YOUR ADVANTAGE – LOSS OF COMPETITIVE ADVANTAGE

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Your Advantage - Loss of Competitive Advantage

Income loss claims can represent a significant portion of damage awards in personal injury claims. If the Plaintiff had a settled line of work over time and is no longer able to continue working due to a personal injury, the resultant income loss is a relatively easy calculation that is simply presented. However, many Plaintiffs continue to work post-injury – albeit with pain and discomfort. They may even work more hours or earn greater income over time yet, struggle each day. In these circumstances, it may be difficult to demonstrate a reduction in post-injury income. However, with the right evidence and supporting expert opinions, you can tell your client's real life story and an economic loss claim can still be advanced for the Plaintiff's loss of competitive advantage. A return to work and even an increase in post-injury income does not disentitle an injured party from claiming economic loss in the future, if they can prove an impaired ability to compete.

The concept of loss of competitive advantage is a recognition that because of the injuries suffered by the injured person, that person will no longer be able to compete in the marketplace with able-bodied individuals who have comparable qualifications or levels of skill. This head of damage contemplates that there are positions or jobs that the Plaintiff will not be able to compete for because his/her injuries have adversely affected his/her ability to carry out legitimate job functions. In these situations the courts have recognized that an inability to compete is the loss of an asset to the injured person. The ability to freely compete in the marketplace for the type of work the injured person would have competed for before the accident is the asset that is now lost.

How to quantify the claim

The calculation of income loss involves a relatively scientific method. Actuaries, economists and/or accountants are hired to calculate past losses and to project future losses. Age, life expectancy, past income, education, training and

experience are considered in the calculations. In order to quantify a loss of competitive advantage, the court is required to look at how someone's ability to compete for employment is impaired. This necessarily involves telling a more detailed story.

There are two generally used methods to present a loss of competitive advantage claim. The first is a traditional lump sum approach without specific regard to any calculated income loss. Many Plaintiffs' counsel resist the use of a lump sum loss of competitive advantage approach because of the conventional range of damages that are determined somewhat arbitrarily. The second approach is to award the Plaintiff an amount representing the annual income loss to an expected retirement date. Using this approach, a significant income earner (or potential significant income earner) who is injured and who has a reasonable likelihood of earning a modest 5% less per annum over his/her career, but for her injuries, is easily looking at a loss of competitive advantage in the six figure range. Of the two approaches, the present day value of an annualized income loss generally produces higher figures. Cases that have awarded "ballpark" figures without any expression of an annualized income loss typically are lower.

History of Awards

Historically, awards for loss of competitive advantage have been conservative lump sums in the range of $50,000 to $100,000. The lump sum awards appear to be arbitrarily quantified and often undervalue the Plaintiffs' true loss. In the 1997 case *Earl v Lang*[1] the court confirmed that damages for loss of competitive advantage will be awarded if there is a real and substantial risk that a person may lose income in the future because of a competitive disadvantage sustained as a result of an accident. The Honourable Justice Morin held that damage assessments will not be arrived at on the basis of statistics and actuarial calculations but a general lump sum figure will be assessed having regard to all of the evidence in a particular case. According to Morin J.:

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[1] Earl v. Lang, 1999 CanLII 18660 (ON CA)

> While I am of the view that Gary is entitled to an award of damages for loss of competitive edge, there being a real and substantial risk that he may lose income in the future because of a competitive disadvantage sustained as a result of the accident, I find none of the analysis of Hollander, Rea and Townsend to be of significant assistance in determining what a fair and reasonable assessment on this head of damage might be. In my view, the assessment cannot be arrived at on the basis of statistics and actuarial calculations. What I must do is arrive at a lump sum figure, on the basis of all of the evidence, which is fair and reasonable to both Gary and Lang. The figure must have an air of reality about it having regard to all of the evidence.
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> While there is a real and substantial risk of some loss of income in the future for this particular individual the risk is minimized by Gary's employment history, his reputation in the work force and his personal courage in doing his work, notwithstanding his disabilities. In my view, a fair and reasonable award on this head of damage would be $50,000. I point out that this award is meant to compensate Gary for his loss of competitive edge. I find on all of the evidence that he has not suffered and will not suffer any loss of income in his trapping or taxidermy business because of injuries suffered in the accident. [Emphasis added]

