

AUSTRALIA / JUDGMENT

Radovanovic v Workers Compensation Nominal Insurer

[2026] NSWDC 314**COURT**

District Court

DECIDED

31 August 2026

BEFORE

Acting Judge Levy SC

CASE / FILE NUMBER

2025/00146489

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Source record**District Court****New South Wales****Medium Neutral Citation:** Radovanovic v Workers Compensation Nominal Insurer [2026] NSWDC 314**Hearing dates:** 2, 3 June, 28 July 2026**Date of orders:** 31 August 2026**Decision date:** 31 August 2026**Jurisdiction:** Civil**Before:** Acting Judge Levy SC

Decision: (1) Plaintiff's damages are assessed in the sum of \$871,284 including past weekly workers' compensation payments of \$555,845.70;
(2) Judgment for plaintiff in net sum of \$315,438.30 after offset of past weekly workers' compensation payments;
(3) The defendant is to pay the plaintiff's costs of the proceedings as agreed or assessed;
(4) The exhibits may be returned;
(5) Leave to apply for further or other orders if required.

Catchwords: TORTS – work injury damages claim
DAMAGES – compensatory damages assessed at \$871,284 – judgment for plaintiff in the assessed net sum of \$315,438.30 after offset of past weekly workers' compensation payments of \$555,845.70

Legislation Cited: Workers Compensation Act 1987 (NSW), s 66, s 151D, s 151H and s 151L, and Div 3 of Part 5
Workplace Injury Management and Workers Compensation Act 1998 (NSW)
Uniform Civil Procedure Rules 2005 (NSW), r 42.1, and Schedule 7, clauses 3(1)(e) and 3(1)(f)

Cases Cited:	Fox v Wood (1981) 148 CLR 438; [1981] HCA 41 Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44 Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305 Mason v Demasi [2009] NSWCA 227 Najdovski v Crnojlovic [2008] NSWCA 175 Purkess v Crittenden (1965) 114 CLR 164 Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; [1986] HCA 1 Watts v Rake (1960) 108 CLR 158
Category:	Principal judgment
Parties:	
Plaintiff:	Zlatko Radovanovic
Defendant:	Workers Compensation Nominal Insurer
Representation:	
Counsel:	Mr L Morgan (Plaintiff) Ms O Dinkha (Defendant)
Solicitors:	Martin Bell & Co (Plaintiff) Turks Legal (Defendant)
File Number(s):	2025/00146489
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JUDGMENT

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Introduction

On Saturday 14 January 2017, Mr Zlatko Radovanovic (“the plaintiff”), a gyprock plasterer now aged 66 years and 10 months, was injured in a work accident when aged 57 years when working under the direction of Corporate Interfirm Pty Ltd (“the company”). His injury occurred in the course of him following the site foreman’s instructions to move some gyprocking materials along with some related tools and equipment from Level 6 to Level 20 of a multi-storey building site under renovation in Barlow Street at Haymarket, NSW.

In carrying out those instructions, without warning, the plaintiff incurred multiple jarring and jolting injuries whilst standing in a goods lift which had malfunctioned between floors. In that incident, the plaintiff claims he sustained injuries to his neck, his left shoulder and left arm, and to his upper and lower back. He has not worked since incurring those injuries and he has been in continuing receipt of his entitlements to weekly payments of workers’ compensation.

On 9 October 2024, the company for which the plaintiff had been working became deregistered. As a consequence, he brings his present claim against a scheme-nominated insurer for the assessment of his statutory entitlement to damages.

Initially, the case commenced as a contest on all issues. However, on the second day of the hearing the defendant conceded there had been a relevant breach of the duty of care owed to the plaintiff.

Following that concession, the matter then proceeded as an assessment of damages where a principal matter in issue was the credibility and reliability of the plaintiff’s evidence.

The proceedings are governed by the common law of negligence as modified by Part 5 the Workers Compensation Act 1987 (NSW) (the WC Act) and the Workplace Injury Management and Workers Compensation Act 1998 (NSW) (the WIM Act).

Procedural background

On 2 February 2017, the plaintiff lodged a workers' compensation claim in respect of his injuries. Necessarily, that claim had to proceed in accordance with the complex statutory scheme governing such claims.

On 9 February 2017 the workers' compensation insurer accepted the plaintiff's workers' compensation claim and commenced paying him his statutory entitlements to weekly workers' compensation benefits.

On or about 23 October 2018, following a series of medical assessments, the plaintiff made a further claim in respect of injury related impairment of his cervical spine, his thoracic and lumbar spine, and his left upper extremity.

In January 2019 the plaintiff made an additional claim for compensation in respect of those matters by commencing proceedings in the Personal Injury Commission of New South Wales to seek lump sum compensation pursuant to s 66 of the WC Act.

On 10 March 2020, pursuant to s 151H of the WC Act, the plaintiff obtained the benefit of an order declaring that he had incurred a 16 per cent whole person impairment where the impairment threshold for compensation was 15 per cent. In accordance with that order he was then paid his statutory entitlement to s 66 lump sum compensation for his assessed impairment.

On 20 June 2024 the Personal Injury Commission reserved the plaintiff's pending claim for damages.

On 9 October 2024, due to the deregistration of the company for which the plaintiff had been working when injured, he was obliged to make his remaining claim for damages against the present defendant, the Workers' Compensation Nominal Insurer ("the insurer").

On 15 April 2025, without prior leave from a court, the plaintiff commenced these proceedings claiming modified common law work injury damages against the insurer in light of the deregistration of the company. In response, the insurer filed a defence which claimed there was a limitation bar which prevented the continuation of the proceedings.

On 25 November 2025 another Judge of this Court heard the plaintiff's interlocutory application for relief regarding the defendant's plea of a limitation bar.

At that time, after considering relevant factors which included: the nature of the claim, a detailed chronology, the delay incurred in commencing the proceedings having regard to the procedural context and requirements of the scheme, and after noting the absence of any material identifying a relevant prejudice to the defendant, an order was made by that Judge granting leave nunc pro tunc for the plaintiff to maintain the present proceedings: s 151D(2) of WC Act.

At the substantive hearing the case was opened on the basis that the parties were at issue on all matters. However, on the second day the defendant conceded that the incident claimed by the plaintiff had in fact occurred, and that it had in fact resulted in him incurring injuries: T81.46.

At that time the defendant also admitted there had been a breach of the relevant duty of care owed to the plaintiff. The remainder of the case therefore proceeded as a contest on the issues of causation of harm and the assessment of the claim for damages.

The parties were at substantial issue on the appropriate measure of damages awardable to the plaintiff. In support of his claim, the plaintiff relied on a schedule of damages in the amount of \$1,095,465. In support of its position, the defendant ultimately relied upon a contrasting schedule of damages in the amount of \$147,969.

My reasons for assessing the plaintiff's damages in the amount of \$871,284 before offset of past weekly workers' compensation payments already received now follow.

Evidence overview

The plaintiff was the only witness who was called to give oral evidence: T11 – T143. He did so with the assistance of a Serbian interpreter. He was extensively cross-examined. The plaintiff's documentary exhibits comprised an extensive range of materials within the two volumes of Exhibit "A", pp 1 – 508. The defendant's exhibits were tendered in the series "1" to "6".

The parties presented detailed written submissions and spoke to those submissions. Reference will be made to relevant aspects of those materials where it becomes relevant to do so.

Issues

Having reviewed the pleadings as overtaken by the admissions made at the hearing, having reviewed the evidence and the submissions of the parties, and having regard to the plaintiff's claim of entitlement to modified common law damages as provided by the restricted scheme under which that claim must proceed, I consider that the relevant issues to be determined in this case may be identified in the following sequence:

The credibility and the reliability of the plaintiff's factual testimony;

The credibility and reliability of expert evidence;

Findings on the plaintiff's accident related injuries and disabilities;

Findings on the plaintiff's claim of past loss of earning capacity;

Findings on the plaintiff's claim of past loss of superannuation;

Findings on the plaintiff's claim of future loss of earning capacity;

Findings on the plaintiff's claim of future loss of superannuation;

Fox v Wood damages;

The defendant's resistance to the plaintiff's claim for economic damages was based first, on the claim of a causation question, namely whether the plaintiff had pre-existing or subsequent injuries and disabilities which should influence an assessment of his entitlement to damages and secondly, on the question of whether the plaintiff was an employee of the company, or an independent contractor.

Those issues will be addressed by particular findings after outlining the facts not in dispute and resolving disputed issues in the context of the submissions of the parties.

The uncontroversial aspects of the plaintiff's history are summarised as follows.

Facts not in dispute

On Saturday 14 January 2017 the plaintiff was injured at his workplace within a high rise building under renovation when an internal goods lift malfunctioned whilst carrying him, his tools, and his related equipment, between several floors of the building.

