



Brown's Economic Damages Newsletter

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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)

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Case Decision: *Kitching v. Devlin*, 2016 ABQB 212 & Announcements

By Cara L. Brown, M.A.

Brown Economic has two announcements that may be of interest to the readership:

Canadian Lawyer has nominated Brown Economic Consulting for consideration in the category "Expert Witness – Personal Injury Quantification" in its 2nd annual **Readers' Choice Survey**. This survey is designed so that counsel can vote as to which vendors and service providers are "the best at what they do". We are honoured to be included for consideration in this survey and would love to garner your vote. *Canadian Lawyer* has the following to say about their survey:

"Your responses are completely confidential, and are used only in the aggregate for us to judiciously determine which contenders are worthy of the distinction of being identified as a winner of a 2016 *Canadian Lawyer* Readers' Choice Award.

Voting is open through June 3, 2016. While voters need not cast their opinion in every category, we do encourage you to vote in in as many as appropriate to your market knowledge of the category...

Your feedback will help us assemble the results and award winners that will appear in the October 2016 issue of *Canadian Lawyer*."

GO TO THIS LINK TO VOTE:

<https://www.surveymonkey.com/r/canadianlawyerreaderschoice>

Cara Brown has been invited to make a presentation for the **Newfoundland & Labrador Law Society** on economic topics. Ms. Brown will be in St. John's on **Friday, June 24, 2016** for a full morning session, and will be pleased to chat with counsel. Ms. Brown has spoken for the Newfoundland & Labrador Law Society on three past occasions, in 2001, 2003 and in 2012 and has been qualified to give expert economic testimony in Newfoundland & Labrador courts, as has Dr. Frank Strain, our Atlantic consultant. For a summary of the topics to be discussed, visit www.browneconomic.com > **Upcoming Newfoundland 2016 Law Society presentation.**

***Kitching v. Devlin*, 2016 ABQB 212 released April 14, 2016:¹ Remarks on quantum claim**

Mr. Kitching sued Mr. Devlin, a lawyer, on the basis that “Mr. Devlin negligently handled his personal injury claim” which was settled for at a JDR for \$350,000 (paras. [1], [2]). Justice Jeffrey determined that “For the reasons that follow I dismiss Mr. Kitching’s claim.” (para. [4])

Ms. Brown testified for the plaintiff at this trial on the economic loss component. No opposing economic expert was hired. There were some interesting remarks included in this judgment that I believe are relevant for economic experts. First, however, I repeat Jeffrey J.’s explanation of how the lawsuit was required to proceed (in at least one respect, repeated below) in order for Mr. Kitching to be successful:

[283] In order to succeed in this lawsuit Mr. Kitching must also prove that the breach of the standard of care caused him loss. In other words, Mr. Kitching has the burden of proving that he would not have agreed to the Settlement Offer or that he would have extracted a higher settlement from Ms. Wyatt’s insurer but for the professional failings of Mr. Devlin: *Webb v Birkett*, 2009 AQBQ 329...

[287] In *Webb*, the Alberta Court of Appeal explained how to assess damages when the allegation is the lawyer caused the client to accept an improvident settlement. The Court, at para 61, held that a plaintiff must show that but for the lawyer’s negligence, the plaintiff would have obtained a better settlement or would have proceeded to trial and obtained more than the settlement provided. In this case, Mr. Kitching does not contend that he could have obtained a better settlement at the JDR. Rather, he argues that he would have obtained a greater compensation had he proceeded to trial. The proper way to quantify damages, therefore, is to conduct a trial within a trial.

Jeffrey, J. stated in para. [296] that “liability is not an issue”. In terms of economic damages, Mr. Kitching “submi[tted] that no reduction to his damages should be made for the purely speculative possibility that he will improve. If any reduction is made, it should be less than five percent.” (para. [297]) The judge’s finding on the issue of Mr. Kitching’s *with-incident*² employment and income ended up influencing the quantum of damages decided by the judge in a major way as noted in para. [341]:

[341] ...the extent of Mr. Kitching’s injuries lead me to believe that he cannot return to dry walling work. However, I do not believe that he is disabled from all types of work, and *certainly not precluded from it because of the Accident*. I base

¹These comments include direct quotes from Jeffrey, J.’s **Reasons for Judgment** dated April 14, 2016 and there is no attempt to comment on the liability part of this claim, which of course is outside the expertise of this author. Only comments relevant to the economic loss are included.

