SUPREME COURT OF QUEENSLAND

CITATION:	*Amer v Consolidated Meat Group P/L* [2003] QCA 390
PARTIES:	**GAYNOR ANN AMER** (plaintiff/appellant) **v** **CONSOLIDATED MEAT GROUP PTY LIMITED** ACN 065 093 709 (defendant/respondent)
FILE NO/S:	Appeal No 10602 of 2002 SC No 582 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2003
JUDGES:	Williams and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, Williams and Jerrard JJA concurring as to the orders made, Helman J dissenting
ORDERS:	**1. Allow the appeal to the extent of setting aside the judgment of $87,791.13 and inserting instead the figure of $112,904.13** **2. Leave granted to the parties to make written submissions as to costs within 14 days of publication of this judgment**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – RE-EMPLOYMENT OF WORKER – where appellant awarded damages for personal injury for which respondent was liable – where injuries to appellant's left hand significantly reduced her working capacity – where capacity was also severely affected by existing physical conditions of the appellant – where learned trial judge assessed reduction in earning capacity at $50 per week – where learned trial judge failed to provide reasons for this calculation – whether reduction for diminished capacity failed to reflect the disability suffered

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, referred to

COUNSEL: R J Lynch for the appellant
D V McMeekin for the respondent

SOLICITORS: Sciacca's Lawyers Consultants (Adelaide Street) for the appellant
Stanwick Murray & Roche for the respondent

[1] **WILLIAMS JA:** I agree with Jerrard JA that the disability associated with the appellant's left hand, for which the respondent is responsible, significantly reduced her earning capacity, severely curtailed though that capacity was by physical conditions for which the respondent was not liable. Without exposing his reasoning the learned trial judge assessed the reduction in earning capacity consequent upon the disability to the left hand as being the equivalent of $50 per week. Given the evidence as to the appellant's past earning capacity, and the sort of tasks she could perform given her overall physical condition, I am satisfied that her reduction in earning capacity consequent upon the disability to the left hand should have been evaluated at more than $50 per week. Whilst, as Jerrard JA acknowledges, there is an element of arbitrariness in selecting $150 per week as the measure of that diminished capacity, it nevertheless, in my view, more accurately reflects the thrust of all the evidence.

[2] It follows that I agree with all of the reasoning of Jerrard JA and with the orders he has proposed.

[3] **JERRARD JA:** On 24 October 2002 the appellant Gaynor Amer was awarded $87,791.13 by way of damages for personal injury suffered on 1 June 1998 against the respondent Consolidated Meat Group Pty Limited, her former employer. It had admitted liability in respect of an incident occurring at the workplace at Lakes Creek Meatworks in Rockhampton. The appellant appeals against the amount of damages she was awarded in respect of past loss of earnings ($50,193.00), and future economic loss ($11,524.00), claiming that each is manifestly inadequate.

[4] The appellant was injured when some white boards fell against her leg, she fell onto her backside, and when putting out her hand to break her fall injured her left hand and left thumb. Following this she suffered from a sore lower back and hand, and from her hand having swollen, she experienced pain in her arm. This continued, and an operation was performed on 9 December 1998. She had remained at work following the injury; but after the operation was off work for three months and with her hand in plaster for seven to eight weeks. She returned to work in May 1999 but her hand and back continued to trouble her. For that she took Panadeine Forte and attended upon a chiropractor.

[5] She suffered a further injury at work on 30 November 1999 for which she also brought a claim, and for which the learned trial judge found that her employer was not liable to her in damages for negligence. In that incident she slipped on some fat or gristle on the boning room floor, which was apparently there at the end of a shift and had not been removed by the two employees regularly employed throughout each shift to remove fat and meat from the floor. What occurred in the incident was that she suffered a near fall, aggravating her back injury and pinching a nerve in her neck when throwing out a hand to break the fall.

[6] She worked for only two days after that second incident and by the date of trial had not worked since. She complained to the learned judge of suffering from daily aching neck pain, headaches and dizziness, disturbed sleep, constant pain in her left thumb, and a loss of strength and dexterity to her left arm. Her weight has increased and she has lost self-esteem.

[7] The learned trial judge made his critical findings in paragraphs [12], [13], [19] and [20] of the reasons for judgment. I will set out [12] and [19] in full and a portion of the other two.

[8] His Honour found:

> "[12] The medical evidence supports the conclusion that Ms Amer suffered aggravation of pre-existing degeneration in both her hand/thumb and lower back in the incident in 1998. These degenerative conditions were largely asymptomatic before the incident. The later incident in 1999 caused some further temporary aggravation. This conclusion is supported by both Drs Gillett and Macfarlane and I accept it. Ms Amer is now unsuited for work in a meatworks although there is no medical reason why she could not do light sedentary or semi-sedentary work not involving heavy lifting, twisting her back or neck in confined spaces or repetitive movements of her left hand or wrist. Suggestions included factory work as a packer or assembler, a messenger, a sales person, shop assistant or parking attendant. Despite her residual earning capacity Mrs Amer appears to have made little effort to seek other work. She worked briefly in a butchery and obtained an application for employment at the Capricorn Resort but did not complete it."

