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DAMAGES FOR SEXUAL ABUSE CLAIMS AND OTHER RECENT DEVELOPMENTS

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TRENDS IN DAMAGE AWARDS IN SEXUAL ABUSE CASES, CLAIMS FOR LOST YEARS AND LOSS OF HOUSEKEEPING CAPACITY

The purpose of this paper is to review the principles and trends in award for damages in cases of sexual assault. Secondly, this paper will discuss the principle of "lost years" in award for future working capacity. Finally, the paper will focus on damages awarded for impaired homemaking capacity.

I. SEXUAL ABUSE CASES

Since the late 1980s the Canadian courts and Human Rights Tribunals have been developing an impressive body of case law in the area of civil liability for sexual abuse, including sexual harassment. Great advancements have been made in various jurisdictions for survivors of childhood sexual abuse to commence civil actions long after the abuse occurred. Although there has been a trend over the past decade of increasing damage awards by judges in civil cases for the consequences of this abuse, this trend is not apparent in the awarding of damages for sexual harassment by Human Rights Tribunals.

In the early 1980s when sexual abuse cases were relatively rare, damage awards by judges and Human Rights Tribunal were extremely low. In these early cases, the courts generally did not apply the usual principled approach to damage assessments that they took when determining damages in other types of personal injury cases. However, since the mid 1990s there has been a greater number of these cases before the courts and the Human Rights Tribunals. In many civil cases, particularly if the plaintiff was a child when the abuse occurred, the damage awards have become much larger, with British Columbia and Ontario leading the way, while the Maritime provinces have much lower damage awards.[1] On the other hand, the general damage awards made by Human Rights Tribunals continue to be relatively low.

In the following section of the paper, there will be a discussion on the approach civil courts take to assessing damages in sexual abuse cases with a discussion on the comparison of the range of damages awarded by civil courts and those awarded by Human Rights Tribunals.

[1] Elizabeth K. P. Grace and Susan M. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000) at 209.

A. CIVIL COURTS

According to Grace and Vella[2], most courts are taking greater care to break down the different components of a plaintiff's losses according to the framework for damages discussed by the Supreme Court of Canada in its 1978 trilogy of personal injury decisions[3]. The trilogy requires damages in personal injury cases to be assessed according to non-pecuniary and aggravated damages, pecuniary damages and punitive damages.

1. Non-Pecuniary Damages (Pain and Suffering)

Over the past decade there has been a wide variance and increase in the awards for non-pecuniary damages. In *Y.(S.)* v. *C.(F.G.)*[4] the British Columbia Court of Appeal acknowledged the trend to award increased non-pecuniary damage awards to Plaintiff's of sexual abuse. The Court noted that prior to 1990 the norm was an award of $40,000, but by 1996 the usual award was in the range of $100,000 to $175,000.

The decision of *Y.(S.)* was significant for Plaintiffs given that the Court of Appeal concluded that the cap of $100,000 for general damages in personal injury cases is not applicable to cases involving intentional torts or quasi-criminal behaviour. *Y.(S.)* involved very serious sexual abuse by a step-father of the Plaintiff when she was between 7 and 14 years of age. This abuse was followed by verbal and physical abuse until the Plaintiff was 18. The Plaintiff was awarded $250,000 for general and aggravated damages and $50,000 for punitive damages. As a result of the Court in *Y.(S.)* concluding that the cap general damages in personal injury cases did not apply in sexual abuse cases, the Court opened the door for significant damage awards in serious cases.

Between 1999 and 2002, the range of general damage awards in British Columbia has been $5,000[5] and $200,000.[6] To date, no court in British Columbia has awarded damages over the "cap".

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[2] Grace and Vella, *supra* at 197.

[3] The following cases are known as the damages "trilogy": *Andrews* v. *Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229; *Arnold* v. *Teno,* [1978] 2 S.C.R. 287 and *Thornton* v. *School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267. In these cases, the Supreme Court of Canada replaced the undifferentiated globalized approach to the assessment of damages with an itemized approach, which considers first claims for pecuniary losses and then claims for non-pecuniary losses.

[4] (1996), 26 BCLR (3d) 155, [1997] 1 W.W.R. 229 (CA) amended (1997), 32 BCLR (3d) 235 (S.C.) (hereafter "*Y(S.)*").

[5] *R.E.E.* v. *W.O.T.* [2000] B.C.J. No. 342 (S.C.).

[6] G. (J.R.I.) v. Tyhurst, [2001] B.C.J. No. 441 (BCSC).

2. Pecuniary Damages

This includes the usual heads of damages in personal injury cases including past and future loss of income/earning capacity, out-of-pocket expenses and past and future care costs.

Since many victims of sexual abuse often have difficulties in establishing or maintaining relationships, the victims suffer a loss of the benefit of increased family income. Grace and Vella[7] note that in future, courts in sexual abuse cases may be considering novel claims advanced as part of a loss of future capacity to earn income claim, including the "loss of the pecuniary benefits of a shared living situation". This claim entails:

1. a loss of the benefit of increased "family income" as a result of forming a relationship with another income earner;

2. loss of the benefit of shared expenses;

3. loss of the benefit of shared home-making, which reflects that fact that two individuals sharing the home tasks is less costly than a commercial service and sharing such tasks may free up time to spend on other projects, including those that generate income.

3. Aggravated Damages

Aggravated damages are a part of non-pecuniary damages and are to be assessed by taking into account any aggravating features of the case. Although they are not to be awarded as a separate head of damage, many courts make them a distinct head of damage. The purpose of an award of aggravated damages is to compensate the Plaintiff for the humiliating and malicious aspects of a tort-feasors conduct which has exacerbated the Plaintiff's pain and suffering.

Grace and Vella[8] have summarized some of the aggravating factors courts will take into consideration to increase the award of non-pecuniary damages include:

- the sexual abuse was accompanied by a breach of trust (i.e. parent/teacher; priest/parishoner; doctor/patient);

- the frequency of the abuse;

[7] *Ibid* at p. 207.
[8] *Supra* note 1 at p. 211 - 212.

- the duration of the abuse;
- the nature and severity of the abuse;
- the age of the plaintiff at the time of the abuse (if the victim was a child);
- a perpetrator's lack of remorse;
- that the perpetrator knew all along what he was doing was wrong;
- the perpetrator's conduct when confronted with allegations of sexual abuse;
- misrepresentations by the perpetrator regarding the nature of the sexually abusive acts; and
- infecting the Plaintiff with a sexually transmitted disease.

Aggravated damages in sexual abuse cases have ranged between $10,000 and $60,000, with the median being $25,000.[9]

4. Punitive Damages

While the purpose of awarding non-pecuniary damages is to compensate the victim, the purpose of punitive damages is to punish a tort-feasor and to serve as a deterrent, both to the tort-feasor and to others.