In those events, the lift carrying the plaintiff dropped an uncertain distance before coming to a halt, causing him to fall and incur a series of jolting injuries to his neck, his left arm and left shoulder, and to his back.

At the hearing the plaintiff was aged 65 years and 10 months. On leaving school in the former Croatia at age 19 years, he worked in the meat industry, as did other members of his family. In 1998 he arrived in Australia from Serbia with his wife and two children to seek a better life and he quickly found work.

Between 1999 and 2017 the plaintiff obtained regular work in the building industry and acquired on the job skills and experience as a gyprocker for various employers, sometimes working for wages, and at other times by using his ABN. His economic history shows that he lodged income tax returns declaring his income from those endeavours.

The plaintiff's work as a gyprocker involved heavy manual work in manhandling, manipulating, and fitting 80kg sheets of gyprock. Prior to the injuries which are the subject of these proceedings, despite having some underlying health issues, he was reasonably fit and well. He had no particular problems in carrying out the demanding physical tasks required of him in that work.

In 2016, the plaintiff commenced carrying out gyprocking work for the now deregistered company. His work involved the refitting of interiors of premises with gyprock sheeting in a building undergoing renovation in the Haymarket district of the Sydney CBD. In that work, his immediate supervisor was Mr Albert Rumera, from whom he took his day to day working orders.

Whilst on that job, the plaintiff carried out work in question variously, over 5, 6, and at times 7 days per week as directed. He was paid for that work at the flat gross hourly rate of \$50. The company paid the plaintiff his earnings from that work directly into his bank account.

The plaintiff sustained his injuries in the following sequence.

On Friday 13 January 2017, the day before the plaintiff was injured, he was required to use the construction lift at the premises to move his construction tools and equipment from Level 6 to Level 20. In those events, whilst in the lift, he noticed the lift had malfunctioned in an irregular manner on a number of occasions by unexpectedly stopping suddenly. He reported those malfunctions to his site foreman on duty that day, Mr Dalibor Stancev. At the end of his shift on that day, he observed that notices had been posted within the premises advising that the lift in question had been closed off from use.

On Saturday 14 January 2017, the day of the plaintiff's injury, his foreman instructed him to move his tools and equipment from Level 6 to Level 20, and to then continue with his gyprocking work at that level. The plaintiff then proceeded to do so, using the same lift in which he had experienced a malfunction the previous day. He did so on the understanding that the operational problem he had experienced with that lift the day before had been rectified.

In those events, as the moving lift approached Level 20 with the plaintiff on board, at about Level 18, "it dropped a certain distance" which he was unable to estimate, and it then stopped. He then attempted to open the lift door. The lift then moved again and it suddenly "dropped", at which time he fell, injuring himself.

When the plaintiff fell, he dropped to the floor of the lift. He then felt pain in the central part of his lower back, and in his left arm. The resultant discomforts caused him to scream loudly. He also became aware of his left arm having hit his toolbox (with approximate dimensions of 1200mm x 700mm) which was located next to him in the lift. In those events, he felt scared. The lift then travelled to Level 20, where he then alighted and reported his adverse experience to his supervisor.

The plaintiff described the events leading to his injuries in the terms set out in the following extract of his oral evidence:

"DINKHA

Q. What happened in the lift?

A. INTERPRETER: So, I was moving my stuff and myself from level 6 to level 20, so I placed in the carriage in the lift my tool box, another big bag with stuff, and a stepladder. I pressed level 20, the button, because I had the ticket to use it for the lift. The lift started stopping at level 18. Okay, so I thought somebody was coming in, but the lift stopped and nobody came in. Okay, so the lift started as if going up but then it just dropped and I fell on my backside, with this side hit the wall to the lift, he is showing the right side, left side hit on the tool box and I dropped to the floor.

...

A. INTERPRETER: Okay, so then I try attempted to press the button again, but then at that stage the lift started moving again and it dropped again, and at that time, the second time when the lift dropped, I screamed. As I attempted to get up, the lift started moving and came up to level 20. Okay, and once the lift door opened .. (not transcribable) .. was in front of the door of the lift, and the boss, Albert Rumora, was present as well. Dalibor said to me, what happened brother.

Q. I'll just stop you here now. You said that you pointed to your right arm or the right side of your body. Can you – this was the first time you fell to the ground. What happened to the right side of your body?

A. INTERPRETER: Okay, so I - yes, hit the right side of the wall of the lift and I was like pushed away, bounced away from the wall to the left, and I hit the left side, left – left arm on the tool box.

Q. Was this before or after you fell to your bottom?

A. INTERPRETER: It was before.

Q. I see, and the left side, or what was your left side?

A. Okay, so like I was showing the left arm, shoulder, but the underarm, underarm, I hit on the edge on the toolbox.

Q. I see, so you say that you were - your right shoulder hit the inside wall of the lift, that caused you to bounce off the wall, you use that word, and strike Part of your left shoulder, including your underarm, onto your toolbox?

A. INTERPRETER: Okay, so what I was let me have this explanation, as the lift started dropping, I lean onto the right side of the wall and bounced back to the left, it was happening very, very fast.

Q. So, the right side of your body didn't impact with ---

A. INTERPRETER: Well it did come into contact with the wall.

Q. It came into contact with it, you don't say you were thrown?

A. INTERPRETER: No, I am not saying that, I am saying that the lift was shaking and I leant – I was leaning or learnt, is that the right word, leant, I leant to the right with my shoulder, yes.

...”

[T97.7 – T98]

The plaintiff went on to explain that in those events, in addition to incurring some damage to his clothing, he sustained a few scratches to the underside of his left arm and to the top of his left shoulder. He said that at that time he did not know precisely what had happened during his fall, other than being aware that in the sudden impact involved in that fall, his left underarm had come into contact with his toolbox: T 98.18 – T98.33. He later experienced discomfort in his neck; left arm and left shoulder, and in his spine.

On the day of the injury, when the plaintiff explained the above events to his foreman, he was immediately sacked and told to go onto workers' compensation. At the time, he was experiencing pain in his neck, his left arm, and in his lower back. The foreman later apologised to the plaintiff for that reactive dismissal outburst and instructed him to return to work on the following Monday.

On the following Monday, as the plaintiff was continuing to experience pain he did not return to his work. Instead, he consulted his general practitioner who gave him anti-inflammatory and pain killing medications and advised him to rest for a few days.

Despite resting, the plaintiff continued to experience persisting pain in the described areas. He therefore returned to see his general practitioner who then referred him for imaging studies for his neck and his back. Thereafter, he remained off work and he was in receipt of workers' compensation payments which were being paid by Allianz, the company's workers' compensation insurer at the time of the injury.

The plaintiff was also referred to a rehabilitation physician, who treated him with steroid injections. The plaintiff did not tolerate those steroid injections well as he had Type 2 diabetes. He was also referred for physiotherapy for his neck pain and for his increasing lower back pain. He was later sent for an MRI scan of his left shoulder and he was also given some localised injections which did not have the effect of diminishing his pain.

In those circumstances the plaintiff was given Naprosyn tablets and he was advised to continue with physiotherapy and to take sleeping tablets. In those events he found that some of the prescribed medications gave him thoracic problems.

Following the results of imaging, the plaintiff was advised he needed to have surgery to his back. The plaintiff did not have the recommended surgery because he felt apprehensive about it. Instead, he continued taking Naprosyn, pain killing medication, and he continued having physiotherapy.

In those events, the plaintiff never returned to work. He was paid workers' compensation payments according to his applicable statutory entitlements due to his ongoing neck, left upper limb and back problems. He said he felt that those problems have continued to prevent him from seeking alternative work.

In the plaintiff's straitened financial circumstances, he sold some land he held in Bosnia Herzegovina and he also withdrew funds from his superannuation savings in order to continue to support his family.

The plaintiff's present claim is for work injury damages. The extent of that claim is limited by statute where his entitlement to damages ceases when he attains the age of 67 years.

Cross-examination of the plaintiff

The plaintiff was extensively cross-examined where the following matters were explored.

A review of the transcript shows that pre-injury, the plaintiff had Type 2 Diabetes which had been successfully managed with medication. He also disclosed that he occasionally experienced gout and some episodes of nocturia. The evidence shows that those matters had not interfered with his ability to carry out his pre-injury work.

The plaintiff was cross-examined about a number of the minor ailments that were mentioned in his medical records. He described his pre-injury ability to work as not involving any particular health issues: T68.40.

There was some initial confusion about whether the plaintiff had been involved in motor vehicle accidents. Initially, he could not recall the details but when questioned in further detail he recalled a 2019 motor vehicle accident in which his vehicle was hit from behind by a slow moving vehicle whilst his vehicle was stationary: T84 – T87.

The plaintiff noted that there was an error in his pre-accident health history concerning the state of his left wrist: T71; T73 – T74. I do not consider that error to be determinative of any substantive issue calling for decision in this case.

