

**DOLDEN**

**WALLACE**

**FOLICK** LLP

# GAZING INTO THE CRYSTAL BALL: AWARDS FOR LOSS OF FUTURE INCOME AND LOSS OF EARNING CAPACITY

*Eric A. Dolden*

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18th Floor – 609 Granville St.  
**Vancouver, BC**  
Canada, V7Y 1G5  
Tel: 604.689.3222  
Fax: 604.689.3777

308 – 3330 Richter Street  
**Kelowna, BC**  
Canada, V1W 4V5  
Tel: 1.855.980.5580  
Fax: 604.689.3777

850 – 355 4th Avenue SW  
**Calgary, AB**  
Canada, T2P OJ1  
Tel: 1.587.480.4000  
Fax: 1.587.475.2083

500 – 18 King Street East  
**Toronto, ON**  
Canada, M5C 1C4  
Tel: 1.416.360.8331  
Fax: 1.416.360.0146

## CONTACT LAWYER

**Eric Dolden**

604.891.0350  
edolden@dolden.com

## TABLE OF CONTENTS

I.	INTRODUCTION - A PRACTICAL APPROACH.....	3
II.	DEFINITIONS .....	3
	a) Loss of Future Income: .....	3
	b) Loss of Future Earning Capacity: .....	4
	c) Contingencies: .....	4
III.	LEGAL BUILDING BLOCKS.....	4
	a) The Capital Asset Approach .....	4
	b) The Real or Substantial Possibility Approach .....	5
	c) Degree of Impairment .....	6
	d) The Evidentiary Burden.....	7
	e) Assessment of Damages.....	8
	f) Loss of Capacity Claim where No Loss of Income .....	9
	g) The Chosen Profession and Lifestyle Considerations .....	10
IV.	TYPES OF PLAINTIFFS .....	11
	a) Infant Claims .....	11
	b) Young Adults.....	11
	c) Adults with Sporadic or no Work History .....	12
	d) Adults with Stable Work History .....	13
	e) The Soon to Retire Worker .....	13
	f) Non-Traditional Employment.....	14
	g) Coping with Injuries.....	14
	h) Male vs. Female Plaintiffs .....	15
	i. British Columbia .....	15
	ii. Alberta .....	15
	i) Fatalities.....	15
V.	CONTINGENCIES.....	16
VI.	HANDLING THE CLAIM - THE DEFENCE PERSPECTIVE .....	17
	a) Process for Investigation.....	17
	b) Documentary Evidence .....	18

<i>i.</i>	Medical Records .....	18
<i>ii.</i>	Education Records .....	19
<i>iii.</i>	Social Service Records, Criminal Records, Information Pertaining to "Police Contact" .....	19
<i>iv.</i>	Work History, Employment Records, Income Records and Business Records .....	20
c)	Interviews of Collateral Witnesses .....	20
d)	Experts .....	21
VII.	CHECKLIST OF QUESTIONS .....	22
a)	Family Background.....	22
b)	Educational Goals .....	22
c)	Family Goals .....	23
d)	Career Goals.....	23
e)	Lifestyle .....	23
f)	Other .....	23
VIII.	CONCLUSION.....	24
IX.	APPENDIX "A" CASE AND AWARD SUMMARIES.....	1

## I. INTRODUCTION - A PRACTICAL APPROACH

The purpose of this paper is to provide guidelines for claims examiners when dealing with claims that involve damages for loss of future earning capacity. The paper offers a practical approach to the problems examiners face in dealing with these often large awards, including guidelines to calculate an insurer's potential exposure to an award at trial or mediation. We will describe the legal foundations, or building blocks, for the awards that Courts have made, and are likely to make in the future under this heading of damages. We will then discuss the established case law in British Columbia and Alberta to identify the trends in more recent cases. Many of the leading cases are from the Court of Appeal in British Columbia and these cases are cited with approval in the Alberta Courts.

When a Court makes an award for loss of future earning capacity, it is attempting to compensate victims of tort claims who have suffered injuries which will impair *the capacity* to earn income in the future. The object sought is full compensation; the goal is to put the injured party back in the position that he or she would have enjoyed if the accident had not occurred, so far as money will allow.<sup>1</sup>

This topic is critical to claims examiners for many reasons. First, the awards are notoriously large (especially in the case of severe, permanent disability) and reserves must be appropriately set. Second, much of the assessment requires speculation. In other words, the Courts will make an "educated guess", using some defined variables, as to what will happen in the future. If examiners understand the variables and have a foundation of legal building blocks, some of this guesswork is eliminated. Be warned however, the leading decisions are from the appellate Court; lower Court judges are often overturned when it comes to assessing damages under this heading of compensation.

## II. DEFINITIONS

As part of the primer, some basic definitions are helpful to interpret the judgments.

### A) LOSS OF FUTURE INCOME:

An award for loss of future income compensates a Plaintiff for earnings that he would have had, had he not been injured. This is a quantifiable sum, based on actuarial or expert labour-economic evidence. The starting point is the difference between the

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<sup>1</sup> *Engel v. Salyn* (1993), 99 D.L.R. (4th) 401 (S.C.C.) as quoted in *Olson v. General Accident Assurance Co. of Canada* (1988), 218 A.R. 310, [1988] A.J. No. 544 (Q.B.).

amount the Plaintiff will make in light of his or her injuries, and the amount he or she would have made but for the accident.

## **B) LOSS OF FUTURE EARNING CAPACITY:**

Simply put, these damages are not to replace lost income. It is not the earnings that are being calculated; it is the *capacity* itself to earn that has been lost, and must be quantified. Loss of future earning capacity has been described as an asset in various cases (see below); whatever its description, the Courts are trying to measure a type of future economic loss. Loss of future earning capacity is sometimes also referred to as “loss of opportunity.” Quite often, counsel confuse this term with an award for loss of future income.

## **C) CONTINGENCIES:**

In assessing a claim for loss of future earning capacity a Court will consider the factors which may operate to decrease or increase the predicted loss of earnings.<sup>2</sup> These factors are called contingencies and can be negative or positive. For example, negative contingencies can include labour market variables such as non-participation in the work force, due to child-care, unemployment or part-time work. Examples of positive contingencies include a Plaintiff’s aptitude for work or his high “rehabilitation goals” after the accident. Contingencies are discussed in more detail in Section 5 below.

## **III. LEGAL BUILDING BLOCKS**

Examiners should remember that the basic mandate of the Courts in making an award for damages for loss of future earning capacity is threefold: a) to make a fair assessment to both the Plaintiff and the Defendant; b) to consider all of the relevant factors; and c) to make a reasonable award in comparison to other cases.<sup>3</sup>

The cases below provide the legal foundation for claims for loss of future earning capacity. Many are appellate court decisions with long-standing precedent.