Generally, punitive damages will not be awarded in cases of negligence given that conduct more serious than a breach of a standard of care is required before the court will make an award of punitive damages. Further, punitive damages are generally awarded against the tort-feasor and not vicariously against their employers or principals. Grace and Vella[10] state that the range of punitive damages that are awarded in cases of intentional torts and breach of fiduciary duty is $4,000 to $50,000. The higher figure is reserved for the most serious cases involving prolonged, repeated and violent acts of sexual abuse by a parent.

[9] Grace and Vella, *ibid* at p. 210.
[10] *Ibid.* at p. 213.

One of the factors that generally militate against an award of punitive damages is where the tort-feasor has received a criminal sentence or a sanction of a professional body. However, as Grace and Vella[11] note there are exceptions to this general rule, such as in cases where the tort-feasor was diverted out of the court system or was not fully "punished" for his conduct.

B. A COMPARISON OF THE AWARDS MADE BY THE COURTS AND THE HUMAN RIGHTS TRIBUNALS

1. General Damage Awards

Sexual abuse often includes sexual harassment.[12] Although under the common law there is no tort of sexual harassment, the behaviour that constitutes sexual harassment often includes sexual assault or battery. If the behaviour that constitutes sexual harassment includes sexual assault or battery, rather than merely verbal sexual harassment, the victim can choose to commence proceedings for damages either in the civil courts, or, before the Human Rights Tribunal. Surprisingly, some victims who have been subject to extreme forms of sexual harassment such as an assault[13] or forced intercourse[14], have commenced proceedings before the Human Rights Tribunal.

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[11] *Ibid.* at p. 215.

[12] In *Janzen* v. *Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252 at p. 1284, the Supreme Court of Canada has defined as sexual harassment as [Unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences of the victims of the harassment.

[13] *A.* v. *Ruby's Food Services Ltd.* (1992), 16 C.H.R.R. D/394 (Ont. Bd. Inq.); *Bonthoux* v. *L.S.Y. Holdings Ltd.* (1992), 16 C.H.R.R. D/327 (B.C.H.R.C.); *Bruce* v. *McGuire Truck Shop* (1993), 20 C.H.R.R. D/145 (Ont. Bd. Inq.); *Burton* v. *Chalifour Bros. Construction Ltd.* (1994), 21 C.H.R.R. D/501 (B.C.C.H.R.); *Carignan* v. *Mastercraft Publications Ltd.* (1984), 5 C.H.R.R.; D/2282 (B.C.Bd.Inq.); *Chand* v. *Vig* (1995), 28 C.H.R.R. D/463 (C.C.C.H.R.) [hereinafter *Chand*]; *Cox* v. *Jagbritte Inc.* (1983), 3 C.H.R.R. D/609 (Ont.Bd.Inq.); *Cuff* v. *Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont.Bd.Inq.); *Darke* v. *Talos Enterprises Ltd.* (1987), 8 C.H.R.R. D/4152 (B.C.H.R.C.); *Fields* v. *Willie's Rendezvous Inc.* (1984), 6 C.H.R.R. D/2550 rev'd (1985), 6 C.H.R.R. D/3074 (B.C.H.R.C.); *Graesser* v. *Porto* (1983), 4. C.H.R.R. D/1569 (Ont.Bd.Inq.); *Green* v. 709637 *Ontario Inc.* (1987),9 C.H.R.R. D/4749 (Ont.Bd.Inq.); *Hall* v. *Sonap Canada* (1989), 10 C.H.R.R. D/6126 (Ont.Bd.Inq.); *Hong* v. *Kandola* (1987), 9 C.H.R.R. D/4441 (B.C.H.R.C.) (Joe); *Hughes* v. *Dollar Snack Bar* (1981), 3 C.H.R.R. D/1014 (Ont. Bd. Inq.) (Kerrr); *Huhn* v. *Hunter's Haus of Burgers* (1987), 8 C.H.R.R. D/4157 (B.C.C.H.R.) (Wilson) [hereinafter *Hunter's Haus of Burgers*]: *Jakob* v. *Mirkovich* (1992), 16 C.H.R.R. D/386 (B.C.C.H.R.) (Patch); *Jalbert* v. *Moore* (1996), 28 C.H.R.R. D/349 (B.C.C.H.R.) (Vallance) [hereinafter *Jalbert*]; *Joss* v. *T.&C. Gelati Ltd*. (1986), 8 C.H.R.R. D/3941 (B.C.C.H.R.) (Edgett) [hereinafter *T.& C. Gelati Ltd.*]; *Kennedy* v. *Vulcan Lumber Building Supplies Ltd*. (1990), 14, C.H.R.R. D/252 (B.C.H.R.C.) (Wilson); *Lampman* v. *Photoflair Ltd.* (1992), 18 C.H.R.R. D/196 (Ont. Bd. Inq.) (McCamus); *Langevin* v. *Air Tex Industry Ltd*. (1984), 6 C.H.R.R. D/2552 (B.C.C.H.R.) (Powell); *MacKay* v. *Ideal Computer System* (1987), 8 C.H.R.R. D/4339 (N.S. Bd. Inq.) (McKinnon), rev'd (*sub nom. Mehta* v. *MacKay*) (26 November 1990), SCA No.01842 (N.S.CA); *MacLaren* v. *Pinocchio's on Third and Columbia* (1989), 10 C.H.R.R. D/6437; (B.C.H.R.C.) (Wilson); *McGregor* v. *McGavin Foods Ltd*. (1990), 12 C.H.R.R. D/15 (B.C.C.H.R.) (Joe); *McPherson* v. *"Mary's Donuts"* (1982), 3 C.H.R.R. D/961 (Ont. Bd. Inq.) (Cumming) [hereinafter *"Mary's Donuts"*]; *Miller* v. *Sam's Pizza House* (1995), 2 C.H.R.R. D/433 (N.S. Bd. Inq.) (Meltzer); *Noffke* v. *McClaskin Hot House*

In the Human Rights reported cases from 1980 to 2001, as in the civil cases, the alleged harasser is generally a male and the victim is generally a female.[15] The range of general damages is a low of $100 to a high of $20,000. In the most recent cases for the period 1999 to 2001, the range of general damages is $1,500 to a high of $6,000.[16]

While the Human Rights Tribunals do not consider historical sexual harassment cases given that in most jurisdictions the complaints must be brought within one year of the harassment, the Human Rights Tribunals are considering some cases that involve serious allegations of sexual abuse. The awards for general or non-pecuniary damages are far less when granted by the Human Rights Tribunals as compared with the awards granted by judges in the civil courts.

