

LOSS OF COMPETITIVE ADVANTAGE

By Carlie Smith

Introduction

In determining damages for personal injury, the realm of future damages is often the area of most disagreement as between the parties. The object of compensation being to a plaintiff is to place him or her in the same position had the injury or wrong not occurred, a calculation of future pecuniary damages requires certain assumptions to be made about the plaintiff's prospects for the future. Given that calculating future losses is inherently speculative, there will be room for creativity on the part of both experts and counsel in developing plausible theories of a plaintiff's future employment and income-earning prospects.

When a plaintiff's future prospects are largely unknown or where the plaintiff's potential losses are particularly intangible, one of the most common heads of damage pursued by plaintiff's counsel is a claim for "loss of competitive advantage."¹ Because the claim is often made when there is insufficient evidence to establish a claim for future loss of income, at times it may seem that this is pleaded without explanation simply to add value to a claim. However, an award for loss of competitive advantage is meant to compensate a plaintiff for the "real and substantial risk of future income loss." It is not awarded automatically and when considering settlement it is important for institutional defendants and defense counsel to understand what the plaintiff is required to prove to obtain an award for loss of competitive advantage.

The purpose of this paper is to provide an overview of the factors a court will consider when faced with a claim for loss of competitive advantage and to provide some guidance with respect to the amount of damages commonly awarded for such a claim.

¹ Loss of competitive advantage is also referred to in the case law as a loss of chance, loss of opportunity, loss of earning capacity, or a real and substantial risk of future income loss. The umbrella term loss of competitive advantage is used in this paper to encompass each of these descriptions of future pecuniary losses.

Loss of Competitive Advantage vs. Future Loss of Income

Lawyers and judges often refer to damages for future pecuniary losses related to income in a variety of different ways, which at times can seem interchangeable. Phrases such as “loss of earning capacity”, “loss of future income”, “loss of chance”, and “loss of opportunity” have all been used to describe a plaintiff’s future pecuniary losses and it is therefore not surprising that there remains some confusion as to the difference between a claim for loss of future income and the loss of competitive advantage. Several cases have also tended to meld the two concepts, awarding a single sum to encompass a loss of future income and loss of competitive advantage.²

Generally speaking, the difference between a future loss of income analysis and a loss of competitive advantage analysis is the degree of uncertainty of the loss. Where a plaintiff’s employment is relatively stable prior to the loss and has been forced to take a different job with a lower salary as a result of his or her injuries, or is unable to continue with any employment entirely, the loss of future earnings can be more accurately assessed.

While the calculation is not always straightforward, the analysis primarily involves an assessment of the plaintiff’s actual income, both before and after the injury. Defense and plaintiff’s counsel will then raise evidence to support various contingencies to be taken into consideration to attempt to increase or decrease the loss of income based on the realistic possibility of occurrences such as early retirement, termination, promotion, illness, accidents, age expectancy, family planning etc. Actuarial evidence, accounting, statistical or economic evidence is used to establish the plaintiff’s future loss in light of the intervening event or injury. While employing assumptions to calculate contingencies will rarely, if ever, result in an entirely accurate prediction of the plaintiff’s future income loss, the goal is to compensate the plaintiff for reasonably predictable loss of future income.

Where a plaintiff’s earnings remain the same or increase after an injury, defense counsel will and should argue that there is no loss of income. In cases where the plaintiff’s injuries have not prevented a return to his or her former employment, this can be a persuasive argument

² For example, see *Mellanby v. Chapple*, [1995] O.J. No. 1299; *Cowles v. Balac*, [2005] 2 S.C.R. 229

against any compensation for future income loss. However, there are other factors that may play a role in the plaintiff's other alleged future pecuniary losses, such as the loss of competitive advantage.

While a loss of future income and a loss of chance/loss of opportunity/loss of competitive advantage all describe ways in which to calculate the amount needed to restore the injured party to his or her position had the injuries not occurred, the concept of a loss of competitive advantage can generally be distinguished from a claim for future income loss. It is most commonly claimed by counsel and experts where there is insufficient evidence to establish a claim for future loss of income or where the loss of future income award does not take into consideration potential future risks specific to the claimant. In other words, a claim for loss of competitive advantage may be *in addition to* or *instead of* a loss of future income claim.

