

Proof of Future Economic Losses in Tort Law

By Greg Hagen

Cases Considered:

[*Chernetz v. Eagle Copters Maintenance Ltd.*, 2008 ABCA 265](#)

In 1999, Harry Chernetz was killed in a helicopter crash. In an action against the helicopter operator and its maintenance company, his estate, his wife and their three teenaged children were awarded damages exceeding \$3 million under the *Fatal Accidents Act*, R.S.A. 2000, c. F-8. The plaintiffs appealed, submitting, amongst other things, that in assessing the loss of future income, the trial judge wrongly required the plaintiff to prove what Harry Chernetz would have earned had the tort not occurred on a balance of the probabilities. Instead, the appellants contended, the trial judge should have attached probabilities to what Harry Chernetz might have earned, as a real and substantial possibility, had the tort not occurred, and calculated the expected earnings. The Alberta Court of Appeal (per Justices Constance Hunt, Clifton O'Brien and Alan Macleod) found that the trial judge applied the wrong standard of proof to isolated issues only and, for reasons of economy of judicial time and resources as well as fairness, ordered the action to be remitted to the trial judge to remedy the isolated errors identified by the Court of Appeal. Unfortunately, given the nature of the principles involved in assessing future economic loss, where there is a lack of clarity in the application of such principles by the trial judge, it may not be possible in principle for the Court of Appeal to accurately identify the errors.

In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada drew a distinction between proof of events which have occurred and proof of events which have not yet occurred or would have occurred had things been different. The standard of proof of past events is on a balance of the probabilities, whereas future events and hypothetical events one need only prove that they have, or would have had, a real and substantial possibility of occurring. Proven past events are to be treated as probabilistically certain, whereas future events should be treated as probable to a degree less than certainty. The Supreme Court of Canada said at paras 26-27:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood.... By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of

probabilities....The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty....

These principles are well known and have been cited by the highest courts in Canada, the U.K. and Australia as well as Canadian appeal courts in Ontario and Alberta. They provide a nuanced, probabilistic approach to future and hypothetical events while maintaining an all-or-nothing, categorical approach to proof of past events. The justification for this dichotomy is apparently that past events either happened or not, while a particular future or hypothetical event may or may not happen. While this distinction could be criticized on the basis that our knowledge of whether an event took place in the past is just as uncertain as our knowledge of whether an event would have or will take place in the future, it possesses, as Lord Nichols of Birkenhead recently said in *Gregg v. Scott*, [2005] UKHL 2, “a comfortable simplicity which accords with everyday experience of the difference between knowing what happened in the past and forecasting what may happen in the future.”

Despite the comfortable simplicity of the distinction, in *Chernetz*, the appellants complained that the trial judge, Mr. Justice S.J. LoVecchio of the Court of Queen’s Bench, had wrongly required that future losses be proved as more probable than not. Not only did the mathematical model used by the trial judge appear to produce categorical results rather than probabilistic ones but, as the Court of Appeal found, the trial judge at one point said that the task of the plaintiffs was to establish “on a balance of probabilities” the net profits that Chernetz’s companies may have earned had Harry Chernetz not died (at para. 35). Notwithstanding this general statement by the trial judge, the Court of Appeal found that the trial judge had erred in using the wrong test in isolated cases only. It concluded that the error did not infect the judgment as a whole and the isolated errors could be corrected by remitting the action back to the trial judge to correct those particular errors.

The difficulty with the Court of Appeal’s decision is that it is not so easy to sort out about which issues the trial court erred and which it did not. If the trial judge is not clear in his reasoning, how is the Court of Appeal able to distinguish between rightly dismissing an unreal and unsubstantial possibility to arrive at a practical certainty and arriving at a practical certainty on the basis of proof on a balance of the probabilities? Consider the fact that, had Chernetz lived, he may have, in the future, implemented a tax planning strategy to minimize income tax. Chernetz’s accountant, who Chernetz relied upon for tax planning, was asked by counsel for the appellants to describe the tax planning strategies that may have been used in the future to minimize tax on income earned by the Chernetz companies and by Harry and his wife. The defendants’ counsel’s objection to this question was upheld by the trial judge who, with little elaboration, confined the evidence of the accountant to what advice *was given* and what *was done* rather than what *might have* been given and done. Further, the trial judge interjected a tax plan which, presumably based upon his own experience as a solicitor, he believed that Chernetz *would have* implemented. The Court of Appeal found that refusing to admit evidence of other tax planning possibilities, while assuming that there would be an estate freeze, was a legal error. In short, the trial judge wrongly dismissed possibilities about what might have happened on the basis of what the judge regarded as the probable tax planning strategy.

Given similar reasoning about different circumstances, however, the Alberta Court of Appeal concludes that the trial judge did not err. The appellants complained that the trial judge did not consider the possibility that a second helicopter would be in use by 2001. Instead, he concluded categorically that the use of a second helicopter would have commenced at the earliest by 2003. The trial judge reasoned that “Harry Chernetz would not take the “big risk” of leasing another helicopter” and “Chernetz would have proceeded one step at a time, appreciating that he could “not be everywhere at the same time”” (see *Chernetz v. Eagle Copters Ltd.*, 2006 ABQB 353 at para. 261). On the face of it, the trial judge appears to reason that the fact that a second helicopter would not be used until 2003 is proved, on a balance of probabilities, on the basis of the evidence of the big risk and Chernetz’s caution. While the appellants submitted that the judge wrongfully dismissed the possibility of using another helicopter as early as 2001, the Court of Appeal concludes that “... it was open on the evidence for the trial judge to conclude as he did with respect to this forecast ” (at para. 70).” The only way it would be open for the trial judge to reach this conclusion consistently with the rules of proof of future losses would be to dismiss the possibility of the use of a second helicopter in 2001 as merely speculative and not a real and substantial possibility. But there is nothing cited by the Court of Appeal in the reasoning of the trial judge to justify the idea that the use of a second helicopter in 2001 was a merely speculative possibility.

Perhaps the Court of Appeal should not have remitted the action to the trial judge to correct the particular errors noted by the Court of Appeal, but to correct any errors that the trial judge made as a result of the application of the wrong principles of assessment of future economic losses, including those identified by the Court of Appeal.