



Brown's Economic Damages Newsletter

March 2016

Volume Thirteen Issue 3

Brown Economic offers 5 user-friendly, economic loss calculators for quick, accurate, and cost-effective damages estimates, available @ www.browneconomic.com:

- **Non-Pecuniary (free)**
- **Working Life / Life Expectancy (free)**
- **Present Value (free)**
- **Housekeeping (pay per use)**
- **Income Damages (pay per use)**

Cara Brown, M.A., Principal
Maureen Mallmes, B.Sc., SEMC
Dan Clavelle, M.Ec.
Rachel A. Rogers, B.A., J.D.
Genevieve Peters, Ph.D.
Kris Julie
Elda Figueira, MLS
J.C.H. Emery, Ph.D.
Frank Strain, Ph.D.
Stephen Clark, Ph.D.

Case Decision: *Luft v. Zinkhofer* and the Role of Expert Rebuttals/Critiques

By Cara L. Brown, M.A.

Brown Economic's Principal, Cara Brown, testified (on behalf of the plaintiff) in an interesting matter in December of 2015 at the Calgary courthouse. Justice Shelagh Martin rendered her decision on March 24, 2016 and it was cited as *Luft v. Zinkhofer*, **2016 ABQB 182**. The plaintiffs, Donald Luft and his wife sued a lawyer, Frederick Zinkhofer, and they appear to have been successful on almost all fronts. Justice Martin awarded the following damages:

- ◆ **Loss of Defamation Action:** \$67,500
- ◆ **General Damages** to Mr. Luft (\$105,000) and to Mrs. Luft (\$100,000)
- ◆ **Loss of Income** to Mr. Luft: \$225,000
- ◆ **Punitive Damages:** \$250,000
- ◆ Plus **pre-judgment interest** and "**solicitor and client costs**". (para. [587])

Counsel for the plaintiff, Loran Halyn, has confirmed to this author that the total judgment, inclusive of solicitor and own client costs, will likely be in excess of \$1.5 million but the final figure is unknown at this time. It is also not known at this time if the matter will be appealed.

Brief summary of quantum findings¹

Justice Martin found that "The reports of the economists were very helpful. They provided a great level of detail and allowed for many different assumptions. I do not believe that I must choose between the two reports, as they are very close when their assumptions are scrutinized carefully." (para. [538]) Martin, J. is correct when she says "The main differences between the expert reports are two-fold: the determination of overtime and whether or not Mr. Luft would have collected 40% or 60% of his salary for disability payments." (para [539])

¹There is no attempt made in this article to comment on the matters involving liability, which is beyond the expertise of this author.

Importantly, Justice Martin did not include any loss for Mr. Luft earning an extra \$10,000 per annum from working on the Emergency Response Team “as such has not been established by any documentation”. Therefore, Justice Martin found that “The Brown analysis in scenario A2 is therefore preferable because it removes this amount.” (para [540]). *This finding highlights the importance of including multiple scenarios, with and without variable amounts, when creating economic loss reports.* Justice Martin accepted our analysis that in the absence of the incident in question, Mr. Luft would have worked at Canadian Western National Gas (“CWNG”) until he was diagnosed with retinitis pigmentosa, at which time he would have commenced receiving long-term disability benefits (“LTD”) as opposed to losing his job at Canadian Western National Gas.

Justice Martin concluded that “I accept the midpoint between the [expert] figures as a good baseline for what Mr. Luft lost in respect of past and future income: being \$358,000. An approximation seems most fair when the details of the LTD benefits are not certain.” (para. [543]). Interestingly, Justice Martin made a point of noting that our analysis had included employer-sponsored fringe benefits, something the other expert had decided to omit: “...I prefer some of the assumptions in the Brown Report, for example, that employment base benefits should be included in salary...”. (para. [543]) However, Justice Martin accepted that the \$52,000 severance payment Mr. Luft received from CWNG should be deducted from income earned and not be treated as a collateral benefit, an assumption Brown Economic had made in its reports.