Two approaches have developed in considering losses that are not adequately addressed through the loss of future income analysis. The first is the "real possibility" approach, which asks whether the plaintiff has a "real and substantial risk of losing income in the future." This approach is often utilized in cases where the plaintiff claims he or she was prevented by his or her injuries from pursuing an intended career or occupation opportunity. The terms "loss of opportunity" and "loss of chance" are often used to describe these losses. The Court must struggle with determining the chance of the plaintiff having succeeded in pursuing that opportunity and place a value on the associated loss. The "real possibility" approach is also utilized in cases where the plaintiff is at increased risk of further injury in the future, which may limit their future income.

It is the "real possibility" approach that is most often confused with a traditional loss of future income analysis as both approaches take into account various contingencies and future probabilities in order to determine a reasonable sum for possible future income loss. In most cases, it is the specific nature of the future contingencies referred to that distinguishes the claims for competitive disadvantage from a classic future loss of income claim. The focus is on the plaintiff's particular characteristics and probabilities for the future rather than a more general actuarial approach often utilized in a future loss of income claim.

The second approach is the “capital asset” approach, which is based on the premise that a person’s capacity to earn income is a capital asset whose value may be lost or impaired by injury. This approach gives the plaintiff an opportunity to recover damages arising from the likelihood that as a result of their injury certain avenues and occupations have closed or will close forever. This approach is often used where there is no reduction in post-accident income but the plaintiff’s ability to perform certain types of employment is diminished.

There is case law to support the use of both approaches in certain circumstances. Depending on the specific fact situation, the subtleties found in each case may be helpful in analyzing the potential damages awards in future cases.

The “Real Possibility” Approach

The unique characteristic of a claim for competitive disadvantage and “real and substantial risk of future income loss” is the degree of uncertainty of the loss. In the cases cited below, the Court is forced to measure the damages awarded to a plaintiff that has an increased risk of injury or damage but who may not suffer damages at all, or a plaintiff who has lost an opportunity they may or may not have pursued in the future. As Justice Day in *Lytle v. Toronto*, the range of possible damages is considerable:

Not knowing what the future will hold for Ms. Lytle makes it immensely difficult to quantify the damages for her future loss of earning capacity. Quantification of that disadvantage could range from a modest amount to a significant amount. Regardless, it comes within the ambit of a substantial possibility, as articulated in *Schrump et al. v. Koot et al.*, supra. The Court, therefore, has an obligation to use its best efforts to quantify her competitive disadvantage as a result of the accident.³

Interestingly, neither of the leading cases on the “real possibility” approach specifically mentions the words “competitive disadvantage,” however the decisions of the Ontario

³ [2004] O.J. No. 1570, at paragraphs 67-69

Court of Appeal in *Schrump et al. v. Koot et al.*⁴ and *Graham v. Rourke*⁵ are the most often cited in Ontario with respect to awards for competitive disadvantage.

In *Schrump et al. v. Koot et al.* the Court evaluated the role of “possibilities” of injury on damage awards. The plaintiff’s medical experts testified that the plaintiff had a 25 to 50 per cent probability of significant worsening future problems, while the defense medical experts testified that the possibility of future surgery was remote. The trial jury awarded the plaintiff a considerable sum in general damages to compensate her for the increased risk, and the Court of Appeal upheld this award.

The Court held that it was not necessary to prove on a balance of probabilities that a future event would occur, but merely that there was a significant possibility it could occur. At page 3 (Q.L.):

In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage will occur, but only that there is a reasonable chance of such loss or damage occurring. The distinction is made clear in the following passages in 12 Hals., 4th ed. , pp. 437-483-4: (my emphasis)

1137. Possibilities, probabilities and chances. Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluation, in terms of money, future possibilities and chances. In assessing damages which depend on the court’s view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

And at page 5 (Q.L.):

⁴ (1977), 82 D.L.R. (3d) 553

⁵ (1990), 74 D.L.R. (4th) 1

In assessing damages for personal injuries the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the “risk” or “likelihood” of future developments attributable to such injuries. It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage; he may be compensated if he proves in accordance with the degree of proof required in civil matters that there is a possibility or a danger of some adverse future development.

The Court of Appeal noted that the increased risk of injury as a result of the negligence of another should not be entirely borne by the plaintiff. Citing the Court of Appeal in *Archibald et al. v. Nesting et al. and Dalton*, [1954] 1 D.L.R. 347 at p. 361, at page 5 (Q.L.) of *Schrump*,

“the innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risk of the uncertainties of the future.”

