Pure Economic Loss

Issues Involving the Assessment and Calculation of Loss of Income/Future Earning Capacity of Self-Employed Plaintiffs/Small Business Owners

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Calculating income loss and earning capacity claims in personal injury matters comes with its usual struggles in the search for information and the battles with Plaintiff’s counsel over what is reasonable and how these claims should be assessed. Generally, both sides recognise what information is necessary to sort out the dispute. Maybe expert opinion is necessary, maybe not, but ultimately the source documents are easily determined. Such assessments become much more problematic when the Plaintiff is the director/sole employee of a corporation or the corporation itself is seeking compensation for the loss of a key employee. Part of the difficulty is often a lack of understanding of the fundamental issues at play by one or both sides and rather than getting to the heart of the issue, there is an attempt to jam a square block into a round hole because it is familiar and easy.

Though not a step by step guide to handle these claims, this paper attempts to explain the issues at play and what factors should be addressed to determine whether there is merit to a claim or if it is even a legitimate claim being advanced.
ISSUES:

1. Can a Corporate Plaintiff claim for losses arising from injuries sustained by a director/sole employee of the Company?

2. Does the doctrine of per quod servitum amisit still exist as a viable cause of action in Alberta?

3. How does the Court assess and calculate a loss of income/future earning capacity claim when a Plaintiff owns a small business or is self-employed?

ISSUE I:

What is Pure Economic Loss and why does it matter? The issue of Pure Economic Loss can arise when the Plaintiff is a self-employed individual, business owner, or some combination of the two. At times, we will see a Statement of Claim in which the Plaintiff’s business is also named as a Plaintiff (i.e. a corporation or partnership) and claims a loss of income because the Plaintiff is injured and unable to work. The question is whether the business is entitled to recover income loss from the Defendant or whether this is barred as a claim for “pure economic loss” which is not recoverable.

Pure Economic Loss is loss suffered by an individual which is not accompanied by physical injury or property damage. In Canadian National Railway v. Norsk Pacific Steamship Co. [1992] 1 S.C.R. 1021, the Supreme Court of Canada recognized five unclosed categories of cases where recoverability in tort for economic loss has arisen. The category important for our purposes is Relational Economic Loss.

Relational Economic Loss is Pure Economic Loss sustained by a Plaintiff in consequence of a physical injury to a third party or damage to the third party’s property. Because of policy considerations, claims of this nature were normally barred under the general exclusionary rule. However, in Norsk, La Forest J., noted departures from the general exclusionary rule should be justified on defensible policy grounds.

Take for example the following situation: “Smith Design Group” is an unincorporated partnership in Fort McMurray where John Smith is the architect and his wife, Jane Smith, provides administrative support. Each are 50% owners. An insured of ABC Insurance Company injures John as a result of a negligent left turn. John misses a few months of work and then resumes some duties working up to full hours within a year or so. Smith Design Group loses money as a result and so Jane Smith is also named as a Plaintiff along with John Smith in the personal injury action against the ABC Insurance’s insured. They claim the

1 Robby Bernstein, Economic Loss (London, Sweet & Maxwell, 2013), 793. Definition at 5.1.1.
business lost $500,000.00 as a result of John’s absence and disability.

Historically, the Court have been very reluctant to award for this type of loss due to principles of foreseeability and indeterminacy. Stepping back to basic tort law, the elements of a negligence claim are as follows:

- Defendant owes Plaintiff a duty of care
- Defendant breaches the duty of care
- Plaintiff suffers injury
- Defendant’s breach is the proximate cause of the Plaintiff’s injury.

The problem in the example – there is not a close enough connection between ABC Insurance company’s insured and Smith Design Group/Jane Smith for it to be foreseeable the unsafe left turn would cause a loss of money to Smith Design Group/Jane Smith. To succeed, the Plaintiff must show an actual loss such as a personal injury or property damage which is not the case for Smith Design Group or Jane Smith. This is Relational Economic Loss.