## **A) THE CAPITAL ASSET APPROACH**

The Supreme Court of Canada has stated that the loss of future earning capacity is equal to the loss of an “asset”. It is this “asset” that the Courts will value at a trial; it is this “asset” that an examiner (and defence counsel) must attempt to value beforehand.

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<sup>2</sup> L.D. Rainaldi, ed., *Remedies in Tort* (Carswell/Thomson Professional Publishing) Vol. 4, c. 27, paragraph 76.

<sup>3</sup> *Friesen v. Pretorius Estate* (1997), 92 B.C.A.C. 232, 150 W.A.C. 232, 37 B.C.L.R. (3d) 255, 40 C.C.L.T. (2d) 72 (C.A.).

As Dickson J. stated in the Supreme Court of Canada case of *Andrews et al v. Grand & Toy Alberta Ltd. et al*:

We must now gaze into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but rather loss of earning capacity of which compensation must be made: *The Queen v. Jennings*, supra. A capital asset has been lost: what was its value?<sup>4</sup>

In the 1985 benchmark case of *Brown v. Golaiy*, a case still relied on today, the B.C. Supreme Court listed four questions to ask to start the assessment process:

1. Has the Plaintiff been rendered less capable overall from earning income from all types of employment?
2. Is the Plaintiff less marketable or attractive as an employee to potential employers?
3. Has the Plaintiff lost the ability to take full advantage of all job opportunities which might otherwise have been open to him, had he not been injured? and
4. Is the Plaintiff less valuable to himself as a person capable of earning income in a competitive labour market?<sup>5</sup>

The Court recognized that the “asset” being assessed would vary from case to case. The four factors listed above are *not* exhaustive; they may not even be a necessary precondition to the assessment but provide a good starting point.

## **B) THE REAL OR SUBSTANTIAL POSSIBILITY APPROACH**

What standard of proof must the Plaintiff meet in presenting evidence that his injuries will, or are likely to, impair his future earning capacity? The Alberta Court of Appeal has recently stated:

The proof need not be that the future loss will likely occur, but that there is a “real and substantial possibility and not mere speculation” that the loss will occur: *Athey*, supra at 470; *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.) at 12-13.<sup>6</sup>

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<sup>4</sup> (1978), 83 D.L.R. (3d) 452, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 2 S.C.R. 229, at page 251.

<sup>5</sup> *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at paragraph 8.

<sup>6</sup> *MacCabe v. Westlock Roman Catholic Separate School District No. 110* 2001 ABCA 257, [2002] 1 W.W.R. 610, 293 A.R. 41, 257 W.A.C. 41, 96 Alta. L.R. (3d) 217, 9 C.C.L.T. (3d) 259, 1 W.W.R. 610, [2001] A.J. No. 1278.

The phrase “gazing into the crystal ball” is an appropriate analogy for determining damages under this head of compensation. Obviously, events which may, or may not, happen in the future cannot be determined using the usual burden of proof for proving past events on the balance of probabilities. Instead the trier of fact will ask, is there “a real or substantial possibility” that the Plaintiff will earn less money (in other words, suffer an economic loss) in the future, than he or she would have, absent the accident?<sup>7</sup> If so, an award for damages for loss of future earning capacity will be made. If not, no award will be made.<sup>8</sup> The Court will decline to make an award for future loss of earning capacity where, on the facts, to do so is too speculative. Where there is a reasonable chance that the future loss will occur (i.e. the “real and substantial possibility” test), the Court will proceed with its assessment.<sup>9</sup> It is a general principle that a Plaintiff should not be compensated for a loss that is not likely to happen.

The capital asset approach and the real or substantial possibility approach are not mutually exclusive; they are simply different ways of attempting to assess the same thing, namely future economic loss. Both arguments can be advanced at trial as alternative methods of assessment.<sup>10</sup>

### C) DEGREE OF IMPAIRMENT

A threshold issue for the Courts to decide before awarding damages for loss of future earning capacity is the degree to which the Plaintiff has been disabled by the accident from earning income in the future. There must be an impairment to be redressed.<sup>11</sup> The disability or impairment can be either physical, mental or even emotional (such as a low self-esteem as a result of facial disfigurement, or loss of the competitive “edge”), or it may be a combination of the three. In many cases, the impairment will not be total; the Plaintiff will be able to return to work, albeit in a limited or different capacity from pre-accident employment. However, the impairment must have some degree of permanency.

Under this heading of damages, the Plaintiff will be compensated if he encounters problems with returning to his old job, or loses a promotion as a result of his impairment. Likewise, he will be compensated if he needs to find new employment as a result of his impairment. That is because his “asset” of capacity to earn income has been limited.

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<sup>7</sup> *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.)

<sup>8</sup> C. Morton “*Polishing the Crystal Ball – Claims for Loss of Future Earning Capacity*” (1998) 56 Advocate 43, at page 44.

<sup>9</sup> *Davidson v. Patten* 2004 ABQB 679.

<sup>10</sup> *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260, [1995] 3 W.W.R. 728, 53 B.C.A.C. 310, 87 W.A.C. 310 (C.A.).

<sup>11</sup> *Palmer v. Goddall* (1991), 53 B.C.L.R. (2d) 44, 1991 CarswellBC 5 at paragraph 61 (C.A.), leave to appeal to S.C.C. refused (1991), 54 B.C.L.R. (2d) xxxiv, 135 N.R. 160.

As the B.C. Court of Appeal stated:

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.<sup>12</sup>

At the time of the trial, if there is no proof that the Plaintiff is presently disabled from his chosen profession or from any other type of employment for which he might be reasonably suited, there will be no award for loss of future earning capacity (or for other future employment related losses, such as the loss of a pension).<sup>13</sup> Even if there is medical evidence that the Plaintiff will likely suffer flare-ups of pain in the future, the Courts may find this to be insufficient to justify an award for loss of future earning capacity.<sup>14</sup>

#### **D) THE EVIDENTIARY BURDEN**

It is the Plaintiff that carries the burden of proving on the evidence submitted that he or she has a claim for loss of future earning capacity. In the Alberta Court of Appeal case of *Lowe v. Larue*,<sup>15</sup> the Court found that the Plaintiff did not prove that she would suffer any loss of income in the future as a result of her injuries, and there was no basis in law or evidence for an award for loss of opportunity (in other words, loss of earning capacity) as a result. The Court said:

The authorities cited support the principle that where a future loss of earning capacity has been established as at least a reasonable possibility, and not mere speculation, the loss of a chance or an opportunity to earn a certain level of income in the future may be taken into account in calculating the loss of future income, a loss which may otherwise be difficult or impossible to assess. There is no principle ...that permits an award for loss of an opportunity or loss of a chance to earn income in the future notwithstanding the failure to show the injury is likely to cause such a loss, much less where ... there has been a clear and specific finding of fact that the respondent would suffer no future income loss attributable to the injury.<sup>16</sup>

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<sup>12</sup> *Ibid.*, at paragraph 25.