The plaintiff took issue with a note appearing in his medical records regarding a claim that he was involved in a motor vehicle accident in 2023. He claimed that at the time, the vehicle was possibly driven by one of his sons: T90.28 – T92.1; T93.34.

The plaintiff was cross-examined at length on the details of his superannuation arrangements: T39 – T47. In my assessment, those arrangements were not determinative of the issues calling for decision in this case regarding the injuries and the related disabilities he incurred from his injury on 14 January 2017.

A review of the plaintiff's evidence establishes that although he could not precisely recall all of the details of his pre-injury income from labouring work, that income was paid into his bank account, and he had paid tax on that income.

The plaintiff explained that he was paid according to the actual hours he worked: T61.26 – T66.1. He paid his tax every three months as was required by law on the advice of his tax agent: T55 – T56; T60. In the accident year the plaintiff estimated that half his income was earned via his ABN arrangements and the other half was paid by the workers' compensation insurer: T57.40.

The plaintiff was cross-examined about some minor discrepancies appearing in records suggesting that at the time of his injury he was either carrying a tool box or whether his left arm was resting on a tool box at the time of the accident (T100.5; T100.45), where the tool box was identified as measuring some 1200 mm x 700 mm: T99.9. In my view, that cited evidence, which comprised a summary rather than a verbatim transcript of what the plaintiff had said, did not derogate from the credibility or the merits of his claim.

The plaintiff estimated that from the year 2000, about 85 per cent of his work was carried out through his ABN registration number and the balance of his work was performed for wages: T39. At the hearing, unsurprisingly given the passage of time, the plaintiff did not have a precise recollection of his financial affairs as at the time of the accident. However, I am satisfied that he did his best to relate those matters when giving his evidence: T44.

The plaintiff stated that he had lost 20kg in weight over the period of a year by taking Ozempic medication: T119.1; T119.46 – T120.14. The plaintiff was cross-examined in detail about his post-accident intake of medications (T105 – T108). Those matters do not have an adverse effect on his capacity to earn an income.

The plaintiff explained that some of his medications were paid for by the PBS scheme and others were paid for in cash over the counter (T110 – T111.10; T114.20 – T114.35). He explained that some medications were for anti-inflammatory pain relief and others were prescribed for diabetes control: (T109.10 – T109.50), noting that he was on a disability pension which provided him with some health benefits (T112.5), where the insurer had never paid for medications (T115.6 – T115.20), and at times he had insufficient money to pay for the medications that he needed: T116.19.

The plaintiff was cross-examined about some apparent minor discrepancies in his medical records as recorded by various doctors. Those doctors were not called to give evidence to clarify such matters: T102. In my view it would be a misuse of those medical notes to base a credit attack on the plaintiff's factual evidence as the notes had not been prepared by him but by others, where they were obviously prepared for treatment purposes and they did not comprise an actual transcript of the discussions which occurred at those consultations: *Mason v Demasi* [2009] NSWCA 227, at [2].

In my assessment, subject to the consideration of some discretionary factors concerning the consideration of relevant discounting factors which will be identified at a later point in my reasons for the assessment of individual components of the claim for damages, none of the matters summarised in the preceding paragraphs operate to deprive the plaintiff of his entitlement to the damages he seeks in this case.

Chronological review of medical evidence

The medical evidence requiring consideration was in four categories: clinical records; threshold assessment reports; reports from plaintiff's experts; reports from defendant's experts. The review of those materials now follows.

Clinical records

I have examined the content of copies of the plaintiff's clinical records and investigation results which were selected for tender: Exhibit "A", Volumes 1 and 2, pp 1 – 508; Exhibit "1", pp 20 – 113. In my view those materials do not reliably serve to undermine any issue in dispute calling for decision in these proceedings.

Pre-injury medical assessments

On 9 March 2005, the plaintiff's left ankle was x-rayed and examined under ultrasound imaging. An old avulsion fracture of the tip of the left medial malleolus was noted along with thickening of the left Achilles tendon with fluid accumulation consistent with Achilles tendonitis: Exhibit "1", p 113.

On 8 February 2007, the plaintiff underwent an x-ray of the thoracic and lumbar spines which revealed a Grade I to Grade II L5/S1 spondylolisthesis with spondylitic change noted through the dorsolumbar spine not associated with significant disc space narrowing. This was described by the radiologist as being significant. Some minor lipping was also noted through the mid dorsal spine: Exhibit "1", p 114.

On 19 February 2016 a clinical note was made concerning the plaintiff having incurred a drill injury to his left hand seems to have been of a temporary and irrelevant nature: Exhibit "A", Volume 1, pp 91 – 92.

Significant elements of the plaintiff's medical records are identified and considered as follows.

17 January 2017 – first post-injury general practitioner contact

On 17 January 2017, the plaintiff first consulted his general practitioner concerning the subject injuries, as is recorded in the letter from that practitioner to the former solicitor on 13 December 2018, where those injuries are documented as being to the left shoulder, left elbow and lower back. The general practitioner's letter documented the fact that the plaintiff transferred his care to Dr Tomka, in Liverpool. In subsequent evidence (at p 127), it was recorded that the first doctor seen before care was transferred to Dr Tomka "didn't pay much attention to his injury": Exhibit "A", Volume 1, pp 123 - 124. T

21 February 2017 - Dr David Manohar – pain specialist

On 21 February 2017, at the request of his treating general practitioner, the plaintiff was examined by Dr David Manohar, a pain management specialist: Exhibit "A", Volume 1, pp 100 – 101. He noted the history of the accident and he examined the plaintiff's affected parts. He noted that the plaintiff's neck pain, shoulder pain, left arm pain, interscapular pain, difficulty gripping, and his lumbosacral pain with associated restricted movements were causing the plaintiff to feel quite uncomfortable, and he ordered MRI investigations of the whole spine.

27 February 2017 – I - MED Radiology

On 27 February 2017, at the request of Dr Manohar, I - MED Radiology reported a series of diagnostic matters after MRI examination of the plaintiff's whole spine: Exhibit "A", Volume 1, pp 102 – 103. That commentary referred to:

a narrowing of the C4/6 disc with a mild bulge and endplate osteophytes, degenerative changes, and a severe narrowing of the right foramen at that level with probable impingement of the right C6 nerve root, and a minimal disc bulge at C6/7 but without impingement;

a normal appearance of the thoracic spine;

desiccation of the L4/5 disc with associated narrowing; a posterior annular tear associated with a mild posterolateral disc protrusion; a bilateral pars defect at L5 and a 12mm anterior displacement of L5 onto S1 consistent with Grade II spondylolisthesis; degeneration and a pseudo bulge causing moderate narrowing of the right foramen and severe narrowing of the left foramen with impingement on the left L5 nerve root within the foramen.

28 February 2017 - Dr Manohar – follow up of MRI scanning

On 28 February 2017, after reviewing the plaintiff, Dr Manohar wrote to the plaintiff's treating general practitioner to summarise the above imaging results: Exhibit "A", Volume 1, pp 107 – 112. His comments related to a disc bulge at C5/C6 with irritation of the C6 nerve root, an annular tear at the level L2/L3, another tear in the L4/L5 disc, a Grade II spondylolisthesis at L5/S1, possibly irritating the L5 nerve root. He raised the possibility that the tears at L3/L4 and L4/L5 caused leaking of leukotrienes irritating the posterior longitudinal ligaments and nerve roots. He noted he was seeking the insurer's approval for diagnostic neural blockades to the L3/L4 and L4/5 levels.

28 March 2017 – Dr Manohar - follow up with insurer

On 28 March 2017 Dr Manohar advised the plaintiff's general practitioner that the insurer had approved diagnostic block and infiltration treatment for the complaints of neck, low back and shoulder pain: Exhibit "A", Volume 1, pp 113 – 114.d

29 March 2017 – Dr Renata Bazina - neurosurgeon

On 29 March 2017, at the request of the treating general practitioner, the plaintiff was examined by Dr Renata Bazina, a neurosurgeon. She recommended that the plaintiff have a left L5 nerve block injection for his back pain and she recommended further investigations in relation to the neck and shoulder pains reported by the plaintiff: Exhibit "A", Volume 1, pp 115 – 116.

March / April / May 2017 – further imaging and injections under ultrasound

On 30 March 2017, at the request of Dr Manohar, the plaintiff underwent an MRI study of his left shoulder which revealed bony impingement anatomy, acromioclavicular osteoarthritis, subacromial bursitis, supraspinatus tendinosis and a circumferential labral tear associated with a large paralabral tear inferiorly: Exhibit "A", Volume 1, p117.