2. Liability of Employer for Acts of Sexual Harassment

Personal liability can be found against the harasser. Although "human rights statutes in Canada do not directly or clearly make employers responsible for sexual harassment of

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(1989), 11 C.H.R.R. D/407 (Ont. Bd. Inq.) (Zemans); *Olarte* v. *Commodore Business Machines Ltd*., (1983) 4 C.H.R.R. D/1705 (Ont. Bd. Inq.) (Cumming), aff'd (sub nom. *Commodore Business Machines Ltd.* v. *Ont. Minister of Labour*) (1985) 6 C.H.R.R. D/2833 (Ont. S.C.) [hereinafter *Commodore Business Machines Ltd.*]; *Penner* v. *Gabriele* (1987), 8 C.H.R.R. D/4126 (B.C.C.H.R.) (Joe); *Phipot* v. *The Royal Canadian Legion* (1987), 8 C.H.R.R. D/4308 (B.C.C.H.R.) (Joe); *Sansome* v. *Dodd* (1991), 15 C.H.R.R. D/393 (B.C.C.H.R.) (Barr); *Sharp* v. *Seasons Restaurant* (1987), 8 C.H.R.R. D/413 (Ont. Bd. Inq.) (Springdale); *Teichroeb* v. *Marcil* (1987), 8 C.H.R.R. D/4306 (B.C.C.H.R.) (Joe); *Torres* v. *Royalty Kitchenware Ltd*. (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) (Cumming) [hereinafter *Torres*]; *Voshell* v. *Red Baron Restaurant Ltd*. (1987), 8 C.H.R.R. D/4250 (B.C.C.H.R.) (Edgett); *Wales-Callaghan* v. *C.N. Office Cleaning Ltd.* (1993), 26 C.H.R.R. D/64 (Ont. Bd. Inq.) (Carter) and *Zarankin* v. *Johnstone* (1984), 5 C.H.R.R. D/2274 (B.C. Bd. Inq.) aff'd (sub nom. *Johnstone* v.*Zzarakin*) 1985, 6 C.H.R.R. D/2651 (BCSC) [hereinafter *Zarankin*]

[14] *Cajee* v. *St. Leaonard's Youth and Family Services Society* (1997), 28 C.H.R.R. D/284 (B.C.C.H.R.) and *Chand*, supra.

[15] In Ontario all cases involved sexual harassment by a male harasser against a female victim. In British Columbia, all cases with the exception of three, involved sexual harassment by a male harasser against a female victim. In *Van-Berkel* v. *M.P.I. Security Ltd.* (1997), 28 C.H.R.R. D/504 (B.C.H.R.C.) a female employee alleged that her female boss harassed her. In *Cassidy* v. *Sanchez* (1988), 9 C.H.R.R. D/5278 (B.C.H.R.C.) a male trainee short-order cook alleged that his male employer touched him and made sexual advances to him. Similarly, in *Hill* v. *Dan Barclay Enterprises Ltd.* (1999), 37 C.H.R.R. D/457 (B.C.H.R.T.) the male complainant alleged that he was sexually harassed by his male boss.

[16] The award of $6,000 was granted in *Denison* v. *Badacki Holdings Ltd. dba Heritage Millwork* (1999) 37 C.H.R.R. D/265 (B.C.H.R.T.) where a 41 year old female industrial machinist. Male co-workers made daily comments about her breasts and buttocks, drew a naked picture of her, pushed up against her, posted nude pictures in the woman's washroom. The award of $1,500 for general damages was granted in *Radloff* v. *Stox Broadcast Corp.* (1999), 36 C.H.R.R., D/116 (B.C.H.R.T.) as a result of 4 incidences wherein the victim's boss made sexual advances or comments to her and delivered a marriage proposal to her.

their employees",[17] the Supreme Court of Canada has held that as a result of human rights legislation a corporation is liable for sexual harassment in the workplace, whether it was caused by supervisory or non-supervisory employees, unless the legislature statutorily restricts this liability.[18]

The human rights legislation in British Columbia has not statutorily restricted the liability of corporations for sexual harassment of employees. However, the *Ontario Code* specifically exempts employers from liability in relations to acts of sexual harassment committed by employees or agents.[19] Nevertheless, the Ontario Human Rights Commission has found employers liable for harassment under the organic theory of corporate liability. In *Persaud* v. *Consumer Distributing Ltd.*[20], Professor Cumming stated:

> *…For the organic theory to be operative, the wrongdoer must be part of the "directing mind" of the employer corporate entity, and the offending acts must occur in the course of carrying on the employer's business. As sexual harassment situations commonly involve a supervisor or person otherwise in authority abusing that authority, as in Robichaud, supra, the criteria of the organic theory would often be met in any event.*
>
> *Thus, under the Ontario Code, unlike the Federal Act as interpreted by the Supreme Court of Canada in Robichaud, supra, there is not vicarious liability in harassment situations. Therefore, in respect of Ontario human rights law the organic theory of corporate responsibility remains very pertinent in harassment situations.*
>
> *If it is a situation of sexual harassment by a mere employee (i.e. not someone who is part of the directing mind) of the corporate employer, then by virtue of the excepting provision in subsection 44(1) [now s. 45(1)] vicarious liability does not attach to the employer. However, if the employee sexually harassing is part of the directing mind of the employer, then while subsection 44(1) does not apply (i.e. there is no deeming of the discriminatory act of the employee to be the act of the employer) there can be personal liability on the part of the employer on the theory as advanced…*

II. LOSS OF FUTURE WORKING CAPACITY

In many catastrophic personal injury cases, including sexual abuse claims, there is a claim for loss of earning capacity. Over the past several years, courts have recognized new sub-heads of pecuniary loss in an attempt to recognize that a plaintiff's incapacity has diverse consequences; all of which are not a loss of earnings. These new sub-heads

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[17] A. P. Aggarwal, *Sexual Harassment in the Workplace,* 2nd ed. (Toronto: Butterworths, 1992) at 181.
[18] *R.* v. *Robichaud*, [1987] 2 S.C.R. 84, *sub nom. Robichaud* v. *Canada (Treasury Board)*
[19] s. 45(1); A. P. Aggarwal, *supra* note 15 at 196.
[20] (1990), 14 C.H.R.R. D/23 (Ont.Bd.Inq.) at para. 43.

include loss of homemaking capacity. At the core of this sub-head is a recognition of the Plaintiff's inability to work. It does not matter whether the fruits of the Plaintiff's labour were paid wages, professional income or homemaking services.

An assessment of damages for loss of working capacity involves:

1. Estimation of the weekly, monthly or annual value of work that would have been performed… [and] the value of lost homemaking, and any loss of shared family income. From this will be subtracted the value of the work the plaintiff will now be capable of doing.

2. Determination of the period during which the loss will continue, involving in serious cases ascertainment of the plaintiff's pre-accident working life expectancy, including, if this has been shortened by the injuries, a reduced award during the "lost years".

3. Estimation of the reduction, if any, to be made to take account of the contingencies of life...

4. Determination of the appropriate discount rate to take account of projected inflation and investment...

5. Consideration of any overlap between the award for loss of working capacity and other heads of damage…

6. Ascertainment of whether there must be deduction of collateral benefits the plaintiff will receive from outside sources as a result of the injuries.[21]

In the following section of the paper, there will be a discussion on the "lost years" principle which is important when calculating loss of future working capacity. Secondly, there will be a discussion on claims involving the loss of homemaking capacity.

