STREAMLINING THE PROCESS OF PROVING AND DEFENDING ECONOMIC LOSS TO RESOLVE CASES EFFICIENTLY:

THE PLAINTIFF'S PERSPECTIVE

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I N D E X

Topic	**Page**
Introduction	1
Proving Future Economic Losses – The Law	2
Critical Factors	5
Experts	7
Streamlining the Process	11
Implications of *Daubert*	15
Conclusion	16

Introduction

1. The purpose of this paper is to:

   (a) provide a helpful checklist of considerations that ought to be made when advancing a claim for economic losses on behalf of a plaintiff;

   (b) outline a roster of possible experts to consider using to best advance the plaintiff's claim for economic losses;

   (c) suggest a few tips for streamlining the process of settling economic loss claims;

   (d) share some insight into what works at a settlement conference or mediation; and

   (e) outline a helpful summary of the law related to claims for future economic loss.

2. As the title suggests, the focus of this paper will be on those tips and pointers which best help a plaintiff resolve a claim for economic losses on a negotiated basis. This paper does not focus on trial strategies or procedure. While there is a great deal of overlap, to be sure, as between the approach adopted for settlement purposes and the approach adopted for trial purposes, this paper will not explore trial techniques.

3. While the paper primarily considers economic losses in general, there will be an inescapable reference to motor vehicle claims in a specific way, since, for most practitioners, car crashes still comprise the bulk of the personal injury litigation commenced in this province. Most of the comments that relate to motor vehicle cases apply with equal effect to non-motor vehicle cases.

Proving Future Economic Losses – The Law[1]

4. The evidence available in support of a claim for economic loss must always be considered in light of the legal tests established for advancing such a claim. Outlined below, as a launch pad for the rest of the discussion in this paper, is a summary of the primary principles coming out of the caselaw, dating back to 1977 in Ontario and elsewhere in Canada.

5. Prospective loss of earnings has been characterized as a lost capital asset. It is therefore necessary to assess its value at trial.[2]

6. In cases where the plaintiff has suffered a diminished life expectancy, capitalization of future earning capacity should be based on the expected working life prior to the accident. The analysis should be viewed as the loss of a capital asset consisting of income-earning capacity rather than a loss of income. It is the loss of that capacity which existed prior to the collision which must be compensated.[3]

7. The plaintiff is not required to prove that future loss will occur, but only that there is a reasonable chance that such loss or damage will occur. The plaintiff need only establish a reasonable, as distinct from a speculative, chance of suffering future loss.[4]

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1 I am indebted to one of my mentors, Vince Calzonetti, for sharing with me an excerpt from a Mediation Memo which contained most of the outline of the law which follows under this heading. I don't know who originally compiled this summary, so I remain unable to credit the original author.

2 *Andrews v. Grand & Toy Alberta Ltd*., 83 D.L.R. (3d) 452 (S.C.C.) at 469

3 *Andrews v. Grand & Toy Alberta Ltd*., supra

4 *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (CA.) at 340

8. In determining compensation for loss of earning capacity the trier of fact must consider:

   (a) Has the plaintiff's earning capacity been impaired to any degree by his injuries?

   (b) If so, what amount in light of all the evidence should be awarded for that impairment?[5]

9. Where a plaintiff has a permanent injury, and permanent pain, which limits him in his capacity to perform certain activities and which, therefore, impairs his income earning capacity, the loss of capacity has been suffered even though he is still employed by his pre-accident employer and may continue to be so employed indefinitely.[6]

10. Ontario and British Columbia courts have both held that even where an award for future loss of earnings has been made, it is still appropriate to award damages for future loss of earning capacity or loss of competitive advantage.[7]

11. In the assessment of future damages for physical injury, it is not necessary for the plaintiff to prove that future loss or damage will occur, but, only that there is a reasonable chance of such loss or damage occurring. Speculative and fanciful possibilities unsupported by expert or other cogent evidence should be ignored, whereas, substantial possibilities based upon expert or cogent evidence must be considered. Regardless of the percentage of the possibility or whether it is

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5 *Earnshaw v. Despins*, [1990] B.C.J. No. 944 (B.C.C.A.) at 9

6 *Pallos v. Insurance Co. of British Columbia*, [1995] B.C.J. No. 2 (B.C.C.A.) at 5

7 *Dikihi v. Via Rail Canada Inc.*, supra, at 7

Ryan v. Richards, supra, at 3

Nelson v. Kanusa, supra, at 9

Doyle v. Crittenden, supra, at 9

favourable or unfavourable, if it is a substantial possibility, the above-noted principal will be applied.[8]

