

CARFRA & LAWTON

Can bodily injury result in loss of corporate income?



By Aron Bookman

When can a personal injury plaintiff successfully recover from an at-fault defendant loss of corporate income for a company in which he or she is a shareholder? It seemed at one point that the Supreme Court of Canada dispensed with this thorny issue, yet the question keeps arising, and recent decisions are resulting in judgments that look a lot like ones that the high court seemingly rejected.

Consider this scenario: a plaintiff/shareholder is injured but loses no employment income because her company continues her salary during her absence from work, yet the company is less profitable because of the plaintiff's absence. Can she or it recover from the wrongdoer?

It is clear the company itself has no claim. In the 1996 case *D'Amato v. Badger*, the injured plaintiff was 50 per cent owner in an incorporated body shop. He and his company sued the defendant. At issue on appeal to the Supreme Court of Canada was an award of \$73,299 to the company for its income loss because D'Amato was less productive after the accident. Justice

Major ruled there was insufficient proximity between the defendant's negligence and the company's loss to uphold the award by the lower court. He went further and held that even if there was sufficient proximity, public policy militated against recovery.

"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," Justice Major said. "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."

How has this seemingly clear prohibition resulted in further similar claims? There are a number of decisions in B.C. that have seen claims surviving where the loss to a closely held corporation translates to direct loss to the injured plaintiff.

In one that went to the Court of Appeal in 2005, *Rowe v. Bobell Express*, the plaintiff bought a ranch in his retirement and operated it through a closely held company with much success. As an estate planning mechanism, he agreed to sell all his shares to his children, by way of payments during his lifetime, out of corporate profits. While the

plan had been for the plaintiff to work less, his children were unable to run the ranch adequately, so he resumed management operations and received about \$26,250 annually from the company that was recorded on the books as a repayment of a shareholder loan. Some years later he sustained grievous injuries in a car accident, which prevented him from running the ranch, with the result that his personal income and that of the ranch suffered.

Reflecting upon the Supreme Court's decision in *D'Amato*, the B.C. Court of Appeal stated: "Clearly, the court called into question the continuing utility of the 'alter ego' doctrine, a point that is significant on this appeal. The rationale for the 'alter ego' doctrine is that injured plaintiffs who earn their income through a closely held corporation should not be denied damages for their loss simply because, strictly speaking, the loss of income was suffered by the corporation. This rationale focuses on the loss of income *per se* as the relevant compensable loss. However, the relevant loss is not the income itself; rather, it is the value of the loss of earning capacity, a capital asset, for which the tortfeasor must pay compensation."

Hence, where the issue can be cast as a reduction of the capital asset of the ability to earn income, then compensation is available. The value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings she or he would have received over time, had the tort not been committed. The court accepted that "sometimes it will be measured by reference to the *actual earnings* the plaintiff would have received; sometimes by a *replacement cost evaluation of tasks* which the plaintiff will now be unable to perform; sometimes by an assessment of reduced *company profits*; and sometimes by the amount of secondary income lost, such as *shared family income*."

Given this judicial treatment, persons responsible for examining and adjusting such claims should be active early on gathering the evidence necessary to limit or eliminate a claim that is, in effect, nothing more than an application of the now-rejected alter ego doctrine and to contain what damages may



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