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## Assessment of future economic loss and residual earnings capacity – Use it or lose it

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### Introduction

In our last Insurance newsletter, we discussed liability issues arising out of the decision in *Paskins v Hail Creek Coal Pty Ltd* [2017] QSC 190. This article explores the quantum issues in that decision.

Varying approaches can be taken to the assessment of future economic loss for plaintiffs working in the mining industry. The approach often taken is to apply a greater than usual discount to allow for such factors as pre-existing injuries, uncertainties in the market place, and uncertain residual earnings capacities.

McMeekin J has previously adopted such an approach in many of his judgements. *Paskins* is a further example of this. The unusual feature of this case is the much greater than usual discounting applied, which makes it an important decision to be aware of when assessing claims in a mining context.

The purpose of this article is to examine what factors can justify the imposition of a greater than usual discount when assessing future economic loss.

### Issues

The plaintiff was 32 years old at the date of the incident and 35 years old at the date of the trial.

As a result of the incident, he sustained a lower back injury (L4/5 disc prolapse) requiring surgery and a secondary psychological injury.

In assessing future economic loss, there were two key issues, being whether the plaintiff would have maintained employment in the mining industry to retirement, and the assessment of his residual earning capacity.

Senior counsel for the plaintiff submitted that damages for future economic loss should be assessed at \$1,223,037, which assumed an uninterrupted career to age 67 in the mining industry, two years of unemployment while he retrained, and a residual earnings capacity of \$250 net per week thereafter (and applying a 10% discount for contingencies). Counsel for Hail Creek submitted, for various reasons, that the award should be \$566,023.<sup>1</sup> The judge however awarded \$350,000, which was below what the defendants had even sought.

In arriving at this amount, the court assessed only a 30% chance that the plaintiff would have maintained employment in the mining industry to retirement. It based this on several factors. First, the plaintiff had not demonstrated continuity in his past employment. He had held eight different positions in the six or so years he had been in the mining industry, and had also faced a number of disciplinary issues.

Secondly, even for exemplary employees, consistency of employment was by no means certain given the vagaries of overseas markets. In this regard, the court referred to the high number of redundancies in recent times. Thirdly, the plaintiff had a pre-existing degenerative condition in his spine, which had previously caused symptoms requiring treatment. And fourthly, in the judge's words, *'what appeals to a younger man does not necessary appeal to someone more advanced in life.'*<sup>2</sup>

In relation to residual earnings capacity, the plaintiff argued that the defendants had failed to discharge their evidential onus of showing the extent of his residual earnings capacity. While the expert evidence was that the plaintiff was capable of employment in a different industry, he had taken no steps to obtain employment. In rejecting the plaintiff's argument, the Court referred to the decision of the Queensland Court of Appeal in *Adsett v Noosa Nursing Home Pty Ltd*<sup>3</sup> in which Pincus JA stated, *'But this argument fails, in my view, for a simpler reason; counsel for the appellant conceded that to throw any onus on the respondent the appellant had to prove that she had really tried to obtain employment.'*<sup>4</sup>

Accordingly, because the plaintiff had made no attempts to secure suitable alternative employment, the onus did not shift to the defendants to establish the extent of his residual earnings capacity.

## Assessment

Having regard to the above, the court approached the assessment of future economic loss as follows:<sup>5</sup>

1. Earnings in the mining industry to age 60 based on what the plaintiff was earning at the time of the injury (\$1,520,700);
2. **Discounted 70%** for the likelihood the plaintiff would not have continued to work in mining (\$456,210);
3. **Discounted a further 65%** to allow for the plaintiff's *'significant'* residual earnings capacity (\$159,673);

4. Add one year's wages for employment for re-training and seeking employment (\$95,000); and
5. Add a further amount for disadvantage on the open labour market even on the assumption that he would not have continued in the mining industry (approximately \$100,000).

## Conclusion

McMeekin J's assessment of future economic loss is notable for two reasons. First, the discount applied to the assessment was significant. And secondly, it reinforced the sometimes misunderstood position regarding the onus of proof as it applies to residual earnings capacities.

When assessing future economic loss, the courts attempt to predict, as best as possible, what is likely to happen in the future, and what may have happened had it not been for the injury. This can be a difficult task, particularly when it is faced with what is often referred to as a number of *'imponderables'*.

Large discounts are not typical and this case probably represents the high water mark. It demonstrates though that, in the mining context in particular, if the plaintiff is young, has a poor employment record, and has pre-existing medical problems, a larger discount can be justified, particularly where there is an additional overlay of credibility issues.

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<sup>1</sup> *Paskins v Hail Creek Coal Pty Ltd & Anor* [2017] QSC 190, [116].

<sup>2</sup> *Ibid* [119] to [123].

<sup>3</sup> [1996] QCA 491.

<sup>4</sup> *Paskins v Hail Creek Coal Pty Ltd & Anor* [2017] QSC 190, [133].

<sup>5</sup> *Ibid* [136].

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