Catastrophic Impairment and the Loss of Interdependent Relationship

What is it?

A. Defining the Loss of the Interdependent Relationship

The loss of the interdependent relationship can best be described as the loss of opportunity to form a permanent interdependent relationship with another individual whether that be through marriage or common law co-habitation. The main component to the loss of an interdependent relationship is the loss of financial benefits from shared family income. This is based upon a simple premise that two people living and working together can be more financially whole than on their own. This includes not only the sharing of the income, but the sharing of paying expenses, undertaking tasks, as well as benefitting from the other spouse's potential fringe benefits including pensions and insurance.

Through the case law it has had various names including loss of opportunity to marry, loss of opportunity of family income, and loss of interdependent relationship. A

notable quote in defining this loss comes from Lambert, J.A. of the British Columbia Court of

Appeal in *Reekie v. Messervey* (1989) B.C.J. No.797, who stated the following:

> "This aspect of the damage award was called 'Loss of Opportunity to Marry' by counsel and by the trial judge. But marriage itself is not the significant point. The significance lies in the loss of an opportunity to form a permanent interdependency relationship which may be expected to produce financial benefits in the form of shared family income. Such an interdependency might have been formed with a close friend of either sex or with a person with whom a plaintiff might have lived as husband an wife, but without any marriage having taken place. Permanent financial interdependency, not marriage, is the gist of the claim. For the sake of simplicity and consistency, I will now usually call this head of loss: 'Lost Opportunity of Family Income' "

As in *Reekie* and most other cases, counsel usually present the loss as one of being pecuniary in nature. The non-pecuniary element however, should not be overlooked. The general damage component is the loss of enjoying the benefits that would arise from a marital relationship including the emotional, sexual, and psychological benefits of having a union with one individual and the prospect of having children. Further consideration should also be given to putting forth that loss on a non-pecuniary basis

under the *Family Law Act* wherein parents of a minor would also lose the opportunity of seeing their child marry and go on to have children.

B. It's origins in Canadian personal injury law.

The concept of the loss of interdependent relationship being a separate heading of damages in which the Plaintiff could make such a claim originated in British Columbia. The British Columbia Court of Appeal, in 1989, in the course of *Reekie v. Messervey* (1989) B.C.J. No.797 solidified this heading of damages in Canadian common law. The case dealt with a 20 year old female Plaintiff who suffered catastrophic injuries in a motor vehicle accident rendering her a paraplegic. The British Columbia Court of Appeal referred to the loss as one being the loss of opportunity to marry. The Court of Appeal set the parameters of such a claim as follows:

1. The Plaintiff is entitled to be compensated for their full pecuniary loss caused by the accident;
2. The loss is both pecuniary and non-pecuniary when assessing the loss of an opportunity to form a permanent interdependent relationship; and
3. The existence or the prospect of a marriage must be taken into account to determine the financial benefits that might flow from a permanent interdependent

relationship.

Notwithstanding the above parameters, the claim must still be presented as being one that requires a substantial possibility that it would have occurred. A number of cases have

referred to it as being a speculative and remote claim, notably *Scarff v. Wilson* (1998) 55 DLR (4th) 247 and *Belyea v. Hammond* (2000) N.B.C.A 41. The loss cannot be too speculative and requires enough evidence to show that there was a very real substantial possibility that it would have occurred and that there would have been a net economic gain to the Plaintiff in the interdependent relationship.

In *Osborne (Litigation Guardian of) v. Bruce (County)* (1999) O.J. No. 50 Justice O'Connor followed the British Columbia approach. In that case Justice O'Connor allowed the Plaintiff an award of $125,000 for the loss of not having an interdependent relationship. Like in the *Reekie* case the Plaintiff was a young girl who was rendered a paraplegic and also suffered a significant brain injury. Since *Osborne* and *Reekie*, there have been several cases in this Province that address this loss. Most notably is *Walker v. Ritchie* (2005) 197 O.A.C. 81. In that case, E.E. Gillese and S.E. Lang, J.J. A. reaffirmed the trial judges award of $125,000 for the future loss of an interdependent relationship

for a Plaintiff who was 17 years old at the time of the accident, who suffered catastrophic injuries. The trial Judge, Justice Brockenshire, felt that the Plaintiff, given all factors, had a substantial possibility that she would have gone on to have an interdependent relationship resulting in financial benefits. In that regard Justice Brockenshire stated the following:

