SUPREME COURT OF QUEENSLAND

CITATION:	*Peebles v WorkCover Queensland* [2021] QCA 21
PARTIES:	**DANIEL JOHN PEEBLES** (appellant) **v** **WORKCOVER QUEENSLAND** ABN 40 577 162 756 (respondent)
FILE NO/S:	Appeal No 6794 of 2020 SC No 10750 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 106 (Jackson J)
DELIVERED ON:	16 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2020
JUDGES:	Fraser, McMurdo and Mullins JJA
ORDERS:	**1. The appeal be allowed.** **2. The judgment sum be varied by substituting the sum of $967,052.92.** **3. Within 14 days of the delivery of this judgment, the parties provide written submissions (if any), not exceeding four pages, as to the costs of the appeal.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – LEGAL PRINCIPLES – where the appellant suffered injuries as a result of his employer's negligence – where the appellant was permanently incapacitated – where there was evidence the appellant had a pre-existing condition and there was a possibility it would have prevented him from working at some time in the future – where the primary judge discounted the future economic loss by 50 per cent for contingencies, including the hypothetical event that the appellant would, in any event, have suffered from a similar disabling condition – where the primary judge applied the same 50 per cent discount to past economic loss – whether the primary judge's discretionary judgment was so unreasonable that the court should infer that an error had been

made

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – REFERENCE TO AMOUNT CLAIMED – where the primary judge accepted a certain calculation of lost earning capacity for past economic loss, but did not accept that calculation for future economic loss – whether the primary judge erred in doing so

Neall v Watson (1960) 34 ALJR 364, applied

COUNSEL: C Heyworth-Smith QC, with M Black, for the appellant
B F Charrington for the respondent

SOLICITORS: Travis Schultz Law for the appellant
BT Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

[2] **McMURDO JA:** The appellant worked as a truck driver until 2014, when he became permanently incapacitated as a result of a back injury which he suffered in the course of his employment. He suffered a spinal disc protrusion or herniation, which occurred in May 2014 and he was permanently incapacitated by the end of that year, when he was then aged 32 years.

[3] It is not now in dispute that the appellant's injury was caused by the negligence of his employer, by requiring him to drive a truck with a defective driver's seat. The only issues involve the assessment of damages.

[4] He was awarded the sum of $764,345.12.[1] He appeals against that assessment, challenging the amounts allowed for the past economic loss and lost earning capacity (or future economic loss). Each of those components was discounted to allow for the possibility that, in any event, the appellant would have suffered a similar disabling back condition at a relevant time. In the trial judge's calculation of damages, a discount of 50 per cent was applied for both past economic loss and lost earning capacity, and it is clear that at least most of that discount, for each component, was an allowance for that contingency. The appellant argues that a discount of no more than 20 per cent should have been applied for future economic loss, and 10 per cent for past economic loss.

[5] The other suggested error by the judge was the amount of weekly earnings which his Honour used to calculate future economic loss. The parties had agreed that he should assess the appellant's loss of earnings to the trial upon the premise of an amount of $1,300 per week. However they were not agreed on the weekly sum to be used in the assessment of future loss, and the judge used an amount of $1,200 per week. The appellant's argument is that on the evidence, there was no basis for the use of that amount, and that an amount of $1,500, or alternatively $1,300, should have been used.

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1 *Peebles v WorkCover Queensland* [2020] QSC 106 (the primary judgment).

The discounting of the appellant's economic loss

[6] It is unnecessary to describe in detail the medical evidence about the appellant's injury and the treatment which it required. The fact and the extent of the injury were not disputed. What presently matters is the evidence which was relevant to the possibility that his pre-existing condition would have prevented the appellant from working at some time, in any event.

[7] At the trial, there was also an issue of causation, for which the respondent sought to rely upon what it said was the seriousness of the appellant's pre-existing back condition. The respondent's case at the trial was that driving with the defective seat caused the appellant no more than a transient and short-term onset of episodic back pain.[2] It contended that the appellant had a pre-existing symptomatic degenerative disease in his lumbar spine, evidenced by episodes in 2003, 2006 and 2011.

