



Impacts of superannuation changes on personal injuries damages– 2019 Update

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05 August 2019

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On 19 April 2012 Vincents (Michael Lee and Mark Thompson) issued a paper (our “original paper”) in relation to changes in Superannuation Guarantee rates and what we believed could be the impact of those changes on the assessment of future economic loss and future loss of superannuation. Each year we have updated those rates to take account of changes in superannuation rates following amendments to subsection 19(2) of the Superannuation Guarantee (Administration) Act 2012 and the passage of time (“the 2014 to 2018 Updates”).

The current rates

At the time of writing this paper the rates of compulsory employer sponsored superannuation support are as follows:

| Period | Rate |
|---|--------|
| Year starting on 01 July 2019 | 9.50% |
| Year starting on 01 July 2020 | 9.50% |
| Year starting on 01 July 2021 | 10.00% |
| Year starting on 01 July 2022 | 10.50% |
| Year starting on 01 July 2023 | 11.00% |
| Year starting on 01 July 2024 | 11.50% |
| Years starting on or after 01 July 2025 | 12.00% |

Table 1

The issue

As noted in our previous papers, the obvious question arises as to whether or not future wage increases (that are factored into the real discount rate employed) will be affected by virtue of the mandated increase in compulsory employer sponsored superannuation contributions.

We concluded that if history is used as the judge in this matter it would appear that this may be the case.

Further, it was our opinion (in our original paper) that the appropriate “conceptual approach” is to make an adjustment to reflect that during the “phase in” period for the increase in Superannuation Guarantee real wages should be reduced by a corresponding amount.

We noted however, that the Courts may take a different approach.

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The approach adopted by the Courts since the previous changes

Subsequent to the issue of our previous paper we note that the Courts would appear to have continued to adopt a “rule of thumb” approach but used a variety of differing rates.

Queensland

As noted in our previous papers in the Queensland Court of Appeal decision of *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 the Court took the approach of allowing superannuation at a rate of 11.33%.

No detailed reasoning would appear to have been provided as to how that rate was determined. However, we note that the Court appears to have considered the increased rates of employer sponsored superannuation contributions as set out in the *Superannuation Guarantee (Administration) Amendment Act 2012 (Cth)* and also “the five per cent multiplier tables and the deferred aspect of the above rates”.

In our 2018 paper we noted during the period July 2017 to June 2018 there were a number of decisions which rejected that rate on the basis of changes in legislation delayed the rates increasing to 12% until 01 July 2025.

Since July 2018 there would appear to have been a number of decisions, notably by Crow J, which have returned to *Heywood* “rule of thumb” however modified the rate depending on the claimant’s age at the date of trial.

In this regard we note the following decisions:

- *Spencer v Downie and Anor* [2019] QSC 98 which adopted 11% and the claimant was aged 51 years at trial.
- *Walker v Newlands Northern Underground Pty Ltd* [2019] QSC 96 which adopted 11.33% and the claimant was aged 32 years at trial.
- *Krobath v Thiess Pty Ltd* [2018] QSC 309 which adopted 10.5% and the claimant was aged 56 years at trial.

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That said, there are various judgments in which the *Heywood* rate or a comparable rate continues to be adopted, including, but not limited to the following:

- *Rook v Crofts* [2018] QDC 184
- *Evans v Williams* [2018] QDC 210

Of note was the decision of *Caffrey v AAI Limited* [2019] QSC 7 in which the Court adopted 18% which reflected the Queensland Police Service contribution.

New South Wales

As noted in our 2018 update during the period July 2017 to June 2018 no consistent approach appeared to be adopted by the Courts and the rates varied without reference to a claimant's age. Since July 2018 our review of the decisions of the NSW Courts suggests there was been a return to the Najdovski approach of using a rule of thumb rate of 11% of future economic loss. In this regard we note the following decisions:

- *Chaffey v MPM Maintenance Services Pty Ltd & Anor* [2019] NSWDC 260
- *Than v Galletta & Ors* [2019] NSWDC 9 %
- *Redding v Manly Life Saving Club Inc & Anor* [2018] NSWDC 278
- *De Ceglie v Timosevski* [2018] NSWDC 196
- *Warda v Specialty Fashion Group Ltd* [2018] NSWDC 218

An exception would appear to be the decision of *Parrish v Olympic Roadways Pty Ltd & Broome* [2018] NSWDC 258 which adopted a rate of 13.58% based on future loss of approximately 14 years. This would appear to be comparable to the amounts envisaged in our 2017 paper.

