

Recent Law on Diminished Earning Capacity

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This paper will provide a brief review of the law on the head of damages referred to as loss of earning capacity in British Columbia. It will also address some recent decisions in this area of the law.

Loss of Earning Capacity

Basic Principles

The essential purpose and most basic principle of tort law is that an award of damages should be sufficient to put the plaintiff in the position he or she would have been if the tortious event had not occurred.¹ A plaintiff is not to be placed in a better position as a result of the tort so it is necessary to determine the original position absent the event and the injured position as a result of the event: the difference between the two being the loss to be compensated.² Assessing the two positions is difficult even on the most reliable of evidence because it requires conjecture. As you may appreciate, in many instances, the process is more art than science.

An award for loss of earning capacity is compensatory in nature. It is not the actual or projected past or future loss of earnings that is to be compensated. What is being compensated is loss or impairment of earning capacity as a capital asset that has been taken away.³ How the loss or impairment is determined and assessed depends upon the circumstances of the particular case. 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. The loss must be assessed, rather than calculated entirely mathematically, taking into consideration relevant factors from the evidence as a whole.⁴ Relevant factors include, but are not limited to, whether the plaintiff has been rendered less capable overall from earning income from all types of employment, whether the plaintiff is less

¹ *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32.

² *Ibid.*

³ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware*, 1999 BCCA 88.

⁴ *Mulholland (Guardian ad litem of) v. Riley Estate (1995)*, 12 B.C.L.R. (3d) 248 (C.A.).

marketable or attractive as an employee to potential employers, whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been available absent the injury, and whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.⁵

A claim for loss of earning capacity is based on hypothetical events as from the date on which the cause of action arose. A trial date or subsequent event, such as a return to work, does not create separate claims for the division of past loss and future loss. Rather, loss of earning capacity encompasses both past loss of earnings and future loss of earnings.⁶ Of course, loss of earning capacity is generally and practically split in two for the period before trial and the period after trial in the future in order to comply with the interest requirements of the *Court Order Interest Act*.⁷

Since loss of earning capacity is based upon hypothetical events, the relevant standard of proof to be applied is not on a balance of probabilities. Past hypothetical events are assessed on the basis of simple probability in the same manner as future events. Possibilities and probabilities, chances, opportunities, and risks must all be considered.⁸ They are considered so long as they are real and substantial possibilities and not mere speculation, at which time they are then given weight according to their relative likelihood or percentage chance they would have happened or will happen.⁹ Since the course of future events is unknown, allowance must be made for the contingency that the assumptions on which the award is based may prove to be wrong.¹⁰ At the end of the inquiry the overall fairness and reasonableness of the award must be considered.¹¹

Recent Decisions and Developments

Court of Appeal Decisions

Steward v. Berezan, 2007 BCCA 150

The trial judge held that the Plaintiff, 55 years old at trial, sustained multiple injuries arising from a 2001 motor vehicle accident, including lower back, neck, shoulder and arm pain. The Plaintiff underwent shoulder surgery in 2003 resulting in 85-90% improvement. However, the Plaintiff continued to complain of ongoing back, neck, and arm pain at trial in 2005. The Plaintiff had worked as a realtor the past 20 years. Prior to that time he worked as a carpenter. Following the accident, he was not up to his full work capacity for two to three years.

The trial judge, citing *Parypa v. Wickware*, 1999 BCCA 88, awarded the Plaintiff \$50,000 for diminished future earning capacity. The trial judge held that the Plaintiff was

⁵ *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), endorsed by the Court of Appeal in *Parypa v. Wickware*, *supra*, and *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.).

⁶ *Smith v. Knudsen*, 2004 BCCA 613.

⁷ *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

⁸ *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9.

⁹ *Supra* (*Athey*) note 1 at para. 27.

¹⁰ *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.) as cited in *Reilly v. Lynn*, 2003 BCCA 49 at para. 100-101.

¹¹ *Supra* (*Rosvold*) note 8 at para. 11.

entitled to compensation for impairment of his earning capacity in other occupations that may now be closed to him. The trial judge advanced that “[i]t is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life.”

