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EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Erik Bruveris by phone at 930-3639, or email at ebruveris@stillmanllp.com.

HEADS UP

Heads Up is a column which appears in each issue of the Stillman LLP LegalEye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

Loss of Earning Capacity: *Jones v. Stepanenko*, 2016 ABQB 295
By Christopher L. Younker

The decision of Justice Eidsvik in *Jones v. Stepanenko*, 2016 ABQB 295, reviews the current case law and legislation in lawsuits following a motor vehicle accident, and is especially noteworthy in the way it treats loss of earning capacity.

At the time of the accident, Ms. Jones was a 19 year old nursing student, about to enter her second year of a nursing program in Calgary in August of 2009. While stopped at a red light Ms. Jones was rear ended by the Defendant, Ms. Stepanenko. The collision that resulted in Ms. Jones' car being pushed into the car ahead of her.

The collision resulted in significant damages to both the Plaintiff and Defendant's vehicles. Ms. Jones was initially in shock following the collision and declined help from the EMS. However, once she arrived home following the collision she began to develop a headache. Ms. Jones discovered that she had an abrasion on her nose and sore knees and wrist from hitting the steering wheel and dash.

In day days and months following the accident Ms. Jones' injuries began to develop into chronic pain. Ms. Jones consulted her Doctor and received treatment from a physiotherapist, and while medical treatment managed to help reduce the pain, it was still an issue for Ms. Jones at the time of trial, some 6 years after the accident.

The Defendants initially argued that Ms. Jones' injuries were minor, and therefore "capped" at $4,000.00 (in 2007 dollars indexed to inflation) pursuant to the Minor Injury Regulations. However, the Defendants quickly conceded that the minor injury "cap" did not apply in Ms. Jones' circumstances as she was continuing to suffer from fibromyalgia and chronic pain caused by the collision. With the Minor Injury Regulation cap found to be non-applicable, and injuries flowing from the collision established, it then fell to Justice Eidsvik to quantify the damages owed to Ms. Jones.

While significant damages were awarded, including but not limited such matters as pain and suffering, and loss of income, it is the matter of loss of earning capacity that was particularly of note.

Justice Eidsvik awarded $125,000.00 for loss of earning capacity. In arriving at the figure, Justice Eidsvik reviewed the cases of *Chisolm v. Lindsay* (put forward by the Plaintiff) and *Pfob v. Bakalik* (argued by the Defendant).

In *Chisolm* Justice Kenney laid out the test for loss of earning capacity as "whether there is a real and substantial possibility that the plaintiff has been rendered less capable of earning an income from many sources of employment, is less marketable to potential employers, and is less able to take advantage of opportunities that may become available." In arriving at his decision, Justice Kenney found that the plaintiff was less capable as a result of the accident, was relatively young (37 years old at the time of trial), and would continue to suffer from pain and fatigue in the future, as well as some cognitive difficulties. At the time of the accident the plaintiff was working full time as a special education teacher, a physically and emotionally demanding job. At the time of trial, the plaintiff was only able to return to work on a part-time basis as a receptionist, but also had two children in the six intervening years between the accident and trial. The plaintiff was awarded $125,000 for loss of earning capacity.

INSIDE:

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In *Pfob* the plaintiff was awarded $25,000 for loss of earning capacity because of a reduced capacity to do heavier jobs as a result of soft tissue injuries following a motor vehicle accident. At the time of the accident the plaintiff was a self-employed contract courier. At the time of trial the plaintiff was 45 years old, and continued to suffer from some degree of chronic pain but none of the emotional issues, including PTSD, such as suffered by the plaintiff in *Chisolm*.

After considering both *Chisolm* and *Pfob* in quantifying loss of earning capacity, Justice Eidsvik concluded that Ms. Jones' injuries were more severe than Mr. Pfob, but less so than Ms. Chisolm. Justice Eidsvik noted Ms. Jones was only 26 years old at the time of trial and was currently working as an Addictions Counselor for $77,000.00 instead of as a full time Registered Nurse at potentially $100,000.00 because the new position made it easier for Ms. Jones to manage her pain. Justice Eidsvik reasoned that if the pain continued throughout Ms. Jones' career she could easily suffer a loss of earnings at $10,000.00 to $20,000.00 per year over the course of 30 years and so awarded Ms. Jones the full amount of her claim for loss of earning capacity. While she acknowledged that she may have gone further in the amount awarded, it was ultimately limited by virtue of what was claimed by the Plaintiff in her statement of claim.