<sup>13</sup> *Bonner v. Baiky* 1997 CarswellBC 584 (S.C.).

<sup>14</sup> *Campbell v. Makela and Mundy* 2003 BCSC 634.

<sup>15</sup> (2000), 76 Alta. L.R. (3d) 9, [2000] 4 W.W.R. 197, 250 A.R. 220, 213 W.A.C. 220, 4 W.W.R. 197, [2000] A.J. No. 55 (C.A.).

<sup>16</sup> *Ibid.*, at paragraph 51.



In other words, the Plaintiff must prove as fact that he will suffer a loss of income earning capacity in the future as a result of the injury. The Plaintiff must put forth different types of evidence to meet the burden of proof, including:

1. medical evidence that the Plaintiff has a diminished capacity to earn income in the future, and if so, the extent to which the ability is diminished; or failing that
2. medical evidence of partial permanent physical disability which will have an effect on capacity to work or on employability, even if the Plaintiff earns more than he did before the accident.

Another factor to consider is mitigation, which is discussed in more detail at section g) below.

## **E) ASSESSMENT OF DAMAGES**

The B.C. Court of Appeal summarized the approach to be taken to assess damages for loss of future earning capacity:

The trial judge's task was to assess the appellant's lost earning capacity, not to provide insurance for loss of a job. While evidence of the value of the income stream from full time employment is fundamental ... it cannot be determinative. The trial judge must gaze into the future with the benefit of all the evidence to assess two uncertainties: what might have been and what might be. Both require an assessment of the physical, emotional, and mental capacity of a claimant, of his character, of the family, community and economic forces at work.<sup>17</sup>

To begin with, the Courts will review the track record of the Plaintiff's previous earnings from employment pre-accident. This is not the only factor to be taken into account, but it is a good starting point. There are different means to assess how the income stream will be affected in the future, and how to compensate the Plaintiff:

1. Postulate a minimum annual income loss for the Plaintiff's remaining years of work, multiply the annual projected loss by the number of years remaining, and calculate a present value of this sum; or
2. Award the Plaintiff's entire annual income for one or more years; or

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<sup>17</sup> *Bradley v. Dymond* 2002 BCCA 284, 169 B.C.A.C. 243, 276 W.A.C. 243, 2002 CarswellBC 1550 at paragraph 9.

3. Award the present value of some nominal percentage loss per annum applied against the Plaintiff's expected annual income.<sup>18</sup>

The Courts have acknowledged that all of these methods are equally arbitrary. However, the difficulty of making a fair assessment of damages does not relieve the Court of its duty to do so.<sup>19</sup>

Valuation of damages for loss of future earning capacity is not a matter of strict mathematical calculation based on existing formulae, nor is it strictly based on income levels before and after the accident. It is an assessment of damages. It is *not* a computation. The Appeal Courts of both provinces agree; mathematical certainly is impossible in virtually all cases. A Judge must make an estimate using the evidence (including contingencies) made available to him by counsel arguing the case. The Courts have acknowledged that this is more of an art than a science.<sup>20</sup>

Practically speaking, a formula is rarely applied by the Courts. Rather, the awards tend to be global, lump sum figures. The B.C. Courts have been known to apply what they describe as the "one year rule", reflecting one year of the Plaintiff's pre-accident income.

#### **F) LOSS OF CAPACITY CLAIM WHERE NO LOSS OF INCOME**

Even if the Plaintiff does not prove a loss of future income, an award may still be made for lost capacity to earn income, even if the Plaintiff has no history or track record of employment. In the Alberta Court of Appeal case of *Foo-Fat v. Ahmed*,<sup>21</sup> a 12-year old promising musician who suffered a back injury after a car accident was awarded damages to represent the "loss of opportunity" of two years. The Court of Appeal did not accept that the young Plaintiff "lost" three years of musical practice, and would not award any monetary loss for these "lost" years.<sup>22</sup>

What if there is no loss of income between the date of the accident and the trial? The basic principle is worth repeating; it is not loss of earnings, but loss of earning capacity which is to be compensated. Even though an injured person may continue his or her employment, the injured person is still entitled to be compensated for the loss of capacity, if it is proven to be attributable to the injuries suffered as a result of the accident.<sup>23</sup>

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<sup>18</sup> *Supra*, note 10 at page 271.

<sup>19</sup> *Supra*, note 10 at page 271.

<sup>20</sup> *Morris v. Rose Estate*, (1996) 75 B.C.A.C. 263.

<sup>21</sup> (1988), 57 Alta L.R. (3d) 388, 208 A.R. 218, [1988] 6 W.W.R. 517 (C.A.).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Andrews et al v. Grand & Toy Alberta Ltd. et al, supra*, note 4.

## G) THE CHOSEN PROFESSION AND LIFESTYLE CONSIDERATIONS

What if a Plaintiff, after a life-changing accident, decides not to re-locate to find better opportunities? Likewise, what if the Plaintiff decides not to retrain to a different profession than the job he held before? In these cases, the Courts have determined that the Plaintiff is *not* entitled to be compensated for losing the exact occupation he held before the accident. The B.C. Court of Appeal has stated:

A Plaintiff is not entitled at the cost of the Defendant to say “The only sort of work I like is such and such. I cannot do that. Therefore you must give me sufficient capital to replace the income I cannot earn on that sort of job”.<sup>24</sup>

The Plaintiff has a duty to mitigate damages by seeking work that can be pursued in spite of the injuries suffered. If the Plaintiff is unable to work at his former occupation, he must, within post-accident abilities, or pursue additional training or education to qualify him for a different job. If the Plaintiff claims he is not able to mitigate by pursuing other lines of work or retraining, this must be proven on a balance of probabilities.<sup>25</sup> As part of the assessment process, a trier of fact will take into account the Plaintiff’s potential to retrain (in other words, mitigate) to other occupations in other areas.

Similarly, the Plaintiff is *not* entitled to damages from the Defendant for loss of future earning capacity if he decides not to relocate after the accident to find better work opportunities, and instead decides to stay in his hometown.<sup>26</sup> In these circumstances the Courts have decided that:

[t]he assessment of damages for loss of earning capacity cannot be affected by the choice of the injured person as to the quality of life. Such considerations, including stress on a marriage caused by having to re-locate to find suitable employment, is more relevant to the assessment of damages for non-pecuniary loss than to the question of impaired earning capacity. ...[W]hat the respondent wanted to do was irrelevant to the determination of the degree of impairment of earning capacity caused by the accident and the amount to be awarded for that impairment.<sup>27</sup>

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<sup>24</sup> *Palmer v. Goodall*, *supra*, note 11 at paragraph 62.