Contrary to the lump sum method for determining loss of competitive advantage adopted in *Earl v Lang,* Cavarzan J. in the 2002 case of *Hutchison v Dalton*[2] awarded a lump sum loss for each year of a Plaintiff's remaining working life because she was limited in the physical type of work that she was best suited to perform. The award of $162,801.00 was calculated based on the Plaintiff's twenty-four year work life expectancy; the present value of $1.00 at $18.089; and

[2] *Hutchison v. Dalton*, 2002 Can LII 32349 (ON SC)

a loss of $15,000.00 per year (reduced by 40% for contingencies). Cavarzan J. recognized that the loss of competitive edge need not be an arbitrary lump sum but was more appropriately calculated as a yearly economic loss.

In Cowles v Balac[3], Madame Justice MacFarland explained that although there were occupations that the Plaintiff could perform on a full-time basis for remuneration equivalent to that of her chosen profession, by the same token the nature of the Plaintiff's permanent disabilities precluded her from a number of occupations. A lump sum of $250,000.00 was awarded to the Plaintiff based on the fact that she was precluded from certain types of work on a full-time basis for the rest of her working life while at the same time recognizing that there were many jobs the Plaintiff could do on a full-time basis.

Similarly, in the 2014 decision of *Gilbert v South*[4], the jury awarded $250,000.00 to the Plaintiff for loss of future income, earning capacity and competitive advantage. The award was made despite the fact that the Plaintiff, a Canada Post worker, continued to work post accident and had not suffered a past loss of income (only $5,800 was awarded for past income loss).

To date, the high-water mark for damages awarded for loss of competitive advantage in Ontario is the 2008 decision of *St. Prix-Alexander v Home Depot of Canada Inc.*[5] Justice Bernard Manton awarded a Plaintiff $400,000.00 for her loss of competitive advantage. In this case, the Plaintiff was injured in a Canadian Home Depot store after being struck in the head and neck by a box that an employee was retrieving from a shelf. At the time of the injury in 1999, the Plaintiff was on parental leave but intended to return to her work as an executive assistant with the Treasury Board, within a few months. The Plaintiff did eventually return to her work post-injury and was working up to 60 hours per week in a stressful

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[3] *Cowles v. Balac* [2005] O.J. No.229 (affirmed on appeal)
[4] *Gilbert v. South et al* 2014 ONSC 2413 (CanLII)
[5] *St. Prix-Alexander v. Home Depot of Canada Inc*., 2008 Can LII 115 (ON SC)

position, but earning strong reviews from her employer. At the suggestion of her doctor, she underwent decompression surgery to her cervical spine due her injuries but continued to work. She was exhausted by the end of each day and her activities at home were very limited. When her boss changed, more demands were expected of her and she was forced to quit because she could not continue to handle the job. The Plaintiff did secure another job with a smaller government department, but her new boss was not flexible. She left that employ after a period of three months and applied for long-term disability. By the time she stopped working entirely; more than 6 years had passed since the accident. During the trial, Justice Manton was critical of the Plaintiff in many ways:

- "I find it strange that the Plaintiff did not display similar difficulties [like those displayed at a two-day vocational assessment] when testifying in this court for more than 13 hours at the trial. In fact, I found that she had a very good memory and was able to remember details of illnesses and jobs going as far back as her college days. She had no difficulty whatsoever testifying in a very effective manner."
- "She was therefore not honest with her employer [when providing a reason for extending her parental leave] thinking that it would be to her advantage in the workplace to give an untruthful reason for extending her leave."
- "I agree with the solicitor for the defence who said in his argument that it seems that at every opportunity, the Plaintiff exaggerated her medical condition. I find that on several occasions, she was not entirely truthful in her answers."
- "I find it difficult to believe that Dr. Morris was told about the pain and headaches at almost every visit and referred to this only twice in his notes."
- "Except for the time she was on maternity leave and the leave of absence that she took when she was operated in 2003, she worked mostly on a full-time basis until the month of June 2006…I have therefore come to the

> conclusion that the Plaintiff could have continued working as a public servant. No effort was made by her to find a less stressful job or to find out if she could be accommodated by her employer by working regular hours at a job with less responsibilities."

