



- INSURANCE
- CONSTRUCTION & ENGINEERING
- RESOURCES
- CORPORATE
- COMMERCIAL PROPERTY
- LITIGATION & DISPUTE RESOLUTION
- AVIATION

## Future economic loss in mining personal injury claims

Glenn Biggs, Partner  
Allison Haworth, Associate

The recent slowdown in capital expenditure in mining, coupled with softening Chinese demand and falling commodity prices, has undeniably impacted job growth across the resources industry. DFP Recruitment has released its mining and resources jobs index which registered a 3.8% fall in September 2014 with the index down 25.6% nationally over the year. Queensland has witnessed a notable decline of 55.01% over the last 12 months.

Notwithstanding job losses and tough market conditions in the resources sector, recent judgments demonstrate the courts reluctance to significantly discount awards for future economic loss. This article examines two decisions demonstrating the courts approach to injury damages in the mining sector and considers the basis of their rationale when calculating sustainable earning capacity.

### ***Martin v Golding Contractors Pty Ltd***

In *Martin v Golding Contractors Pty Ltd*,<sup>1</sup> a 23 year old female plaintiff sustained injury on 27 March 2009 when, during the course of her employment as a truck driver, she was rough loaded causing her to be thrown around in the truck. The plaintiff sustained cervical and lumbar spine injuries which the court accepted precluded her from returning to any form of manual employment.

Liability was not in dispute and the issue for determination was quantum of damages recoverable, taking into account the fact the plaintiff's contract was due to expire in early 2010 and given the apparent slowdown in the mining industry. An impressive number of witnesses were called to give evidence on behalf of the plaintiff as to her:

- competency, both in her trade as a fitter and turner, and as a truck driver/machine operator;
- the prospects of whether the plaintiff might have been able to obtain secure fulltime employment in the mining industry; and
- the availability of employment in the mining industry.

A statement from a union official was tendered into evidence, without objection or challenge, which set out that in 2010 coal mining was booming in Queensland and operators were picking up 'anyone' with mechanical skills to address the shortage of Fitters. Accordingly, the plaintiff would have obtained employment in the coal mining industry without difficulty. A number of enterprise agreements were also tendered as evidence of comparable earnings.

An uncle of the plaintiff with 15 years experience working as a plant operator and instructor gave evidence the mine at which he was currently employed was expanding in early 2010 and plant operators were sought after. He also imparted he was able to secure his daughter employment at the mine site in September 2010, indicating he would have been able to recommend the plaintiff's services. The plaintiff's cousin provided corroborative evidence she had been employed as a truck driver from September 2010, having previously worked as a beauty therapist.

Additionally, an ex-work colleague of the plaintiff with 17 years experience working in the mining industry gave evidence a number of plant operators who had been employed by the defendant obtained employment elsewhere once the contract ended in 2010. Similarly a friend of the plaintiff, a company director and mining manager, also gave evidence he would have offered the plaintiff a job in 2010 had she sought employment as a fitter and turner.

In the alternative, even if the plaintiff were not able to secure work in the mines, further evidence was furnished by an ex-work colleague who had worked with the plaintiff as a 'wagon master' when she worked for Queensland Rail, that it was possible for the plaintiff to qualify as a 'wagon master' within one year. Wagon masters earnings were comparable to those of a truck driver or fitter and turner working in the mines. Likewise, the owner of a trucking business gave

evidence he knew of the plaintiff's abilities as a truck driver and would be prepared, if there was a position available, to offer the plaintiff work.

On the other hand the defendant's evidence focussed on performance reviews, specifically an operator performance review dated 31 August 2008 where concerns were raised over the plaintiff's 'apparent personality clash'<sup>2</sup> with others. Additional evidence was presented that out of 84 employees, more than 12 persons were not transferred to other projects when the subject contract came to an end.

