AUSTRALIA / JUDGMENT

Pratt v Ditton

[2026] NSWSC 1041

COURT	DECIDED
Supreme Court	01 September 2026
BEFORE	**CASE / FILE NUMBER**
Fagan J	2024/449161

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Medium Neutral Citation:	Pratt v Ditton [2026] NSWSC 1041
Hearing dates:	3 - 6 August 2026
Date of orders:	1 September 2026
Decision date:	01 September 2026
Jurisdiction:	Common Law
Before:	Fagan J
Decision:	(1) Verdict and judgment for the plaintiff in the sum of $1,030,742.67. (2) By 8 September 2026 the parties are to provide to the Associate to Fagan J either a minute of an agreed order with respect to costs or written submissions, from each party, as to the appropriate costs order. (3) Direct that any issue as to the proposed costs order be resolved in chambers on the papers unless either party requests a hearing.
Catchwords:	NEGLIGENCE – Personal injury – Employer and employee – Claim for work injury damages under the Workers Compensation Act – Where plaintiff injured by falling steel beam crushing his foot – Where plaintiff reasonably understood that he was instructed to approach the steel beams – Breach of duty – Causation – No finding of contributory negligence – Assessment of damages – Employment history – Total loss of earning capacity.
Legislation Cited:	Civil Liability Act 2002 (NSW) Work Health and Safety Act 2011 (NSW) Workers Compensation Act 1987 (NSW)

Cases Cited:	Czatyrko v Edith Cowan University (2005) 214 ALR 349; [2005] HCA 14 Husher v Husher [1999] HCA 47 Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330 South Sydney Junior Rugby League Club Ltd v Gazis [2016] NSWCA 8 Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited [2022] HCA 11
Category:	Principal judgment
Parties:	Thomas William Pratt (plaintiff) Patrick James Ditton (defendant)
Representation:	
Counsel:	R O'Keefe SC with B Madden (plaintiff) I Todd (defendant)
Solicitors:	The Firm Law Group (plaintiff) Turks Legal (defendant)
File Number(s):	2024/449161
Publication restriction:	No

JUDGMENT

The plaintiff claims damages in negligence against his former employer for a crush injury sustained to his left foot in an accident on a building site on 27 June 2016. The defendant denies breach of its duty of care and alleges that if breach should be found the plaintiff's damages should be reduced on account of contributory negligence. Quantum of damages is disputed independently of the issue of contributory negligence.

The construction site where the accident occurred was at 343-355 Pennant Hills Road, Pennant Hills. By 23 June 2016 a concrete slab had been poured on the site, to serve as the floor of a motor vehicle showroom. The contractor in control of the site in June 2016 was Williams River Steel Pty Ltd (Williams River Steel). It had ordered a number of steel beams to be delivered to site, to be erected as columns that would stand on the slab. The design of the project called for steel cross beams to be connected to the tops of the columns, to support the roof, and precast concrete panels to be attached between the columns, to form the walls of the structure.

Williams River Steel engaged the defendant to provide labour. The defendant's workers were required to assist with unloading the steel beams as they were delivered by truck to the site and to provide ancillary support to steel riggers employed by Williams River Steel who would erect the structure. On 27 June 2016 when the accident occurred, the defendant had on site Mr Gary Dries as a supervisor/foreman, the plaintiff and another labourer, Mr Jamal Richardson.

The plaintiff had been employed by the defendant since December 2015 as a labourer. He had worked for the defendant on sites at Dubbo and on the Central Coast. On Thursday, 23 June 2016 the plaintiff and Gary Dries drove together from the Central Coast to the Pennant Hills site for a pre-start inspection. They were shown around by Mr David Orrick, Williams River Steel's site

foreman. While they were there a mobile crane operated by Woddo's Cranes Pty Ltd arrived at the site and was left parked near the slab, ready for offloading steel components that were due to be delivered the following Monday, 27 June. On Thursday, 23 June 2016 Mr Orrick told Gary Dries and the plaintiff that they would need to be on site by about 5:30 am the following Monday, when delivery of steel would commence.

The plaintiff tendered his own sketch of the site on a sheet of A4 paper. When held in landscape orientation, the sketch shows Pennant Hills Road running north-south at the left-hand margin. The site was on the east side of Pennant Hills Road. Along the street frontage, being the western end of the block, there was a concrete driveway running north-south, parallel with Pennant Hills Road. Immediately adjacent to the driveway was the western edge of the slab. The driveway had a slight upturn along its edge next to the slab and also along the edge closest to Pennant Hills Road. Thus, in cross section the driveway was slightly dish shaped, presumably to drain rainwater towards the centre. The slab extended towards the back, or eastern end, of the site. The site office is depicted on the plaintiff's sketch in the north-east corner of the site, just off the east edge of the slab.

On Monday, 27 June 2016 the plaintiff again travelled to the site with Gary Dries, arriving at about 5:30 am. Mr Orrick was the only person present for Williams River Steel. No steel riggers had arrived because there were as yet no components for them to erect or assemble. The crane was positioned on the driveway, parallel to the southern half of the western edge of the slab. It was stabilised by outriggers extended laterally from each corner of the machine and by hydraulic jacks located at the ends of the outriggers.

At some time after about 9:00 am a truck carrying six steel beams arrived on site and was positioned close to the rear of the crane. The beams were 17.5 m long and between 300 mm and 400 mm deep, with a cross section resembling the letter "I". The top and bottom components of the "I" were approximately 200 mm wide. The evidence includes varying estimates of the weight of each I-beam. I am satisfied that each weighed at least 750 kg. Some of the beams had plates welded to the ends of them that exceeded the cross-sectional dimensions, so that when placed on a level surface the beams would not be in contact with the surface over their full length.