> "In this case we have convincing evidence that before the accident, Stephanie had been an outgoing, personable and well liked person, who had dated through her four years of high school. She has a loving family, with parents in a committed and mutually supportive relationship. From this background, while nothing is certain, the strong probability would have been that she would have married, and that the marriage would have endured. Now, she has not only physical, memory and cognitive difficulties, but also personality problems which have left her with few if any friends, and led her own sisters to say that she can be difficult to be with or talk to. It is obvious that her chances of marriage, or of any interdependent relationship, have been significantly reduced, and if such a relationship is entered into, the chances of it breaking up have been significantly increased."

As the Court of Appeal upheld the loss, it is quite clear that the loss of an interdependent relationship is a firm and solidified heading of damages in this Province.

How and When does it arise?

A claim for the loss of an interdependency relationship arises when a Plaintiff has

suffered severe and catastrophic injuries. Their injuries are such that there is a substantial likelihood that they will not ever enter into such a relationship. The Courts in this regard have focused on two main factors; age and sex.

In dealing with the question of age, in any action the younger the Plaintiff is, it seems the more likely it is for counsel to make a successful claim. The basis of this as an example is that an individual at the start of their adult life in their twenties will have had a better prospect of developing an interdependent relationship. Conversely, a 50 year old who did not have an interdependent relationship prior to suffering the injuries statistically would be more unlikely to have developed an interdependent relationship with someone over their lifetime.

Of note in addressing the issue of age is the case of *Cherry (Guardian ad litem of) v. Borsman* (1991) B.C.J. No. 2576. This was a medical negligence case in which a woman attempted to have a therapeutic abortion which was not successful. The infant Plaintiff was subsequently born having severe congenital defects including brain damage as well as having physical abnormalities. The British Columbia trial judge, Justice Skipp, concluded that it was clear, based upon the evidence that it was extremely unlikely that the infant Plaintiff would ever go on to marry. As such, he had no difficulty in

accepting the Plaintiff's claim in principle. In order to address the probability that in the absence of the tort that she would have gone on to marry Justice Skipp accepted statistics used by the Plaintiff's economist in which the evidence was that 77% of Canadian women aged 25-64 enter into either a common law or a marriage relationship. The Plaintiff's expert put forward the probability that the Plaintiff would have married at 75-80%. As the Plaintiff was so young, Justice Skipp found that the claim was also speculative as the possibility of her developing an interdependent relationship would not have arisen for a significant period of time. Notwithstanding the speculative nature of the claim for a minor Plaintiff, Justice Skipp remarked in the ruling that it was not open to the Court to reject the infant plaintiff's claim just because it was a speculative one. Rather, the trier of fact should not only consider statistics but also include other factors such as family background, geographic residency, sex, and expected educational attainments among other factors. Even though the Plaintiff's expert provided hard calculations outlining the loss, due to its speculative nature Justice Skipp reduced it to a lump sum of $100,000 representing approximately one half of the Plaintiff's expert's calculation.

Not only age will be of issue, but whether or not the Plaintiff is female or male. Theoretically, the loss of interdependent relationships is available to both sexes. It may

seem in this day and age and given today's jurisprudence that there should not be any difference in a male or female making such a claim. Surprisingly there is very little case law dealing with male plaintiffs making such a claim. Conceptually it appears the Courts still find it easier to award damages under this heading to a woman as compared to a man. The reasoning why is not clear and very well may be due to old beliefs and biases or statistics showing women make lower earnings. Perhaps it is dependent upon some concept that women, on average, are more dependent on males financially. Nonetheless, the reasoning is not clear and it is surprisingly unusual that male claimants are not as successful as female claimants.

