SUPREME COURT OF QUEENSLAND

CITATION:	*Souz v CC Pty Ltd* [2018] QSC 36
PARTIES:	**GREGORY WILLIAM SOUZ** (Plaintiff) **v** **CC PTY LTD (ACN 121 024 271)** (Defendant)
FILE NO/S:	S756 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	2 March 2018
DELIVERED AT:	Rockhampton
HEARING DATE:	5, 6, 7 and 8 February 2018
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff against the defendant for $1,125,949.04**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where plaintiff claims damages for injuries suffered in the course of employment with the defendant – where both liability and quantum of damages are in contention TORTS – NEGLIGENCE – BREACH OF DUTY – where the plaintiff was operating a loader when the canopy of the loader collided with a steel beam erected across the roof of the mine – where the canopy together with the deck which the operator's chair was located could travel up and down – where the plaintiff was unaware of the existence of the lever or the capacity for the canopy and cabin height to be altered by the operator – where the manufacturer had warned about the possibility of an accidental raising of the canopy – where the case advanced by the plaintiff was that the plaintiff's gumboot must have inadvertently caught under the lever located on the floor of the operator's cabin causing the cabin to rise up – where the defendant's case is that the canopy was deliberately raised by the plaintiff and the plaintiff forgot to lower it back down – where after the accident a guard was fitted over the lever to prevent any inadvertent raising of the

canopy – whether it was possible for the canopy and cabin to rise up without the operator knowing – whether the defendant was in breach of its duty of care

TORTS – NEGLIGENCE – CAUSATION – where the plaintiff is diagnosed with a disc prolapse at the C6/7 level of his spine – where it is in contest as to whether the prolapse was caused by the loader incident on 26 June 2013 or by an event at a later date – where it is the plaintiff's case that he did have symptoms consistent with a disc prolapse from the date of the loader incident – where no medical records or other record supports the plaintiff's assertions that he had such symptoms – where some records are positively against the plaintiff – where the symptoms described by the plaintiff to his treating neurosurgeon are consistent with a frank prolapse occurring not at the time of the collision but after 25 October 2013 – where conversely several lay witnesses attest that the plaintiff exhibited and spoke of continuing symptoms sufficient to base a finding of a probable causal connection between the incident and the prolapse – whether the plaintiff experienced symptoms consistent with a disc prolapse after the loader hit the overcast on 26 June 2013 – whether the disc prolapse at the C6/7 was caused by the loader incident

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES FOR AN ACTION IN TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL DAMAGES – where the parties are agreed as to the dominant injury – where the parties are in dispute as to the appropriate level of ISV – whether the assessment should be in the middle of the range or at the top of the range with a 25% uplift

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES FOR AN ACTION IN TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – PAST ECONOMIC LOSS – where the plaintiff was highly skilled – where the parties are in dispute as to the appropriate discount that should be applied – where the mine in question closed in mid-2015 – where the plaintiff's calculation assumes only one week out of employment – whether the calculation of past economic loss should be further discounted to allow for various contingencies

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES FOR AN ACTION IN TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – FUTURE ECONOMIC LOSS – where the plaintiff has no residual earning capacity – where a claim is made assuming full time employment in the mining industry until the age of 68 –

where the claim contains a 10% discount for contingencies – where there was medical evidence predicting that the plaintiff would have symptoms arising from the degenerative condition of the neck likely to be responsible for curtailment of the plaintiff's ability to work underground – whether the medical evidence can be taken as certain that the plaintiff would have had symptoms sufficient to prevent him working in the mining industry – whether the plaintiff would have remained in full time employment in the mining industry

DAMAGES – PARTICULAR AWARDS OF GENERAL DAMAGES – QUEENSLAND – where there is undisputed evidence that the plaintiff requires care and assistance – where there is an arrangement between the plaintiff and his carer involving the payment of money for services – where the plaintiff claims for paid care and assistance – where the defendant disputes the claim contending that no amount can be allowed because of the restrictions contained in the legislation – where the plaintiff contends that the services provided are not gratuitous services but rather services provided by the carer in her professional capacity – where the defendant contends that even though the services are paid, they are not within the definition of paid services as they are not provided by the carer in her professional capacity or in the course of her business – whether the carer is a member of the plaintiff's household – whether the services are paid services as defined within the legislation – whether the legislation intends to catch such an arrangement as is present in this case

Civil Liability Act 2003 (Qld) s 59
Superannuation Guarantee (Administration) Act 1992 (Cth) s 19
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B, s 305C, s 305D, s 305E, s 306C, s 306D, s 306H, s 306J,s 306L, s 306 N, s 306 O and s 306P
Workers' Compensation and Rehabilitation Regulation 2014 (Qld) s 130

Allwood v Wilson & Anor [2011] QSC 180, cited
Cowen v Bunnings Group Limited [2014] QSC 301, considered
Da Costa v Cockburn Salvage Trading Pty Ltd (1970) 124 CLR 192, cited
Foster & Anor v Cameron [2011] QCA 48, distinguished
EMI Australia Ltd v Bes [1970] 2 NSWR 238, cited
Gaudry v Pacific Coal Pty Ltd [1996] QCA 525, considered
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270, cited
Kriz v King [2007] 1 Qd R 327, considered

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, cited
McLean v Tedman (1984) 155 CLR 306, cited
Nicolia v Commissioner for Railways (NSW) (1970) 45 ALJR 465, cited
Smith v Broken Hill Proprietary Co Ltd (1957) 97 CLR 337, cited
*Strong v Woolworths Limited (*2012) 246 CLR 182, cited
Tabet v Gett (2010) 240 CLR 537, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40, considered

COUNSEL: G F Crow QC with S J Deaves for the Plaintiff

R C Morton for the Defendant

SOLICITORS: Maurice Blackburn for the Plaintiff

DibbsBarker for the Defendant

[1] **McMEEKIN J:** Greg Souz claims damages for a neck injury. His case is that he suffered the injury in an incident that took place on 26 June 2013 in the course of his employment with the defendant, CC Pty Ltd. He was then employed underground at the Cook Colliery.