A. THE "LOST YEARS" PRINCIPLE

In those cases where the defendant's negligence has caused the Plaintiff to sustain injuries resulting in a truncated life expectancy, a claim for loss of working capacity

[21] Ken Cooper-Stephenson, *Personal Injury Damages In Canada, Second Edition(*Toronto, Carswell, 1996*)* at 203-204.

should include a claim for "lost years". "Lost years" means that the Plaintiff's post-injury life expectancy is less than the Plaintiff's expected pre-injury retirement date. For example if a young male, university educated Plaintiff was expected to work to age 65, but after the accident the Plaintiff's life expectancy has been reduced to 50, the Plaintiff has arguably lost 15 years from his/her working life. Depending on the Plaintiff's earnings, 15 years of a loss of a working life may result in a substantial future income loss to the Plaintiff's estate.

The leading case that has considered this principle is *Toneguzzo-Norvell (Guardian ad litem of)* v. *Burnaby Hospital*.[22] In Toneguzzo, the infant Plaintiff was injured at birth. Her life expectancy as a result of the defendant's negligence was considerably reduced. The Supreme Court of Canada concluded that the infant plaintiff was entitled to an award for loss of earning capacity not only for the years she will actually live, but also for the years she would have lived had she not been injured at birth. The issue before the Court was the appropriate deduction for personal living expenses from the award for lost earnings capacity during the "lost years". The Court stated this issue as follows:

> *…It is established that a deduction for personal living expenses must be made from the award for lost earning capacity for the years she would actually live. This is necessary to avoid duplication with the award for cost of future care. The question is whether a similar deduction should be made from the award for lost earning capacity for the years after the plaintiff's projected death.*[23]

In considering this issue, McLachlin, J stated:

> *… had the plaintiff been in a position to earn the moneys represented by the award for lost earning capacity, she would have to spend a portion of them for living expenses. Not to recognize this is to introduce an element of duplication and to put the plaintiff in a better position than she would have been in had she actually earned the moneys in question.*[24]

The Court agreed with the British Columbia Court of Appeal's deduction of 50% for personal living expenses for lost earning capacity.

In cases of infant plaintiffs where there has been no chance for the plaintiffs to establish an earnings and expense history, it is difficult for the Court to determine what percent of income the plaintiff would have expended on personal living expenses. However, in cases involving plaintiffs who have an earning and expense history, in order for a court

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[22] (1994), 110 D.L.R. (4th) 289 (S.C.C.) (hereafter "*Toneguzzo*").
[23] *Ibid.* at 296.
[24] *Ibid* at 296-297.

to make an accurate deduction for personal living expenses, plaintiffs must present the court with evidence of the pre-injury spending pattern of the plaintiff. Depending on the evidence, the range of deduction for personal living expenses is 30- 50%.[25]

B. DAMAGE FOR LOSS OF OR IMPAIRED HOMEMAKING CAPACITY

It has been over a decade since the Saskatchewan Court of Appeal in *Fobel v Dean*[26] recognized a pecuniary loss for impaired homemaking capacity. Cases where plaintiffs advance a claim for loss of homemaking capacity fall into two categories. The first group of cases involves plaintiffs who are full-time homemakers, and as a result of their injuries are no longer able to perform the homemaking task that they could pre-accident. This was the case in *Korpela v March.*[27]

The second group of cases involves plaintiffs who worked full-time, but spent a large portion of their waking hours performing household tasks. This was the case in *Fobel, McLaren v Schwalbe* [28] and in *McTavish* v. *MacGillivray.*[29]

Damages awarded to the plaintiff for a loss of or impaired homemaking capacity may be awarded under non-pecuniary damages, special damages, past loss of income, cost of future care, or loss of future earning capacity or it may be considered under a new head of damage, either pecuniary or non-pecuniary.[30] In assessing damages in *Whittington* v. *Goupil*,[31] the Court concluded that the evidence supports the plaintiff's claim that she suffered a curtailment of her activities including a diminished capacity to perform work required of her as a farmer, parent and homemaker, which in this case occupied most of her time and was all unpaid. The Court took that into account when making an award for non-pecuniary damages and stated that there was no need to order compensation for that diminished capacity.

In the leading case of *Fobel* the Court said that in order to determine an award that is fair it is necessary to identify the components of homemaking and then determine which elements have been impaired or lost. The Court adopted a systematic method of computing damages for loss of homemaking capacity and separated homemaking functions into two categories, including direct labour and management functions.

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[25] *Dube* v. *Penlon* (1994), 10 O.R. (3d) 190 (Gen. Div.).
[26] (1991), 83 D.L.R. (4th) 385 (Sask. CA) (hereinafter "*Fobel*").
[27] (1993) 9 Alta. LR (3d) 117 at 130-31(hereafter "*Korpela*")
[28] (1994) 16 Alta. LR (3d) (QB)
[29] [2000] B.C.J. No. 507 (CA) (hereafter "*McTavish*").
[30] *Kroeker* v. *Jansen* (1995), 4 BCLR (3d) 178 (CA) (hereafter "*Kroeker*").
[31] [2000] B.C.J. No. 2775 (Q.L.)(S.C.).

Once the Court has determined the scope of the loss, the next step is to quantify the loss. The Court adopted a combination of the substitute homemaker and the catalogue of services approach to quantification. The Court recognized that the management function is particularly difficult to value, and as such, a precise calculation is not required. Rather, what is needed is:

> *…meaningful evidence…which enables (the court) to evaluate the homemaking capacity in all its aspects so as to fully compensate the victim for the loss suffered. There is ample economic statistical evidence available of the amount of time spent by homemakers in the home and the economic benefit which they provide to a family which would permit a court using (such an) approach…to properly assess the damages and award fair and just compensation…*

In *Fobel* the Court concluded that the assessment must be done separately for both pre-trial and post trial loss of capacity to perform housekeeping tasks. The Court stated further that the loss of housekeeping services prior to the trial must be assessed as the loss of an amenity when no replacement help was hired although the replacement cost is a relevant element in arriving at a dollar value. In determining Mrs. Fobel's claim for pre-trial loss of capacity to perform housekeeping tasks, the trial judge included the pre-trial loss of housekeeping capacity in his award for general damages. In considering this issue on appeal, the Court of Appeal concluded that the trial judge's award of $15,000 for loss of pre-trial housekeeping capacity included in the damage award was reasonable.

With respect to the loss of future housekeeping services, the Court in *Fobel* determined that any award under this head of damage is a pecuniary loss and should be assessed by estimating the cost of replacement services for the life expectancy of the plaintiff.

