



## **Vocational Outcomes for Survivors of Traumatic Brain Injury A Legal Perspective of the Hurdles and Helpers**

This paper considers compensation for an acquired brain injury following a motor vehicle accident. Motor vehicle accidents are the leading cause of brain injury. The principles, with the exception of those relating to Part 7, are equally applicable to any traumatic event that results in injury and for which compensation from the party at fault may be sought.

### ***Part 7 v. Tort***

There are 2 separate and distinct sources of compensation that may be available to an individual injured in a motor vehicle accident in British Columbia. The Part 7 or no fault compensation is available to the individual regardless of who is at fault for the motor vehicle accident. These benefits are paid by the Insurance Corporation of British Columbia ("ICBC"). The other source of compensation can be referred to generally as tort compensation and refers to when the individual seeks compensation from the party who is at fault for the injury. The Part 7 benefits are an insurance type of compensation, with strictly defined entitlements and limitations on what is available. The tort compensation is meant to compensate the individual for what has been lost due to the injury. The goal of tort compensation is to put the injured person as close as possible to the position that he or she was in prior to the injury through monetary compensation.

### **Part 7 – What's Available**

Individuals involved in motor vehicle accidents in British Columbia have available to them through our insurance scheme Part 7 or "no fault" benefits. These benefits are available to anyone injured in a motor vehicle accident as long as the following criteria are met:

- a. The accident must have arisen out of the use or operation of a motor vehicle;
- b. The individual must be an "insured" as defined in the Regulations. This definition includes the following:
  - i. an owner of a vehicle;
  - ii. a member of the vehicle owner's household;
  - iii. an occupant of a vehicle licensed in British Columbia, or an occupant of a vehicle not required to be licensed in British



- Columbia but driven by a person with a British Columbia driver's license;
- iv. a cyclist or pedestrian who collides with a vehicle described in an owner's certificate;
  - v. a resident of British Columbia who is entitled to bring an action for injury or death under the *Insurance (Motor Vehicle) Act*, s. 20 (uninsured motorist provisions) or s. 24 (hit and run provisions);
  - vi. the personal representative of a deceased insured; or
  - vii. a resident of British Columbia who holds a valid driver's license and members of his or her household.
- c. The individual is not specifically restricted by the Regulations. If the individual is, then ICBC is not required to pay Part 7 benefits. These restrictions are detailed in s. 96 of the Regulations and include such things as when the injured person occupies a vehicle that is not required to be licensed in British Columbia under the *Motor Vehicle Act*, or when the injured party is an occupant of a vehicle that is being used for an illegal purpose.

Motor vehicle insurance benefits and requirements vary from jurisdiction to jurisdiction. In Canada, each province has its own scheme of motor vehicle insurance and the coverage available in each province differs. The comments regarding Part 7 benefits in this paper are directly applicable only to British Columbia.

Part 7 of the Regulations to the *Insurance (Motor Vehicle) Act* outlines the benefits available to persons injured or killed in Canada or the United States in an accident that arose out of the use or operation of a motor vehicle. You can view the legislation on the web at <http://www.qp.gov.bc.ca/statreg/>. These benefits are called Part 7 benefits, or no fault benefits. They are available regardless of whose fault the accident was, subject to certain restrictions in the *Act*. You must be an “insured” as defined in the *Act* and detailed above to qualify for benefits. There are three categories of benefits available:

1. medical and rehabilitative benefits;
2. disability benefits for employed persons and homemakers; and
3. death benefits.

With respect to survivors of traumatic brain injury, the benefits particularly relevant to their vocational outcome are the medical and rehabilitative benefits and disability benefits.

### **Medical and Rehabilitative Benefits**

There are 2 types of benefits, mandatory and permissive. ICBC’s overall liability is limited to \$150,000.00 for medical and rehabilitative benefits for each person injured in a



motor vehicle accident. Rehabilitation is defined in the Act as “the restoration, in the shortest practical time, of an injured person to the highest level of gainful employment or self sufficiency that, allowing for the permanent effects of his injuries is, with medical and vocational assistance, reasonably achievable by him”. Where an individual is entitled to Part 7 benefits, ICBC is required to pay all reasonable expenses incurred by the individual as a result of the injury for necessary medical, surgical, dental, hospital, ambulance, professional nursing services, physical therapy, chiropractic treatment, occupational therapy, speech therapy, or for prosthesis or orthosis. Travel expenses incurred in obtaining treatment is also recoverable. These are “mandatory” benefits.