[2] The fact of the occurrence of the incident of 26 June is not in dispute. That Mr Souz now has a prolapsed disc in his neck is not in issue, nor is it in issue that as a result of that physical injury and its consequences he has a serious psychiatric illness, an opioid dependency and has lost all earning capacity. Breach of duty is in issue but should not be. In my view it is beyond argument that the defendant breached its duty to the plaintiff.

[3] The real issue is causation – was the injury to the neck (eventually identified as a C6/7 disc prolapse) caused by the trauma involved in the incident of 26 June 2013? As well damages are in contention.

Some observations about Mr Souz and his background

[4] Mr Souz was born on 26 May 1962. He is presently aged 55 years. He was 51 years old at the time he says he suffered the subject injury.

[5] Mr Souz believes he is dyslexic. He has only a limited ability to read. He left school in Grade 9, completed an apprenticeship as a spray painter and by his early twenties was involved in working on conveyor belts. He then worked in coal mines for decades. By the time of the subject incident he was regarded as a specialist in conveyor belts. He was highly regarded by the men at the Cook Colliery both for his character and expertise.

[6] Mr Souz's role at the Colliery was as day shift supervisor and coordinator for the belt crew. He was in charge of organising the work of the new installations and the maintenance of the belt systems.

[7] Mr Souz was in obvious pain throughout his testimony. He moved very stiffly, having to rotate his body to look to one side, for example when answering questions

from myself. He said he had taken medication before and during the day in Court, but at a reduced level to try and keep his thinking clear. His carer described him as stoic.[1]

LIABILITY

Breach of Duty

[8] Cook Colliery is an underground coal mine. Mr Souz was driving a loader underground at the relevant time, a vehicle supplied to him by his employer. A loader is a machine peculiar to underground coal mines. One witness said that the loader was a type of tractor but that is misleading. It is unlike any farm tractor. The machine weighed about 23 tonnes. The operator sits facing towards the long side of the machine but travels either to his or her left or right. Left is considered to be in the forward direction.

[9] Above Mr Souz, as he sat in the operator's chair, was a canopy. Unbeknownst to him the canopy, along with the deck on which the operator's chair was located, could travel up and down. When raised to its highest point (2.2 meters) the canopy was liable to collide with the roof of the mine or things attached to or hanging from the roof in some, but not all, sections of the mine.

[10] Mr Souz has no memory of the accident the subject of the litigation. His first memory after the incident is of looking for his helmet and cap lamp and of a Mr Travis Newman coming to his aid. But the following seems probable and, I think, largely uncontested.

[11] At about 8.30pm on 26 June 2013 the canopy of the loader collided with a steel beam (called an "overcast") erected across the roof of the mine. The clearance there was 2 meters. Upon impact the loader, which had been travelling at about 10 to 15 kph, came to a sudden stop. Mr Souz was travelling to his left. He was wearing a lap belt but without a sash over the shoulder. No sash was fitted. It is not in contest that Mr Souz sustained an injury to the left arm in the incident which indicates that Mr Souz was thrown such that his left side impacted with the steel frame of the machine. I will refer to this event, at times, as "the loader incident".

[12] The canopy at its lowest height was at 1.9 meters. Thus, at best, there was only clearance of 100mm under this beam.

[13] The mechanism by which the canopy was moved up and down was a small lever located on the floor of the operator's cabin and immediately adjacent to the operator's right leg. When activated, not only the canopy but the whole deck on which the operator sat moved. Despite that I will refer to the movement as the canopy moving.

[14] Mr Souz says that he knew nothing of this lever or of any capacity to move the canopy up and down and that if the canopy moved up on this occasion he did not deliberately cause that to occur. According to an early statement he had passed

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[1] In fact she said "stonic" but her meaning was clarified and in any case clear.

under the overcast on three previous occasions in the course of that shift.[2] The case advanced on his behalf was that his gumboot must have inadvertently caught under the lever causing it to rise up enough to overlap the overcast.[3]

[15] After the accident a fitter obtained a few pieces of scrap metal and in an hour or two fashioned a guard that prevented an inadvertent raising of the canopy.

[16] The defendant's case is that the canopy was deliberately raised by Mr Souz and he simply forgot to lower it. It is said:

(a) That the canopy could be inadvertently raised is not tenable.
(b) This is because:
  (i) The canopy seat and the toggle switch all rise and lower in unison;
  (ii) As soon as the seat started to rise the Plaintiff would have been aware of it;
  (iii) Further if, as the Plaintiff's theory is, the toggle switch was lifted by his boot, as soon as the switch rose it would stop.
  (iv) There is no reason why standing up would cause the Plaintiff's gumboot to be in any different position to that which it had been when he was sitting
(c) Accordingly, it simply cannot have happened the way the Plaintiff says.

[17] Apparently it is thought that it follows that the employer is not then liable.[4]

Discussion

[18] Sections 305B and 305C of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("WCRA") govern the duty owed by an employer to a worker. Those sections provide:

> **"305B General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the injury would occur if care were not taken;

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[2] Exhibit 10.
[3] For a photographic representation of the possibility see Exhibit 12.
[4] By whom it is thought is not clear. To be fair to Mr Morton he made it plain that this was not the strongest part of his case.

(b) the likely seriousness of the injury;

(c) the burden of taking precautions to avoid the risk of injury.

305C Other principles

In a proceeding relating to liability for a breach of duty—

(a) the burden of taking precautions to avoid a risk of injury includes the burden of taking precautions to avoid similar risks of injury for which the person may be responsible; and

(b) the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk."

[19] The introduction of a machine to the workplace that was intended to be driven about underground, where effectively the workers operate in the dark, but with the propensity to collide heavily with overhead objects such as steel beams obviously exposed the operators to a serious risk of injury. No submission was made that the conditions in s 305B(1)(a) and (b) were not satisfied.

[20] While not submitted in terms the defendant's argument presumably is that the condition in s 305B(1)(c) is not met i.e. "in the circumstances, a reasonable person in the position of the [employer] would [not] have taken the precautions" against the risk of injury. In my view that is entirely wrong. The relevant factors are set out in subsection 305B(2). Those factors reflect the common law's approach as explained by Mason J in *Wyong Shire Council v Shirt*[5]:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can

[5] (1980) 146 CLR 40.

> confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."[6]

[21] Here, the probability that the injury would occur if care was not taken was high; the likely prospective injury from a 23 tonne vehicle colliding with a steel beam was serious; the burden of taking precautions was light. Against that background it was incumbent on the employer to take reasonable measures to meet that risk of injury. So far as I can determine from the evidence the employer took no measures at all.