In *McTavish* the British Columbia Court of Appeal once again considered the principles to be applied in determining appropriate compensation for loss of the capacity to do unpaid work of economic value. At trial the judge in *McTavish* awarded $20,800 for past loss of household services and $43,170 for future loss of housekeeping capacity. These awards were affirmed on appeal. The future loss award was assessed using the replacement cost method. In rejecting the appellant's submission that a deduction should be made for the contingency that replacement services might not be hired, the Court stated:

> *"As I have noted, the majority in Kroeker quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have*

> *referred could it have permitted, a deduction for the contingency that replacement services might not be hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely."*

In considering the appeal of the pre-trial loss of housekeeping capacity, the Court stated:

> *"It now seems settled that the value of voluntary substituted services is to be compensated, most often as special damages just as if the services had been hired. Compensation will also be awarded for tasks left to be accomplished in the future. In the absence of one of these conditions, compensation for loss of housekeeping capacity seems to form part of the general award for non-pecuniary damages, if compensation is awarded at all.*[32]*"*

The Court agreed with the trial judge's approach to the pre-trial loss of housekeeping capacity and stated:

> *In my view, when housekeeping capacity is lost, it is to be remunerated. When family members by their gratuitous labour replace costs that would otherwise be incurred or themselves incur costs, their work can be valued by a replacement cost or opportunity cost approach as the case may be. That value provides a measure of the plaintiff's loss. Like the trial judge I would prefer to characterize such compensation as general damages assessed in pecuniary terms, reserving special damages for those circumstances where the plaintiff actually spent money or incurred a monetary liability, although I do not wish to state a settled view on that question in the absence of full submissions as to the consequences of the distinction, if any.*

While the courts have recognized for many years that housekeeping and other spousal services have economic value for which a claim by an injured party may be advanced against a tort-feasor, the courts continue to struggle with the difficulty of properly valuing these claims.

C. CONCLUSION

In considering personal injury claims arising from sexual abuse, the civil courts are taking a much more principled approach to the assessment of the plaintiff's damages. This has resulted in increasing general damage awards. Similarly, when a court is considering a claim for a loss of or reduced housekeeping capacity, the courts are increasingly refining their approach to the valuation of the plaintiff's loss so that the plaintiff can be fairly compensated for unpaid work that has economic value.

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[32] *Supra* note 29, para. 51.

The British Columbia Court of Appeal has concluded that the replacement costs approach is to be utilized in assessing a claim for future loss of or diminished housekeeping capacity. While the Court of Appeal has stated that with respect to the valuation of the plaintiff's pre-trial loss of housekeeping capacity, it prefers to characterize such compensation as general damages in pecuniary terms, this is not a settled approach to the valuation of this head of damage.

III. RECENT DEVELOPMENTS IN THE LAW OF DAMAGES FOR PERSONAL INJURY

The increase in damage awards in cases of sexual abuse has been mirrored in recent years by similar increases in other types of cases. This increased exposure to insurers has not gone unchallenged by the defense bar, who have advanced novel arguments in an attempt to restrain this upward trend.

A. TRENDS IN DAMAGE AWARDS FOR NON-SEXUAL ABUSE CLAIMS

1. Non-Fatal Injuries

Non-pecuniary damage awards for non-fatal injuries have been steadily increasing over the last number of years. This is a trend likely to continue. In 1996, the highest general damages award was $251,963[33]. In the year 2000, the 'ceiling' was judicially determined at $262,000[34]. Now, that ceiling is approximately $282,000, and will continue to increase at a rate commensurate with inflation. Non-pecuniary awards in the "catastrophic" cases range from approximately $175,000 to the present ceiling, confronting insurers with a $100,000 range in awards for cases involving quadriplegics, paraplegics, and severe traumatic brain injuries.

An upward trend is also present in cases of moderate or mild traumatic brain injuries causing diminished capacity. Awards typically range from $50,000 to $175,000, but most awards in the last four years have been in excess of $100,000. Thus, while the high-end awards for moderate and mild traumatic brain injuries may still be around $150,000, the floor has increased significantly and $100,000 appears to be the starting point. Further, a review of cases involving concussions that did not cause mild traumatic brain injuries or contribute to diminished capacity shows a range of awards between approximately $35,000 and $85,000. Higher awards are reserved for cases with other significant injuries or scarring. Nonetheless, it is likely that a court faced with an

[33] *Jacobsen* v. *Nike Canada Ltd.* (1996), 19 BCLR (3d) 63 (S.C.)
[34] *Wilson* v. *Russell*, [2000] BCCA 611

accident causing mild traumatic brain injury with some diminished capacity will award in excess of $100,000 to the plaintiff, while a court faced with a brain injury that had no lasting residual effects will award less than $100,000.

2. Fatalities

Awards for the loss of guidance, care and companionship of a parent, where appropriate, have remained consistently between $25,000 and $35,000. The *Ruiz* case[35] is the exception where the Court awarded $55,000 and $65,000 to the two children respectively. The basis of the award was the fact that the family was an immigrant family and would have relied heavily on their deceased mother. *Ruiz* is a rare case in which the Court awarded separate amounts for loss of guidance and loss of love and affection.

The other area of interest is the filial piety cases. It is now clear the parents can be awarded significant sums of money if they can prove that their deceased child would have supported them. This has been extended to household help in the *Cahoose* case[36]. Thus, awards for parents close to or over $100,000 are now possible if the parents can prove that the loss of the child was a financial as well as an emotional loss.

B. ABORIGINAL PEOPLE AND DAMAGE AWARDS

The overall increase in damage awards has been challenged to some extent by novel, if controversial, arguments to lower damage awards based on a plaintiff's membership in a minority group. Defence counsel have argued that awards to Aboriginal peoples should be discounted due to a statistically shorter life expectancy. The reasons for a shorter life are attributed to social ills such as alcoholism, poverty, poor nutrition and limited education. The aboriginal community in turn views this concession to the defence as a reward for the racism which is responsible for the shorter life span in the first place[37].

In *Ross* v. *Watts*[38], the Judge did not impose a negative contingency for life expectancy based on the Plaintiff's aboriginal status. The statistical tables tendered in support of the reduction did not accurately reflect this particular plaintiff's life circumstances. However, the Court did accept that there was a present and traditional discrepancy

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[35] *Ruiz* v. *Mount Saint Joseph Hospital*, [1999] B.C.J. No. 1772 (S.C.)
[36] *Cahoose* v. *Insurance Corp. of British Columbia* (1999), 63 BCLR (3d) 265 (CA)
[37] Braker, Hugh, Q.C. *Aboriginal Peoples and Damages for Personal Injury in British Columbia*. CLE, Damages 2001.
[38] [1997] Nanaimo Registry No. S10640 (BCSC).

between the earnings of a non-aboriginal and an aboriginal B.C. male in the workforce which could not be ignored. An appropriate discount was therefore applied.

There may be other factors to be considered by the defence in assessing loss of income claims involving aboriginal people. The *Indian Act*[39] exempts from taxation the personal property of an Indian or band situated on a reserve. In one decision, *Baker* v. *Manion*[40], the Court took into consideration the possibility that a portion or all of the plaintiff's income would be tax exempt in assessing the future income loss.