<sup>25</sup> *Parypa v. Wickware* (1998), 45 C.C.L.T. (2d) 71, 65 B.C.L.R. (3d) 155 (C.A.).

<sup>26</sup> *Friesen v. Pretorius Estate* (1997), 92 B.C.A.C. 232, 150 W.A.C. 232, 37 B.C.L.R. (3d) 255, 40 C.C.L.T. (2d) 72 (C.A.).

<sup>27</sup> *Ibid.*, at paragraphs 37 - 38.

## IV. TYPES OF PLAINTIFFS

Above we laid out the legal foundations to illustrate the general approach the Courts will take in B.C. and Alberta when assessing an award for loss of future earning capacity. Below are cases to illustrate these principles at work. The case review is not exhaustive; however, we want to provide a survey of how the Courts have treated different types of Plaintiffs in both provinces. Precedents from the B.C. and Alberta appellate courts are often cited with approval in both jurisdictions. For ease of reference, the cases from this section (plus a few additional cases) are summarized in chart form at Appendix A.

### A) INFANT CLAIMS

Since the assessment of damages for loss of future earning capacity involves predicting future events, this task is made much more difficult when the Plaintiff is an infant with no established pattern of education or earning from which to make a projection.<sup>28</sup> An infant cannot undergo vocational or ability testing. Courts in this case will review and analyze statistical data for the hypothetical average worker, and will also look to the infant's family's occupational and educational pattern.

Even if the Plaintiff is very young, regard must be had to age, sex, background, education and all the general contingencies such as labour force participation or child bearing potential. For instance, Courts will more often look to the parents' or siblings' level of education, among other things, to determine what the Plaintiff may have achieved. In the case of a catastrophically injured 3-month old, the Court in Alberta looked at both the level of education achieved by both the natural parents *and* the step-father, who was a primary care-giver, to make its assessment.<sup>29</sup>

When dealing with infant claims, the Alberta Court of Appeal has stated that Canadian Courts can apply male statistics, regardless of the actual gender of the Plaintiff, when awarding damages for loss of future earning capacity to a catastrophically injured infant with no opportunity to express a view on the course his life might have taken.<sup>30</sup>

### B) YOUNG ADULTS

Where the Plaintiff has not yet embarked on a career, and is partially disabled, the damages award for loss of future earning capacity can take into account delay in

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<sup>28</sup> *MacCabe v. Westlock*, *supra*, note 6, at paragraph 123.

<sup>29</sup> *Brown (Next Friend of) v. University of Alberta Hospital* (1997). 33 C.C.L.T. (2d) 113, [1997] 4 W.W.R. 645, 48 Alta L.R. (3d) 1 (Q.B.).

<sup>30</sup> *MacCabe v. Westlock*, *supra*, note 6, at paragraph 122.

entering the workforce. When the Plaintiff is permanently disabled as a young adult the Court will have to determine what career the Plaintiff would have chosen, based on any pre-accident training or inclinations to a specific career path. For example, where a Plaintiff was interested in computers before the accident (but had never worked), the Court assessed his claim for lifetime loss of future earning capacity based on a career as a computer operator and analyst at \$400,000.<sup>31</sup>

In *Ayles (Guardian ad litem of) v. Talastasin*,<sup>32</sup> a student with debilitating headaches developed coping strategies to maintain his grades and continued his pre-accident involvement with sports. The B.C. Court of Appeal stated that it was not clear if the coping strategies at school would be compatible with a regular working situation and more than tripled a lower-court ruling for loss of future earning capacity. Quoting the four factors from *Brown v. Golaiy* (supra), the Court found that the Plaintiff might be less marketable or attractive as an employee and less valuable to himself as an income earner as a result of his headaches to justify an award of \$150,000.<sup>33</sup>

In *O'Brien (Guardian ad litem of) v. Anderson*<sup>34</sup> the B.C. Court of Appeal stated that a student's below-average academic and employment history had to be taken into account in assessing damages for loss of earning capacity. This was a specific contingency, to consider against the Plaintiff's troubles holding down a regular job after the accident. Yet, the Court awarded the Plaintiff \$545,000 for loss of future earning capacity.

### C) ADULTS WITH SPORADIC OR NO WORK HISTORY

In dealing with claims for loss of future earning capacity, a Plaintiff's past earnings are a significant factor that must be considered. The assessment is made more difficult if there is no work history, a very sporadic work history, or a reliance on unemployment insurance benefits. The B.C. Court of Appeal has stated that in the absence of a proven track record, no level of earnings can be treated as a certainty. For instance, in the case of a young lawyer injured only two months after being admitted to the bar, the Court could not say with certainty where the career would take him.<sup>35</sup> In the case of *Papyra v. Wickware*, the B.C. Court of Appeal stated:

...perhaps the factor most difficult to overlook is the appellant's sporadic work history...While past work history is not determinative of what will occur in the

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<sup>31</sup> *Chiu (Guardian ad litem of) v. Chiu* 2002 BCCA 618, 8 B.C.L.R. (4th) 227.

<sup>32</sup> 2000 BCCA 87, 73 B.C.L.R. (3d) 60, 217 W.A.C. 183, 133 B.C.A.C. 183, [2000] B.C.J. No. 245, 2000 CarswellBC 240.

<sup>33</sup> *Ibid.*

<sup>34</sup> 2000 BCCA 460, 142 B.C.A.C. 45, 233 W.A.C. 45.

<sup>35</sup> *Reilly v. Lynn* 2003 BCCA 49, 14 C.C.L.T. (3d) 1, 178 B.C.A.C. 69, 10 B.C.L.R. (4th) 16.

future, it is a significant factor to consider when estimating the likelihood of what would have happened in the future but for the accident.<sup>36</sup>

In that case, the Court concluded that the Plaintiff would only have worked part-time even if the accident had not occurred, and reduced the award for loss of future earning capacity on this conclusion.

#### **D) ADULTS WITH STABLE WORK HISTORY**

Many considerations arise when dealing with a Plaintiff with an established career path. It is worth repeating that the Plaintiff's earning history is a key factor in the assessment of the award for loss of capacity; it follows that the longer the track record, the more evidence the Court or trier of fact has on which to base its award. In general, the older the Plaintiff, or perhaps, more accurately, the better established the Plaintiff is in his or her pre-injury career, the more actuarial evidence will be relied upon by the Court.<sup>37</sup>

In the 2004 case of *Davidson v. Patten*,<sup>38</sup> the Court was faced with the case of a trained linesman who had been laid off before his accident due to an economic downturn and took another job as a concrete finisher. Evidence was presented that the Plaintiff would have eventually been re-employed as a lineman in a more favourable marketplace soon after the accident. Instead of using the Plaintiff's employment at the time of the accident, the Court based its award for loss of future earning capacity on the assumption that the Plaintiff would have returned to his old, and more profitable, profession.

