

ICBC Claims, Future Wage Loss And The Ability To Work In Your Chosen Profession

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Imagine sustaining permanent and partially disabling injuries in a BC Car Accident through the fault of another. Despite your permanent injuries you are able to carry on in your own chosen profession. Are you entitled to be compensated for future wage loss in your ICBC tort claim or does the fact that you can work in your own occupation restrict such an award? Reasons for judgement were released by the BC Supreme Court today dealing with this issue.

In today's case (Ayoubee v. Campbell) the now 34 year old Plaintiff was injured in a multiple vehicle collision which occurred in September, 2003. The Plaintiff sustained serious injuries including a herniated disc (at the L5 / S1 Level) with associated pain down his leg and mechanical back pain in the collision. At the time of the accident he had just begun a computer course at BCIT and intended to make a career from the opportunities that this education would provide. Despite his serious injuries he was able to complete his studies then found and maintained employment in his chosen field.

In awarding \$100,000 for non-pecuniary damages the court accepted that the Plaintiff will have some permanent pain and made came to the following conclusion with respect to his injuries:

[104] I accept Mr. Ayoubee's evidence that he has never been pain free since the accident, although he has managed to control the level of pain through exercise and stretching. He has attempted to function as fully as he can, despite the limitations he now contends with. In the past year, however, his leg has deteriorated and the quality of his life has diminished even further. Surgery may help with the pain, but he will likely be left with residual numbness and discomfort, and the back pain will remain. As a result of the accident, he has lost the quality of life of an active young man.

Madam Justice Humphries engaged in a lengthy discussion addressing the Plaintiff's loss of future earning capacity. The court found that given the Plaintiff's permanent injuries certain occupations will be closed to the Plaintiff, however, the Plaintiff 'is not foreclosed from the type of job he was training for at the time of the accident, obtained after the accident, and has held full-time employment ever since.'

In assessing the Plaintiff's impaired earning capacity (future wage loss) at \$80,000 Madam Justice Humphries made the following analysis:

[89] In my view, this is a case in which it would be more appropriate to award a lump sum for loss of capacity. There are a significant number of jobs that Mr. Ayoubee can no longer do, jobs of the type he once held and which could still provide him with opportunities for part time income enhancement that he now must forego.

[90] As well, he is not as attractive an employee on the open labour market as he once was, given his chronic pain and inability to work without breaks.

[91] He will also be unable to work while he recovers from surgery, which it is likely he will undergo once he has seen Dr. Dommissie. Dr. Yu suggests the recovery time would be two or three months. The defendants calculate the loss attributable to those months, reduced by the possibility that Mr. Ayoubee might decide not to have the surgery, and suggested that the applicable rate should be his salary level in 2005 when, in their position, he should have mitigated his damages. The defendants arrived at a figure of approximately \$7,700. The plaintiff did not address that issue.

[92] Surgery may improve Mr. Ayoubee's leg pain, although the doctors differ on whether this is still realistic. In any even he will be left with back pain. I take into account that, of the two, the leg pain has always

been the most severe, and is the cause of his greater restrictions at present. On the other hand, given the back pain, there is no suggestion that he will be able to undertake moderate to heavy physical employment again.

[93] An important factor that distinguishes Mr. Ayoubee's case from those in which very high awards have been made for future loss is that he is not foreclosed from the type of job he was training for at the time of the accident, obtained after the accident, and has held full-time ever since. He does not require retraining. His employability does not depend on his ability to do heavy physical labour and he never intended that it should, although there is a substantial possibility that he might have supplemented his income occasionally with the type of job he held at Rona, if he were still able to do so.

[94] Considering that some future wage loss will be attributable to the surgery, and considering the diminution in the capital asset of his employability generally, I set his future loss, including his loss of capacity, at \$80,000.