[22] In my view, even if the employer's arguments were accepted that an inadvertent raising of the canopy was not possible, there remained the distinct prospect of an operator raising the canopy and forgetting that it was raised, or not realising that he was entering a part of the mine were the roof was for whatever reason lower than the height of the canopy, or an operator thinking that the amount that the canopy had been raised was still at a safe height. It has long been the law that employers are obliged to bring into account thoughtlessness or inadvertence by the worker in determining what precautions reasonable care demands be taken: *Smith v Broken Hill Proprietary Co Ltd*[7]; *Da Costa v Cockburn Salvage Trading Pty Ltd*[8]; *McLean v Tedman*[9]; *Czartyrko v Edith Cowan University*[10]. There is no indication that the WCRA has affected that fundamental principle.

[23] However I reject the defendant's arguments. The evidence is all one way. The plaintiff's hypothesis for the occurrence of the raising of the canopy is entirely credible and supported by every witness called who had familiarity with the machine or similar machines. Some said they had experienced this inadvertent raising of the canopy. Some said that it was entirely possible that the canopy could rise up without the operator knowing. None said that it could not occur. That was so because of the slow speed at which the canopy moved (I doubt that a video tendered[11] showing the movement is truly representative given the evidence of the lay witnesses[12]) and the jolting inherent in operating these machines. None accepted the defendant's proposition that the operator had to be aware of such a movement. The ability to do so self-evidently depends on how much the canopy moves and the stability of the platform. The mine roads are rough. An operator is constantly being thrown about as he or she traverses the roads. As well the operator variously stands and sits. It is entirely credible that an operator may not appreciate a change in height of what may have been only a few inches. The prospect of a gumboot catching on the lever was obvious. That precise thing had happened to one witness.[13] The manufacturer had warned about the possibility of an accidental raising of the canopy.[14]

[24] Mr Souz said he was completely unaware of the existence of the lever or the capacity for the canopy height to be altered by the operator. His assertion was not

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[6] At 47-48.
[7] (1957) 97 CLR 337.
[8] (1970) 124 CLR 192.
[9] (1984) 155 CLR 306.
[10] (2005) 214 ALR 349.
[11] Exhibit 11.
[12] Mr Saxon: T2-77/27; Mr Dorey: T2-57/17-22.
[13] Mr Newman: T2-31/25-32/7.
[14] See Mr Davey's evidence: T2-13/9-14.

challenged. It appears that there were several machines of this or a similar type on site and some had this capacity to move the canopy and some did not. No one was called who said that his claim of ignorance was wrong, nor was any document advanced which demonstrated that any such information had been given to him. So he was simply unaware of the hazard. He should have been warned about it. In the absence of any other control this area of the mine should have been a no-go zone for loaders of this type. The guard eventually fitted would have avoided the incident. No submission to the contrary was made. No reason was advanced as to why the defendant should not have done any of these things – the precautions were obvious in prospect, involved minimal trouble and expense, and involved no conflict with the defendant's other responsibilities or business activities.

[25] The defendant was in breach of its duty of care. I do not understand why it was in issue.

[26] I decline to enter into the debate, as I was urged to do, as to whether the *Coal Mining Safety and Health Act* 1999 (Qld) provides a private right of action for breach by the employer of s 41 of that Act. I believe I have made all necessary findings of fact to assist the Court of Appeal if the point is to be agitated. It is a vexed question and, given the obvious breach of duty at common law, it is not necessary for me to embark on a discussion of the issue.

[27] No contributory negligence argument was advanced, and properly so.

Causation

[28] By January 2014 a disc prolapse at the C6/7 level of Mr Souz's spine had been identified. The contest is whether that prolapse was caused by the loader incident. The symptoms described by Mr Souz to his treating neurosurgeon, Dr Baker, as being present after 25 October 2013 were consistent with a frank prolapse occurring then, not four months earlier.

[29] The essential and determinative point is: what symptoms did Mr Souz experience between 26 June 2013, when the loader hit the overcast, and 25 October 2013, when it is common ground that there are symptoms present consistent with a frank prolapse of the disc?

[30] The neurosurgeons, Drs Campbell and Baker, are agreed that for there to be a causal connection drawn between the loader incident and the prolapse, symptoms such as neck or shoulder pain or tingling and numbness in the arm need to have been present and present within a relatively short time of the loader incident. Such symptoms would reflect the true onset of upper limb radicular pain and so be consistent with damage to the disc at that earlier time.[15] Dr Campbell thought that the causal link would be probable if such symptoms were present and Dr Baker thought it possible. If medical science concedes the possibility, and perhaps not even so much,[16] then it is for me to determine the probability.[17]

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[15] See the admirably succinct cross examination of Dr Campbell: T3-33/29 – 40.
[16] See *Nicolia v Commissioner for Railways (NSW)* (1970) 45 ALJR 465.
[17] *EMI Australia Ltd v Bes* [1970] 2 NSWR 238 at 242 per Herron CJ.

[31] Mr Souz maintains that he did have such symptoms – neck and shoulder pain and tingling into his hand – from the date of the loader incident. No medical or other record supports Mr Souz assertions that he had such symptoms and some records are positively against his case. On the other hand several lay witnesses were called, all palpably honest, who saw Mr Souz through that period and who swear that he exhibited and spoke of continuing symptoms sufficient to base a finding of a probable causal connection between the incident and the prolapse. Dr Baker's evidence of the symptoms to be expected following damage to the C6/7 disc[18] matched reasonably closely the symptoms that Mr Souz claims that he had. I did not understand the defendant to argue that if that lay evidence be accepted, or the evidence of the plaintiff be accepted, that causation was not shown.

The "heart attack" of 25 October

[32] To understand the arguments it is necessary to understand the events of 25 October 2013. The loader incident had occurred four months before.

[33] In the intervening period Mr Souz had returned to work. Mr Souz's evidence (and in this he is supported by the mine manager, Mr Lidbury[19]) suggests that he did not in fact return to full duties. His attendance records were in evidence but they do not show where he worked or whether there was any restriction on him. The colliery has closed and records apparently misplaced. There is no doubt that Mr Souz performed light duties above ground for a period, and probably, at least usually, until 15 August when a medical clearance was given by a Dr Lip.

