

BRIEFING NOTE

BC Court of Appeal releases a trio of cases on claims for loss of future income earning capacity: A common sense clarification of a plaintiff's evidentiary burden, or a signal of lower future damages awards?

I. The Trio of Authorities

On April 17, the BC Court of Appeal released a trio of cases which addressed the issue of whether the plaintiff was “overcompensated” for loss of future income earning capacity. All three actions arose out of motor vehicle accidents. All three appeals related to damages only, and in two out of three of these cases, the Court reduced the damages awards quite substantially. In doing so, the Court provided further commentary on *Rab v. Prescott*, 2021 BCCA 345, and the framework that trial courts must follow when assessing this head of damages.

In *Deegan v. L'Heureux*, 2023 BCCA 159, the trial judge awarded a “global” award of \$250,000 for loss of future earning capacity using the “capital asset approach”, in circumstances where the young plaintiff's future career was uncertain. In granting this award, the judge accepted the plaintiff's submissions that she would incur significant future income losses because she could not run a licenced day care to full capacity due to her injuries. However, at paras 78-86, the Court of Appeal found that the trial judge's reasons were “lacking”, in that they did not transparently explain how the court arrived at the award. They failed to fulfill the third step in *Rab v. Prescott*, to assess the value of a possible future loss, including assessing the relative likelihood of the possibility occurring. The Court set aside the award, as not being grounded in the evidence, and reduced it to \$70,000.

Following this decision, plaintiffs need to do more than assert, for example, they would have otherwise had a successful business, but for the accident. Rather, they must specifically show through evidence – e.g., through a functional capacity evaluation, vocational rehabilitation assessment, labour economist report, and in this case, evidence as to the

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expected profitability of the business – how they will sustain that future income loss.

In *Ker v. Sidhu*, 2023 BCCA 158, the Court did not reduce the award of \$100,000 under this head of damages. It did confirm its comments from *Rab*, however, that just because a plaintiff is injured, it does not necessarily follow that they will suffer a loss of future income earning capacity. In that regard, the Court stated, at para. 43, that “[s]uccessfully demonstrating an accident-related loss of capacity does not necessarily establish a real and substantial possibility of a future event leading to a loss of income”.

Accordingly, in establishing the three pre-requisites set out in *Rab*, a plaintiff must always prove that there is a real and substantial possibility that the impairment will lead to a future pecuniary loss. Establishing an injury is necessary, of course, but not sufficient. Ultimately, the trial judge must be persuaded (on a “real and substantial possibility” standard) that the plaintiff’s injuries will cause a future loss.

In *Wood v. Kim*, 2023 BCCA 156, the Court reduced the award for future loss of earning capacity by 25%. The Court reached this figure by assessing a 10% reduction for the plaintiff’s failure to mitigate and by adding a further 15% discount to reflect “both the real and substantial possibility that Ms. Kim in future could work at a more physically demanding job following treatment, or could obtain a higher paying sedentary position even if her physical condition remained the same”: para. 17.

Despite being a “notoriously difficult task”, trial judges must consider the likelihood of pecuniary loss occurring in the future. This includes considering both the positive and negative contingencies.

II. Isn’t this just Common Sense?

In the writers’ view, this is not a sea change or a profound transformation in the law.

Rather, it is more a helpful restatement of the principles applicable to factual causation, all of which are common sense. It would not surprise a layperson that, in order to be granted an award under this head of damages, a plaintiff must prove: (i) they were injured; (ii) those injuries, with some level of certainty, will cause a future income loss to the plaintiff; and (iii) the loss can be valued to a certain extent, based on a consideration of all potential contingencies that might arise in the future and that might have some bearing on that loss. This is captured in the three-part test set out in *Rab*:

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1. Did the plaintiff prove a potential future event that could lead to a loss of capacity? (That is, did the plaintiff prove injuries which are ongoing and might lead to a future economic loss?)
2. Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
3. If so, in assessing the relative likelihood of that possibility occurring and other contingencies, what is the value of that possible future loss? (see para 47 of the judgment)

From a defence perspective, therefore, these cases provide another reminder that plaintiffs are not entitled to awards under this head of damages just because they have been injured. Any such injuries must also be shown to be ongoing and must be shown to have a real and substantial likelihood of causing an economic loss.

Finally, it is not necessarily sufficient for a plaintiff to assert that they are entitled to their “full” damages because they cannot now work in their employment as they could before. As demonstrated in *Wood v. Kim*, the trial judge must consider various contingencies, both positive and negative; and where the contingencies establish that the plaintiff may be able to earn income as before (whether that be because the plaintiff can better tolerate work after following treatment recommendations of treating physicians or because the plaintiff can obtain another job that pays the same as their current employment), then an award under this head of damages should be discounted.

III. Conclusion

This trio of cases is notable for our Court of Appeal intervening to reduce future income loss awards, based on a review of the evidence adduced by the plaintiff at trial. If not profound, this is at least encouraging for those doing defence work in personal injury cases.

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