Justice Manton refused to award the Plaintiff compensation for income loss between the time she went on long-term disability and her expected retirement age. The court found that, contrary to her testimony, the Plaintiff could have continued to work in a role with less responsibility, given the full time, high stress work that she held for many years post injury. However, despite his clear criticism of the Plaintiff, Justice Manton awarded the Plaintiff a significant sum for her loss of competitive advantage and explained:

> I have no doubt that she had suffered a loss of competitive advantage because of the injuries sustained by her and she will suffer economic loss because of the fact that she can no longer work 60 hours per week and her ability to compete for employment has been impaired. She can no longer accept jobs that demand a lot of concentration and are as stressful as an Executive Assistant. She will therefore be less attractive to her employer than a comparable individual not impaired in any way.

The above mentioned decisions are important to highlight the fact that a return to work does not disentitle Plaintiffs from claiming economic loss if they can prove that injuries restrict them to fewer jobs than they could perform pre-injury or that they can do fewer job functions than persons with similar education and skills who are not impaired. Further, the decisions confirm that Ontario courts have not ruled out the possibility of sizable damage awards for loss of competitive advantage or loss of earning capacity despite previous court decisions that have had less desirable outcomes for Plaintiffs.

Burden of Proof

It is not necessary for Plaintiffs to prove on the balance of probabilities that future loss or damages will occur but only that there is a reasonable chance of such loss or damage occurring. The standard of proof is "simple probability". The Court of Appeal confirmed in *Schrump v. Koot*[6] that a Plaintiff satisfies the burden of proof for establishing a loss of future income (or by extension loss of competitive advantage) by demonstrating a real and substantial risk of pecuniary loss.

Evidence

There are many statistics dealing with labour market analysis and an economist can access statistics relevant to the loss of competitive advantage analysis required in light of the facts of the case. Statistics indicate that persons suffering physical or psychological impairment have a higher rate of unemployment, are more likely to work part-time as opposed to full-time, and earn lower hourly rates than their unimpaired colleagues.

Rehabilitation consultants can give evidence that the Plaintiff exerted maximal effort to realize post-accident potential but that the Plaintiff is left with a number of restrictions which adversely impact his or her vocational potential. A vocational assessor (or psycho-vocational assessor) may also be helpful to identify that the Plaintiff's employment aptitudes are inconsistent with their measured abilities post-injury. The vocational assessor may also provide an opinion about the current labour market and how opportunities are restricted for people with impairments. Vocational assessors can also provide an opinion about whether or not the Plaintiff will be restricted to part-time employment, sedentary employment, or minimum wage employment with little or no opportunity for advancement. The use of non-expert evidence can also be used to support a loss of competitive advantage claim. Evidence from employers and co-workers describing pre-injury and post-

[6] *Schrump v. Koot* (1977), 18 O.R. (2d) 337, 1977 Can LII 1332 (ON CA)

injury performance of the Plaintiff can be very persuasive and is almost immune to effective cross-examination.

When to advance a LoCA claim

Loss of competitive advantage claims should be advanced in situations where the injured party can return to some work, but is now "damaged" goods and is unlikely to get promotions, qualify for key projects, or receive salary increases at the same rate as their non-injured colleagues. The claim should also be advanced in situations where the Plaintiff is less likely to get the job when competing with other able-bodied or able-minded individuals who do not suffer the ongoing sequlae of injury. Loss of competitive advantage is a very specific award and should not be misused to squeeze more money out of general damages.