The crane had an extendable boom that could be slewed. A wire hoist rope was reeved through a sheeve at the end of the boom, with a lifting hook attached. Gary Dries was a trained and licensed dogman. The task of a dogman is to attach each load safely, for example by using slings, to direct the crane operator when to lift the load, when to slew the boom and when and where to lower the load. The dogman is then responsible for safely detaching the load by releasing the slings. A Regulation made under the Work Health and Safety Act 2011 (NSW) was in force in 2016, requiring that a person performing high risk work, which included a dogman, was required to have a high risk work license.

Gary Dries commenced the unloading by climbing onto the tray of the truck and passing chain slings under two of the I-beams and attaching them to the hook at the end of the crane's hoist rope. The crane driver then raised the pair of beams off the tray of the truck, slewed the boom

through more than 90° to a point over the concrete driveway adjacent to the western edge of the slab and then lowered the beams onto the driveway. Gary Dries dismounted from the truck and disconnected the slings. The boom was slewed back to the truck to sling and unload a second pair of I-beams.

The only evidence in the case to establish the above sequence of events and to describe what happened next came from the plaintiff, in five statements and in his oral evidence. His first statement was made on 10 July 2023, six years after the accident. Subsequent statements were made on 22 November 2023, 5 March 2025, 26 February 2026 and 30 July 2026. There is significant variance between the plaintiff's statements concerning events proximate to him sustaining his injury. There is yet further variation between his evidentiary statements and his oral evidence, including internal inconsistency in his oral evidence.

The plaintiff has not satisfactorily explained the differences in the accounts he has given from time to time. I do not accept his claim that additional details have come back to him over the years as genuine recollections. His answers in oral evidence regarding belated recollections included the following:

A. [...] I constantly have triggers and remember things that I didn't remember years ago that I remember way after.

[...]

A. It's hard because I still have constant nightmares of seeing – if I'm driving and I see steel on the back of a truck I freeze. I constant have different visions of the same thing, and things come back to me, things come back where it's just happens out of nowhere. I can remember things that I didn't remember from, like, previously.

[...]

Q. You accept, don't you, that your memory closer to your accident is better than your memory today.

A. Yeah, I still, as I just said, I remember things from that day that I didn't remember before, like, after the accident, I'm remembering finer details at the moment that I did 12 months after it.

[...]

Q. A moment ago you gave evidence that you constantly have visions. You say that your memory has gotten better because of those visions. Correct.

A. Yep.

Q. Those visions you mentioned occur in nightmares. Is that right?

A. Yeah. Nightmares. Dreams.

Q. I see. Your memory has improved has it because of those nightmares and dreams?

A. Yeah. I'm remembering finer details of the accident.

I do not find those explanations of the plaintiff's purportedly improving memory convincing. Even if some of his more recent assertions of detail of the events have indeed come to him in visions, dreams or nightmares, I do not accept that they are grounded in reality, as opposed to being artefacts of his waking or sleeping imagination. It is relevant that for 10 years the plaintiff has used Endone at the rate of three 5 mg tablets per day. That is a strong opioid medication (oxycodone hydrochloride) usually prescribed for short-term relief from strong pain. Confusion is a known side effect in some patients. Whether or not the medication has played any part in the development of the plaintiff's purported memories, I find some of his claimed recollections that are said to have surfaced years after the event unreliable.

In 2019 the plaintiff commenced a separate negligence action against Williams River Steel and Woddo's Cranes Pty Ltd, claiming damages from both of them in respect of the crush injury to his left foot. That action commenced to be heard together with the plaintiff's claim against the defendant but it was settled after the plaintiff had given evidence. The sequential changes to the plaintiff's statements are consistent with an endeavour on his part to embellish his case against all defendants. The course of his cross examination is also to be explained on that basis, in my view.

In making the following findings I discount much of the detail given by the plaintiff, particularly in his later statements and oral evidence. I rely upon central elements of the plaintiff's narrative that have been present from his first statement and that correspond with objectively established features of the site and with probabilities that derive from surrounding events. I accept the following description of events from the plaintiff's first statement of 10 July 2023:

28 The beams were rigged as pairs for transport by the crane and chain slings were used. A first and second pair of beams were successfully lifted off the deck of the truck and moved by crane to the laydown area where they were placed on the ground. The securing chains were removed by Mr Gary Dries who was acting as the dogman for the crane driver.

29 A third set of beams were then chained up, moved into position, and then set down. After setting down Mr Dries directed me to remove the chains by calling out that "they're right".

30 As I approached to the pair of grounded beams, they were still chained up, but there was no tension on the chains, when suddenly and without warning, both beams became unstable and toppled over. As the beams toppled over, they crushed my lower left leg, foot, and ankle.

I accept the plaintiff's evidence that he had not received any training whilst in the employment of the defendant to work as a dogman. Nor had he received any such training anywhere else prior to 27 June 2016, or represented to the defendant that he was trained or qualified for the role. I accept that when he approached the I-beams to unsling them he did not appreciate that there was a risk that one of them could move and fall on him. He understood Gary Dries' words "They're right" as a direction to approach the grounded load and to disconnect the slings. He understood Gary Dries to be expressing an assessment that it was safe to do so. The defendant did not adduce

any evidence to refute that Gary Dries called out those words. I accept that they were spoken and that the plaintiff's understanding of them was reasonable.

I am satisfied that Gary Dries made no inspection of the steel beams on the ground, to check that they were stable, before he told the plaintiff, "They're right". As described by the plaintiff, that call came straight after the beams were laid down and the plaintiff makes no reference to a delay, or an approach by Gary Dries towards the load, during which such an inspection could have been made. It is clear that the two beams were not both flat on the ground. That could have been seen by anyone nearby and should have prompted Gary Dries to inspect them for stability before directing or allowing anyone to approach.