On appeal, the defendants argued that the trial judge applied the wrong test for diminished future earning capacity. The Court of Appeal agreed. The Court noted that the trial judge lifted the phraseology “it is impossible to say...” from an appeal context and this was the wrong test to be applied at trial level. The Court held that the Plaintiff bears the onus of proving at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that event will occur. The Court noted there was nothing in the trial evidence to suggest that, if for some reason, the Plaintiff was unable to continue his profession as a realtor, he would take up carpentry again, given his age and success as a realtor. The Court further elaborated that the medical evidence suggested only a residual disability that would interfere with strenuous physical work. However, since there was no other realistic alternative occupation that would be impaired by the injuries, the award of \$50,000 diminished capacity award was overturned.

Djukic v. Hahn; Djukic v. Tham; Djukic v. Hahn, 2007 BCCA 203

Mr. and Mrs. Djukic operated a deli business when they were involved in a motor vehicle accident in June 2000 and Mrs. Djukic in a second accident in June 2001. After the first accident, Mrs. Djukic complained of neck, shoulder, arm, wrist, knee, and lower back pain extending down her leg. Pre-accident migraines headaches were exacerbated. Her symptoms were aggravated by the second accident and the back and leg pain increased. She underwent disc surgery to her lumbar spine in late 2002. The trial judge accepted the medical evidence that the lumbar disc herniation requiring surgery was causally connected to both accidents. She also suffered from severe chronic anxiety and depression. Mr. Djukic’s soft tissue injuries to his neck, back and shoulder were less debilitating but he had decreased range of motion and suffered from anxiety and depression.

Mr. and Mrs. Djukic were equal partners in the deli and the trial judge found that what made the business successful was the complimentary nature of their partnership. Mr. Djukic was a skilled chef and butcher and Mrs. Djukic was a skilled manager and promoter. After an unsuccessful attempt by Mr. Djukic to continue with the business with only minimal assistance from Mrs. Djukic, they sold it and moved to Kelowna, where Mr. Djukic opened a meat and butcher shop selling wholesale products without any physical limitations. At trial, Ms. Djukic was awarded \$500,000 for loss of future earning capacity due to medical evidence supporting permanent partial disability affecting her both physically and emotionally due to the accidents. The trial judge noted that with treatment Mrs. Djukic might be able to return to sedentary or light duties, such as assisting her husband with the paperwork in his business. However, her worth to employers and access to future employment was severely restricted. Mr. Djukic was awarded \$40,000 for loss of future earning capacity as he had lost a capital asset to some degree, particularly if he had to seek employment should his wholesaler business fail. The defendants appealed, amongst other things, the damage awards for future loss of earning capacity.

On appeal, the appellants (defendants) referred to *Steward v. Berezan*. The Court stated that *Steward* turned on its facts and did not establish any new principle of law. The Court indicated that the error of the trial judge in *Steward* was in awarding damages for diminished earning capacity based on the plaintiff's inability to work as a carpenter. The Court again noted that the plaintiff in *Steward* did not contemplate a return to work in a trade that he had not worked in for the past 20 years. Thus *Steward* had no application to Djukic as the assessments of loss of earning capacity in Djukic were based on a business actively pursued and not a long abandoned occupation without any prospect of return to it as in *Steward*.

The appellants argued that the trial judge erred in failing to consider light duty or sedentary occupations other than small business entrepreneur in the assessment of the loss arising from Mrs. Djukic's ongoing disability. The Court of Appeal held that the trial judge's approach to the assessment was consistent with previous law and there was no reason to consider other occupational prospects. The Court noted the trial judge considered Mrs. Djukic's best employment prospects were as an entrepreneur and income from that occupation would exceed income from other potential employment for which she was suited by education and training. If Mrs. Djukic recovered sufficiently to perform sedentary or light duty work, her best prospects financially would be with her husband's business. The Court specifically noted that the trial judge considered negative contingencies, such as Mrs. Djukic returning to work for her husband after future treatments, when assessing the capacity award.

