

AUSTRALIA / JUDGMENT

Fuchs v Coles Supermarkets Australia Pty Ltd

[2026] NSWSC 948**COURT**

Supreme Court

DECIDED

07 August 2026

BEFORE

Sirtes J

CASE / FILE NUMBER

2023/00345570

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Source record**Supreme Court
New South Wales****Medium Neutral Citation:** Fuchs v Coles Supermarkets Australia Pty Ltd [2026] NSWSC 948**Hearing dates:** 27–28 July 2026**Date of orders:** 7 August 2026**Decision date:** 07 August 2026**Jurisdiction:** Common Law**Before:** Sirtes J**Decision:** (1) Judgment for the Plaintiff in the sum of \$907,375.50.
(2) The Defendant is to pay the Plaintiff's costs.**Catchwords:** NEGLIGENCE – damages – economic loss – earning capacity – where plaintiff has reduced working capacity following injury – assessment of residual earning capacity – consideration of buffer to be awarded
NEGLIGENCE – damages – measure of damages – where plaintiff earned salary and received dividends from shareholdings prior to injury – whether any loss suffered by reason of injury**Legislation Cited:** Civil Liability Act 2002 (NSW), Pts 1A, 2, s 16

Cases Cited:	Allianz Australia Insurance Ltd v Cervantes [2012] NSWCA 244 Allianz Australia Insurance Ltd v Kerr (2012) 83 NSWLR 302; [2012] NSWCA 13 Coleman v Barrett [2004] NSWCA 27 Graham v Baker (1961) 106 CLR 340; [1961] HCA 48 Husher v Husher (1999) 197 CLR 138; [1999] HCA 47 O'Brien v McKean (1968) 118 CLR 540; [1968] HCA 58 Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 Southgate v Waterford (1990) 21 NSWLR 427 State of New South Wales v Moss (2000) 54 NSWLR 536; [2000] NSWCA 133 Varga v Galea [2011] NSWCA 76
Category:	Principal judgment
Parties:	Suzanne Fuchs (Plaintiff) Coles Supermarkets Australia Pty Ltd (Defendant)
Representation:	
Counsel:	PJ Mooney SC (Plaintiff) DA Priestley SC (Defendant)
Solicitors:	Masselos & Co Lawyers (Plaintiff) McCabes Lawyers (Defendant)
File Number(s):	2023/00345570

JUDGMENT

On the morning of 1 November 2020, Suzanne Fuchs (the Plaintiff) attended the Coles supermarket at Bondi Junction to buy a cake topper. Sometime between 9.20 and 9.25am, she walked into aisle 6, in the middle of which stood a pillar. A fully stocked roll cage to the right of the pillar obstructed the right side, requiring the Plaintiff to pass to the left of the pillar. Just past the pillar, the Plaintiff's right foot slipped forward without warning. She fell heavily, doing "the splits", with her right foot forward. She could not get up.

Whilst on the floor, the Plaintiff saw a second, partly stocked roll cage behind the pillar and a deposit of red-tinged oily liquid under roll cage 2, extending into the aisle into her path, being the liquid upon which she slipped.

The Plaintiff suffered an injury in consequence of the fall.

On 31 October 2023, the Plaintiff filed a Statement of Claim in the District Court bringing an action in negligence and occupiers' liability against the Defendant, Coles Supermarkets Australia Pty Ltd. She seeks damages, interest and costs. The claim is subject to Pts 1A and 2 of the Civil Liability Act 2002 (NSW) (the CLA).

On 14 October 2024, the proceedings were transferred to the Common Law Division of this Court because the estimated quantum of the claim exceeded the jurisdictional limit of the District Court. Up until a few days prior to the hearing, the issues joined on the pleadings involved questions concerning liability, causation and quantum of loss. However, by agreement recorded

in the parties' opening submissions (23 July 2026), the Defendant sought leave to amend its defence to admit liability, with the parties agreeing to a 10% deduction for contributory negligence. Accordingly, the liability issues and causation of the primary injury fell away, leaving the trial as an assessment of damages only. The amount each party sought at the hearing for each head of loss is set forth in the following table:

Plaintiff

Defendant

Non-economic loss

\$402,000

\$185,000

Past out-of-pocket expenses

\$65,000

\$65,000

Future out-of-pocket expenses

\$69,678

\$43,500

Past loss of earnings

\$683,064

\$45,000

Future loss of earnings

\$1,019,833

\$100,000

Past care

\$67,123

\$60,000

Future care

\$231,762

\$75,000

Total

\$2,538,460

\$573,500

The significant disparity (nearly \$2 million) between the amount claimed by the Plaintiff, in contradistinction to that contended by the Defendant, is largely made up of four items, being:

non-economic loss;

past loss of earnings;

future diminution of earning capacity; and

future care.

I will deal with each of the heads of loss in the same order as they appear in the table above, though proportionate attention will be given to the areas in dispute. In order to consider these matters, it is necessary to set forth the parties' expert evidence as well as the factual matters relied upon by the Plaintiff and other lay witnesses, most of whom were cross-examined.

The evidence

Each of the parties marshalled a considerable body of expert medical evidence, none of which was the subject of cross-examination. The Plaintiff's medical expert evidence comprised:

two reports prepared by Dr Drew Dixon, consultant orthopaedic surgeon, dated 18 September 2023 and 26 February 2026 respectively;

two reports prepared by Dr Uthum Dias, consultant occupational physician, dated 27 November 2023 and 19 May 2026 respectively;

two reports prepared by Dr Richa Rastogi, consultant psychiatrist, dated 1 March 2024 and 10 June 2025 respectively; and

two reports prepared by Vanessa Zweck, occupational therapist, dated 9 February 2024 and 25 May 2026 respectively.

The Defendant's medical expert evidence comprised:

the report of Associate Professor Paul Minitier, orthopaedic surgeon, dated 26 April 2024;

the report of Dr Robin Mitchell, occupational physician, dated 6 May 2024; and

the report of Dawn Piebenga, occupational therapist, dated 10 March 2025.

The parties' respective orthopaedic surgeons, occupational physicians and occupational therapists were able to produce joint reports on each of those subjects.

I have considered each of these reports in detail and set out their opinions, conclusions and remaining areas of disagreement below.

In addition to the expert medical evidence, both parties relied on expert forensic accountancy reports. Michael Lee prepared a report for the Plaintiff, while Richard Ivey and Peter Tremain prepared two reports, dated 14 November 2025 and 26 February 2026 respectively, for the Defendant. The forensic accountants also provided a joint report arising from their conclave but, unlike the medical experts, were the subject of cross-examination given concurrently via audiovisual link.

Plaintiff's lay evidence

The Plaintiff's own evidence, contained in two evidentiary statements dated 2 December 2025 and 24 June 2026, is the cornerstone of her case.

The Plaintiff lives at Bondi Junction. She was born in 1968 and is, at the date of this hearing, 57 years of age. After she completed her secondary education, she completed a bachelor's degree in architecture and has worked as an architect since her early 20s.

In 1990, when aged around 22, the Plaintiff married Peter Fuchs. All three of the couple's children are now adults.

In around 1996, the Plaintiff and her husband commenced a building and design business known as P & S Design and Construction Pty Limited (P & S). The Plaintiff provided the architectural services for the clientele of P & S, whilst the building work was undertaken by that company, overseen by the Plaintiff's husband, Peter, who is a builder.

In 2014, the Plaintiff completed a master's degree in cultural heritage and, in consequence of that, developed specialist skills required to undertake heritage reports. She commenced preparing such reports for a business known as Weir Phillips Heritage (then known as Weir Phillips Heritage and Planning) in 2015.