In residential school litigation, the Crown has argued that life circumstances which existed prior to life in a residential school, representing a compromised social position, should be treated as a pre-existing condition. A (pre-existing) home life attendant with risks and shortcomings would negatively effect the lives of the plaintiffs. Sexual assaults would simply compound that existing problem. The question arises as to whether this argument is a viable interpretation of the law on pre-existing conditions and whether the alleged "life conditions" were "already manifest and presently disabling"[41] as required by law.

C. NERVOUS SHOCK

The Plaintiff bar has recently been arguing to expand the ambit of cases that would otherwise fall outside the scope of a claim for 'nervous shock'. The law in this area has been slowly evolving in British Columbia. To advance a claim for nervous shock, a Plaintiff need not have been physically injured in an accident. Because the Plaintiff is not physically injured, and may not even come into contact with the defendant, the psychiatric injury alleged is an extra step removed from the negligence of the defendant, and difficult questions of proximity and duty of care arise[42].

Two approaches emerge from the caselaw. Some judges use a principled approach. With this, the reasonable forseeability of harm is the test for compensability. Other Judges are concerned with controlling the class of persons and types of emotional or psychiatric conditions that will be compensated[43].

To succeed in a claim for nervous shock, a plaintiff must establish the following criteria:

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[39] R.S.C. 1985, c. I-5.
[40] [1997] B.C.J. No. 1018 (BCSC).
[41] *supra*, note 37.
[42] *Devji* v. *Burnaby (District)* (1999), 70 BCLR (3d) 42 (CA)
[43] Wright, Mary-Helen, *Claims for Nervous Shock*, Personal Injury & Fatality Cases, Damages 2001, CLE

1. the psychological injury must be connected to and a direct result of the defendant's negligence. Simple grief and sorrow is not compensable at law.

2. There must be reasonable forseeability between the defendant's conduct and the plaintiff's injury. There must be sufficient proximity between the two such that a duty is placed on the defendant to avoid the injury. The aftermath of an accident must be alarming, startling or frightening in nature.

3. The damages sustained must be serious enough to be a recognizable psychiatric illness. The loss must be distinct from the surprise, grief and usual emotional responses to be expected upon the death of a relative. There must be fright, terror or horror.[44]

Recent decisions at B.C.'s trial level have extended these established principles to new factual scenarios:

1. A Plaintiff who sustained a psychiatric injury from viewing the death of the negligent driver who caused the accident could recover damages according to the principles laid out of *Devji*[45]. A plaintiff is not precluded from recovery simply because the defendant is the person killed in the accident[46].

2. A plaintiff who sustained psychological injury from viewing the other driver being injured and learning of the resulting death the next day met the requirements for an action in nervous shock[47].

Recently, the Ontario Court of Appeal was invited to reconsider the requirement of a recognized psychiatric illness. The plaintiff argued that psychiatric recognition of the plaintiff's loss ought not to restrict compensation for any genuine loss sustained through the negligence of another[48]. The Court upheld the trial Court's dismissal based on a lack of foreseeability and declined to consider the point raised by counsel. However, the Plaintiff bar will surely continue to press for judicial recognition - and compensation - for injuries falling off the psychiatrist's map.

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[44] *supra*, note 34.
[45] *supra*, note 41.
[46] *Schaffer* v. *Murphy* (22 March 2000), Kamloops No. 2711 (BCSC).
[47] *Falbo* v. *Coutts Estate* (9 March 2000), Vancouver No. B960916 (BCSC).
[48] *Vanek* v. *Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (CA)

Psychiatric damage is not foreseeable in law unless it is foreseeable that such damage could be suffered by a reasonable person. The law expects a reasonable degree of fortitude. The thin skull rule has no application until after liability has been established. In the reported cases, judges have determined what amounts to reasonable fortitude without reference to extrinsic evidence. Whether a Court will rely on expert evidence to make that determination in the future has yet to be seen[49].

D. FATAL ACCIDENT CLAIMS

Awards under the *Family Compensation Act* of B.C. are made for pecuniary losses, not for the loss of companionship or loss of love and affection of a child. The question arises as to whether this will change in the future.

The Trial Lawyers Association has recently announced that it will ask the provincial government to amend the Family Compensation Act to provide for awards of grief and loss of companionship. Statutes in other provinces, such as New Brunswick, allow damages for the loss of companionship of a child. Alberta's *Fatal Accidents Act* allows for awards for the loss of a child, spouse or parent, without family members having to prove pecuniary loss[50].

In Ontario, a claim for nervous shock is precluded by statute. However, a section of the *Family Law Act* provides that family members can recover pecuniary loss resulting from the death of a family member caused through the negligence of another. In *McCartney* v. *Warner*[51], the parents of a deceased child could no longer work as a result of the psychological injuries caused by the death of their child. The Court concluded that such lost income was recoverable pursuant to the *Family Law Act*. Prior to this decision, the parents would only have been able to recover pecuniary loss arising from the income earned by the deceased[52].

E. AWARDS FOR LOSS OF FUTURE INCOME AND/OR EARNING CAPACITY

Insurers and defence counsel both need to deal very carefully with awards for loss of future income and loss of earning capacity for 3 reasons:

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[49] Wright, Mary-Helen, *Claims for Nervous Shock*, Personal Injury & Fatality Cases, Damages CLE 2001.
[50] Wright, Mary-Helen. *Personal Injury & Fatality Claims*. CLE, Damages 2001.
[51] (2000), 183 D.L.R. (4th) 374 (Ont. CA)
[52] *Supra*, note 50

- income related damages often comprise the bulk of personal injury awards and therefore can involve large sums;

- courts and counsel often fail to properly distinguish between these damages, thus contributing to the uncertainty from a reserving perspective; and

- assessment of these damages always involves projections and prophesies and is therefore highly speculative.

Defence counsel need to take all steps possible to reduce the uncertainties of these awards in order to accurately estimate necessary reserves and to make fair and cost efficient settlement offers where necessary.

1. Nature of the Loss

It is important to note at the outset that these losses are distinct, and that a Plaintiff may be entitled to compensation for one or the other or both of them. This is true notwithstanding the large number of cases where these heads of damages are "rolled" into one amount.

2. Loss of Future Income

This loss is generally more quantifiable than lost earning capacity award. An injured Plaintiff is compensated for the income she would have earned in the future but for the accident.

Some very simple examples illustrate this head of damages:

(i) Plaintiff A has worked at Safeway for the past 20 years. Currently, he works 35 hours per week at $18.64 per hour. At trial, the court accepts that the Plaintiff will return to work 4 months from the date of trial at 16 hours per week, and will return to full-time work 8 months from the date of trial. Calculation of future loss of income is a simple matter in this case - the court will count the hours of work missed and compensate the Plaintiff accordingly.

(ii) Plaintiff B is an associate accountant in a large downtown accounting firm. Just prior to the accident (which was permanently disabling) the Plaintiff was earning $60,000 per year. Plaintiff B expected to be made a partner within 2 years of the accident. Both

Plaintiff and Defence counsel will tender expert evidence relating to the Plaintiff's expected career course and anticipated lifetime income. This award will be converted into present day value and the Plaintiff will be compensated accordingly.