On 21 April 2017, Waratah Imaging conducted an CT Guided injection into the plaintiff's lumbar spine: Exhibit "A", Volume 1, p 118, p 134. On 28 April 2017, Dr Manohar reported on that procedure commenting that the pain relief obtained was in keeping with the pharmacology of the agent used and shows that the facets at L3/4 and L4/5 are the generators of the pain experienced by the plaintiff: Exhibit "A", Volume 1, p 119.

On 3 May 2017, Dr Manohar performed lumbar neural and facet block injections on the plaintiff's lumbar spine commenting that the levels L3/4 and L4/5 bilaterally were the generators for the plaintiff's back pain: Exhibit "A", Volume 1, p 121.

17 December 2018 – Dr Alexander Simring - Endoscopy for gastro-intestinal problems

On 17 December 2018, the plaintiff was diagnosed with reflux symptoms, dyspepsia, constipation and bloating by Dr Alexander Simring, a gastroenterologist, who considered that the symptoms were due to taking the pain killing medication Tramal: Exhibit "A", Volume 1, p 125.

26 June 2024 – Dr Geoffrey Rosenberg – Orthopaedic assessment

On 26 June 2024, at the referral of Dr Tomka, the plaintiff was assessed by Dr Geoffrey Rosenberg, a, orthopaedic surgeon: Exhibit "A", Volume 1, pp 137 - 138. After reviewing the plaintiff's history, the results of medical investigations and conducting an examination, he considered the plaintiff's lumbar spine was rendered unstable by the injury, and this was unlikely to improve without surgical intervention.

26 August 2024 – Dr Peter Khong – neurosurgeon and spinal surgeon

On 26 August 2024, at the request of Dr Tomka, the plaintiff was assessed by Dr Peter Khong, a neurosurgeon and spinal surgeon: Exhibit "A", Volume 1, pp 141 – 142. Dr Khong noted the plaintiff's complaints of pain and restrictions. On examining the plaintiff after reviewing the MRI imaging results, he identified the post injury complaints of persistent neck pain, thoracic and lower back pain and referred left leg pain, and the exacerbation of previously asymptomatic degenerative changes in the neck, the thoracic and lumbar spine. He organised further MRI imaging and a bone scan of the whole spine, noting that Dr Rosenberg was looking after the lumbar spine problems.

23 April 2026 – Dr Geoffrey Rosenberg – re-assessment

On 23 April 2026, at the request of the plaintiff's present solicitor, Dr Rosenberg undertook a re-assessment of the plaintiff's condition: Exhibit "A", Volume 1, pp 143 – 145. He noted the plaintiff's condition had remained unchanged from the assessment 2 years earlier and he suggested that if the symptoms became unmanageable, the plaintiff should consider lumbar fusion surgery. He concluded that it was unlikely that the plaintiff would be capable of any meaningful work. He expressed the opinion that the plaintiff's lumbar issues are as a result of the subject injury at work.

Threshold systemic assessment reports

The plaintiff was required to submit to assessments by expert assessors retained by the Workers' Compensation Commission and the Personal Injury Commission for the purpose of determining his degree of permanent impairment.

On 4 February 2020, the plaintiff was assessed by Assessor Truskett, a general and trauma surgeon: Exhibit A, Volume 1, pp 9 – 31.

On 19 March 2020, after assessing the plaintiff's complaints about his cervical spine, lumbar spine, left shoulder and his digestive system, Dr Truskett reviewed the plaintiff's history, he examined him and he considered the investigations and the treatment that had been provided. Following that review, he assessed the plaintiff's degree of whole person impairment at 16 per cent. That assessment opened the procedural gateway for the plaintiff to proceed with this claim: Exhibit A, Volume 1, pp 509 – 31.

Plaintiff's medical expert reports

6 February 2018 - Dr Guirgis – orthopaedic surgeon

On 6 February 2018, at the request of the plaintiff's former solicitor, he was examined by Dr Medhat Guirgis, an orthopaedic surgeon: Exhibit A, Volume 1, pp 60 – 76. After examining the plaintiff and considering a range of investigation reports which he appended to his own report, Dr Guirgis considered the plaintiff's neck, left shoulder, thoracic spine and lumbar spine symptoms and related radiating complaints and concluded on the balance of probabilities that the plaintiff would be unable to rejoin the active work force because:

the incident in the lift had caused a post-traumatic mechanical derangement and related musculo-ligamentous strain of the cervical spine with C5-6 disc involvement which had aggravated pre-existing and vulnerable underlying age related degenerative changes in the cervical spine. He noted the plaintiff had lost disc height at the level C5-6 and he also noted there was probable impingement of the right C6 nerve root and that were symptoms of right C6 radicular involvement;

the plaintiff had post-traumatic symptoms in his left shoulder joint caused by contusion of the articular surfaces and spraining of the supporting capsular and ligamentous structures which had triggered and aggravated the effects of underlying asymptomatic degenerative changes which had affected the left acromio-clavicular joint. He noted MRI evidence of supraspinatus tendonitis and sub acromial bursitis and a circumferential labral tear with an associated paralabral cyst inferiorly;

he noted the presence of age related degenerative changes which rendered the spine more vulnerable to the stresses of the described violent jarring that occurred in the incident;

the plaintiff had a post-traumatic mechanical derangement of the lumbar spine caused by musculo-ligamentous strain with intervertebral disc involvement which had also triggered and aggravated underlying degenerative changes in that area. He noted the presence of a Grade II

spondylotic spondylolisthesis of L1 on L2, an associated slip and pseudo disc bulge causing narrowing of the foramen for the L5 nerve root. He also noted MRI evidence of a central posterior annular tear and a central posterior disc protrusion extending backwards to indent the thecal sac at L2 - 3. He also noted the presence of a central posterior annular tear associated with right centro-oblique disc protrusions extending backwards to touch the arterio-lateral surface of the thecal sac at L4 – 5. He also noted symptoms and signs of a left L5 radicular irritation;

He noted that he had advised the plaintiff to continue with conservative pain management treatment.

14 May 2019 – Dr Greenberg – general and gastro-intestinal surgeon

On 14 May 2019, at the request of his former solicitor, the plaintiff was examined by Dr Anthony Greenberg, a general and gastrointestinal surgeon: Exhibit “A”, Volume 1, pp 77 – 90. He noted the plaintiff had gastro-oesophageal reflux disease, probable analgesic gastropathy and medication induced gastro-intestinal motility disorder. He considered the plaintiff’s gastro-intestinal symptoms were related to the medication he requires for his orthopaedic problems. He noted those medications are recognised to cause significant gastro-intestinal side effects particularly in the upper GI tract. He expressed the opinion that the recognised side effects of which the plaintiff complained could account for some of the described symptoms.

Dr Kris Tomko – second general practitioner

On 21 January 2019, at the request of the former solicitors, the plaintiff’s second general practitioner, Dr Kris Tomka, provided an historical report summarising his clinical contact with the plaintiff. The dates of those consultations were not incorporated into that letter: Exhibit “A”, Volume 1, pp 126 – 131. In essence, Dr Tomko’s comments were as follows:

prior to the accident, the plaintiff was “always in excellent health”;

in summary form he described the way in which the accident occurred;

he described his findings on examination of the plaintiff, identifying limited neck movements, thoracic pain, shoulder pain, and lumbar pain, with disturbed sleep, flashbacks to the accident, irritability, psychological problems and digestive problems;

he described his treatment recommendations for medication and physiotherapy;

he described the results of imaging of the neck and left shoulder, and the referrals to specialists for assessment and treatment’

in firm terms, he expressed his opinion that he was in no doubt that the described injuries were a direct result of the described injury at work;

he identified the plaintiff’s significant lifting and movement restrictions which prevented him from returning to work, resulting in a permanent loss of earning capacity.

Defendant's medical expert reports

The defendant relied upon reports and correspondence from Dr Ivan Popoff, Associate Professor Paul Minter, and Dr John Bentivoglio, as follows.

9 August 2024 – Dr Ivan Popoff – orthopaedic surgeon

On 9 August 2024, the request of his general practitioner Dr Tomka, the plaintiff was examined by Dr Ivan Popoff, an orthopaedic surgeon: Exhibit “2”. Dr Popoff’s communication to Dr Tomka was in the form of a clinical communication concerning his clinical evaluation of the plaintiff’s pain in his neck, left shoulder and back following the accident at work. He concluded that those symptoms were due to a combination of an AC joint arthropathy and a labral tear of the left shoulder muscles. The mention of the plaintiff’s weight loss in that letter was sufficiently explained by his use of Ozempic which was prescribed by his general practitioner for weight control due to his diabetes: Exhibit “3”.