“Permissive” benefits are various benefits that ICBC may provide where, in the opinion of ICBC’s medical advisor, the provision of any one or more of these benefits is likely to promote the rehabilitation of the individual. Permissive benefits include such things as funds to undergo vocational training, reimbursement for the cost of attendant care and funds to purchase a motor vehicle or to alter the individual’s residence to make it accessible.

### **Disability Benefits**

To obtain disability benefits an individual must on the date of the accident either be employed or have been employed for any six months in the 12 months prior to the motor vehicle accident. Within 20 days of the accident the injury must prevent him from engaging in employment for which he is reasonable suited. If this can be shown, then the individual will be entitled to receive the lesser of \$300 per week or 75% of their average gross weekly earnings in the 12 month period immediately preceding the accident. The benefit will be paid for the duration of the total disability or for 2 years, whichever is shorter. Total disability is considered to exist where the individual cannot perform any substantial requirement of his or her ordinary duty of employment and where there is an inability to do substantially all the material acts in substantially the usual and customary manner.

### **Tort – What’s Available**

The purposes of a tort award are to put the injured party in the position that he or she would have been in had they not been the victim of another party’s negligence. The first pre requisite to a tort award is that another party must be at least partially at fault for the injury. The individual’s compensation is dependent upon the level of fault of the other party. For example, if the other party is found to be only 30% at fault for an injury, a victim will be only entitled to 30% of the damages that are found to be necessary to return him to the position that he was prior to the accident.

There are 5 different areas under which compensation may be considered. They are as follows:



1. Non-pecuniary damages;
2. Past wage loss;
3. Future loss of income;
4. Special damages;
5. Cost of future care.

A more detailed description of each of these separate areas follows.

1. Non-pecuniary Damages

This monetary award is to compensate the individual for the pain suffering and loss of enjoyment of life that they have suffered as a result of the negligence of another. The Supreme Court of Canada has described this monetary award as a means of providing solace to the individual for the loss of enjoyment of life that they have experienced as a result of injury. The purpose of the non-pecuniary award is to allow the substitution of other sources of satisfaction for those that have been lost. The money awarded is intended to be used by the individual to make his or her life more bearable and to provide reasonable solace for his intangible losses. This functional approach was described by the Supreme Court of Canada in *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 as follows:

*To my mind [the functional] approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way...The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements over and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non pecuniary loss compensation.*

In British Columbia we have standardized jury instructions which are typically given by a judge to a jury when they are assessing damages in a personal injury case. The description of non-pecuniary damages and the method for assessing them is particularly clear and provides an excellent description of this type of damages and the way that it should be assessed. I have below reproduced the jury instructions. The general instruction describes non-pecuniary damages as follows:

*Non-pecuniary losses are personal injury losses that have not required an actual outlay of money. The purpose of such an award is to compensate the plaintiff for such things as pain, suffering, disability, inconvenience, disfigurement, loss of enjoyment of life, and loss of expectation of life...The award should compensate the plaintiff both for such losses suffered up to the date of trial and for those he or she will suffer in the future.*

In terms of quantifying the award for non-pecuniary damages, the standardized jury instructions direct jurors as follows:



*Damages for these losses have a different purpose than other damages. There is no market in health and happiness. It is generally not possible to put a plaintiff back in the position he would have been in had the injury not occurred. It is a mistake to try to award the plaintiff a sum for which he would have voluntarily chosen to suffer such pain, disability, inconvenience, disfigurement, loss of enjoyment of life, and loss of expectation of life. You must fix a sum that is fair and reasonable...you should make one award for non-pecuniary loss which takes all these factors into account.*

*There is no formula whereby a particular injury brings about a fixed and certain dollar recovery. Nor is there a number of dollars to be in exchange for a loss of happiness. Each award of non-pecuniary damages is custom made for a particular individual plaintiff. You must fix a sum that is fair and reasonable in this case.*

*In assessing damages, you must consider what use the plaintiff can make of the money you may choose to give him. A purpose of making an award under this heading is to substitute other amenities for those which the plaintiff has lost. It is meant to provide better physical arrangements beyond those directly relating to the injury (some "extras") to make the plaintiff's life more bearable.*

The standardized jury instructions go on to further explain non-pecuniary damages in the following terms:

*Your award should compensate the plaintiff for the pain and suffering he has experienced from the date of the injury to the present, as well as for the pain and suffering you conclude he is likely to experience in the future. In making your award you should consider all distress or discomfort caused or contributed to by the accident that has been felt by the plaintiff in the past and is likely to be felt by him in the future.*

*The law does not provide for recovery of damages for distress where none is felt, as for example where the victim is unconscious. However, if you are satisfied that the plaintiff's injuries have given him distress or discomfort, even if you consider that most people would not have felt it, or would not have felt it so severely in the circumstances, you must award compensation for that pain and suffering.*

...