Whilst Judge North found the defendant's evidence to be 'essentially reliable',<sup>3</sup> ultimately he was impressed by the plaintiff's witnesses on the issues of employability and industry conditions. For that reason he found that, but for the incident, the plaintiff had excellent prospects of obtaining highly remunerative employment in the mining industry. Whilst accepting by 2012 and 2013 the mining industry in central Queensland was not as buoyant as it had been in 2009 and 2010, North J opined work was available for experienced competent persons, it was highly remunerative and there remained many opportunities offering continuity of employment.

It is worthwhile noting that North J was particularly impressed with the plaintiff's evidence; specifically her employment history, the extent of her training, including trade qualifications, and her vehicle and machinery competence.

In assessing compensation for loss of earning capacity, North J maintained a notional loss in accordance with the plaintiff's pre-incident earnings. He then reduced the same to reflect the plaintiff's residual earning capacity and applied a discount of 25% for contingencies taking into consideration the low prospect of



the plaintiff working in the mining industry to age 67, coupled with other potential life factors which he held warranted a 'significant discount for contingencies'.<sup>4</sup> The plaintiff was awarded \$700,000.00 for future economic loss.

## **Pollock v Theiss Pty Ltd & Ors**

In the slightly later decision of *Pollock v Thiess Pty Ltd & Ors*<sup>5</sup> the plaintiff, a 26 year old male, sustained injury on 7 April 2010 when a tub plate weighing in the order of 150kg fell, crushing his right foot. At the time of incident the plaintiff's employer was a labour hire company, notably in liquidation at the time of hearing. Liability was not in dispute however Judge McMeekin was required to assess damages.

The plaintiff was a qualified boilermaker at the



**Reliable witness evidence is key when determining sustainable earning capacity in the mining industry...**



time of the incident and had sought and obtained work with various contractors in the mining industry. He claimed that following the incident he was unable to continue in his role as supervising senior boilermaker. Despite the defendants relying on evidence from medical specialists to the contrary, McMeekin J preferred the plaintiff's evidence and found the defendants failed to discharge the onus of proving residual earning capacity. Average pre-incident net earnings were calculated in the sum of \$1,600.00 per week and debate thus centred on the plaintiff's sustainable earning capacity, having regard to the 'significant downturn'<sup>6</sup> in the mining industry in 2012.

Evidence was given by the director of the second defendant (whom the plaintiff had worked for previously) the mining slowdown had lasted

nine months in its severest form, during which time approximately 40% of his workforce were laid off. Boilermakers who were retained were generally the more senior workers.

The court found the plaintiff was well respected, qualified and competent. Furthermore, the plaintiff called a work colleague as a comparable employee whose income had evidently not been affected by the downturn. McMeekin J found the evidence of the comparable employee provided support for his assumed average net earnings.

Accordingly, when calculating future economic loss, McMeekin J found the short lived downturn only justified modest discounting of the award. He determined sustainable earning capacity with reference to average pre-incident earnings applying only a 20% discount to account for the 'vagaries of the mining industry'.<sup>7</sup> The plaintiff was awarded \$455,000.00 for future loss of earning capacity.

## **Comment**

Damages in tort are measured by reference to the likelihood of what will happen or what would have happened. Quantifying an award for future economic loss is a challenging judicial task given the array of uncertainties at play. It is a matter of judgment, guided by the basic principle that a plaintiff is entitled to be placed in the same position he/she would have been in but for the accident.

The onus is on the plaintiff to discharge the burden of proof and a future or hypothetical possibility will be considered, provided it is not merely speculative. The claim must satisfy the test of remoteness and hypothetical events are given weight according to their relative probability. If a court finds the probability is greater than the possibility of its non-existence, the burden of proof may be satisfied. Competing hypotheses are informed by tangible persuasion.

In the cases outlined above, it is clear that reliable witness evidence is key when determining sustainable earning capacity in the mining industry and assisting the courts establish competency, employability and industry conditions.

In *Martin v Golding Contractors Pty Ltd*<sup>8</sup> the plaintiff's witnesses' were proficient and gave comprehensive evidence on the issues. In

contrast the defendant's evidence was confined to a performance review carried out seven months prior to the incident where a personality clash with others was noted. Whilst the plaintiff's evidence was no doubt convincing, no evidence was tendered on behalf of the defendant as to labour market conditions or to justify a larger discount for contingencies. Similarly in *Pollock v Thiess Pty Ltd & Ors*<sup>9</sup> the defendants presented no evidence of current or projected market conditions for boilermakers in the mining industry.

