

Assessing Loss of Earnings Capacity (Eicas v Dawson [2016] SASCF 124)



This case reaffirms important principles for assessing loss of earnings capacity in personal injury matters.

Background Facts

Mr Dawson suffered severe injuries in a motor vehicle accident in September 2008.

For many years prior to the accident, Mr Dawson had operated a profitable construction business. Initially Mr Dawson operated the business as a sole trader, however from the 2005 year he operated the business through a company. The company distributed the majority of its profits to Mr Dawson in the form of subcontractor fees, retaining only modest net profit balances.

Being somewhat entrepreneurial, in the two years prior to the accident Mr Dawson also acquired and operated two Cold Rock Ice Cream franchises which were operated through a family trust.

At the time of the accident, the Cold Rock franchises were in a 'start up' phase and were not profitable. Furthermore, Mr Dawson was spending more time working in the franchises than in his construction business.

After the accident, Mr Dawson was unable to return to any active role in his construction business and he let his building licence expire in 2010. Following unsuccessful attempts, Mr Dawson was also unable to maintain his Cold Rock franchises and he was declared bankrupt in 2013.

SA District Court Judgement

The District Court based its assessment of past loss up to the trial (in February 2014) on actual earnings recorded in the personal tax returns of Mr Dawson in the two financial years prior to the accident (subject to various adjustments)¹.

In relation to future loss, the trial Judge stated:

“It is likely that from around the date of the trial or not too long after, the plaintiff would no longer have had the significant distraction of, and the profitless drain on his efforts occasioned by the Cold Rock franchises. He may of course have had other unprofitable ventures. However, it becomes in my view more valid to have recourse to pre-accident average earnings over extended periods that comprise his earning endeavours over times that include periods of work solely in the construction business, as they more accurately reflect his general loss of future working capacity.”²

In light of the above, the District Court based its assessment of future loss on the actual earnings recorded in the personal tax returns of Mr Dawson in the five years prior to the accident (subject to various adjustments).

The trial Judge disregarded the modest profits retained in Mr Dawson’s corporate entity when assessing past and future loss for, inter alia, the following reason:

“.....that profit was never paid to the plaintiff, and it is unclear whether the sum represents actual cash that the company possessed and could be paid out or not, whether it was required for working capital, needed to repay debt or for any number of other reasons would not have ever been available to pay out as a dividend to the plaintiff.”³

SA Supreme Court Judgement

On appeal to the Full Court of the Supreme Court, the issues for consideration included apportionment of liability and the quantum of assessment for loss of earnings capacity.

In relation to quantum issues Lovell J, with whom Nicholson and Parker JJ agreed, stressed or found that:

- Whilst evidence of past earnings *“may provide useful guidance about what would have been earned if that worker had not been injured”* they do not *“always provide certain guidance about the future”⁴*.
- The trial judge was required to take into account evidence which indicated that the Cold Rock franchises may have failed irrespective of the intervention of the accident, thus allowing Mr Dawson to refocus on his construction business.
- *“When assessing future loss of earning capacity the trial Judge did use the method of averaging the five years of earnings having found that from around the date of the trial the appellant would not have had the “distraction” of the two Cold Rock franchises. Having made that finding his Honour then was in error to include in his figures those two years of income which reflected the fact the appellant was so distracted”. Clearly those years of income should be removed from the figures to be averaged.”⁵*

¹ Dawson v Eicas [2014] SADC 151 [129] – [132]

² Dawson v Eicas [2014] SADC 151 [138]

³ Dawson v Eicas [2014] SADC 151 [126]

⁴ Eicas v Dawson [2016] SASFC 124 [106] – [107]

⁵ Eicas v Dawson [2016] SASFC 124 [171]

- It was not to the point whether the modest profit retained in Mr Dawson's company represented actual cash that the company possessed or whether it would be used, for example, as working capital. "*It was profit that the appellant had earned from his exertions and was a measure of earning capacity.*"⁶ Accordingly, any assessment of loss of earnings capacity of Mr Dawson should take into consideration the modest profits retained in the company, in addition to the earnings recorded in personal tax returns of Mr Dawson.
- Consideration of loss of earnings capacity had been confused with loss of earnings.

The Supreme Court set aside the District Court's assessment of past and future loss of earnings capacity (\$625,000) and awarded an increased sum to Mr Dawson (\$840,000).

In relation to apportionment of liability issues, the Supreme Court found that Mr Dawson had not been contributorily negligent and set aside the District Court's findings of contributory negligence.

The total sum awarded by the Supreme Court to Mr Dawson for damages, incorporating all heads of loss, was \$1,320,640.

Takeaways

This case highlights that for personal injury disputes, care must be taken in considering the difference between economic loss and loss of earning capacity.

Furthermore, careful consideration is required regarding the extent to which historic earnings provide a reliable guide to future earnings capacity. Whilst historic earnings may provide a guide, it will typically be necessary to consider a range of contingencies based on the facts of each case.

For personal injury disputes, as is the case with commercial disputes that require estimation of 'but for' earnings, the simplistic approach of averaging pre-accident / tort / contract breach earnings as a basis for quantifying loss may prove unreliable.

Clifton Hall Forensics

Led by Tim Clifton, Simon Miller and Ian Wigg, Clifton Hall's forensic team has written approximately 1,000 expert reports and provided evidence in numerous courts and jurisdictions.

Clifton Hall Forensics features individuals with qualifications in forensic accounting, business valuation, insolvency and information technology. It has a wealth of experience providing expert witness and consulting expert services across a range of matters including commercial disputes, matrimonial disputes, insurance disputes, personal injury disputes, financial investigations, insolvency and IT forensics.

⁶ Eicas v Dawson [2016] SASFC 124 [138]