



## **The Test for Loss of Earning Capacity – Is it going through a Transformation?**

The British Columbia Court of Appeal recently rendered a decision regarding the test for loss of earning capacity which has resulted in practitioners arguing that the test has been expanded. The argument is that rather than simply requiring proof of the traditional factors supporting loss of earning capacity, the plaintiff now bears the burden of proving the additional factor of a substantial possibility of a future event leading to an income loss. To understand the argument fully requires knowledge of not just one, but three cases that have recently been decided by the British Columbia Court of Appeal.

The first decision rendered by the BCCA on this issue was *Steward v. Berezan*, 2007 BCCA 150, rendered on March 14, 2007. This is the decision which is pointed to as having changed the test for loss of earning capacity. At trial, the plaintiff had been awarded \$50,000 for loss of earning capacity. The appeal in relation to this award was on the basis that the judge had predicated the award on a theoretical rather than an actual basis. The plaintiff was a realtor and the award for loss of earning capacity was made as compensation for the “impairment of his earning capacity in other occupations that may now be closed to him”. The defendant/appellants argued that as there was no suggestion that the plaintiff had any intention to go into a career in which his injuries would be an impediment the award is compensation for a mere theoretical loss. The appellant further argued that there was no indication of a substantial possibility of a future loss. In allowing the appeal, the Court of Appeal stated as follows:

*The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must award compensation on an estimation of the chance that the event will occur.*

On March 19 the Court of Appeal rendered a second decision on loss of earning capacity in *Djukic v. Hahn* 2007 BCCA 203. The submissions to the court relied heavily on the *Steward* decision, with the accompanying argument that the trial judge had erred in the assessment of loss of earning capacity. In rejecting the submission of the appellants that the *Steward* decision had established a new principle of law or test for determining loss of earning capacity, the Court of Appeal stated specifically that “The case turned on its facts and did not establish any new principle of law”.

The Court of Appeal rendered a third decision regarding loss of earning capacity on April 30, 2007. In *Sinnott v. Boggs* 2007 BCCA 267 an appeal from an award of damages in the amount of \$30,000 for loss of earning capacity was brought by the defendant. The Plaintiff was found to suffer from aches in her neck and shoulders, ongoing discomfort and intermittent headaches. The prognosis was that these symptoms would continue indefinitely. The trial judge awarded \$30,000 for loss of earning capacity to compensate the plaintiff for “being less marketable as an employee because of the limitations on her ability to work competitively in all jobs previously open to her”. The argument put forward by the appellant was that where no occupation has been foreclosed, where there



has been no alteration of future plans, where there is no evidence of dissatisfaction from employers in the performance of duties and where there is only discomfort in the course of competitive employment, any compensation should be made in the form of an award for non pecuniary damages and not for loss of earning capacity. The Court of Appeal rejected the appellants argument to limit loss of earning capacity awards, holding that a finding by the trial judge that the plaintiff faced limitations on her ability to work competitively in jobs that were previously open to her is an adequate foundation for the trial judge's award.

The implications for practitioner's putting forward loss of earning capacity claims are no different than prior to *Steward*. Loss of earning capacity must be proven in the same manner as it always has been. A review of trial level decisions post *Steward* show that defense counsel rely heavily on *Steward* in opposing loss of earning capacity claims. Practitioner's must be prepared at trial to argue *Steward*, *Djukic* and *Sinnott* and the well established line of cases that preceded them. Assessment of loss of earning capacity has traditionally been grounded in real loss, not theoretical. Given the *Steward* case counsel will do well to ensure that the evidence regarding loss of earning capacity is focused on real and substantive loss and the particular circumstances of the plaintiff.

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