

“Durability” Stands the Test of Time in Future Income Loss Claim

Boucher v. Bemister, 2023 BCCA 17

The Appellant/Defendants appealed a damage award for a motor vehicle accident, specifically for loss of future income capacity. The Defendants alleged the Trial Judge erred by finding a future income loss based on a possibility that the ongoing pain suffered by the Plaintiff may prevent him from retiring as planned at 65.

Background

The Plaintiff was in an accident in 2017 and suffered a WAD II injury, various chronic neck pains, and psychological dysfunction. He was awarded \$60,000 in non-pecuniary damages and \$45,000 for loss of earning capacity at trial. He was a special education teacher who often dealt with non-verbal students, and sometimes required physical ability to calm his students down in the event they became violent.

The damages awarded at trial were largely based on an independent medical exam from Dr. Audrey Chen. She gave a somewhat optimistic prognosis for the pain, but stated his “durability” to continue the type of work was questionable, and he was unlikely to return to pre-accident functioning.

The Defendants also produced an expert who believed the Plaintiff’s debilitation was caused by a perception of pain rather than actual impairment. Both experts agreed the Plaintiff had pain, but Defendant’s expert could not reconcile the belief the Plaintiff had legitimate ongoing pain with the belief the injury should have fully healed within three months. For these reasons, the Plaintiff’s evidence was preferred.

On Appeal

The Appellants argued the Trial Judge incorrectly applied the test in *Dornan v. Silva*, 2021 BCCA 228 for assessing future income loss. The crux of the Defendant’s argument was the following:

- the Plaintiff amassed two years of sick leave and only had three years until maximum pension was reached;
- the Plaintiff was effectively fully employed at his job following the Accident; and
- the Plaintiff could work as an English teacher for the say pay;

In *Dornan*, the BC Court of Appeal applied a three-part test for assessing future earning capacity where there is no loss apparent at trial. The general analysis is the following:

1. whether the evidence discloses a *potential* future event that could lead to a loss of capacity;
2. whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss;

3. If such a real and substantial possibility exists, assess the value of that possible future loss, which ... must include assessing the relative likelihood of the possibility occurring.

In the first step at trial, the evidence from both experts at trial demonstrated the Plaintiff sustained soft tissue injuries. While there was a hopeful prognosis from both experts, the notion of “durability” was in dispute because of the *speculative* nature of claiming for a potential future event.

In the second step, the evidence demonstrated the Plaintiff intended to work until 65. The Trial Judge “rightly noted that a loss of capacity award can be made even where a plaintiff has not suffered any current loss of income”.

Lastly, the Trial Judge assessed the relative strength of each argument and concluded the positive contingencies outweighed the negative ones. She assessed these damages with a capital asset approach.

The Court of Appeal confirmed the application of the test in *Dornan*. They focused on this particular passage from Dr. Chen’s evidence since the critical issue was the evidentiary basis for considering the durability of the Plaintiff:

“He has been able to continue to work full-time and near full duties despite his pain. However, given his age, persistent symptoms, and demands of his work, his durability for the next 5–10 years is questionable.”

The Court of Appeal confirmed it was up to the Trial Judge to assess whether the durability concerns will potentially realize before the Plaintiff’s retirement. They further confirmed it was reasonable to interpret the phrase “5-10 years” as being any time within the 10 years timeframe.

The Court also noted the possibility of transferring laterally between jobs could still lead to a potential loss. The Court specifically referenced how this was rightfully considered in the contingency analysis conducted by the Trial Judge.

Lastly, the Court recognized the double recovery aspect of the Appellant’s argument through the amassed sick days. This argument necessarily dealt with an analysis of the collective agreement, and this was not argued at trial. While this argument may have had merit, the court confirmed banked sick days do not bar recovery for future loss of earnings in any event.

In conclusion, this case confirms a Plaintiff’s potential *durability* can be used as an argument to claim future loss of income. Tangentially, it highlights the importance on the internal consistency of expert reports and statements. Overall, it signifies a further step forward in expanding future loss of income claims.