12. If the plaintiff establishes a real and substantial risk of future loss, he or she is entitled to compensation. The greater the risk of loss, the greater the compensation that is to be awarded.[9]

13. The rule in *Schrump v. Koot* has been discussed and followed in a number of decisions of the Supreme Court of Canada and the Ontario Court of Appeal as the appropriate test for determining future loss. It has been more succinctly expressed as "the reasonable possibility of future loss" or the "real or substantial possibility of future loss".[10]

14. The Ontario Court of Appeal in *Graham et al v. Rourke* expanded upon its statement in *Schrump et al v. Koot et al*. It was stated on page 634 that:

> A plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities that her future earning capacity will be lost or diminished or that she will require future care because of the wrong done to her. If the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation.
>
> A plaintiff who establishes a real and substantial risk of future pecuniary loss is not necessarily entitled to the full measure of that potential loss. Compensation for future loss is not an all-or-nothing proposition. Entitlement to compensation will depend in part on the degree of risk established. The greater the risk of loss, the greater will be the compensation. The measure of compensation for future economic loss will also depend on the possibility, if any, that a plaintiff would have

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8 *Schrump et al v. Koot et al* (1977), 18 O.R. (2d) 337 (Ont. C.A.) at 340

9 *Graham et al v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.) at 634

10 *Ippolito v. Janiak* (1981), 34 O.R. (2d) 151 (Ont. C.A.)

Janiak v. Ippolito, [1985] 1 S.C.R. 146

Graham et al v. Rourke (1990), 75 O.R. (2d) 622 (Ont. C.A.)

Meyer v. Bright (1993), 15 O.R. (3d) 129 (Ont. C.A.)

Athey v. Leonati (1996), 3 S.C.R. 458

suffered some or all of those projected losses even if the wrong done to her had not occurred. The greater this possibility, the lower the award for future pecuniary loss.[11]

Critical Factors

15. At its most basic level, the analysis of economic losses comes down to two questions:

(a) What would the plaintiff have earned, had the accident not have occurred?

(b) What will the plaintiff now earn, given the accident-related impairments?

16. Embedded within these two main questions are the following further considerations:

- When would the plaintiff have retired, assuming the accident did not happen?
- Given the plaintiff's accident-related difficulties, what is the expected retirement date?
- Is the plaintiff's pre-accident earning profile, as evidenced in Tax Returns, business records, or other documents, the best predictor of what the plaintiff's future income earning capacity would have been, absent the accident, or is some other evidence a better indicator of future income earning potential?
- Can the plaintiff work full-time hours, part-time hours, or not at all?
- Are there hidden losses to economic capacity such as the loss of sick days, the loss of pension contributions, the loss of seniority, the loss of promotion, etc., that need to be factored into the analysis?
- What is the cost of accommodation or retraining?

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11 *Graham et al v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.) at 634

- Will the plaintiff be forced to reduce down from full-time hours to part-time hours at some point in the future, owing to accident-related difficulties?
- Will there be a delay in entering the workplace, if the plaintiff is a student or homemaker?

17. Some of the considerations to take into account in making the assessment of loss of earning capacity are whether:

(a) the plaintiff has been rendered less capable overall of earning income from all types of employment;

(b) the plaintiff is less marketable or attractive as an employee to potential employers;

(c) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

(d) the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.[12]

18. In assessing loss of competitive advantage, the Ontario courts have analyzed the following criteria:

(a) Physical problems which will impact on job performance;[13]

(b) Age - Younger claimants have a greater opportunity for advancement over the course of a career than those who are approaching retirement;[14]

(c) Difficulty in obtaining other employment;[15]

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12 *Brown v. Golaiy*, 1985, B.C.J. No. 31 (December 13, 1985), Vancouver Doc. B831458, (B.C.S.C.) as cited in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.) at 4

13 *Teti v. Neilson Estate*, [1987] O.J. No. 813 (Ont. H.C.) at 2
Baron v. Nguyen, [1992] O.J. No. 609 (Gen. Div.) at 6
Ryan v. Richards, [1991] O.J. No. 2067 (Gen. Div.) at 3
Dikih v. Via Rail Canada Inc., [1987] O.J. No. 272 (Ont. H.C.) at 7
Remouche v. Mercer, [1992] O.J. No. 900 (Gen. Div.) at 4
Borland v. Muttersbach, [1984] O.J. No. 481 (Ont. S.C.) at 18

14 *Stein v. O'Brien*, [1988] O.J. No. 617 (Ont. Gen. Div.) at 8
Teti v. Neilson Estate, supra, at 2