The appellants also argued that the \$40,000 award to Mr. Djukic was inconsistent with the trial judge's findings that the ongoing symptoms did not impact present work ability. The Court of Appeal held the award was not inconsistent. The award was based on the diminution of a capital asset; namely, Mr. Djukic's ability to work due to his symptoms, especially if his Kelowna business venture proved unsuccessful and he had to seek employment elsewhere for which he was qualified.

Sinnott v. Boggs, 2007 BCCA 267

The Plaintiff, 16 years at trial, sustained soft tissue injuries to her neck, back, and shoulders from a motor vehicle accident that occurred in 2002. She missed one week of high school. Her back pain resolved but at the time of trial in 2006, she continued to complain of ongoing neck and shoulder ache and discomfort and intermittent headaches. The medical prognosis was that the symptoms would continue indefinitely.

The medical evidence at trial provided that the Plaintiff would have some difficulty with more strenuous and physically demanding work, especially if it involved lifting and carrying. The trial judge noted that the medical evidence did not infer or provide that that Plaintiff was not capable of earning income from all types of employment. However, the trial judge added that when painful symptoms continue in such a manner that they affect the ability to work at a competitive pace in a variety of jobs, the capital asset of employment has been affected. The trial judge awarded the Plaintiff \$30,000 for loss of earning capacity because she was "less marketable as an employee because of the limitations on her ability to work competitively in all jobs previously open to her."

The appellants argued that since there was no occupation foreclosed to Ms. Sinnott, no alteration of future plans, no evidence of poor performance duties, and where there is

only discomfort in the course of employment, any compensation should be in the form of a non-pecuniary award rather than loss of earning capacity. The appellants further argued there was no evidence Ms. Sinnott was excluded from particular types of work and thus an essential foundation for an award was lacking.

The Court referred to the four considerations that may be taken into account in assessing damages for loss of earning capacity as cited in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) and indicated that those considerations were not intended to be exclusive of other factors that may be considered:

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 if not injured; and
4. the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market.

The Court dismissed the appeal adding that three of the four factors outlined in *Brown* were broad enough to support an award in circumstances where a plaintiff is able to continue in an occupation but the ability to perform and the earning capacity resulting from the ability to perform are impaired by injury. Ms. Sinnott was a young person not yet established in a career and without a settled pattern of employment. The trial judge's findings that she faced limitations on her ability to work competitively in jobs that were previously open to her was adequate foundation for an award for loss of earning capacity. As a result, there was no palpable and over-riding error of fact to permit the Court to the conclusion or award.

Supreme Court Decisions

Downey v. Brousseau, 2007 BCSC 149

The Plaintiff was a passenger in a limousine in 2001 that collided with a light pole at an estimated speed of 60-80 km/h. He sustained multiple injuries including mild to moderate compression fractures in his thoracic spine, a fractured left wrist, and other injuries.

The Plaintiff had injured his back in three prior work-related accidents that occurred in 1991, 1999, and 2000. As a result of the 1991 injury he was found to have a 13% permanent partial disability. He worked only a short period of time before the 1999 and 2000 injuries. He did not work between the 2000 accident and the 2001 accident only returned to work in 2003 as a security guard after completing a two month course. He worked as security for one year before obtaining employment at a rental store as a driver. He subsequently became a maintenance mechanic doing light duty repair work.

The judge noted Mr. Downey sought retraining both before and accident the limousine accident. There are circumstances in which a plaintiff who does not suffer a loss in earnings as a result of a tortious injury may still be awarded damages for loss of earning capacity. The reason for such an award is because while the injury does not affect the

plaintiff's ability to earn income in the current line of work, it has reduced the ability to earn income in other occupations, as those may now be closed to the plaintiff by reason of the injury.

The judge held that the additional damage to the Mr. Downey's back as a result of the limousine accident did not negatively impact Mr. Downey's ability to work, either in his current line of work or in other lines of work. Any limitations he had were due to pre-existing problems with his back. Thus there was no difference between his original position and his injured position and therefore he was unable to recover any award for loss of earning capacity in the future.

