



USE OF HALS/PALS APPROACH IN CASE LAW¹

In *Robinson v. Williams* (estate of), 2005 AQBQ 659, Ms. Brown testified on behalf of the defendant in front of Veit, J. Ms. Brown's testimony on the approach to determine Mr. Robinson's potential loss of income is reproduced from her trial transcript below:

Ms. Brown's trial transcript in *Robinson v. Williams*:

- Q. Is [the HALS]...a valid approach in your – in your view?
- A. ...I happen to think it's kind of a useful approach sometimes because, like, in cases like this, this is a classic case where it's really hard to pin down where the [person] would have been. I mean essentially, the accident caught him at a place and time where we don't really know what he would have been doing because he talks about being, you know, promised this job and wanting to work at Earls and loving, you know that kind of work, but the fact is, is he wasn't doing that. And then – and then things changed after the accident so that those actual particular jobs were not available.

And also, he's got this track record of – you know, Dr. Mandel talks about it of... changing jobs all the time, not that settled, even – he even says at one point in his report that...the way that he worked...his characteristics made him – may have limited his earning potential...So we have an individual that it's really hard to peg exactly where he would have gone at the time he was injured. So I find that the HALS thing is useful when you can't really go, well, career 'A' versus career 'B'... like even since the accident we – he's been all over the place, right? So we find that when you – it's real hard to do career 'A' versus career 'B' that sometimes using a HALS approach where you have a – a deficit – what I call a deficit approach rather than the traditional career 'A' versus career 'B' can be very helpful because then it doesn't matter whether we're right about [the without-incident and with-incident salary levels].

So that's kind of the approach that our report has taken and...we may not have the deficit right either for obvious reasons. I mean there's lots of other evidence than my evidence, so if the Court finds, Well, no, you know, this is the deficit I think is applicable to M. Robinson. We have a multiplier where the Court can apply that...and I find that that's just as appropriate or realistic as doing an 'A' versus 'B'. [pages 61-62]

- Q. So if you take 10,000, 20,000, 30,000 a year deficit, all you have to do is use the multiplier and that will tell you how much the losses were.
- R. Well, and – and actually I'm not talking rocket science. Courts have done that in lots of cases before, right? I mean I'm not suggesting actually anything new, but what I am coming to court with, I'm saying, Well, now, we even have a really good survey from a

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¹ See also: *Medina v. Danbury Sales* (1971) Ltd. [1991] O.J. No. 2225; and *Jones v. Cheesebrough* [2003] A.J. No. 324 2003 ABQB 196. The author testified for the plaintiff in *Jones*.

statistical point of view that – that backs up the fact that people injured in motor vehicle accidents in Canada suffer a 10 or 18 or 25 percent wage deficit. So we have some – some solid statistical evidence on that now we're not just...picking some percentage out of the air...that's the part I bring...to the table. I mean this deficit approach clearly has been around...for a long time. [pages 62-63]

Q. So you figured out that he's going to have a deficit of about \$3,000 per year and a \$50,000 future loss of income.

A. Yes...we have that on page B36...(page 109, lines 15-17)

Justice Veit then went on to state in her findings on loss of income in the *Robinson* case:

[79] In assessing the evidence that has been put before me, I adopt the following comments made by Ms. Brown:

- ⇒ it is only in exceptional cases that an individual is tied to one job. Mr. Robinson's case is not a situation where he should be tied uniquely and exclusively to employment at Earl's;
- ⇒ his pre-accident employment history indicates that Mr. Robinson consistently was earning less than others in his age cohort. In every single year, he was below the average, and in some years he was far below the average. In those circumstances, it would be overly optimistic to assume that Mr. Robinson would have achieved the top available wage at Earl's;
- ⇒ there is a wage gap between a person who has the kind of mild/moderate functional disability for employment purposes suffered by Mr. Robinson (the inability to cut his toe nails does not have an impact on his employability) and a fully able-bodied worker. That wage gap is in the range of 3-6%. In the circumstances here, this results in a probable yearly deficit for Mr. Robinson in the range of \$3,000 - \$3,500.

[113] Despite Mr. Robinson's obvious general abilities and success in obtaining competitive employment after the injury even without any re-training, I accept the evidence that he will probably suffer some problems in obtaining and securing employment in the future because of his disability. I award him \$3,500 per year until the age of 62 to compensate him for that probability.

f) Future loss of income

[107] This is the main area of contention between the parties. Mr. Robinson argues that the evidence supports a finding that he had the motivation, the aptitude, the training and the ability to become a restaurant manager in the Earl's chain of restaurants and that he would have achieved that status and remuneration had it not been for the accident.

