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PROVING LOSS OF EARNING CAPACITY FOR SELF-EMPLOYED INDIVIDUALS

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As we all know, in many personal injury cases, the most controversial issue is often the Claim for loss of capacity. After all, we have case law to guide us in the assessment of non-pecuniary damages and special damages, and cost of future care claims are readily derived from medical and other expert reports. In contrast, the ways of assessing and proving the claims for loss of capacity to earn income, are literally as diverse as the imagination of counsel.

The most challenging cases in which loss of earning capacity is in issue often involve entrepreneurs and other self-employed individuals. The purpose of this paper is to provide some practical ideas for counsel who are having to build a convincing claim for loss of earning capacity for self-employed individuals.

I. PROVE THE IMPAIRMENT

Even experienced counsel often assume that any evidence of ongoing symptoms would be sufficient to satisfy the criteria set out in Brown v. Golaiy (1985) 26 B.C.L.R. (3d) 353 which was approved by the Court of Appeal in Kwei v. Boisclair (1991) 60 B.C.L.R. (2d) 393:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

I strongly recommend that you obtain and present clear evidence on the nature of the duties you expect

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that your client will be performing in the future and that you get clear, specific medical opinions as to the nature and extent of limitation of your client in respect to those specific duties.

For example, in the case of Roberts v. Kidd (1998) 52 B.C.L.R. (3d) 326, the Trial Judge found that the plaintiff was capable of full time work, but only of a sedentary and lighter nature. However, because all of the plaintiffs previous jobs had been of a sedentary or lighter nature, Trial Judge held that he was not significantly less capable of earning income. The Judge did find that the criteria of Brown v. Golaiy applied and held:

I say 'significantly' because it is true there has been a theoretical diminution in her capacity and because Ms. Roberts obviously feels that she is less valuable as a person capable of earning income in the labour market. She says she has lost her self-confidence and the ability to project herself as a positive and capable person and that this impacts on her ability to sell. In recognition of this factor, and in the absence of any evidence that her psychological problems were pre-existing, I would award her the sum of $20,000 under this heading.

(From trial judgment referred to by Justice Hollinrake in the Court of Appeal Decision, Roberts v. Kidd, supra at page 333.)

However, when the matter came before the Court of Appeal, Mr. Justice Hollinrake had this to say:

The first thing to note under this head of damages is that there was no psychological or psychiatric evidence before the court as to lasting problems of a psychological nature. With respect, I do not think it enough to found an award under this head of damages to have the plaintiff testify to a loss of confidence and an ability to project oneself as a positive and capable person in the absence of any evidence to demonstrate that there is a functional element to such a loss or ability as is the case here. I view this award as compensating the plaintiff for how she feels about her position in the market place. I do not think this is compensable in the absence of a functional element. The judge has referred in her reasons to a 'theoretical diminution in her capacity'. I take the word 'theoretical' as negativing any functional element or any possibility of such an element in the future.

In my opinion Maslen v. Rubenstein (1993), 83 B.C.L.R. (2d) 131 (B.C. C.A.) must govern the approach to this head of damages in this case. At p. 134, this Court said:

To meet the onus which lies on a plaintiff in a case of this sort, and thereby avoid the 'ultimate risk of non-persuasion', the plaintiff must, in my view, establish that his or her psychological problems have their cause in the defendant's unlawful act, rather than in any desire on the plaintiffs part for things such as care,

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sympathy, relaxation or compensation, and also that the plaintiff could not be expected to overcome them by his or her own inherent resources, or will power.

In my opinion there is no factual underpinning in this case to justify an award for diminution of lass of earning capacity on the basis of the findings of the trial judge and this award cannot stand.

