

Jury Instructions For ICBC Injury Claims With Multiple Years Of Past Wage Loss

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If you have an ICBC Injury Claim heading for a Jury Trial reasons for judgement were released today demonstrating an effective 'charge' to the Jury where multiple years of past income loss are at issue.

Section 98 of the BC *Insurance (Vehicle) Act* limits past income loss awards to 'net' income loss in negligence claims stemming from BC motor vehicle collisions ([Click here to read my previous post on this topic](#) for some background). This limitation in law can significantly reduce a Plaintiff's damages in a BC Injury Claim and reasons for judgement were released today demonstrating this.

In today's case ([Wittenberg v. Ellis](#)) the Plaintiff sued for damages as a result of a 2005 car crash. After a jury trial damages of over \$2 Million dollars were awarded which included an award for \$1,420,000 in past income loss. The court was asked to make the appropriate deduction under s. 98 of the *Insurance (Vehicle) Act* and ultimately decided that the past wage loss had to be reduced by \$594,774 in order to comply with the legislation.

In a recent case by the BC Court of Appeal ([Lines v. Gordon](#)) the Court held clarified the law of how past income awards by juries will be taxed to comply with section 98. Specifically the Court of Appeal held that "There will be a wide variety of circumstances facing trial judges. In each case, the trial judge will have to decide whether it is appropriate in the circumstances before him or her to calculate net income loss on the basis of one period, calendar-year periods or other multiple periods. In making a decision in this regard, the trial judge should consider all of the circumstances and apply s. 98 in a manner that is most consistent with the principles of damage assessment to which I have referred."

Today's case demonstrates keen trial skills by the Plaintiff's lawyer as he asked the judge to instruct the Jury to focus on the claimed income loss on a year by year basis. The Jury did indeed award damages on a year by year basis. As a result Madam Justice Boyd was able to assess the income tax consequences for each year. If the Plaintiff's lawyer was not savvy enough to get this instruction the Jury could have awarded the past income loss as a lump sum and the award could have been taxed as if the money was all earned in one tax year. This would have resulted in a significantly greater reduction for the Plaintiff.

This case also addressed whether a personal plaintiff can use a corporate tax rate when there is evidence that the past income claimed would have been earned through a corporation. Madam Justice Boyd held that s. 98 does not permit this and Plaintiff's need to have past income taxed based on personal tax rates, specifically she held as follows:

[39] I agree with the defence submission that this is the exact result which would occur if the plaintiff at bar is permitted to rely on a corporate tax rate for the bulk of his income loss award. Like the RRSP deduction, corporate tax rates offer the deferral of the personal tax burden, but only until the owner/shareholder withdraws the corporate funds for personal use, at which time personal income tax must be paid on the funds. As the award for net income loss will be paid to Mr. Wittenberg and not to his corporation, in effect, it will be as if earnings had been withdrawn from the corporation and taken into Mr. Wittenberg's personal income.

[40] Permitting the plaintiff to rely on corporate tax rates for part of his income loss award in this case would enable him to avoid entirely his statutory obligation to pay personal income tax rates on personal income theoretically drawn from the corporation. The result would be over-compensation. Such an outcome would consequently place Mr. Wittenberg in a better position than he would have been in if he had not been injured. In my view, this result is impermissible under the Insurance (Vehicle) Act, income tax legislation, and the general principles of damage assessment noted above.

[41] The correct approach is for the jury award for past income loss to be taxed at the personal income tax rate, as required by s. 95 of the Act.