In that report, Dr Popoff recorded an erroneous history of the lift accident as involving the lift plummeting to the ground at the time of the accident. That portion of Dr Popoff’s report was not a forensic evaluation of the cause of the plaintiff’s injury. Instead, the report was directed at evaluating the plaintiff’s neck and left shoulder and left arm symptoms within the terms of his specialty and he concluded those symptoms were due to a combination of an AC joint arthropathy and a labral tear of the left shoulder muscles. The question of the plaintiff’s weight loss was sufficiently explained by his use of Ozempic which was prescribed by his general practitioner for weight control due to his diabetes: Exhibit “3”. In my view, Dr Popoff’s opinion, which emerged some 7 years after the injury, does not suggest the plaintiff’s orthopaedic symptoms would have inevitably emerged absent the injury and the report does not suggest the plaintiff has a residual earning capacity.

22 May 2017 – Associate Professor Paul Minter

On 22 May 2017, at the request of the workers’ compensation insurer, the plaintiff was examined by Associate Professor Paul Minter: Exhibit “1”, pp 1 – 6.

Associate Professor Minter noted that there was some doubt about the plaintiff’s history, saying he was “unable to provide a coherent history”. He did not expand upon that comment as to its source of effect. He found it “impossible to provide a specific working diagnosis” concerning the plaintiff’s upper extremities or his left shoulder. He also noted the plaintiff’s English was particularly poor, which suggested there was no interpreter present to assist with the examination.

Associate Professor Minitier stated that the MRI findings concerning osteoarthritis in the plaintiff's acromioclavicular joint, the features of subacromial bursitis and the circumferential tear of the labrum with an associated paralabral cyst were "longstanding pathological features ... not related to recent injury". He expressed doubt as to whether any serious injury had occurred in the reported incident and suggested the plaintiff be reassured and should not seek surgical opinion on his left shoulder problems.

Associate Professor Minitier said as far as he could determine, the plaintiff "may have" aggravated pre-existing pathology in the cervical and lumbar spine and he said he could not provide a clear explanation related to the subject workplace accident to account for the plaintiff's then current severe disability.

Associate Professor Minitier went on to state that the plaintiff's left shoulder pain was "probably related to cervical spine discomfort" but he was unable to clinically evaluate that to the clinical presentation. He stated, without cogent explanation, that the elevator drop "has not caused the pathology in the left shoulder". He said the labral tear noted on MRI scanning of the left shoulder was longstanding and not related to the subject incident. He similarly dismissed the paralabral cyst as being unrelated to the workplace accident. He stated the MRI and CT findings are unrelated to the workplace fall and that there was no evidence to support the suggestion that abnormalities found at L5/S1, were clearly longstanding or accident related.

Associate Professor Minitier stated that the plaintiff's pre-injury employment as a gyrocker was not the cause of his current diagnosis, which he attributed to pathological processes combined with "marked abnormal illness behaviour" which he did not specifically identify.

24 April 2018 – Dr John Bentivoglio – orthopaedic surgeon

On 24 April 2018, at the request of the workers' compensation insurer, the plaintiff was examined by Dr John Bentivoglio, an orthopaedic surgeon. Dr Bentivoglio appears to have examined the plaintiff without the assistance of an interpreter. His report of that consultation, which addressed 19 questions posed by the insurer, is dated 5 days later, on 1 May 2018: Exhibit "1", pp 7 – 17.

Dr Bentivoglio recorded that the plaintiff was most troubled by his back symptoms but also in his neck and left shoulder. When he examined the plaintiff's back, he noted there was no paravertebral muscle present, which must be a misdescription. I will not speculate on what he intended to say at that point.

Dr Bentivoglio stated that he had difficulty understanding how the plaintiff could have possibly developed shoulder symptoms from a jarring incident, although he accepted the possibility that the incident had aggravated pre-existing changes to the plaintiff's neck and back.

Dr Bentivoglio's answers to specific questions were as follows:

his diagnosis of the plaintiff's neck problems was that of an aggravation to pre-existing degenerative changes;

he considered the aggravation to the plaintiff's neck had settled by the time of his examination;

he considered the MRI findings relating to the plaintiff's neck showing a pre-existing disc osteophyte complex at the level C5/6 were the cause of ongoing neck problems;

he considered the plaintiff's thoracic problems were due to referred symptoms from his neck, and there was no disability of the thoracic spine;

he considered that the plaintiff's employment was not the cause of the current thoracic symptoms;

he considered that there were no pre-existing or degenerative diseases that contributed to the plaintiff's injury. He added: "There are no pre-existing abnormalities";

he considered, as I understand his response to the question, that the degree of discal damage to the lumbar spine at multiple levels was longstanding and pre-existing;

he considered that the pre-existing spondylitic spondylolisthesis was not caused by the subject injury;

he considered the plaintiff had had longstanding pre-existing abnormality in his back but he was unsure whether these were causing him any symptoms;

he considered the plaintiff had an impingement syndrome of the left shoulder;

he considered it was impossible, from the described mechanism of injury, that the plaintiff's shoulder problems were due to the incident;

he considered that all of the plaintiff's left shoulder problems related to a pre-existing disability;

he considered that it was possible that the plaintiff was not capable of performing his pre-injury duties but this would be because of pre-existing abnormalities;

he considered the plaintiff had a capacity for work but this was "somewhat restricted" by him not being fluent in English;

he considered the plaintiff should avoid activities requiring him to bend or twist his back or repeatedly lift objects weighing over 15kgs and avoid working in awkward or confined spaces;

he considered that there were no other conditions affecting the plaintiff's recovery and return to his work;

he considered there was no treatment that would improve the plaintiff's condition and he considered ongoing physiotherapy "entirely inappropriate";

he considered the plaintiff has reached his maximum level of medical improvement;

He assessed the plaintiff as having a 13 per cent whole person impairment at that time.

13 June 2018 – Dr Bentivoglio – response to questions raised by the insurer

On 13 June 2018, at the request of the workers' compensation insurer, Dr Bentivoglio clarified his 24 April 2024 report to state that he had explained to the plaintiff that "it would not be possible" to sustain any injury to the left shoulder in the mechanism he described "on that day, and the MRI findings should be seen as being a pre-existing abnormality". He went on to state that in relation to the plaintiff's neck problems, which showed there were pre-existing abnormalities present and "probably within normal limits for his age", "there is no real way of categorically stating that the work incident was definitely not a substantial contributing factor to his current condition", describing that scenario as unlikely without explaining the basis for that view: Exhibit "1", pp 18 – 19.

8 October 2025 – Dr Mark Magdy – gastro-intestinal surgeon

On 8 October 2025, at the request of a specialist from Wollongong Hospital, the plaintiff was examined by Dr Mark Magdy, a gastrointestinal surgeon; Exhibit "4". He was asked to assess whether there were any underlying gastrointestinal problems given the plaintiff's history of significant weight loss. Dr Magdy found no matters of concern within his specialty that required surgical correction.

The reliability of the opinions in those reports will be taken up in the consideration of Issue 2.

Plaintiff's primary written submissions

The plaintiff's primary written submissions were filed on 25 June 2026. In essence those submissions proceeded on the basis that his account of events should be accepted as credible and reliable. Those submissions argued that since the subject injury he has been totally incapacitated for work, as was evidenced by the uninterrupted payment to him of his statutory entitlement to weekly workers' compensation. The plaintiff's primary submissions, which identified uncontroversial common law principles, argued for an award of compensatory damages in the amount of \$1,095,465.

Defendant's primary written submissions

The defendant's primary submissions were filed on 14 July 2026. In essence those submissions proceeded on the basis that the plaintiff was a deemed worker as provided by Division 3 of Part 5 of the WC Act. Despite that concession, the defendant submitted that his account of events leading to his claim for economic damages should not be accepted as being credible or reliable.

The defendant's submissions proceeded on the basis that the plaintiff's evidence as to his involvement in any motor vehicle accidents after 14 January 2017 was neither credible nor reliable. The defendant also submitted that the plaintiff's evidence concerning the extent of his use of medication should be seen in the same light.

In making those submissions, although the defendant conceded the plaintiff had no capacity for employment after January 2017, the defendant argued that the plaintiff's described problems should be seen as being due to the effects of degenerative disease rather than being due to his post-accident problems. The defendant's arguments on those points were based on the content of the tendered medical opinions which must be analysed for their persuasive content.

In that regard, the defendant's primary submissions referred to particular aspects of the medical evidence to support the argued proposition that on the issue of causation, the plaintiff's case on damages was not supported by authority, invoking the decision in *Mason v Demasi* [2009] NSWCA 227, at [2], and similar cases.

Those submissions took extensive and substantive issue with the manner in which the plaintiff has sought to quantify his claims for economic loss. The defendant ultimately submitted that the plaintiff's compensatory damages should be limited to \$147,969.

Plaintiff's written submissions in reply

The plaintiff's written submissions in reply were filed on 23 July 2026. In those submissions the plaintiff responded to the defendant's submissions on the basis of what the defendant argued to be truly in issue in the proceedings. Accordingly, the plaintiff's written submission in reply focussed on matters of credibility and reliability of testimony, the nature and the extent of the plaintiff's related injuries and disabilities, and the assessment of consequential question of the assessment of the plaintiff's claim for economic loss.

