Litigating Catastrophic Injury Cases: Employability and Future Cost of Care

Prepared For: Legal Education Society of Alberta

Personal Injury and Insurance Update

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For Presentation In:
Edmonton – May 15, 2012
Calgary – May 24, 2012
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INTRODUCTION

A catastrophic injury is one in which the plaintiff has suffered physical, mental, or emotional injuries which are widespread, of noteworthy and serious effect on enjoyment of life, ability to earn income, attend educational pursuits, or address household services, and which require significant cost of future care. Particularly, catastrophic injuries include significant brain injury, quadriplegia, hemiplegia, paraplegia, severe whole body burns, or otherwise horrific injuries.

Catastrophic injuries are noted for attracting large damages, not only in the area of non-pecuniary awards, but particularly in the area of general pecuniary awards, including past and future loss of income, future loss of earning capacity, past and future loss of housekeeping services capacity, cost of future care, and taxation gross up on future non-income losses. This paper will explore the issue of catastrophic injuries, particularly with respect to the areas of loss of future employability and working capacity, and cost of future care. Comment will also be made on liability issues in catastrophic injuries, given the focus on quantum which often consumes the attentions of counsel.

Both the assessment of damages for loss of working capacity and cost of future care require an evaluator to peer into the future and make predictions on the plaintiff's future abilities and capacities. With respect to loss of wages, the evaluator must determine what path the plaintiff's life would have taken “but for” the injuries he or she sustained, and alternatively, with respect to future costs the evaluator must determine what future costs the plaintiff will incur as a result of the path he or she was put on as a result of the accident. In the case of catastrophic injuries, where the plaintiff is rendered permanently and extensively disabled, this task is even more demanding as an evaluator must determine damages for the plaintiff's working and life expectancy while balancing the requirements of reasonableness.

Parts 1 and 2 of this paper set out a general synopsis of the principles of laws that form part of the process of assessing damages for loss of future income or working capacity, and future cost of care. Part 3 briefly touches on issues of liability which often are overshadowed in cases of catastrophic injury where damage awards can be in the millions of dollars.

PART ONE: EMPLOYABILITY AND CATASTROPHIC INJURY

Loss of working capacity compensates a plaintiff for his or her inability or diminished ability to work, including loss of wages, homemaking services, professional income, business profits or access to
The determination of loss of future income has been described as “crystal ball gazing as the court is burdened with the task of deciding what career path and other life choices [the plaintiff] would have taken, which could have impacted her earnings”. In Olson v. General Accident Assurance Co. of Canada the Alberta Court of Appeal noted:

“Damages for loss of earning capacity are awarded when there is evidence demonstrating that the injuries will, or are likely to, impair a plaintiff’s future earning capacity with regard to his previous occupation: Cook v. Benson Lobster Co. Ltd. (1990), 105 N.B.R. (2d) 265 (C.A.). The proof need not be that the future loss will likely occur, but that there is a ‘real and substantial possibility and not mere speculation’ that the loss will occur: Atthey, supra, at 470; Graham v. Rourke (1990), 74 D.L.R. (4th) 1 (Ont. C.A.) at 12-13.”

In practice, the actuarial method is used to accurately calculate damages for loss of future income or working capacity. Actuarial method has been described as “an accurate mathematical calculation of the various amounts required, through the liberal use of expert economic and actuarial evidence, and based implicitly on the notion that statistical averages merely reflect the simple probability and standard of probability”. The steps of calculating loss of working damages have been itemized as follows:

1. Estimation of weekly, monthly or annual value of work that would have been performed, including lost earnings or profits calculated on a net-before-tax basis, the value of lost homemaking, and any loss of shared family income. From this will be subtracted the value of the work the plaintiff will now be capable of doing;

2. Determination of the period during which the loss will continue, involving in serious cases ascertainment of the plaintiff’s pre-accident and post-accident working life expectancy;

3. Estimation of the reduction, if any, to be made to take account of the contingencies of life, either on a general level or with respect to particular contingencies that arise from the facts;

4. Determination of the appropriate discount rate to take account projected inflation and investment interest, the effect of general productivity, and with respect to future categories of damages that are not earnings-related, the gross-up for the tax that will be levied on the interest generated by the lump sum;

5. Consideration of any overlap between the award for loss of working capacity and other heads of damage, and any required reduction to take account of the plaintiff’s reduced need; and

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2 MacCabe v. Westlock Roman Catholic Separate School District No. 110, 2001 CarswellAlta 1364 (CA) at para. 84.
4 Cooper-Stephenson, supra at 646.