Most importantly, Justice Martin concluded that the action in question was not completely responsible for Mr. Luft’s loss of employment income:

“While [the other expert] and Ms. Brown listed various negative contingencies and set out their assumptions in full, I believe that some of this income loss was caused by other factors. For example, the death of his daughter in 2006 had a significant impact upon Mr. Luft and his earnings. Further, Mr. Zinkhofer’s breaches caused much loss, but I am not prepared to say that he caused all this loss. Mr. Luft leaving CWNG could also have been influenced by factors other than the defamation, like negative feelings created by Mrs. Luft suing his colleague in respect of a motor vehicle accident. There will also [be] a need to a deduction for lost income already awarded on the defamation claim.” (para. [544], emphasis added)

This conclusion of Martin, J.’s is important because experts are frequently asked to assume that the intervening act is wholly responsible for the resulting income loss, but many are left to wonder if other factors could be contributing to the income loss result. It might be prudent for counsel to ask experts to pro-rate their findings for some percentage (a percentage decided by counsel, of course) if causation is not 100% responsible.

Do not hesitate to contact this author for further discussion about this decision or other case results. Ms. Brown can be contacted at: **1-800-301-8801, ext. 201.**

Rebuttals & Critiques

Brown Economic Consulting's main work involves preparing assessments for plaintiff and defense counsel (or insurers) that evaluate whether a plaintiff or family has sustained an income loss from an intervening act. Of course, these "acts" could arise from a motor vehicle accident ("mva"), slip and fall, medical malpractice, sexual assault, wrongful confinement or other reason for interrupting earnings. The intervening act could also bring about a fatality, types of cases in which we are not only intimately familiar with (having testified in *Duncan v. Baddeley* in the 1999 quantum trial) but have spearheaded the refinement of personal consumption rates ("PCRs") in dependency loss cases so that they vary not only by *family size* but by *family income level*. This refinement has resulted in new PCRs, published in 2004 and in 2012, in the Journal of Forensic Economics. The 2012 published article is readily available from Brown Economic by emailing us at help@browneconomic.com.²

Prior issues of **Brown's Economic Damages Newsletter** that are related to this topic:

- ◆ **"Short-Form Reports: Less costly alternative for expert economic advice"**
September 2015, vol. 12, issue #9
- ◆ **"Profile of Brown Economic's Consultants & Firm Services"**
April 2015, vol. 12, issue #4
- ◆ **"Legal Memorandums & Loss of Marriage Benefit Claims"**
April/May 2014, vol. 11, issue #4
- ◆ **"Calculating Claims for Children & Young Adults"**
March 2014, vol. 11, issue #3
- ◆ **"Three ways to assist your practice:"**
 - Legal research memorandums available with *Damages: Estimating Pecuniary Loss*
 - The ["Date of Valuation"](#)
 - Information required by quantum expertsJuly 2013, vol. 10, issue #6
- ◆ **"5 common challenges when calculating quantum"**
January 2012, Special Issue

In addition to preparing assessments for plaintiff or defense counsel (or insurers), however, Brown Economic has also done thousands of "rebuttal" reports (and "sur-rebuttal"³) reports for counsel and insurers which usually involve a critique of another expert's approach. (A rebuttal report was presented in *Luft v. Zinkhofer* when Ms. Brown testified in front of Martin, J.) We are respectful of the other expert's work and as such our approach involves evaluating whether a different way of calculating or assessing damages would provide guidance to the parties involved and to the court. A "different way" could include:

² A description of the 2012 article is also contained in **Brown's Economic Damages Newsletter**, "Personal Consumption Rates ("PCRs") in Fatality Cases: 2007-2008 *Survey of Household Spending* Data, August 2014, vol. 11, issue #7.

³ We distinguish these documents as replies or responses to an existing critique of an original report.

- ◇ Assessing “loss of opportunity” or “loss of capital asset” using the **wage deficits** computed from the 2001 *Participation and Activity Limitation Survey* and 2006 *Participation and Activity Limitation Survey*;⁴
- ◇ Calculating the **impact of a delay in education** that involves not only the “pure” loss of time (i.e., the first year or the last year of a career) but evaluates the possible erosion of real wage growth due to the delayed start;
- ◇ Applying “acceptance” ratios into educational programs using application rates and acceptance rates when it is not 100% certain that the plaintiff would have gained admission to the specific program;
- ◇ Using “major field of study” data when the career path is hazy but the aspirations are clear. Brown Economic has more than 400 “fields of study” for which we can supply income data;
- ◇ Tailoring the analysis when it involves immigrants⁵ or aboriginal persons;
- ◇ Offering multiple retirement age scenarios when a late-career change was imminent or the plaintiff is injured late in life;⁶
- ◇ Applying specific approaches when an unusual injury has occurred (such as facial disfigurement);
- ◇ Calculating income loss scenarios by education level for infants and minors when a career path has yet not been established;
- ◇ Researching the probability of resumption of work in the labour market after extended maternity leave(s);⁷
- ◇ Adding scenarios for income losses based on “male” data when the plaintiff had established a non-traditional career, or if the plaintiff was an infant at the date of incident and thus had no chance to establish a career at all;
- ◇ Analyzing the propensity for a specific percentage of the population to remain in “low-income” when dealing with a plaintiff who exhibited a lengthy history of below-average income levels (using Statistics Canada’s *Low Income Cut-offs*, or LICOs);
- ◇ Addressing unusual claims, such as loss of insurability or loss of RRSP wealth accumulation;⁸
- ◇ Using income and labour force statistics to calculate a loss when a history is unavailable.