A notable case dealing with a male Plaintiff is the case of *Bartosek (Litigation Guardian of) v. Turret Realties Inc.* (2001) O.J. No. 4735. In that case the minor Plaintiff Kirk Bartosek was a six year old boy who suffered a severe brain injury after being hit by a vehicle while riding his bicycle. Justice Kent, in his reasons which were upheld by the Ontario Court of Appeal, did not allow any damages under this heading on the basis that he felt it was too speculative and too remote and therefore did not make any assessment for same. In his ruling, Justice Kent was critical of the plaintiff's expert who did not take into account the theoretical possibility that the minor plaintiff's spouse-to-be may not be able to work or in the event of a marital breakdown the minor Plaintiff

would, in fact, have to pay support. Therefore, at least at the present time, it appears to be easier for a female to make such a claim. It should be noted that in *Bartosek* Justice Kent was highly critical of the evidence put forward by the plaintiffs to establish such a claim.

What types of Plaintiff's injuries would lead counsel to make a claim for loss of interdependent relationship?

Theoretically, in any personal injury action the Plaintiff will have the possibility of making a claim under this heading. However, in reality counsel will only want to put

forward this claim in the most extreme cases involving severe injuries. These would, in my view include, but are not limited to, the following:

- paraplegia
- quadriplegia
- brain injuries
- severe psychological and emotional disorders arising from a tortious act
- extreme external physical impairments including disfigurement

All of these injures are ones that any Plaintiff counsel should, at a minimum, consider

the possibility that their client may have a claim for the loss of interdependent relationship.

When assessing the types of injuries a Plaintiff might have that would give rise to such a claim, it must be put in the context as previously noted as to their age and sex. A further consideration, however, should be given to an individual who is in an existing relationship which, due to the plaintiff's injuries, will likely fail and will prevent them from entering into a new interdependent relationship in the future.

In the vast majority of claims the Courts have addressed the loss of an interdependent relationship in the context of a Plaintiff who had yet to engage in one. A case that deals with a Plaintiff already in an established relationship is that of *Grewal v. Brar* (2004) B.C.J. No. 1819. In that case the Plaintiff suffered a severe spinal cord injury as well as a head injury. Some of her deficits included a suffering dramatic personality change, sexual dysfunction and had become heavily withdrawn. At the time of the accident she was 25 years of age and had been married for just under two years. The Plaintiffs submitted a claim for the loss of an interdependent relationship arguing that the Plaintiff's marriage was likely to fail due to the Plaintiff's injuries. The Defence argued

that this heading of damages was only available to Plaintiffs who had yet to enter into marriage or any other interdependent relationship. Justice Cole relied upon the principles as set in *Reekie* and found that such principles applied to an existing relationship. He found the evidence credible enough to find that the relationship was significantly strained and that there was a noted loss of sexual relations.

Justice Cole also relied upon statistics dealing with the average length of marriages. He indicated that approximately the average length of marriages that are before the Courts are approximately 10-12 years in duration. Given that time frame and the fact that there would be other contributing strains on the marriage in the absence of the accident, he took into account the possibility that the marriage would have failed in any event and that the accident may have accelerated its breakdown. Nonetheless, he found the marriage to be reasonably good at the time of the accident and allowed the Plaintiff's claim. He did not provide any underlying basis for his determination of the quantum of the claim. He acknowledged that there were many contingencies to the claim and simply awarded $30,000 under this heading. He also noted that in the event the breakdown takes place, that given the Plaintiff's cognitive and emotional difficulties combined with her physical limitations, that it would be extremely unlikely that she would ever remarry in the future.

Normally, counsel think of making this claim in typical personal injury actions including motor vehicle accidents, slip and falls, product liability cases, and medical malpractice suits. However, there are other tortious acts in which counsel should consider making the claim. Of note is the intentional tort of sexual assault. It is well established in medical literature that after an individual has been sexually assaulted that they may suffer from long term serious issues dealing with sexuality and dealing with others on a social basis. For example a female who is sexually assaulted by a male may have extreme difficulties ever developing future situations of trust with a male. That interference in that part of their life can lead to the real possibility of them never being able to engage in an interdependent relationship. That very issue was dealt with by Justice Morrissette in *Jane Doe v. John Doe* (2003) O.J. No. 4839. This was a civil case in which the then 34 year old Plaintiff sued a 44 year old defendant for damages due to a sexual assault that occurred 31 years after the fact. The Defendant admitted that at the age of 12 he did commit the sexual assault on the Plaintiff which involved sexual touching including oral contact with the Plaintiff's genitalia. As the Defendant had admitted the tortious act, the only question was that of damages. As part of the Plaintiff's case, there was a long history of psychological and emotional problems present which included severe depression, social withdrawal, and suicidal ideations.