*When fixing a sum for damages with respect to pain, injury, and suffering, you know that damages can never be adequate in the sense that a person would undergo this pain and suffering in exchange for money. Although you cannot give complete compensation you must try to award the plaintiff an amount that is fair and reasonable and bears some reasonable relation to the loss and injury claimed, as shown in the evidence. This amount forms part of your award for non-pecuniary loss.*

*If you find that the defendant is liable for the plaintiff's injuries, the plaintiff is entitled to be compensated for the negative effect of those injuries on his enjoyment of life. Thus, you should include an amount in your award to compensate the plaintiff if you conclude that because of the accident he has been unable to enjoy, in the way that he formerly could, whatever life should offer.*

...

*The plaintiff says that he has not been able to do these things to the same extent (or at all) because of the accident. The plaintiff also says that he is unable to enjoy his work as well since the accident. These are matters affecting the plaintiff's enjoyment of life. If you accept his evidence,*



*he is entitled to be compensated for this loss of enjoyment of life as part of an award for non-pecuniary loss.*

The detailed standard jury instructions for quantifying the award of non pecuniary damages reads as follows:

*Damages for pain, injury, suffering and loss of enjoyment of life are called non-pecuniary because they cannot be compared to a dollar amount as is the case in a claim for past loss of income. Therefore, there is no formula I can give you which will guide you in fixing an appropriate sum. Each award for pain, injury, suffering and loss of enjoyment of life is custom-made for each individual plaintiff. The law does not have a specific table illustrating how a particular injury brings a fixed and certain dollar amount.*

*A judge sitting alone without a jury is required to consider similar awards of other judges, to maintain consistency with them. But it would be improper for me to hand you copies of other trial judgments relating to similar kind of cases, or tell you about awards in other cases.*

*You should understand that the exercise of determining an appropriate award for non-pecuniary damages is not intellectual in the sense that it is taught as a course at law school. You are in just as good a position as I am to decide what is the correct figure. Your figure may differ from what I think is appropriate, but that does not necessarily mean you are wrong and I am right. You bring to the law the common sense of the community. Your decision helps the courts keep in touch with the views of the citizens, whom the law is designed to serve. Because your verdict is not published in the law books and because you give no reasons for your decisions, it sets no particular precedent.*

*You see if I were to tell you the approximate range of damages I might award, and you adopted what I said, you would merely be returning a verdict based upon a judge's award. In that event, the educational value of your independent judgment would be lost to the law. Besides, my assessment would be based on my view of the evidence. It might be entirely different from yours.*

These standardized jury instructions provide a very clear description of non-pecuniary damages and how they are to be assessed.

## 2. Past Wage loss

This award is to compensate the individual for loss of income that he otherwise would have earned if he had not been injured. This is based upon a comparison of what would have been earned had the individual not been injured, and what has been earned, up to the date of assessment, whether that be at trial or at settlement. Consideration of not only the earning pattern at the time of injury but also projected earnings to the date of trial or resolution is necessary.

## 3. Future loss of income

This award is to compensate the individual for loss of earnings after the date of assessment of loss. This is often characterized as a loss of opportunity to earn income, or a loss of capacity to earn income. The purpose of this award again is to put the individual in the position he would have been in if he had not been injured. Damages may be



awarded if the court finds that there is a real or substantial possibility that the individual will earn less money in the future than he would have, if he had not been injured in the accident.

