

THE CALCULATION OF AN INFANT'S LOST EARNINGS  
*HOULE v. CALGARY*  
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I. INTRODUCTION

In the recent case of *Houle v. Calgary*<sup>1</sup> an eight-year old boy was involved in an accident which resulted in the amputation of his right arm below the elbow.<sup>2</sup> The court, in calculating the expected loss of income suffered as a result of this amputation, took into account evidence that: the boy's I.Q. was 93, he had had speech and grammar problems as an infant, he had fallen two years behind in school as a result of the accident, his natural father was a skilled tradesman (a roofer) who had left home when the boy was aged three, and he was the fourth child in a family of seven. The court concluded from this evidence that the boy would have become an unskilled or semiskilled tradesman — such as a baker, janitor, construction labourer, gas fitter, or roustabout — had he not been injured; whereas, with his injury, he would be forced to adopt a more sedentary occupation — such as clerk, draftsman, meter reader, security guard, or warehouse checker.

In an "Annotation" to this case, Professor Lewis Klar argued that the determination of loss of prospective earnings was ". . . one of the most arbitrary aspects of the court's decision. . . ."<sup>3</sup> He suggests that when the evidence concerning future earnings is "soft," the court should ignore the boy's family history. Instead, it should concentrate solely on his I.Q. and/or ". . . other exceptional conditions which clearly suggest a prospective earning ability different than the national average."<sup>4</sup> And where I.Q. and these other "exceptional conditions" show no significant deviation from the average, foregone earnings should, in the interest of "fairness," be set equal to the national average income of Canadians in full employment. The purpose of this note is to suggest that Professor Klar has, perhaps, overstated the case for uniformity in such decisions.

II. CRITICISM OF THE UNIFORM APPROACH

First, consider the issue of "fairness" raised by Klar. Assume that two young boys, A and B, have been left paraplegics (paralysed from the waist down). If neither had "exceptional" I.Q.'s, Klar's proposal would result in similar (if not identical) awards for both. Presumably each would receive an award which approximated the loss which would be suffered by an average, fully-employed Canadian male. Assume, however, that most members of A's family were "professionals" — engineers, doctors, lawyers, accountants, etc. — whereas most members of B's

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1. [1983] 26 Alta. L.R. (2d) 34 (Q.B.).

2. Medhurst, J. incorrectly reported in the decision that it was the boy's left arm which had been amputated.

3. *Supra* n. 1 at 37.

4. *Id.* at 38.

family were unskilled tradespeople — construction workers, janitors, clerks, etc. If, in the absence of their respective accidents each boy could have been expected to follow in his family's footsteps, then the effect of Klar's proposal would be to overcompensate A and undercompensate B. The reason for this is that the effect of paraplegia upon the earnings potential of a professional would be far less severe than the comparable effect on an individual who could have been expected to rely on physical activity to earn his living. I find it difficult to accept that it would be "fair" to ignore family background in such a case.

Second, Klar does not explain how he proposes to calculate post-accident earnings potential. Clearly, it cannot be his view that the national average income be used for both pre- and post-accident valuations; for to do so would result in the conclusion that the plaintiff has suffered no net loss. Instead, the post-accident earnings calculation must take into account the effect of the plaintiff's injury. But there are no figures concerning the national average earnings of, say, paraplegics or amputees. Therefore, expert testimony will be required in order to calculate post-accident earning loss.

### III. PROPOSALS

Two approaches to the calculation of post-accident earning loss appear plausible. First, experts — presumably a rehabilitation counsellor and an economist — could prepare a list of occupations for which the average individual with the plaintiff's injury was suited and then provide evidence as to the prospective earnings of individuals in those occupations. Alternatively, a rehabilitation counsellor could examine the plaintiff and prepare a list of occupations for which that individual, given his injury and aptitudes, was suited; and the economist could provide evidence as to the prospective earnings of those occupations.

Of these two approaches, I would suggest that the latter is the more desirable. Once a rehabilitation expert has been retained to give evidence concerning job prospects for the disabled, there is little incremental cost involved in having him give aptitude tests to the plaintiff. As these tests will differentiate among different degrees of occupational disability, it is only fair to both plaintiff and defendant that they be conducted. Furthermore, once evidence has been gathered with respect to post-accident potential earnings, there will be virtually no incremental cost to presenting it with respect to the pre-accident potential. In a case such as *Houle*, for example, the same tests used to determine the infant's capabilities and aptitudes after the accident could be used to throw light on his capabilities before the accident. Thus, as the cost of using the information for the latter purpose would be very low, there would appear to me to be no valid reason for discouraging counsel from introducing it. The court, after all, is free to ignore any information which it considers irrelevant.

Finally, the evidence upon which one can base predictions of occupational attainment is not quite as "soft" as Professor Klar implies. There is now an extensive literature consisting of statistically rigorous studies of the determinants of occupation and income. A survey of these studies by a highly respected researcher revealed that the major determinants of oc-

cupational choice were: father's occupation, education, and income; I.Q. of the plaintiff; number of siblings; stability of family life; and birth order (relative to siblings).<sup>5</sup> When taken in combination with other facts available concerning the plaintiff, such as aptitude tests, school performance, and occupational choices of older siblings, forecasts of the occupational attainment of infants become, in my view, no less reliable than forecasts of many of the other variables commonly considered in personal injury cases — such as discount rates, unemployment rates, and rates of growth of income.

In short, although I agree with Professor Klar that it would be disingenuous of us to pretend that we can forecast with confidence the precise income level to which an eight-year old might have aspired, I believe that he has overstated the case for treating all plaintiffs as though they were the same. What is needed is not a judicial injunction against the introduction of formal evidence, but the exercise of restraint and common sense by counsel.

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5. A. Leibowitz, *Family Background and Economic Success: A Review of the Evidence — Kinometrics: Determinants of Socioeconomic Success Within and Between Families* (P. Taubman, ed., 1977) 9.