The leading case on Relational Economic Loss was examined in the context of a Plaintiff who was a director in a privately held Company is *D’Amato v. Badger* [1996] 1 S.C.R. 1071. In this case, the Plaintiff, aged 57, could not read or write English and had done only heavy physical work. He owned 50 per cent of an auto body repair company, supervised employees and did repairs. Because of injuries caused by the Defendants’ negligence, the Plaintiff became unable to do the physical labour required. The company hired replacement labour, thereby suffering $73,000 lost profits. The Plaintiff continued the minor contribution of supervising and preparing estimates and received his former salary of $55,000 per year. The Company sued the Defendants for damages for its economic loss and the Plaintiff sued for damages for loss of earning capacity. The trial judge awarded the Company $73,000. He awarded the Plaintiff $55,000 per year for seven years for a $385,000 total, with a 25 per cent deduction for contingencies based on the Plaintiff’s continued role with the Company. The Court of Appeal disallowed the award to the Company and reduced the award to the Plaintiff to $50,000. The Company and the Plaintiff appealed to the Supreme Court of Canada.

With respect to Pure Economic Loss, Major J., writing for the Supreme Court of Canada stated at paragraph 51:

> If a company is allowed to recover pure economic loss arising from the loss of a key shareholder and employee, the problem of indeterminacy arises. An injury to one person obviously has a ripple effect, causing economic loss in various forms to a large number of people, both individuals and corporations. To allow recovery in these circumstances would invite similar claims by multi-membered plaintiffs. It would remove the incentive for
contracting parties to negotiate on who will bear risk of loss, and for corporations to plan for events such as this, through insurance or otherwise.

The Company’s appeal was dismissed accordingly.

Although the ruling in D’Amato did not provide a definitive statement as to whether or not Relational Economic Loss claims are recoverable, it did conclude the two different tests proposed by McLaughlin J., and La Forest J., in Norsk, would generally arrive at the same result. It seemed as though the Supreme Court was slowly narrowing the uncertainty in this area of law.

Relational Economic Loss was addressed further in the Supreme Court decisions of Bow Valley Husky (Bermuda) Ltd., v. Saint John Shipbuilding Ltd. [1997] 3 S.C.R. 1210 and Canadian National Railway v. Norsk Pacific Steamship Co [1992] 1 SCR 1021 and provided a unanimous statement on the recoverability of same. With respect to the issue of recoverability, while confirming it is the exception in tort, three general exceptions were confirmed:

I. Cases where the claimant has a possessory or proprietary interest in the damaged property;

II. General average cases;

III. Cases where the relationship between the claimant and the property owner constitutes a joint venture.

Although the Court concluded the case did not property fall within any of the three exceptions, it went on to state in Bow Valley, supra:

However, that is not the end of the matter. The categories of recoverable contractual relational economic loss in tort are not closed. Where a case does not fall within a recognized category the court may go on to consider whether the situation is one where the right to recover contractual relational economic loss should nevertheless be recognized. This is in accordance with Norsk, per La Forest J., at p. 1134:

Thus I do not say that the right to recovery in all cases of contractual relational economic loss depends exclusively on the terms of the contract. Rather, I note that such is the tenor of the exclusionary rule and that departures from that rule should be justified on defensible policy grounds.

Ultimately the appeal was dismissed, but the ruling in Bow Valley restored the traditional exclusionary rule which has been rejected by McLaughlin J., in Norsk. It also recognized discrete, “recoverable” exceptions to the exclusionary rule and described the process for recognizing additional such exceptions on the future meaning, there may be new categories of exceptions where relational losses are recoverable if policy reasons justify it on a “case by
case” basis.²

The most definitive pronouncement of the test for recovery of Pure Economic Loss came in the Supreme Court of Canada decision of Cooper v. Hobart [2001] 3 S.C.R. 537. This case confirmed the reference point with respect to recognizing new categories of Pure Economic Loss, generally, was in the duty of care test as established in Anns v. Merton London Borough Council, [1978] A.C. 728 which requires answers to the following two questions:

1. Whether the circumstances of the case disclosed reasonable and foreseeable harm, and proximity sufficient to establish a prima facie duty of care; and

2. Would this prima facie duty of care be negated or otherwise limited by policy considerations?

In Cooper, the case did not fall within and was not analogous to a category of cases in which a duty of care had previously been recognized. Nor was this a situation in which a new duty of care should be recognized. Even if a prima facie duty of care had been established under the first branch of the applicable test, the Court held it would have been negated at the second stage for overriding policy reasons.

Fast forward a couple of years, in the Alberta case of Samaska v. Soykut [2003] ABQB 694, the Plaintiff Samaska was a shareholder in the Corporate Plaintiff, Unicorn Energy Inc. The Company claimed for losses stemming from injuries Samaska suffered by way of the Defendant’s negligence. Following the principles in D’Amato, supra, the Court denied the claim of Unicorn Energy Inc. stating:


With respect to the live issue as to whether the principles of D’Amato applied to Samaska on a personal basis, I need not deal with that issue due to my previous finding that Samaska, like Unicorn, has not provided any evidence of proven income loss (at para 93 – 95).