[34] On 25 October 2013 Mr Souz was at work. Because of continuing problems with the conveyors and the down time that had been experienced he decided that it was necessary that instead of riding around underground as he had been doing he needed to walk the mine, as he used do before the loader incident. He said that during the day there was an onset of increased tingling in his arm. There was no sudden change but an increasing of symptoms through the day. He then did a very light task of popping a roller with a steel bar weighing about 5 kgs, a task he said, and others agreed, that involved no force on the shoulder or arm, a task he had done thousands of times before. Following that he went to the crib room and explained to the crew the work that he had seen needed doing. His evidence was:

> "Well, continue on. You're in the crib room at about three. What happens? -- I was explaining that to them, and the – the numb – the pain and the numbness and the tingling was still increasing, and
>
> You're indicating it's – by touching your arm. It's going from your elbow towards your shoulder? -- Yeah, well that was the main change. Like, through the day, your tingling would always come up, and it'd always be in that area, the main pain in your forearm, but the tingling come right up to the shoulder, and this is why I was more thinking heart attack. You know, when you hear all this stuff out there, and we get talked about all the time with other people with their tingling all up your left arm and that and – and it just

[18] T3-4/26-30; Exhibit 6 p11
[19] See T2-39/29-40/13.

> started really concerning me. After Peter dropped Ashley at the pit bottom to go up, he come back to the crib room with it because we only got one drift runner with us, the belt crew, and I said to him, 'I need to go up…'" [20]

[35] Mr Souz was taken to the hospital. The entry made by the nurse for "presenting complaint" at 17.27 reads: "Pain in top back of 'L' arm radiated down arm. Pain commenced around 1400 hours today." Under the heading "Clinical assessment and management" the record reads: "Shoulder pain 8/10 radiating down left arm (tingling)". There is a note that there had been no previous episodes of the same pain. It was determined that Mr Souz was not having a heart attack.

[36] This is the first medical record of shoulder pain or tingling. The defendant says that only after this time should it be found that Mr Souz had symptoms consistent with the disc prolapse that was later diagnosed.

The applicable legislation

[37] Section 305D of the WCRA provides, relevantly:

> "(1) A decision that a breach of duty caused particular injury comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***);
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (***scope of liability***).
>
> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection(1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.
>
> (3) …
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty."

[38] Section 305E WCRA states that the onus of proving any fact relevant to the issue of causation is on the plaintiff and on the familiar balance of probabilities test.

[39] What is in issue here is factual causation. The plaintiff must show that "but for" the defendant's breach of duty the injury would not have occurred.[21] The question here

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[20] T1-38/17-29.

[21] *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18].

is whether the forces that acted on Mr Souz when the loader came to a sudden stop on 26 June did in fact cause or contribute to the prolapsed disc later found in his neck?

[40] Before embarking on an examination of the evidence and arguments I should observe that each side advanced a significant body of evidence that supported their respective positions, each side made cogent arguments based on that evidence, and hence the decision is a particularly difficult one.

There were significant forces involved and a probable neck injury

[41] A starting point is that the force involved in the collision between the loader and the overcast was substantial and quite capable of causing significant forces to come onto Mr Souz's neck. Mr Davey, the sometime maintenance superintendent and control room operator, saw the loader a few days after the incident. He gave the following evidence:

> "What observations did you make of the loader? The canopy section, which is called the ROPS FOPS, had been severely damaged. There's a welded structure at the base of the loader where it – it actually attaches to the – the loader itself. It was torn and ripped, and the canopy itself was folded back.
>
> All right. What sort of material is the canopy made of? It's made of a steel. The actual canopy part's usually made of a Bisalloy.
>
> All right. And what did that damage tell you about the collision, if anything? **It was quite a high impact collision**."[22]

[42] That evidence was confirmed by Mr Newman, mentioned previously, who observed something of the collision. His evidence was:

> "When the collision occurred, where were you? I was probably 15 metres away from the loader when it hit it and I heard the bang and seen all the dust come off the roof.
>
> When you say you heard the bang, other than simply saying it was a bang, are you able to give any further description of the type of bang? Well, it was a loader hitting the overpass and it was an extremely loud bang and it shook – it was enough to shake the roof and all the dust came down off the over-cast and I turned around and I could see Greg, that he was injured, hurt in the cabin later. **It was a hard impact.**
>
> And what did you do after? You heard this and then you could see he was injured. What did you do? I went over there and asked if he was okay and tried – he looked at me and said, "I'm hurt. I'm hurt. Get me out of here".

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[22] T2-12/23-32 – my emphasis.

> Now, when you came to the loader, where was the loader stopped in relation to the steel over? It was stopped directly underneath it. **Where it hit the over-cast it was stopped dead in its track right where it hit**.
>
> Were you able to see any damage to the steel over-cast? I could see visually – yeah. Yes, I could. Yeah.
>
> What was it? Tell us what you saw of the steel over-cast? **The square tube on the over-cast that was about 100 by 100 mil thick was squashed flat**."[23]

[43] Mr Alley, a boilermaker who saw the machine after the incident, said that an inch thick plate of steel had been bent by about 20 millimetres around the door jamb.[24] He had the task of realigning the door jamb. He said it would not have been easy to cause that misalignment - it "had a decent size smack against something".[25]

[44] So, I am satisfied that there was a very heavy impact.

[45] I am satisfied too that there was more damage than merely pain in the left arm, as the defendant maintains, following that impact.

[46] Mr Davey, mentioned earlier, was also the senior first aid person on site and saw Mr Souz in that capacity when he was brought to the surface. He gave evidence of his observations:

> "All right. Can you tell his Honour what you observed? Yeah, when I first met Mr Souz he was out in the carpark at the smoking area. I asked him what was wrong. He first complained about his lower left arm. He was also, I guess, not really with it. He – **he didn't seem to be fully lucid at the time**. I asked Mr Souz to put his cigarette out and go straight into the first aid room. I laid him on the bed. I then went through the normal process of – he couldn't tell me exactly what was wrong or what had happened, so I went through the normal process you would go through with – feel him up to see what parts were injured and damaged. **His neck was severely sore; so was his shoulder. I then did the simple questions of, you know, who's the Prime Minister, what day**
>
> Sorry. Can I pull you up there. You indicated his neck, and you placed your right hand on the left-hand side of your neck? Yeah, just in here.
>
> Is that where you say his neck was sore? Yeah, he had damaged something in there.
>
> All right. **And you then said his shoulder was sore, and you ? In the top end of his shoulder**.