Although the Court does not mention competitive disadvantage and in fact upholds the award to the plaintiff as a lump sum general damages award, the *Schrump* case is largely viewed as the starting point for an analysis of competitive disadvantage or future risk of income loss.

In *Graham v. Rourke*, the plaintiff was injured in three successive accidents.⁶ One of the issues for the Court of Appeal was whether the trial judge erred in his failure to give effect to the negative contingencies based upon the respondent’s previous medical history and thus reduce her award to account for the negative effects of the first two accidents.

The Court reinforced its earlier decision in *Schrump*, citing at page 9 (Q.L.), “if the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation.” The Court held that both positive and negative contingencies should be considered when determining damages awards. In addition, according to the Court, there are two types of contingencies the Court can consider in awarding damages. When seeking to establish a contingency that is specific to the plaintiff’s circumstances, such as an increased risk of disability, the plaintiff must rely on evidence to support his or her claim. The plaintiff must establish that there is a real possibility of the contingency occurring. At page 11 (Q.L.):

⁶ *Supra*, note 5.

...contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g. promotions or sickness; and “specific” contingencies, which are particular to a particular plaintiff, e.g., a particularly marketable skill or a poor work record...

If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot* ⁷

Thus, in *Graham v. Rourke*, the Court more clearly enunciated the test for increased probabilities, namely that there must be evidence to prove that the increased risk is a realistic possibility as opposed to a speculative one.

Utilizing the “real possibility” approach developed in *Schrump v. Koot* and *Graham v. Rourke*, the Court in *Earl v. Lang*, equated a “loss of competitive edge” with “real and substantial risk that [the plaintiff] may lose income in the future” ⁸. The court rejected actuarial evidence, brought forward by the plaintiff, which took a base of males who are disabled and limited compared to males who are disabled but not limited. The Court found that this information was “not helpful.” Instead, the Court held the calculation should be based on an “air of reality about it having regard to all of the evidence.” Similar to that position articulated in *Graham v. Rourke*, the Court cited the plaintiff’s own work history, his reputation in the work force and his personal courage in doing his work notwithstanding his disabilities and awarded him \$50,000 in loss of competitive edge.

In *Lytle v. Toronto*, [2004] O.J. No. 1570 Justice Day provides an example of an analysis the claim for loss of competitive advantage separate from a claim for loss of future income. This was a situation where the plaintiff, despite injury, continued to enjoy increasing income after the accident. However, the plaintiff’s employment was about to expire. The Court concluded that the plaintiff was entitled to both an award for future loss of income because

⁷ supra, note 5

⁸ [1997] O.J. No. 739, at para 27

a subsequent job would likely pay less. In calculating future loss of income the Court found an annual loss of \$5,000 for a present value of \$75,000. The Court also awarded her a sum for loss of competitive advantage because her career as a librarian necessarily involved some lifting, which she was at a competitive disadvantage to accomplish. The Court held at paras 67-69:

Not knowing what the future will hold for Ms. Lytle makes it immensely difficult to quantify the damages for her future loss of earning capacity. Quantification of that disadvantage could range from a modest amount to a significant amount. Regardless, it comes within the ambit of a substantial possibility, as articulated in *Schrump et al. v. Koot et al.*, supra. The Court, therefore, has an obligation to use its best efforts to quantify her competitive disadvantage as a result of the accident. Given the indefiniteness of such a possibility in the circumstances, I am limiting the quantity of the disadvantage at \$10,000.⁹

In cases where the plaintiff's earning potential is uncertain at the time of the loss, the Court must undergo a similar probabilities analysis. The Court must assess the probability of the plaintiff's future success, but for the injury. Although the plaintiffs in the two cases below were awarded damages under a future loss of income, the probabilities analysis was similar to claims for loss of competitive advantage.

In *Mellanby v. Chapple*¹⁰, the plaintiff was a professional NHL hockey player who was injured when he intervened during a bar fight. He suffered a serious injury to his left forearm, which adversely affected the plaintiff's ability to play hockey. Mr. Mellanby was in the third year of his NHL career when the accident occurred and he continued to play hockey for many years post-accident. However, the Court struggled with how to evaluate his diminished ability and loss of competitive advantage.

The plaintiff testified that his left hand was more important than his right hand in playing hockey. The accuracy and strength of his shot was reduced and he became less able to react quickly in various situations. He was also less able to fight for the puck in the corners and his combined grip strength was reduced. While the plaintiff conceded that he had adapted his playing to compensate for his deficits, he claimed his level of play had been permanently

⁹ *Supra*, note 3.