(d) The substantial or real risk that the plaintiff will change employment. Aggressive plaintiffs with the type of personality to actively seek better employment opportunities or advancements have a greater opportunity of advancement;[16]

(e) The risk that should the plaintiff lose his present employment he will be significantly adversely affected because of his education and skill level;[17]

(f) The fact the employers tend to avoid prospective employees with physical limitations;[18]

(g) The injuries and the subsequent absences created a poor work record thereby making the employee or applicant less attractive;[19]

(h) The career path of the plaintiff. A plaintiff with injuries that prevent her from entering one area of work will not be compensated if there was no intention or ability to enter that field of work;[20] and

(i) Prior injuries or physical impairments that hindered the plaintiff before the accident.[21]

19. All of the factors mentioned above need to be considered when assessing the merits of the economic loss claim.

Experts

20. From file to file, and case to case, the roster of experts who might be able to assist a plaintiff in advancing a claim for economic losses shifts. The spectrum of possible experts includes the following:

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15 *Teti v. Neilson Estate*, supra, at 2
Ryan v. Richards, supra, at 3
16 *Teti v. Neilson Estate*, supra, at 2
Green v. Trepanier, [1992] O.J. No. 1807 (Ont. Gen. Div.) at 3
17 *Remouche v. Mercer*, supra, at 4
18 *Baron v. Nguyen*, supra at 6
Dikih Via Rail Canada Inc., supra at 7
Borland v. Muttersbach, supra at 12
19 *B.W. v. P.M.M.,* [1994] O.J. No. 2241 (Ont. Gen. Div.) at 2
20 *Soulliere v. Neilson Estate*, [1987] O.J. No. 814 at 2
Freeswick v. Forbes, [1996] O.J. No. 1466 at 6
21 *Koukounakis v. Stainrod*, [1995] O.J. No. 1369 (C.A.) at 4

- an economist
- an accountant
- an occupational therapist
- a psychologist to do a psychovocational assessment
- a rehabilitation professional to do a vocational review
- a physiatrist, being a specialist in physical medicine and rehabilitation
- the family physician

21. Obviously, there may be additional medical experts who will give evidence about the plaintiff's physical, mental, or psychological functioning. As may be appropriate, those individuals will probably also be in a position to provide an opinion with respect to income-earning potential. It would be unusual to have every one of the experts identified above involved in a claim. Instead, it is necessary to pick and choose those experts who, on the facts of the case, are best able to explain the difficulties that the plaintiff will have in pursuing competitive employment at a rate of pay comparable to pre-accident earnings or the expected earnings that would have been earned post-accident, had the accident not occurred.

22. An economist is useful when the pre-accident track record is determined to be a less than adequate measure of the plaintiff's post-accident, without injury, earning capacity. There are a number of circumstances when this might be the case, including:

    (a) students who have reasonable ideas about what they will become in the future, but who have not yet completed their studies;

(b) an individual who is in the midst of a career shift;

(c) someone who has the opportunity for considerable advancement in a career, perhaps only working at an entry-level position at the time of an accident; and

(d) a homemaker currently raising children, who plans to return to the workforce at some point in the future, perhaps when the children are all of school age.

In any of these scenarios, an economist can be helpful in generating a statistical profile of the type of earnings that one would expect to receive, given the geographical location of the plaintiff and the plaintiff's general education or experience. In the language of the cases, the economist is providing statistical opinion evidence about the substantial possibility of employment, now lost due to injury.

23. An accountant is particularly helpful when dealing with a self-employed individual. There are often legitimate income tax splitting arrangements available to self-employed individuals which serve to reduce their taxable income. This must be analyzed by a forensic accountant. There are also various legitimate business expenses that may be deducted through a self-employed business that ought to be considered as a loss of earning capacity within the context of the economic loss claim. An experienced forensic accountant is able to conduct the necessary review of business records and assimilate the information in order to make it understandable and identify an annual loss of income. I find it hard to settle a case for a self-employed plaintiff without a report from an accountant.

24. An occupational therapist may be needed in order to conduct a jobsite physical demand analysis. The physical demands of a particular occupation may not be

easily understood without an occupational therapist attending at the worksite in order to prepare a detailed list of job demands. Not all employers have a written job description for the job being performed by their employees. Part of the economic loss analysis, from the plaintiff's perspective, is adequately demonstrating that the plaintiff is unable to do his or her old job. The physical demands analysis, prepared following an onsite visit to the workplace, can then be used by some of the other medical specialists on the file to determine whether the injured plaintiff lacks the physical abilities necessary to do the job.