²We refer to the plaintiff’s employment and income *following the incident* as the “with-incident” employment and income. In terms of the plaintiff’s employment and income in the absence of the incident – that is, in the event the incident had not happened – this is referred to as the “without-incident” employment and income. This short-hand enables us to distinguish our scenarios in the economic loss reports.

this conclusion on my finding that Mr. Kitching exaggerates the effects of his pain, that is, the degree to which his pain impedes or even prevents all alternate forms of employment, which in turn significantly discounts the reliance that I place on Mr. Kuyltjes' FCE. In addition, I have drawn an adverse inference in respect of Mr. Kitching's residual working capacity. (emphasis added)

There was an additional factor that the judge considered based upon another personal injury lawyer's opinion, Mr. Rodin of Calgary. Mr. Devlin, the defendant, "testified that courts 'very seldom will simply give a person with these types of complaints a lifetime award'." Jeffrey, J. subsequently reiterated Mr. Rodin's opinion on this topic:

[244] ...[Mr. Rodin] said:

And there's several cases in Alberta which clearly say that *no matter what an economist says about how much future loss of income will be over a person's working life, the courts have a tendency to reduce that number significantly.*

Even where the evidence is clear that there's a total disability, even where the evidence is unclear that the person will ever achieve a recovery of any significance, *the courts will still in Alberta make an award for future losses on a basis that this plaintiff will get their life together.* That over time this plaintiff will achieve more function and that this plaintiff will likely work. *And that's the reality in Alberta, and then there's case law to back that up.* I've been involved in cases myself where that is the exact decision of the court. (emphasis added)

In commenting on Mr. Rodin's evidence, the judge stated that "Mr. Rodin did not advance a theory of judicial discrimination. Rather, his testimony emphasized the many legal hurdles that personal injury plaintiffs face in discharging their onus of proof...Evidentiary problems with witness credibility, standard of care, causation, or damages are common and may arise unexpectedly at trial. Trial judges will reduce the damages award, if not dismiss the action entirely, if on balance the plaintiff's case is not proven in some key aspect." (para. [247]) What is key from this exchange is that the economic loss report often represents the "high water mark" for the quantum of economic losses, particularly if the plaintiff's with-incident capacity for employment is unknown or disputed. If the quantum expert is not provided with any information regarding the plaintiff's with-incident employability, and/or the plaintiff has not worked since the incident in question (which often spans a good number of years), the economist has no choice but to compare the without-incident scenarios to the status quo. When the status quo is non-employability, of course the future income loss awards increase dramatically.

Jeffrey, J. subsequently went on to assess pecuniary damages for Mr. Kitching based on Brown Economic's July 25, 2014 report. The judge quoted from many aspects of Brown Economic's report (paras. [365], [367], [368], [369], [370], [371]). Interestingly, Jeffrey J. commented on Brown Economic's with-incident scenarios for Mr. Kitching (unemployable for life, or minimum wage employment) by saying "Neither scenario informs the amount of lost future earnings for the period of time which I find it would have taken Mr. Kitching to earn a comparable income. I find this would have been achieved by Mr. Kitching within 5 years of a November 2010 trial." (para. [372]) As Jeffrey, J. eloquently states,

[373] As mentioned earlier, *I find that Mr. Kitching has not proven that he is completely disabled.* Where a plaintiff has a residual earning capacity, the measure of damages for lost income is the difference between what the plaintiff earned before the accident and what the plaintiff could earn after the accident. *I am persuaded on a balance of probabilities that as at November 2010 Mr. Kitching's future income would significantly exceed minimum wage, though only after a period of*

time to identify and become proficient in a new line of work. *Mr. Kitching has not proven on balance that he can only perform jobs that pay the minimum wage; the weight of evidence demonstrates he can perform higher paying jobs...* (emphasis added)

[375] *For future loss of income I find it would take 5 years following November 2010 for Mr. Kitching's proficiency in new work to reach or exceed the income level he would have attained but for the Accident...*(emphasis added)

On this basis, Jeffrey J. provisionally awarded Mr. Kitching a minimal loss for past loss of income (\$194 because of a loss of income only until January of 2009³ and due to receipt of income replacement benefits, as per para. [374]) and then \$285,000 for future loss of income based on a graduated scale of loss (as per para. [375]).

Jeffrey, J. also provisionally awarded Mr. Kitching \$82,000 for "cost of care and loss of housekeeping capacity" based on many of Mr. Kuyltjes' recommendations and Brown Economic's extrapolations in our cost of care items table (for specific items,⁴ see para. [381]). Jeffrey, J. accepted Brown Economic's method for calculating the tax gross-up on the future heads of damage but correctly acknowledged that with his different numbers for the awards the tax gross-up would have to be recalculated if need be. (para. [383])

However, as noted at the outset, Jeffrey J. "[dismissed] Mr. Kitching's action against Mr. Devlin" (para. [384]) but in the event he was "incorrect in finding Mr. Devlin not negligent" then Mr. Kitching would be entitled to damages of \$98,194⁵ because the settlement offer awarded to Mr. Kitching (of \$350,000) would be offset against the provisional award for damages by Jeffrey, J. (para. [385]).