In total, Ms. Jones was awarded $282,683.65 plus interest and costs. This relatively large award for damages for a motor vehicle accident in Alberta reflects not only Ms. Jones physical injuries, but the ongoing pain she continues to suffer as well as the lifelong impact the accident may continue to have on a young professional who has been diligent in seeking treatment and attempting to mitigate her damages.

When it comes to calculating loss of earning capacity there remains a significant degree of uncertainty in the law as it is based upon assumptions as to a plaintiff's future earning capacity made by a trial judge based upon testimony given by a plaintiff and their expert witnesses. A significant reason for Ms. Jones award of $125,000 for loss of earning capacity was a result of Justice Eidsvik finding that Ms. Jones had been diligent in seeking medical treatment to mitigate her damages and had made great efforts in returning to her prior role as a registered nurse.

In the end, it is important to consider a number of different factors when pursuing a personal injury claim. The steps a plaintiff takes leading up to a trial after an accident can be extremely important in playing a role in any final determination or award that the court is to make. That the court has shown a willingness to assess future earning capacity in the manner in which they did in *Jones v. Stepanenko* suggests a rather welcoming approach to assessing damages insofar as it relates to a loss of future earning capacity.

FIRM NOTES

The first half of 2016 has seen our firm continue to be busy while continuing to grow. We are pleased to welcome Alex Manolii who will be commencing his articles in the summer of 2016, and Sara Boulet who has joined our office as a summer student in between her studies at the University of Alberta's law school.

We have also welcomed two new assistants, Chelsey Cuvelier and Christina Babcock. Chelsey has been working primarily in the area of family law for some time and she brings that experience with her as she continues working in that sphere, while Christina is will be joining the litigation department. We are happy to welcome both Chelsey and Christina to our office.

As the summer sets in, Stillman LLP is pleased to continue its community involvement, through variety of active means, including but not limited to our sponsorship of WeBA and its annual golf tournament, as well as it welcoming in what is sure to be another successful (though heated) season of slow pitch baseball.

CAUSE CÉLÈBRES

Costs Awards and Emergency Protection Orders: *Denis v Palmer*, 2016 ABQB 54

By Braden Nehring

Family violence is an all too prevalent issue in our society. In Alberta, one mechanism for those suffering from family violence is an Emergency Protection Order (an "EPO"). An EPO is available when violence or threatening behaviour occurs between family members and there is a need for immediate protection. A person in need of protection may apply to the court for an EPO without notice to the other party. If an EPO is breached, the Respondent can be arrested and summoned to appear before the court.

Denis v Palmer, 2016 ABQB 54 is a decision of the Court of Queen's Bench that addressed whether a costs award is appropriate in reviews of EPOs under the *Protection Against Family Violence Act*, RSA 2000, c P-27 ("*PAVFA*").

This case garnered much notoriety as it involved Jonathan Denis, the former Justice Minister and Solicitor General for Alberta. Mr. Denis's former wife, Breanna Palmer obtained an *ex parte* (without notice) EPO against Mr. Denis and his mother on April 25, 2015. The EPO was obtained immediately prior to the provincial election. Pursuant to the *PAFVA*, a review hearing must be held for all EPOs. Justice C.M. Jones provided a decision following the review hearing on May 4, 2015. Although he revoked the EPO, Justice Jones rejected the Denis' request for an order setting aside Palmer's and the without notice order retroactively. As is typical, the Judge provided the parties an opportunity to agree on costs payable by one party to the other. In Alberta, a party that is successful in litigation is typically entitled to costs in accordance with the Rules of Court. The costs awarded by Alberta courts are typically not full indemnity, but are pursuant Schedule C which sets out appropriate costs awards for various steps in a proceeding. As is also typical, if the parties were unable to agree on costs, the matter could return before the court to be addressed and determined with finality.

The issue of costs was subsequently brought back before Justice Jones, and the Denis' argument was twofold. First, they argued that since the EPO was revoked and therefore signalled success, he should be entitled to costs on a solicitor-client basis. Second, they argued that Palmer's actions "were scandalous and vexatious" and were "calculated to injure Denis at a critical point and unjustly profit against him" (at paragraph 10). He also claimed that Denis was required to resign from his cabinet position and that he "may have lost his election bid as a result of Palmer's accusations". Additionally, He argued that Palmer's conduct had caused "irreparable harm to Mr. Denis' career" (at paragraph 10).