Oral submissions

On 28 July 2026 the hearing resumed to enable the parties to make their final submissions on the remaining damages issues: T149 – T199.

Plaintiff's oral submissions in reply

In the plaintiff's oral submissions in reply, the real issues calling for determination were identified to centre around the credibility of his evidence, the nature of his employment relationship with the now deregistered company, and the assessment of the claim for economic loss.

On the employment point the plaintiff argued that the continued payment to him of weekly workers' compensation was a strong factor which ought to support a finding that he was employed by the former company.

The plaintiff also argued that as the defendant had in effect abandoned the contest on the issue of employment, and considering the plaintiff's evidence of earning at an hourly rate rather than being paid according to a job cost pursuant to a business arrangement, those factors were persuasive of the existence of a master and servant relationship notwithstanding the defence arguments on the superannuation question.

The plaintiff submitted that the compelling conclusion to be drawn from the evidence was that the plaintiff was an employee and not a business contractor for the deregistered company. That submission was also based on the fact of continuing payments to the plaintiff of his statutory entitlements to weekly compensation which exceeded half a million dollars over a period of 5 years.

The plaintiff argued that those circumstances were a strong indication for making a finding that at the time of the injury in question a relationship of master and servant existed between himself and the now defunct company.

The plaintiff further argued that the defendant in effect abandoned the contentious causation commentaries based on the evidence of its own expert witnesses, and had instead, continued to make weekly workers' compensation payments to the plaintiff.

The plaintiff further argued that the defendant's analysis of the evidence of his past probable earnings involved a sterile argument because if increments over many years since the accident had been added, a much higher loss of earning capacity would be revealed.

Defendant's oral submissions in reply

In the defendant's oral submissions in reply, it was not suggested to the plaintiff that he had retained an unexercised residual capacity for work that had to be offset against his claim for damages.

Rather, the defendant suggested that the plaintiff's evidence should be carefully evaluated for corroboration before acceptance, arguing that it was likely the plaintiff's incapacity for work was more likely due to the normal processes of degenerative changes relating to age rather than being due to the lasting effects of injury.

The defendant submitted that before acceptance, the plaintiff's evidence should be treated with caution unless independently corroborated by documentary evidence, including medical evidence, as well as by reference to commentaries appearing in conventionally accepted authorities concerning the ongoing effect of pre-existing conditions, where the defendant carried the evidentiary burden of untangling such matters: *Watts v Rake* (1960) 108 CLR 158; *Purkess v Crittenden* (1965) 114 CLR 164.

The defendant's oral submissions in reply pointed to a series of adverse inferences it sought to draw against the plaintiff's case raising the question of whether he was injured whilst engaged as an independent contractor rather than as an employee, having regard to the plaintiff's sequential claims of work related expenses, as set out in his income tax returns.

In essence, the defendant argued, based on its preferred medical evidence, that the plaintiff's ongoing problems of incapacity for work were more likely to be due to the effects of underlying age-related degenerative changes rather than being due to the effects of injuries that the defendant argued had long since resolved. That submission required a focussed analysis of the medical evidence.

Plaintiff's further oral submissions in reply

The plaintiff's further oral submissions in reply identified the undisputed sum of \$555,845.70 which must be set off against the plaintiff's claim for economic loss. The plaintiff's further submissions in reply raised a series of available approaches to the factual question of the manner in which his economic loss claim could be assessed.

I now turn to the consideration and the determination of the issues identified at paragraph [23] above.

Issue 1 - Credibility and reliability of factual testimony

The credibility and the reliability of the plaintiff's testimony was identified as being the important preliminary question to be determined.

The plaintiff submitted, correctly in my view, that when assessing his credit as a witness, and when assessing his claims of past and future loss of earning capacity, the nature of his work and his extended work history cannot be ignored or glossed over.

In embarking on that consideration of the evidence, it is clear the plaintiff had a solid pre-injury work history where he deployed his gyrocking skills and experience to derive an income over many years. In my view, in light of that history and his family situation, it is improbable that he would have retired earlier than at the planned age of 67 years. In that regard, it is significant that the defendant did not challenge the plaintiff's evidence of a post-injury inability to return to work.

In my assessment, given the defendant's concession that there was a relevant breach of the duty of care owed to the plaintiff in the lead up to his injury, this is not a case where the plaintiff's credit as a witness concerning injury related matters raised in his evidence should be determined by a process of a sterile analysis of unexplained medical histories as recorded in the tendered medical and allied reports which had been prepared for non-forensic purposes: *Mason v Demasi* [2009] NSWCA 227, at [2].

In assessing the plaintiff's credit as a witness, it must be noted that in his evidence, within the limits of his recollection, he made fair concessions when called upon to do so in cross examination and in doing so he did not seek to invoke untenable or unrealistic propositions to support his case. Furthermore, in support of his case, he has provided ample unchallenged medical evidence from his treating and assessing practitioners to support his case of an injury related inability to continue working.

After reviewing the evidence as a whole, and after making due allowance for the fact that the plaintiff gave most of his evidence through an accredited interpreter, I nevertheless assessed him to be being a credible and reliable witness on the key factual matters that have arisen in this case.

I do not regard the plaintiff's relative unsophistication and his limited fluency in the English language as indications that his evidence should be seen to be unreliable in any respect and requiring independent corroboration as was submitted by the defendant. In arriving at that conclusion I have not overlooked several elements of confusion as to his recollection of peripheral events such as unrelated motor vehicle accidents, especially given the span of the many years that has passed since he was injured.

There was no reason for the plaintiff to have actively retained a recollection of those peripheral matters, unlike the need he had to keep in mind and recall relevant factual matters relating to this case.

The critical point to emerge from the defendant's exploration of the plaintiff's prior work history is that whatever the plaintiff's past health issues were or might have been, he continued to work in a physically demanding job until he acquired his injury which has led to his claim of an inability to continue to work in the context where fault was ultimately admitted by the defendant.

It was not suggested to the plaintiff that he had unreasonably failed to mitigate his loss of earning capacity: s 151L of the WC Act. Furthermore, an adverse impression on the mitigation question does not emerge from either a consideration of the plaintiff's evidence or from a consideration of the medical evidence as a whole.

The defendant's attack upon the plaintiff's credit as a witness was substantially based on a selective analysis of summarised medical histories where those histories were recorded as background matters which did not require a critical forensic examination of how the accident or the injuries occurred. In that vein, the defendant submitted, unreasonably in my view, that the plaintiff's evidence on the key issues in the case should be considered to be unreliable or requiring corroboration before acceptance.

In my view, the defendant's submission as to the need for corroboration of the plaintiff's evidence before acceptance seeks to impose an unreasonably high standard of proof for resolving factual questions in this case.

If corroborative evidence was required, I consider that the factual history of injury as was recorded by Dr Manohar on 21 February 2017, where he noted that the plaintiff stated that the lift had stopped and collapsed several times at the time of injury. In my view that history is sufficiently corroborative and persuasive of the occurrence of a jolting mechanism by which the plaintiff was injured.

In my assessment, despite the emergence of some minor peripheral matters of recollection in the course of the plaintiff's evidence, where there may have been some potential for confusion on his part on peripheral matters, his evidence on key matters in contention was capable of being accepted without the need to seek contemporaneous independent corroboration.

In arriving at my assessment of the plaintiff's credit as a witness, I have not overlooked the significance of a series of factual matters relied upon by the defendant in seeking to resist the plaintiff's claim. In sequence, those factual matters were as follows.

First, the defendant pointed to the fact that the plaintiff's superannuation was not paid by the now deregistered company. In my assessment, that fact, of itself, is not a determinative factor, noting that the plaintiff's evidence identified industry non-compliance on this issue, and there have been changes in the law on that subject since the plaintiff's injury. A similar conclusion arises in respect of the general issue of payments of long service leave in the building industry.

Secondly, the fact that the now deregistered company had not deducted tax from the monies it paid into the plaintiff's bank account was not of itself necessarily indicative or determinative of a relationship between a business owner and an independent contractor where the ultimate alternative factual pathways of assessment required findings of either an actual economic loss or a more generalised assessment of a loss of earning capacity.

Thirdly, the details contained in the Medicare and PBS printout schedules for medical services provided to the plaintiff between 27 June 2021 and 21 April 2026 limited to matters of medical consultations and prescribed medications (Exhibits "5" and "6") does not throw any light on liability or causation questions that arise in this case.

I conclude that the plaintiff gave credible evidence that was capable of being accepted on its face. I considered him to be a credible and a reliable witness on the factual matters in dispute in these proceedings.