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[23] T2-30/8-31 – my emphasis.
[24] T2-69/35-45.
[25] T2-70/8.

> Okay. And again, you were touching your left shoulder? Yep.
>
> Is your recollection is that's the shoulder that was sore? Yes, it is.
>
> All right. Sorry. Continue**? So I did the simple question thing, like who's the prime minister, how – what day is it. Didn't get any of the answers right** …."[26]

[47] It was suggested to Mr Davey that he was confused about the time he made this observation, that it really followed the events of 25 October. But I see no reason to think he could be so confused. There is no suggestion of any head injury at that later time. The event of 25 October involved Mr Souz standing up from the crib table and having an onset of tingling into his upper arm, thought at the time, wrongly as it turned out, to be a heart attack. And the chance of a head injury being sustained in the subject incident was high given the force of the impact, the closeness of the surrounding steel cabin, and the absence of a sash seat belt.

[48] Mr Davey is supported by other evidence. First, it is noteworthy that the reports that the manager of the mine, Mr Lidbury, recalls receiving on the day after the incident[27] as well as his own observations then[28] were consistent with the observations that Mr Davey says he made.

[49] Secondly, Mr Newman indicated that there was a rib of metal located around the top of the cabin on the machine and "if he was to hit his head on that, he could have done some real damage."[29] It is not known whether Mr Souz did or not. Mr Newman too thought that Mr Souz was "a bit vague" and unresponsive immediately after the incident confirming Mr Davey's observations. Mr Newman said "he [that is, Mr Souz] was in a lot of pain" and "hunched over".[30]

[50] Thirdly, that a head injury was sustained is supported by a Mr Doorey. He claimed, as did Mr Newman, that he was first on the scene after the incident. He said he found Mr Souz slumped over in what he called the Eimco. His evidence in chief went on:

> "All right. So you've seen him slumped like that holding his arm. What happened next? I – I spoke to Greg. **He was quite unresponsive**. I must have called him three or four times. I put me hand on his shoulder, and when I did call him, like, there was a grunt a couple of times, and put me hand on his shoulder and he – he lifted his head up.
>
> All right? So he was – **he was pretty groggy**.
>
> Right. What happened next? I tried to get him out. I found that the door on the Eimco was sort of partially locked or whatever, so I had

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[26] T2-16/5 – 30 – my emphasis.
[27] T2-39/4.
[28] T2-38/38 – 39/25.
[29] T2-35/32.
[30] T2-31/1-15.

four or five goes at trying to lift up the handle. And I'd say that's what he's hit his arm on when he's hit this over-cast.

Okay? I finally got the handle up and then turned him, and I got him out of the machine, and he – he was **quite groggy for several minutes**. I ended up – I got into my machine and took him out.

All right. Now, was anybody else there with you at the time? Not when I was first there, no, but there was – there was a crew turned up after me.

All right. Once Mr Souz was out of the machine, what happened then? It was probably a few minutes because where I parked up would have been a matter of 40 metres away, I suppose, and I walked him down. I held on to him because he was – **he was quite groggy, but he – I said to him, "I'll take you outside", and he didn't really want to do that. He wanted to keep on with the job. But I got him – I just convinced him, "I've got to take you out, mate. You have to go outside."**

Yep? Because I – I was certain he'd broken his arm.

Right? Just the way he was holding his arm.

Right? And so he originally didn't want to go out, but I convinced him, "Let's go."

And did you then take him out? And I walked him to the car.

All right. And once in the car, where to from there? I took him to pit bottom.

Right? And I called down to dolly car and got him into the dolly car and took him outside, and that's where, you know, the controller then took over and took him into the treatment room.

Okay. Now, who's the controller you're referring to? That would have been Mik Davey."[31]

[51] In my view this is a formidable body of evidence and from witnesses who were unlikely to be mistaken about their observations and the time to which they relate. I say that because the occurrence of the collision was, unsurprisingly, of some significance in and around the mine site and provides a ready point of reference for the witnesses. As well the evidence makes sense when put into the context of such an accident.

[52] Each witness provides strong support for the claim that significant forces came to bear on Mr Souz, that he had a head injury of some sort, and so support the argument that he may well have had significant forces imposed on his neck. The observations of the first aid officer, Mr Davey, of complaints of neck soreness

[31] T2-52/44 – 53/37 – my emphasis.

immediately following coming to the surface and of Mr Souz's observed behaviour then and the next day by Mr Lidbury, also strongly support a finding that he sustained an injury of some sort to his neck.

[53] It is worth noting too that it is drawing a pretty long bow to suggest that these witnesses are in such a relationship with Mr Souz that they would deliberately lie to a Court about him. I did not understand Mr Morton's submissions to go so far but none of these men were shown to be very close to Mr Souz. Mr Lidbury was the manager of the mine. He was obviously an intelligent man and his demeanour was as you would expect of a man accustomed to the exercise of authority and the bearing of important responsibilities. Given his responsibilities I would expect that he would have a very good idea of what was going on in his mine. While he obviously held Mr Souz in high regard it is very difficult to believe that he would let that high regard interfere with his duty. Indeed he was the one who eventually terminated Mr Souz's employment with the Cook Colliery. And to mislead a court on something that occurred on his watch as manager would imperil his career.

[54] Great reliance was placed by the defendant on the medical records, and understandably so, but I am satisfied that the hospital record made on the night of the accident does not give any indication of the scope of the high impact on Mr Souz. It reads: "Sore left arm – hit arm against door latch. Good C✓W✓M↓S. Ice applied prior to presentation" where C stands for colour, W for warmth, M for movement and S for sensation. The "S" has both a downward arrow and superimposed on it a tick which I have not attempted to reproduce. The reason for the change was not explored although the nurse who made the record (and who gave evidence) plainly considered that the intended final version of the mark was a "tick". There was a space provided on the form for showing the results of testing of sensation. It is blank. That absence was not explored with the nurse either. One inference is that there was no such testing.