In our September 2015 newsletter issue, we noted that “short-form” rebuttal reports cost in the range of \$2500 to \$4500 (plus GST). More lengthy or intricately researched rebuttal reports cost in the range of \$7500 to \$15000 (plus GST).

⁴ An article has been published about this approach: **Brown, C.L.** and J.C.H. Emery (2010) “The Impact of Disability on Earnings and Labour Force Participation in Canada: Evidence from the 2001 PALS and from Canadian case law”, *Journal of Legal Economics* Vol. 16, no. 2, April 2010.

⁵ See **Brown’s Economic Damages Newsletter** for a 3-part series on the labour force experience of immigrants in Canada (October 2015, November 2015 and December 2015).

⁶ Brown Economic has prepared numerous issues of the **Brown’s Economic Damages Newsletter** on retirement age issues, drawing results from both Statistics Canada’s 2002 and 2007 *General Social Surveys* on retirement. See the heading “Retirement & working life expectancy” in **Topic Index of BEC Newsletters** available at www.browneconomic.com > **RESEARCH & PUBLICATIONS** > *Brown’s Economic Damages Newsletter*.

⁷ See **Brown’s Economic Damages Newsletter** issues “The Gender Wage Gap: Dimensions (Part I)” October 2014, vol. 11, issue #9 and “The Gender Wage Gap: Economic Theories (Part II)” November/December 2014, vol. 11, issue #10.

⁸ When dealing with loss of RRSP wealth accumulation, this calculation is only possible when the plaintiff can show a concrete history of rates of return in excess of the “usual” discount rates applied in civil litigation. Otherwise, the present discounted value of the loss is a “wash”.

There are other topics that Brown Economic can address – the above-noted descriptions are simply examples from past projects. Other examples of unusual projects in which Brown Economic has been involved include:

- ◆ Calculating the impact of wrongful imprisonment for **David Milgaard and his family resulting in a \$10 million settlement** (and preparing an income loss report for Stephen Truscott due to wrongful imprisonment);
- ◆ **Analyzing local and regional food economies in Canada** to determine the status and patronage of local food markets (for Agriculture and Agri-Food Canada);
- ◆ Identify, investigate the background of, and document **traceability systems**⁹ in various regions in the world (for Agriculture and Agri-Food Canada);
- ◆ Researching the **impact of disability on "participation"**: the economic concept of whether, and how much, to work in the paid labour market;
- ◆ **Analyzing Canadian household expenditure** to determine the decedent's consumption in fatality cases, based on Statistics Canada's *Survey of Household Spending (SHS)*;
- ◆ Assessing the **impact of sexual abuse amongst 70 Nunavut males resulting in a \$21 million settlement** for all involved in this litigation;
- ◆ Evaluating the **viability of constructing an NHL arena facility using demographic and economic indicators** (the "True North" project in Winnipeg, Manitoba) for airing by CBC;
- ◆ Assessing the **social discount rate in litigation** involving destroyed timber and woodland;
- ◆ Developing and attesting to the methodology for the "lost years' deduction" in fatality cases with no dependents under the *Survival of Actions Act*, **affirmed by the Court of Appeal of Alberta in *Duncan v. Baddeley***;
- ◆ **Impact of the delay in education** (*Brodie v. Canada (Attorney General)*) 2010;
- ◆ Analysis of **expenditures of high-income households** - with a view to analyzing maximum child support payable;
- ◆ Projecting the **potential career path of a woman who was held back** from progressing in a career as a "landman" (Delorie Walsh Human Rights case);
- ◆ **Predicting NHL career draft position** from player statistics on points, goals, penalty minutes;
- ◆ Projecting **earnings of physicians** when their fee-for-service income cannot be quantified using Census income (obtain statistical data from provincial health bodies);
- ◆ **Pension and fringe benefits** loss of university professor when prejudicially terminated early;
- ◆ Estimation of working life expectancy for older plaintiffs (see also: Brown Economic's [Working Life/Life Expectancy Calculator @ www.browneconomic.com](#));