It should be noted that there was a strong dissenting opinion by Lambert, J.A. who stated:

I would like to add that in my opinion there is no support in law for the view that there must be a 'functional' element to any loss of self-confidence, or to any change in psychological outlook, before such a loss or change will be compensable. If the plaintiff genuinely experiences those changes, as the trial judge found she did, and if they were caused by the accident, as the trial judge found that they were, then they are properly compensable without any necessity for establishing a 'functional' element. That is established by the judgments of this Court in Maslen v. Rubenstein (1993) 83 B.C.L.R. (2d) 131 (B.C.C.A), and Yoshikawa v. Yu (1996), 21 B.C.L.R. (3d) 318 (B.C.C.A.)

Mr. Justice Ehrcke recently considered this issue in the case of Cheung v. MacDonald [2004] B.C.J. No. 293, 2004 B.C.S.C. 222,

The proper question under this head of damages is not simply whether a plaintiff will suffer an actual wage loss, but rather whether there has been an impairment of his income-earning capacity. This latter approach treats the ability to earn income as a capital asset, and the proper question is then whether that asset has in any way been diminished by reason of the defendant's negligence.

As Finch J.A. (as he then was) said in Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.) at paragraph 42:

In sum, there is no clear medical evidence that the plaintiff has a diminished ability to earn income in the future, or, if so, the extent to which that ability is diminished. On the other hand, there is uncontradicted medical evidence of partial permanent physical disability which could have an effect on his capacity to work, and on his employability. I would conclude that his earning capacity has been reduced, even though he presently earns more than he did before he was injured.

To similar effect are the remarks of Huddart J.A. in Rosvold v. Dunlop (2001), 84 B.C.L.R (3d) 158, 2001 BCCA 1, w ere she said at paragraphs 8-10:

An award for loss of earning capacity is based on the recognition that a plaintiff 's capacity to earn income is an asset which has been taken away: Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Parypa v.

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Wickware (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff"s permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: Athey v. Leonati, [1996) 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence.

Looking at the matter in this way, I am satisfied that Dr. Cheung's professional capacities have been negatively affected by the

accident in that he cannot work for prolonged periods without pain, and the pain makes him tire more quickly than he otherwise would. Even though he may be capable of working through that pain and

exhaustion if he wills himself to do so, it seems to me undeniable

that his professional capacity to work as a paediatric dentist has been diminished. In my view, he is entitled to fair compensation for that diminishment.

I should add that in my view, the loss of ability to work without pain and exhaustion is not something that has already been compensated under the head of non-pecuniary damages. What was at issue there was, in part, the loss of the satisfaction and joy that the plaintiff previously derived from his work. What is being compensated here is something different: the loss of the capacity to work as a paediatric dentist without pain and exhaustion (see Gojevic v. Philpott, 2002 BCCA 483, at paragraph 10; and Ayles v. Talatasin, 2000 BCCA 87).

I think it is significant to note that the judgment in favour of the plaintiff was based on a clear finding by the trial judge of a specific medical condition which affected his work in a specific way. The stronger and clearer the evidence you can present of actual limitation, the stronger your case will be.

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If you present only vague evidence of general disability and combine that with unclear evidence as to the actual requirements that your client will likely need to meet in the future, you will greatly increase your risk that any award for loss of capacity will be inadequate.

II. WHO'S LOSS IS IT?

We all tend to take it for granted that a personal plaintiff can recover for loss of capacity even though they may be carrying on business as a corporation or in a partnership, etc. The law on this subject seemed to be well settled in British Columbia in Everett and M.J. Everett & Sons Ltd. v. King, Park Pacific Hotels Ltd., Huston and Noel, (1981) 34 B.C.L.R. 27, and Rivers v. Rivers [1993] B.C.J. No. 1226, but cases such as D'Amato v. Badger 22 B.C.L.R. (3d) 218 (SCC) remind us that this issue is not always a slam dunk.

Mr. D'Amato and a partner each owned fifty percent of Arbor, an autobody repair shop. Mr. D'Amato's injuries prevented him from continuing to do the physical labour aspects of the job but he continued to manage the shop, supervise and do estimates. Because the business needed to hire replacement help, profits dropped. The trial judge awarded Mr. D'Amato damages based on the loss of profits.