Brief Comment on Jeffrey J.'s Findings for Quantum Experts

It is abundantly clear in the *Kitching* decision that the economic loss report will only be useful to all parties involved in the lawsuit if the plaintiff's with-incident employment status is properly diagnosed. Otherwise, there will be little in the way of monetary offset against the without-incident scenarios and the future economic losses will escalate thereafter.

One of the ways in which the plaintiff's with-incident employment status can be properly diagnosed is to obtain (**and give to the economist**) a vocational report; functional capacity report; or neuropsychological report commenting on the plaintiff's employability. (Different types of reports will be needed depending on the type and extent of the plaintiff's injury).

The other way in which the quantum expert can assist the process is to provide future loss tables that show the present value of each year's loss in the future such that the judge (or counsel or mediator) can easily distinguish the sum of the losses if it is found that the plaintiff will recover from his/her disability at some point in the future **before** retirement age. For instance, we show the impact of truncating the future losses at each age prior to reaching retirement in case the losses are found to cease before retirement age. Brown Economic does this as a matter of course in all economic loss reports.

³The accident in question in this lawsuit occurred on October 11, 2007 (para. [11]).

⁴The items included pain and related medication, jar openers, vocational assessment, travel to assessment, a reasonable additional amount for vocational training and upgrading, and some of the indoor and outdoor household services. (See para. [381])

⁵In the text of para. [385] from the CanLII judgment, the numeric figure is shown as \$98,19494 but we assume the correct figure is shown at the bottom of the table in para. [385], namely \$98,194.

An additional method for adding realism to the economist loss report is to add with-incident scenarios other than “unemployable” in the future. As a matter of course, Brown Economic adds with-incident scenarios to show the impact to all parties involved if the plaintiff returned to work sometime in the future at some capacity. (This was one of the reasons why the “minimum wage” scenario, B2, was provided in the *Kitching* report).

A final way of assessing the economic losses more realistically in the future is to assume that the plaintiff may experience a reduction in future earnings but only based on a certain percentage (rather than assume 100% non-employability). Brown Economic has developed research based on Statistics Canada's 1991 *Health and Activity Limitation Survey* (“HALS”) and 2001 & 2006 *Participation and Activity Limitation Surveys* (“PALS”) which were eventually published in **Brown, C.L.** and J.C.H. Emery, “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. The plaintiff completes a questionnaire from which Brown Economic scores the answers to determine the severity of disability (mild, moderate, severe or very severe). The wage deficits implied by the severity level are applied to the future losses. Since the wage deficits range from 16% (“mild” disability for men or women) to 51% (“very severe” disability for men) to 66% (“very severe” disability for women),⁶ they are a lot smaller than losses based on 100% disability (which is what unemployable represents). For more information or to request the *Journal of Legal Economics* article, visit www.browneconomic.com > **HALS/PALS Analyses** (click directly from the home page) or email us at help@browneconomic.com. This represents an ample way for plaintiff's counsel to “...help their clients by putting forward the best case they can from that available evidence, emphasizing the strengths of the client's case and acknowledging but downplaying the weaknesses.” (*Kitching v. Devlin*, para. [208])

⁶ **Brown's Economic Damages Newsletter**, “2006 PALS: Wage deficits by education level & dealing with self-employed plaintiffs using the PALS data” May 2011, vol. 8, issue #4, Table 1 (p. 3). This newsletter is available by visiting the **HALS/PALS Analyses** page after clicking from the home page @ www.browneconomic.com.