#### **E) THE SOON TO RETIRE WORKER**

In *Olson v. General Accident Assurance Co. of Canada*,<sup>39</sup> a 57-year old man was struck by a car and suffered severe injuries. Prior to the accident, the Plaintiff had no plans to retire. Despite a lack of certainty, the Court of Appeal found that the Plaintiff would be forced to retire at age 61 (and that there was no certainty he would have retired at age 65 in any event). The Court awarded a sum that reflected the fact that the Plaintiff had lost his capacity to earn, including his "competitive edge", even though he kept working at a steady rate right up to the trial. The Court re-calculated the quantum to reflect a loss over the four years from age 61 (when he might have retired) to age 65. In summary, the Court decided that it would forecast *when* there would be a loss in future capacity, i.e. after age 61 until age 65.

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<sup>36</sup> *Parypa v. Wickware*, *supra*, note 25, at paragraph 75.

<sup>37</sup> C. Morton "Polishing the Crystal Ball – Claims for Loss of Future Earning Capacity", *supra*, note 8, at page 47.

<sup>38</sup> 2004 CarswellAlta 1323 (Q.B.).

<sup>39</sup> 2001 ABCA 91, 281 A.R. 327, 248 W.A.C. 327, [2001] A.J. No. 414, 2001 CarswellAlta455.

## F) NON-TRADITIONAL EMPLOYMENT

In assessing damages for loss of earning capacity, the self-employed Plaintiff presents a particular challenge to the trier of fact because the Plaintiff may contribute many intangible elements to the business, including entrepreneurialship. As well, the risks involved in running a business may constitute a strong contingency factor and must be balanced by evidence of the profits already earned, or the potential to do so.

In the case of *Rowe v. Bobell Express Ltd.*<sup>40</sup> an older, “self-made” millionaire had already sold off the dude-ranch he had built up over his lifetime. He was not formally employed by the company, nor paid a wage or salary; instead he received payments on a monthly basis as repayment of the “debt” the company owed to him. The Court determined that even though he was not receiving a salary from the company at the time of the accident, the Plaintiff’s earning capacity was a capital asset of the company and it had been impaired as a result of his injuries.

What if the Plaintiff is self-employed at the time of the accident, continues to work (albeit fewer hours) and the business still improves its performance? In the case of *Holder v. Maclean*<sup>41</sup> the Court determined there was no real or substantial possibility that the entrepreneur would suffer a future loss of income earning capacity and stated:

... Many factors aside from the plaintiff’s ability to work would bear on the performance of the company. There is no basis for determining how, or even if, more time worked by the plaintiff would have produced higher personal earnings or increased shareholder value.<sup>42</sup>

## G) COPING WITH INJURIES

Some Plaintiffs cope better with their injuries or disabilities than others. A Plaintiff who mitigates his damages by developing coping strategies is still entitled to an award for loss of future earning capacity.

In the case of a young man who was able to continue to do well at school despite a fractured back, the B.C. Court of Appeal ruled that the Plaintiff would still be less valuable as an income earner in the future:

The fact that the Plaintiff has developed certain coping strategies and in doing has been able to maintain his academic standing and sporting involvement, does not diminish the difficulties imposed by such strategies. In particular it is not

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<sup>40</sup> *Rowe v. Bobell Express Ltd.* 2005 BCCA 141, 39 B.C.L.R. (4th) 185, 2005 CarswellBC 560.

<sup>41</sup> *Holder v. MacLean* 2001 CarswellBC 2367, 2001 BCSC 1474 at paragraph 31.

<sup>42</sup> *Ibid.*, at paragraph 31.

clear that these strategies would be compatible with a regular working situation  
...the evidence establishes beyond question the plaintiff will be less marketable  
... and consequently less valuable to himself ...<sup>43</sup>

## H) MALE VS. FEMALE PLAINTIFFS

In claims for loss of future earning capacity, statistics are used to attempt to assess average lifetime earnings. In assessing claims by different types of Plaintiffs, particularly if young and female, the difficulty is whether or not to use average male lifetime earnings or female earnings. Traditionally, statistics for female earnings show decreased earnings, reflect inequity in the work-place, and include years out of the workforce as a result of being a mother and homemaker.<sup>44</sup> These statistics are now given less weight by the Courts as an increasing number of women work full-time and the availability of paternity leave. As well, in some professions, like teaching, there is less likely to be disparity in the labour market performance statistics.

### i. British Columbia

In B.C., the Court of Appeal has cautioned that labour market statistics used in the assessment of loss of future earning capacity are averages only, and should only be used as a guide. The particular circumstances of each case, and each Plaintiff, must be equally considered.

### ii. Alberta

Courts generally accept that wage statistics reflect historic wage inequities.<sup>45</sup> In *MacCabe v. Westlock*,<sup>46</sup> the Alberta Court of Appeal acknowledged that there would be cases where it would be appropriate to use the male tables, instead of the female tables, depending on the evidence in the case (and, we might add, on the work-history and type of Plaintiff). This was a case where a young female Plaintiff gave evidence that she had planned to have four children and would have taken a number of years away from work as a result. She had also planned on being a physiotherapist, a profession which was remunerated regardless of gender (in Alberta) because of its union status.

## I) FATALITIES

If the Plaintiff has died as a result of the accident, claims for loss of future earning capacity may be disallowed by statute. In B.C. claims for loss of future earning capacity

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<sup>43</sup> *Ayles (Guardian ad litem of) v. Talastasin*, *supra*, note 32, at paragraph 15.

<sup>44</sup> The section is based in large part on the excellent discussion on this topic in C. Morton's article "Polishing the Crystal Ball – Claims for Loss of Future Earning Capacity", *supra*, note 8.

<sup>45</sup> *MacCabe v. Westlock*, *supra*, note 6, at paragraph 28.

<sup>46</sup> *MacCabe v. Westlock*, *supra*, note 6.



on behalf of the estate of a deceased plaintiff are not allowed pursuant to the *Estate Administration Act*, R.S.B.C. 1996, c. 122. However, the *Family Compensation Act*, R.S.B.C. 1996, c. 126 permits a spouse, child or parent of a deceased to bring an action for loss of financial support he or she could have expected but for the fatality.

