CANADIAN DEFENCE LAWYERS

HEARSAY

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**DEALING WITH LOW-INCOME PLAINTIFFS** (pp. 55-56 of online edition)

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On occasion, defence counsel is involved with cases where a plaintiff has a record of "low-income persistence". There are some key aspects of these kinds of situations that a quantum expert should address when attempting to compute loss of income or loss of dependency damages.

**Injury cases**

In each assessment, the quantum expert should begin with a view to analyzing the plaintiff's education, employment and income history. This type of analysis allows us to see if any patterns emerge. On occasion, we encounter plaintiffs who show a persistence of living in low-income. When this occurs, ***we include an appendix to the assessment*** which shows that once someone has a pattern of living in low-income, ***such a pattern is likely to persist***. (There are numerous articles on this subject). Adding an appendix to the assessment can be very helpful in predicting the plaintiff's potential without-incident income. Such an analysis leads to a more realistic portrayal of the plaintiff's potential income loss.

**Fatality cases**

In fatality cases, it is most appropriate to use the joint/cross dependency formula to compute dependency loss damages, which essentially means considering the total household income, i.e., the income potential of *both* the decedent and the survivor. This method is the only one that has economic justification; ignoring a spouse's income simply does not pass the muster test when almost all couples share income and pay household expenses together (even if they have multiple bank accounts). Of course, this leads to *lower* dependency losses than those done by experts who use the sole dependency method (i.e. they ignore the survivor's income). If the survivor's income dwarfs the decedent's income, there may be no dependency loss for the family; it simply reflects the situation whereby the decedent was consuming a greater portion of household income than s/he was contributing. (This finding does not imply that the survivor is "better off" without the decedent; it simply flows directly from using the joint/cross dependency formula).

The other aspect of fatality cases that counsel and insurers might want to consider is that the personal consumption rate ("PCR") of the decedent varies not only by family size but by family income level. This finding is well-founded in the economics literature and presents a refinement that is long overdue (and used in the US since the 1980s). What this implies for low-income households is that the PCR for the decedent will be larger than rates used which do not consider family income levels. For instance, in a 2-adult family, the PCR will be 40% to 50% when income levels are less than $25,000. This leads to a dependency loss that is smaller: 50% to 60% of the family's income – not 70% to 80% (the PCR and the dependency loss have an inverse relationship). The creation of PCRs that fluctuate according to family size and family income level using Statistics Canada's *Survey of Household Spending 2007-08* have been published in C.L. Brown, "Update of Personal Consumption Rates for Canada, Using 2007-08 Survey of Household Spending, Varying by Family Size and Income Level" Journal of Forensic Economics, September 2012, vol. XXIII, No. 2.

Michael Lee of ***VINCENTS*** (an accounting firm in Australia) has recently published PCRs by income level *and* family size entitled "Dependency Percentages in Australia Revisited – Estimating Personal Consumption Using Statistical Data" January 2012 whereby he recommends PCRs that vary by household income level. There are 3 decisions in Canada whereby judges have used PCRs that vary by household income level: *Fullowka* (2004), *Johnson v. Carter* (2007), and *Palmquist v. Ziegler* (2010).

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