[8] The first of those episodes involved generalised back pain, after lifting 25-40 kilogram bags, for which he was off work for a couple of days.[3] The second episode involved a consultation with a general practitioner about lower back pain for two days after lifting and moving heavy things at work.[4] The third episode, in 2011, involved another consultation with a general practitioner, who noted back pain and restricted movement as having occurred for 10 days, and referred the appellant for diagnostic imaging by CT scans of his lumbar spine. However the result of the scans, the judge recorded, did not support a finding of pre-existing degenerative disease of the plaintiff's lumbar spine, as at December 2011.[5]

[9] An orthopaedic surgeon, Dr Licina, gave evidence that the appellant had some degeneration which preceded the injury in 2014. In his opinion, the appellant's disc was then particularly susceptible to the injury which he suffered in May 2014. In his view, the appellant's condition was caused by three contributors, being the pre-existing degeneration, the initial disc herniation in May 2014 and the worsening of that herniation in December 2014.[6]

[10] Dr Licina expressed the opinion that had the appellant not developed his condition in association with his driving with the defective seat, it is likely that he would have developed symptoms at some stage in the future, in any event. As the judge recorded, Dr Licina said that he could not say with any accuracy what was the likelihood of such an occurrence or when it would have occurred, but that his "best guess" was "that it was more likely than not to have occurred within 5 years of the subject accident."[7]

[11] Another witness, Associate Professor Fearnside, was of the opinion that the forces on the appellant's spine, which he experienced when driving with the defective seat, would not be expected to be encountered in day to day living. He also considered that "there [was] no certainty at all that but for the nature and conditions of his work, [the appellant] would have enjoyed anything other than a pain-free course." Responding to that evidence, Dr Licina said "prediction of problems in the future is difficult and it is accepted that degenerative change does not necessarily mean

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2 Primary judgment [47].
3 Primary judgment [50].
4 Primary judgment [51].
5 Primary judgment [54].
6 Primary judgment [105].
7 Primary judgment [106].

symptomatic back pain", and that his opinion and that of Associate Professor Fearnside were "reasonable and represent[ed] the spectrum of possibilities."

[12] After discussing that evidence, and the evidence of another witness, Dr Albeitz, the trial judge found that the injury suffered by the appellant would not have occurred had it not been for his employer's negligence. What then had to be considered was the possibility that, had the 2014 injury not occurred, the appellant would have suffered the same disability at some stage of his working life.

[13] His Honour continued as follows:

> "[131] However, in my view, there was also a significant prospect that had the plaintiff not suffered the particular harms at late May 2014 and December 2014, he would have suffered from a similar disabling back condition at some time after those dates. I acknowledge that Dr Licina's opinion of a five year horizon for that to occur is necessarily an assessment of an uncertain past or future hypothetical event, and that, as Associate Professor Fearnside explained, as the future played out the event may never have happened.
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> …
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> [133] In my view the probability that the event of the plaintiff suffering a similar disabling back condition to the harm that he did suffer as a result of the employer's negligence is that it is as likely as not that he would have done so over the period of the losses he has and will have suffered as a result of the employer's negligence. It is a reasonable inference from Dr Licina's evidence that the longer the period from the date of the harms in fact suffered that is considered, the greater the likelihood that a similar disabling back condition would have been suffered. However, having regard to the methodology proposed in *Malec*, I do not consider it is incumbent upon the court or the correct approach to attempt to formulate a date by which a similar condition would have been suffered. The correct approach is to consider the percentage prospect overall of the event which would reduce the damage suffered from the defendant's negligence and to decrease the amount of the award of damages accordingly."

[14] The trial judge then discussed the respective cases as to the assessment of future economic loss. For the appellant, it was there submitted that the assessment should be made upon the basis of a loss of $1,500 net per week over a 29 year period, with a discount for contingencies of 10 per cent. The respondent there submitted that an amount of $1,200 net per week should be used with an overall discount of 65 per cent. It is necessary to set out his Honour's reasoning on that issue in full:

> "[138] In my view, the plaintiff's calculation of the future economic loss before discount should not be accepted. First, there is no sufficient evidentiary basis for the conclusion that the plaintiff's lost earning capacity as of the date of the trial was $1,500 net per week net as opposed to $1,200 per week net or $1,300 per week net. Second, in my view, the plaintiff's

discounting for the contingencies including the plaintiff's vulnerability to impairment and loss of earning capacity from his lumbar discs at some point in the future, is too low.