In Alberta, depending on when the accident occurred, certain claims may be brought by the estate, or by the surviving dependants for future loss of earning capacity. Statutes which come into play include the *Survival of Actions Act*, R.S.A. 2000, c. S-27, the *Fatal Accidents Act* R.S.A. 2000, c. F-8 and the *Adult Interdependent Relationships Act*, 2002 S.A., c. A-4.5.

Survivor compensation claims are complex, in part due to the so-called “lost years”, namely the years and earnings between the pre-accident life expectancy and the post-accident life expectancy. These claims are beyond the purview of this paper. For a starting point however, one of the leading cases in Alberta is the Court of Appeal decision in *Duncan Estate v. Baddeley*.<sup>47</sup>

## V. CONTINGENCIES

Contingencies almost always act to decrease an award for full compensation to the injured Plaintiff. There are general contingencies and specific contingencies; general contingencies relate to everyone, specific contingencies relate to a specific Plaintiff. That means each case, and each Plaintiff, must be treated separately. Unfortunately contingencies have been inconsistently applied in evidence and in argument in both jurisdictions.

Since assessment under this category of damages is not a calculation and involves predicting future events, allowances must be made for the fact that the assumptions upon which the award is made may prove to be wrong.<sup>48</sup> The Supreme Court of Canada has stated:

First, in many respects, these contingencies are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse... Finally in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small.<sup>49</sup>

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<sup>47</sup> 2000 ABCA 277, 192 D.L.R. (4<sup>th</sup>) 53, 266 A.R. 323, 228 W.A.C. 32.

<sup>48</sup> *Reilly v. Lynn* 2003 BCCA 49, 14 C.C.L.T. (3d) 1, 178 B.C.A.C. 69, 10 B.C.L.R. (4<sup>th</sup>) 16, 292 W.A.C. 69, 2003 CarswellBC 135 at paragraph 101.

<sup>49</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452 at page 253.

It is worth repeating that in some cases, projections of income and base employment statistics are already adjusted for contingencies.

The basic rule established in the case law in both jurisdictions is that, in the absence of unusual circumstances, contingency deductions for loss of earning capacity should be no more than 20 per cent, although this figure is not universally applied.<sup>50</sup> Unusual circumstances might consist of a Plaintiff who had a very sporadic work record, a Plaintiff who had very limited skills and decreased employment opportunities as a result, or a Plaintiff who had pre-existing health problems.

## **VI. HANDLING THE CLAIM - THE DEFENCE PERSPECTIVE**

In a disputed claim, the examiner will rely on defence counsel to:

- a) collect, correlate and analyze the evidence necessary to properly defend the claim for future economic loss; and
- b) retain and instruct experts, including medical, vocational, economic and actuarial experts to advise and prepare reports to present at mediation or trial.

The depth of the investigation conducted, as with any matter, will be largely dictated by the prospective exposure occasioned by the claim. What follows is an indication of the types of records to be gathered and investigation to be undertaken in a case involving serious injury with significant and permanent physical or cognitive impairments to a Plaintiff.

### **A) PROCESS FOR INVESTIGATION**

A number of procedural vehicles exist to aid in the marshalling of relevant information. A dissertation of civil procedure is beyond the scope of this paper but, generally speaking, the following procedures are typically utilized to gather relevant information:

- i) civil rules permit parties to demand documents and impose obligations for continuing production of relevant records;
- ii) examination for discovery permits counsel to delve into the work, social, medical and academic history of the Plaintiff. From there,

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<sup>50</sup> L.D. Rainaldi, ed., *Remedies in Tort*, supra, note 2, at paragraph 77. However the B.C. Supreme Court recently declined to apply a 20% general contingency in *Spehar (Guardian ad litem of) v. Beazley* 2002 BCSC 1104. On the other hand, the Court of Appeal relied on it in *Soligo v. Turner* 2002 CarswellBC 131 (C.A.).

relevance of various categories of documents and identity of various individuals who may have information material to the issue of loss of capacity are established and the records or information itself demanded for production;

- iii) material witnesses may be interviewed. A refusal to answer questions by a witness may lead to use of civil rules designed to compel a material witness to attend for an examination under oath; and
- iv) Plaintiffs may be required to submit to one or more expert assessments (medical, cognitive, functional, vocational).

## **B) DOCUMENTARY EVIDENCE**

### ***i.* Medical Records**

In dealing with the future income loss component of a claim, maximizing access to pre-loss medical records is important. Courts will not allow a “fishing expedition” but if a claim is made for loss of earning capacity or loss of future income, any evidence of pre-loss fragility may supply the grounds for access to pre-loss records for a period of up to decades, assuming the records are still available.

In B.C., the Medical Services Plan (“MSP”) records any services obtained through the public health system. Summaries are available which identify dates, general categories of medical services utilized by an individual as well as the practitioner administering the service regardless of where in B.C. the service was administered. These summaries are available for a period of seven years prior to the date a request is inputted.

It is important, particularly in cases where injuries are clearly serious to catastrophic, that MSP requests be made early to maximize the pre-loss summary information available. In the case of a Plaintiff who has relocated within the province, or who regularly changed doctors but who is a poor medical historian, the MSP record may be invaluable in identifying all pre-loss services received. Plaintiff’s counsel may balk at producing pre-loss MSP records prior to relevance of the record being established at an examination for discovery; but as the historical information is “vanishing” over time, agreements may be made between counsel that the information be requested but retained by Plaintiff’s counsel subject to relevance being established at a later date in the course of litigation.

Present and historic records of medical and paramedical practitioners (chiropractors, massage therapists, acupuncturists, naturopaths) may all be of assistance in identifying

collateral complaints. The purpose of the medical investigation is to identify any conditions which:

- a) have no causal connection to the loss; and
- b) negatively affect the Plaintiff's life expectancy, or his longevity either in the workplace as a whole, or at least in the area in which he was trained and working at the time of the loss.

*ii.*     **Education Records**

The importance of these records is self-evident. In brain injury cases, school records will be invaluable to the experts in assessing pre-loss intellectual potential or performance. Often, what is sought or produced is an individual's permanent school record. It is worth investigating whether an individual had any sort of intellectual or emotional intervention at school. If so, those records may prove useful, particularly in a case where the Plaintiff is a minor or young adult who is alleged to have been destined to be high functioning and a significant earner as part of the "but for" scenario.

For students receiving extra intervention at school, there may be voluminous records containing psychological reports, neuropsychological test results, counselling notes and the like. Often these are physically separate from the file containing the permanent school record so some investigative digging is required to unearth the existence of these records, particularly for a student who has already graduated.