[9] In [13] the learned trial judge recorded that "Without the aggravation in 1998 her prognosis was that her degenerative condition may have become symptomatic in her mid to late fifties." He held that while he did not accept the inevitability of this it seemed likely, particularly when it was noted that the medical record of the respondent Meatworks revealed a complaint by the appellant about pain in both thumbs after filleting on 12 May 1998. He also noted that there was other evidence in the medical records suggesting that her hands were progressively becoming problemsome.

[10] In [19] the learned judge wrote:

> "On the basis of the matters set out above I consider that the second incident contributed little to Ms Amer's present condition. Even had it not occurred the probability is she would have had to cease work because of the difficulties she was experiencing."

[11] After recording that she was born on 29 March 1950 and had spent most of her working life at the Lakes Creek Meatworks (with three seasons at Anglis Meatworks in Melbourne from 1970 to 1973, and one season at Seigal's Meatworks in Melbourne also in the early 70's, and a few months working in Biloela in the early 1980's), His Honour noted that she had lived in Rockhampton since at least 1965 and her daughter and granddaughter lived in Rockhampton, where the appellant has property. The relevance of those remarks by the learned judge is explained by the fact that the Lakes Creek Meatworks closed, apparently permanently, on 28 July 2002. The night shift worked by the appellant stopped for

all practical purposes on 1 November 2001, and resumed for only a short period thereafter. The appellant's evidence had been that if she was not injured she would have left Rockhampton looking for work in another meatworks.

[12] His Honour held (at [20]) that:

> "On the balance of probabilities I find that even had the first incident not occurred Ms Amer would probably have remained in Rockhampton and as a result of the meatworks closure would probably now have or be looking for other work.
>
> [21] I accept however that Ms Amer is now placed in a more difficult position in seeking alternative work than she would otherwise have been."

[13] Those are the critical parts of the learned judge's reasons and findings. On the basis of those he assessed past loss of earnings at $50,193.00 and explained that award by a footnote which read:

> "I have allowed the amount of $525.00 per week for 38.2 weeks from 9.12.98 to 17.3.99 and 3.12.99 to 30.6.00 and $547 per week less 50% for residual work capacity and meatworks closures from 1.7.00 until the meatworks closed plus $50 per week from 29.7.02 until judgment. The weekly amounts are based upon gross earnings in the 1998 financial year less applicable tax. The 50% discount allows a progressive return to alternative employment."

[14] He awarded $11,524.00 for future economic loss, explaining that sum via a footnote reading:

> "$50 per week for diminished capacity for 8 years discounted by 33% to allow for, inter alia, the risk the symptoms would have appeared before age 60."

[15] The appellant complains that those two awards grossly underestimated her difficulty in finding alternative employment given her age, her very restricted past employment experience, the absence of any evidence of other income earning skills, and the restriction imposed by the necessity that any other employment not involve heavy lifting or twisting her back or neck in confined spaces or repetitive movements of her left hand or wrist. It is submitted on her behalf that even the factory work as a packer or assembler, suggested as available to her in the judgment, would most likely involve such lifting or movement.

[16] The appellant accordingly argues that the learned judge was in error in finding that she had a residual earning capacity of 50% of her pre-accident work capacity on and from 1.7.00, if that finding can be distilled from the award of damages. The appellant also complained that the learned judge had misapplied the decision in *Malec v J C Hutton Pty Ltd*[1] in predicting, on the balance of probabilities, that the appellant would have remained in Rockhampton; and then treating that as a certainty. The appellant argues that there was perhaps a one third possibility that had the plaintiff not been injured she would have left Rockhampton to find alternative meatworks work elsewhere.

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1 (1990) 169 CLR 638 at 643

[17] The evidence would have supported a finding expressed in even stronger terms by the learned trial judge. The appellant described her daughter, as being in a happy and stable relationship with "her man" (at AR 10), and their daughter, the appellant's granddaughter Becky, is five. The appellant has an investment house in Rockhampton, and lives down "at the beach" (at AR 11). Her evidence about alternative employment was that:

> "I – well I would have found what sheds were working, I would have rung round and I probably would have went to Casino with Phyllis and Graham and yeah."

and

> "Actually I've got a friend in Western Australia that's got his own shed. Two of the girls from the meatworks are working over there." (AR 10)

[18] This was evidence of the most general variety, and not evidence of the actual availability of any employment for the appellant in other meatworks, let alone of the probability of her leaving her home and family to work elsewhere. I consider the learned judge was correct in calculating damages on the basis that the appellant would, uninjured, have remained in Rockhampton; both because of the ties binding her there and the evidence of other matters incapacitating her for meatworks employment in any event, discussed below.

[19] The appellant's alternative submission regarding future economic loss was that she was largely rendered unfit for the varieties of work available for her, and that a more realistic reduction in her earning capacity was in the order of $250.00 net per week. That figure was explained as being 50%, more or less, of her pre-1998 injury capacity.