[108] Mr. Robinson states that he had set his career path in the 2 ½ years prior to the accident, and that he was on his way to fulfilling his goal, even though it might have appeared that he was taking his time as a server on the way to restaurant management.

[109] The evidence establishes that Mr. Robinson was indeed on his way to becoming a restaurant manager at Earl's at the time of the accident and there seems little doubt that he would have attempted to maintain employment at Earl's, in part because of the potential for moving to one of the restaurants operated by the chain in a desert area of the United States where the weather would have been helpful in the management of Mr. Robinson's psoriasis. However, maintaining a job at Earl's was not guaranteed:

Mr. Robinson himself had some experience with the dislocations caused by the sale of the franchised locations in Fort McMurray and the Earl's location in Jasper was such an operation and with individuals who had been employed in a management capacity at Earl's and left Earl's and indeed the industry after the re-jigging of management roles at Earl's in Jasper.

[110] In addition to the evidence that employment at Earl's as a restaurant manager was neither guaranteed within a specific period of time or at all, the evidence also discloses that, relative to his age cohort in his chosen field, Mr. Robinson had always underperformed in terms of remuneration although not in terms of ability and achievement. Therefore, while it is possible that his experience at Earl's would have been different from his employment prior to Earl's, the court must be guided by probabilities rather than possibilities.

[111] More important even than the risks relative to continued employment at Earl's is the principle that even an individual who has been injured as a result of the negligence of another cannot merely ask to be compensated for the damage thus caused, but must make reasonable efforts to mitigate the damages that he has suffered.

[112] In this case, I accept Dr. Mandel's evidence that Mr. Robinson has the capacity, aptitude and background to go into hotel management and that such a career would pay Mr. Robinson as much as, and perhaps more, than a job as a restaurant manager for Earl's. Mr. Robinson would lose 2 years' income to obtain additional training to become a hotel manager, and there would be some disbursement associated with that training for an additional \$50,000. It would be reasonable for Mr. Robinson to re-train for a career in hotel management: that career is closely allied to the career in which he is currently involved, he has done work of this general type in the past, and his administrative and personnel strengths would be put to good use in such a career. It might well have been sensible for Mr. Robinson to have taken the re-training during the period from April 1, 2001 to the date of trial, but I cannot conclude that it was unreasonable for him not to have done so. Therefore, in relation to future loss of income, I award Mr. Robinson two years' of remuneration based on his current remuneration at Whistle Stop, plus \$50,000, to allow him to retrain for a career in hotel management.

Justice Veit's reasons for judgment in *Robinson v. Williams* with respect to quantum losses reflect an endorsement of the "deficit" approach to assess loss of income. The data from the 1991 *Health and Activity Limitation Survey* (HALS) and 2001 *Participation and Activity Limitation Survey* (PALS) corroborate the notion that disabled persons in Canada, who are injured in motor vehicle accidents, experience wage deficits in the labour market.

To obtain the HALS questionnaire² or PALS questionnaire,³ please contact our office using the HELP line:

1-888-BEC-ASST (1-888-232-2778)

Once the plaintiff or a medical expert fills out the questionnaire, it can be returned to us for a HALS/PALS income deficit report.

² Also available in Statistics Canada, *The 1991 Health and Activity Limitation Survey Microdata file – Adults in Households User's Guide* (Ottawa: Statistics Canada, 1994); Form 02. It is reproduced in C.L. Brown, *Damages: Estimating Pecuniary Loss*, loose-leaf (Aurora, Ontario: Canada Law Book), 2005, appendix 5-1, pp. 5-45 to 5-48.

³ This questionnaire is not available from Statistics Canada. It is based on D. Faucher, *PALS 2001 Disability Scale for Adults*, January 29, 2002; and consultations with senior analysts at Statistics Canada. It is reproduced in C.L. Brown, *Damages: Estimating Pecuniary Loss*, loose-leaf (Aurora, Ontario: Canada Law Book), 2005, appendix 5-2, pp. 5-48 to 5-48.23. The scoring instrument for the PALS 2001 questionnaire is available from Brown Economic Consulting Inc.