*iii.*     **Social Service Records, Criminal Records, Information Pertaining to "Police Contact"**

In cases involving individuals with an extensive history of complaints at the level of the family physician, and where the claim arising out of the loss is for damages relating to any of the various chronic pain disorders, it often proves the case that these individuals face challenging social circumstances. Not infrequently, investigation reveals a history of physical, sexual or emotional abuse at some point in the Plaintiff's life which has led to contact with various help agencies. Depending on the nature of the claims alleged, records of social services may contain information that undermines assertions of a promising and stable future in the "but for" scenario.

Private investigators may be utilized to attempt to ascertain whether the Plaintiff has a history of police contact (as opposed to a criminal record) and the purpose of that contact. If it is learned that the Plaintiff was the victim of assault at some point relevant to the accident, inquiry will be made to determine if victim compensation was sought through any organization. In B.C., the WCB administers a criminal injury compensation program which will compensate victims of crime for their injuries, or pay for

counselling which would be obtained outside of the health care system (and therefore be undetected within the MSP summary). The contents of these records may prove very important in claims for loss of capacity.

*iv.*     **Work History, Employment Records, Income Records and Business Records**

For the self-employed Plaintiff, income and business records are requisite elements of the claim valuation. Information pertaining to earning history, business organization, and the Plaintiff's projections of growth and development will be considered by business and actuarial experts in considering whether projections of future income are consistent with the business structure intended to give rise to those earnings.

By way of example, our firm recently handled a claim by a dentist (a self employed individual) who suffered what proved to be a permanently limiting injury to his arm. He claimed the injury caused him to reduce his working time by 1.5 days per week (or 30%) and prevented him from moving into more financially lucrative practice areas. With the assistance of an expert in dental practice management and a forensic accountant, we gathered such information as historic and present patient appointment records, laboratory records, financial records, the dentist's continuing dental education records, information pertaining to physical plant facilities, equipment and layout, and employee payroll records.

We were able to determine that despite his alleged 1.5 day/week loss of work, the dentist was able to restructure his practice to compensate for much of the loss. Moreover, his overall practice organization was not consistent with the allegation that he would have moved toward more financially lucrative dental procedures. Alternatively, in the event the dentist did so, his external laboratory costs would increase in parallel with the increased earnings such that the net projected earnings would not change in any event. The future loss of capacity claim settled for less than a quarter of the original demand under that head of damages.

For the Plaintiff employed by another, employment records are a must. These should include payroll records and personnel records. Depending on the employer, very detailed records may be available that codify the reason for all absences from employment. In cases where a worker has availed himself of disability or workers' compensation benefits, those records should also be obtained. Often, if a Plaintiff is on disability for any significant length of time, independent evaluations are carried out by the insurer/WCB. These evaluations will not appear in the Plaintiff's MSP records.

## **C) INTERVIEWS OF COLLATERAL WITNESSES**

The importance of collateral witness information in serious or catastrophic injury claims cannot be understated.

Early interviews of former teachers, coaches, parents of the Plaintiff's friends, neighbours, and co-workers (if applicable) are particularly important in cases involving minors or very young adults claiming serious injury, particularly traumatic brain injury. The younger the child, the more necessary the interviews. A young child suffering a significant loss will have little in the way of documentary records evidencing achievement or social adaptation. Typically, the parents will assert that all of a minor's post-accident difficulties stem from the loss. A careful interview of collateral witnesses may reveal information about subtle traits of a young child that are harbingers of probable difficulties in later life.

Success in minimizing claims will be in the subtle details, which may be expected to fade from the memory of collateral witnesses reasonably quickly. A claim involving a serious injury (particularly an allegation of brain injury) to a minor may be active for ten years or more. If this type of investigation is left until the litigation is mature, the majority of useful information may be lost. Examiners must be prepared for a costly early investigation followed by a long period of quiescence in such claims, until the Plaintiff is sufficiently mature for a complete assessment and claim valuation.

Regarding adult claims, interviews with employment supervisors and co-workers will reveal information about the Plaintiff's pre-loss work performance and attendance. A middle-aged Plaintiff may have discussed retirement plans with friends or work colleagues. Co-workers may have information relevant to any pre-loss work absences, or information about the Plaintiff's pre-loss personal circumstances that may have some bearing on the assumptions made about the Plaintiff's "but for" future income earning capacity scenario. Co-workers and work superiors will also have detailed information about the physical and intellectual job requirements of the Plaintiff's position.

## **D) EXPERTS**

A variety of experts may be required to properly assess a claim for future loss of capacity. Initially, medical experts must examine and opine on the severity and prognosis of the injuries alleged. If the medical records reveal the existence of a serious underlying medical condition of the Plaintiff, it may be necessary to resort to the use of an epidemiologist to opine on life expectancy issues that would have been in existence regardless of the accident.

If the case of a typical serious loss, more than one expert will be required to deal with different aspects of the Plaintiff's difficulties. For instance, in a claim involving both physical and cognitive sequelae, an expert will be involved to assess the limitations occasioned by the physical injuries. Another expert will address the nature, extent and causation of cognitive disabilities. Following that analysis and depending on the severity of the ongoing difficulties, a functional capacity assessment may be required to assess the functional effects of the injury on the individual. In the event the Plaintiff is

disabled from his regular employment, a vocational assessment may be undertaken to assist in identifying what areas of employment remain open to the Plaintiff.

In serious injury claims, economic experts are typically engaged to assist with future loss projections, necessitating use of actuarial data and assuming a variety of future scenarios.

As indicated above, in cases involving the self-employed, it may prove necessary to engage the assistance of business experts and/or forensic accountants to analyze the validity of the Plaintiff's assertions about his business's pre-loss circumstances and "but for" projections of growth.

## **VII. CHECKLIST OF QUESTIONS**

Depending on the type of Plaintiff making the claim for loss of capacity to earn income in the future, examiners can use the following questions as a basic starting point to make an assessment for reserve amounts, or to work with defence counsel defending the claim. The trier of fact can only make a decision based on the evidence before him; these questions may help identify areas where more information is needed.

### **A) FAMILY BACKGROUND**

- What is the Plaintiff's family background?
- What level of education did the Plaintiff's parents, siblings or primary caregivers achieve and when?
- What career path have the Plaintiff's family members or primary caregivers chosen?
- Have the Plaintiff's parents, siblings or primary caregivers been successful in their careers?

### **B) EDUCATIONAL GOALS**

- Are the Plaintiff's plans vague in terms of continuing education, or already set in motion by the time the injury occurred?
- Would the Plaintiff have graduated from high school, university or technical training?
- If so, what grades would he or she have achieved upon graduation?

- Did the Plaintiff have future educational goals, such as upgrading or as a mature student?