Further, there was a pecuniary claim put forward as the Plaintiff had significant difficulty maintaining employment. The Plaintiffs also put forward the prospect that due to the assault and its resulting psychological sequella that there were serious barriers preventing her from establishing a normal social lifestyle. This therefore led the Plaintiff to make a claim for the loss of an interdependent relationship. Justice Morrissette relied upon the expert opinion of a psychiatrist who saw the Plaintiff for a medical legal consultation. The evidence showed that the Plaintiff lived in constant fear and that her prognosis was very much guarded. As such, Justice Morrissette allowed an assessment of $150,000 for this loss and accepted that there was a substantial possibility that the Plaintiff would not be able to have and maintain a meaningful relationship in the future.

How to prove it

Proving a Plaintiff’s claim under this heading involves a number of factors. A small list that counsel should consider in trying to prove the loss include:

- age;
- male or female;
- economic family background;
- family history of marriage and divorce;

- religious background;
- ethnicity;
- education and vocational history;
- family, and in particular siblings educational and vocational history; and
- personality traits.

The above factors will form the basis of developing marriageability prospects with a statistical-like basis. In order to obtain a proper statistical data base counsel will want to have any expert who deals with social sciences and in particular, one who specializes in human social behaviour. That evidence would be required in order to put forward a hard actuarial calculation through another expert. Affecting the quantum of the hard calculation would also be the Plaintiff's life expectancy. In that regard counsel will only likely retain such an expert in the most severe cases in which the Plaintiff's life expectancy has been impeded. It is also likely, that in a case where there is a large future care costs component that the Defendant will make the argument that due to a Plaintiff's severe impairments that their life expectancy is significantly reduced. Counsel must remember that the quantum for the loss will only be as accepted as is the acceptance of the Plaintiff's theory dealing with their future based upon those headings.

The proof in many of these circumstances will be similar to that which is put forward on

behalf of infant plaintiffs in catastrophic cases. We use their parents, siblings and socio-economic circumstances to predict their likely educational attainment and income. Taken one step further, one can put forth the presumption that they will likely marry or co-habitate with a similar status partner in life.

In order to establish the establish the loss, the Plaintiff must show a substantial possibility that it would have occurred. The basic elements that need to be followed are still those as set in *Schrump et al. v. Koot et al* (1977) O.J. No. 2502. In dealing with the issue of possibilities versus probabilities, Justice Lacourciere, on behalf of the Court of Appeal, made it clear that in order to put forward a claim, the Plaintiff must establish that only on the balance of probabilities and in the absence of the accident would the future loss likely arise. It does not have to be absolute, nor can it be too remote or purely speculative in nature. Notably, Justice Lacourciere stated the following:

> "In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a Plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage will occur, but only that there is a reasonable chance of such loss or damage occurring."

To properly sway the trier of fact that an award under this heading should be given, counsel, through expert evidence, must establish that it was a substantial possibility.

The Plaintiff's experience in *Bartosek* is one that counsel should bear in mind when attempting to prove this loss. As previously noted in this case, Justice Kent would not allow the loss for a minor male Plaintiff who had suffered a severe brain injury. He did not, however, have any problem ruling that it was an accepted heading of damages. The difficulty he had in allowing an award appears to be based on the evidence, or lack of it, in taking into account negative contingencies. As part of their proof line, the Plaintiff's had an economist testify outlining the potential losses. Justice Kent was highly critical of the expert as he did not take into account that theoretical the Plaintiff's potential spouse might not work full time or at all and whether or not the relationship could be subject to a marital breakdown. He also was critical of the expert by not addressing the differences between men and women. On this point he stated the following:

> "This court must bear in mind that this head of damages grew out of the fact that the average wage for women was less than for men and that there are multiple contingencies other than those set out above including:
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> * the time Kirk's (the Plaintiff) theoretical spouse would, if working, be off work to parent children;
> * when the theoretical marriage would occur;
> * when the theoretical spouse would retire;
> * what the effect of the costs of raising a family might be."