⁹ The Food Safety and Quality Policy Directorate ("FSQPD") of Agriculture and Agri-Food Canada define traceability as "the ability to follow an item, or a group of items, whether animal, plant, food product or ingredient, from one point in the supply chain to another, either backwards or forwards".

- ◆ **Analysis of "arm's length" compensation** when family owns business using management consulting salary data (i.e. Towers Watson salary surveys);
- ◆ Estimating pecuniary compensation when **defamation** occurs (as per *Young v. Bella, Rowe & Memorial University of Newfoundland SCC 2006*);
- ◆ Estimating compensation when **"oppression"** is alleged (*McRoberts v. Whissell (2005)*);
- ◆ Estimating tax regulations, TIPPs bond rates, interest rates and prejudgment interest for various US states for **injured US citizens** (Ohio, Wisconsin, Oregon, Utah);
- ◆ Estimating pecuniary loss due to **sexual assault** (as per *B.M.G. v. Nova Scotia (Attorney General), 2007*);
- ◆ **Calculating losses for start-up ventures** in conjunction with industry experts' opinions on unit prices, royalty rates, usage per population, etc.;
- ◆ Calculating pecuniary losses when a person is **wrongfully confined and sterilized**¹⁰;
- ◆ Estimating **pension losses** for members of defined benefit pension plans, including an analysis of *Practice Recommendations* from the Canadian Institute of Actuaries;
- ◆ Assessing the specific **impact of visual impairment** amongst the impact of various types of disability;
- ◆ Assessing a proper discount rate in various contexts;
- ◆ Calculating the "cost of raising children" for the Federal Department of Justice (1991) prior to creation of the federal child support guidelines, and submitting a report to modify the federal guidelines for Alberta guidelines for Alberta Justice (1999).

¹⁰ Brown Economic's Principal, Cara Brown, testified in *Muir v. Alberta (1995)*.

UPDATING NON-PECUNIARY AWARDS FOR INFLATION (FEBRUARY 2016, CANADA)