The Plaintiff contends that, before the accident, she worked more than 60 hours per week, undertaking both her role for Weir Phillips as well as working for P & S three to four days a week. For both roles, she stated that she was required to make site visits that involved considerable walking, on occasion on uneven ground, and carrying photographic equipment including a tripod. The majority of the sites that she visited were in Sydney, although occasionally she was required to travel to regional NSW.

Prior to the accident, she deposes to having been in good health. She stated that she regularly walked between the Weir Phillips office in Woolloomooloo and her home in Bondi Junction. Not only did she undertake a considerable amount of work but, in addition, she also managed all the gardening and domestic duties (cooking, cleaning, shopping and laundry).

The accident

After the Plaintiff fell as described at [1] above, she felt a “ripping sensation” in the back of her leg, causing her “excruciating pain” which left her unable to get up. She called her daughters, one of whom, I note, is a doctor, while the other is a comedian. After they arrived, the Plaintiff was transported by ambulance to St Vincent’s Hospital. X-rays performed did not reveal any fractures and, after her right thigh was strapped, she was discharged that same day.

The Plaintiff’s injuries

The parties agreed on the following regarding the Plaintiff’s injury. Due to the accident, she suffered an avulsion tear of the right hamstring tendon. On 1 December 2020, an orthopaedic surgeon performed hamstring repair surgery and sciatic nerve neurolysis. There was, at that time, also a minor traction injury to the sciatic nerve. Following this surgery, there was a necessary period of rehabilitation.

The Plaintiff underwent two further procedures directly related to the Plaintiff’s injury. The first was performed by a neurosurgeon in August 2021 and another by a (different) orthopaedic surgeon in November 2022. In April 2023, the Plaintiff underwent liposuction and scar revision surgery. That procedure was necessitated by the injury and the previous surgeries.

The Defendant also accepts that the injury still causes the Plaintiff some pain and restricts her. The extent to which the injury has caused restrictions on her capacity to work and carry out domestic duties is discussed below.

Non-economic loss

The principles concerning the calculation and awarding of damages for non-economic loss are not in dispute. Section 16 of the CLA refers to a “most extreme case”. No damages may be awarded for non-economic loss unless its severity is at least 15% of a most extreme case: s 16(1) of the CLA. More severe injuries are to be assessed on a sliding scale contained within that provision.

The Court of Appeal in *Southgate v Waterford* (1990) 21 NSWLR 427 (Gleeson CJ, Kirby P and Meagher JA) at 439–440 held that a trial judge should approach the assessment of non-economic loss in three stages. Those steps are:

consider and make findings on the elements in the evidence which are relevant to non-economic loss, being those relevant to an award of general damages;

conceive a “most extreme case”; and

award damages between nil and the statutory maximum in the ratio the judge determines, bearing in mind that the maximum is reserved for a “most extreme case”.

In *Coleman v Barrett* [2004] NSWCA 27, Gzell J (with whom Sheller JA agreed) said at [63]–[65]:

“63 Non-economic loss is defined in the Civil Liability Act 2002, s 3 as pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement. ... It requires a judge, if the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, to determine the severity of the non-economic loss as a proportion of the non-economic loss of a most extreme case.

64 It has been said that the task under such legislation involves reaching a point where further reasoning is impossible and it is necessary to make a determination which is insusceptible to entirely logical exposition (*Southgate v Waterford* (1990) 21 NSWLR 427 at 442) and that the assessment of general damages is an evaluative process in respect of which minds may reasonably differ (*Woolworths Ltd v Lawlor* [2004] NSWCA 209 at [14]).

65 Nonetheless, the statute requires a comparison to be made of the non-economic loss suffered by a plaintiff against the non-economic loss in a most extreme case. The statute does not require the comparison to be made against the most extreme case imaginable. In *Kurrie v Azouri* (1998) 28 MVR 406 at 413, Sheppard AJA said: “The expression “a most extreme case” requires some discussion. It enables one to provide oneself with a yardstick as to what the legislature had in mind. A court considering the question will need to contemplate what in practical terms is embraced by “a most extreme case”. Immediately one considers such a case, one thinks of cases of quadriplegia, perhaps some serious cases of paraplegia, cases of serious brain damage and, perhaps, some cases of extremely serious scarring and disfigurement caused, especially to young children, by scalding or burning. No doubt there are others.”

One of the factors relevant to my assessment of non-economic loss is the Plaintiff’s age: *Varga v Galea* [2011] NSWCA 76 at [72]–[73] (McColl JA, Beazley JA and Handley AJA agreeing). The Plaintiff is 57 years old. She has a life expectancy of 88 with a multiplier of 0.822. She therefore has approximately 30 years ahead of her.

The Plaintiff claims non-economic loss at 50% of a most extreme case, or \$402,000. The Defendant submits that the appropriate assessment for non-economic loss would be 30% of a most extreme case, or \$185,000. In light of the findings I make in the balance of this judgment concerning the Plaintiff’s injury and ongoing difficulties, I assess the Plaintiff’s entitlement to non-economic loss at 37% of a most extreme case, or \$297,480.

Past out-of-pocket expenses

At the hearing, the parties were able to agree on past out-of-pocket expenses in the sum of \$65,000. I see no reason not to adopt that figure.

Future out-of-pocket expenses

The Plaintiff seeks the amount of \$69,678 as compensation for future out-of-pocket expenses. The Plaintiff’s calculation is derived from expenses, both recurring and non-recurring, that are found both in the joint reports as well as in Dr Dias’ and Dr Dixon’s reports. The Plaintiff’s proposed amount totals \$4,560 per year.

The Defendant submits that the amount to be awarded under this head of loss should be \$43,500. That figure comes from the joint report of Dr Dias and Dr Mitchell, which estimates the cost of medical management to be around \$2,500 to \$3,000 per year. The Defendant submits that the Plaintiff's medical improvement has "topped out", so to speak, and notes that no further surgery is needed, with ongoing treatment to be necessarily conservative.

The items in dispute are, effectively, MRI scans every two to three years, joggers to be purchased every two years, orthotics to be purchased every four to five years, and an allowance of 10km travel per week at \$0.66 per kilometre.

I will allow the inclusion of the joggers and orthotics but will disallow the MRI scans and limit the allowance for travel.

I am satisfied, on the evidence, that the Plaintiff's ongoing discomfort requires the provision of joggers and orthotics. However, in circumstances where the experts agree that her condition has stabilised, I do not consider further radiological scans to be necessary. Similarly, the Plaintiff's injury will not require further surgical management, and most of the items contained in the Plaintiff's schedule of future out-of-pocket expenses recur annually, or even less often. I will adjust the allowed travel from 10km per week to 1km per week.

Accordingly, I will award \$55,772 for future out-of-pocket expenses.

Past loss of earnings

The Plaintiff's claim for past loss of earnings was initially in the amount of \$464,468. During his closing submissions, Mr Mooney SC invited the Court to disregard the amount for past loss of earnings contained in the Plaintiff's schedule of damages. He sought a greater amount of \$683,064, represented by the following calculation:

Maximum under s 12 = \$3,148 NPW (net per week)

Actual earnings = \$1,000 NPW

Loss = \$2,148 NPW × 318 weeks

The Defendant contends that the Court ought to quantify this loss at nil because the financial documentation, comprising the management accounts of P & S and the Plaintiff's tax returns, fails to reveal that any loss of earnings has occurred.

