

Possibilities, Probabilities and Chances: Assessing Future Pecuniary Losses

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In the 1970s, Chief Justice Cowan of the Nova Scotia Supreme Court provided a succinct description of the trend in awards for future lost earnings in personal injury cases: "In this Province loss of earnings is considered part of general damages and not part of special damages." (*Hollies v. Ritcey* (1970), 3 N.S.R. (2d) 400).

Over the years, "loss of future income" has not only become a head of pecuniary damages considered entirely separate from others, it has taken on different identities as increasingly creative ways to further the plaintiffs interests are used.

There are a number of terms that have been used by courts across Canada to describe the head of damages meant to compensate a claimant for potential future losses that are somehow associated with income. Some examples are: "Loss of future income," "diminution of earning capacity," "impairment of earning capacity," "loss of earning capacity," "loss of occupational advantage," "loss of a capital asset" or "loss of competitive advantage." Are they all just different ways of saying the same thing? Are they variations on a theme? Are they, collectively, too easy to obtain?

The amount awarded to the plaintiff in the *Hollies* case quoted above was \$5,000, of which \$1,000 was meant to compensate for loss of earnings. Contrast that case with the more recent decision of *Abbott v. Sharpe* 2007 CarswellNS 23, in which the Court of Appeal upheld a jury award of \$400,000 for diminution of earning capacity. One must question whether the varying labels have paved the way for a standard of proof that is far easier for a plaintiff to meet.

In *Leddicote v. Nova Scotia (Attorney General)* 2002 CarswellNS 135 the Nova Scotia Court of

Appeal quoted with approval the words of Justice Chipman in the earlier decision of *Newman (Guardian ad litem of) v. LaMarche*, (1994) N.S.J. No. 457 (C.A.): "All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss." In *Newman*, the Court also recognized that a loss of earning capacity was

compensation for "a loss which may never in fact occur."

A loss which may never in fact occur? And the plaintiff need only show "a chance" he or she will suffer some loss in the future? Couldn't any of us meet that burden?

Many decisions refer to the "substantial possibility test," which sounds as if it is a slightly higher burden than proving there is "a chance," but does not simplify the task of making awards under these headings. In the very recent decision of *Sinnot v. Boggs*, 2007 BCCA 267, the Court of Appeal affirmed considerations that had been set out previously in other decisions and which summarize what these labels are attempting to address: Has the plaintiff been rendered less capable overall from earning income from all types of employment? Is the plaintiff less marketable or attractive as an employee to potential employers? Has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured? Is the plaintiff less valuable to himself as a person capable of earning income in a competitive labour market?

With some exceptions, the most common approach to proving these claims is through medical evidence outlining the plaintiffs physical capabilities coupled with actuarial evidence. The actuary purports to calculate the future loss based on the difference between what the plaintiff was doing prior to the accident and what the plaintiff is physically capable of after the accident. This approach has inherent flaws and is an inadequate method of proving anything other than a pure future loss of income. An actuary can do no more than mathematics and cannot assess whether a plaintiff is less marketable. Neither an actuary nor a doctor can predict what job opportunities may have been open to a plaintiff in the future had the accident not occurred.

Enter the world of economists.

These experts have been around for years, but are gaining popularity in personal injury cases and cases involving institutional abuse for a reason. They perform statistical analysis based on the plaintiffs responses to questionnaires regarding their abilities, the plaintiffs particular demographics and labour and

employment statistics. From this they profess to be able to measure such probabilities as whether a plaintiff has been rendered less capable overall from earning income from all types of employment or whether a plaintiff's disability will affect their level of earnings in a chosen field. They also quantify positive and negative contingencies.

This approach allows an insurer, and eventually a judge, to somehow measure and justify an award based on a reduced capacity or capital asset. It is still not a perfect system, however, as economic assessments are convoluted and difficult to understand by the claimants, the lawyers, the insurers and the judges. Sometimes, they are disregarded altogether and other times they are persuasive of the "substantial probability test," but are pushed aside in favour of an arbitrary measure of the actual loss.

A good example of this is *Earl v. Lang*, 1999 CarswellOnt 2505 (C.A.). The plaintiff in that case had not lost any income in the seven years between the date of the accident and his trial, due in large part to the agreeable accommodations of his employer. He was nonetheless awarded \$50,000 for "loss of competitive edge" because the court was satisfied there was a "real and substantial risk" that the plaintiff may lose income in the future. Although the trial judge was not willing to accept the evidence of the accountant, economics professor and actuary who calculated the future loss at \$175,000, it is arguable the trial judge would not have been persuaded there was a real and substantial risk at all if it weren't for the expert evidence of the differences between salaries of disabled and non-disabled males.

Trying to quantify a concept as esoteric as the value of a plaintiff to himself or the inability to take advantage of lost opportunities is ineffectual without expert evidence. Such awards often seem as though they are picked out of thin air, with no apparent basis

for the amount. While Justice Morin in *Earl* at least tried to put a particular label on the award by calling it "loss of competitive edge," others acknowledge that it doesn't matter what it's called - it's simply an arbitrary award in a similar vein as general damages. In *Colonna v. Mitchell*, 1997 CarswellOnt 4678, Justice Pitt was blunt in stating: "Whether these factors are considered under the rubric of competitive advantage, loss of earning capacity, or some other designation, they warrant an additional award of \$40,000."

The comments from *Newman*, *Leddicote* and *Colonna*, are examples of the loosening of the test, and a symptom that a change in judicial attitude towards future loss claims is in order. Justice Lacourciere got it right back in 1977 in *Schrump v. Koot* (1977), 82 D.L.R.

(3d) 553 (Ont. C.A.), when he said: "Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. "

Similarly, when referring to the task of picking a totally arbitrary global sum out of thin air, Chief Justice Drapeau of the New Brunswick Court of Appeal pointed out: "I would add that if a trial judge is unable to articulate any rational foundation for his or her assessment of future pecuniary loss, the problem is likely sourced in the claimant's failure to provide essential evidence." (*Vincent v. Abu-Bakare*, 2003 NBCA 42)

It's time to put the burden back to the plaintiff to provide that essential evidence. To do it right, it should consist of a strategic combination of medical, statistical, and mathematical evidence. The evidence may not allow the trier of fact to accept that the loss is a calculable number, but it will, as Chief Justice Drapeau suggested, allow him or her to rationalize the foundation for the global amount that has been chosen .**