Issue 2 - Credibility and reliability of expert evidence

The defendant relies on the content of medical reports and treatment records to attack the credibility of the plaintiff's evidence. It is therefore appropriate that such evidence be examined, starting with the reports of Associate Professor Minter, Dr Bentivoglio, and Dr Popoff, whose reports are summarised between paragraphs [90] to [103] above.

Report by Associate Professor Minter

I do not accept the proposition that the 2017 report of Associate Professor Minter provides a reasonable basis for not accepting the evidence of the plaintiff on matters in dispute in these proceedings. My reasons for that conclusion, which are based on the level and content of the reasons he has provided, are as follows:

It is clear from his 22 May 2017 report, which was based on a single examination of the plaintiff, that he did not have the opportunity to consider the entire array of the testing and imaging results available to the experts relied upon by the plaintiff covering the 8 years which have passed since Associate Professor's examination;

He did not have the benefit of interviewing the plaintiff with the aid of an interpreter in circumstances where he observed that he could not obtain a coherent history from the plaintiff, he could not provide a specific working diagnosis for the plaintiff's left shoulder problems, and he could not provide a clear explanation to account for the plaintiff's then current disabilities;

He was unable to provide a summary of the circumstances of the plaintiff's injury beyond the limited explanation (at Exhibit "1", p 2), that the incident was said to have occurred when a lift fell freely whilst on a work site. In my view, that limited account represented an obstacle to him considering the causal connection between the plaintiff's account of his injuries and the underlying jolting and jarring events in the lift which preceded those injuries;

His commentary on the plaintiff having longstanding underlying degenerative changes in the various parts of his body that were injured, where he said that the aggravating effect of those injuries had receded, was not satisfactorily explained by adequate reasons as required by Schedule 7, clause 3(1)(e), Uniform Civil Procedure Rules 2005 (NSW);

His historical 2017 opinion (at Exhibit "1", p 3), that the plaintiff should be reassured that "no serious injury has occurred and that he should be able to return to work immediately" was unreliable and inadequately reasoned in that it appears to have been based on an unacceptable and unexplained ipse dixit statement: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305, at [59], [87];

His reasons did not set out the clinical basis for his view that any aggravating effects of the injuries sustained by the plaintiff in the subject incident would have receded by the time of his examination four months later in May 2017;

His commentary (at Exhibit "1", pp 5- 6), that the findings on the MRI and CT imaging studies of the plaintiff's lumbar spine "are unrelated to the fall that is said to have occurred in the workplace" do not engage with that part of the plaintiff's case which argues that those degenerative changes have been aggravated by the injury, and that those aggravating effects have continued;

His statement (at Exhibit "1", p 2), that there was some doubt as to the veracity of the plaintiff's history "in toto", which appears to have been based on his understanding of the content of a factual investigation to which he had access, was apparently based on "the documentation provided" to him by the workers' compensation insurer where that material was not tendered in evidence in these proceedings. In my view, those circumstances have precluded a proper understanding of the basis for his critical views;

The clinical basis for his statement (at Exhibit “1”, p 5), that the plaintiff’s presentation involved “marked abnormal illness behaviour”, an apparent psychological issue, remained unexplained by clear reasons, and that comment appears to be beyond the remit of his expertise: Schedule 7, clause 3(1)(f), Uniform Civil Procedure Rules 2005 (NSW).

For the above reasons I consider that the report of Associate Professor Minter does not provide reliable assistance to the task of resolving matters of fact and opinion in dispute in these proceedings.

Reports by Dr John Bentivoglio

The reports of Dr John Bentivoglio are reviewed at paragraphs [99] to [103] above. In the course of that review, it became apparent that Dr Bentivoglio’s assessment of the plaintiff took place without the assistance of an interpreter in circumstances where it was plain to him that the plaintiff was not fluent in the English language. In my view that factor, of itself, hampered the assessment process and serves to cast doubt upon the reliability of his assessment.

In my view, the reliability of Dr Bentivoglio’s opinions as to the temporary duration of the aggravating effects of the plaintiff’s fall on the underlying degenerative changes in the affected parts of his body have been inadequately reasoned which precludes an acceptance of his views: Schedule 7, clause 3(1)(e), Uniform Civil Procedure Rules 2005 (NSW).

Dr Bentivoglio’s statement, at Exhibit “1”, p 13, where he said he considered that any aggravation to the pre-existing degenerative changes in the plaintiff’s neck had settled was not supported by adequate reasons: *Makita (Australia) Pty Ltd v Sprowles* (supra), at [59], [87]; Schedule 7, clause 3(1)(e), Uniform Civil Procedure Rules 2005 (NSW).

A similar conclusion arises in respect of Dr Bentivoglio’s opinion (as stated at Exhibit “1”, p 15), that the plaintiff’s inability to work is due to the presence of pre-existing abnormalities in his back rather than the injuries in the subject accident.

A similar conclusion also arises with respect to Dr Bentivoglio’s opinion (at Exhibit “1”, p 15), where he stated that the plaintiff had some capacity for work, where that opinion was not supported by adequate reasons: Schedule 7, clause 3(1)(e), Uniform Civil Procedure Rules 2005 (NSW). Dr Bentivoglio’s statement that the plaintiff has restrictions concerning his use of the English language is not a sufficiently reasoned explanation for asserting he has some capacity for work where the actual work he had in mind for the plaintiff has been left largely undefined.

A further difficulty in the path of acceptance of Dr Bentivoglio’s opinions is his stated uncertainty (at Exhibit “1”, p 14), as to whether the pre-existing abnormalities as seen on imaging were causing him any symptoms. A state of unexplained uncertainty in the mind of an expert witness does not form a proper basis for drawing a negative conclusion to contradict other cogent expert evidence which is adequately reasoned and not otherwise improbable.

For the above reasons I consider that the reports of Dr Bentivoglio do not provide reliable assistance to the task of resolving matters of fact and opinion in dispute in these proceedings.

Letter from Dr Ivan Popoff

My consideration of the correspondence from Dr Ivan Popoff dated 24 August 2024 is set out at paragraphs [91] to [92] above, where I have already recorded the view that Dr Popoff's letter to the plaintiff's treating general practitioner does not support the suggestion that the plaintiff has a residual earning capacity. His letter is a relatively brief clinical communication between treating doctors. It does not comprise a forensic expert evaluation of the issue of earning capacity.

I therefore consider that Dr Popoff's letter dated 24 August 2024 does not provide reliable assistance to the task of determining whether the plaintiff has a residual earning capacity.

Reliability of medical evidence relied upon by the plaintiff

In contrast to the above analysis of the medical evidence relied upon by the defendant, for the reasons that now follow, I consider that the medical evidence relied upon by the plaintiff is acceptably supportive of the causation, injury and damages case that he seeks to make. In that regard:

The pre-injury clinical records identified at paragraphs [67] to [69] above do not suggest that the plaintiff had a likely long term restriction in his earning capacity;

The uncontested 21 January 2019 historical report of Dr Tomka considered at paragraph [89] above supports the plaintiff's case of an injury related inability to work. That report does not support the defendant's argument that the aggravating effects of the plaintiff's injuries were short lived, thereby suggesting that his impaired earning capacity was due to pre-existing degenerative changes in his affected parts;

Dr Guirgis' uncontested report dated 6 February 2018 credibly and sufficiently described the mechanical process whereby the plaintiff sustained his injuries. That report went into adequate explanatory detail as to the aggravating effects of the subject injury on the plaintiff's pre-existing degenerative changes in his affected parts which supports the plaintiff's case on causation of harm and continuing economic loss;

Dr Greenberg's uncontested report dated 14 May 2019, considered at paragraph [88] above, provides credible expert evidence supporting the plaintiff's claim that the medications he was prescribed for the after effects of his injury gave him adverse gastro-intestinal side effects from the medication he was prescribed.

Reliability conclusions concerning the medical evidence

In my view, although some of the correspondence relied upon by the plaintiff may not have referred to the code of conduct for expert witnesses as is required of expert evidence, in this case, that requirement should not be read as precluding those practitioners who treated the plaintiff from communicating the clinical views they gained from such clinical contact with the plaintiff and their treatment of him.

My overall conclusion on considering the medical evidence is that the identified materials and medical opinions relied upon by the defendant in this case do not provide a reliable basis for rejecting the credibility of any matter in dispute in the plaintiff's damages case.

On the contrary, my identified analysis of the medical evidence relied upon by the plaintiff persuades me that such evidence is not inherently improbable. I am satisfied that such evidence is both credible and should be accepted in preference to the medical evidence relied upon by the defendant. I therefore here record my acceptance of the medical evidence relied upon by the plaintiff.

Issue 3 – Findings on accident related injuries and disabilities

Having considered the evidence as a whole, I accept the evidence of the plaintiff on disputed matters of fact. I also accept the evidence of his treating and assessing doctors and find that in the subject accident, in addition to the plaintiff experiencing an initial sensation of shock when injured, he also sustained jarring injuries to his neck, his left arm and shoulder, and to his upper and lower back. I find that those events aggravated pre-existing degenerative changes in those areas. I find that those injuries led the plaintiff to experience an immediate and ongoing adverse effect on his capacity to earn an income within his skill set and experience.