[139] Because of the time value of money, the application of a discount rate in a discounted cash flow means that a dollar lost some years in the future does not have the same present value as a dollar lost today and, over a horizon of more than ten years, the value of a future dollar becomes much less. But I do not accept, as the plaintiff submits, that the time value of money is a factor that feeds directly into the appropriate discounting for the suffering of future loss on the possibilities in accordance with the assessment required by the principles of *Malec v JC Hutton Pty Ltd*.

[140] On the other hand, the selection of a 65 percent rate of discount submitted by the defendant as appropriate cannot be justified without accepting that there is a more than a 50 percent chance that, absent the injury suffered in May 2014, the plaintiff would have suffered a similar disabling back condition, in any event, based on the tentative opinion evidence of Dr Licina that such an occurrence would have happened within, say, five years.

[141] The assessment of the hypothetical factual bases or assumptions for the calculation of future economic loss in this case is attended with great uncertainty. The plaintiff's approach to that uncertainty is that the defendant has to disprove the assumptions for which the plaintiff contends. I do not agree. Overall, the plaintiff bears the onus of proof on the issue of damages. But the question should be considered, having regard to the obvious difficulties of such a hypothetical assessment and the attendant complexities raised by the evidence. The court is required to assess these assumptions and complexities as best it can.

[142] In my view, an appropriate discount of the plaintiff's damages for economic loss for the contingencies including the hypothetical event that the plaintiff in any event would have suffered from a similar disabling back condition, is 50 percent. This results in future economic loss of $486,000."

[Footnotes omitted.]

[15] After that passage, his Honour reasoned as follows, in relation to past economic loss:

"[144] The parties agree that the plaintiff's past economic loss should be assessed on an earning capacity of $1,300 net per week. The plaintiff had been off work since December 2014, being 268 weeks at the date of the trial. Accordingly, the plaintiff claims $348,400.

[145] The defendant accepts that period and calculation but submits that the amount of past loss should be discounted to reflect the

> probability that the plaintiff's degenerative condition in his lumbar spine at L5-S1 level would have intervened within 5 years in any event. I deal with that question above, generally speaking.
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> [146] Applying the 50 percent discount I have previously adopted, the amount is $174,200."

[16] At paragraph [133] of the primary judgment, which is quoted earlier, the trial judge made the critical finding that it was as likely as not that the appellant would have suffered a similar disabling back condition "over the period of the losses". Neither party challenges that finding. As each party accepts, the effect of this finding was that it was as likely as not that, absent the injury or injuries suffered in 2014, the appellant would have suffered from a similar condition and disability at some time between 2014 and 2049.

[17] His Honour inferred that the likelihood of that similar disabling back condition occurring would increase over that period.[8] Nevertheless, on his findings, there was a 50 per cent chance that such a similar condition would never have occurred.

[18] If the judge's discounting of future economic loss had been wholly attributable to only that contingency, the discounting would have been excessive. As the appellant submits, the application of a 50 per cent discount, for this contingency alone, would aptly represent a finding that the appellant was certain to have been fully incapacitated by half way through the relevant period.

[19] That submission may be accepted, as far as it goes. However, for the component of future economic loss, it was appropriate to apply a discount for the other contingencies which could have affected the appellant's income. In that respect, a discount of 10 to 15 per cent would have been appropriate. His Honour was well aware of the need for such a discount, and the rate which he applied, namely 50 per cent, was "for the contingencies including the hypothetical event that the plaintiff in any event would have suffered a similar disabling back condition".[9] Consequently, it can be seen that the extent of the discount, for that particular contingency, was not as high as 50 per cent, as the appellant's argument at times seemed to suggest.

[20] The selection of the appropriate rate of discount involved a discretionary judgment and a range of rates was open. The trial judge could have applied a lower discount rate for future economic loss, but the question is whether he was obliged to do so. No specific error of principle is identified in the appellant's argument on this question. Instead, the argument is that the discount of future economic loss was so unreasonable that the Court should infer that an error has been made.[10] In my conclusion that inference cannot be made, and it was open to the trial judge to impose that discount rate on future economic loss.

