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The Law of Damages in Motor Vehicle Accident Cases (Tort): 101

The law with respect to the burden of proof in motor vehicle accident cases is often overlooked until it is too late. We need to know what we need to prove when assessing cases, advancing a position at a mediation, and well before we step inside a courtroom. We run the risk of relying on practical assessments of cases, which may prove to be inaccurate, as they are untenable in law. One must understand the difference between calculating past and future income loss claims in order to assess exposure. Similarly, one should understand the difference between the balance of probabilities test versus the real and substantial possibility test when assessing past and future exposures. When we are arguing liability, it is important to understand what is the actual test for negligence.

Below is a basic primer on some of the key legal concepts that one should have a handle on when considering motor vehicle accident tort claims.

The Balance Of Probabilities Test

In a criminal case, the prosecution is required to prove that the Defendant is guilty beyond a reasonable doubt. This is a difficult test for the prosecution to overcome. In a civil case, the burden of proof is much less onerous. Whoever has the burden must simply prove that it is more probable than not that their side is right. This is known as the balance of probabilities test. In a recent trial I

attended, opposing counsel aptly described the burden by way of the following sports analogy. The party with the burden does not have to win the game 5-0; but rather by the smallest of margins such as 5-4. However, if the party cannot prove their case, or it is a 5-5 tie, the party with the burden loses. Another way of looking at it is like a pass – fail exam. A pass is a pass on the exam whether the student gets 51% or 95%.

With a few exceptions, the Plaintiff has the burden of proof in a motor vehicle accident case to prove liability and entitlement to damages. This means that the Plaintiff has to prove her case. If a Plaintiff proves on the balance of probabilities (for example 51%) that she is entitled to damages then she is entitled to compensation.

Liability

When dealing with a motor vehicle accident between two vehicles, the Plaintiff has the burden of proof to establish on the balance of probabilities that the collision was caused by the Defendant.

However, the burden of proof in liability does not solely lie with the Plaintiff. In a circumstance in which the Defendant raises the issue of contributory negligence, it is up to the Defendant to prove contributory negligence on the balance of probabilities. For example, let us assume that the accident involves a Defendant driving one vehicle, a husband Plaintiff driving another vehicle, and a



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wife Plaintiff who is a front seat passenger in her husband's vehicle. The Plaintiffs are obligated to prove that the Defendant is liable for the accident. The Defendant, at the same time, is obligated to prove that the husband Plaintiff is contributory negligent for the injuries sustained to his wife the passenger.

Similarly, when dealing with a pedestrian knock-down accident, (which includes a collision involving a bicyclist), the law obligates that a reverse onus applies. This means that rather than Plaintiff proving that a Defendant is at fault, the Defendant is now obligated to prove that the Plaintiff is at fault on the balance of probabilities. Accordingly, when the Defendant alleges contributory negligence, or when dealing with a pedestrian knock-down accident, the burden of proof lies with the Defendant.

When determining the issue of whether a party is negligent for causing the collision, the standard of care is measured by the conduct of an ordinary person reacting to the circumstances of an accident. The standard is not of an extraordinary skilled person, but rather that of a reasonable and ordinary one. For example, an accident reconstruction report that comes to the conclusion that a driver could have avoided an accident by reacting significantly quicker than the common man should carry little to no weight at trial.

At the same time, while a driver in a motor vehicle accident is not expected to have exceptional reaction time abilities, he is responsible for taking reasonable action in the circumstances. If a Jury comes to the conclusion that on a common sense approach that a reasonable driver ought to have taken alternative action to avoid an accident, then liability will be established.

Burden Of Proof For Damages For Past Events

The burden of proof for each head of damages is on the Plaintiff to establish on the balance of probabilities; except for future losses. At trial, the Jury will be instructed that they are to assess damages for injuries that have been caused or contributed to by the accident. That means that if the burden of proof is met by the Plaintiffs for a particular claim for past damages then a Jury should award 100% of the particular claim. Examples of damages for past events include past income loss, out of pocket expenses, and past housekeeping.

For instance, if a Jury decides that on the balance of probabilities that a Plaintiff has suffered a past income loss of \$10,000, then they should award \$10,000. If a Plaintiff proves on the balance of probabilities that she has incurred a \$5,000 loss for paying

someone to do her housekeeping before trial, then she should be awarded the entire \$5,000.

Burden Of Proof For Damages For Future Events

Unlike claims for past events, the law is somewhat different when it comes to proving future events such as future income loss, future health care, and future housekeeping costs. The reason for this is that there is no certainty that something might happen into the future. One Plaintiff may undergo surgery into the future and require significant treatment thereafter. Another Plaintiff may have not worked since the accident and then go back to work full time the day after the trial is complete. A Jury will be asked to evaluate the possibility that some event will happen into the future. Since a Plaintiff does not get the opportunity to come back to court to show that they really cannot go back to work, a Jury is asked to predict what will happen; and award money accordingly.

The test for proof of future events is the "real and substantial possibility" that an event into the future will occur. The real and substantial possibility test is less difficult for a Plaintiff to prove than on the balance of probabilities. If there is a real and substantial possibility that a future damages claim will occur, then a Jury will be asked to decide the actual percentage possibility of the event occurring. If it is mere speculation or conjecture then there should not be any award for any future damages.