UPDATING NON-PECUNIARY AWARDS FOR INFLATION (MARCH 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
March 2015-March 2016	1.012	\$10,124	\$25,311	\$50,622	\$75,932	\$101,243
Avg. 2014-March 2016	1.015	\$10,151	\$25,378	\$50,755	\$76,133	\$101,510
Avg. 2013-March 2016	1.034	\$10,344	\$25,861	\$51,722	\$77,583	\$103,444
Avg. 2012-March 2016	1.044	\$10,441	\$26,103	\$52,207	\$78,310	\$104,413
Avg. 2011-March 2016	1.060	\$10,600	\$26,500	\$52,999	\$79,499	\$105,999
Avg. 2010-March 2016	1.091	\$10,908	\$27,271	\$54,542	\$81,813	\$109,084
Avg. 2009-March 2016	1.110	\$11,103	\$27,757	\$55,514	\$83,271	\$111,029
Avg. 2008-March 2016	1.116	\$11,156	\$27,889	\$55,778	\$83,666	\$111,555
Avg. 2007-March 2016	1.140	\$11,400	\$28,499	\$56,999	\$85,498	\$113,997
Avg. 2006-March 2016	1.164	\$11,643	\$29,108	\$58,216	\$87,324	\$116,431
Avg. 2005-March 2016	1.188	\$11,876	\$29,690	\$59,380	\$89,070	\$118,761
Avg. 2004-March 2016	1.214	\$12,139	\$30,348	\$60,697	\$91,045	\$121,393
Avg. 2003-March 2016	1.236	\$12,365	\$30,912	\$61,825	\$92,737	\$123,650
Avg. 2002-March 2016	1.271	\$12,706	\$31,766	\$63,531	\$95,297	\$127,063
Avg. 2001-March 2016	1.299	\$12,993	\$32,484	\$64,967	\$97,451	\$129,935
Avg. 2000-March 2016	1.332	\$13,320	\$33,301	\$66,602	\$99,903	\$133,204
Avg. 1999-March 2016	1.368	\$13,683	\$34,208	\$68,417	\$102,625	\$136,834
Avg. 1998-March 2016	1.392	\$13,920	\$34,801	\$69,601	\$104,402	\$139,202
Avg. 1997-March 2016	1.406	\$14,059	\$35,147	\$70,294	\$105,442	\$140,589
Avg. 1996-March 2016	1.429	\$14,287	\$35,716	\$71,433	\$107,149	\$142,865
Avg. 1995-March 2016	1.451	\$14,512	\$36,279	\$72,559	\$108,838	\$145,117
Avg. 1994-March 2016	1.482	\$14,823	\$37,058	\$74,116	\$111,174	\$148,232
Avg. 1993-March 2016	1.485	\$14,847	\$37,119	\$74,237	\$111,356	\$148,475
Avg. 1992-March 2016	1.513	\$15,125	\$37,813	\$75,625	\$113,438	\$151,250
Avg. 1991-March 2016	1.535	\$15,350	\$38,374	\$76,749	\$115,123	\$153,498
Avg. 1990-March 2016	1.621	\$16,214	\$40,534	\$81,068	\$121,602	\$162,136
Avg. 1989-March 2016	1.699	\$16,990	\$42,475	\$84,949	\$127,424	\$169,898
Avg. 1988-March 2016	1.784	\$17,837	\$44,591	\$89,183	\$133,774	\$178,366
Avg. 1987-March 2016	1.855	\$18,553	\$46,382	\$92,764	\$139,146	\$185,529
Avg. 1986-March 2016	1.936	\$19,361	\$48,404	\$96,807	\$145,211	\$193,615
Avg. 1985-March 2016	2.017	\$20,173	\$50,433	\$100,865	\$151,298	\$201,731
Avg. 1984-March 2016	2.097	\$20,972	\$52,431	\$104,861	\$157,292	\$209,723
Avg. 1983-March 2016	2.188	\$21,875	\$54,688	\$109,375	\$164,063	\$218,750
Avg. 1982-March 2016	2.316	\$23,159	\$57,897	\$115,795	\$173,692	\$231,590
Avg. 1981-March 2016	2.565	\$25,651	\$64,128	\$128,256	\$192,383	\$256,511
Avg. 1980-March 2016	2.886	\$28,855	\$72,138	\$144,277	\$216,415	\$288,553
Avg. 1979-March 2016	3.178	\$31,778	\$79,446	\$158,892	\$238,338	\$317,784
Jan. 1978-March 2016	3.620	\$36,197	\$90,491	\$180,983	\$271,474	\$361,966

\$92,764 = \$50,000 x 1.855 represents the dollar equivalent in March 2016 of \$50,000 based on inflation increases since 1987. Similarly, \$361,966 (= \$100,000 x 3.620) represents the dollar equivalent in March 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 Mar 2015 to Mar 2016* (rates of inflation)		For the month of Mar 2016	
Canada**	1.3%	Canada:	7.1%
Vancouver:	2.1%	Vancouver:	6.3%
Toronto:	1.9%	Toronto:	7.3%
Edmonton:	1.6%	Edmonton:	6.9%
Calgary:	1.4%	Calgary:	8.6%
Halifax:	0.5%	Halifax:	7.2%
St. John's, NF:	0.9%	St. John's, NF:	7.4%
Saint John, NB:	1.2%	Saint John, NB:	8.3%
Charlottetown:	0.5%	Charlottetown (PEI):	11.0%

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



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