Similarly, in Bertrand v. Bertrand, [1999] B.C.J. No. 2040, the Court effectively held the mere fact the negligence of a defendant caused the company’s loss does not constitute sufficient proximity to warrant recovery for pure economic loss.

In Dean Estate v. Moravec (1999), 71 B.C.L.R. (3D) 256 (B.C.S.C.) the Court held even if the company is owned by family members, it will not be distinguished from the general

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² Russell Brown, Pure Economic Loss in Canadian Negligence Law (Markham, LexisNexis Canada, 2011), 89.
exclusionary rule which precludes recovery for pure economic loss of a key shareholder or employee.

Generally, in a situation wherein a Corporate Plaintiff suffers losses which arise from injuries to an employee or director, those losses would not be recoverable pursuant to the ruling in D’Amato. Losses of this nature constitute contractual relational economic losses which are not one of the three “exceptions” to the general exclusionary rule. Further, losses of this nature would not be sufficient to found a new category of exception (pursuant to Bow Valley) as policy considerations and the problem of indeterminacy would negate any prima facie duty of care.

ISSUE II:

*Per quod servitum amisit* (“*per quod*”) is a specific cause of action which allows an employer to bring an action against a Defendant whose negligence is alleged to have injured his or her employee. The following case is an Alberta authority wherein an action in *per quod* arose:

*Kneeshaw et al., v, Latendorff [1965] CarswellAlta 60*

In this case, Farthing J., assessed the law as it stood in Canada and concluded the action of *per quod* existed at common law. As such, the Corporate Plaintiff was able to claim damages arising from injuries caused to Kneeshaw who was a 50% shareholder in the company. Farthing J., made the following comments with respect to the law in England and Canada:

“...For these reasons, it seems clear that the common law on this question in Canada has become established on different lines from those which may prevail in England and that the Corporate plaintiff has the right to ask the court for the relief it seeks in this action. But whether such relief should be granted or not depends, of course, on the evidence...

That defendants were responsible for the accident is admitted. First plaintiff has a 50 per cent interest in second plaintiff. In his evidence, he said that he was employed by second plaintiff. It is, of course, axiomatic that a company is a body corporate, having a legal existence of its own apart from that of each of its individual shareholders. Kneeshaw devoted all his working time to the company. If second plaintiff sustained any loss as a result of his incapacity — and I find that it did — then it has a claim against the defendants.

In other Canadian jurisdictions such as British Columbia and New Brunswick, *per quod* has been statutorily abolished. However, in Alberta the action still technically exists although it has not been applied often. The existence of the *per quod* cause of action poses interesting questions about the nature of the claim and whether or not it still exists as a *sui generis* cause of action or whether it is a form of relational economic loss (in *per quod* form).³

³ Brown (*supra*), 119. See 2.129 – 2.130 regarding the status of the *per quod* cause of action in Canadian Law and
In Alberta, the Court of Appeal dealt with the issue of a *per quod* action in *Canada (Attorney General) v. Livingstone* [2004] ABCA 236. The Court of Appeal made the following comments:

“The chambers judge concluded the doctrine of *per quod servitium amisit* still exists in Alberta and has not been statutorily abolished: *Canada (Attorney General) v. Livingstone*, 2003 ABQB 1036 (Alta. Q.B.). However, he observed the action is no longer based on the concept that injury to an employee is an injury to the employer's property; rather, the action is one of relational economic loss based on the contractual relationship between the employee and employer. The judge decided that although the loss does not fall within one of the identified exceptions for relational economic loss, it meets the *Anns* test (from *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.)), to create a new exception to the general rule.

On appeal, the Livingstones argue the trial judge erred in holding that the doctrine of *per quod servitium amisit* exists in Alberta and in creating a new exception to the general exclusionary rule for relational economic loss in these circumstances.

This appeal raises serious and important issues, and answers questions posed by Dickson J. in *R. v. Buchinsky* [1983] 1 S.C.R. 481 (S.C.C.), at 490:

The serious question is whether, despite its antiquated origins, the action can now find a different justification. Does it serve a useful purpose that would not otherwise be met? Is it consistent with general principles of tort law concerning collateral benefits and recovery for economic loss? Do employers, simply because they are employers, merit a special cause of action? . . . In a future case it may be appropriate to address these issues.