[55] As well the defendant points to a note made by a WorkCover officer, Ms Carusi, of a telephone call she had with Mr Souz on 1 July, four days after the incident. She there records him saying under what seems to be a heading "Event and injury?": "left forearm – I was driving a machine and the cabin of the machine hit the roof and came sudden stop (*sic*) and I've hit the cab door with my forearm." There is a strong prospect that this is a reconstruction, based on information provided to Mr Souz by his workmates, given Mr Souz's dazed state immediately after the incident. But the defendant's point remains that there is no mention of a neck problem.

[56] One obvious reason why the records on the night and a few days later may have mentioned only the arm was that there was a very significant problem with it, a problem that overwhelmed any concern about other areas. Mr Souz said he thought that he had broken his arm. As well he thought he was still dazed when at the hospital and has only a limited memory of his attendance. Mr Doorey said, he was certain on the night, no doubt from the way Mr Souz held his arm and from whatever complaints or comments he made, that Mr Souz had broken his arm.

[57] So I am satisfied that these witnesses are reliable and that there was the strong likelihood that significant forces came onto Mr Souz's neck in the incident, that he probably sustained a head and neck injury at the time, and that the hospital record

made that night, for whatever reason, is quite misleading and that the note of the telephone call, cryptic as it is, sheds little light on the true state of affairs. I am satisfied that Mr Souz suffered more than a "sore left arm" in the incident as mentioned in the hospital record and I am confident that he collided with more than a "latch".

[58] There is no doubt this injury to the forearm was the principal problem. Should I be satisfied it was the only ongoing one?

Were there continuing symptoms other than the arm pain?

[59] Mr Souz says that over the next day or two he became aware of general soreness in other areas of his body. More particularly for present purposes he became aware of numbness in the palm of the left hand and tingling about a quarter the way up the forearm and into the back of the middle fingers. In the course of his evidence a ruler was obtained and a measurement undertaken of how far up the forearm Mr Souz meant. The measurement was 10cm.[32] As well, he noticed aching in the left shoulder and a stiff neck. To a considerable extent Mr Souz is supported in his claim by six witnesses.

The plaintiff's witnesses

[60] Mr Davey, the control room operator, said that he saw Mr Souz after he returned to work. His evidence was:

> "And did you see him when he returned to work? Yes, I did.
>
> All right. And how often – sorry. How soon after the incident do you think you saw him at work? Maybe a week, two weeks, depending on where my roster sat at the time.
>
> All right. And were you able to make any observations about Mr Souz as to his physical condition? Yeah, he – he had a – a plaster cast on the left arm. He was very stiff. He wasn't turning his head. If you spoke to him, he'd sort of do the whole body bit to talk to you and spent a lot of time going like this, rubbing his shoulder and neck [indistinct]
>
> All right. Now, again, for the record, the witness has put his right hand on the left-hand side of his neck and rubbed it. All right. Those observations you've just described, the not turning the head and the rubbing of the neck - how often do you recall having seen them since his return to work? Once he went back down the colliery full time, that's when I started to see him – basically, like, I used to see him all the time. When he was on light duties, I didn't see a lot of Greg because he was in the office away from me. Once he went back down the colliery, it was a pretty regular event for him to be holding his neck, complaining about headaches, complaining about neck pain.

[32] The "Unidentified Speaker" mentioned in the transcript was the bailiff.

> All right. And have you ever – can you recall ever noticing a time when that behaviour stopped? Not really, no."[33]

[61] While it is not entirely clear when Mr Souz recommenced underground "full time", it is tolerably clear that he did not do so until he was cleared medically and that only occurred in August and probably only after a certificate issued by Dr Lip of 15 August.

[62] Mr Lidbury, the manager, explained that he saw Mr Souz "quite a bit" after the morning immediately following the incident and that he saw he had ongoing problems. He said:

> "…the next time I seen him he had his arm in a half cast and he'd try not to lose time from work and he'd come back but he was definitely restricted in all of his movements with his arm and his shoulder and whatever and his neck. And I arranged through the rehab co-ordinator for him to do light duties at the mine as per our rehab policy. That was in the store. He did that for a period of time and then he kept going to the doctors to try and get a certificate to go back down the pit. So he did. He went down the pit, so we put in planning, conveyer installations and the maintenance and all that sort of stuff without any manual handling and he did that for a while but that didn't work out. The pain in his neck didn't go away. Then he had to seek further medical help and I think that's when he went off and had some treatment to his neck.
>
> Now, so from the time that he was on light duties and you mentioned that you put him in the stores, did you have occasion to see him during that period of time? Yeah, I seen him in the stores.
>
> Did you observe any improvement in the physical symptoms you described to us? No. He didn't do – he didn't do any physical work while he was there. He was
> sort of doing computer work and maybe stacking the shelves or unloading, things like that, but he wasn't able to drive the forklift or anything like that.
>
> Did you see any signs of improvement in the movements that you've described as restricted? No.
>
> All right. And when he went back underground, did you have occasion to see him from time to time once he returned underground? I seen him during the times that I did inspections down the mine so I used to go down the pit once a week and go around and I would see him, mostly see most of the people down the pit in the sections. He wasn't – he was just doing – he wasn't doing any manual work or anything like that. And I think he putting his

[33] T2-16/45-17/22.

> helmet and everything on might have restricted him a bit too so he wasn't doing much.
>
> So did you at any stage observe these symptoms of stiffness and restricted movement improve or resolve? No."[34]

[63] Mr Doorey saw Mr Souz at work again about two weeks after the incident with a cast on his arm. His evidence was:

> "All right. And what did you observe about him that day that – when you first saw him with the cast on his arm? I – I noticed that as far as his movements and all of rest of it, he was pretty upright, and he said he was ready to come back to work and all the rest of it, and he was quite stiff.
>
> All right. In what part of his body did you observe him to be stiff? His upper shoulders. Like, he – he – he stood pretty much straight up and down. Turned his head and his body at the same time.
>
> All right. So, again, you have just rotated in your chair ? Yep.
>
> without moving your head? Yep."[35]
>
> "All right. So you recollect this is a couple of weeks after the incident, he's got the cast on his arm, and he's turning his shoulders with his head, not moving his head? Yep.
>
> Did you observe that behaviour again after that occasion? Yeah, he – he was doing that for quite some time.
>
> Well, when you say for quite some time, did you ever see him stop doing that? Did you ever see him freely moving his head about? Not really. He was quite careful in the way he actually would turn around and all the rest of it…"[36]

[64] Mr Hetherington shared a house with Mr Souz at the time of the subject accident. He did so for some years and has maintained contact since Mr Souz ceased work. His evidence was:

> "When you first saw him four to five days later, what did you observe of him? Yeah, he was getting about – he was getting around bit miserable because his – his arm gave him a lot of pain. He was on a lot of painkillers for that, and then probably – I sort of observed probably a week or so after that he was starting to have neck problems.

