Skills are assets: ONSC clarifies approach for awarding loss of competitive advantage

July 19, 2022

In *Herrington v. Brewer* et al., the Ontario Superior Court commented on the approach to awarding damages for loss of competitive advantage in a personal injury action.

Background

In December 2015 the plaintiff was involved in a rear-end motor vehicle accident resulting in soft-tissue injuries, including pain in his left elbow. At the time of the accident, the plaintiff was 56 years old and worked as a mechanic at an auto repair shop that he owned and operated. The pain from his elbow injury began to severely interfere with his ability to work as a mechanic.

The plaintiff commenced a claim against the defendants seeking various heads of damages, including damages for loss of earnings and loss of competitive advantage/loss of earning capacity. The defendants accepted liability for the collision, so the trial dealt primarily with damages.

The decision: Loss of earning capacity/competitive advantage

At trial, the plaintiff testified that his injuries substantially interfered with his ability to perform successfully as a mechanic, relegating him to administrative and supervisory roles. To compensate, the plaintiff hired additional workers to take over his responsibilities and help mitigate his loss. Although the plaintiff was able to maintain and exceed his pre-accident income, the Court recognized that the labour shortage would inevitably make it increasingly difficult for him to find and retain employees.

The Court recognized that “where an injured person is no longer capable of performing the essential functions of their craft, trade, or profession then they have suffered the loss of an asset.” Once the value is assessed, the financial impact of that loss on current and future contingencies must be evaluated.

In calculating loss of competitive advantage the Court relied on the expert opinion of an accountant, who suggested the fairest approach is the methodology employed by the

Supreme Court of Canada in *D'Amato v Badger*, where the Court considered the following factors:

a. The fair market value of his pre-accident contribution to the business (ignoring distributions either motivated by tax planning or attributable to his investment in the business);
b. The present value over the remainder of his projected pre-accident working life; and
c. Reduced to reflect the fair market value of his post-accident projected future contributions to the business.

The plaintiff's expert offered three scenarios for loss of competitive advantage, one of which the Court adopted. The Court assessed the plaintiff's earning capacity pre-accident to normal retirement age (68 years old), based on the plaintiff's inflation-adjusted average earnings from the business. The Court utilized the plaintiff's average earnings from his business from 2013-2015 (two years pre-loss), with an adjustment of 70 per cent loss of current capacity. Based on this method, the Court awarded the plaintiff $571,595 in damages for capacity/loss of competitive advantage.

The Court accepted that the plaintiff's injuries resulted in limited ability to perform and thus created a significant competitive disadvantage. Furthermore, despite mitigating his lost earnings, this would still be inadequate to counter the consequences of the labour shortage. In light of these factors, the Court determined that the appropriate approach for assessing damages was to utilize a broader range of the plaintiff's actual income, tailored to the plaintiff's situation.

Key takeaways

This decision helps provide clarity in quantifying the value of a person to their business in both the present and the future. Traditionally, "awards for loss of competitive advantage are often made without an accompanying award for loss of future earnings in circumstances where the injured party has returned to their pre accident level of income."

The Court departs from this trend, recognizing the plaintiff's ability to return to work was severely reduced in capacity and thus so was his value to his company. The methodology employed by the Court is one to consider for defence lawyers in future litigation.

If you have further questions about the Court's approach to loss of competitive advantage, reach out to the key contacts listed below.

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