The Court of Appeal noted this appeal presented novel and important legal issues and should accordingly be decided on proper evidence, argument and application of legal principle. The lower court’s judgment was set aside and a trial *de novo* was ordered.

This case is interesting because the Trial Judge specifically noted the *per quod* action not only exists in Alberta, but is also an action of relational economic loss based on a contractual agreement between employer and employee. This was in contrast to the historical conceptualization of the *per quod* action as being one of an employer suing for injury caused to the employer’s property. Also, the Trial Judge found the loss would meet the *Anns* test to create a new exception to the general exclusionary rule against claims for relational economic loss.

Even though the Court of Appeal set aside lower court judgment, they failed to comment on the findings with respect to a *per quod* action. Instead, the Court of Appeal only commented these issues are novel and should be retried on the basis of proper evidence and argument.
This is significant and lends support to the notion a *per quod* action in no longer an anomalous, *sui generis* cause of action and is in substance an action for contractual relational economic loss.

This is further evidenced by the decision in *D'Amato*. The action arose in British Columbia, a jurisdiction wherein a *per quod* action is statutorily barred. However, the Corporate Plaintiff’s claim for damages which arose from the injuries sustained by an employee (the director *D'Amato*) were framed within the context of relational economic loss and subject to the test outlined in *Norsk*. Through application of the duty of care analysis, the Corporate Plaintiff was not successful. Therefore, it is only possible to reconcile the *per quod* action with the duty of care test governing claims for relational economic loss generally if the legislative status of the *per quod* action is ignored. As evidenced in *D'Amato* where the *per quod* action was abolished, the Supreme Court of Canada ignored same and applied the duty of care test to the claim.

Conversely in *Livingstone* where the *per quod* action was found to still exist, the Alberta Court of Appeal ignored its existence and instead applied the duty of care analysis to the claim.

With the Alberta Court of Appeal declining to definitively rule on the question of whether or not the *per quod* action exists in Alberta and given it is not statutorily barred, it technically still exists at common law. That being said, the historical conceptualization of the action has shifted over time. The doctrine has been framed by the Supreme Court of Canada as a “species” of relational economic loss (as evidenced in *D'Amato*). As there is no recent case law applying the *per quod* action, there is no definitive way to determine how it would be applied in Alberta (a jurisdiction which has not statutorily abolished it).

It is impossible to reconcile the decision in *Livingstone* with *D'Amato* as the subjection of the *per quod* action to the general duty of care test simply cannot be reconciled with judicial statements recognising the subsistence of the *per quod* action. However, if the *per quod* action’s existence is to continue to be recognised in the future, a possible solution may be for the Supreme Court to reconcile its decision in *D'Amato* as having preceded the refinement of the duty of care test as set out in *Cooper* and recognizing the *per quod* action as comprising one of *Cooper’s* “analogous categories” in which proximity has already been recognised. Alternatively, the action may be abandoned as being inconsistent, as Dickson J., suggested in *Canada v. Bushinsky*, with “general principles of tort law concerning collateral benefits and recovery of economic loss.”

On the basis of the jurisprudence in *Livingstone* and *D'Amato*, it seems likely if a *per quod*

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4 Brown (*supra*), 120. See 2.134.
5 Brown (*supra*), 121. See 2.135 regarding reconciliation of the Supreme Court ruling in *D'Amato* and the Alberta Court of Appeal in *Livingstone*. 
action was brought in Alberta, it would be subjected to the duty of care analysis and viewed as a species of relational economic loss. Over time, the doctrine has shifted from one of an employer claiming for damages arising from injury to the employer’s property to one of an action based on a contractual relationship between employer and employee. The evolution in the conceptualization of the *per quod* action can be attributed to the shift to a modern, contract-based relationship between employer and employee as opposed to the historical property ownership or a master – servant relationship. As such, there may no longer be a need for a separate, *sui generis per quod* action as the relational economic loss analysis (in *Bow Valley* and refined more recently in *Cooper*) seems sufficient to assess claims for same.

As such, there is a high likelihood if a *per quod* action is brought in Alberta it would be unsuccessful. This assumption is based on the recent trend of assessing a *per quod* action through the duty of care analysis related to relational economic loss. Because a *per quod* action would not fit into one of the three exceptions to the general exclusionary rule (and most likely not meet both legs of the *Anns* test to create a new exception) a loss of this nature would not be recoverable.

