

## PERSONAL INJURY

# Future income loss claims must show realistic career plans

Trying to determine a plaintiff's future loss of earning capacity may seem like gazing into a crystal ball. But the courts have clarified the picture by establishing definite requirements, such as showing a substantial possibility of a future event leading to an income loss.

What this means is that plaintiffs must show a link between the injuries and limitations suffered and their ability to earn income in the future. A strong evidentiary foundation will give the judge a clear vision of the plaintiff's realistic potential and future career and employment options.

Pursuing damages under this head of damage has always presented challenges, given that there is no uniform approach incorporated by the courts to assess the damages applicable to a loss of future earning capacity. There are different approaches the courts have historically used and they often depend on the particular circumstances and background of a plaintiff. (A few examples of different approaches are found in *Steenblok v. Funk*, [1990] B.C.J. No. 1158 and *Pallos v. I.C.B.C.*, [1995] B.C.J. No. 2.)

In *Steward v. Berezan*, [2007] B.C.J. No. 499, Justice Donald held that the claimant bears the onus to prove a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur.

In *Kralik v. Mount Seymour*



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*Resorts Ltd.*, [2008] B.C.J. No. 366, the Court of Appeal reduced the trial judge's award of \$300,000 for future loss of earning capacity down to \$75,000, finding a failure to demonstrate the possibility that the claimant would ultimately retrain

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Gone are the days when an injured party with a loss of some capacity to do certain jobs can get compensation for the loss of that ability.

and return to the mathematics field (which was a field that he had prior knowledge of). The court stated,

“The trial judge did not find that but for the accident, he would have continued as a painter until retirement, nor that he would never have

gone back into the mathematics field... However, she failed to reflect in her award the possibility... that he would ultimately retrain in and return to the mathematics field, notwithstanding his unsuccessful foray into the computer industry in the period immediately prior to trial...

“One must assume Mr. Kralik had invested a considerable amount of time obtaining his Ph.D. and would likely earn substantially more once established in the field in Canada, than he would earn in jobs

requiring physical labour.”

Although appellate judges should hesitate to interfere with factual assessments and conclusions, this is an area where the court seems more comfortable adjusting the quantum figure through what appears to be a factual reassessment. As such, trial judges, in an effort to ensure a more comprehensive and accurate prediction, are already integrating this substantial possibility of a future likelihood test into the future loss of earning capacity equation.

This was recognized by Justice

Bauman in *Chang v. Feng*, [2008] B.C.J. No. 48: “This appears to be an express direction to first enquire into whether there is a substantial possibility of future income loss before one is to embark on assessing the loss under either approach to this head of loss, in particular, under the capital asset approach as well.”

Gone are the days when an injured party with a loss of some capacity to do certain jobs can get compensation for the loss of that ability. The inability to work must

See *Income* Page 16

## Unmasking the mystery.



## PERSONAL INJURY

# Occupation must be foreseeable

## Income

Continued From Page 13

relate to some realistic occupation or career opportunities which are likely or foreseeable in a plaintiff's future at the date of the assessment.

Although I am not suggesting people should not strive to constantly improve themselves and advance their position in society (and there are excellent examples of rags to riches stories), damages would not be easily provided to a lifelong unskilled labourer who

claims a loss of future capacity due to inability to become a medical doctor because of his injuries or limitations – that would be a very difficult evidentiary burden.

Conversely, in today's courts, a family doctor who has a physical limitation affecting his or her ability to do heavy labour will also have a difficult time realizing on a claim for a loss of capacity due to inability to get a job in a lumber mill or factory. Trial lawyers must ensure that there is a real likelihood and connection between the client and the possible

career opportunities presented as being within the scope, ability, and reasonable likelihood of the particular client.

Once that connection is made, the usual approach to the calculation of loss of future earning capacity still applies. ■

*Art Vertlieb is a governor of the Trial Lawyers Association of B.C. and a bencher of the Law Society of B.C. He thanks Robert McCullough for his assistance in writing this article.*

# Defamation actions a concern

## References

Continued From Page 8

## Confidentiality

Any factual information about a former employee and the referee's opinions about a former employee are considered to be the former employee's personal information under privacy legislation.

Conversely, the identity of a referee is generally considered to be the referee's personal information under privacy legislation. Therefore, it is possible to struc-

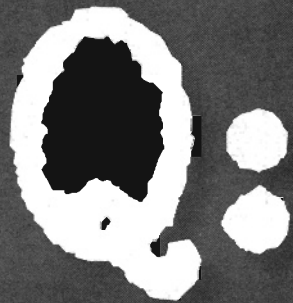
ture the giving and receiving of a reference in a manner that will keep the identity of the referee confidential.

If referees do not wish their identity to be disclosed, they should advise the prospective employer that they are providing the reference on the condition that their identity not be disclosed to the former employee or to anyone else except on a "need to know" basis for the purpose of assessing the former employee's suitability for employment. Any employer bound by privacy legislation will be obligated to maintain the privacy of the referee's identity.

## Defamation

Many employers are reluctant to give employee references because they fear they may be sued for defamation. This fear is driven largely by U.S. case law that has little similarity to Canadian case law. In Canada, case law has confirmed that the defence of qualified privilege extends to an employer who is asked to provide an employee reference.

This means that if the employer gives a reference with a reasonable and honestly held belief that the information given is true, no action in defamation can be maintained against the employer even if the statements made by the employer were defamatory. The privilege is only lost if it is proven that the



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