Issue 4 - Findings on past loss of earning capacity

On my consideration of the evidence of the plaintiff and the reliable elements of the medical evidence as explained above, I find that since his injury on 14 January 2017, the plaintiff has been rendered totally incapacitated for work either as an employee generally, or as an independent gyrocking contractor.

The plaintiff submitted that damages for past economic loss should be assessed on the basis of a total incapacity for work over 501 weeks between 15 January 2017 and 25 August 2025 at an average net weekly loss of \$1,485, yielding an assessment of net past economic loss of \$743,985: MFI "4". In contrast, the defendant submitted that damages for past economic loss should be assessed at the rate of \$900 per week net limited to a period of 52 weeks, namely \$46,800: MFI "5".

In my assessment, the defendant's submission on past economic loss is unrealistic as it is arbitrarily limited to a period of one year after the accident and it therefore does not take annual increments into account.

The defendant argued that the plaintiff was not an employee of the now deregistered company and that instead, he was an independent contractor to that company. There is flexibility in the approach to the determination of that question having regard to the factual circumstances that unfolded on the day of the accident.

In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; [1986] HCA 1, at [9], in summary, it was held that amongst the many factors to be considered in determining whether the relationship between the parties was one of employee and employer or whether the relationship was one of independent contractor, the degree of control and the direction and the supervision of the worker were important considerations, but not the sole determinants of the question.

In *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44, the flexibility of approach to the question of employment and the range of matters that may be considered in resolving that question was clarified to include the need to adapt to changing social conditions: [19]; [44] and [72].

In this case, on the question of whether the plaintiff was an employee of the now defunct company or whether he was an independent contractor to that company, I am satisfied that the described work arrangements indicate the plaintiff was an employee of the company at the time of his injury.

A combination of factors persuades me to that view. The plaintiff was required to work at the direction of the company site foremen and he was directed by him to carry out the specific tasks that led to his injury; he had to submit time sheets for his work; the company supplied the gyprock material for his work; and his work was covered by the company's workers' compensation insurance arrangements. Those features indicate the company maintained the requisite degree of control over the plaintiff's work to indicate he was its employee at the time he sustained his injury. In my view, the failure of the company to pay him his superannuation entitlements as and when they fell due is not determinative of the question of employment.

In this case, following the guidance on the employment issue as provided by the decision in *Stevens v Brodribb Sawmilling Co Pty Ltd* (supra), it seems to me that the defendant's admission of a breach of the relevant duty of care owed to the plaintiff renders arguments over the issue of employment irrelevant as the common law duty owed to the plaintiff to take reasonable care for his safety was identical whether he was an employee or an independent contractor.

Absent evidence of records of comparable earnings, the assessment of the claim for past loss of earning capacity over the lengthy period of 501 weeks requires that an allowance must be made for annual increments. It would be unrealistic to proceed otherwise. In that regard, the plaintiff seeks to apply CPI increments. In my view, that approach is reasonable in the circumstances of this case.

A question arises as to the likely continuity of the plaintiff's work as a gyprocker over the extended period of 501 weeks as claimed. The plaintiff's work history shows that prior to his injuries he moved from job to job. In my view, those circumstances indicate that a measure of

discount should be applied to the assessment of past loss of earning capacity to reflect the reality that the plaintiff's employment may not have continued seamlessly after the Haymarket job was completed. In my assessment, it would be reasonable to apply a discount of 15 per cent on account of that factor.

On that basis, applying a 15 per cent discount to the plaintiff's submitted calculation of \$743,985, which I accept, I assess the plaintiff's claim for past loss of earning capacity at \$632,387.

Issue 5 – Findings on past loss of superannuation

The plaintiff submitted that damages for past loss of employer funded superannuation should be assessed at the rate of 13 per cent in accordance with the decision in *Najdovski v Crnojlovic* [2008] NSWCA 175: MFI “4”. The defendant's submissions made no allowance for past loss of employer funded superannuation benefits: MFI “5”.

The plaintiff submitted that as an employee he was entitled to employer funded superannuation benefits at the cited rate of 13 per cent of the damages assessed for past loss of earning capacity. In my view that approach is unreasonable in this case where it was unlikely he would have had continuous employment over the entire period as there would most likely have been gaps between jobs which would make the precise calculation contended by the plaintiff unrealistic.

Therefore, in this case I consider the most appropriate method of assessing the plaintiff's damages for past superannuation would be to allow a discounted buffer sum in the amount of \$50,000.

Issue 6 - Findings on future loss of earning capacity

The plaintiff submitted that damages for net future economic loss should be assessed to age 67 years at the current net weekly rate of \$1,681 x 50.9 to yield a net loss of \$85,563: MFI “4”.

I accept that the nature and the extent of the plaintiff's injuries rendered him unfit to return to work. I accept that the plaintiff's submitted rate of \$1,681 per week net is a reasonable basis for assessing his claim for damages for future loss of earning capacity.

The plaintiff's claim for damages for future loss of earning capacity must terminate at age 67 years. I consider this component of the claim must be discounted by 15 per cent to allow for the conventional potential adverse vicissitudes. The relevant calculation is \$85,563 less 15 per cent. Accordingly, I assess the plaintiff's claim for damages for future loss of earning capacity in the discounted amount of \$72,728.

Issue 7 – Findings on future loss of superannuation

The plaintiff submitted that damages for future loss of employer funded superannuation should be assessed at the rate of 14.06 per cent in accordance with the decision in *Najdovski v Crnojlovic* (supra): MFI “4”. The defendant's submissions made no allowance for future loss of employer funded superannuation benefits: MFI “5”.

I find that as an employee, the plaintiff would ordinarily have been entitled to employer funded superannuation benefits at the cited rate of 14.06 per cent which, based on an underlying assessment of \$72,728 for future loss of earning capacity, yields the calculation of \$10,225.

However, having regard to the plaintiff's age in the final years of his earning capacity, his longstanding underlying health issues, and questions over his ability to sustain heavy work between the ages of 66 and 67, rather than approaching this element of damages as a precisely projected calculation, the assessment of a discounted rounded down buffer amount would be a more appropriate method.

I therefore assess the plaintiff's damages for future loss of employer funded superannuation in the rounded down buffer amount of \$5,000.

Issue 8 – Fox v Wood damages

The plaintiff's claim concerning the reimbursement of the total amount of tax of \$111,169, which was deduced from his weekly payments of worker's compensation was uncontested: Fox v Wood (1981) 148 CLR 438; [1981] HCA 41. Accordingly, I find that the plaintiff is entitled to be reimbursed for such amounts in the total sum of \$111,169.

Summary of damages assessment

As explained in the preceding paragraphs, my assessment of the plaintiff's entitlement to damages is summarised as follows:

Past economic loss

\$632,387

Past superannuation loss

\$50,000

Fox v Wood damages

\$111,169

Future economic loss

\$72,728

Future superannuation loss

\$5,000

Total

\$871,284

As the plaintiff has already received weekly payments of workers' compensation in the total amount of \$555,845.70, that sum must be deducted from the damages assessed at \$871,284 to yield the judgment sum due to the plaintiff in the net amount of \$315,438.30.

Disposition

The plaintiff has succeeded in establishing his claim that his former employer Corporate Interfirm Pty Ltd was negligent, and that such negligence had relevantly caused his injuries and claimed losses as assessed above, thereby entitling him to a verdict in his favour in the amount of \$871,284.

The net judgment due to the plaintiff is identified by deducting the amount of \$555,845.70 already received by way of past weekly payments of workers' compensation payments from the assessed sum of \$871,284. On that basis, the net judgment sum due to the plaintiff is \$315,438.30.

Costs

Ordinarily, in cases such as this, subject to any special circumstances that might be shown, costs should follow the event, with the result that the defendant would be ordered to pay the plaintiff's costs of the proceedings as agreed or assessed: UCPR r 42.1. Absent special circumstances I will therefore make an order for costs to that effect. If a party has a basis for seeking a different costs order there will be liberty for that party to apply for a variation of the costs order I will make.

Orders

I make the following orders:

Verdict for the plaintiff in the assessed amount of \$871,284;

After deducting past weekly compensation payments of \$555,845.70, judgment for the plaintiff in the sum of \$315,438.30;

The defendant is to pay the plaintiff's costs of the proceedings as agreed or assessed;

The exhibits may be returned;

Liberty to apply for further or other orders if required.

I CERTIFY THAT THIS AND THE PRECEDING 49 PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF HIS HONOUR ACTING JUDGE LEONARD LEVY SC

Associate

Date: 31 August 2026

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Decision last updated:

31 August 2026

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