The Court of Appeal, however, felt that loss of profits was a pure economic loss suffered by Arbor and that because Arbor had suffered neither property damage nor physical injury, the loss was not recoverable. The Supreme Court of Canada upheld the decision of the Court of Appeal denying the claim for loss of company profits but allowed Mr.-D'Amato's appeal larger award for loss of capacity. The case contains a good review of the issues involved in claims for economic loss. Counsel should familiarize themselves with the principles in this case and not just assume that any and all losses which may occur in a business can be claimed in a loss of capacity claim on behalf of the individual. There are limits.

III. TYPES OF EVIDENCE TO USE

The message here is BE CREATIVE. Work closely with your client to find out everything you possibly can about the nature of their existing business and/or businesses they would like to start in the future; the intellectual, psychological, and physical requirements of the work the client would be performing; general market conditions, etc. Then, HIRE AN EXPERT IN THE FIELD OF BUSINESS VALUATION. Do not simply turn raw data and a bunch of hvpotheticals over to an economist.

An economist can only do mathematical calculations based on facts provided by counsel and widely accepted statistical tables.

The work of a business valuator is really more of an art than a science. That is why their evidence is often rejected by the courts. Nevertheless, they are very valuable in that they can take into account real world

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circumstances such as the performance of similar business, changes in market conditions, advances in technology, new competition, and the myriad other factors that go into determining whether a business will be successful. In my view, the case of Santi v. Pacific National Exhibition [2000] B.C.J. No. 901, 2000 B.C.S.C. 716, is an excellent example of a case where counsel effectively gathered evidence of a wide variety of sources on a broad array of topics relevant to the success or failure of the proposed business.

Mrs. Santi was a 41 year old woman who had started a relatively small business of manufacturing and installing fireplace mantles. Her claim for loss of capacity was based on the loss of an opportunity to take over a similar business that her 68- year old father, who was in poor health, had in Los Angeles.

The defence made the usual arguments that Mrs. Santi was not really going to take the business over and even if she did it would not have been successful. Counsel for the plaintiff was able to effectively counter these arguments by presenting evidence as the following:

1. Promotional Efforts.

- She used fliers and brochures from her father's business
- She began to-assemble her own catalogue
- She participated in Street of Dreams exhibitions
- She advertised in other magazines
- Her product was featured in promotional material for other advertisers

2. Sound Business Planning

- She was careful not to incur any debts
- She incorporated a company
- She decided to expand her business and negotiated a lease for larger premises – she was obtaining 90% of the jobs on which she bid
- She entered a niche market which did not rise and fall with single housing starts
- She had prepared herself by visiting and working in her father's factory regularly since 1990
- She had familiarized herself with all aspects of the business and had formed close working relationships with many of her father's employees.
- She had taken charge of her father's business on several occasions when her father was away travelling.
- She had discussed immigration issues with an American immigration attorney.

3. The talent and abilities of Ms. Santi

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- Evidence was called to show she had talent and a passion for the business
- As her children got older, she was willing to devote more time to the business
- She was a cautious business woman with a history of progressing carefully
- She was willing to work without salary or income when necessary because she loved her business so much

4. Market Forces

- Counsel called evidence to show that because Ms. Santi focused on a niche market, the business was relatively immune to swings in the general housing market.
- Without this comprehensive evidence pointing to the likelihood of the business being successful, it is unlikely that the judge would have awarded anything approaching the $650,000 that was given for loss of future income and opportunity.

IV. WHAT IF THE TAX RETURNS DON'T SUPPORT THE CLAIM?

Often, in representing self-employed claimants, counsel is faced with the task of proving the loss of income when the claimant's tax returns, if filed at all, show little or no income to lose. In the case of Carmen v. Gray [1988] B.C.W.L.D. 163, B.C.S.C., MacDonald, J. held:

Failure to declare income for tax purposes does not absolutely bar a claim for loss of income, but it raises a strong inference against the claimant: see Hachey v. Dakin (1983) 57 N.S.R.(2d) 441, 120 A.P.R. 441, at 444 (T.D.)