Kralik v. Mt. Seymour Resorts Ltd. et al, 2007 BCSC 258

In March 2003 the Plaintiff, 50 years old at trial, and his then 16 year old, went skiing during spring break at Mt. Seymour. The mountain was busy, and it was foggy and drizzling at the base. Mr. Kralik was an experienced skier and had loaded onto chairlifts many times. He had ridden the chairlift at Mt. Seymour several times that day. This particular time, he moved forward from the line to the chairlift loading area. As the chair came around and he appropriately positioned himself, he turned to brush away a layer of snow or ice on the wet seat for comfort reasons. He had done so earlier in the day but this time "he momentarily lost track of time as he was absorbed in the reasonable action of cleaning his seat." His son sat down properly, but the Plaintiff grabbed onto the chair, which kept moving. The lift attendant was focused on dealing with children loading onto the chair behind Mr. Kralik and never stopped the chair. Mr. Kralik, dangling from the chair, felt it safer to drop himself three meters rather than keep holding on and broke his shoulder.

Mr. Kralik had a Ph.D. in mathematics and worked in Slovakia in computer programming prior to coming to Canada in 2002. Upon arrival, he tried to find work in the computer industry but language skills and a lack of necessary specialization forced him to take work as a painter.

Mr. Kralik underwent shoulder surgery and rotator cuff repair shortly after the accident and completely disabled for six months. He returned to intermittent work for six months in 2005 before ceasing his painting career. He tried to obtain some computer certification but failed the exam. He eventually found work with a friend installing soffits on houses. The surgeon opined that that Mr. Kralik would have ongoing problems with overhead repetitive movement and his ability to work as a painter was permanently compromised. The Defendants' expert indicated that the Plaintiff had a permanent weakness and wasting of the shoulder that compromised the Plaintiff's abilities to work overhead.

The Plaintiff argued that there were two methods of making an award under loss of earning capacity: the first being the *Steenblok* approach, referring to *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), that looks at the "real possibility" of earning income in the future and second as the *Pallos* approach referring to *Pallos v. ICBC* (1995), 100 B.C.L.R. (2d) 260 (C.A.), that looks at the loss of a "capital asset." The Plaintiff argued that if the accident did not occur he would have earned significantly more at painting than he did prior to the accident and similar to a high earning painter friend. The

Plaintiff also alleged that because of the accident, he would earn significantly less than he previously earned in the past.

The judge concluded that the evidence fell far short of showing any loss of opportunity anywhere close to his allegations based on a *Steenblok* analysis. Rather the judge noted the Plaintiff was partially disabled from doing one aspect of heavy physical work but was quite capable of working at less strenuous employment. Accordingly, the *Pallos* approach was applicable as the Plaintiff had lost a capital asset in that he could not do work requiring reaching or heavy lifting.

The judge concluded that Mr. Kralik would, in the future, have the ability to earn income at a higher level than he was as a painter (\$36,000) but he would have to retrain and upgrade his language skills since he could no longer paint. The judge held that any figure derived for the Plaintiff's loss of capacity over his residual working life, likely sometime past age 65, was somewhat arbitrary and awarded \$300,000.

Joyce v. Dorvault, 2007 BCSC 786

The Plaintiff, 54 years old at trial, was injured in a motor vehicle that occurred in 2003. He sustained moderate soft tissue injuries to his right arm, shoulder, neck and upper back. He further complained of residual symptoms including pain and significantly diminished enjoyment of life and ability to work. Improvement in the future was possible but unlikely since much time had passed without improvement.

The Plaintiff was fairly new to the business of acquiring and selling helicopter parts but alleged that by the time of the accident he had proven himself capable and would have achieved a profit of some \$300,000 per year approximately five years post-accident. As a result of injuries from the accident, he alleged he was unable to carry on in that business. The Defendants argued the Plaintiff was doomed to failure or significantly lower profits when his business partner left shortly following the accident. In the alternative, they alleged the Plaintiff was exaggerating his injuries, could have carried on business by working with pain and hiring others to undertake the heavier physical work.