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[34] T2-39/30 – 40/16.
[35] T2-54/10-19.
[36] T2-55/26-35.

> Okay. You say you observed him to start to have neck problems. What did you see? He was just - sort of now and again he'd give it a rub and – and a - sort of like a stiff neck. I didn't think much of it at first because I thought he might have slept the wrong way and - but it just remained.
>
> When you say he would now and then give it a rub, what was he rubbing? The back of his neck, like doing those ones. He never really had the – the full rotation of his – of his head up or down or [indistinct] or sideways.
>
> After noticing this, did you have any conversation with him about that? I just asked him was he having trouble. He said, yeah, he was, and I didn't really think he thought much of it [indistinct] at that time, but it just – it constantly stayed there with him. Even before he went to work, that was just – yeah, it – it never left.
>
> From the first time that you saw him a week - or four or five days, I should say, after the incident, until perhaps one or – one year later, did you observe – did your observations of the way he was presenting change or did he look the same to you? Looked the same. Probably – yeah, probably a little bit worse. Not – you know, not a – I really – can't really say because I'm not a doctor, but he got a little bit worse, then – then as we know, he had that operation, and then it just – it never got any better. It just stayed the way it was. And he's always in pain now.
>
> Since you first saw him four to five days after the accident, did you see him at home taking any pills? Yeah. Yeah. He was always taking pills. He was always in a lot of pain. I often had been woken by him not waking me up, but he'd be walking around at 2, 3 o'clock in the morning because he just couldn't sleep.
>
> Before this accident of June '13, had you ever seen him taking pills? No.
>
> Since the accident, to your observations of him, has he changed as a person? Yes, he has. He's - he's not – he's not the same person he was before. He's probably withdrawn. He's – he's – he's miserable. He has his days. Yeah, he's just – he's just different altogether. He's not the same person no more."[37]

[65] As emerged in cross examination Mr Hetherington was well aware of the suspected heart attack incident and correctly recalled that as occurring in October. He was adamant that Mr Souz had a sore neck before that event. While he thought Mr Souz was "a little worse" after the suspected heart attack[38] he plainly thought the significant problems pre-dated that event.

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[37] T2-62/15 – 63/6.
[38] T2-64/27 - 28.

[66] Mr Hetherington is criticised as an unreliable witness as he believed that the problem was on the right side of the neck instead of the left, and thought that Mr Souz had fractured his arm, which he had not. The latter point is unsurprising. Mr Souz himself believed, initially at least, that he had a fractured arm. In an early statement he claimed that an ultra sound indicated a "slight fracture" to the arm.[39] As well several of the witnesses recalled Mr Souz wearing a cast for some time. It seems that what he in fact wore was a bandage, but the mistake is an understandable one to make. And Mr Hetherington is not the first witness, and often those in error are medically trained (Dr Campbell made the same error in this case, as did a Dr Directo in a certificate), to confuse left and right. These seem to me to be very minor points. Perhaps if his evidence stood alone there would be some cause for concern but its strength is in the fact that it matches the evidence given by four other witnesses.

[67] Mr Eldon Alley, mentioned earlier, was a workmate. His evidence was:

> "Can you recall seeing Mr Souz return to work after the collision?---Yeah, I did see him probably a – a month or – or two months after the accident, yes.
>
> All right. And did you observe anything about Mr Souz when you did observe him?---Yes, just the way that he could not turn his head. He would have to, like, turn his whole body, instead of – you know, talking to a normal person, you just turn your head to them.
>
> All right. And when do you believe this was, in relation to the collision? What time period?---It'd be between a month to two months after his accident, yes."[40]

[68] Mr Alley was adamant in cross examination that his observations of a stiff posture related to the time "between a month to two months after [Mr Souz] had his accident". With due respect to the cross examiner it does little to detract from a witnesses' credit to show that they cannot recall by reference to dates (here February 2015 was used) when something occurred. Speaking generally, my observation of witnesses over 40 years has been that dates long in the past mean nothing to the average person unless tied to events of significance for them.

[69] Finally, a statement was tendered of a Mr Pickstone.[41] He was the mine safety officer in June 2013 and the months following. By the time of trial he had passed away. His statement sheds very little light on the key issue. In essence he says that upon Mr Souz's return to work underground after a period on light duties he was always in pain and took medication. Of interest is his assessment of Mr Souz's character and perseverance:

> "9. Greg returned to work pretty quickly after the incident from memory. That was the way Greg was though, he was someone who would just soldier on. He was on alternative duties for a short period

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[39] See Exhibit 10.
[40] T2-70/17-26.
[41] Exhibit 1.1 pages 119 – 124.

> but I recall he was very keen to return underground and get back to his usual job.
>
> 10. When he returned underground I recall him being in ongoing pain and persevering with work for a long period. I cannot recall if the pain was only in his left arm or up into his neck, but I recall him working though pain from the time he was cleared to return underground in about August 2013."[42]

[70] A point made by the defendant, and not without some force, is that several of these witnesses provided statements to the plaintiff's solicitors which do not make clear the fact that they each now assert.[43] The statements make plain that each witness thought Mr Souz to have continuing problems from the time of the loader incident, problems from which he never fully recovered. But the statements do not deal with the crucial issue. Were the physical symptoms prior to 25 October limited to the left forearm or did they extend to the neck and shoulder? Counsel for the defendant urges that the appropriate inference is that the witnesses could not recall this detail in October 2016 when the statements were apparently taken, and so they should not be accepted as accurately recalling those symptoms now. But it is by no means clear that the witnesses could not recall the detail – they do not say that, save for Mr Pickstone.[44] What seems evident is that they were not asked for the detail. Senior counsel for the plaintiff submits that what is evident is that the person who took the statements was simply incompetent in failing to appreciate, and so have the witnesses address, the crucial issue. Dr Baker's report of 21 December 2015[45] should have alerted all concerned to the importance of the precise symptoms. When the lawyers appreciated the true issue that needed to be examined is not clear to me but I note that Dr Baker's precise delineation of the issue and the symptoms that he would expect is contained in a file note dated 30 January 2018 – only a week before the trial commenced.[46]

[71] So the evidence of the witnesses is uniformly that from the outset Mr Souz had difficulties not just with his arm but with his neck. Why should they be disbelieved?