**ISSUE III:**

**General Principles – Past Loss of Income:**

Although a Corporate Plaintiff is not able to claim relational economic loss, an Individual Plaintiff is able to claim for loss of income stemming from injuries caused by a negligent party. With respect to loss of income of a self-employed party, the Supreme Court of Canada outlined the principles which should be followed in the case *Engel v. Kam-Pelle Holdings Ltd.*, [1993] 1 S.C.R 306. This case involved a claim for damages following a motor vehicle collision. The Appellant was one of two employees of a bakery. Following the accident, the Appellant was no longer able to do her previous work duties and two replacement workers were hired to do twelve hours of replacement labour per day. Gonthier J., made the following comments with respect to pecuniary loss:


There are numerous examples of such cases in Alberta alone in which the Court has looked
specifically at the particular circumstances in each case to assess whether there is merit to a
loss of income claim being awarded while keeping in mind the general principles. These
cases include: Madge v. Meyer [1999] ABQB 1017, the case of a self-employed farmer;
Meehan v. Holt [2010] ABQB 287, the case of a chiropractor who owned her own practice in
addition to working in another clinic; and Stevens v. Okrainec [1997] CarswellAlta 925, a tax
accountant who operated her own home business in addition to other previous jobs at other
accounting firms.

General Principles – Loss of Earning Capacity:

With respect to loss of earning capacity, the starting point of the analysis is Andrews v. 
Grand & Toy Alberta Ltd. [1978] 2 S.C.R 229. This matter arose out of a motor vehicle
collision wherein the Plaintiff was rendered a quadriplegic. The Supreme Court of Canada’s
commentary with respect to Loss of Earning Capacity is informative. Dickson J., for the
Supreme Court stated:

“...It is not loss of earnings but, rather, loss of earning capacity for which compensation
must be made: R. v. Jennings, supra. A capital asset has been lost: what was its value?...

It is a general practice to take account of contingencies which might have affected
future earnings, such as unemployment, illness, accidents and business depression. ...

This whole question of contingencies is fraught with difficulty, for it is in large
measure pure speculation. It is a small element of the illogical practice of awarding
lump-sum payments for expenses and losses projected to continue over long periods
of time. To vary an award by the value of the chance that certain contingencies may
occur is to assure either over-compensation or under-compensation, depending on
whether or not the event occurs.

With respect to the issue of contingencies, the contemporary Canadian approach was
outlined in Andrews (supra). Doherty J.A., commented:

Factors affecting the degree of risk of future economic loss and the possibility that all
or part of those losses may have occurred apart from the wrong which is the subject
of the litigation are referred to as contingencies.

These cases, and those which have applied them, tell me that 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 peculiar to a particular Plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs." A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

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...

The Alberta cases referenced above also address the issue of earning capacity in relation to the self-employed Plaintiffs in their unique circumstances. In Alberta, the Court summarized the relevant law in assessing the Plaintiff's loss of earning capacity in Olson v. General Accident Assurance Co. of Canada [1998] ABQB 405 in a case involving a Business Owner/Investment Company Director. Justice Binder stated:

"In determining loss of earning capacity, I find on the basis of the Authorities, the following to be the relevant principles ("Principles"):

- In assessing damages for pecuniary losses, the object sought is full compensation. Although it is virtually impossible to evaluate future losses with complete accuracy, the trial judge must attempt to put the injured party in the position that the party would have enjoyed if the Accident had not occurred: Engel;

- It is not loss of earnings, but rather the loss of earning capacity of a person, injured by the negligence of another, for which compensation must be made. It is the capacity which existed prior to the Accident that must be valued. In effect, a capital asset has been diminished and the question is - what was its value: Andrews;

- The amount or value of the loss of earnings in the future need not be proven on a balance of probabilities. Although mere speculation will not suffice, a "real and substantial possibility" will: Athey. A trial judge who is called upon to assess future pecuniary loss is, of necessity, nevertheless engaged in a somewhat speculative exercise: Andrews;

- Even though an injured person may, notwithstanding the impairment of his or her earning capacity, continue his or her employment, the injured person is nevertheless entitled to be compensated by the person whose negligence caused such injury, for
such loss. The usual method of valuing such loss is the amount of future loss of earnings: Pallos, Palmer, Earnshaw, Graff, Personal Injury Damages in Canada, p. 202;