**C) FAMILY GOALS**

- Does the Plaintiff have plans to have a family, or have other children?
- Does the Plaintiff have family commitments, other than children, that would dictate time out from the workforce?
- Would the Plaintiff get married but for the accident?

**D) CAREER GOALS**

- What were or are the Plaintiff's career aspirations?
- What steps had the Plaintiff taken to achieve those goals?
- What occupational choices had the Plaintiff already made?
- Had the Plaintiff shown any interest in a particular vocation even if there was no employment history?
- Will the Plaintiff take a part-time job (either voluntarily or involuntarily as a result of the accident)?
- When did the Plaintiff expect to retire?

**E) LIFESTYLE**

- What sort of "lifestyle" did the Plaintiff have before the accident?
- Did the Plaintiff have pre-accident capabilities in sports or other activities un-related to regular employment?

**F) OTHER**

- Does the Plaintiff plan on living in a foreign country that may have different standards of living or average income levels?



## VIII. CONCLUSION

Quantifying damages for loss of future earning capacity demands a case by case approach. This paper sets out the basic guidelines for examiners to approach the task, whether it be for the purpose of setting reserves, to attend a mediation, or to prepare for trial. Each Plaintiff is different, but the foundation for arriving at the right number under this head of damages is found in the established case law. Even in light of the number of precedents, "gazing into the crystal ball" to see something as complex as the loss of capacity to earn income in the future is still a very difficult process for examiners, for counsel and for the Courts. One Court of Appeal Judge summed it up nicely by stating:

... Judges will differ, perhaps widely, in making assessments [for loss of future earning capacity] in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses ... is in a much better position to come to a conclusion as to what is fair and reasonable in the circumstances.<sup>51</sup>

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<sup>51</sup> *Lawin v. Jones* (1994), 98 B.C.L.R. (2d) 126 (C.A.) at paragraph 37.

**IX. APPENDIX "A"  
CASE AND AWARD SUMMARIES**

**Awards for Loss of Earning Capacity**

Note: This chart is a summary of the cases referred to in the paper. Full citations for these cases below are found in the footnotes.

	<b>CASE NAME</b>	<b>DATE</b>	<b>SEX &amp; AGE (@ Accident)</b>	<b>PRE-ACCIDENT SITUATION</b>	<b>POST- ACCIDENT SITUATION</b>	<b>AWARD</b>	<b>NOTES</b>
1.	<i>Brown v. Golaiy</i>	1985	M - 31	truck driver	right knee fracture, worked as car salesman	\$20,000	
2.	<i>Steenblok v. Funk</i>	1990	M - 47	labourer on paving crew	chronic debilitating pain	\$150,000	balance of probabilities test only applies to past fact
3.	<i>Palmer v. Goodall</i>	1991	M - 31	"budding" pro- motorcycle racer, supermarket clerk	basal skull fracture, fibromyalgia	\$150,000	could not handle heavy work after accident
4.	<i>Lawin v. Jones</i>	1994	M - 22	unemployed (but some work as radiator mechanic)	orthopaedic injuries	\$250,000	Plaintiff could not perform 50% of occupations previously open to him
5.	<i>Pallos v. ICBC</i>	1995	M - 31	labourer	leg fracture, residual pain, reduced to light labour	\$40,000	leg fracture, residual pain
6.	<i>Morris v. Rose Estate</i>	1996	F - 23	mood disorder prior to accident; "spotty" work record	significant injuries limited to light labour or sedentary jobs, no manual dexterity	\$250,000	on appeal 20% contingency allowed
7.	<i>Friesen v. Pretorius</i>	1997	M - 29	millwright	closed head injury,	\$425,000	Plaintiff chose not to

	CASE NAME	DATE	SEX & AGE (@ Accident)	PRE-ACCIDENT SITUATION	POST- ACCIDENT SITUATION	AWARD	NOTES
	<i>Estate</i>				continuing back pain, restricted to light work		move to get better work, Defendant not liable for choice
8.	<i>Bonner v. Baikey</i>	1997	F - 55	insurance sales representative	headaches, prematurely retired, restricted activities	no award	did not establish presently disabled from work for which she was suited
9.	<i>Foo-Fat (Next Friend of)</i>	1997	F - 12	accomplished music student	continuing lower back pain	\$55,000	no track record of employment
10.	<i>Brown (Next Friend of) v. University of Alba.</i>	1997	F - infant	abused infant; massive brain injury	profound mental retardation	\$196,000	reduced life expectancy; "lost years"
11.	<i>Parypa v. Wickware</i>	1999	F - 40	nurse in training, American citizen	closed head injury plus multiple injuries, not able to work as nurse	\$254,000 (USD)	retraining possible
12.	<i>Lowe v. Larue</i>	2000	F - 28	professional trumpet player	severe injury to right wrist	no award	no finding of fact that income loss b/c of injury
13.	<i>Ayles (Guardian ad litem of) v. Talastasin</i>	2000	M - 9	student	severe migraines and low back pain	\$150,000	coped well with injuries
14.	<i>O'Brien (Guardian ad litem of) v. Anderson</i>	2000	M - 17	student	closed head injury	\$545,000	reduced award due to negative contingencies
15.	<i>Olson v. General Accident</i>	2001	M - 47	successful business owner	fractured pelvis, broken back, displaced organs	\$660,000	award split over 4 years from 61 to retirement at 65
16.	<i>Maccabe v. Westlock Roman Catholic</i>	2001	F - 16	student	quadripalegic	\$667,079	male vs. female earnings and contingencies

	CASE NAME	DATE	SEX & AGE (@ Accident)	PRE-ACCIDENT SITUATION	POST- ACCIDENT SITUATION	AWARD	NOTES
17.	<i>Holder v. Maclean</i>	2001	M - 60	self-employed	residual headaches, reduced work abilities, but cont'd to run business	no award	no proof Plaintiff would have earned more but for accident
18.	<i>Bradley v. Dymond</i>	2002	M - 56	heavy duty field mechanic	persisting neck injury and chronic pain, could not return to work	\$300,000	
19.	<i>Chiu (Guardian ad litem) v. Chiu</i>	2002	M - 16	student	spinal and head injuries	\$400,000	no work history
20.	<i>Campbell v. Makela</i>	2003	M - middle age	no info provided in case	whiplash	no award	no evidence of permanent partial disability
21.	<i>Reilly v. Lynn</i>	2003	M - 29	newly called lawyer	mild traumatic brain injury	\$1.6 m	never able to practise law again
22.	<i>Davidson v. Patten</i>	2004	M - 48	power linesman	severe injuries including spinal and head injuries	not quantified	court chose 62 as age of retirement
23.	<i>Rowe v. Bobell Express Ltd.</i>	2005	M - 69	established ranch owner	fractured neck, depression	\$25,000	