The Plaintiff worked as an automobile broker for 15 years prior to 1999. He then accepted employment with a business that acquired and sold helicopter parts. Shortly thereafter, he began a business with a partner. The business partner had considerable experience selling inventory and became aware of what was, in effect, a fire sale of helicopter parts from an oil firm in Alberta. The Plaintiff provided the funding and the physical work dismantling, cataloguing, and stocking, while the partner found and sold the inventory. When his business partner shortly after the accident, the Plaintiff continued working but in a great deal of pain. He was placed on light duties by his doctor and as time went by without recovery, he sold off the inventory.

The judge noted that there are two ways of calculating loss of earning capacity. These approaches are known as the "capital asset" approach and "real possibility" approach.¹² The judge added that:

¹² *Pallos v. ICBC*, [1995] B.C.J. No. 2 (C.A.), at paras. 23-27.

[t]he circumstances of the particular case will dictate which method will provide the better calculation approach for the plaintiff's loss. In a case where economic evidence and past work history and future expectations are assessable the "real possibility" method may be most suitable. In a case where the plaintiff is a young person or someone who has not yet established a career or pattern of employment, the quantification of the loss may be more at large and the "capital asset" approach more useful: see *Stafford v. Motomochi* (1996), 28 B.C.L.R. (3d) 1 at paras. 42-43 and *Sinnott v. Boggs*, 2007 BCCA 267 at para. 16.

In the case at bar, the judge found sufficient economic evidence to apply the "real possibility" approach. The judge held the Plaintiff would have continued in the helicopter business given his ability and dedication but that because of physical demands and pre-accident degenerative changes, he would have likely worked only a further ten years. In the end, the judge awarded \$325,000 for loss of earning capacity in addition to \$200,000 past loss of earnings.

Stone v. Ellerman, 2007 BCSC 969

The Plaintiff was 19 years old when she was involved in a motor vehicle accident that occurred in 2002. The force generated in the accident was deemed "enormous" as the Plaintiff, at a stop in a Honda Civic, was hit from behind by the Defendant in a Toyota Corolla at 50 km/h, and propelled forward into a pickup truck. As a result of the accident, the Plaintiff sustained headaches and soft tissue injuries to her neck and upper back, and right sacroiliac joint resulting in pelvic malalignment. Her work history pre-accident and post-accident was retail and service oriented.

The judge noted that "it is loss of or diminishment of a capital asset that is of interest in considering the effect of the defendant's negligence on the plaintiff both before and after trial." The judge cited *Steward v. Berezan* and reiterated the Court of Appeal's premise that proof of a reduction in capacity to earn income prior to trial results in no award absent a sufficient basis in the record for the estimating of hypothetical past losses. In the case at bar, there was no such evidence and the Plaintiff was awarded a nominal sum of \$700 for loss of earning capacity prior to trial. The judge noted that the law, in effect, punishes a plaintiff for having the grit and determination to work through pain as simply a fact.

The judge held that what the Court of Appeal said in *Steward v. Berezan* about loss of future capacity had been contextualized, and in the result, effectively read out of the case law by the Court of Appeal in subsequent decisions (*Djukic v. Hahn*, 2007 BCCA 203 at para. 14 and *Sinnott v. Boggs*, 2007 BCCA 267).

The judge indicated that the accident apparently struck at the heart of what the Plaintiff – a non-academic – had to offer an employer: energy, drive, good health, and physical stamina. As a result of the accident, the Plaintiff was left with ongoing upper body pain that had plateaued and was only to improve, if at all, at a "glacial pace." The Plaintiff's lower body pain was also ongoing and the prospect for any improvement was "bleak." Against that background, the judge noted that the Plaintiff was young, not academically inclined, and was in good health before the accident. It was further noted that she had qualified as a hairdresser post-accident but had determined it was too much for her injuries. She had also received workplace accommodations by her post-accident

employers. The judge further summarized that the chronic pain she experienced was debilitating and likely to “carve down and ultimately destroy her ability to work through her pain.”

The judge held that the employment scenarios advanced by the economic reports and by counsel for the Plaintiff were of little or no assistance. Reference was made that the Plaintiff met the four factors often cited in assessing the value of a lost capital asset as set out in *Brown v. Golaiy*, and a \$500,000 award was made for loss of earning capacity in the future.

