

**RECENT DECISIONS**

## Looking back to assess the future

*Fuller v Avichem Pty Ltd. District Court 2017/00359791*

### Summary

This case considers the appropriateness of assessing the level of economic incapacity based upon Average Weekly Earnings; contributory negligence; and increasing the allowance for vicissitudes of life.

### Background

The defendant employer conducted a hardware business in Broken Hill. The plaintiff suffered an injury to his back and neck when carrying six sheets of MDF (Medium Density Fibre building panels), one at a time, from the employer's storage facility to a customer's vehicle for loading. The MDF was stored vertically in racks and the plaintiff asserted that access to the racks was impeded by the presence of pallets loaded with goods adjacent to the racks, requiring him to adopt an awkward posture to remove the sheets.

The plaintiff had suffered a previous back injury and did not have a strong pre-injury work history. The plaintiff alleged that but for the injury he would have progressed to become a store manager however the employer refuted this on the basis that in the period prior to the injury the plaintiff had been suspected of taking cash from the business. His claim for economic loss was framed, on one alternative, on the basis of average weekly earnings statistics.

The plaintiff said that he felt pain in his back while lifting the first of the six sheets but persisted in the task notwithstanding. The defendant argued that he contributed to the severity of his injury by failing to stop when he felt the pain, having regard to his previous experience with back injury.

The defendant presented an earning capacity assessment, and the assessor gave evidence, to the effect that the plaintiff had a residual capacity to work of eight hours per week. The defendant also submitted that, because of the prior injury and poor work history, the reduction for vicissitudes of life should be greater than the usual 15%.

### Decision

The Court found that the defendant was in breach of its duty of care to its employer in respect of the system of work and the obstructions in the storage area. Although the Judge found the plaintiff to be an "unreliable" witness, he found that on the balance of probabilities there was a breach of duty, notwithstanding concurrent medical histories that were inconsistent. The employer was unable to contradict the general tenor of the plaintiff's version of events. He was satisfied that there were reasonably available alternative methods of performing the task which would have obviated the risk of injury.

As to contributory negligence, His Honour found that the defendant's culpability was significant and in comparison the plaintiff's contribution was not sufficient as to warrant a reduction of damages.

His Honour accepted that the plaintiff would have continued indefinitely in his employment with the defendant but for the injury. He did not accept that he would have progressed to store manager, as that role was occupied by the owner's son-in-law. He allowed past economic loss on the basis of pre-injury earnings incremented by 3% per annum.

The Court did not accept that future economic loss should be based upon average weekly earnings statistics of \$1,400 net per week because the plaintiff had not demonstrated that level of earning capacity prior to the injury. The Judge accepted the evidence of the earning capacity assessor that his true uninjured capacity was \$1,000 per week and that the plaintiff had a residual capacity to work of at least 20%. The Judge reduced future economic loss accordingly.

The Court accepted the defendant's submission as to the amount of reduction for the vicissitudes of life. The plaintiff had undergone previous back surgery and this increased his prospects of a diminished work life irrespective of the current injury. In addition, his pre-injury work history suggested that he may not have had unbroken future work prospects. Accordingly, a reduction of 25% was applied instead of the usual 15%.

[back to top](#)

## Implications

The decision provides a demonstration of the utility of obtaining an earning capacity assessment to provide the Court with an alternative basis for assessing work capacity and the impact of the injury on that capacity. It also highlights the benefits of carefully considering the pre-injury medical and employment history of the plaintiff to identify aspects which may be brought into consideration of likely future earnings and the vicissitudes of life.

## For more information, please contact:



**Doug Vorbach**  
Special Counsel  
[doug.vorbach@turkslegal.com.au](mailto:doug.vorbach@turkslegal.com.au)