I accept the plaintiff's evidence in par 32 of his second statement, dated 22 November 2023, that he did not speak with the crane operator before the unloading job commenced. I do not accept that he exchanged hand signals with the crane operator before approaching to remove the chains or that he looked over to the cab of the crane, or saw the operator watching him. Those matters were first added to the defendant's narrative at pars 34 and 35 of his second statement.

From the second statement I accept the plaintiff's recollection that one of the beams was sitting on top of the other prior to it toppling and crushing his foot. Also from that statement, the following is a credible description of the aftermath:

37 Soon after I was hit by the beams the crane driver lifted the beams up and [off] me because they had not been unslung.

38 The crane operator lifted the steel beams off my leg and placed them on the ground beside me. Another worker [Jamal Richardson] kicked the beams over on their side, so they didn't fall on anyone else.

In his fourth statement dated 26 February 2026, the defendant asserted that two truckloads of steel came to the site at about 9:00 am on 27 June 2016 and that the crane also arrived that morning. The plaintiff said that while he was waiting for unloading to commence, David Orrick said he had been informed by Gary Dries that the plaintiff had experience as a dogman. The plaintiff told David Orrick that that was not so. The plaintiff said that unloading of the first truck proceeded and was completed, with Gary Dries acting as dogman, then removal of steel beams from the second truck commenced. None of that detail had ever previously been given over the nearly 10 years from the date of the accident up to 26 February 2026. I cannot place reliance upon any of it.

In the same statement the plaintiff said the steel I-beams that moved and caused him injury were the last pair to be moved off the second truck. Under cross examination he agreed with a proposition that three truck-loads of steel were brought to the site and that he was injured by an I-beam that was in the last pair to be unloaded from the third truck. It does not appear relevant to the issue of negligent breach of duty whether one or two trucks, or no trucks, were unloaded prior to the truck in question. I would not be able to make a finding on the balance of probabilities about the number of trucks, based upon the plaintiff's erratically variable evidence

on that point.

Also in the fourth statement the plaintiff asserted that David Orrick was not present during the unloading of the first two pairs of I-beams from the truck in question but “appeared” when the third pair were being unloaded. He said that the crane operator lifted the third pair and then held them suspended over the tray of the truck because David Orrick called out to Gary Dries that he wanted to speak to him. Gary Dries responded by walking over to David Orrick on the driveway near the laydown area, where a discussion took place between them. While that conversation was taking place, the crane operator continued to hold the final pair of I-beams suspended over the truck. David Orrick and Gary Dries argued over whether the beams should be laid on the slab. They both then “stormed off to the site office”, at which point the crane operator slewed the boom and lowered the pair of beams onto the driveway, where they sat with the chains still attached.

According to the plaintiff’s fourth statement at par 36, he and Jamal Richardson had been standing about 10 m away from the laydown area during the unloading process up to this point. The plaintiff marked their position on his sketch, near the north edge of the slab, about three quarters of the way back towards the site office. The fourth statement recounts that David Orrick and Gary Dries then emerged from the site office and the following took place:

49 [They] walked over toward where me and Jamal were standing. They were still arguing. While they were standing a metre or two away Gary yelled out to me: “Go unhook the chains”.

50 I said: “I don’t have a ticket. I’m not doing your job”.

51 Gary then said to me “You fucking don’t want to do nothing. I might as well just do everything myself”.

52 David and Gary then kept arguing about moving the steel off the driveway and on to the slab. David then turned to me and Jamal and said, “Just listen to him go on” with a frustrated look on his face and he then walked back towards the site office.

53 Gary turned to me and said again to me: “Go and unhook the chains.”

54 I decided to do what I was told as I didn’t want to lose the job. [...].

I do not accept any of the plaintiff’s evidence as summarised and extracted in the preceding two paragraphs of these reasons. There is no plausible reason why, if any of it reflects an actual recollection, the plaintiff would not have included it in one of his three previous statements. The second and third statements recapitulated his description of the occurrence, with some modifications indicating reconsideration of what he could remember. In oral evidence the plaintiff further embellished his narrative with a claim that, while David Orrick and Gary Dries were arguing, another truck carrying steel arrived and the driver urged the two men to bring their argument to an end so that his vehicle could be unloaded. That was not said in any of his written statements and, as a purported recollection first emerging 10 years after the incident, I regard it as unreliable.

The plaintiff said in oral evidence that the last pair of I-beams were sitting on the concrete driveway for 10 minutes before he approached to unhook the chains. He said that the 10 minutes were occupied by the argument between David Orrick and Gary Dries. I am not satisfied that there was any such argument, or a delay of 10 minutes for any other reason. On the account that I accept in pars 28-30 of the plaintiff's first statement, there was no appreciable delay between the I-beams being set down and Gary Dries making the call, "They're right", to which the plaintiff responded by stepping forward to release the chains.

Principles of liability

The plaintiff's claim is governed by Pt 5 of the Workers Compensation Act 1987 (NSW). Section 151 of Div 2 of Pt 5 provides that liability in respect of an injury to a worker that exists independently of the Act, which includes liability of the worker's employer in tort, is not affected by the Act except to the extent expressly provided therein. Other provisions of Div 2 stipulate procedural requirements for such an action. The defendant does not dispute that those provisions have been complied with. The sections of the Workers Compensation Act that modify workers' common law rights, so far as relevant to the present case, are sections 151E-151M and 151R contained in Div 3 of Pt 5. Those sections limit the categories and quantum of damages that may be recovered. The Workers Compensation Act does not modify the common law principles with respect to duty, breach of duty or causation: South Sydney Junior Rugby League Club Ltd v Gazis [2016] NSWCA 8 at [115] (Basten JA, Macfarlan and Simpson JJA agreeing).

