

November 27, 2015

BC Court sets low threshold for loss of income claims

In *Gillespie v. Yellow Cab Company Ltd.* (2015 BCCA 450), the B.C. Court of Appeal upheld an award of damages for lost income where the plaintiff was still able to achieve the pre-injury earnings, albeit with some additional effort.

The plaintiff, Michael Gillespie, alleged he suffered cognitive and psychological impairments as a result of two motor vehicle accidents. Before and after the accidents, he ran his own flooring supply and installation company. At trial, he claimed damages for past and future income on the basis that post-accident mental impairments caused him to work at a slower pace, make more errors, undermined his confidence in his work, and affected his business relationships.

No expert opined on the loss of income claims. The only evidence on the subject came from the plaintiff, who "guessed" that his work took longer to perform. He could not provide any details on the projects he failed to win or the jobs he had to turn down since the accident. The trial judge described the evidence as "in essence, Mr. Gillespie's personal assessment and an anecdotal discussion about the type of work he would have done or would have qualified to do" but for the injury.

Notably, the Plaintiff's post-accident income for 2012 was substantially greater than his pre-accident income. The Plaintiff explained that his injuries could be surmounted when he "pushed himself" to work. He testified that this level of effort affected his health and was not sustainable. However, there was no evidence that the plaintiff had made any accommodations or changes that might have ameliorated his symptoms.

The trial judge found that the plaintiff was unlikely to return to pre-accident state of health and that his injuries would be ongoing. He awarded \$160,000 for past income loss and \$140,000 for future loss based on a capital asset rather than earnings approach.

On appeal, the defendants did not challenge the trial judge's finding that impairments affected the plaintiff's functioning as an employee. Instead, they pointed to the finding that these effects could be overcome, to argue there was no evidence linking the alleged injuries and reduced work performance to any loss of profit.

The Court of Appeal acknowledged that the evidence supporting a loss of income was "thin". Nevertheless, the Court accepted there was some impact on the plaintiff's ability to work, and that if his ability to work was reduced, his income would likely fall. They therefore unanimously upheld the trial judge's decision.

The case sets a low threshold for plaintiffs seeking to recover loss of income.