Loss of Income and Loss of Competitive Advantage – can you claim both

In *Cerilli v. Ottawa (City)*[7], the Plaintiff was a hairdresser and broke her ankle when she slipped and fell on a city sidewalk. McKinnon J. found that because of her injuries, the Plaintiff was no longer able to continue working as a hairdresser. However, the Plaintiff had found other work and, by the time of trial, was earning more than she had been earning in her previous career. Justice McKinnon elected to deal with the claim for future income loss by awarding damages for loss of competitive advantage. When Justice McKinnon ruled on the issue of costs, counsel for the City of Ottawa took issue with prejudgment interest having been awarded on the damages for loss of competitive advantage and argued that interest should not have been calculated on this portion of the award. McKinnon J. continued to opine that interest should be awarded and explained:

> I do not agree [with the Defence submissions]. The loss of competitive advantage occurred directly as a result of the accident

[7] *Cerilli v. Ottawa* (City), 2006 Can LII 40785 (ON SC)

> and there is no reason why interest on the amount should not be paid from the date of the accident.

The awarding of pre-judgment interest on the loss of competitive advantage sum indicates that the head of damage is not analogous to future loss of income. Future loss of income is a head of damage that has not yet been suffered and therefore the Plaintiff has not experienced the loss of the use of the money, which is what pre-judgment interest under s.128 of the *Courts of Justice Act*[8] is intended to redress. Therefore, an award for loss of competitive advantage is not a future income loss but more correctly an award of compensation for the loss of a capital asset (the ability to earn income). The loss of the asset is suffered at the time of the accident and therefore attracts prejudgment interest. On this analysis, a loss of competitive advantage claim can be awarded in addition to an award for loss of future income. In those cases where the Plaintiff has a calculated future income loss because s/he cannot return to work or is earning less than pre-injury, s/he may also (additionally) suffer a loss of competitiveness that is not captured by the straight income loss calculation. In the case of *Branch v Martini*[9], MacLeod J. awarded the Plaintiff damages for both future income loss and loss of competitive advantage. The Plaintiff was employed as a mover and suffered significant injuries in a motor vehicle accident. He was unable to return to his work as a mover but eventually secured less physical work driving a truck and remained in that position at the time of trial. Evidence was led and accepted that the Plaintiff would be unable to continue in his present work at a truck driver because his medical condition was expected to deteriorate and he would therefore require a less physically demanding job. When considering the Plaintiff's economic losses, MacLeod J. found that the Plaintiff's employability was significantly limited; that he would be unable to resume his pre-accident job; that he was capable of alternative work but was limited by his physical disabilities and lack of education and skills; and on a balance of probabilities, the Plaintiff would not be able to perform his

[8] *Courts of Justice Act*, RSO 1990, c C.43, section 128
[9] *Branch v. Martini* [1988] O.J. No. 2474

current occupation indefinitely and would have to change to a lower paying occupation. MacLeod J. awarded an annual wage loss which would continue to the assumed retirement age. The loss of future income award was calculated based on the present value of an annual wage loss. In addition, an award was granted for loss of competitive advantage because it was likely that the Plaintiff would have to change jobs in the future (at age 45) and was now more marginalized than before the accident, resulting in an increased annual wage loss of $5,000 per year for his remaining working life. The loss of competitive advantage award was $65,965.00. Similarly, in *Bezusko v Waterfall*[10], a business owner Plaintiff was awarded a future loss of income and a loss of competitive advantage for his loss of the ability to create value carrying out construction work of the business or improve assets to its property.

A loss of competitive advantage claim can be a true advantage to injured Plaintiffs because it recognizes that people who continue to work post-injury still suffer a compensable economic loss. Plaintiffs who ultimately get back to work, but struggle with no work/life balance; or use up their vacation time for recovery; or are overlooked for promotions, merit raises or access to key projects; or face many of the other employment problems injured people routinely suffer, will be compensated for those losses. While both future loss of income and loss of competitive advantage are separate heads of damage, there is risk that the Plaintiff will be seen as over-reaching or trying to recover twice for economic losses – unless the Plaintiffs real life employment story is told (supported by evidence) and the difference between future income loss and loss of competitive advantage is clearly explained.

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[10] *Bezusko v Waterfall*, [1977], O.J. No. 4693