Mr. Denis took the position that "false allegations of family violence with collateral usage of EPOs should not be tolerated as this may diminish society's view of the serious impact of family violence when it has in fact occurred" (at paragraph 12). Mr. Denis advanced a further policy argument that EPO applications may be brought with no consequence if the court fails to make a costs award for EPO applications that are without merit. Palmer's position was that each party should bear their own costs.

Justice Jones noted that costs awards are within the discretion of the court, with that discretion to be exercised judicially while considering a number of relevant factors.

Rule 10.29 of the *Alberta Rules of Court*, Alta Reg 124/2010 provides that a successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party. The court may consider factors such as the result of the action and degree of success of each party; whether a party has engaged in misconduct; and whether the conduct of a party was unnecessary (Rule 10.33(1) and (2)). Justice Jones also noted that assessing the importance of the issues at stake (Rule 10.33(1)(c)) required consideration of the objectives that the *PAFVA* seeks to achieve, primarily the importance society attaches to protecting its vulnerable members from family violence (at paragraph 15).

Justice Jones determined that each party should bear their own costs. He pointed out that the parties had mixed success. Justice Jones went on to point out that the original EPO was not issued in error. Although he concluded that Palmer was not "in danger of family violence or in need of protection" at the time he rendered his decision, he "did not equate that to a finding that the Provincial Court Judge erred in granting the EPO in the first instance" (at paragraph 17). He then went on to reject the Denis' assertion that Palmer acted frivolously, without merit or that she intended to cause harm to the Denis'. According to Justice Jones, the matter proceeded in accordance with the protocols set out in the *PAFVA*, which allow an EPO to be obtained *ex parte*, after which it is reviewed in the Court of Queen's Bench with the benefit of additional evidence to assist the court in determining whether the EPO should be revoked or continued.

Justice Jones also noted that although the *PAFVA* prohibits making a frivolous or vexatious complaint, there is no penalty provision for doing so. As such, if the court were to impose a penalty, this "would require the court to search for malicious intent by assessing an applicant's professed subjective belief in the threat of family violence at the time of the EPO application before the Provincial Court; an unjustifiable exercise in speculation" (at paragraph 20).

In the end, that the court is reluctant to grant costs in light of the statutory framework of the *PAFVA* is not surprising. That being said, when faced with the prospect of requesting an EPO or defending against an EPO, litigants should be aware of the legal landscape before them. Each case is decided on the merits and whether those merits exist on the evidence will determine the long term viability of an EPO.

AS WE SEE IT

Security for Costs: *Commercial Construction Ltd. v. Ghostriders Farm Inc. 2016*

A costs award is an award of money ordered by the Court from one party to the other as a penalty against the losing party to help contribute to the legal fees and disbursements incurred by the victorious party. The concept of security for costs is: money is ordered to be paid into Court to stand as security for potential costs award given against a particular party. In the Court's eyes, it is not always reasonable for one party to drag another party into costly litigation, where it is evident that if they lose, they will not be able to afford to pay costs awarded against them.

In *Commercial Construction Ltd. v. Ghostriders Farm Inc.*, 2016 ABQB 66 (hereinafter referred to as "*Ghostriders*"), Justice Nielsen discusses the rules and statutes which apply to security for costs applications for both individuals and companies, namely: the *Business Corporations Act, RSA 2000, c B-9* (the "BCA') Section 254; and the *Alberta Rules of Court, Alta Reg 124/2010* Rule 4.22. In the final analysis, Ghostriders is a helpful case that builds upon the existing caselaw to highlight the different standards by which individuals and corporations will be judged when faced with a security of costs application.

Section 254 of the BCA provides that:

> In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

And Rule 4.22 provides that the court may grant security for costs on the consideration of the following factors:

(a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
(b) the ability of the respondent to the application to pay the costs award;
(c) the merits of the action in which the application is filed;
(d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action; and
(e) any other matter the Court considers appropriate.

In the case of a corporation, Section 254 of the BCA applies and in all other cases, not subject to other statutory enactments, Rule 4.22 of the *Alberta Rules of Court*, Alta Reg 124/2010 applies.