Justice Kent concluded that the Plaintiff's claim was presented in a speculative and remote manner and as such did not allow any award for the loss. To avoid a similar result, Plaintiff's counsel must address all these potential theoretical pitfalls that can affect the Plaintiff's calculations. As such, great care needs to be taken in providing the correct theory to the economist or actuary addressing all of the contingencies that Justice Kent outlined as well as leading evidence to support the Plaintiff's theory through experts who can address socio-economic and human factors.

Calculating it in the future

As discussed previously, the calculation of the interdependent loss needs to be based upon a theory that will be accepted by the Court. Regardless, the Plaintiff will always have difficulty dealing with the speculative and remote nature of the claim. The case is going to be based upon a theoretical partner who does not exist and may have come to be at some point in the unknown future. Simply, we need to prove why people marry and why that potential Plaintiff would likely to have gone on to form an interdependent relationship. Factors dealing with this include geography, age, sex, family background, and religion, among others. With that, in mind, once the theory of where the Plaintiff was likely going to go is established then, through an economist or an actuary, can the real calculation begin. The calculation will be based largely upon the statistical

probabilities of establishing what the total joint family income would have been. Part of that calculation will flow from the Plaintiff's pecuniary loss. The theory used for the Plaintiff's future wage loss would be the same theory used in determining what that individual's income would have been in calculating joint income. The second and most difficult part of the calculation is that of calculating the theoretical spouse's income. As we are dealing with an unknown, an average statistical calculation would have to be made.

Thus far there are three main approaches that have been used to deal with this loss which may be familiar to counsel in cases dealing with fatalities. These approaches are as follows:

1. Cross dependancy approach
2. Sole dependancy approach
3. Modified approach

The sole dependancy approach is simply an approach in which the family unit has one single earner. This approach ignores the impact of children. The cross dependency approach uses two family incomes where the calculation allows for an offset of potential savings that would have been spent on the prospective spouse and for which the

prospective spouse would have contributed to the overall family income. The modified approach is a modification of the cross dependency approach where special circumstances arise. What the approaches attempt to do is compensate the Plaintiff for the financial benefits of a potential income of the theoretical spouse. These approaches use percentages of usually 60% or 70% as factors in calculating the value to the Plaintiff of the spouse to be's income after tax. The theory being that the Plaintiff will statistically spend 30%-40% of his or her net income on the theoretical spouse. Statistics will be used to address the earnings of a two family based income and Plaintiff's counsel would likely want to put forward an argument that the educational level of the theoretical spouse will be similar to that of the Plaintiff in order to use some real statistical data.

The expert will also have to address a number of contingencies, as one would in a fatality case, including the possibility of divorce, permanent separation, remarriage, or having children. These will all be contingencies that will have to be factored in. In order for the expert's figures to be successfully accepted by the trier of fact, the evidence must be presented effectively and persuasively to show what the Plaintiff's income strength would have been and what education level they would have had. This will be based upon social factors like religion, upbringing, and family history leading to the

likelihood that they would have entered into an interdependent relationship and at what point in time. Certainly the question of when the interdependent relationship would have arisen will be very speculative and as such, Plaintiffs will have to rely upon the average statistics largely based upon the Plaintiff's age, sex and geographic location.

The net pecuniary benefit of homemaking services and providing child care services will likely form part of the Plaintiff's future care cost claim. Loss of homemaking services and the provision of child care services would be formulated on a pecuniary basis under that heading and therefore would not form a part of the interdependency loss as they would have already been claimed.

Where it may be headed

The lack of male Plaintiffs making this claim is a noted area that will likely emerge in future cases. The distinction and differences between a male and female Plaintiff will have to be addressed and hopefully overcome. As well, given the changes in Family Law dealing with same sex spouses there will likely be an expansion of potential claimants who may be entitled to make such a claim. Undoubtedly these areas will be explored in more depth in the future and other issues surrounding this loss will likely emerge.

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