

Future Loss of Earning Capacity in BC

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A. Executive Summary

If there is an established history of earnings, either a plaintiff's pre-injury salary or an approximation thereof, this will serve as a useful starting point for the calculation of lost earning capacity. This salary amount is considered along with other factors such as:

- the plaintiff's pre-accident length of working life, as estimated by the use of actuarial evidence;
- employment history (for example, whether the plaintiff had a tendency to change employers or occupations prior to injury);
- academic record;
- tendency for career advancement;
- pre-accident work capacity limitations (for example, whether the plaintiff's pre-accident employer(s) had made accommodations for the plaintiff before the accident at issue);
- post-accident employment, in particular (a) whether the plaintiff has returned to work and in what capacity, and (b) whether accommodations have been made to allow the plaintiff to return to work; and
- the plaintiff's business acumen and work ethic.

Because of the numerous occupations and ways that people can earn a living the best approach to calculating future losses must be dictated by the particular circumstances, with the court relying on the assistance of expert witnesses to determine an appropriate method of calculation. Where a plaintiff is not wholly incapacitated by his or her injuries and retains some capacity to work, the defendant will only be responsible for the difference between what the plaintiff can earn in their injured state and what they would have earned but for their injuries. In assessing loss of future earning capacity, courts will take into account any relevant

contingencies,¹ choose an appropriate discount rate² and consider any overlap with the cost of future care or other heads of damages.

B. General Principles

Two threshold questions arise when assessing a claim for future loss of earning capacity:

Is there “a real and substantial possibility the plaintiff will suffer a future loss of income?”

The plaintiff will bear the burden to prove there is a real and substantial possibility, not mere speculation. An assessment of loss of future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event (*Grewal v. Nauman*, 2017 BCCA 158).

If the plaintiff establishes a “real and substantial possibility” how should compensation be determined?

Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach.

¹ For example, negative contingencies include possible future unemployment, illness, accidents and business depression while positive contingencies include possible wage raises, along with the possibility of family income, early retirement packages and the trend to increase and equalize the salaries of women with those of men.

² For example, if, at the date of assessment, a plaintiff's anticipated future loss was determined to be \$1,000 per year for a period of 10 years, the plaintiff would be over-compensated if the court were to award \$10,000 today. This is because the plaintiff could invest that \$10,000, thereby earning interest on that amount, with the result that in 10 years' time, the plaintiff would in fact be in a better position than if the tort or breach of contract had never occurred. Courts address this problem by discounting the plaintiff's damages for future loss to present value. In other words, courts attempt to determine the present value of the plaintiff's future stream of income and/or expenses.

The **earnings approach** involves an assessment of the plaintiff's annual income loss multiplied by the remaining working years. The earnings approach will be appropriate in cases where the loss is more easily measured, the plaintiff has some earnings history, or where the court can reasonably estimate future earnings (*Moody v Hejdanek*, 2018 BCSC 380 at para 78). This approach is typically applied in cases where the plaintiff had settled/consistent employment at the time of injury.

The **capital asset approach** treats an individual's ability to earn income as an asset that has been damaged or lost. This approach requires more speculation and hypothetical considerations than the previous and is best suited for cases "where the loss, though proven, is not measurable in a pecuniary way." (*Moody v Hejdanek*)

When using the capital asset approach, the court will consider whether:

- (a) the plaintiff is less capable from earning income from all types of employment;
- (b) the plaintiff is less marketable or attractive as an employee to potential employers;
- (c) the plaintiff is no longer capable of taking advantage of the job opportunities open to them due to the injuries suffered; and
- (d) the plaintiff is less valuable to themselves as a person capable of earning income in the marketplace.

C. Future Loss Assessments: Tricky Cases

Self-Employed Plaintiff

Future Loss of Earning Capacity claims by self-employed individuals are recoverable, but can be difficult to assess. The plaintiff still needs to prove a pecuniary loss and, for this reason, self-imposed employment restrictions (e.g. only able to work 75% of full-time hours) not grounded in

medical advice will not usually be accepted (*De Vries v. Poltorak*, 2013 BCSC 3026). The plaintiff's loss of future income in these cases, if any, can be assessed by (a) examining the cost of replacement labour equal to the reduction in the plaintiff's capacity to work, or (b) examining the loss of business profits because of the plaintiff's reduction in capacity. Loss of business profits may include loss of dividend payments from the plaintiff's company or a reduction in the capital value of the business. Of course, there are negative contingencies which will reduce this award given the inherent economic risks of owning a business.

