

Sisett & Company presents "You and the Law"

## COMPENSATION for "DIMINISHED EARNING CAPACITY"

*Our law is based upon principles of fairness and responsibility. If we cause harm to another, we each have a responsibility to 'set things right.' Given human failings, we rely upon various forms of insurance to protect us in meeting our responsibilities. Basically, our law involves protection of the integrity, independence and dignity of each of us from insult.*

Determining the right compensation for a person injured in an accident is never easy. If the matter goes to court, the trial judge must assess and weigh the testimony of the victim, doctors, "actuarial" experts who give evidence on the victim's potential future lost income, and other witnesses to arrive at a sum of money that best compensates the injured person for their losses.

The task can be even more difficult if the person hasn't suffered quadriplegia, severe brain damage or other catastrophic injury, but can still work in future despite some residual problems.

When figuring out the future lost earnings, the court tries to compensate for the person's impairment. Even a person who'll likely earn as much as they could have made if they hadn't been injured is entitled to some compensation for their impairment.

Why? Because for the rest of their life, some occupations will be closed to them, and it's impossible to say that their impairment won't harm their income earning ability in future.

Consider the case of John Palmer. He was 31 when he was broadsided by another vehicle. His symptoms suggested he suffered a fracture at the base of his skull (often these fractures can't be seen by an X-ray) in addition to a lot of soreness and bruising, but he didn't experience any brain damage.

Before the accident, he worked as a Safeway clerk and would have earned a total wage/benefit package of \$42,000 a year. But while he tried to go back to work after the accident, he couldn't handle the heavy work. He found a job instead as a stereo installer making \$12,000 a year, with the possibility of earning up to \$19,000 a year.

The trial judge assessed the compensation for his future diminished earning capacity at \$494,000. But the BC Court of Appeal reduced

that sum to \$150,000.

The Court of Appeal said what Palmer proved was that he had lost his capacity to follow the sort of occupation he was doing at the time of the accident. But that didn't prove that he couldn't earn as much as before by pursuing some other sort of job. Still, because some jobs would be closed to him in future, he was entitled to something for his diminished earning capacity, which the Court of Appeal said should be \$150,000.

More recently, the Court of Appeal upheld an amount of \$500,000 for diminished earning capacity for Eileen Charles, 22 at the time of her accident. She was a jogger who suffered a head injury when struck by a cab in Vancouver.

The trial judge described her permanent head injury as "subtle,

something that would not be noticed by a person who met her casually, and yet it restricts or prevents her functioning at the higher level she was once capable of." While there was still a real possibility she could pursue a master's degree as originally planned, she probably would no longer be able to advance to a senior management level in her chosen field because of the limitations imposed by her brain injury. The trial judge assessed this loss at \$500,000, which was upheld on appeal.

Figuring out the proper compensation for diminished earning capacity isn't a precise science. But having a good lawyer will go a long way to helping you receive a fair amount.

*This column is written by Janice Mucalov in consultation with Ian R. Sisett to help in understanding of our law and its application in matters of injury. The column provides information only, not legal advice. Please consult Ian R. Sisett and associates at SISETT & COMPANY for legal advice concerning your particular case. No fees charged unless we can help. Fees contingent upon success.*



Ian R. Sisett

Lawyer Janice Mucalov has authored several popular law books and writes about legal affairs for a variety of publications. "You and the Law" is a registered trade-mark. © by Janice Mucalov.



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