Klein v. Dowhy, 2007 BCSC 1151

The Plaintiff, 22 years old at the time, was involved in a motor vehicle accident in 2003. The airbags in his vehicle inflated as a result of the “violent” collision causing burns to his face. The Plaintiff also sustained soft tissue injuries to his shoulder, neck, and upper back.

The judge noted the Plaintiff missed 85 days of work and returned to work on a restricted basis, presumably for some time. The lack of employment records placed before the Court by the Plaintiff was a failure to take the necessary and simple steps needed to provide a solid basis for assessing damages. The judge awarded \$12,000 as a conservative award in light of the lack of provided evidence and noted that the courts must guard against awarding too much and against encouraging sloppiness generally.

With respect to loss of capacity to earn income in the future, the judge cited the factors provided in *Brown v. Golaiy* and referred to *Andrews v. Grand & Toy Alberta Ltd.*, which demands an examination into the “foggy crystal ball of what might have been and what might yet be.” The judge was convinced the Plaintiff’s work on a labour intensive assembly line at KFC or elsewhere fit perfectly with his overall capacity to earn income. References to the Plaintiff seeking employment as a pressman or train engineer or in construction were mere speculation and disregarded in probability analysis because only real and substantial possibilities were of interest. The judge found the dominant real and substantial possibility was that the Plaintiff would continue to work on what amounts to labour intensive assembly line work at KFC or elsewhere with the possibility of moving up “perhaps one level.” Working in pain, as a result of the Defendant’s negligence, was reflected in the non-pecuniary damages. What the Plaintiff was held to have lost was a capital asset: his capacity to take up very heavy labour if he ever needed to engage in such employment due to the vagaries of life. That was deemed the real loss, one that was very real but marginal and not overwhelming, for which the Plaintiff had to be compensated.

The judge provided that at “this level of the analysis both common sense and the case law say that any stab at a calculation is an indulgence in a comforting illusion grounded in arbitrariness.” After considering the evidence as a whole, the judge awarded the Plaintiff \$40,000 for loss of earning capacity in the future.

Naidu v. Mann, 2007 BCSC 1313

The Plaintiff was involved in a motor vehicle accident in 2000. As a result of that accident, the Plaintiff suffered from thoracic outlet syndrome (TOS), TMJ, headaches,

brief depression, and assorted soft tissue injuries and associated sequelae. Surgery for the TOS was discussed four years post-accident but put on hold as the Plaintiff wanted to pursue other methods of recovery and wanted to wait until she obtained full-time employment. Due to pregnancy, the Plaintiff never underwent surgery. It was understood that there was a 50-60% chance that surgery might alleviate the numbness and tingling.

The claim for loss of income earning capacity, both past and future, was clearly disputed. The parties disagreed with the career path the Plaintiff would have taken absent the accident and also the relevant standard of proof to be applied to hypothetical events. The Plaintiff argued that a court must take into account hypothetical events according to the probability that such events would have occurred. The Defendants did not disagree with that but emphasized, pursuant to *Steward v. Berezan*, that the Plaintiff must prove a substantial possibility, and only then could a court award compensation on the chance it would occur.

The Plaintiff presented a number of different scenarios for past and future wage loss (loss of earning capacity) and actuarial evidence under each scenario. The judge noted that the submissions were premised on everything in life going favourably for the Plaintiff, despite a spotty post-secondary academic record and only low-level employment experience to the date of the accident. The judge reviewed the proposed scenarios. The judge found that the Plaintiff had not demonstrated a substantial possibility of pursuing an alleged career in sales. Furthermore, there was no proof and it was pure speculation that she would have gone on to become a paralegal. However, the Plaintiff proved there was a (substantial) possibility she would have obtained employment as a legal secretary. That possibility was discounted to a 30% chance the Plaintiff would have become employed as a legal secretary considering all the evidence.