Assessment of future loss often involves an assessment of the loss of future earning capacity or the impairment of a capital asset. The factors used to measure this loss were first set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 252, which was quoted with approval by our Court of Appeal in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393. The factors used to measure the loss or impairment of a capital asset were described as follows:

*The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:*

1. *the plaintiff has been rendered less capable overall from earning income from all types of employment;*
2. *the plaintiff is less marketable or attractive as an employee to potential employers;*
3. *the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open had he not been injured; and*
4. *the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.*

In catastrophic injury cases, most if not all of the capital asset is lost. The court assesses rather than calculates with mathematical certainty, the loss suffered by the individual. The approach of assessing has been described by our Court of Appeal in *Hay v. Hoffman*, 1999 BCCA 26 as follows:

*I believe that a consistent theme running through the authorities is that a trial judge, in deciding an award of damages under the heading of anticipated future loss, whatever term one actually uses, ought to endeavour to make an informed estimate or assessment of anticipated loss as opposed to merely undertaking to do a computation. Because one is considering the future which has about it always an aspect of the unknowable, contingencies positive and negative fall to be considered. Ultimately, a best estimate is required and while there almost invariably be mathematical calculations to be considered, a purely mathematical approach will usually not be appropriate because such an analysis is too limited in scope.*

Assessment of future loss of income again involves a comparison of what an individual will earn in the future with what they would have been expected to earn had they not been injured.

#### 4. Special damages

This award compensates the individual for out of pocket expenses that they have incurred as a result of injury. These may range from vocational assistance to the cost of medications. The general approach is used on the same principles as the approach to loss of earning capacity and cost of future care. The plaintiff “is to be restored to the position



he would have been in had the accident not occurred, insofar as this can be done with money”. A court will award special damages if the expense incurred was reasonably necessary. The test for recoverability of special damages was formulated by Mr. Justice Harvey in *Brennan v. Singh*, [1999] B.C.J. No. 520 as follows:

*It is what a reasonably minded person of ample means would be prepared to incur as an expense; and cannot in the remotest sense be considered a squandering of money; and for which there is no medical basis.*

The test is whether a reasonable person would have incurred the expense.

#### 5. Future care

This award is to compensate the individual for the cost of care that they will incur in the future. The purpose again is to put the injured person in the position that he would have been in absent the injury. The courts are to look into the future and determine what expenses will be required for the future care of the injured person. There are 2 basic approaches, the “total lifestyle” approach and the “additional expense” approach. These two approaches were described by Madame Justice McLachlin as she then was in the case of *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, affirmed (1987), 49 B.C.L.R. (2d) 99 as follows:

*The “total lifestyle” approach is appropriate where the plaintiff’s entire future life has been radically changed because of his or her injury...The plaintiff needs a totally different environment and totally different care than he would have required had he or she not been injured. The simplest and fairest approach is to award him all these costs and make a deduction from loss of future earnings from what would have been spent on basic necessities.*

*The “additional expense” approach is preferable where the plaintiff will continue to lead basically the same life as he would have had he not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance and facilities which the plaintiff will require.*

### **Compensation for the Loss or Compromise of Ability to Work**

#### The Consequences

The consequences of an acquired brain injury can be devastating to an individual's ability to be competitively employed. The Brain Injury Association of American lists the following as consequences of brain injury:

- ii. short term memory loss;
- iii. long term memory loss;
- iv. slowed ability to process information;
- v. trouble concentrating or paying attention for periods of time;



- vi. difficulty keeping up with a conversation;
- vii. other communication problems such a word finding;
- viii. spatial disorganization;
- ix. organizational problems;
- x. impaired judgment;
- xi. inability to multi task;
- xii. lack of initiating activities;
- xiii. difficulty concluding tasks without assistance;
- xiv. seizures;
- xv. muscle spasticity;
- xvi. vision problems including blindness and double vision;
- xvii. loss of smell or taste;
- xviii. speech impairments such as slow or slurred speech;
- xix. headaches or migraines;
- xx. fatigue and increased need for sleep;
- xxi. balance problems;
- xxii. increased anxiety;
- xxiii. depression;
- xxiv. mood swings;
- xxv. impulsive behaviour;
- xxvi. more easily agitated; and
- xxvii. egocentric behaviours, difficulty seeing how behaviours can affect others.

Each of these consequences on their own would impair an individual's ability to earn an income. Any of these in combination could result in a significant negative impact on income earning ability.

The terms mild, moderate and severe do not necessarily reflect the level of impairment of an individual's ability to earn an income. An individual with a “mild” brain injury may be totally disabled from working. Having a “mild” brain injury does not mean that a person will have “mild” problems.

Compensating for the losses suffered by an individual who has sustained a traumatic brain injury is complicated by the difficulty in assessing the losses. Loss of judgment, loss of ability to plan, loss of motivation, loss of the ability to engage in appropriate social interactions and the loss of the ability to regulate and monitor behaviour are difficult to assess and it is often difficult to determine how to compensate for these losses. Assessment of loss should focus on what can be done to replace what has been lost and on the nature of these deficits in cognitive, emotional and behavioural functioning.