The Plaintiff's calculation is based upon the report of Mr Michael Lee of Vincents (31 May 2024). At par 4.4 of his report, Mr Lee records his instructions as to the Plaintiff's pre-accident income, which was derived from two sources:

her involvement in P & S in undertaking all the architectural duties of the business for approximately four days per week; and

an annual salary of \$85,000 plus superannuation full time, which was prorated for her working two to three days per week at Astragal Heritage Pty Limited (Astragal), which trades as Weir Phillips, completing architectural heritage reports.

He was also instructed to assume that, after the Plaintiff returned to work in or around February 2021, she did so in a reduced capacity. She was unable to work her pre-accident level of hours in the business, was unable to undertake large architectural design projects and, since her work is now limited to undertaking heritage reports only, has ceased undertaking work for the business. In that regard she is no longer an employee of Astragal but invoices that company through P & S for any hours of work completed, charging \$85 per hour including GST.

Mr Lee was asked to assume that the Plaintiff's injury has caused the business to lose out on building contracts due to efficiency and quoting issues, with a resultant loss of income. He was also asked to assume that the business "lost" income in regards to the large architectural fees which had been generated by the Plaintiff.

As part of his assessment, Mr Lee considered the Plaintiff's personal income tax returns which he summarised at par 6.2 of his report which I reproduce as follows:

Mr Lee notes that the salary and wages earned by the Plaintiff were an amalgam of income paid to her by way of salary and wages from P & S and Astragal, with "other income", comprising interest and dividends (paid by P & S alone).

Mr Lee was able to identify, from the Plaintiff's wages and salary, the proportions received by her from Astragal. Those amounts were set forth at par 6.4 of his report.

A comparison of the income from Astragal with the Plaintiff's overall salary and wages earned between 2016 and 2021 reveals that the Plaintiff earned between 21% and 45% of her income from that source. What is, however, apparent is that, in certain years, the Plaintiff earned significantly greater amounts from P & S from dividends than from salary and wages. I shall return to this matter at [57] below.

Mr Lee, in Schedules C, D and E to his report, sets out his calculations of the Plaintiff's past economic loss. The Plaintiff's schedule of damages departed from those calculations because the hearing of this matter took place almost 26 months after Mr Lee's 31 May 2024 report. The schedule contains updated figures.

The Defendant disputes part of this calculation. Specifically, it disputes the claim that, post-accident, the Plaintiff's actual earnings were \$1,000 NPW. Apart from a possible loss (in 2022) that Mr Ivey identifies in his report, the Defendant contends that the Plaintiff's actual earnings were considerably greater than \$1,000 per week and she has suffered negligible loss.

The figure of \$1,000 per week is drawn from Mr Lee's report, albeit with some rounding up by the Plaintiff. At par 37 of the Plaintiff's written submissions, she stated the following:

“Using this as a baseline, Mr Lee assessed the plaintiff’s past economic loss to 31 March 2024 at \$130,857. As at March 2024, Mr Lee assessed that the plaintiff was earning around \$1,188 gross per week (\$985 NPW) from her labour. As she has continued working in a similar capacity with no intervening pay rises, it is appropriate to adopt an averaged figure of \$1,000 net per week as the plaintiff’s earnings since April 2024.”

Whether this figure ought be accepted depends upon whether I accept Mr Lee’s analysis. For the reasons that follow, I do not.

Mr Ivey critiques Mr Lee’s conclusions in relation to past economic loss in some detail. His opinion rests on three propositions. First, after an analysis of the business records of P & S, he concluded that the business did not suffer any downturn for a period of approximately 14 months after the incident. The base figures set forth in Schedule 1 of Mr Ivey’s report record that, in the quarters following the final quarter of 2020 (at which time sales were \$717,875), for the entirety of 2021, including each independent quarter therein, the company grew and exceeded the last quarter of 2020, which was the quarter during which the Plaintiff sustained her injury. The first dip in income occurred in the January-to-March 2022 quarter. The 12 months of revenue enjoyed by P & S between January and December 2021 produced \$4,072,603, the company’s highest 12-month total on record. While there was a dip in the first quarter of 2022, it recovered immediately thereafter and rebounded strongly in the July and September 2022 quarters, contributing \$1,124,296 in revenue.

Secondly, Mr Ivey observed that the Plaintiff’s own remuneration from P & S increased after the incident causing the injury. Whilst her wage from P & S was set at \$62,400 in every year from 2016 to 2021, it rose to \$90,000 in 2022, 2023 and 2024 and to \$100,000 in 2025. Viewed through the conceptual lens of mean wages, a comparison reveals \$64,200 (2015 to 2020) as against \$83,100 (2021 to 2024).

Although Mr Ivey accepted that the Plaintiff’s total wages, being a combination of P & S plus Astragal income, fell, on average, from \$97,591 to \$89,115, he explained that this was in consequence of a change in the route of payment. Work undertaken by the Plaintiff started to be billed by P & S from 2022 to 2025 as contract fees rather than paid to the Plaintiff as wages. He also observed that the wages paid to the Plaintiff by Astragal were already falling before the incident.

Of course, wages from P & S were not the only source of the Plaintiff’s income. She also earned additional income from wages received from Astragal and dividends paid to her by P & S. These were identified in the Plaintiff’s tax returns. The Plaintiff’s average taxable income between 2015 and 2020 was \$168,365 but increased between 2021 and 2024 to \$190,268. On a weekly after-tax basis the Plaintiff’s taxable income every year after her injury increased above every pre-injury year.

Thirdly, Mr Ivey noted that the profitability of P & S after the incident equalled or exceeded its pre-incident profitability. Between 2014 and 2020, net profit of P & S averaged \$178,647 but increased, between 2021 and 2024, to an average of \$209,360.

Beyond these three points, Mr Ivey disagreed with Mr Lee's methodological approach. This was no mere quibble about arithmetic. Mr Lee's framework for arriving at past loss of earnings was based upon a counterfactual formula: expected (but-for) earnings minus actual earnings equals loss. In order to calculate the first limb of the equation, Mr Lee calculated the "true" profit of P & S (representing net profit with non-commercial items adjusted out), apportioned a share of that profit to the Plaintiff on the basis that her labour generated such profit, and calculated those earnings. The apportionment rates varied as they were based on calculating her actual employment earnings by reference to her full-time salary of \$85,000. In short, the calculation of expected earnings included wages and the Plaintiff's share of business profit.

When building out the second limb of the equation, namely actual earnings, Mr Lee excluded the Plaintiff's share of business profit.

In essence, Mr Ivey's opinion, which I accept, is that much of the claimed loss identified by Mr Lee is generated not by any decline in the Plaintiff's earnings but by the asymmetry in Mr Lee's own methodology.

A further issue Mr Ivey takes with Mr Lee's report is that profit share is the wrong measure of labour value. The fact that the Plaintiff earned income in the nature of salary as well as dividends received qua shareholder requires greater scrutiny to identify the existence of any compensable loss. It is trite that damages are awarded for the diminution of the plaintiff's earning capacity caused by the injury only to the extent that the diminished capacity is productive of financial loss: *Graham v Baker* (1961) 106 CLR 340; [1961] HCA 48 at 347. In *Husher v Husher* (1999) 197 CLR 138; [1999] HCA 47 (Husher) at [7], the High Court set forth the working test as being able to identify the capacity that has been lost and the economic consequences that will or might flow from that loss.