UPDATING NON-PECUNIARY AWARDS FOR INFLATION (NOV. 2005, 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
November 2004-November 2005	1.022	\$10,222	\$25,555	\$51,109	\$76,664	\$102,218
Avg. 2003-November 2005	1.039	\$10,392	\$25,981	\$51,962	\$77,944	\$103,925
Avg. 2002-November 2005	1.068	\$10,678	\$26,695	\$53,390	\$80,085	\$106,780
Avg. 2001-November 2005	1.092	\$10,919	\$27,298	\$54,596	\$81,894	\$109,192
Avg. 2000-November 2005	1.120	\$11,198	\$27,996	\$55,991	\$83,987	\$111,982
Avg. 1999-November 2005	1.150	\$11,502	\$28,756	\$57,511	\$86,267	\$115,023
Avg. 1998-November 2005	1.170	\$11,703	\$29,259	\$58,517	\$87,776	\$117,035
Avg. 1997-November 2005	1.181	\$11,812	\$29,531	\$59,061	\$88,592	\$118,123
Avg. 1996-November 2005	1.200	\$12,002	\$30,005	\$60,009	\$90,014	\$120,019
Avg. 1995-November 2005	1.220	\$12,198	\$30,494	\$60,988	\$91,483	\$121,977
Avg. 1994-November 2005	1.246	\$12,461	\$31,152	\$62,304	\$93,456	\$124,608
Avg. 1993-November 2005	1.249	\$12,485	\$31,213	\$62,426	\$93,639	\$124,853
Avg. 1992-November 2005	1.271	\$12,710	\$31,775	\$63,550	\$95,325	\$127,100
Avg. 1991-November 2005	1.290	\$12,904	\$32,259	\$64,518	\$96,777	\$129,036
Avg. 1990-November 2005	1.362	\$13,623	\$34,057	\$68,114	\$102,170	\$136,227
Avg. 1989-November 2005	1.428	\$14,281	\$35,702	\$71,404	\$107,107	\$142,809
Avg. 1988-November 2005	1.499	\$14,988	\$37,471	\$74,941	\$112,412	\$149,882
Avg. 1987-November 2005	1.560	\$15,595	\$38,988	\$77,975	\$116,963	\$155,951
Avg. 1986-November 2005	1.627	\$16,274	\$40,685	\$81,370	\$122,055	\$162,740
Avg. 1985-November 2005	1.695	\$16,947	\$42,367	\$84,733	\$127,100	\$169,467
Avg. 1984-November 2005	1.763	\$17,628	\$44,071	\$88,141	\$132,212	\$176,283
Avg. 1983-November 2005	1.839	\$18,394	\$45,984	\$91,968	\$137,952	\$183,936
Avg. 1982-November 2005	1.946	\$19,464	\$48,660	\$97,320	\$145,980	\$194,640
Avg. 1981-November 2005	2.158	\$21,579	\$53,947	\$107,895	\$161,842	\$215,789
Avg. 1980-November 2005	2.423	\$24,228	\$60,571	\$121,142	\$181,713	\$242,284
Avg. 1979-November 2005	2.669	\$26,691	\$66,728	\$133,455	\$200,183	\$266,910
Jan. 1978-November 2005	3.043	\$30,433	\$76,082	\$152,164	\$228,245	\$304,327

\$77,975 = \$50,000 x 1.560 represents the dollar equivalent in November 2005 of \$50,000 based on inflation increases since 1987. Similarly, \$304,327 (= \$100,000 x 3.043) represents the dollar equivalent in November 2005 of \$100,000 in 1978 based on inflationary increases since 1978.

* Source: Statistics Canada, Consumer Price Index, monthly CPI release

Consumer Price Index		Unemployment Rate	
From Nov. 2004 to Nov. 2005* (rates of inflation)		For the month of Nov. 2005	
Canada:	2.2%	Canada:	6.4%
Vancouver:	1.9%	Vancouver:	4.8%
Toronto:	1.8%	Toronto:	6.4%
Edmonton:	2.1%	Edmonton:	4.3%
Calgary:	2.0%	Calgary:	4.4%
Halifax:	2.5%	Halifax:	5.4%
St. John's, NF:	2.6%	St. John's, NF:	8.2%
Saint John, NB:	2.4%	Saint John, NB:	7.6%
Charlottetown:	3.0%	Charlottetown:	10.6%

* Based on 12-month rolling average. Source: Statistics Canada

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