### Getting the help

In assessing the cost of future care, the court considers what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff. The test



for standard of care generally is whether a reasonably-minded person of ample means would be ready to incur the expense. The Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.* described the principles in assessing future care costs as follows:

*In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, restitution in integrum is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.*

The standard of proof to establish future cost of care is “simple probability”. All that has to be established is a real and substantial risk of pecuniary loss. It is not necessary for the Plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur.

The Supreme Court of Canada recently in the case of *Krangle (Guardian ad litem of) v. Brisco* (2002), 208 D.L.R. (4<sup>th</sup>) 193 re-affirmed the principles involved in assessment of future care. Madame Justice McLachlan states:

*Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person’s best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.*

*The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. J. Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997), 113 L.Q.R. 257, thus suggests that the tort measure of compensatory damages may be described as the “normal expectancies’ measure”, a term which “more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached...had it not been for the tort”. The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained.*

In *Milina v. Bartsch*, [1985] B.C.J. No. 2762 Madame Justice McLachlin (as she was then) noted that the primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the patient. She then went on to state what has become the frequently cited formulation of the “test” for future care awards as follows:

*The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.*

*These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.*



Unfortunately for severely injured individuals, a return to paid work is often not an option. Volunteer work can be a necessary part of the individuals' post-injury mental health and well-being, although because of the deficits present following a severe injury, even attaining volunteer work may be difficult if not impossible. The British Columbia Supreme Court has recognized this and has in some cases provided an allowance for job coaching to assist the plaintiff in making the transition from one voluntary position to another. This type of award recognizes the difficulties faced by brain-injured individuals in keeping volunteer work, due to the amount of supervision they require.

Other cases in the British Columbia Supreme Court have recognized the importance and benefit of provision of educational and tutorial support to assist the brain-injured individual in completing education.

### Keys to Valuing the Past

Assessment of past loss of income involves an assessment of what the past would have held, but for the injury, on a balance of probabilities. The question is “but for the accident and injury, what income would the plaintiff have earned?” There must be proof both of causation and of the loss itself. In other words, the plaintiff has to prove that it is because of the injury that he has earned less than he would have earned if he had not been injured. If the plaintiff has proven on a balance of probabilities that he has suffered a loss, it is then the court's duty to attempt to assess that loss, even if it is not possible to calculate it precisely.

### Valuing the Residual

Future income loss and diminished earning capacity are one head of damage sometimes referred to as loss or impairment of future earning capacity. In determining the amount to be awarded under this head of damage, the court is conducting an assessment rather than a calculation with mathematical certainty. The British Columbia Court of Appeal in the case of *Hay v. Hoffman*, [1999] B.C.J. No. 77 (B.C.C.A.), at paragraph 67, described the required assessment process as follows:

*I believe that a consistent theme running through the authorities is that a trial judge, in deciding on an award of damages under the heading of anticipated future loss, whatever term one actually uses, ought to endeavour to make an informed estimate or assessment of anticipated loss as opposed to merely undertaking to do a computation. Because one is considering the future which has about it always an aspect of the unknowable, contingencies positive and negative fall to be considered. Ultimately, a best estimate is required and while there will almost invariably be a mathematical calculation to be considered, a purely mathematical approach will usually not be appropriate because such an analysis is too limited in scope.*

The Court of Appeal in *Hay v. Hoffman* also dealt with the standard of proof that was required for loss of impairment of future earning capacity. The Court said:



*Perhaps the leading case in this jurisdiction concerning the question of how to approach the question of an award of damages for future loss is the case of Steenblok v. Funk (1990) 46 B.C.L.R. (2d) 133, (leave to appeal denied, [1990] S.C.C.A. No. 327), a judgment of this court. In that case, Hutcheon J.A., speaking for the majority, pointed out that in dealing with an award of damages for future loss, substantial possibilities fall to be considered and that the degree of likelihood or certitude that might be applicable in considering the standard of proof concerning past losses cannot be reasonably expected when one is dealing with an estimate of what is likely to occur in the future.*

*In the case of Pallos v. Insurance Corporation of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.) at 269, Finch J.A., for the majority said, after referring to several earlier cases:*