In the case of Iannone v. Hoogenraad, (1990) 50 B.C.L.R. (2d) 390, Mr. Justice Maczko reviewed the authority and concluded:

Our courts have only done so far as to say that if a plaintiff does not declare income on his tax returns he will face a strong inference against him. I believe I should follow the British Columbia line of authority and award what seems like a reasonable figure based on the evidence.

In Kilik v. Leung [1993] B.C.J. No. 1907, counsel for the plaintiff attempted to assert a claim for past and future loss of income in circumstances in which the plaintiff had not filed income tax returns every year, and the returns that were filed did not disclose all income earned. They also called witnesses who testified as to the plaintiffs abilities as a tradesman. Evidence that the plaintiff had purchased and maintained expensive tools with which he worked in these trades, and evidence of his collection and use of used building materials. Based on that evidence, the judge attributed income of $10,000 per year to the plaintiff.

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In Klingsat v. Westminster Savings Credit Union, the Plaintiff claimed that he had earned up to $200,000 modelling in Europe and that he was going to return to Europe to resume that career. Unfortunately, the client had no tax returns or other documentation to prove his past earnings. Counsel for the plaintiff attempted to overcome that obstacle by calling evidence from other models and photographers who knew the business well and were able to establish that other models had earned amounts comparable to what Mr. Klingsat said he earned. Counsel also called the plaintiffs ex-girlfriend who described him as a generous boyfriend who bought her expensive gifs including furs and jewellery. She testified that Mr. Klingsat often carried large amounts of cash and that he would hide cash in various locations in their apartment. She says he paid most of their living expenses and also their travel costs on the occasions in which she would join him.

The trial judge was not persuaded. Goepel, J. concluded that in the five years between the injury and the trial, Mr. Klingsat would have earned $100,000 total, and that his future earnings would likely be $35,000 per year. The judge used the loss of a capital asset approach to determine loss income.

Tips from the Matrimonial Bar

Many matrimonial cases require efforts by counsel for one of the spouses to prove the true earnings of the other spouses' business when that spouse is doing their best to hide their income. Your job is proving the income potential of a cooperative client rather than an uncooperative opposing party should be much easier.

The case of Johnson v. Johnson [2002] B.C.J. No. 294, 2002 B.C.S.C. 226, sets out a relatively common situation in matrimonial law:

The plaintiff in May 1995 swore an affidavit his employment and rental income was $38,400. In his Income and Expense Statement sworn November 12, 1999 his estimated employment income had dropped to $2,000 and net rental income was only $1,573.80, for an annual income of $25,573.80.

In 1996 his reported total income for income tax purposes was apparently $29,067; for 1997 it was $39,663; and for 1998 was $28,331.

Despite the apparent decline in income since his marriage the acquisition of new rental properties, investments, and maintenance of existing investments in property and businesses continued apace.

I have a serious concern that the plaintiff who is a well educated, skilled businessman, and professional accountant is minimizing his real income, or his ability to earn and sustain employment and investment income. Creating a Separation Agreement, when no separation bad in fact occurred, and improperly

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obtaining a tax deduction in my view has considerably weakened his credibility and reliability in respect of financial matters.

These factors considered in the context of the whole of the

evidence and argument I feel justified imputing to the plaintiff the income for Guideline purposes of $40,000 a year.

I refer to this case simply to show that evidence of acquisition of new properties an investments, etc. can be used to prove income even in the absence of supportive tax returns.

V. CONCLUSION

I have observed that occasionally plaintiff's counsel just produces some medical evidence of ongoing pain and then tosses out a huge figure for loss of capacity hoping that the defence will throw something at the claim just to make it go away. In my view, this approach will inevitably result in the plaintiff receiving inadequate compensation. Counsel should carefully assemble medical evidence to support a real disability which would explore all aspects of the plaintiffs current prospects, and should assemble clear, factual evidence to show how realistic the opportunity was and why it has been lost or compromised.

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