In both cases, the party seeking security for costs bears the initial onus of establishing, on the balance of probabilities, that the responding party will be unable to pay its costs if the defence is successful. If they are successful, the onus then shifts to the responding party to show why the Courts should not exercise its discretion in making such an order.

Justice Nielsen then set out, citing other Alberta Court of Queen's Bench authority, two non-exhaustive lists of factors that will weigh for and against granting the order. The factors favouring the granting of an Order for security for costs include:

a) the respondent is a corporation and has no assets in Alberta;
b) the respondent is a corporation and the assets it has in Alberta are of a nature or value that there is a substantial risk that the applicant may not be able to recover any costs award likely to be granted to it;
c) the likelihood the respondent will receive judgment against the applicant is low;
d) a security for costs Order will not prevent the respondent from prosecuting its action;
e) the applicant is not seeking security for steps already taken;
f) if the applicant has counterclaimed, and the issues raised by the counterclaim and the claim are different, this will not deter a court from granting security for costs;
g) the applicant has applied for a security for costs Order at the earliest opportunity; and
h) the resolution of the issues presented by the respondent's action is not important to the greater community.

And the factors weighing against the granting security for costs include:

(a) the applicant failed to apply for security for costs at the earliest opportunity;
(b) the applicant seeks security for costs of steps already taken;
(c) the respondent has assets in Alberta of a nature and value that there is little risk the applicant will be unable to recover any cost award likely to be granted to the applicant;

(d) the likelihood the respondent will receive judgment against the applicant is high
(e) the shareholders of a corporation, which has no assets in Alberta or the assets it has in Alberta are of a nature and value that there is a substantial risk the applicant may not be able to recover any costs award likely to be granted to it, have assets in Alberta that would be sufficient to meet any costs award likely to be granted and have offered to provide personal guarantees;
(f) a security for costs Order will prevent the respondent from prosecuting its action;
(g) the applicant has counterclaimed and the issues raised by the counterclaim and the claim are the same or the counterclaim adds significantly to the action, with the potential to prolong discoveries and trial; and
(h) the resolution of the issue presented by the respondent's action is important to the community.

Justice Nielsen lastly went on to cite previous case law in determining the difference between Section 254 of BCA application and 4.22 of the Alberta Rules of Court. That is, for a company, the Court only considers whether they will be unable to pay a cost award but for an individual, the Court must consider whether it is "just and reasonable" to force them to pay money into Court. Effectively, what this means is, if it looks as though a company will not be able to afford or have assets available to cover a cost award against it, the Order will be granted. However, for an individual, it will be necessary to compare circumstances at hand with previous decisions to determine whether it is fair to the responding party.

Applying the above factors to the case at hand, Justice Nielsen allowed the application in part. There, Ghostriders Farm Inc. applied to have Commercial Construction Supply Ltd. pay security for costs on the basis that it did not have exigible assets in Alberta of sufficient value and nature to satisfy an award of costs against it, primarily because it was a British Columbia corporation extra-provincially registered in Alberta with most of its assets being outside of the Alberta jurisdiction.

Counsel for Ghostriders was able to discharge the initial onus of establishing on the balance of probabilities that Commercial Construction Supply Ltd. would be unable to pay costs awarded against it. The evidentiary burden then shifted to Commercial Construction Supply to show why the Court should not make the Order. Key evidence analyzed by the Court was that the assets in Alberta consisted primarily of accounts receivable and inventory which would not convert easily into cash available to pay costs. Further, those assets were pledged to the Bank of Montreal under a General Security Agreement.

In the end, the Court ordered that Commercial Construction Supply should pay $150,000.00 into Court in light of the foregoing, and because they failed to provide evidence that they would be unduly prejudiced by the order, and the evidence provided by Ghostriders that Commercial Construction's business had declined over the preceding two years.

Security for costs as a remedy remains a viable option to consider for those who have been dragged into costly litigation. It can certainly be an effective tool for a defendant in a lawsuit to defend themselves against frivolous claims, and can ultimately end up acting as leverage to produce a settlement rather than being forced to incur legal fees all the way through trial. However, at the very least, a successful security for costs application will act to secure an innocent defendant to receive some contribution towards their legal fees in the form of a costs award if they are ultimately successful.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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