25. Not all economic loss claims are premised on the notion that the plaintiff will remain unable to work for the rest of his or her life. Indeed, more claims probably involve the scenario where the plaintiff will be returning to work, at some point in the future, either on a modified or part-time basis, or perhaps in some alternate field. If a career change, perhaps from manual labour to sedentary work, is a possibility, a psychovocational assessment helps to identify the interests and aptitudes of the plaintiff so that an informed analysis can be conducted of the likely post-accident income stream. The psychovocational assessor is also able to establish the educational retraining that might be necessary for the switch in careers, along with the length of time the plaintiff will need to take in order to upgrade those skills.

26. In the right type of case, it might be necessary to engage a rehabilitation professional to review and analyse the type of work available in the plaintiff's general geographic area. In smaller urban centres, or rural areas, the pool of available employment opportunities can often be limited. If the plaintiff has the

technical skills to do some other form of employment, but no such employment is available where the plaintiff lives, that evidence can often be persuasive when trying to make the claim for economic losses. Whether it is with a rehabilitation professional, or even the plaintiff personally, it is much more persuasive to demonstrate that no one is hiring, or that no jobs are even available within a particular career line, by producing evidence of the local economic marketplace. In this regard, there are often helpful statistics available from the local HRDC office which keeps statistics on job postings and availability.

27. The medical specialists who see the plaintiff, either on a treating basis or as a consulting physician, should be asked for their opinion concerning employability. Often, the family physician will have had a longstanding relationship with the injured plaintiff and will have a very clear sense of what the plaintiff is able to do and not do. Not all defence lawyers and insurance adjusters are persuaded by what the family physician has to say, sometimes perceiving the family physician as being an advocate on behalf of a patient. Nonetheless, it has been my experience that family doctors who come forward to strongly support a patient are straight-shooters who genuinely accept the plight of the plaintiff. They can be a powerful link in the economic loss chain.

Streamlining the Process

28. If you are attempting to settle the claim before trial, it is imperative that you have certain basic minimal documentation available to be shared with the adjuster or defence counsel. These documents would include:

- the employment file or files relating to the Plaintiff's pre-accident employment;
- Income Tax Returns for a reasonable number of years pre-accident;
- the family doctor's clinical notes and records for a reasonable block of time pre and post-accident;
- the AB file or other collateral benefit files;
- treating specialists' clinical notes and records; and
- all potential lay witnesses have been identified and the gist of their expected testimony is shared.

29. I am always careful not to ignore the various sources of collateral benefits that are available. If my client has LTD benefits, I aggressively pursue those LTD benefits. If it looks like the plaintiff will be unable to return to work, I bring the application for the Canada Pension Plan Disability Pension as soon as possible. I always keep pushing the accident benefit carrier to continue paying income replacement benefits if it is a car accident case. It has been my observation that there can be a domino effect, whereby one insurer can be persuaded to continue making payments because another insurer has accepted the Plaintiff's level of disability. Particularly, if the Plaintiff begins receiving the Canada Pension Plan Disability Pension, this can be a powerful negotiating tool. If the matter has come before the CPP Review Tribunal, I will often send a copy of the favourable decision as soon as it is received, highlighting those excerpts which support my theory of the case. Often, the Review Tribunal will make a comment that the plaintiff's evidence was given in a credible straightforward fashion, and I am always quick to highlight the fact that these three independent individuals found my client to be believable.

30. Do not under-estimate the persuasive value of family, friends, neighbours, and co-workers who augment the medical opinions in the file to “tell it like it is” with respect to the plaintiff’s likelihood of returning to work or likelihood of earning an income at some replacement occupation in the future. Share persuasive “will say” statements early on to demonstrate the exposure on the defendant.

31. In my view, you are doing yourself a disservice if you attend Examinations for Discovery without clearly mapping out your theory of economic losses. If all you can say to the defence lawyer is that you will think about that claim and get back to the lawyer in the future, you are not giving the defence lawyer much help in trying to explain to his or her principals what the potential exposure is for economic loss. It may not be necessary to have an accounting report or an economist report or a formal work-up completed. It is often sufficient to have a detailed work-up of your own doing that can be shared. By the time of Examinations for Discovery, you should at least know what the answer is to the following questions:

- Will the plaintiff be unemployable into the future?
- Is it likely for the plaintiff to return to his old job?
- If the plaintiff is working, will the plaintiff be forced to retire early or reduce full-time hours down to part-time hours?
- If further surgeries or treatments are likely, at least know the best and worst case scenarios and what the range of economic losses could be.