Section 3B(1)(f) of the Civil Liability Act 2002 (NSW) provides that the Act does not apply to or in respect of an action such as the present, to which Div 3 of Pt 5 of the Workers Compensation Act applies.

The following statement from the judgment of the High Court in Czatyrko v Edith Cowan University (2005) 214 ALR 349; [2005] HCA 14 at [12] sufficiently states the duty owed by the defendant to the plaintiff for the purposes of the present case (citations omitted):

An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work.

Identification of the relevant risk of harm in the instant case is an essential pre-requisite to consideration of what precautions were required of the defendant to discharge his duty of care (the scope or content of the duty), leading to ascertainment of whether there was breach by reason of such steps not having been taken. Gummow J explained the necessity to identify relevant risk in Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330 at [59], as follows:

It is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be.

To the same effect, Gordon, Edelman and Gleeson JJ said this in Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited [2022] HCA 11 at [106] (most citations omitted):

The proper assessment of the alleged breach of duty depends on "the correct identification of the relevant risk of injury" [citing Roads and Traffic Authority of NSW v Dederer], because it is only then that an assessment can take place of what a reasonable response to that risk would be. The enquiry is concerned with determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks damages. The characterisation of the relevant risk should not obscure the true source of the potential injury.

Risk, scope of duty and breach of duty in the present case

The potential for the plaintiff to suffer the crush injury to his left foot, for which he now claims damages, arose from the placement by crane of very heavy steel I-beams on the driveway surface where any worker approaching closely could be injured if the beams should be unstable and should move after the lifting chains became slack and ceased to restrain them. Reasonable precautions to avoid the realisation of that risk included at least the following:

Adoption of a system of work whereby a qualified and licensed dogman would inspect the load from a safe position immediately after its placement on the ground and before anyone else would be permitted to come near. A safe position would be at either end of the beams, as they obviously could not move longitudinally. It would also be safe to inspect from a few metres away at any point along the length of the beams because they were not of a shape that would permit them to roll more than a metre at most.

The inspection by a qualified dogman would reveal whether both beams were lying safely in contact with the driveway surface or, if one beam was lying on top of the other as occurred here, whether the beams were nevertheless in a stable attitude.

If the inspection revealed instability the beams could be raised again and resettled. If necessary the load could be manipulated by the crane as it was lowered, to ensure that both beams would be deposited in contact with the driveway surface.

A safe system would require that all other employees, such as the plaintiff, would be directed by Gary Dries, who was both the foreman and dogman, not to approach the beams until he was satisfied that they were stable and until he, and no one else, had disconnected the chains.

To allow for inattention and inadvertence of employees on the site, a safe system would require either that the lay down area be marked off with a highly visible barrier, such as tape stretched between upright posts, or that a person other than the dogman be appointed to the role of supervisor of the operation to keep a lookout for other employees who might approach the danger area and to warn them away. That function could not be satisfactorily fulfilled by the dogman himself as he would be occupied with the load and the crane.

Every one of those reasonable precautions was in this case omitted. The breach of duty went beyond omission. The person engaged by the defendant to supervise, Gary Dries, positively directed the plaintiff to approach the load on the ground without it having first been checked for stability. The direction was given to an employee whom the supervisor, and through him the employer, knew had no training as a dogman and would not have the skill to assess danger arising from the attitude of the steel beams. I am satisfied that the failure to take the precautions listed above and Gary Dries' direction to the plaintiff constituted a negligent breach of the defendant's duty of care.

The breach of duty caused the plaintiff's injury. If reasonable care had been exercised by the defendant, in the respects enumerated above, the plaintiff would not have approached the steel beams in their unstable condition and would not have been in a position where the upper beam could topple onto his foot and crush it.

No contributory negligence

I do not accept that the plaintiff's injuries were contributed to by his own negligence in approaching the I-beams as he did. The facts and decision in Czatyrko v Edith Cowan University provide an illustration of the application of principle to a case such as the present. There, the appellant was loading a truck with boxes as directed by his employer. He and a fellow employee worked together using a mobile platform that could be brought alongside the truck and raised and lowered. Boxes were placed on the platform in its lowered position, lifted up to the level of the truck and transferred onto the tray of the truck. As the boxes were stacked on the vehicle the remaining space on which the employee could stand was reduced. The second employee lowered the platform for the purpose of placing on it more boxes to be lifted. The appellant stepped backwards not realising that the platform had been lowered. He stepped into thin air and fell heavily.

The Court rejected the proposition that "the appellant's injuries were caused or contributed to by his own negligence in failing to look behind him before stepping backwards". The Court's analysis at [18] was as follows:

In the present case, the appellant did no doubt omit to take a simple precaution of looking to see whether the platform was raised before stepping on to it, and this omission was a cause of his injuries. But in acting as he did, the appellant did not disobey any direction or warning from the respondent [employer]. No directions or warnings of any kind were given by the respondent in relation to the use of the platform. Furthermore, both the appellant and Mr Fendick were under

pressure from their supervisor to complete the job promptly. The work was repetitive. In all of these circumstances it presented a fertile field for inadvertence. The onus of proving contributory negligence lay upon the respondent. This it failed to do in this case. The appellant's attempt to step on to the platform in the mistaken belief that it was still raised, and in an effort to finish loading the truck, was the product of nothing more than "mere inadvertence, inattention or misjudgment". It was not a remote risk that the appellant might step back without looking behind him. His actions were neither deliberate, intentional, nor in disregard of a direction or order from the respondent. No finding of contributory negligence should have been made.