*...These cases all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury. It is a different approach from that taken in Steenblok v. Funk and similar cases where the court is asked to determine the likelihood of some future event leading to loss of income. Those cases say, if there is a "real possibility" or a "substantial possibility" of such a future event, an award for future loss of earnings may be made. There is nothing in the case law to suggest that the "capital asset" approach and the "real possibility" approach are in any way mutually exclusive. They are simply different ways of attempting to assess the same head of damages, future loss of income. It is to be regretted that plaintiff's counsel did not advance the case at trial using both approaches, in the alternative.*

*In a recent case in the court of appeal, Friesen v. Pretorius Estate (1997), 37 B.C.L.R. (3d) 255, one of the issues in the appeal was whether the trial judge had erred in his approach to the assessment of damages for future loss by apparently assessing the respondent's potential loss of earning capacity in strict arithmetical terms rather than by considering the anticipated loss and an award of damages on the basis of a diminution of earning capacity. Macfarlane J.A., writing for the court, noted that in the above cited case of Pallos, Finch J.A. had said that there were different possible approaches that could be taken by a court to assess a dollar value for future loss. Macfarlane J.A. in the course of his Reasons quoted from Morris v. Rose Estate (1996), 23 B.C.L.R. (3d) 256 (C.A.), where at p. 263, Donald J.A. said:*

*Assessing damages in this area involves an estimated based on prophecies. Mathematical certainty is impossible in virtually all cases. While a comparative scenario approach will often be useful, the judge must step back and look at all the relevant factors, especially general incapacity, before fixing an amount.*

...

*I turn now to consider the defendant's arguments on appeal. By way of general observation, I think that the defendant's objections to this part of the judgment miss the point of the evaluative task facing the learned trial judge. He was to make an estimate of the loss using the guides available to him; he was not performing a computation. The defendant's arguments unduly focus on the mechanics of the judge's calculation and they fail to recognize that in the end it is the judge's sense of what is fair compensation that matters. There is much more art than science in that process.*

The British Columbia Supreme Court decision of *Abraham v. Abbinante* 55 B.C.L.R. (3d) 150 discusses the standard for proving future loss:



*In assessing damages for income loss after the date of the accident, including past wage loss and loss of future income earning capacity, it is necessary to make a determination about what would have happened in the past (between the date of the accident and the date of the trial) and what will happen in the future (after the date of the trial). In Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 (B.C.C.A.) at 137, the Court of Appeal dealt with the onus of proof on a plaintiff to demonstrate his loss in such circumstances, quoting with approval from Kovats v. Ogilvie (1970), [1971] 1 W.W.R. 561 (B.C.C.A.) at 564:*

*It is a fundamental rule that in civil cases questions of fact are to be decided on a balance of probabilities; this is a matter of proof. But it is not equally true that damages in respect of things which have not yet developed may only be awarded if it is probable that they will develop and may not be awarded if it is only possible that they will develop. One can decide on a balance of probabilities that something in the future is a possibility, and in appropriate circumstances that possibility can be taken into account in assessing damages; in such a case it is not essential, before damages can be assessed for the thing, to decide on a balance of probabilities that the thing in the future is a probability.*

*The Court of Appeal went on at p. 138 to cite Madam Justice Wilson's reasons in Janiak v. Ippolito, [1985] 1 S.C.R. 146 (S.C.C.) at 170 – 71 where she said:*

*In assessing damages the court determines not only what will happen but also what would have happened by estimating the chance of a relevant event occurring, which chance is then to be directly reflected in the amount of damages.*

Assessment of future loss is based on the “real possibility” that a certain event might happen. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.

### Required Evidence

In a personal injury case, the purpose of an award of damages is to put the individual (the Plaintiff) in the position that he or she would have been absent the motor vehicle accident. Evidence regarding the position that the individual was in prior to injury is as important as evidence regarding the injury and consequences of the injury. Evidence typically presented includes the general practitioners, all treating practitioners, independent experts and friends, family and coworkers. Documentary evidence often includes such things as school records, medical records and employment and income earning records.

### Conclusion7

The role that compensation plays in outcome is a complicated issue and I leave that to others with more expertise in that area. From my experience, outcomes, and in particular vocational outcomes, are impacted by legal proceedings. Specific factors that I have identified in my practice on improving outcome including ensuring that assistance is

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provided to the individual in a timely manner, appropriate supports are in place, the client's team is well informed about decisions as they are made and communication lines between all involved are kept open, the individual is treated in a compassionate and personal manner and the case is resolved as soon as is practically possible. The litigation ends but the individual remains with a lifetime legacy of the injury.

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