As the Defendant noted in its written submissions, because the Plaintiff has received income from two sources, she must establish that a source of income has been impaired by the injury she sustained. In relation to the salary paid to the Plaintiff by Astragal, as well as by P & S, the calculus of identifying loss is usually not difficult if a disparity exists between pre- and post-accident payments in consequence of the loss of earning capacity (rather than some other causally disconnected factor). Income being derived through dividends is no impediment to the establishment of loss. Husher established that a plaintiff's earning capacity is a matter of substance rather than form. Earning capacity is to be valued by reference to the whole of a plaintiff's exertion and is not cut down by the structure through which that exertion is remunerated.

The principle from *Husher* is not inviolable. Dividends represent a return on shareholding. Only dividends that genuinely reward a person's exertion will be captured. Where dividends constitute a return on invested capital of the Plaintiff or on the labour of others, they are not a measure of the Plaintiff's earning capacity and thus cannot be a measure of loss caused by a reduction in earning capacity through injury. This shines light on the relevant enquiry: was the company's income attributable to the Plaintiff's personal exertion? If so, to what extent?

The Plaintiff's chief difficulty in relation to her dividends is that, even on the evidence of the Plaintiff's own expert, since the Plaintiff's injury the revenue and profit of P & S have grown, or have not been conspicuously affected. If P & S distributes the same, or roughly the same, amount in dividends because the return is capital-derived, or through corporate restructure, or because other persons undertake income-producing work, or because the Plaintiff's residual output is sufficient to maintain output, then the injury to the Plaintiff's working capacity has produced no financial loss.

I am, of course, alive to the argument that even if revenue (whether personal or corporate) remains static post-accident, or even grows, a plaintiff may still prove loss by establishing that, but for the injury, there was a real, rather than fanciful, prospect that their undiminished exertion would have increased personal or corporate revenue. However, this must be established by the evidence, and none exists.

This demonstrates precisely Mr Ivey's complaint as to why profit share is the wrong measure of labour value. Profit rewards capital, goodwill and the Plaintiff's husband's exertion as well as her own, so those returns must be stripped out before apportionment.

Mr Ivey's report identifies a significant methodological problem with the approach adopted by Mr Lee. Aside from Mr Ivey's opinions as to a potential loss suffered by the Plaintiff in FY2022, which I shall address next, I reject Mr Lee's opinion as to past economic loss and prefer Mr Ivey's opinion that, since her injury, the Plaintiff has failed to identify that she has suffered any loss.

Financial Year 2022

Mr Ivey's analysis revealed that the Plaintiff could potentially establish a loss in FY2022 (and that year only). The financial metrics of that year, in contradistinction to those preceding and succeeding it, demonstrated a considerable decrease in revenue and profits. Gross profit decreased to \$402,720, with a net profit of \$10,004, viewed against a pre-incident low of \$36,429 in 2017. The Plaintiff's architecture and heritage income of \$44,986 was well below 2020 (\$73,471), 2021 (\$88,584) and 2023 (\$85,961).

Whilst Mr Ivey expresses a number of reservations as to the precision of the figures that inform his calculation and, properly, makes no concession as to causation, the summary of damages schedule prepared by the parties identifies that the Defendant accepts \$45,000 for past loss of earnings. I consider there is merit in this, whether it be a concession or otherwise, and I am prepared to find the existence of such a loss. It follows that my ultimate finding as to the existence of past loss of earnings is limited to \$45,000.

Future diminution of earning capacity

The largest disparity between the parties, in terms of quantum, concerns future diminution of earning capacity. The relevant legal principles are not in dispute.

It was observed by Heydon JA in *State of New South Wales v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133 at [71] that:

“... Evaluation of the worth of a loss of capacity to earn — of a lost chance to earn — is of its nature a more imprecise enquiry than calculation of a lost income. It rests on the hypothesis — that the plaintiff will have undiminished capacity — which has been rendered false by events. It does not depend on calculating the income from a particular career which is no longer possible, but in calculating the damage to a capacity to carry on various careers. It is an exercise in estimation of possibilities, not proof of probabilities. H Luntz, Assessment of Damages for Personal Injury and Death, 3rd ed, at 91 [1.9.18], said: ‘it is not necessary for the plaintiff to establish the future loss with the same degree of precision as the present and past loss ... The court is really being asked to estimate as best it can the future effect of the injuries from which the plaintiff has been proved to be suffering as a result of the defendant’s wrongful act.’”

Heydon JA noted, further, at [72]:

“Thirdly, the mere fact that the quantum of damages is difficult to assess does not mean that the plaintiff is only entitled to a nominal sum. This principle applies as much to the assessment of damages for impaired earning capacity in injured plaintiffs, as it does to pecuniary loss caused by negligent advice ... or to loss in the form of the diminished value of damaged property ... or equitable damages ... or damages for breach of contract.”

Heydon JA further noted, at [77], that “the trier of fact is not constrained by narrow limitations even though it is not entitled, without evidence, to assume a specific figure for what could have been earned without the injury.”

Heydon JA also observed, at [86], that in some cases the courts have supplemented exiguous evidence by resort to judicial notice.

Barwick CJ stated in *O’Brien v McKean* (1968) 118 CLR 540; [1968] HCA 58 at 545–546 that “fair compensation for [loss of earning capacity] is to be determined as a matter of judgement and not of calculation. But it is of course to be an informed judgement.”

The Plaintiff initially particularised her loss in the amount of \$945,701. That was based upon the expert report of Mr Lee, the Plaintiff's forensic accounting expert. During closing submissions, however, Mr Mooney SC, who appeared for the Plaintiff, handed up an amended schedule of damages. That amended claim in relation to future loss of earnings increased to \$1,019,833. This signalled an abandonment of the methodology and conclusions of Mr Lee in favour of different assumptions. I shall return to the substituted methodology shortly.

The Defendant has, at all times, denied any calculable loss of earnings but accepted that a buffer of \$100,000 is, in the circumstances, appropriate in conformity with the principles informing the awarding of such buffers.

Mr Lee identified three different scenarios concerning future economic loss. Each of these calculations was based on a scenario where the Plaintiff retired at 65, although the calculations continued to 70. I assume this was on the basis that the Plaintiff's expert evidence, if accepted, supported a finding that the Plaintiff's working career had, in consequence of the accident, been foreshortened by five years.

Mr Lee set out the assumptions that he was asked to make at par 7.1 of his report. Those assumptions included the following:

that, had the accident not occurred, the Plaintiff would have maintained self-employment as an architect (i.e. continued to operate the business) until retirement and would have continued to work two to three days per week until retirement with Astragal; and

that, under Residual B, she would continue to operate the business, albeit in a reduced capacity, until the age of 65 and would derive a minimum of \$800 per week after tax.

A few immediate observations can be made in relation to Mr Lee's report. First, he gave no consideration to any scenario where the Plaintiff would, at any time, be running an architect's practice alone, or obtain employment as an architect in an architecture practice. His residual scenarios are all (and only) concerned with "the business", which was P & S. Secondly, as Mr Ivey observed, there was no evidence which supported the assumption that the Plaintiff would derive a minimum of \$800 per week after tax. Thirdly, the residual scenarios concerning Residual B and Residual C all concerned the continued operation of the business in circumstances where the evidence established that it was the intention of the Plaintiff's husband to cease operating the business.

As I have noted at [72] above, the relevance of Mr Lee's report as to future economic loss fell away during the Plaintiff's closing submissions. In its place, Mr Mooney SC ventured an approach which involved the assumption that, but for the accident, P & S would cease its operations and the Plaintiff would continue to earn income from her heritage work with Astragal as well as either as an employed architect (for the balance of her working week) or on her own (presumably as a sole trader or through a corporate vehicle). As the evidence disclosed that the Plaintiff has moved from an employment relationship with Astragal to one of consultancy, charging \$160 (excluding GST) per hour for her time, I was asked to assume that the Plaintiff would enjoy the

same hourly rate as an architect and that this figure ought be used in the calculation of future economic loss.