There are obvious differences between those facts and the present. On the one hand the "field for inadvertence" was less "fertile" here, in that the plaintiff's approach to the load of steel beams was not part of a repetitive cycle and there is no suggestion that he was under pressure of time. On the other hand, the present plaintiff placed of himself in a position of danger by approaching the load in obedience to an instruction from his immediate supervisor, a far stronger negation of contributory negligence than mere absence of disobedience. Having regard to the way the principles were applied in Czatyrko v Edith Cowan University, their application to the circumstances of this case leads me to the conclusion that the defendant has not discharged its burden of proving contributory negligence on the part of the plaintiff, in any degree.

The plaintiff's injuries and physical and psychiatric complications

The plaintiff was born in February 1984 and was 32 at the date of the accident. He was immediately taken to Hornsby Hospital and later in the day he was admitted to John Hunter Hospital in Newcastle. On 30 June 2016 the plaintiff was admitted to Maitland Hospital for the purpose of surgery being performed. Radiographic studies showed that four metatarsals and three cuneiform bones in his left foot had been fractured by the crushing force of the steel beam. Joints between the bones and associated ligaments were damaged. On 1 July 2016 he underwent surgery at Maitland for the repair and fixation of the fractures with plates and screws. Three days later he was discharged. From 6 October 2016, 3 ½ months after the accident, the plaintiff commenced physiotherapy.

By January 2017 the plaintiff was experiencing neuropathic pain, that is, pain caused by damage to nerves resulting in painful sensation not related to external stimuli. The sensation of pain was experienced in the left lower limb and was chronic. The diagnosis in January 2017 was complex regional pain syndrome. In late April and early May 2017 lumbar sympathectomy procedures were carried out on the plaintiff on three occasions. The procedure was by minimally invasive intervention to block or remove specific sympathetic nerves in the lower back, to improve blood flow and reduce severe pain in the left leg and foot.

On 28 June 2017 a second operation was performed on the plaintiff's left foot to remove the metalwork and to carry out joint fusion and a bone graft. The plaintiff was unable to weight bear for more than a month. An infection of the surgical wounds required washout, debridement and re-suturing in early August 2017. During the second half of 2017 the plaintiff experienced ankle pain and instability and was suffering left-sided leg pain and low back pain. Further surgery was

carried out on 7 February 2018, by arthroscopy, to remove some bone tissue in the ankle. Instability of the ankle joint and pain in the left foot and ankle continued after that operation.

By late 2018 the plaintiff was taking prescribed medication for depression and he consulted with a psychiatrist in early 2019. He suffered falls during 2019 caused by the instability of his left foot and ankle. The falls resulted in additional slight consequential injuries. The plaintiff was certified unfit to return to work throughout this period and into 2020, as a result of his complex regional pain syndrome.

On 3 July 2020 the plaintiff had a further operation on his left foot to remove the remaining metalwork and some bone tissue and to carry out a bone graft. Left foot and ankle instability, repeated falls and lower back pain continued to trouble the plaintiff throughout 2020. There is in evidence a medical opinion to the effect that the back pain was contributed to by irregular gait, resulting from the injury to the left foot. On 19 April 2021 the plaintiff had a further arthroscopic operation to remove bone tissue in the left ankle. From 2021 the plaintiff was consulting a psychiatrist every six months to review and manage symptoms of depression, anxiety and post traumatic stress disorder (PTSD).

On 21 March 2022 a left ankle arthroscopy and arthrodesis operation was performed, to fuse the bones of the ankle to achieve a solid union of the joint. Subsequent to the operation an MRI of the plaintiff's lumbar spine revealed minor degenerative disc disease at L3/4, from which the plaintiff experienced severe pain radiating into his lower legs. From mid-2021 he was prescribed cannabidiol (CBD) for pain management, initially with good effect. One year later it was discontinued due to it having caused acute psychiatric symptoms.

By early 2023 the long course of surgical procedures, chronic pain, unsuccessful or incompletely successful treatments, physical disability and psychiatric disturbances was causing the plaintiff to be ill tempered and irritable with his partner and her child. He also became antisocial and self-conscious about his physical limitations. The plaintiff's memory and powers of concentration diminished.

On 26 August 2024 a surgical revision of the left ankle fusion was undertaken, with another bone graft and fixing of an anterior fusion plate. The plaintiff was unable to weight bear on the left ankle for approximately eight weeks. He experienced considerable pain in the left foot when he again attempted to mobilise. In February 2025 further surgery was performed to replace one of the screws in the fixing plate, which was impinging on a nerve. The plaintiff had to use a knee scooter to mobilise during the first half of 2025.

On 27 October 2025 the plaintiff had another operation on his ankle to remove a bone graft and to re-articulate the ankle joint. His generalised pain from the left lower limb has continued to the present day. He has been advised that there is no more that can be done, orthopaedically, to improve the function of the left foot and ankle. Nor are there any further options for treatment of his continuing chronic pain.

To the date of the trial the plaintiff has continued to experience the psychological and social disabilities referred to at [42] above. He has continued to see a psychiatrist at six monthly intervals. He remains depressed by his situation. The plaintiff's ability to drive a motor vehicle has been greatly reduced by the injury. He is only able to drive a car with automatic transmission. Pain that he experiences from being seated while driving limits him to a range of about 20 minutes.