(iii) Plaintiff C was the sole proprietor in a fledgling business just prior to the accident. Plaintiff C's injuries have reduced her abilities by 30%. Economic experts and/or business valuators may be required to assess the long term growth prospects of this business, and to assess what sort of income the Plaintiff may have seen. Plaintiff C will then be compensated for the business income that was lost due to the injury.

3. Loss of Earning Capacity

The Supreme Court of Canada has described earning capacity as a capital asset. Like any other asset, its value may well be distinct from the use to which we put it. For example, an individual working below his capacity would prefer to maintain the ability to work at a higher capacity. Another example is an individual who has two marketable skills, but whose current position utilizes only one of those skills. Certainly the loss of the other skill is a compensable loss to the Plaintiff.

As the British Columbia Court of Appeal noted in *Palmer* v. *Goodall (1991), 53 BCLR (2d) 44 [CA]:*

> *Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment.* ***He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability****.*
> [emphasis added]

British Columbia courts have listed and relied repeatedly on 4 factors for consideration in making this type of award. These are:

- has the Plaintiff been rendered less capable overall of earning income from all types of employment?

- is the Plaintiff now less marketable or attractive as an employee to potential employers?

- has the Plaintiff lost the ability to take advantage of all job opportunities that might otherwise have been available to her had she not been injured?

- is the Plaintiff less valuable to herself as a person capable of earning income in a competitive labour market?

Almost any injury that causes a permanent impairment or disability could support a claim for loss of earning capacity. Examples of the types of injuries that could support an award for loss of earning capacity are:

- head injury
- fractured leg/ankle
- aggravated disc degeneration
- knee injury
- shoulder impingement

Some examples of claims for lost earning capacity include:

(i) Plaintiff A works as a unionized data entry clerk. She loses her left leg in a boating accident. Her return to work 3 months after the accident coincides with her second anniversary in that position. Her seniority increases and she receives a 5% increase in salary. While Plaintiff A has no claim for future wage loss, and indeed is earning more money post-accident than pre-accident, Plaintiff A is entitled to compensation for lost earning capacity, since some occupations she may have wished to pursue are now foreclosed by the permanent disability.

(ii) Plaintiff B is a high school student who sustains a mild head injury. The Plaintiff is no less intelligent after the accident, but he now requires more time to perform simple mathematical and verbal functions. Certainly the Plaintiff is no longer as marketable for certain positions and he will therefore be unable to take advantage of every occupational opportunity. Presumably the Plaintiff is also less valuable to himself as a person capable of earning income in a competitive labour market.

In claims for catastrophic injuries to children or to adults not participating in the labour market, courts generally subsume loss of future income into loss of earning capacity by compensating the entire income claim by a payment for lost earning capacity.

4. Evidentiary Issues

The general caveat here is that this head of damages involves prophecy and "crystal ball gazing". In order to guide the outcome, and avoid unpleasant surprises, we advise that insurers and counsel pay close attention to the following matters.

5. Loss of Future Income and the Onus of Proof

In general, every plaintiff must prove his or her case on a balance of probabilities. For example, Plaintiff A must prove on a balance of probabilities that her temporomandibular disorder was caused by the motor vehicle accident for which she seeks damages. Plaintiff B must prove that, on a balance of probabilities, his inability to lift heavy objects was caused by the personal injuries he sustained in a fire.

Such is the standard of proof for deciding matters that have already happened. The standard of proof lowers to "simple probability" when the court turns its attention to future losses. Accordingly, Plaintiff B in the above example need only show the simple probability that he would have continued working as a roofer until his retirement at 65 in order to show his entitlement to the lost wages. He does not need to show on a balance of probabilities that he is significantly more likely to continue working than not.

6. Type Of Evidence

Courts abhor hypothetical evidence in all cases other than when the Plaintiff suffers catastrophic injuries as a child, or has absolutely no work history.

Counsel should narrow the factual field as much as possible when arranging for and submitting their expert reports. An example is in *Earnshaw v. Despins (1990), 45 BCLR (2d) 380 [CA]* where the B.C. Court of Appeal rejected the Plaintiff's hypothetical report as irrelevant and out-dated and wished instead for present average earnings of people living in the Plaintiff's geographical area in various occupations in which the Plaintiff may have been engaged but for his accident.

7. Calculation

Future wage loss is generally calculated by taking the following steps:

(i) determine the plaintiff's annual earnings at the time of the accident;

(ii) deduct from that amount any sum the plaintiff will likely earn after the trial;

(iii) multiply that figure by the number of years during which the diminished earnings will last;

(iv) discount the sum to arrive at a present value figure;

(v) apply positive and negative contingencies. For example, is it likely that the Plaintiff would have earned more from his employment absent the accident? Is it likely that the Plaintiff will die before the anticipated number of years runs out?

8. Important Issues That May Affect Calculation

What is the Plaintiff's family background? Are many members of the Plaintiff's family university educated or highly skilled? What career paths have the Plaintiff's siblings chosen? What steps had the Plaintiff taken with regard to career planning?

What occupational choices has the Plaintiff made? For example, in today's economy, a 22 year old Plaintiff who planned to become a logger will have a considerably bleaker earning projection than the same Plaintiff who had planned to become an occupational therapist or a computer programmer.

What sort of labour market participation rates apply to the Plaintiff's peer group? Are the Plaintiff's socio-economic and cultural co-horts participating in the labour market?

What sort of unemployment rates can we expect to affect workers in occupations similar to that of the Plaintiff?

Is it possible that the Plaintiff could become a voluntary or involuntary part-time worker? How will part-time work affect the Plaintiff's income projections?

Does the Plaintiff plan to live in a foreign country that has different standards of living and different average income levels?

Is the Plaintiff a member of a minority group that has historic legacy of lower earnings? Does the insurer want to factor disadvantage into its wage projections?

To what extent are wage tables appropriate for certain workers? For example, in the case of a 25 year old male Plaintiff who works for the City of Edmonton driving a disposal truck, using average incomes of 50 year olds in the same industry will likely yield a higher income than the Plaintiff would actually have earned. This is based on the expectation that low skilled jobs will not pay as well in the future as they do now.

9. Possible Objections To Expert Reports

Question the data on which the report is based. Is it up-to-date? Is it reliable? Is it geographically relevant?

Question the assumptions on which the report is based. The best report will be based on as few assumptions as possible. A cross-examination that raises serious doubts about the accuracy of the assumptions can disqualify the entire report.

Question the methods of valuation used. Arrange for the defence expert to review the plaintiff's report to suggest technical lines of questioning.

Question the discount rate applied. Note that discount rates are set by statute in British Columbia, but in Alberta the discount rate is a matter of some discretion.

