – Statistical Notes*. Centers for Disease Control and Prevention/National Center for Health Statistics, April 1995, No. 7, pp. 1-2. "Morbidity" is defined as "having a disease or a symptom of disease, or to the amount of disease within a population".

[15] Martel, L., Belanger, A., and Berthelot, J., "Loss and recovery of independence among seniors," Statistics Canada *Health Reports* vol. 13, no. 4, July 2002; Statistics Canada & Centers for Disease Control and Prevention (CDC), "Joint Canada/United States Survey of Health, 2002-03," *Joint Canada-US Survey of Health, 2002-03*, 2004; Marc Luy and Yuka Minagawa, "Gender gaps – Life expectancy and proportion of life in poor health," Statistics Canada *Health Reports*, catalogue no. 82-003-X, December 2014; Bushnik, T., Tjepkema, M., and Martel, L., "Health-adjusted life expectancy in Canada," Statistics Canada *Health Reports*, catalogue no. 82-003-X, April 2018; *Canadian Institute for Health Information* (CIHI), "International Comparisons at CIHI," February 2017; *Health Affairs*, "Comparing Health and Health Care Use in Canada and the United States," vol. 25, issue 4, 2006; *Open Medicine*, "A systematic review of studies comparing health outcomes in Canada and the United Stated," 2007; *Institute for Clinical Evaluative Sciences*, "Health Care Delivery in Canada and the United States: Are There Relevant Differences in Health Care Outcomes?" June 1999; O'Neill and O'Neill, "Health Status, Health Care and Inequality: Canada vs. the US," *National Bureau of Economic Research (NBER)*, September 2007; Nadine Ouellette and Robert Bourbeau, "Changes in the age-at-death distribution in four low mortality countries: A nonparametric approach," *Demographic Research*, vol. 24, article 19, 2011).

APPLICATION OF A NEGATIVE "HEALTH" CONTINGENCY

The **negative health contingency** accounts for restrictions to major daily living activities, including housework, as people age – regardless of the incident in question.

Brown Economic applies this contingency to all housekeeping capacity loss assessments – including cost of care recommendations for household services – and in cases involving interrupted earnings when the plaintiff had serious pre-existing health impediments, and/or would have continued working after age 65.

The negative "health" contingency, when applied to loss of housekeeping capacity claims or to recommendations from cost of care experts, accounts for the possibility that the person would have done less housework as she or he aged (regardless of the incident in question), due to four possible factors which are obscured in datasets about time use:

a. **The "hobby" factor**: People change the distribution of activities such that some tasks become hobbies, thus blurring the definition of "housework". This can be the case for tasks such as gardening, pet care, baking and renovating;
b. **The decline in "heavy" chores**: Many seniors decrease their involvement in "heavy" household chores, and particularly in childcare, other than babysitting grandchildren. There are participation rates available for males and females in Canada, under and over age 65, which show a decline in some housekeeping activities;
c. **The interpretation of "time"**: Data on hours spent on housekeeping chores shows consistently that seniors spend more time on household work than do non-seniors. However, this could be because they either *have more time* to do the chores; or they *take more time* to do them. The time use data obscures these impacts;
d. **Ailing health**: just as in the case of working at a paid job, poor health can interfere with performing unpaid work.

None of the effects in (a) to (d) can be captured by the time use data, which on its face merely collects the time people say they spend on an activity.[16]

[16] Since 1985, Statistics Canada has gathered data on various social trends in Canada through the *General Social Survey* ("GSS") program. The GSS *Time Use Survey* was first conducted in 1986, has been repeated every five to six years, and has become the primary source of data on the "time use" of Canadians. The structure of the 2015

ACCEPTANCE OF THE NEGATIVE "HEALTH" CONTINGENCY: *WARNER V. CALGARY REGIONAL HEALTH AUTHORITY (2020)*

Brown Economic's negative health contingency has been considered and accepted in two Alberta cases: *Warner v. Calgary Regional Health Authority (Rockyview General Hospital)* in 2020;[17] and *Mahe v. Boulianne* in 2008.[18]

During the *Warner* trial, the provenance of Brown Economic's health contingency data was placed at issue by the plaintiff's economic expert. The main criticism that arose from the plaintiff's expert's testimony was that although he concurred with my assessment that there are not sufficient yearly probabilities available for the Canadian population, he alleged that we had "derived" the gender- and age-specific probabilities used from Expectancy Data's *Healthy Life Expectancy* tables; in other words, we had somehow altered this data and failed to present the supposed "derivations" in our report.[19] Had the plaintiff's economic expert investigated this source of data,[20] he would have realized that no derivations are required – the gender- and age-specific probabilities can be adopted directly from the *Healthy Life Expectancy* tables.

Below, I have reproduced the excerpt from *Warner* where Macleod, J. comments on the negative health contingency in the context of awarding housekeeping costs contained in cost of care recommendations:

GSS *Time Use Survey* identified four broad groups of unpaid household work activity: "household chores," "care of household children under 18 years," "care of household adults" and "shopping for goods and services." Included in "care of household children under 18 years" (source: *2015 Time Use Survey Technical Note* (June 2017) Statistics Canada catalogue 89-658-X, at p. 4). To date the GSS *Time Use Survey* has been conducted in 1986 (sample size = 16,400), 1992 (sample size = 9,000), 1998 (sample size = 10,700), 2005 (sample size = 19,600), 2010 (sample size = 15,400) and 2015 (sample size = 17,390). Brown Economic has obtained custom tabulations from Statistics Canada (for a fee) from the 1998, 2005, 2010 and 2015 surveys.

[17] 2020 ABQB 172, para. [87]. This author testified on behalf of the defendant in this case.

[18] 2008 ABQB 680, para. [115]. This author testified on behalf of the plaintiff in this case.

[19] As per the plaintiff expert's trial transcript, Feb. 6, 2019, p. 57.

[20] On p. 57 of the plaintiff expert's trial transcript from Feb. 6, 2019, in response to defense counsel's query that we had stated the source of our health contingency data in our report, the plaintiff's expert replied: "…but I shouldn't have to go out and buy the data and do the derivation". Our firm researched this topic and located the best available proxy for the health contingency data and purchased these tables from *Expectancy Data* (for $80 USD per year) starting in 2006.

> [87] The amount of damages claimed for future cost of care by the Plaintiffs does not include a health contingency for Ms. Warner's future household services. I find that Ms. Brown's proposed reduction is helpful and I accept her views that this reduction must be calculated into the future household services. *I reduce the cost of those services by 20% to reflect health contingencies* (emphasis added).

The negative "health" contingency reduces claims for loss of income/dependency and housekeeping capacity by -10% to -30% per year, depending on the plaintiff or decedent's gender and age.