A further issue arose as to when the Plaintiff would have obtained such secretarial employment. The judge considered all the evidence and found that the hypothetical onset of such employment would have been delayed by the history of academic difficulty, the death of her father and brother-in-law and injury of her sister in a subsequent motor vehicle accident, and the fact the Plaintiff was working two jobs when the accident occurred, subsequently married and purchased a house. The judge also considered the fact the Plaintiff took a significant number of trips following the accident, started to earn more money following the accident and shortly prior to trial than she made at any time previously, and exaggerated her complaints. The judge awarded the Plaintiff \$15,000 for past wage loss.

With respect to an award for future loss of income (loss of earning capacity), the judge reviewed the cases provided by the parties and followed *Steward v. Berezan*. The judge stated that:

The B.C. Court of Appeal in *Steward v. Berezan*, supra, clarified that while the plaintiff is to be compensated not for lost earnings themselves, but for the loss of earning capacity as a capital asset (based on *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 (C.A.) and *Parypa v. Wickware* (1999), 169 D.L.R. (4th) 661, 1999 BCCA 88 at para. 63), the plaintiff bears the onus to prove at trial a substantial possibility of a future event leading to an income loss and the court will then

award compensation on an estimation of the chance that the event will occur (at para. 16).

The judge then referred to the four factors often cited in assessing the value of the lost capital asset as set out in *Brown v. Golaiy*. The judge continued that the court may use, as a starting point only, mathematical evidence of the present value of the plaintiff's projected future earnings. The assessment may also be guided to some extent by the actual earnings prior to the accident.¹³ However, the court must consider all the evidence and award what is fair and reasonable in the circumstances.

In that case, the judge found the Plaintiff was rendered less attractive as an employee due to difficulty engaging in repetitive motions and as a result some occupations were closed to her. The actuarial evidence outlined the difference between the difference in earnings between a legal secretary and bank teller until retirement taking into consideration contingencies (\$122,500). It was held that there was only 30% probability the Plaintiff would have been successfully employed as a legal secretary and the amount was discounted to \$35,000. Based upon all the evidence, the judge concluded the Plaintiff would most probably continue to work as a bank teller even with her injuries. The Plaintiff also failed to mitigate her damages by failing to undergo TOS surgery and thus that amount was reduced by 70% to \$10,000 for loss of (future) earning capacity.

Laroye v. Chung, 2007 BCSC 1478

The Plaintiff, a 38 year old architect intern, was involved in a collision with a motor vehicle while riding his bicycle in 2004. He sustained soft tissue injuries to his left elbow, knee, calf, ankle, neck and shoulders. The most significant injury was to his left hip area giving rise to chronic bursitis. He reported being able to return to most of his recreational activities, such as hiking, biking, snowboarding, and swimming, but at a less vigorous pace.

The Plaintiff alleged a claim for loss of earning capacity (future). The Plaintiff argued that due to pain in his hip encountered when conducting physically demanding tasks, he was less capable overall from earning income from all types of employment. He specifically felt limited at work while on construction sites and alleged his injury precluded him from going into construction management, a career option that others in the architect profession undertake. The Defendant argued there was no evidence that the Plaintiff could not do his normal job functions despite pain. It was also pointed out that the Plaintiff was able to lift 120 lbs. of computer equipment onto shelves as part of his duties as an IT person at the architect firm.

The Plaintiff argued that authorities such as *Pallos v. ICBC*, and *Brown v. Golaiy* referred to one year's income as a reasonable measure of compensation for loss of earning capacity. The Plaintiff earned \$66,000 in 2004 and currently earned \$82,000 per year and was seeking an award in the range of \$50,000 to \$60,000.

The judge noted that the defense expert, on cross-examination, opined that the Plaintiff had difficulty with any sort of heavy work and had pain with prolonged sitting and would have even more disability for anything involving heavy, physical labour. The

¹³ *Smith v. Knudsen*, 2004 BCCA 613 at para. 31.

judge held that the evidence provided that in the event the chronic bursitis remained permanent there would be a range of careers or positions foreclosed as too physically demanding. However, the judge was also mindful that there was a reasonable possibility that the chronic bursitis would gradually improve. An award of \$40,000 for loss of earning capacity was made to the Plaintiff.

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