[21] However, the application of the same discount rate to the appellant's pre-trial loss is a different matter, for at least two reasons. Firstly, in this respect the appellant's health and circumstances over the relevant period are known, so that it is known that many of the things which might have affected the earning of income in that

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8 Primary judgment [133].

9 Primary judgment [142].

10 *Neall v Watson* (1960) 34 ALJR 364 at 367-368 per Dixon CJ, McTiernan, Kitto, Menzies and Windeyer JJ.

period did not occur. Secondly, the period in question here is about five years compared with the 29 years which was used to calculate the future economic loss. There was still a possibility that the appellant would have suffered a similar permanent disabling condition in his back, in the period until the trial. However the trial judge declined to make a finding in the terms of Dr Licina's "best guess" that, probably, this would have occurred. As I have discussed, his Honour's finding was instead that, as likely as not, this would have occurred during what would have been a full working life.

[22] Yet at paragraph [146], his Honour simply applied "the 50 per cent discount … previously adopted". In my respectful opinion, that was an error. A much lower discount rate had to be applied to this component than that for future economic loss. I accept the appellant's submissions that the component for past economic loss, and the related component for lost superannuation contributions, should be re-assessed by applying a discount rate of 10 per cent.

The appellant's weekly loss

[23] The remaining question is the multiplicand used by the trial judge for the calculation of future economic loss. At the trial, it was submitted for the appellant that the evidence supported findings that truck drivers earnt around $30 to $40 per hour, and that the appellant would have worked a 50 to 60 hour week, thereby justifying $1,500 net per week as reasonable measure of his lost earning capacity. The same submissions are maintained in this appeal.

[24] His Honour found that there was "no sufficient evidentiary basis" for an award based on $1,500 net per week, "as opposed to $1,200 per week net or $1,300 per week net."[11]

[25] There was evidence that the appellant had a potential earning capacity of up to $2,400 gross per week, or about $1,700 net per week. There was evidence that the appellant commonly worked a 50 to 60 hour week. He described his roster of "five nights a week" and that his working day, in early 2014, involved 10 and a half hours. There was no controversy that a truck driver with the appellant's experience would be expected to earn $30 to $40 per hour. At the trial, the respondent's submissions adopted $40 per hour and applied 38 hours per week which, the evidence showed, would result in a net weekly income of about $1,200. It appears to be that calculation which the judge accepted. On the evidence, by applying a gross hourly rate of $30, the net weekly loss would have been $950 per week.

[26] It is curious that a different figure was used as the multiplicand for future economic loss from the amount $1,300, which the parties had agreed for the assessment of the appellant's loss of income before the trial, without something being identifiable as an explanation for the difference. The parties were not bound by their agreement on that figure in making their respective submissions for future economic loss. Importantly, however, there was also the judge's finding that there was a sufficient evidentiary basis for a loss of $1,300 per week. In my respectful opinion, the evidence having proved a weekly loss of that amount, it is that amount which should have been allowed. For that reason also, the assessment of damages must be revised.

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11 Primary judgment [138].

Conclusions and orders

[27] The parties helpfully provided calculations for the possible outcomes of this appeal. On those calculations, I would vary the award in the following respects:

• Future economic loss, adjusted to a multiplicand of $1,300 per week	$526,500.00 (from $486,000)
• Future loss of superannuation benefits, adjusted on the same basis	$61,811.10 (from $57,056.40)
• Past economic loss	$313,560.00 (from $174,200)
• Past loss of superannuation	$29,788.20 (from $16,549.00)
• Interest on past economic loss	$10,921.29 (from $6,067.39)

[28] In consequence, the judgment must be increased by a total of $202,707.80, to the sum of $967,052.92.

[29] I would order as follows:

1. The appeal be allowed.
2. The judgment sum be varied by substituting the sum of $967,052.92.
3. Within 14 days of the delivery of this judgment, the parties provide written submissions (if any), not exceeding four pages, as to the costs of the appeal.

[30] **MULLINS JA:** I agree with McMurdo JA.