In the circumstances, this new methodology was, naturally, not considered by Mr Ivey.

The Defendant submitted that this fresh methodology was riddled with assumptions unsupported by any evidence and should therefore be rejected. There is considerable force in that submission. Even if, as I am minded to, I accepted the Plaintiff's evidence that she intended to practise as an architect until 70, it would be reductive for the Plaintiff to invite the Court to adopt the approach of awarding her damages on the assumption that she would be fully occupied for, say, three or more days a week earning \$160 per hour (plus GST). Such a scenario makes several (untested) assumptions:

there is no justification for adopting a billing rate of \$160 per hour for architectural services merely because this is the rate that the Plaintiff charged for independent heritage reports rather than for the provision of architectural services. It was the Plaintiff's evidence that she did not invoice P & S for her architectural services at all. The new model imports a private-heritage fee rate and applies it to a hypothetical architecture practice in circumstances where she has never billed on that basis;

\$160 per hour plus GST represents a gross professional fee. That \$160 is gross of both tax and the practice's own costs. Even though those costs might be low if the Plaintiff intended to undertake her practice from her home, there would nevertheless be operating costs constituted by practice overheads, including, I would assume, professional indemnity insurance, architecture registration, software licences, vehicle expenses and subcontracted consultants' fees. These matters are raised only as examples. I do not intend to be exhaustive, nor does the evidence (or lack thereof) permit me to be. As such, gross fees of \$160 do not represent personal-exertion income;

the model assumes that every "lost hour" represents a billable hour, week in and week out. No allowance has been made for the non-billable reality of sole practice; that is, quoting for work, marketing, unpaid site time, travel and administrative time. Nor does it account for gaps between engagements as well as vacation periods. On the assumption that, during her 60s, the Plaintiff's husband was retired, it is safe to assume that even someone as hard-working as the Plaintiff would take time off, now and then, to rest and recuperate and travel with her husband. Even assuming that the Plaintiff conducted a busy practice, this does not translate into one which would necessarily bill 30 hours a week;

it must be observed, as well, that there was no evidence which suggested that the Plaintiff had ever run an architecture practice during her working life. It is apparent from the Plaintiff's husband's evidentiary statement and Mr Lee's oral evidence that P & S was an integrated design and construct model where it appears that the architecture was a discounted loss-leader; a pipeline to win the far more valuable construction work;

there is no allowance for vicissitudes such as illness, downturn or other unrelated events; and

the new approach assumes that the Plaintiff would have devoted the time that was freed up, after P & S closed, to an architecture practice. It is possible that the Plaintiff would simply have devoted the additional time available to her to undertake further heritage work for Astragal, noting, as I do, that this is perhaps not altogether significant so long as she was earning \$160 per hour for both that work and her solo architecture practice.

I am unable to accept the Plaintiff's scenario in support of her claim for future economic loss as a reliable measure of damages. It is compromised. There are too many uncertainties and it requires me to accept the application of a private-heritage fee rate, applied to a practice that she has never run, at full billable utilisation, gross of tax and overheads, without vicissitudes, and with no allowance for holidays or time off. There is no evidence of or submissions made in relation to these matters. I consider that, if I were to adopt that approach, it would overcompensate the Plaintiff over the course of a very lengthy period of time.

For those reasons, I reject the Plaintiff's claim for loss of future earning capacity. I will, however, award a buffer. In order to do so, I must make findings as to her age of retirement and residual earning capacity.

Plaintiff's age of retirement

In determining the Plaintiff's claim for future economic loss, it is necessary to arrive at a finding as to the duration of the Plaintiff's working life.

The Plaintiff's Statement of Particulars, filed on 8 February 2024, contains a heading "future diminution of earning capacity". Under that heading, it is alleged that the Plaintiff "would have remained in the workforce until at least age 70". It further contends that she "will be forced into early retirement by age 62 when she will become totally and permanently incapacitated on the labour market."

The Plaintiff's schedule of damages calculates "future loss of earnings" on the assumption that the Plaintiff will continue to work until 70. This is consistent with her evidence.

Although the Defendant did not challenge the Plaintiff's credit, I was invited to find implausible her evidence that she would work until 70. Rather, the Defendant contended, I should fix her pre-accident retirement age, meaning the age at which the Plaintiff would have retired but for her injuries, at 65. As part of this deliberation, I must also consider whether I accept the Plaintiff's medical experts' evidence that her working life has been foreshortened by five years.

In her first evidentiary statement, the Plaintiff maintained that she was "planning a long career in architecture". Her professional plan was expressly built around working beyond her husband's retirement. The Plaintiff stated at par 32:

"Given that my husband is eleven years my senior, it had been important for me to develop my professional profile to ensure that I can continue working after his retirement."

When cross-examined, the Plaintiff confirmed that she intended to work as long as possible until she was 70. She said that she still “feel[s] young” and was not thinking about retiring and did not intend to play golf.

She stated that she intended to retire approximately 15 years after her husband’s retirement (though I note that her husband’s evidence was that his retirement plans have been delayed by the Plaintiff’s early retirement from the business). The Plaintiff stated that although she may not have worked six days each week, she regarded her 60s as her “freedom years”, not a time to “wind down”. During cross-examination, she said:

“My children were grown. I didn’t have grandchildren yet ... I intended to throw myself into building the career ... that would’ve taken me to my retirement...”

Of course, that was the Plaintiff’s perspective prior to having grandchildren. Whether that perspective had changed since becoming a grandparent was also challenged, leading to the following exchange:

“Q. Do you think that that might have affected whether or not you would have wanted to continue working full time from about 2024 onwards ...?”

A. No. Definitely not ... I don’t want to start caring every day for other people like my grandchildren. I just want to visit.”

Mr Fuchs confirmed this evidence during cross-examination, stating that whilst he intended to retire after the conclusion of two particular building jobs, the Plaintiff had never discussed with him any plans for her to retire. On the contrary, his evidence was that the Plaintiff wanted to keep working and was “never retiring”. He added that the Plaintiff was hoping to use the recognition and acclaim from two large residential projects in Vaucluse as a springboard to more work.

During closing submissions, Mr Priestley SC and I had the following exchange:

“PRIESTLEY SC: [The Plaintiff] was going to work until 70, even though that was a 15-year period then that [Mr Fuchs] would be sitting at home, apparently not doing any housework. [The Plaintiff] was going to continue to work six days a week, do all the housework for 15 years. Your Honour, there’s just an inherent improbability in that whole circumstance that raises real doubt about things like projected retirement age, and as Mr Ivey said — Mr Ivey did give the court some objective material in relation to retirement ages, your Honour.

HIS HONOUR: So what finding are you asking me to make? One would be you’re asking me, as I take it, to treat as well intentioned, but perhaps aspirational, a retirement age of 70.

PRIESTLEY SC: Yes.”

Making a finding as to the Plaintiff's likely retirement age, but for her injuries, is hardly a straightforward task. True it is that a retirement age of 70 would be inconsistent with the statistical mean, but such statistics can only go so far. It was also suggested during cross-examination that it would be implausible for the Plaintiff and her husband not to share a joint, salubrious retirement in the later years of their lives, in which they could enjoy the fruits of their labour and the blessings of grandchildren.