Students

If an injury disrupts education/training, this may cause a delayed entry into the workforce, which may be compensable. If a student suffers ongoing injuries, then the damages for future loss of earning capacity will likely be based on the job opportunities he or she had a reasonable probability of attaining given his or her aptitude – these questions will require the assistance of expert doctors as well as functional and vocational experts. The plaintiff must establish the reasonableness of alternative occupations in order to be awarded compensation (*Kathura v. Wildgrove*, 2015 BCCA 186). For example, for the plaintiff to argue their injuries have prevented them from becoming a police officer, they will likely require pre-accident evidence of their intention to pursue that occupation (e.g. taking classes to support that intention, inquiries about program enrollment/details, preparation for fitness testing). If the plaintiff can establish (a) an intention to have pursued policing but for the accident and (b) injuries preventing or delaying pursuit of that career path, then a future loss of earning capacity award should be expected; likely based on the gap between current earnings and absent accident earnings (calculated based on present value multipliers and actuarial evidence).

Infants/Children

Where a young child is injured, their future loss of earning capacity must be assessed without any employment history. Future loss of earning capacity awards for infants are typically reserved for more serious injuries, producing lifelong challenges; for example, brain injury, loss of limb and/or loss of motor function. These cases are highly fact sensitive, but the court will usually consider factors such as the education and employment history of parents/siblings, academic performance prior to the accident as well as the average projected income levels for the cohort the plaintiff would have likely been a member absent injury. In many cases the court will assess the present value of lifetime earnings of a person similar to the plaintiff (for example, a male with a university degree) and apply contingencies from there (*Fullteron v. Delair*, 2006 BCCA 339).

D. Recent Case Studies

***Harry v Powar*, 2018 BCSC 845**

- A young lawyer plaintiff (38 years old) suffered soft tissue injuries and mild psychological issues as a result of two car accidents. The plaintiff returned to work quickly and her income increased post-accident. The plaintiff argued she was entitled to a future loss of capacity award despite this because her ability to bill hours “to her fullest potential” had been impaired by the accident.
- The Court accepted that there was a “real and substantial” possibility of a future income loss to the plaintiff based primarily on:
 - The plaintiff took great steps (e.g., medication, trigger point injections, physiotherapy, and massage therapy) to recover from the injuries.
 - Expert medical evidence (orthopaedic surgeon) suggested the plaintiff will experience an earlier than average physical decline as she ages.

- The fact the plaintiff did not let the injuries impact her busy litigation practice (minimal missed days at work) and the need to continue to miss work in the future to attend medical appointments were also taken into consideration.
- The Court applied the capital asset approach concluding that the plaintiff's injuries would prevent her from earning \$6,000/annually from the date of trial until the age of retirement (64 years).
- The plaintiff was awarded \$105,000 for future loss of earning capacity.

Kellet v Stam, 2018 BCSC 1127

- 61 year old plaintiff with soft tissue injuries. Employed as a child protection social worker at the time of injury.
- The plaintiff took 9 months off work after the accident, and struggled meeting certain job requirements (e.g. driving for extended periods of time). At the time of trial, the plaintiff was back working full-time at her pre-accident employment, but the court accepted the plaintiff was not meeting her job requirements – even with accommodations provided by her employer.
- The expert medical evidence as well as the functional capacity report suggested that:
 - The injuries prevented the plaintiff from completing her job duties.
 - The plaintiff was at risk of losing her job because of her injuries.
 - Even with surgical intervention or injections, the plaintiff will have ongoing limitations and be unable to carry out the duties of her job.
 - The plaintiff will continue to suffer from chronic pain in her hands and low back regardless of the treatment plan.

- The court accepted the plaintiff would be able to continue to work at least part-time until the age of 65. The economist evidence was that if the plaintiff was only able to work 80% of her full time duties until the age of 65, her loss would be \$412,000.
- The plaintiff was awarded \$350,000 for future loss of earning capacity.

McGonigle v Parada, 2018 BCSC 1017

- 42 year old plaintiff who suffered soft tissue injuries and chronic pain in a car accident.
- The plaintiff was not working outside the home at the time of the accident; however, she produced wooden carvings and other artwork while caring for her children. She did not have a consistent pattern or earnings, but there was evidence that some of her carvings may have a value in the range of \$20,000.
- The court accepted that the plaintiff was best suited to unskilled labour only, the majority of which was work her injuries would prevent her from performing. It was also relevant that the plaintiff had split from her husband and would have to begin supporting herself financially.
- The plaintiff was awarded \$40,000 for future loss of earning capacity