Year of Accident/ Year of Settlement or Trial	"Inflationary" Factors*	Non-Pecuniary Damages - Sample Awards				
		\$10,000	\$25,000	\$50,000	\$75,000	\$100,000
February 2015-February 2016	1.012	\$10,124	\$25,309	\$50,618	\$75,927	\$101,236
Avg. 2014-February 2016	1.014	\$10,141	\$25,352	\$50,703	\$76,055	\$101,406
Avg. 2013-February 2016	1.033	\$10,334	\$25,835	\$51,669	\$77,504	\$103,338
Avg. 2012-February 2016	1.043	\$10,431	\$26,077	\$52,153	\$78,230	\$104,306
Avg. 2011-February 2016	1.059	\$10,589	\$26,473	\$52,945	\$79,418	\$105,890
Avg. 2010-February 2016	1.090	\$10,897	\$27,243	\$54,486	\$81,729	\$108,972
Avg. 2009-February 2016	1.109	\$11,091	\$27,729	\$55,457	\$83,186	\$110,915
Avg. 2008-February 2016	1.114	\$11,144	\$27,860	\$55,720	\$83,581	\$111,441
Avg. 2007-February 2016	1.139	\$11,388	\$28,470	\$56,940	\$85,410	\$113,881
Avg. 2006-February 2016	1.163	\$11,631	\$29,078	\$58,156	\$87,234	\$116,312
Avg. 2005-February 2016	1.186	\$11,864	\$29,660	\$59,319	\$88,979	\$118,639
Avg. 2004-February 2016	1.213	\$12,127	\$30,317	\$60,634	\$90,952	\$121,269
Avg. 2003-February 2016	1.235	\$12,352	\$30,881	\$61,762	\$92,642	\$123,523
Avg. 2002-February 2016	1.269	\$12,693	\$31,733	\$63,466	\$95,200	\$126,933
Avg. 2001-February 2016	1.298	\$12,980	\$32,450	\$64,901	\$97,351	\$129,802
Avg. 2000-February 2016	1.331	\$13,307	\$33,267	\$66,534	\$99,801	\$133,068
Avg. 1999-February 2016	1.367	\$13,669	\$34,173	\$68,347	\$102,520	\$136,694
Avg. 1998-February 2016	1.391	\$13,906	\$34,765	\$69,530	\$104,295	\$139,060
Avg. 1997-February 2016	1.404	\$14,044	\$35,111	\$70,222	\$105,334	\$140,445
Avg. 1996-February 2016	1.427	\$14,272	\$35,680	\$71,359	\$107,039	\$142,719
Avg. 1995-February 2016	1.450	\$14,497	\$36,242	\$72,484	\$108,726	\$144,969
Avg. 1994-February 2016	1.481	\$14,808	\$37,020	\$74,040	\$111,061	\$148,081
Avg. 1993-February 2016	1.483	\$14,832	\$37,081	\$74,162	\$111,242	\$148,323
Avg. 1992-February 2016	1.511	\$15,110	\$37,774	\$75,548	\$113,321	\$151,095
Avg. 1991-February 2016	1.533	\$15,334	\$38,335	\$76,670	\$115,005	\$153,341
Avg. 1990-February 2016	1.620	\$16,197	\$40,493	\$80,985	\$121,478	\$161,970
Avg. 1989-February 2016	1.697	\$16,972	\$42,431	\$84,862	\$127,293	\$169,725
Avg. 1988-February 2016	1.782	\$17,818	\$44,546	\$89,092	\$133,638	\$178,183
Avg. 1987-February 2016	1.853	\$18,534	\$46,335	\$92,669	\$139,004	\$185,339
Avg. 1986-February 2016	1.934	\$19,342	\$48,354	\$96,708	\$145,062	\$193,417
Avg. 1985-February 2016	2.015	\$20,152	\$50,381	\$100,762	\$151,143	\$201,524
Avg. 1984-February 2016	2.095	\$20,951	\$52,377	\$104,754	\$157,131	\$209,508
Avg. 1983-February 2016	2.185	\$21,853	\$54,632	\$109,263	\$163,895	\$218,526
Avg. 1982-February 2016	2.314	\$23,135	\$57,838	\$115,676	\$173,514	\$231,353
Avg. 1981-February 2016	2.562	\$25,625	\$64,062	\$128,124	\$192,187	\$256,249
Avg. 1980-February 2016	2.883	\$28,826	\$72,065	\$144,129	\$216,194	\$288,258
Avg. 1979-February 2016	3.175	\$31,746	\$79,365	\$158,729	\$238,094	\$317,459
Jan. 1978-February 2016	3.616	\$36,160	\$90,399	\$180,798	\$271,197	\$361,595

\$92,669 = \$50,000 x 1.853 represents the dollar equivalent in February 2016 of \$50,000 based on inflation increases since 1987. Similarly, \$361,595 (= \$100,000 x 3.616) represents the dollar equivalent in February 2016 of \$100,000 in 1978 based on inflationary increases since the month of January 1978.
* Source: Statistics Canada, Consumer Price Index, monthly CPI release, rolling average (except for Jan. 1978).

Consumer Price Index Unemployment Rate

From Feb 2015 to Feb 2016* (rates of inflation)		For the month of Feb 2016	
Canada**	1.4%	Canada:	7.3%
Vancouver:	1.8%	Vancouver:	6.1%
Toronto:	1.7%	Toronto:	7.2%
Edmonton:	1.3%	Edmonton:	6.8%
Calgary:	1.4%	Calgary:	8.4%
Halifax:	1.2%	Halifax:	6.8%
St. John's, NF:	1.7%	St. John's, NF:	7.6%
Saint John, NB:	1.8%	Saint John, NB:	8.3%
Charlottetown:	1.2%	Charlottetown (PEI):	11.0%

* Using month-over-month indices. Source: Statistics Canada
** 12 month rolling average up to February 2016 is 1.2% (see table above).



Brown Economic Consulting Inc.

HEAD OFFICE

#216, 5718-1A Street South West
Calgary, AB T2H 0E8

#907, 1128 Sunset Drive
Kelowna, B.C. V1Y 9W7

1701 Hollis Street Suite 800
Halifax, NS B3J 3M8
Toll 1.800.301.8801

Email help@browneconomic.com
Web www.browneconomic.com