¹⁰ [1995] O.J. No. 1299

affected. Medical and hockey experts testified on the plaintiff's behalf citing his medical injuries, as well as his former ability and his reduced capacity after the accident. The court concluded that he was a less talented hockey player as a result of the accident and that the accident had placed the plaintiff at a competitive disadvantage.

Measuring the monetary value of the loss of competitive advantage was difficult. The plaintiff was at the beginning of his career and the court had to make predictions about his potential as a hockey player. Justice Jarvis used comparables - players that were of roughly similar ability before the plaintiff's accident - and took the difference between Mr. Mellanby's future income potential and theirs. The difference was approximately \$100,000. Allowing for negative contingencies, the court assessed Mellanby's claim for past loss of income at \$500,000 and his future loss of income at \$250,000.

Justice Jarvis cited several of the leading cases on loss of future income, including a passage from *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.) and another from *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.). The noteworthy passages in *Mellanby* focus on the role of contingencies in accounting for future income loss. From *Graham v. Rourke*, at page 634, at para 120 in *Mellanby*:

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 or 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 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: Personal Injury Damages in Canada, supra...¹¹

In *Traquair v. National Arts Centre Corp.*,¹² the Plaintiff was a very talented musician who fell during a rehearsal and struck his head against a wall. Although he continued to be able to play the trombone in the Ottawa Symphony Orchestra, he claimed that he was unable to

¹¹ *Supra*, note 8.

¹² [2004] O.J. No. 4198

practice for a sufficient length of time to enable him to audition with a large symphony - a position he claimed he would have obtained had it not been for the fall. The Court analyzed the plaintiff's damages under the heading of future loss of income, but the analysis was similar to the loss of competitive advantage cases. The Court first applied the test in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para 27, and para 88 of *Traquair*.

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood. . . A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.¹³

The Court went on to cite both *Schrump v. Koot* and *Graham v. Rourke* for the proposition that the plaintiff must prove that the possibility he would have secured a position with a large romantic size orchestra was reasonable. The Court concluded that the probability that the Plaintiff would have obtained employment either as a principal or second trombonist with a romantic size orchestra in the next five years was 60%. They then calculated the mid-level salary of a position with a romantic size orchestra and deducted 40% to reflect the possibility that the Plaintiff would not obtain a position. The Court calculated the plaintiff's loss of future income at \$424,296.

Typically, awards using the "real possibility" approach are higher than those awarded under the capital asset approach. A plaintiff is required to establish that there is a "real possibility" of a future event (contingency) occurring such that he or she is has a real and substantial risk of future income loss. The plaintiff will not necessarily be entitled to the full potential of the loss, as it may be just as likely that the loss will not occur. The Court must weigh the extent of the risk that the negative contingency will or will not occur. The greater the possibility, the greater the percentage of the potential loss ought to be awarded.

¹³ Ibid.

The Capital Asset Approach

This approach is based on the premise that if a plaintiff has suffered a permanent disability, then he or she has lost, or partly lost, a capital asset. There is considerable jurisprudence establishing that an award for loss of earning capacity is to compensate for the loss of an asset – the ability to earn. The Supreme Court of Canada noted in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] “it is not the loss of earnings, but, rather, the loss of earning capacity for which compensation must be made.”¹⁴ Under the capital asset approach, it is the impairment itself that is to be compensated. This concept has worked its way into the jurisprudence and there are several cases which have made such loss of competitive advantage awards.

In *Branch v. Martini*,¹⁵ Justice MacLeod calculated the reduced future income of the plaintiff as the difference between former income and post accident income and multiplied this for every year up to age 65, for a total of \$54,660.05. The judge then found that, at para 115, “on a balance of probabilities and in consideration of all the evidence,...Mr. Branch will suffer an additional loss by having to accept less physically demanding employment in the future as a result of his injuries,...resulting in an additional loss of \$5,000 per annum,” bringing the total calculation for loss of competitive advantage to \$65,965.

In *Colonna v. Mitchell*,¹⁶ the plaintiff was a public health nurse, and a part-time hospital nurse and family planning counselor, who was employed after the accident as a government hospital nurse manager. She claimed that the accident prevented her from potentially becoming a public health nurse manager. The Court held that the plaintiff had failed to show that there was a significant salary differential or less employment stability in her current job and denied her claim for future income loss. However, the Court did award her \$40,000 for loss of competitive advantage because the accident had cost her the chance to pursue her most desired vocational choice.