The plaintiff has undertaken very little physical activity since the accident and appears not to have endeavoured to maintain upper body fitness, although upper body exercise would be feasible notwithstanding his left foot and ankle limitations. The consequence of the inactivity has been very significant weight gain. Prior to the accident his weight varied between 92 and 95 kgs. At one point between the date of the accident and the date of the trial he had put on nearly 50 kgs, to a weight of 140 kgs. Self-evidently, this massive weight gain would exacerbate the load on his injured foot and would impair recovery and resolution of pain. I infer that the plaintiff's psychological and psychiatric responses to the injury have limited his will to exercise within his limitations and to control his weight gain.

Plaintiff's work and earnings history

The plaintiff completed his secondary schooling at Jesmond/Callaghan High School in the Newcastle area in late 2002, at age 18. In about 1998, at age 14, the plaintiff was diagnosed with an intellectual disability. He struggled with schoolwork and he stated at trial that he still has difficulty reading, at age 42. Psychological testing in September 2023 showed that his reasoning ability is "below average of trade and all work groups and very low compared to the unemployed population".

The plaintiff had commenced a chef apprenticeship while still at school. That required classroom study at Hamilton TAFE College and work experience in restaurants. The plaintiff continued with the apprenticeship program for three and half years. With only one six-month module remaining, the plaintiff quit the apprenticeship program. The evidence does not make clear the extent to which his schooling overlapped with the apprenticeship and hence there is uncertainty about when the latter came to an end. So far as I can ascertain, he left the apprenticeship in about late 2005 when he was approaching 22 years of age. He then worked for two years as a sous chef, through to about the end of 2007 (aged nearly 24). The sous chef work involved long hours and pressure, which did not suit the plaintiff and caused him to leave the restaurant business altogether.

In providing a history to the defendant's vocational expert, the plaintiff gave a different account of his activities after ending the apprenticeship. He said that he did not work for a year and "surfed every day and hung out with his mates". It is not possible to reconcile the dates and events of his employment history as provided to the vocational assessor with those he provided in his evidentiary statements and oral evidence.

Commencing in 2008 the plaintiff worked “on and off for several years” in a garden maintenance business run by his brother. He worked either full-time or part-time “depending on the needs of the business and [his] other interests”. The plaintiff’s evidence is imprecise about the duration of that work but I infer that the “several years” ran from about the beginning of 2008 until about the end of 2012, that is, from the age of 24 until the plaintiff was almost 29.

According to the plaintiff’s statements he also undertook labouring work during that period of “several years”, through employment with Haydon Recruitment and other agencies. He was assigned to labouring roles with various employers in the Newcastle area. Also in the same period he enrolled at Belmont TAFE College in a course of study for a Certificate II in Engineering and Metal Fabrication. The plaintiff says that he had an ambition to own his own custom metal fabrication business producing bull bars, towbars and other car modification parts. He attained the Certificate II and thereby qualified as a Level 2 welder, but without qualification in TIG (Tungsten Inert Gas) welding. Level 2 is the first grade of skill above entry level. The plaintiff says that he subsequently taught himself TIG welding.

In one of the unskilled jobs to which the plaintiff was assigned by Haydon Recruitment, he was required to perform welding of steel cages for the reinforcement of precast concrete elements. In another assignment he was employed as a fabricator but he suffered a severe burn to his right leg early in that employment and was unable to work for the next seven months. Other jobs during that period involved concreting and labouring in factories and on building sites.

The plaintiff says that he did not work for 12 months during 2013 after he was diagnosed with cancerous polyps in his stomach. The polyps were surgically removed. There is no evidence of recurrence of the disorder, or of ongoing symptoms. Upon recovery from the stomach condition, the plaintiff returned to labouring, which he performed as a self-employed contractor. That appears to have continued for about a year, during 2014 (when the plaintiff was aged 30). In 2015 he had two weeks work as a full-time chef in Maitland but he left of his own accord and appears not to have worked again that year until he commenced with the defendant from December 2015.

Total loss of earning capacity as a result of the accident

The plaintiff accepts that s 151G of the Workers Compensation Act limits the categories of damages that he may be awarded to past economic loss due to loss of earnings and future economic loss due to deprivation of earning capacity, including loss of employer funded superannuation benefits.

The plaintiff has not returned to any form of employment since the accident. The ongoing chronic pain and instability in his left foot and ankle have prohibited a return to labouring or any other physical work of the kind that would require mobility. For a number of reasons he has not been able to transition to a more sedentary occupation. He can no longer sit for prolonged periods due to back pain caused by soft tissue damage in his lumbar spine, associated with irregular gait. He is not able to wear a shoe on his left foot, which is an impediment to employability in any retail position. The plaintiff’s low intellectual capacity, poor educational

standard, marginal literacy and lack of capacity for further vocational learning prevent him from being able to acquire the skills required for jobs that are not physically demanding. The plaintiff's lack of computer skills add to his lack of versatility with respect to employment. He has not been able to take up work of a less physical nature than the labouring and other roles he has previously filled.

Further, I am satisfied that the plaintiff's long-term immobility, his chronic pain and his numerous surgical interventions have led to his diagnosed mental disorders of depression and PTSD. Associated with those disorders are the plaintiff's poor motivation, low mood, anxiety, irritability and other behavioural disturbances, which would further detract from his employability.

All the above considerations apply equally with respect to the plaintiff's past loss of earnings and his future loss of capacity to work. The injury and its lasting effects on the plaintiff have rendered him permanently unemployable. Theoretically, he could perform some very limited, nonphysical tasks in a non-commercial and un-demanding environment, for up to 12 hours per week spread over three non-consecutive days. However, there is no evidence that any such position is available to him or likely to become available. For practical purposes the plaintiff's earning capacity has been entirely lost.