The Court must with rigour refrain from overlaying its findings with cultural or societal stereotypes or norms of behaviour. That would introduce an unwarranted bias into its fact-finding function. Further, the Defendant, at least implicitly, invites the Court to find that the Plaintiff's evidence as to her retirement age conflated aspiration with reality. In so doing, the Defendant invites a finding that 65 was a more realistic age at which the Plaintiff would, in fact, have retired.

The strong impression given to the Court by the Plaintiff was that she was a person of immense capacity. During her adult life, albeit from a young age (22), she, together with her husband, raised three children whilst working as an architect. Later in life, the Plaintiff undertook further post-graduate qualifications in heritage architecture to augment her skill set. This in addition to undertaking the vast majority of the family's domestic duties. She worked six days a week, often into the night. The foregoing bespeaks a person of prodigious discipline and conviction who has a tolerance and capacity for decades of hard work. Within that framework, I would not easily dismiss the Plaintiff's avowed intention, and determination, to work until the age of 70. Even though that may mean that any shared retirement with her husband would be delayed until he was 81, I gained no impression from Mr Fuchs, including during cross-examination, that he ever had, or would, discourage his wife from fulfilling her ambitions. For this reason, I find the Plaintiff's working age to be 70, subject to whether that age has been foreshortened by her injury. This is considered at [108]–[119] below.

Residual earning capacity

An issue which remains in dispute between the parties is whether, and to what extent, the Plaintiff has been incapacitated for work as a result of the accident. The Plaintiff contends that, as a result of her injuries, she is incapable of working more than 20 hours per week, with a number of significant restrictions in relation to how that work is performed. Conversely, the Defendant maintains that the Plaintiff's injuries give rise to only minimal restrictions which do not justify a finding that the Plaintiff has any residual incapacity.

Resolving these differences requires careful consideration of the lay and expert evidence.

Plaintiff's evidence

Prior to sustaining the injury, the Plaintiff held two jobs: first, as an employee (and shareholder) of P & S and, secondly, for Astragal as a heritage consultant preparing heritage reports. She stated that she worked from 45 hours to in excess of 60 hours per week across those roles.

In consequence of the injury, she states that she has returned to work, as a heritage consultant, in a reduced capacity. She states, in her first evidentiary statement, that her injuries forced her to stop working for P & S due to the combination of pain and fatigue, nor could she attend site visits regularly as she encountered difficulty managing steps, stairs and uneven terrain.

She confirmed that she continued work “around 12.5 hours per week” preparing the heritage reports and the most she can contribute to P & S is about two hours of basic administrative duties per week.

The Plaintiff amplified this evidence in her second evidentiary statement. She noted that, owing to her injuries, she was unable to sit or stand for extended periods, walk safely on a busy construction site or perform at the professional standard required while managing pain and side effects of medication. She observed that she was, at that point in time, managing to work approximately “12 to 16 hours of work per week” such hours being “highly sporadic and broken up because of my pain”. She states that she works usually from bed and limits site visits to no more than one per week while spreading larger projects over multiple days rather than completing them in a single day as was done before the accident.

During cross-examination, the Plaintiff confirmed that her contribution to P & S had diminished to “just a little bit of administration, mostly just banking and communicating with the accountant and typing up the progress claims”, totalling about two to three hours a week. Her heritage work has continued, but on a changed footing. The Plaintiff now works from home rather than the office and has moved from a fixed wage to a contractor system, undertaking 12 to 16 hours per week. She stated that she cannot undertake any further work owing to difficulties that she described as a loss of focus and endurance requiring her to take frequent rest breaks. The Plaintiff stated that she works largely from bed, using either a laptop or printed documents. Her evidence was that she now uses the home office “very rarely” and “for very, very brief periods”, mostly to retrieve whatever she needs before returning to work in bed. She has an ergonomic chair and a standing desk but testified that she could sit or stand only briefly and sits with her right buttock off the chair.

Beyond the pain, the Plaintiff attributes to her injury an anxiety which has left her unable to return to architecture. She worried about where she was and what would happen to her when “out in the world”. The Plaintiff would go to some lengths to ensure that even heritage site premises were unoccupied when she undertook inspections because of this anxiety.

Her evidence is that she cannot return to architectural services. Being unable to stand for long or work extended periods without pain, she cannot produce drawings in a timely, acceptable fashion. The Plaintiff rejected the possibility of returning as a draughtsperson.

During cross-examination, the Plaintiff conceded that her heritage output had, after a 2021 period of intermittent work, since 2022 returned to roughly pre-accident levels of about two days a week. In that regard, she attends heritage sites, drives herself, carries a camera and lightweight tripod and has travelled to Wollongong and Orange, although her husband or one of her daughters would drive her on the longer trips.

The Plaintiff rejected firmly, during cross-examination, the notion that she could undertake her former architectural role. She maintained that the role was physically demanding. It required standing for several hours in, for example, tile shops and on site with tradespeople.

Her husband confirmed this evidence. He stated that on P & S building sites, the Plaintiff would have to climb ladders as well as navigate ramps and building materials, none of which is possible for her.

It is opportune, at this juncture, to observe that I consider the Plaintiff to have been a model witness. She was attentive to questions without attempting to pontificate on her own case. She answered questions truthfully and carefully without adornment and made appropriate concessions when necessary. I found her to be deeply impressive and I accept, without any reservation, her evidence. Her (comedian) daughter, who gave evidence via audiovisual link from London, and husband were also cross-examined. I extend my observations to each of them as well. No credit finding was sought to be made by the Defendant, no doubt as an exercise of sound forensic judgment in this instance.

Expert evidence concerning residual earning capacity

The parties' expert evidence was central in considering the Plaintiff's residual earning capacity.

Plaintiff's experts

Dr Dixon

After taking instructions as to the Plaintiff's fitness for work, Dr Dixon, consultant orthopaedic surgeon, considered that the Plaintiff's prognosis for being able to work at pace, use a standing desk and sit for prolonged periods in order to do IT work, data entry and site visits for photography "remains guarded". In his opinion, it is probable that the Plaintiff's working life would be foreshortened by some five years as she would have increased difficulty with heritage planning and design work for her husband's construction business. Dr Dixon did not consider there would be any improvement in the Plaintiff's sitting, standing or walking tolerance. Indeed, he expected it to deteriorate over the next 5-15 years, causing the Plaintiff prematurely to retire by some five years.

Dr Dias

Dr Dias, consultant occupational physician, considered that the Plaintiff's fitness to work was limited up to a maximum of 25 hours per week. Even this was qualified by his opinion that the Plaintiff ought not lift repeatedly more than 5kg, ought not walk more than 15 minutes or stand

for more than a relatively short time. There were further restrictions, including on the amount of time she should drive and walking on uneven terrain. He considered that the restrictions would likely persist indefinitely and would effectively render the Plaintiff unemployable on the open labour market. Like Dr Dixon, Dr Dias considered that her injuries would foreshorten her working life by approximately five years, which years ought be deducted from her proposed retirement age. In his 19 May 2026 report, Dr Dias considered that the Plaintiff would have been able to remain fit and continue working on a full-time basis in her pre-injury employment until the age of at least 70 years.

Dr Rastogi

Dr Rastogi, consultant psychiatrist, diagnosed the Plaintiff with chronic adjustment disorder with anxious distress causally connected to the accident. This psychological condition left the Plaintiff, in his opinion, unsuited to psychologically demanding or stressful work. He regarded her as vulnerable to relapse in the future and considered that she would have, from a psychological perspective, remained fit for unrestricted work until normal retirement age but for the subject accident.