When defending mining personal injury claims, witness evidence and statistical data relating to average retirement age, mining industry employment forecasts, mining industry projected earnings (with mining earnings set to drop) and firm evidence of potential residual earnings (where appropriate) will assist the court and likely result in maximal reduction for exigencies. Whilst the evidential burden of proof rests with the plaintiff, the upshot of that is to ensure as a defendant you are well equipped to persuade the court otherwise.

<sup>1</sup> [2014] QSC 53.

<sup>2</sup> *Ibid* [17].

<sup>3</sup> *Ibid* [18].

<sup>4</sup> *Ibid* [31].

<sup>5</sup> (No 2) [2014] QSC 95.

<sup>6</sup> *Ibid* [33].

<sup>7</sup> *Ibid* [66].

<sup>8</sup> [2014] QSC 53.

<sup>9</sup> (No 2) [2014] QSC 95.

## Authors



**Glenn Biggs**

*Partner*

P: (07) 3000 8319  
E: gbiggs@carternewell.com



**Allison Haworth**

*Associate*

P: (07) 3000 8350  
E: ahaworth@carternewell.com

## Australian Civil Liability Guide 9th edition

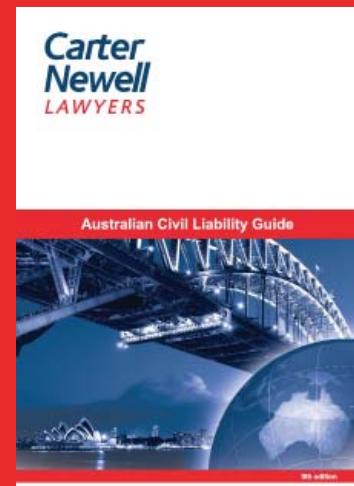
The Australian Civil Liability Guide 9th edition is now released and is a product of the continual evolution of previous publications by Carter Newell Lawyers.

Since the introduction of the tort reform in 2002 we have updated this guide as the legislative changes have occurred and case law has developed.

The Carter Newell Australian Civil Liability Guide is the only publication of its type released in Australia which provides a comprehensive overview of the maze of legislation and case law impacting upon the tort reform in Australia.

In addition to The Honourable David A Ipp AO QC writing the forward, this edition has also been endorsed by The Honourable Michael Kirby AC CMG.

If you would like to receive a copy of any of our publications, please request a hard copy via email to [newsletters@carternewell.com](mailto:newsletters@carternewell.com). Alternatively, the Guide can be viewed on our website at [www.carternewell.com](http://www.carternewell.com).



Please note that Carter Newell collects, uses and discloses your personal information in accordance with the Australian Privacy Principles and in accordance with Carter Newell's Privacy Policy, which is available at [www.carternewell.com/legal/privacy-policy](http://www.carternewell.com/legal/privacy-policy). To tell us what you think of this newsletter, or to have your contact details updated or removed from the mailing list, please contact the Editor at [newsletters@carternewell.com](mailto:newsletters@carternewell.com). If you would like to receive newsletters electronically, please go to [www.carternewell.com](http://www.carternewell.com) and enter your details in CN|Newsletter sign up.

*The material contained in this newsletter is in the nature of general comment only, and neither purports nor is intended to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering, and if necessary, taking appropriate professional advice upon their own particular circumstances.*

© Carter Newell Lawyers 2014

### Brisbane

Level 13, 215 Adelaide Street  
Brisbane QLD Australia 4000

Phone +61 7 3000 8300

### Sydney

Level 6, 60 Pitt Street,  
Sydney NSW Australia 2000

Phone +61 2 9241 6808

### All correspondence to:

GPO Box 2232, Brisbane QLD 4001

[www.carternewell.com](http://www.carternewell.com)

ABN 70 144 715 010