[20] The respondent's principal submissions were that the appellant's argument failed to recognise that only a very small part of her problems were its responsibility, and assumed a finding in her favour that but for the first incident she would have continued at the meatworks until closure on 29 July 2002; and further that there was no finding that her unfitness for work involving heaving lifting, twisting her back or neck in confined spaces, or repetitive movements of her left hand or wrist, was a result of the subject accident. The respondent's submissions inferentially acknowledged that if the appellant had the benefit of such findings, her complaints about the quantum of economic loss would have substance.

[21] The respondent submitted that the learned trial judge had not dealt in the judgment with its case and submissions. The plaintiff's evidence describing how she had suffered from pain in her left hand which was so bad that she went to work "full of Panadeine Forte", and she did not think she would have kept working had it not been for the onset of headaches, provided sufficient grounds for the finding in [19] of the reasons that the plaintiff would have had to cease work because of the difficulties she was experiencing with her left hand. Even so, the evidence was that she stopped work in 1999 because of the headaches she experienced and continues to experience. Her counsel readily conceded on the appeal that those headaches, the dizziness, and the aching neck pain, all of which she suffers from daily, were not conditions for which the respondent was in any way liable. Those conditions, which had been sufficient to end her employment, had continued; albeit the injury to her left hand, would have had the same consequences in any event. The point the respondent made on the appeal was that despite the appellant's assumption, the

learned judge had **not** found that but for that first incident the appellant would have continued at the meatworks until closure; and that the learned judge could not have made that finding. That submission is obviously correct.

[22] There is not as much merit in the respondent's other major submission, that there was no finding that the appellant's unfitness for work, whatever its extent, was an outcome of the 1998 accident. It is true there was no such finding; and that it could not be made in respect of the unfitness for work resulting from a need not to twist her neck. Certainly it could be made about unfitness resulting from a need to avoid repetitive movements of her left hand or wrist. Regarding the unfitness involving heavy lifting, or twisting of her back, the position is not so clear. The medical evidence at the trial was generally that the aggravation of the plaintiff's pre-existing degenerative condition in her back by reason of the 1998 incident had in all likelihood run its course by the end of calendar year 1998. On the other hand, the plaintiff's evidence when that was put to her in cross-examination was that she had had back pain all the time, which on some days was terrible and on other days "it's not there." (at AR 32). The learned judge made no finding about the extent of the respondent's liability for that back pain as an ongoing condition.

[23] The picture presented by the evidence was that of an employee disabled, both by injury for which the respondent was liable and also by other unrelated causes, from a capacity for employment in meatworks on and from December 1999; and thereafter from work involving similar physical effort. It follows that the statement in [20] of the reasons in the last sentence that:

> "…I find that even had the first incident not occurred Ms Amer would probably have remained in Rockhampton and as a result of the meatworks closure would probably now have or be looking for other work."

is too favourable to the plaintiff in the light of her incapacitating conditions other than that resulting from her damaged left hand, and (possibly) lower back pain.

[24] The footnotes in which the learned judge briefly explained how the quantum was assessed probably sufficiently revealed a balancing of the undoubtedly difficult to resolve factors which resulted in an award for past loss of earnings which may have been a little generous, to an appellant appreciably disabled for employment from other causes. Even so, the figure of $50 per week for her present and future capacity for employment diminished by reason of the conditions for which the respondent is liable, namely the accelerated consequences of degeneration in her hand, is a surprisingly minimal award to make without any explanation. A condition which realistically made her a one handed potential employee who already suffered from the disability of headaches, dizziness, and an incapacity to twist her back, neck, or lift heavy objects, would actually ensure her unemployability. It has the single most adverse effect of all of her disabling conditions. Although the matter is entirely one of a discretionary judgment, I consider that of the learned judge on this figure so low as to be in error, in addition to the error of being unexplained. I would substitute the equally admittedly discretionary figure of $150.00 per week for that diminished capacity for eight years, discounted by 33%. Using the calculations of the appellant's counsel, this would increase the award for future economic loss by $23,040.00; and future occupational superannuation losses on that amount would be $2,073.00.

[25] In the result I would order that the appeal be allowed to the extent of setting aside the judgment of $87,791.13 and inserting instead the figure $112,904.13. I would order that the parties have 14 days within which to make written submissions as to the costs to be ordered.

[26] **HELMAN J:** I have had the advantage of reading the reasons for judgment prepared by Williams J.A. and Jerrard J.A. and I agree with what Jerrard J.A. has written, except that - and with respect to the views of the other members of the court - I am not persuaded that a case has been made out for the intervention of this court on the question of the impairment of the appellant's future earning capacity. When her residual earning capacity, the absence of evidence of any sustained effort in seeking employment, her age, the likelihood of the onset of symptoms of degeneration had she not suffered the injury for which the respondent accepted liability, other conditions affecting her earning capacity unrelated to that injury, and contingencies are taken into account in arriving at a figure for diminution of future earning capacity productive of financial loss, I am not satisfied that it has been demonstrated that the sum arrived at by his Honour was manifestly inadequate. The appellant's earning capacity was no doubt adversely affected by the injury, but I think it is fair to say not greatly so in the long term, when all of the other factors affecting this part of her claim are considered.

[27] In my view the appeal should be dismissed with costs.