In his second report, dated 10 June 2025, Dr Rastogi added that the Plaintiff's ability to function vocationally even at her present reduced capacity would diminish further over time until she became able to work only two days a week for a total of 10 hours each week. This would cause the Plaintiff to struggle to perform her current role in heritage works and, over time, cause premature retirement.

Defendant's experts

Associate Professor Paul Miniter

Associate Professor Miniter disagreed with Dr Dixon as to the foreshortening of the Plaintiff's working life. He considered that Dr Dixon's prognostication of a five-year foreshortening was "an inappropriate estimation", as was Dr Dixon's additional opinion that the Plaintiff's ability to sit, stand and walk would deteriorate over the next 5–15 years. He also considered that Dr Dias's qualifications of a 5kg lifting restriction, as well as all the other qualifications he raised, were "simply inappropriate" and had "no basis". Associate Professor Miniter stated:

"Objectively, she has a very good outcome from the surgical reconstruction, despite the fact that she has persistent symptoms relating to the original sciatic nerve injury. She has objectively made a very good recovery ... but the restrictions put forward by Dr Dias are simply unreasonable."

Dr Robin Mitchell

Dr Mitchell considered the Plaintiff's current capacity to be such that she would be able to work on a full-time basis, provided she avoided frequent manual handling (i.e. lifting, carrying, pushing and pulling) of more than 5kg and avoided prolonged walking over uneven or sloping surfaces and had the capacity to sit for at least short periods throughout the day. Unlike Associate

Professor Minter, there was a broad agreement between Dr Mitchell and Dr Dias in relation to some of the qualifications, but he disagreed particularly with the need for days off or reduced attendance at work. He stated:

“Rest is not therapeutic and will not provide any advantage in the longer term, furthermore it is a basic principle of occupational health practice that providing the suitable duties undertaken had no potential to aggravate any underlying conditions, then normal hours of such work should be possible.”

The joint reports of Dr Dixon and Associate Professor Minter showed stark differences between their positions. Associate Professor Minter was considerably more bullish as to the Plaintiff’s capacity to work normally without restrictions or qualifications, other than perhaps walking over very difficult surfaces. He did not consider that there was any foreshortening of her working life was justified. Dr Dixon maintained his view that the Plaintiff could only work 12 to 16 hours per week, with a consequential foreshortening.

Since these matters are important in the assessment of past and future economic loss, and due to the markedly divergent opinions expressed by these physicians, the forensic decision by each of the parties to not cross-examine these experts presented the Court with a difficulty. I must prefer one over the other without the assistance provided by their evidence being tested. Although this difficulty was raised with Counsel, little guidance was forthcoming as to how the quandary ought be resolved.

There was greater concurrence resulting from the conclave between Dr Dias and Dr Mitchell. They both considered the Plaintiff’s prognosis to be relatively poor. They regarded her symptoms and disabilities to have become entrenched over the last 5.5 years in a chronic pattern. They doubted that the Plaintiff would ever be free of symptoms or functional compromise.

The central area of divergence between them concerned restrictions on work capacity and the extent to which the Plaintiff was able to work full time. Dr Mitchell considered that, with all restrictions in place, the Plaintiff was capable of at least 30 hours of work per week. Dr Dias considered the Plaintiff to be fit only for part-time work of up to 20 hours per week, given the limitations both to her sitting tolerance and her ability to perform on-site visits.

I conclude, from the combination of lay and expert evidence, the following:

the Plaintiff’s residual incapacity limits her to 24 hours of work per week, spread over 5 or even 6 days, which allows the Plaintiff the ability to work 4 hours (or slightly more) a day. I consider this conclusion to be open and available to me on the evidence (particularly that of Dr Mitchell) and, also from the Plaintiff’s own protestations in the witness box, in the face of cross-examination, that she still “feel[s] young”;

I am not persuaded, on the basis of the available evidence, that the Plaintiff will suffer a foreshortening of her working life by 5 years. As the Plaintiff’s condition appears to have stabilised (and does not appear to be worsening), I consider that, with management of her working hours, she can continue to work until the age of 70 if she chooses.

Buffer

As I have already said, the Defendants agreed that a buffer of \$100,000 is appropriate. I consider that it should be a greater sum.

The circumstances in which it will be appropriate to award damages by way of a buffer were summarised in *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99, where McColl JA, with whom Mason P and Beazley JA agreed, said the following:

“84 As to the future economic loss, it is appropriate to award damages by way of a buffer, including in a case such as this where damages are to be determined pursuant to the Civil Liability Act, when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine. In such a case, the Court still undertakes a comparison between the economic benefits the plaintiff derived from exercising earning capacity before injury and the economic benefit derived from exercising earning capacity after injury, although the difference cannot be determined otherwise than by the broad approach of a buffer: Penrith City Council v Parks [2004] NSWCA 201 (at [3] - [5]) per Giles JA; applied K'mart Australia Ltd v McCann [2004] NSWCA 283 (at [62]) per Pearlman AJA (Handley and Ipp JJA agreeing); see also Hornsby Shire Council v King [2005] NSWCA 67 (at [23]) per Ipp JA (Mason P and Brownie AJA agreeing); Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 (at [33]) per Hodgson JA (McColl JA agreeing). In the latter case Mason P (at [2]) opined that “a buffer or cushion award is usually reserved to the situation where there is a smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future”, but, with respect, the accepted wisdom appears to be that a buffer can be deployed in circumstances such as the present.”

In *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302; [2012] NSWCA 13, McColl JA made the following observation:

“7 The award of a buffer for future economic loss in circumstances “where earning capacity has unquestionably been reduced but its extent is difficult to assess” reflects the proposition that, to paraphrase, the want of precise evidence “does not necessarily result in non-recovery of damages”: State of New South Wales v Moss [2000] NSWCA 133; (2000) 54 NSWLR 536 (at [87]) per Heydon JA...”

In *Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244, Basten JA, with whom McColl and Macfarlan JJA agreed, stated the following:

“33 The calculation of economic loss, whether in the past or for the future, involves a comparison between the actual circumstances of the claimant, as a result of the accident, and the circumstances which would probably have continued or come to pass but for the accident. On the assumption that the accident has resulted in a loss of earning capacity, the Court must also consider whether such a loss might have occurred independently of the accident.

...

35 The conventional approach to such an exercise is to assess the earning capacity of the claimant in monetary terms prior to the accident (usually on the basis of net weekly or annual earnings) and, where there is evidence of unemployment or employment at a reduced income thereafter, to assess the quantum of the difference up to the date of hearing (past economic loss) and to project the calculation into the future (future economic loss). The latter exercise will, again conventionally, be discounted by 15% on account of vicissitudes.

36 Such calculations produce precise figures, often resulting in awards expressed in dollars and cents. However, such precision is fallacious. Varying degrees of uncertainty will attend the hypothetical aspects of the calculation, rendering any degree of precision misleading.

37 Additionally, with respect to future economic loss, the exercise requires a discounting of the calculation in order to achieve a present monetary value for the assessed loss which, it is assumed, will accrue steadily over the remaining working life of the claimant.

38 Under the general law, it has long been accepted that, at least in some cases, the assessment will involve such a degree of speculation as to render a calculation by the conventional techniques inappropriate. In those cases, a lump sum is awarded by way of “buffer”, the court being satisfied on the probabilities that a loss will be suffered or, indeed, has been suffered.

