

## ICBC Injury Claims, Past Wage Loss And Income Tax

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I normally don't blog about tax law but in certain circumstances the interplay of tax law and personal injury law can have very significant consequences in ICBC Injury Claims.

If you are injured through the fault of another in a motor vehicle collision in BC and advance a tort claim for your past wage loss you need to be familiar with s. 98 of the *Insurance (Vehicle) Act* which limits past income loss awards to past 'net' income loss.

Most ICBC Injury Claims lawyers can tell you that serious injury claims usually take many years before making their way to trial, mostly because it is important for injuries to reach a point of maximum medical improvement before trying to value them.

As a result of this many Plaintiff's with serious injuries such as brain or spinal cord injuries have several years of past wage loss by the time their claim gets to trial. How then, should s. 98 of the *Insurance (Vehicle) Act* operate for past wage loss in these circumstances? Take the following example:

Imagine a Plaintiff who earned \$50,000 per year had 4 years of income loss before his ICBC Injury Claim got to trial. His gross income loss would be \$200,000. What would the net loss be? Would it be the income tax on \$200,000 at today's rate or would the income be taxed at the lower rate (the taxes payable on a salary of \$50,000 in each calendar year)?

In a 2003 decision named *Hudniuk*, the BC Supreme Court stated that taxes must be assessed "as if the past income had all been earned at the effective date of the jury's assessment namely, the first day of trial" Since 2003 this approach has been generally accepted as being correct. This approach, in my opinion, unfairly penalized Plaintiffs by taking an amount off their award for taxes far greater than what they actually would have paid in taxes had they earned the income year by year. Fortunately, [very important reasons were released today by the BC Court of Appeal \(Lines v. Gordon\)](#) adding clarity to the application of section 98.

In today's case the BC Court of Appeal weighed in how s. 98 of the Insurance Vehicle Act should be applied. In doing so the Court first reaffirmed the important principle in tort law that:

*Damages should, so far as any monetary award can do so, restore the plaintiff to the position in which he would have stood but for the defendant's wrongdoing. On this basis they should represent compensation for loss of earning capacity and not for loss of earnings. In a case of personal injuries, what the plaintiff has lost is the whole or part, as the case may be, of his natural capital equipment and to tax him on this is contrary to generally accepted principles of taxation.*

The Court then went on to decide that the approach taken by the trial judge in *Hudniuk* was not inflexible and not appropriate in all circumstances and stated as follows:

[181] *Although the wording of ss. 95 and 98 contemplates the possibility of calculating net income loss for multiple periods between the date of the accident and the date of trial, it is my opinion that the Legislature did not intend to require in every case that gross past income loss be allocated to each of the calendar years between the date of the accident and the date of trial and to never allow net income loss to be calculated on the basis that the compensation for it was all received on the first day of trial. If the Legislature had so intended, it would not have used the words "for any period" in the introductory portion of the s. 95 definition of "net income loss". Rather, if that had been the intention, the Legislature would have used words to the effect of "for each calendar year".*

[182] In my opinion, the Legislature recognized that there may be difficulties in allocating gross income loss to particular periods between the date of the accident and the date of trial. For example, as in *Hudniuk*, a jury may make a finding as to the gross income loss without being asked to allocate the loss to any calendar year or other period, and the judge may consider it inappropriate to speculate on the jury's reasoning process. The difficulty could be compounded if, again as in *Hudniuk*, the tax rules applicable to the income earned in a particular year are different from the tax rules applicable to the income allocated to that year.

[183] Another example is a situation where the plaintiff was unemployed at the time of the accident and had no imminent prospects of employment. The judge or jury could make an award for loss of past earning capacity, but it would be artificial to allocate it among different periods.

[184] In my opinion, by the use of the phrase "for any period", it was the intention of the Legislature to give a discretion to the judge to determine what period or periods are appropriate for the determination of net income loss in all of the circumstances. In the two examples I have given, it would be appropriate for the judge to use only one period for the calculation of net income loss (namely, the entire period from the date of the accident to the first day of trial). In such a case, net income loss would be calculated as if the gross income award was received by the plaintiff on the first day of trial.

[185] By way of contrast to the two examples I have given, in the situation where, at the time of injury, the plaintiff was working at a job and returned to that job after sufficiently recovering from the injuries, it would be appropriate, absent any complications, for the judge to allocate the gross income loss to the calendar years between the date of the accident and the date of trial as if the plaintiff had continued working. This would accord with the principle that, insofar as is possible, the plaintiff should be put in the position he or she would have been in if not for the injuries caused by the defendant's negligence.

[186] There will be a wide variety of circumstances facing trial judges. In each case, the trial judge will have to decide whether it is appropriate in the circumstances before him or her to calculate net income loss on the basis of one period, calendar-year periods or other multiple periods. In making a decision in this regard, the trial judge should consider all of the circumstances and apply s. 98 in a manner that is most consistent with the principles of damage assessment to which I have referred.

[187] The application of s. 98 in jury trials should be consistent with its application in trials by judge alone. The judge will typically consult with counsel as to whether the jury will be requested to only make an award for the gross amount of the loss of past earning capacity or to also make a finding of fact with respect to the net income loss prior to trial. Whether the jury will be requested to provide a lump sum amount of the past gross income loss, or will be requested to provide periodic gross amounts, for use in calculating the net income award, will depend on the circumstances of the case.

[188] In the present case, the plaintiff did not earn any income between the date of the accident and the date of trial, with the result that there is no complication of using different tax rules for actual and allocated income. Although the trial judge made a global assessment of the past income loss, he specifically accepted a scenario which allocated projected income among the calendar years between the accident and the trial, and he then applied contingencies to arrive at the award he made. In the circumstances, it is reasonable to infer that he applied the contingencies to the projected annual incomes on a pro rata basis.

[189] In addition, it is apparent from the supplementary reasons for judgment that the trial judge felt constrained to follow what he understood to be the inflexible approach of *Hudniuk* in circumstances where he felt that approach diverted from the damage assessment principle that a plaintiff should be made whole. It is reasonable to conclude, in my opinion, that if the judge appreciated that he had a discretion to allocate the gross income loss to more than one period, he would have allocated it to each of the calendar years between the accident and the trial on a pro rata basis according to the incomes projected in the scenario he accepted.