Rule of Thumb Approach

As noted in our previous paper, whilst the “rule of thumb” approach provides for a convenient and simple method of assessment, in nearly all circumstances it leads to over or under compensation due predominantly, to the variance in tax rates applying to income and superannuation.

Regardless of the above, having regard to the decisions subsequent to the issue of our previous paper and the current levels of employer sponsored contributions (see Table 1) we set out below the future average weighted rates of employer sponsored superannuation contributions.

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A possible Queensland Approach

With the changes in mandated percentages the “rule of thumb” as applied will need to be amended to reflect varying future rates. The following table provides a guide to the future “weighted” average percentage that may be appropriate for varying periods of years until retirement (as at today).

| Years to retirement | Average Super % | Years to retirement | Average Super % | Years to retirement | Average Super % | Years to retirement | Average Super % |
|---------------------|-----------------|---------------------|-----------------|---------------------|-----------------|---------------------|-----------------|
| 1 | 9.50% | 13 | 11.42% | 25 | 11.70% | 37 | 11.80% |
| 2 | 9.75% | 14 | 11.46% | 26 | 11.71% | 38 | 11.80% |
| 3 | 10.00% | 15 | 11.50% | 27 | 11.72% | 39 | 11.81% |
| 4 | 10.25% | 16 | 11.53% | 28 | 11.73% | 40 | 11.81% |
| 5 | 10.50% | 17 | 11.56% | 29 | 11.74% | 41 | 11.82% |
| 6 | 10.75% | 18 | 11.58% | 30 | 11.75% | 42 | 11.82% |
| 7 | 10.93% | 19 | 11.61% | 31 | 11.76% | 43 | 11.83% |
| 8 | 11.06% | 20 | 11.63% | 32 | 11.77% | 44 | 11.83% |
| 9 | 11.17% | 21 | 11.64% | 33 | 11.77% | 45 | 11.83% |
| 10 | 11.25% | 22 | 11.66% | 34 | 11.78% | 46 | 11.84% |
| 11 | 11.32% | 23 | 11.67% | 35 | 11.79% | 47 | 11.84% |
| 12 | 11.38% | 24 | 11.69% | 36 | 11.79% | 48 | 11.84% |

Table 2

For example, for the most extreme case of a 19 year old worker injured with a working life of an additional 48 years the appropriate average percentage would appear to be 11.84% of the future economic loss.

The NSW Approach

As noted in our previous paper the approach in *Najdovski v Crnojlovic* [2008] NSWCA 175 would appear to have attempted to take account of the issues of the different taxation treatment of income and superannuation and that superannuation is based on gross earnings. The Court therefore adopted a superannuation loss percentage of 11% of the future economic loss.

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If in fact the approach arrived at in *Najdovski* is to be preferred then the percentages set out in Table 2 ought to be “grossed” up on the same basis. The impact of this “gross up” would be to provide for a range of superannuation loss percentages as follows:

| Years to retirement | Average Super % | Years to retirement | Average Super % | Years to retirement | Average Super % | Years to retirement | Average Super % |
|---------------------|-----------------|---------------------|-----------------|---------------------|-----------------|---------------------|-----------------|
| 1 | 11.61% | 13 | 13.73% | 25 | 14.18% | 37 | 14.34% |
| 2 | 11.61% | 14 | 13.79% | 26 | 14.20% | 38 | 14.35% |
| 3 | 11.81% | 15 | 13.85% | 27 | 14.21% | 39 | 14.35% |
| 4 | 12.07% | 16 | 13.90% | 28 | 14.23% | 40 | 14.36% |
| 5 | 12.34% | 17 | 13.95% | 29 | 14.25% | 41 | 14.37% |
| 6 | 12.63% | 18 | 13.99% | 30 | 14.26% | 42 | 14.38% |
| 7 | 12.92% | 19 | 14.02% | 31 | 14.27% | 43 | 14.38% |
| 8 | 13.14% | 20 | 14.06% | 32 | 14.28% | 44 | 14.39% |
| 9 | 13.31% | 21 | 14.08% | 33 | 14.30% | 45 | 14.40% |
| 10 | 13.44% | 22 | 14.11% | 34 | 14.31% | 46 | 14.40% |
| 11 | 13.56% | 23 | 14.14% | 35 | 14.32% | 47 | 14.41% |
| 12 | 13.65% | 24 | 14.16% | 36 | 14.33% | 48 | 14.41% |

Table 3

For example, for the most extreme case of a 19 year old worker injured with a working life of an additional 48 years the appropriate average percentage would appear to be 14.41% of the future economic loss.

If you have any questions in relation to
the content of this document please
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