Hypothetical employment from 1 July 2016, but for the accident

Counsel's closing written submissions on behalf of the plaintiff included the following:

[The] Court should find according to the balance of probabilities that the plaintiff had matured and moved on from his troubled teenage years and early 20s. He had [...] pivoted in about 2012 when aged in his late 20s and commenced TAFE studies to become a welder. [...] he trained himself in TIG welding and he obtained some work as a welder/fabricator.

I do not accept that any "pivot" is exhibited in the plaintiff's employment record. On his evidence he obtained his Certificate II welding qualification somewhere in the period 2008-2012. Up to 2012 he had used his welding skill in two separate short-term employments that he obtained through a recruitment agency. I put aside the seven months of unemployment while he recovered from a burn injury and the year 2013 when he did not work after he was diagnosed with cancerous stomach polyps. It is not clear whether the whole of that year of unemployment was attributable to the disorder but I make the assumption, favourable to the plaintiff, that that was the case. However, when he resumed working in 2014 it was in the capacity of a contract labourer rather than using his welding ability. Then, in 2015, he went back to the restaurant industry for two weeks and otherwise was unemployed until he took up labouring, again, with the defendant at the end of the year.

In my assessment the whole record of the plaintiff's working life from when he left school is one of inconsistency, involving changes from one occupation to another, failure to complete formal qualification as a chef, failure to pursue and maintain employment utilising such skills as he developed (as a chef and as a welder) and, for extended periods, having no employment or only part time and/or intermittent employment. Periods of unemployment and of part time employment were by his own choice.

It was submitted on behalf of the plaintiff that he had "consistently performed work as a cook and then as a labourer, except for a career break when transitioning between the two, and when unable to work due to injury". I do not accept that as an accurate analysis of the plaintiff's changes of occupation and periods of unemployment. He had long periods of unemployment and of part time and intermittent employment when he was not affected by illness or injury. His only period of consistency in working as a cook was for two years in his early 20s. It is not correct, as the plaintiff's counsel submitted, that the plaintiff worked "increasingly hard and across long hours". I accept that he worked long hours in the defendant's employment at Dubbo over 12 weeks but that appears to have been a closed and isolated period.

The plaintiff's counsel submitted in closing that, but for the accident, he would have sought to maintain full-time employment with the defendant "until about 2018", at which time he would either have commenced his own business as a metal fabricator or sought full-time employment in that capacity. I consider it reasonable to accept that the plaintiff would have continued as a labourer for another two years after mid 2016 but I am not satisfied on the balance of probabilities that he would have utilised his earning capacity on a full-time continuous basis, either as a labourer or subsequently in the higher skilled and higher paid field of welding.

The defendant submits that the extent to which the plaintiff would have maintained remunerative employment, but for the accident, is so uncertain that the Court should award no more than a buffer against the mere possibility that he might have derived some earnings if he had not been injured. I consider that approach too extreme as a response to the weaknesses in the plaintiff's case about what work he might have undertaken from 1 July 2016 onwards. In my view the most reasonable basis for assessing the value of his lost earning capacity is to make a calculation based upon the hypothetical path of employment projected by his counsel and then to apply a significant discount, over and above the usual allowance of 15% for vicissitudes. I consider that an additional 15% would be appropriate, in recognition of the high probability that the plaintiff would have continued his past course of frequent changes of employment, reverting at times to unskilled work at rates lower than what would be paid to a Level 2 welder and with significant intervals of unemployment.

Hypothetical earnings from 1 July 2016, but for the accident

As stated in Husher v Husher [1999] HCA 47 at [17], the Court is concerned to establish what financial loss has been occasioned by impairment of the plaintiff's earning capacity. To that end, an assessment must be made of what work the plaintiff would have undertaken and what income that work would have generated, but for the injury. That assessment is required both in respect of the quantification of lost earnings up to the date of judgment and in respect of future economic loss.

The plaintiff gave evidence that for the first three weeks of his employment with the defendant he was paid at the rate of $20 per hour. Thereafter the rate was $25 per hour. He said that the first job he worked on was at Dubbo, where the hours were long, as much as 17 hours in a day. The plaintiff said he remained on the Dubbo job for about 12 weeks, to about the end of February 2016, and that while he was there he sometimes worked six days in a week. The plaintiff's evidence of these numbers was imprecise, to say the least. At best the evidence would support an estimate of, on average, 72 hours per week for 12 weeks. Applying the $25 per hour rate, that would amount to a gross pay of about $21,600.

The plaintiff said that he then worked for the defendant on various jobs around Newcastle, Lake Macquarie, the Lower Hunter and Central Coast during the four months immediately preceding the accident (March to June). The number of days per week worked over those months was not made clear in the evidence. The plaintiff said that when working close to Newcastle he did not work such long hours as had been worked on the Dubbo job. The tenor of his evidence is that he did not at all times work full weeks. The plaintiff gave evidence that he worked on a contract basis, rendering invoices to the defendant, although no invoices were tendered. On a generous view, it may be inferred that his gross earnings from the beginning of March up to the date of the accident would have been in the order of $16,000, on the basis that he worked 16 weeks, each of 40 hours.

Those calculations suggest that the plaintiff's earnings as a labourer working for the defendant from December 2015 were, on average, in the order of $1300 per week gross. The plaintiff lodged an income tax return for the year ended 30 June 2016 declaring taxable income of only $5675. His evidence to explain the discrepancy between that return and his evidence before me was unsatisfactory. I find on the balance of probabilities that the explanation is that he under declared his income to the Commission of Taxation. I accept that the plaintiff's true earnings from the defendant at the time of the accident were, on average, up to about $1300 per week gross.

The plaintiff's tax return for the year ended 30 June 2015 discloses a taxable income of $39,221. That income would have been derived from his work as a labourer in the second half of 2014 and his two weeks work in a restaurant at Maitland in the first half of 2015: see [53] above.

