

## PERSONAL INJURY

# StatsCan data bolsters claims for future lost income

When representing plaintiffs with permanent disabilities, counsel should consider using Statistics Canada's HALS/PALS data to support claims for future lost income. When used with other medical and vocational evidence, the HALS/PALS data can bolster a plaintiff's argument for losses arising from diminished earning capacity or loss of competitive advantage.

Plaintiffs' counsel often wrestle with how to prove future economic losses for a client with a disability who has returned to work and, in some cases, is earning more income than before his or her injury. But persons with disabilities face unique challenges with entry and participation in the workforce. These challenges include both physical and attitudinal barriers.

While barriers can be mitigated by education, technology or modification of the work environment, persons with disabilities are at greater risk to experience bias, discrimination and reduced productivity, as compared to non-disabled co-workers.

While the risk of income loss in these circumstances is real, it is difficult to prove. Accordingly, the trier of fact is often reluctant to award damages for future loss of income. Counsel can use the HALS/PALS data to illustrate the impact of disability on income and thereby make the risk of future income loss seem less speculative.

The HALS/PALS data comes from the *Health and Activity Limitation Survey* (HALS) and the *Participation and Activity Limitation Survey* (PALS), which were national surveys completed by Statistics Canada in 1991 and 2001. Among other things, the HALS/PALS studies examined the impact of disability on employment and income. A key finding was that participant's incomes decreased in direct proportion to the severity of their disability.

These results may reflect how external factors – including bias by employers and co-workers, physical barriers and loss of competitive advantage – can translate into actual loss of income to persons with disabilities. While the HALS/PALS data are compelling, there are challenges with applying it to individual personal injury cases, as was illustrated in recent cases of *Daborowski v. Robertson*, [2007] A.J. No. 949 (Q.B.) and *Gerlitz v. Lee*, [2007] A.J. No. 872 (Q.B.).

In *Daborowski*, the plaintiff suffered a fracture dislocation of



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his ankle when his semi-trailer truck jack-knifed on the highway and crashed into the ditch. He suffered chronic pain and anxiety. He had a nine percent permanent partial disability.

Justice J.B. Veit held that the plaintiff had essentially recovered from the accident, had returned to work as a truck driver and was making more money than he made at the time of the accident. Taking these circumstances into account, Justice Veit held the plaintiff had, nonetheless, established there was a probability he would suffer future loss of income because of his permanent disability.

Justice Veit accepted the HALS/PALS analysis of the plaintiff's economist as evidence the plaintiff would likely suffer loss of income in the future as a result of his disability. The defendant argued, unsuccessfully, that it was inappropriate to use general population statistics (i.e., HALS/PALS data) in circumstances where so much specific information was known about the plaintiff, his injuries and his career path before and after the accident.

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In *Gerlitz*, the plaintiff suffered injuries to the connective tissue of his back and spine in a motor vehicle accident. He suffered ongoing stiffness and pain and was diagnosed with a five percent whole person impairment rating. At the time of the collision, the plaintiff was a competitive martial artist. He owned and was the primary instructor at his own martial arts studio.

Because of his injuries, the plaintiff was unable to return to teaching high-level martial arts. He hired other instructors and focused on managing and expanding his business. His

memberships and profits increased after the accident. Relying on the HALS/PALS data, the plaintiff's economist opined that the plaintiff would suffer future loss of income because of his ongoing disability.

The defendant's economist believed that it was inappropriate to use the HALS/PALS data given that the plaintiff's income came from returns on capital,

rather than employment. He noted any reduction in earning capacity would be related to the plaintiff's inability to teach high-level martial arts classes, and not his ability to manage and expand his business operations.

Justice S.M. Bensler accepted the opinion of the defendant's economist and did not award damages for future lost income.

These decisions show that, in some circumstances, courts will

accept the HALS/PALS data as evidence of future income loss. It can corroborate a plaintiff's claim for future lost income arising from loss of earning capacity and loss of competitive advantage, and should always be used together with other medical and vocational evidence. ■

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