- In assessing damages for loss of future earning capacity, the following factors are relevant: Kwei, namely whether the Plaintiff:
  - Has been rendered less capable overall from earning income from all types of employment;
  - Is less marketable or attractive to potential employers;
  - Has lost the ability to take advantage of all job opportunities which might otherwise have been open to him or her;
  - Is less valuable to him or herself as a person capable of earning income in a competitive labour market;
  - An individual Plaintiff is entitled to recover a business loss suffered by a corporation ("Corporation") of which the Plaintiff is the controlling shareholder and directing mind, provided the loss is as a result of the Accident; Fobel, Engel;
  - Where the Corporation is a holding or family type of Corporation, incorporated for "income splitting" between spouses and/or for estate planning purposes, and the income of the Corporation is dependent and contingent upon the services of the Plaintiff, the entire loss due to the Accident is recoverable by the Plaintiff, notwithstanding that the Plaintiff's spouse is the registered or beneficial owner of a portion of the issued shares of the Corporation: Personal Injury Damages of Canada, pp. 151-159; 273-274, Everett, Van Paasen;
  - It is acceptable practice to take account of contingencies which might affect future earnings, such as unemployment, illness, accidents and business depression, provided one or more have not already been taken into account in an assessment of the projected average level of earnings of the Plaintiff. Accordingly, the proper percentage deduction will depend on the facts of the case, particularly the nature of the Plaintiff's occupation; Andrews.

When it comes to calculation of income loss/future earning capacity in the case of a self-employed individual or small business owner, the Court seems to take a case by case approach. In Engel, the Supreme Court of Canada reiterated in some cases a straight assessment of decrease in salary may not be an appropriate measure of damages as it is not an accurate reflection of the Plaintiff's contribution to the business. However, the Supreme Court also noted a loss of profits approach may be warranted in some cases but not others. As such, the best approach will depend on the individual circumstances.

From a review of the case law mentioned above, it seems likely the Court will assess both
heads of damage on a case-by-case basis. However, general principles as outlined in *Andrews, Prosser* and *Diakow* will be incorporated to help assess the Plaintiff’s loss of a “capital asset” when decrease in income loss is not the only consideration to taken into account. Once a general figure is determined to set the Plaintiff’s annual income loss (per billable hour in *Stevens* or per patient visit in *Meehan*) the Court will then apply specific and general contingencies to this number to account for the circumstances of the Plaintiff in question (i.e.: part time work as seen in *Stevens*) or a similarity situated Plaintiff (i.e.: normal retirement age). Also important is the fact these specific types of cases usually involved one or more Expert Reports prepared by an Economist to try and quantify the income loss/loss of earning capacity of a self-employed Plaintiff/small business owner.

**PRACTICAL APPLICATION:**

So, what do we do when we have a Plaintiff who is also a business owner? What information do we need to assess the income loss claim (what is recoverable)? In assessing the “business income loss” of an owner or self-employed Plaintiff, personal tax returns will not typically show the total loss as it would with a salaried employee. There are expenses and write-offs that go into this number and often times the reported gross business income versus net income are vastly different. Dividends or “draws” are also not typically an accurate measurement of income. A dividend is defined only as the movement of income from a business to an owner at a point in time. How much an owner pays himself may have little connection to the work he does. Even if a loss is shown, this may not be related to injury as all factors affecting the business must be considered, including:

- Increase in expenses
- Economic downturn
- Industry downturn
- New competitors
- Loss of major clients/customers
- Retirements
- New technology
- Expanded services

What do we need to determine if there is an actual loss of income? Attempts should be made to obtain the following information:

- Plaintiff’s business: corporation, partnership, or trade name?
- Plaintiff’s personal tax returns with all T4 (if any) and other slips?
- If unincorporated, the Statement of Business or Professional Activities;
- If incorporated, the corporate tax returns and incorporating records;
• Financial Statements for the business and fiscal year end;
• Recorded hours/timekeeping records, if applicable;
• Monthly billings/sales/revenue generation;
• Access to Annual General Ledger as needed
• Access to source documents for tax returns and financial statements as needed;
• Determination if an economic or accountant report is necessary;
• Determination if a Questioning is necessary.

Ultimately, the first step is narrowing the issues in dispute before bounding down the rabbit hole of investigation. If agreement can be reached early respecting the viability of these claims and, in particular, the claim being brought on behalf of the corporation, it could serve to simplify the litigation in the long run.

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