Subject to a substantial discount for vicissitudes and the likely intermittency of any paid work that the plaintiff obtained, I will proceed with the calculation of past loss of earnings on the basis that the plaintiff would have continued working for the defendant for a further two years, as

submitted on his behalf, at a weekly earnings rate of approximately $1300 gross. I will assume weekly earnings as a full-time Level 2 welder from 1 July 2018 onwards, utilising the figures identified by the plaintiff's vocational expert, Mr Dominic Manca. Mr Manca drew the following figures from reports of the Australian Bureau of Statistics:

Year

Average weekly gross earnings

FY19

1501.60

FY20

1508.90

FY21

1526.90

FY22

1527.20

FY23

1651.70

FY24

1705.70

FY25

1750.00

With respect to the last two entries, Mr Manca says that the weekly rate of $1705.70 relates to the period 16 October 2023 to 15 May 2025, which approximates to the financial years ended 30 June 2024 and 30 June 2025. Confusingly, he also gives a weekly rate of $1796.50 for "2024/25". I have adopted the $1705.70 for FY24 and the midpoint between that figure and $1796.50, that is, $1750, for FY25. In the absence of any other figure for the period 1 July 2025 to the date of this judgment, I calculate the plaintiff's lost earnings in that period at Mr Manca's rate of $1796.50 per week.

Mr Manca provided figures for weekly rates advertised for vacant positions for welders between 16 October 2023 and 15 May 2025, namely, in the range $1679-$2432. He similarly provided advertised rates for the period "2024/25", namely, $1960-$2811. I do not accept that the rates from which the plaintiff's damages are to be calculated should be increased by reference to the range of advertised rates.

For a worker with the plaintiff's characteristics, I consider the average rates published by Australian Bureau of Statistics to be more appropriate. On his own case, the plaintiff is of low intellect, has limited literacy and has had very little experience is an employed welder. He would have competed poorly in seeking a position as a Level 2 welder at any time from 1 July 2018 onwards. On the employment path submitted by his counsel as the most likely, any application by the plaintiff for a job as a welder would come on the back of two years as a labourer (FY17 and FY18), with prior to that a very patchy record of unskilled and semiskilled work

I take into account the following figures in calculating the plaintiff's after tax loss of income from the date of the accident to the date of judgment:

Year

Gross weekly

Gross annual

Net annual

FY17

1300.00

67,830.10

54,238.25

FY18

1300.00

67,830.10

54,238.25

FY19

1501.60

78,350.48

61,339.73

FY20

1508.90

78,731,38

61,596.81

FY21

1526.90

79,670,59

63,310.84

FY22

1527.20

79,686.24

63,321.29

FY23

1651.70

86,182.40

67,706.25

FY24

1705.70

89,000.01

69,608.01

FY25

1750.00

91,309.75

73,129.05

FY26

1796.50

93,735.98

74,827.48

1 Jul – 1 Sep 26

1796.50

16,168.50

12,631.50

TOTAL

$655,947.46

I take into account the following figures for annual losses of superannuation contributions, up to the date of judgment:

Annual super

FY17 (9.5% of gross)

6443.85

FY18 (9.5%)

6443.85

FY19 (9.5%)

7443.29

FY20 (9.5%)

7479.48

FY21 (9.5%)

7568.70

FY22 (10%)

7968.62

FY23 (10.5%)

9049.15

FY24 (11%)

9790.00

FY25 (11.5%)

10500.62

FY26 (12%)

11248.31

1 Jul – 1 Sep 26 (12%)

1940.22

TOTAL

$85,876.09

The plaintiff's past loss of net earnings and employer paid contributions is therefore $741,823.55, before applying the significant discount that I consider necessary to allow for the likelihood that the plaintiff's employment after June 2016, had he not suffered the injury, would likely have been intermittent and irregular and that at times he would have accepted employment at a lower skill level and a lower rate of pay than would apply to a Level 2 welder.

Future economic loss must be calculated from the starting point of potential weekly earnings of $1,796.60 before tax, as a Level 2 welder. The after-tax earnings would be $1434.11 per week. Superannuation at 12% of gross income would be $172.09 per week. The total of the two figures is $1,606.20. In accordance with s 151J(2) of the Workers Compensation Act, impairment of earning capacity must be assessed by reference to the 5% discount tables. Section 151IA requires the Court to assume that the plaintiff would have retired at age 67 years, meaning that he had 25 years of working life remaining. The multiplier for 25 years in the 5% tables is 753.6.

In my view, having regard to the high degree of uncertainty about the extent to which the plaintiff would have actually sought and secured full-time work, either between the date of the accident on the date of this judgment or in the future, the usual discount for vicissitudes of 15% should be varied by adding an additional 15%, giving rise to a total factor of 30% to be applied. On that basis the economic loss figures are as follows:

Total past loss of earnings ($741,823.55 from [75]) less 30%

519,276.56

Total future economic loss: 753.6 x $1,606.20 x .7

847,302.62

Agreed figure for Fox v Wood damages

52,663.40

Subtotal

1,419,242.58

Less weekly payments of compensation already made, to be deducted pursuant to s 151A(1)(b) of the Workers Compensation Act

388,499.91

NET TOTAL

$1,030,742.67

Orders

The orders of the Court are as follows:

Verdict and judgment for the plaintiff in the sum of $1,030,742.67.

By 8 September 2026 the parties are to provide to the Associate to Fagan J either a minute of an agreed order with respect to costs or written submissions, from each party, as to the appropriate costs order.

Direct that any issue as to the proposed costs order be resolved in chambers on the papers unless either party requests a hearing.

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Decision last updated:

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