The claim will be streamlined if you supply the answer to these questions to the defence lawyer because you will have planted the seeds of a good settlement during that face-to-face encounter.

32. From my perspective, I have found it helpful to adopt a pragmatic and realistic approach to the assessment of future income losses. We are all familiar with the mathematical analysis that can yield very large numbers. That analysis, however, has to be grounded in the facts and evidence available for the case. To be sure, there are always exceptional cases which mandate an exceptional level of compensation. More often, however, the evidence in support of the income loss claim is less compelling. It is my view that it is appropriate to make the necessary concessions during negotiations, rather than present a "pie in the sky" number that may do more harm than good by poisoning the negotiations.

33. At a mediation or settlement meeting, consider the following:

(a) You may want to have the former employer, if that individual is supportive, actually attend for ten minutes to talk about what a good employee the plaintiff was before the accident, and how they wish that he/she would be able to do the job if he/she wasn't so badly injured;

(b) If the plaintiff is diligent in seeking employment, produce copies of the job applications and all the letters of denial that have been received;

(c) Consider having the rehabilitation professional who has been assisting with the job search come to the mediation and explain in five minutes why they don't think that there is a job available for the plaintiff, or, alternatively, why the only jobs available to the plaintiff pay half of the plaintiff's former earnings. If that is the crux of your argument, don't

simply append the supporting report to the Mediation Memo – bring that person along to explain it firsthand;

(d) I find it helps to generate multiple scenarios which yield a range of possible losses. The future is not certain and a range of scenarios is appropriate. You may well want to concede at the outset of the mediation that, for settlement purposes, you are not tied to the highest possible scenario, but that, nonetheless, that exposure exists at trial; and

(e) If the plaintiff's occupation was particularly physical, have some photographs or video taken of an uninjured co-worker performing the task, so that the plaintiff, the co-worker, the employer, or an expert, can explain why the old job is beyond the tolerances of the injured plaintiff. If I do this, I am, however, always sensitive to the advice that I have consistently received from defence counsel and adjusters that they don't want to be subjected to long PowerPoint demonstrations or tedious self-serving videos. We have to use this settlement tool selectively, only when it would be well received and would help rather than harm the settlement process.

Implications of *Daubert*

34. The decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993), a decision of the Supreme Court of the United States, deals with the Court's function, as a gatekeeper, to allow or disallow the tendering of certain types of expert evidence. The trial Judge is mandated by *Daubert* to make a preliminary assessment of whether the testimony's underlying reasoning or methodology is

scientifically valid, and whether it can properly be applied to the facts at issue in the lawsuit. For this analysis, many considerations will be brought to bear, including whether the theory or technique in question can be or has been tested, whether it has been subjected to peer review and publication, what its known or potential error rate might be, and the existence and maintenance of standards controlling its operation. The trial Judge may also consider whether or not the area of expertise has attracted widespread acceptance within a relevant scientific community. The inquiry is meant to be a flexible one, and its focus must be solely on principles and methodology, not on the conclusions generated by those principles and methodology.

35. My practice over the last 12 years has been restricted almost exclusively to plaintiff personal injury litigation. I have not seen *Daubert* raised as an issue on any of my files or those of my colleagues. In my view, it is likely unnecessary to adduce evidence from the kind of expert who would be vulnerable to a *Daubert* analysis. The experts mentioned above are clearly well recognized, attracting widespread acceptance within their own communities. For my part, I do not see *Daubert* being an issue, at least with respect to economic loss claims.

Conclusion

36. I enjoy my practice as a lawyer advancing claims on behalf of injured plaintiffs. I enjoy this work because I am trying to build a theory and create a recognition in others that legitimate losses have been sustained. Like the other categories of compensation, claims for economic losses will always hinge on the evidence that can be adduced. Very often, the evidence is there just waiting to be discovered,

if some hard work and ingenuity are applied. The trick is weaving the various pieces of evidence into a compelling tale that harmonizes with the opinion of the treating doctors and retained experts. Sometimes, by the sheer nature of the physical injuries, the task is relatively simple. Consider the factory worker who was rendered a quadriplegic. Very little effort will be needed to prove that kind of economic loss claim. Real work and ingenuity, however, is needed in a case where the plaintiff ultimately gets back to work but encounters constant difficulties or needs to use up all available sick time, or has to decline overtime, or many of the other myriad scenarios that we all observe.

37. It is the development of a credible, believable economic loss theory that yields the good settlements for plaintiffs. I hope this paper will help by highlighting some of the things that I have found have assisted me as I try to efficiently resolve economic loss claims on behalf of plaintiffs.