39 One of the contingencies which may not be readily assessable, thus supporting the lump sum approach, may be the question of vicissitudes. The greater the difficulty in identifying the claimant’s most likely future circumstances but for the accident, the greater the difficulty in assessing the uncertainty as to whether or not those circumstances would have arisen in any event, and if so when and for how long they might subsist. Awarding a lump sum will usually incorporate the element of vicissitudes into the global assessment.”

Having regard to these principles, I will impose a buffer of \$350,000 for the following reasons:

from the observations I have made above, there is every reason to accept that the Plaintiff would, in her 60s, have undertaken valuable work, either as a heritage consultant (possibly on a full-time basis) or through an amalgam of heritage and architectural work. I find that, but for the accident, the Plaintiff would have worked up to the age of 70. However, I do not consider that she would necessarily have worked full-time and I have made allowance for vacations, time off and periods of downturn or quiet in her practice; and

the Plaintiff is a highly credentialed professional. In the sphere of her qualifications and the hourly rate that she could command, which could easily exceed \$160 per hour, a sum of \$100,000 over the course of over 10 years is a rather meagre sum which appears to represent the lowest, tokenistic sum proposed by the Defendant.

It is easy to accept that over a 10-to-12-year period the Plaintiff could, conceivably, have earned over \$1 million if she worked full-time as a self-employed or even an employed architect. Indeed, it could have been a multiple of this amount. Nevertheless, I cannot make that assessment accurately in the absence of evidence advancing either scenario adequately or, as to her salary as an employed architect, at all. It is, in any event, a matter I have taken into consideration in determining the buffer amount.

Past care

Under this head of damage, the Plaintiff claims for the cost of commercial cleaners she hired after the accident as well as for the cost of gratuitous care given by her family where that care exceeded six hours per week. As the items claimed are derived from the joint occupational therapists' report, there is little difference between the parties. The Plaintiff seeks \$67,123, while the Defendant seeks it be limited to \$60,000. The difference arises for two reasons. First, Ms Piebenga, in her report, rounded down the amount of gratuitous domestic assistance on the assumption that the Plaintiff had a commercial cleaner at the time of the accident. Secondly, the Defendant submits that the Plaintiff would have engaged commercial cleaners even if she had not been injured.

Ms Piebenga recorded in her report that the Plaintiff said that, while she and her husband had engaged cleaners when her children were younger and lived at home, this arrangement had ended around a year before the accident because, among other reasons, she had difficulty finding a cleaner. When asked about this in cross-examination, the Plaintiff said this was not the case and that Ms Piebenga may have misunderstood her because what she meant was that it was difficult to find a cleaner after the accident.

As to the first point of difference between the parties, I am prepared to believe that there may have been some infelicity of expression or other miscommunication when the Plaintiff saw Ms Piebenga. The second point of difference follows as a matter of logic. The Plaintiff did not have a cleaner in the year leading up to the accident. She was adamant that she did not intend to engage one, either. I see no reason to doubt her for the reasons I have expressed above.

I will award \$67,123 for past care.

Future care

This was a second area of significant difference between the parties. The Plaintiff seeks \$231,762, while the Defendant proposed an amount of \$75,000. That disparity is largely due to the occupational therapists' different allowances for the commercial rate of the services to be provided.

The Plaintiff's expert occupational therapist, Ms Zweck, made her calculations using the hourly rate for domestic assistance as set out in the National Disability Insurance Scheme (NDIS) Arrangements and Price Limits 2025-26 document, being \$58.03. The Defendant's expert occupational therapist, Ms Piebenga, in the occupational therapy joint report, noted that the

Plaintiff is not a NDIS participant and that the NDIS price limits are, naturally, upper limits. Those limits apply to registered disability service providers and incorporate specific overheads, supervision and reporting obligations which are not applicable to commercial services of the kind the Plaintiff has engaged.

Ms Piebenga calculated her proposed hourly rate based on the hourly rate of the Plaintiff's current cleaner, being \$35, because "[the Plaintiff's] own purchasing power is the best available evidence of the market rate".

Counsel for the Plaintiff submitted that this was an area in which a degree of compromise between the two parties' amounts would be appropriate. I agree, though that compromise will reflect that I much prefer the Defendant's proposed hourly rate.

The Plaintiff's calculation was made by reference to a document which, as I have said, sets an upper limit and includes allowances unique to NDIS providers. The price a person is paying for a commercial service outside of the NDIS is a firmer basis for the market rate of precisely that service. I will allow \$40 per hour for domestic assistance.

The parties' experts agreed that the Plaintiff needs 2.5 hours per week of commercial assistance, comprising spring cleaning and cleaning generally. They also agree on several other smaller items, two of which were that the Plaintiff would require a driver for work travel more than an hour away as well as garden maintenance of 15 hours per year. The Defendant nevertheless submitted that it was not established on the evidence that the Plaintiff was likely to engage a commercial driver or gardener.

I agree with the Defendant with regard to the Plaintiff's need for a driver. There was in this matter evidence of only a few long drives for work. The Plaintiff has managed to make the trips herself, consistent with Dr Mitchell's view, or with the assistance of her husband or one of her daughters. I do, however, accept that the Plaintiff, who said during cross-examination that she would readjust how she sat at lights, would be in some discomfort. This was consistent with Dr Mitchell's view. However, there was simply insufficient evidence of the frequency of such trips and the Plaintiff's probability of engaging a driver, particularly as she has in the past successfully driven herself to those more distant sites or been taken there by family members.

The situation with respect to gardening is somewhat different. The Plaintiff did most of the gardening before her injury. That much was consistent throughout the Plaintiff's medical expert reports and her own evidence. It was buttressed by her husband, who, when asked in cross-examination if he did the gardening before her injury, replied:

"No. Some of it. If I was – happened to be home, and I had some time, and there was something that needed doing, I would do small amount, yeah. But she did – the majority of the work in the [house] was done by [the Plaintiff]"

However, it was also clear that the Plaintiff's residence required very little gardening. There are references in the reports of Dr Dias and Ms Zweck to the fact that the property has a courtyard but no lawn, meaning there are, in Dr Dias' words, "no significant gardening requirements associated with [the Plaintiff's] property". Most of the Plaintiff's gardening consisted of either caring for pot plants (recorded in Ms Zweck's report) or managing the courtyard bamboo and planter boxes (recorded in Ms Piebenga's report). I will deal with these in turn.

As to pot plants, I do not consider that the Plaintiff has established that she is likely to engage a commercial gardener to assist with pot plants.

As to bamboo, Ms Piebenga records that the Plaintiff would, in the past, devote approximately an hour each month to trimming the bamboo. Since the Plaintiff's injury, the bamboo has only been cut once a year, leaving it overgrown. The Plaintiff further informed Ms Piebenga that the bamboo could, ideally, be cut "every couple of months, it could be twice a year".

In my opinion, this work would quite naturally require the engagement of a commercial gardener. The family's difficulty in maintaining the bamboo since the Plaintiff's injury bespeaks precisely that.

I will allow ten hours per year for commercial gardening services.

After making those adjustments, I will award for future care the amount of \$127,820.

Conclusion

For the foregoing reasons, the damages I award are contained in the following table:

Non-economic loss

\$297,480

Past out-of-pocket expenses

\$65,000

Future out-of-pocket expenses

\$55,772

Past loss of earnings

\$45,000

Future diminution of earning capacity

\$350,000

Past care

\$67,123

Future care

\$127,820

Total

\$1,008,195

After the 10% deduction as agreed at [5], that amount is \$907,375.50.

Orders

I make the following orders:

Judgment for the Plaintiff in the sum of \$907,375.50.

The Defendant is to pay the Plaintiff's costs.

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Decision last updated:

07 August 2026

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