For example, let us accept that the value of a Plaintiff's future health care claim is \$100,000. If a Jury determines that there is a 100% real and substantial possibility that the value of this loss will be sustained then the award should be \$100,000. Likewise, if a Jury concludes that there is only a 10% real and substantial possibility that this future health care claim will be sustained then only \$10,000 should be awarded.

General Damages

The purpose of such an award is to compensate a Plaintiff for such things as pain, suffering, disability, inconvenience, and loss of enjoyment of life. These are only dealing with those damages which flow from injuries that were caused or contributed by the accident. If it is determined that some injury was not caused or contributed by the accident then a Plaintiff should not be compensated for same.

There is no formula whereby a particular injury nets a certain dollar recovery. Each award of general damages (also known as non-pecuniary damages) is supposed to be tailored for each individual



Plaintiff. A likeable and credible Plaintiff who suffers from chronic pain will likely be found entitled to more compensation than a Plaintiff complaining about the same problems but not believable. A claimant who suffers an objective injury but returns to his day-to-day activities is likely worth less than a Plaintiff who suffers soft tissue injuries but never returns to work again.

Claims for general damages post October 1, 2003 are subject to a \$30,000 deductible for all awards of \$100,000 or less. The Plaintiff must also establish that her injuries cross the threshold in order to be awarded any such compensation (beyond the scope of this paper).

Past Loss Of Income

The Plaintiff must prove that she has suffered a past loss of income based on the balance of probabilities. The past loss of income time period commences at the date of the accident and ends at the date of trial. For all claims that commenced before September 1, 2010 past loss of income claims are calculated at 80% of net income. For accidents that occur after September 1, 2010 the past income loss is calculated at 70% of gross income. The burden of proof is on the balance of probabilities.

While there is still some controversy as to what deductions are allowed for past income loss claims on the tort side, for the most part it is accepted that the following benefits are deductible: long term disability benefits, short term disability benefits, income replacement benefits, post-accident income, and CPP disability benefits.

Future Loss Of Income

The Plaintiff must prove that there is a real and substantial possibility that she has suffered a future income loss. The higher the possibility that a future income loss claim will be suffered by the Plaintiff, the higher the award should be. When determining a future income loss claim the Jury will decide this on the basis of 100% of gross income. This means that there will not be any deduction for taxes or the 80% of net rule. At the same time, a Jury is left to consider any reasonable contingencies and risk factors that they consider relevant to their determination as to the value of any future income loss claim.

For instance, a Jury may believe that a Plaintiff will return to work one day post trial at full time duties and award her nothing. At the same time, a Jury may find that a Plaintiff will never return to work and award her everything that is being asked.

With the exception of an assignment, (beyond the scope of this paper), there are no specific deductions allowed by the tort Defendant for a future income loss claim. However, if a Jury does not believe that a Plaintiff is entitled to any future income loss, then the award may be nil. This is of course the best deduction of all.

Future Cost Of Care

Similar to the claim for future income loss, the Plaintiff is only obligated to prove that there is a real and substantial possibility that she will incur expenses under such a heading.

First, a Jury will be asked whether the Plaintiff will incur these expenses into the future. Second, they will determine what is the reasonable cost of those expenses. Finally, they will decide how long the future cost of care is likely to be needed.

For instance, a 65 year old Plaintiff may allege that she has suffered a future housekeeping claim of \$100,000. A Jury may accept that there is a real and substantial possibility that the Plaintiff will require housekeeping services. A Jury may also find that the Plaintiff only requires such services 1 day a week and that by the age of 70 she would have required these services regardless of the accident. So, a Jury may accept that there is a viable future housekeeping claim, but only award \$20,000 of the \$100,000 sought.

One of the types of claims for future cost of care is attendant care. In a case in which there is the possibility of surgery into the future one of the common claims for future treatment is for attendant care by a personal support worker (for care post-surgery). Such a personal support worker may help a Plaintiff function on a daily basis for a certain period of time and charge \$22.00/hour. On a practical basis most people do not hire personal support workers to assist with such care as they either will get assistance by family or manage on their own. As a matter of law, however, a Plaintiff is not required to seek help from family members. All because a Plaintiff is unlikely to hire a personal support worker into the future does not mean that a Defendant is not obligated to pay for same by way of a verdict. While it is up to a Jury to decide the total value (if any) for attendant care services based on their own reasons, they are entitled to consider the possibility that a Plaintiff will require the services of a professional service provider.

Conclusion

Despite all our attempts to standardize and computerize our jobs to make things easier, there is no substitute for knowledge. We need to know that there is a different burden of proof for claims for past



losses compared to future losses; with very important consequences. The defence should realize that a Plaintiff is potentially entitled to be compensated for the cost of a personal support worker for future care; even though there is no practical reality that she would ever hire one. It is important to realize that while as the Defendant has the obligation to prove negligence in a pedestrian knock-down case, the test is still just based on the balance of probabilities.

The assessment of a case revolves primarily around two elements: the facts and the law. Both the facts of the case and the applicability of the law are often spun in very different directions depending on what side of a file you are on. While as the facts of each Plaintiff's claim are different, the law remains the same. As long as we are secure in the knowledge of the law then we will be half-way to making an informed decision on each new case when it lands on our desk.

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