Loss of Earning Capacity and the Onus of Proof

The same "simple probability" standard of care applies to proving loss of earning capacity as applies to proving future loss of income.

This "simple probability" standard is lower than the "balance of probabilities" standard that the Plaintiff must satisfy when proving events that have already occurred.

10. Type Of Evidence

The Plaintiff must prove that she has been permanently disabled or impaired as a result of the accident, and that such disability or impairment will affect her employability.

Generally, only expert medical evidence will suffice to prove this permanent impairment.

11. Calculation

In most cases, the court will consider the type of disability and how it could potentially affect the Plaintiff's future occupation, and will fix on an arbitrary figure (literally

plucked out of the air) with which to compensate the plaintiff. In other cases, courts have suggested methods of calculation.

In *Brown* v. *Golaiy, unreported, (December 13, 1985) BCSC*, the Court awarded the equivalent of one year pre-accident income to the Plaintiff.

In *Steenblock* v. *Funk, (1990), 46 BCLR (2d) 133*, the Court awarded the Plaintiff (who was near retirement) the difference between his pre- and post-accident income from the date of trial until the date of projected retirement. Interestingly, the Court reduced this award by 20% on the contingency that the condition may prove to be reversible. Insurers may wish to put forward this argument in an attempt to keep this award down.

Other methods of calculating the loss of earning capacity award include figuring the present value of the annual projected income loss for each year of employment post-accident, awarding one or two years full annual income, and awarding present value of some nominal percentage loss per year. It appears that, since there can never be any "hard and fast" evidence as to the future, each approach is equally arbitrary. Such was the implication in *Pallos* v. *ICBC, [1995] B.C.J. No. 2, Vancouver Registry No. CA014230.*

Note that although the Plaintiff must prove on a balance of probabilities that her disability or impairment is permanent (since it has already occurred), the Plaintiff is not required to prove on a balance of probabilities the *extent* to which her work capacity will be compromised.

Would a reduction be possible based on the contingency that the disability or impairment could prove not to be permanent?

Should the award for loss of future earning capacity be lowered somewhat in the case of a middle-aged professional Plaintiff who had planned to continue in the same sedentary position until retirement and who sustained a permanent impairment of his knee such that he could not longer bend, lift, and carry objects without pain and discomfort? Is even "simple probability" satisfied in this case where there is absolutely no reason to believe that the Plaintiff would ever pursue a manual labour occupation?

Table 1: Examples Of Actual Awards For Loss Of Earning Capacity

CASE	AGE	SEX	INJURIES	AWARD
Brown v. Golaly unrep'd, BCSC (December 13, 1985)	31	M	- fracture in right knee - unable to continue pre-accident occupation as truck driver	$20,000
Pallos v. *ICBC* unrep'd, BCSC (January 3, 1995)	34	M	- one leg 1 cm. shorter than the other due to fracture, residual pain and weakness with stairs, climbing, heavy lifting - **earning more money post-accident in same job as pre-accident**	$40,000
Palmer v. *Goodall* (1991), 53 BCLR (2d) 44 (CA)	31	M	- fibromyalgia resulting from motor vehicle accident, plaintiff unable to complete repetitive lifting - post-accident working at lighter job, earning less money - court finding no evidence that Plaintiff unable train for an equally remunerative career (therefore declining to compensate future loss of income)	$150,000
Nelson v. *Kanusa* unrep'd, BCSC (May 1, 1995)	unstated	F	- moderately severe head injury with typical changes to personality, cognitive abilities, memory, emotionality - still working at previous job post-accident and **earning more money than pre-accident**	$50,000
Steenblock v. *Funk* (1990), 46 BCLR (2d) 133 (CA)	40	M	- injuries to neck and back from a motor vehicle accident - earning less money post-accident as a security guard than pre-accident as a raker on a paving crew	$150,000

CASE	AGE	SEX	INJURIES	AWARD
Moore v. Smith (1992), 2 ALR (3d) 242 (ABQB)	18	M	- permanent injury to left lower leg sustained in motorcycle accident - partial disability to perform heavy labour - little education, working as general labourer at time of loss	$20,000
Gamache v. Basaraba (1993), 7 ALR (3d) 219 (ABQB)	unstated	M	- spinal injury sustained in motor vehicle accident resulted in permanently limited range of motion - impairment expected to influence employment prospects for 12 years whereupon the plaintiff would have sufficient seniority and experience that the disability should no longer affect earning capacity	$36,000
McDonald v. Nguyen (1991), 3 ALR 27 (ABQB)	40	F	- head injury and some disfigurement resulting from head-on motor vehicle accident - plaintiff permanently slower, more emotional, more irritable, less able to handle multiple stimuli - plaintiff unable to work as a teacher - income loss subsumed under award for loss of earning capacity.	$599,000

CASE	AGE	SEX	INJURIES	AWARD
Fobel v. *Dean* (1991), 9 CCLT (2d) 87 (SKCA)	58	F	- permanent pain resulting from motor vehicle accidents - functioning at 30% of pre-accident capacity - calculated at 70% of income plaintiff would have earned but for the accident, multiplied over the number of years the plaintiff would have worked	$115,716.40
Resendes v. *Boutros*(1989), 2 CCLT (2d) 275 (ONHC)	24	M	- severe facial injuries including disfigurement, permanent sinus pain, and heightened risk of fatal infection - permanent residual disability	$30,000
Giannone v. Weinberg (1989), 68 OR (2d) (CA)	43	F	- permanent back injuries sustained in rear-end motor vehicle accident - pre-existing back problems - 25% reduction of trial award for loss of earning capacity	$349,947
Graham v. Rourke (1990), 75 OR (2d) 622 (CA)	6	F	- plaintiff lost right forearm (dominant hand) - future income loss subsumed into award - 75% loss of earning capacity	$342,532

F. OTHER POINTS OF INTEREST OR 'ONES TO LOOK OUT FOR'

Recent court decisions highlight the ever-evolving tension between the plaintiff bar's efforts to maximize recovery for their clients and the defense bar's efforts to reduce an insurer's exposure. Some recent examples follow:

1. The assessment of damage awards for management fees and tax gross-ups are to be made on the amount of damages awarded for future losses, without

deduction for the Plaintiff's legal costs or other expenditures which may be made from the amounts recovered.

Townsend v. Kroppmanns, [2002] B.C.J. No. 1287 (BCCA).

2. An award of equitable interest is not appropriate beyond a limited category of property claims.

K.L.B v. British Columbia, [2001] B.C.J. No. 584 (BCCA), leave to appeal granted December 6, 2001.

3. Social assistance benefits cannot be deducted frpom an award for past loss of income as the receipt of those benefits does not result in double recovery.

M.B. v. British Columbia, [2001] B.C.J. No. 390 (BCCA), leave to appeal granted April 29, 2002.

4. The "replacement cost" approach to the assessment of lost housekeeping capacity has been expressly favoured over the "opportunity cost" approach.

McTavish v. MacGillivray, [2000] B.C.J. No. 507 (CA)