Likewise, in *O'Day v. Facchetti Estate*,¹⁷ Justice Pitt awarded the plaintiff \$20,000 for loss of competitive advantage, but also concluded the plaintiff was not entitled to future loss of

¹⁴ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 83 D.L.R. (3d) 452, at page 469

¹⁵ [1998] O.J. No. 2474

¹⁶ [1997] O.J. No. 4898

¹⁷ [2002] O.J. No. 2374

income. The plaintiff truck driver actually earned more money in the years after the accident and thus there was no evidence on which to conclude that he experienced a loss of income. However, a sum was granted for loss of competitive advantage,

...the medical evidence that the injury could have some impact on the plaintiff's future employability. Already, the plaintiff has some difficulty doing long distance driving. While it is difficult to put a figure on the value of that loss,... I assess the loss of competitive advantage at \$20,000.¹⁸

In *Nichols v. Sibbick*¹⁹, the plaintiff was self-employed and ran concessions at the Gretzky Centre in Brantford. The Court accepted that Mr. Nichols was limited by pain in doing his work and required carts, mechanical devices and other employees to help him with certain of his functions. The plaintiff argued for loss of competitive advantage of \$40,000 to \$60,000, based on the principles of *Schrump v. Koot*, in that they did not have to prove that future loss would occur, but only that the possibility was there. The Court held:

Nichols is certainly more limited in his employment options now than he was prior to the loss of his eye. He is unlikely to be hired as a driver, for instance. Similarly, any job requiring acute vision would be impossible for him. This, in the court's view, is what the loss of competitive advantage claim is meant to address. It is by its nature difficult to scientifically prove as it is prospective in nature.

While the court accepts and acknowledges that Mr. Nichols does have a loss of competitive advantage, the dimensions of same are more limited given the loss in relation to his current job and likely employment opportunities. As such, the court would assess this aspect of the claim at \$15,000.²⁰

*Cowles and Balac*²¹ is the infamous African Lion Safari case in which an exotic dancer was injured and scarred as a result of a tiger attack. The Court attempted to measure her loss of future income as a result of her injuries. The Court was satisfied that the Plaintiff had always intended to go into nursing and that she had pretty much given up working as an exotic dancer and thus did not have to address whether or not the scarring left her at a competitive disadvantage for her dancing career. The Court did find that she had difficulty working as a personal support worker and that her goal to be a Registered Practical Nurse might prove to

¹⁸ *Supra*, note 17, at para 67

¹⁹ [2005] O.J. No. 2873

²⁰ *Supra*, note 19, at para 28

²¹ [2005] O.J. No. 229

be too physically difficult for her. The Court was satisfied that there were many occupations that the Plaintiff could easily qualify “which would not require of her the physical demands of her chosen nursing field occupation.”²²

The Court awarded the Plaintiff a lump sum to account for the fact that she was precluded from a number of occupations by reason of the accident. The Court awarded her \$250,000 “to reflect the fact that she is a young woman who will be precluded from certain types of work on a full time basis for the rest of her working life while recognizing there are many jobs she could do on a full-time basis. It is her loss of earning capacity that has been compromised and for which she is compensated.”²³

The above-noted cases provide an example of the range of possible awards for loss of competitive advantage using the loss of capital asset approach. Where a plaintiff has not sustained an actual decrease in income but has lost the opportunity to pursue certain avenues, the Court must ask to what extent these avenues were a real or substantial possibility. Based on the extent of the loss, the Court has awarded anywhere from \$10,000 - \$40,000 in more modest cases, and in the case of Ms. Balac, \$250,000 to compensate the young woman for the overall potential loss of earning capacity.

Conclusion

The purpose of these approaches is to calculate future pecuniary damages such that the plaintiff receives the appropriate compensation despite the fact that the future is unknown. Given the difficulties in predicting the real loss, each method is capable of providing either over-compensation or under-compensation. When addressing a loss of competitive advantage claim at trial, all evidence will be important in shaping the Court’s opinion about the degree of risk for future losses. The defence must craft a vision of the plaintiff’s future with the support of expert evidence. The case law suggests that there is a wide range for awards of loss of competitive advantage and utilizing precedents with similar fact scenarios may be helpful in providing the court with some additional guidance.

²² *Supra*, note 21, at para 112

²³ *Supra*, note 21, at para 114