The defendant's case

[72] As I have said, the defendant disputes that these symptoms were present before 25 October 2013 and so too late to be causally connected to the loader incident.

[73] The submission is that Mr Souz has come to believe over the years that the symptoms date back to the subject incident and convinced his friends and colleagues of that too. The argument is that they have been asked to recall these symptoms too long after the event for me to have any confidence in the accuracy of their recollections of the timing of onset.

[74] The defendant's evidence falls into two distinct categories. The first is the evidence in the contemporaneous medical records, or more accurately the absence of any

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[42] Exhibit 1.1 page 119.
[43] Exhibits 13, 14 and 15.
[44] Exhibit 1 tab "Liability" p119-120.
[45] Exhibit 6 tab 4.
[46] See Exhibit 6 tab 5.

evidence in those records, of relevant symptoms, prior to 25 October 2013. The second is that in conversations with WorkCover officers and doctors about his claim or injury Mr Souz talked of symptoms commencing on or after 25 October and not after 26 June.

The contemporaneous medical records

[75] The defendant's point is that no mention is made of any problems other than the arm pain at the medical attendances that followed the incident. Those attendances were[47] on 27 June (Dr Nithianantha), 29 June (Dr Villareul), 3 July (Dr Koh), 9 July (Dr Droulers), 19 July (Dr Directo), 8 August (Dr Madriano), and 15 August (Dr Lip). On 8 August Dr Madriano recorded: "Needs a clearance to return to normal work. Left forearm feeling much better, with full range of motion." He noted: "Fit to return to normal duties." Apparently there was some problem with the certificate issued and Mr Souz had to get a further clearance. Hence he attended on Dr Lip a week later. Dr Lip's note reads: "L forearm fine now. L elbow and wrist movements good".[48]

[76] The premise underlying the defendant's argument is that it is not credible that Mr Souz would not have mentioned shoulder pain, symptoms of tingling in his arm, and continuing stiffness and pain in his neck to these practitioners if those symptoms were indeed present. I do not accept that is right.

[77] First, I note that each of the practitioners mentioned is a general practitioner. While there are seven practitioners Mr Souz visited only two medical centres. Four of the attendances were at the Mandalay Medical Centre and three at the North Blackwater General Practice. This creates a potential problem that doctors presumably work off the previous notes (they would certainly be well advised to) and their approach might well be thereby limited or affected by what they perceive is the issue. As well, counsel for the plaintiff point out that we have no way of knowing how long the attendances were for, but the notes suggest a limited time only. However that does not meet the main point – Mr Souz either did not tell the doctors about these symptoms, or made so little of them the doctors saw no reason to record them.

[78] Secondly, and more importantly, if the defendant's premise is put as a general proposition concerning the behaviour of people in the community I do not accept it. Much depends on the significance of the symptoms to the sufferer. In assessing Mr Souz there is an added consideration. It is quite evident that he lived for his work and that his primary motivation in seeing the doctors as time went on was to get himself back to work. As well he was acutely aware of the impact of recording a lost time injury (an "LTI" in the argot) and plainly wanted to avoid that record being made.[49] At least after the early attendances he was not after treatment but after a certificate to enable him to go back underground. Against that background is a

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[47] I will not list the medical reports regarding the taking of X-Rays and scans – in my experience while they evidence the reason for the referral, they otherwise add little as there is usually no communication with the patient by the radiologist, as opposed to a radiographer.

[48] I note that Mr Morton was prepared to call each of the doctors (save Dr Lip who had passed away). On his concession that none of the doctors could actually recall the attendances on Mr Souz and that they would each accept that their notes did not purport to record everything that was said at the consultation it was agreed between counsel that they did not need to be called.

[49] See T1-34/45 – 35/5.

worker likely to mention ongoing, niggling but not disabling problems? I think it not only entirely credible that he would not, but that he might endeavour to conceal his true problems.

[79] Counsel for the plaintiff submits that the medical records are not as clear cut as the defendant maintains. My attention is drawn to references to "left ulna arm injury" in the certificates of Dr Nithianantha and Dr Droulers and so a possible implication of a nerve injury. However the reference by Dr Nithianantha in his notes ("review injury to left ulna area") is to an area of the arm as opposed to a nerve in the arm. The doctors were at the same practise and no doubt work off the same medical notes and so duplication is not unexpected. While the implication might be said to be possible, it is not particularly persuasive.

The statements made after 25 October 2013

[80] I set out defence counsel's written submissions in full, with footnotes:[50]

> "41. The Plaintiff presented to Blackwater Hospital on 25 October 2013 (Ex 6 Tab 6, p. 29) with pain in the top back of the left arm, radiating down the arm, reporting that such symptoms have "**commenced**" at 14:00 hours that day. There was no report of a stiff neck or neck pain[51]. If in truth the Plaintiff had experienced neck pain/stiffness or shoulder pain or numbness in the preceding months, it would be extraordinary if it was described as commencing that day and as being present for some months.
>
> 42. On 29 October 2013 the Plaintiff presented to Dr Directo with "**sudden**" onset of left shoulder pain with numbness in the fingers, arm and forearm. The "sudden" onset is inconsistent with the Plaintiff having such problems prior to 25 October 2013. Again, if in truth the Plaintiff had neck, shoulder or arm pain over the preceding months it is extraordinary it was not mentioned or recorded.
>
> 43. On 2 January 2014 the Plaintiff presented to Dr Directo with pain around the left shoulder, pins and needles on the forearm (still no mention of the neck).
>
> 44. A similar attendance the next day (3 January 2014) on Dr Directo referred to pain around the left shoulder, radiating to the chest and shoulder[52], but again no mention of the neck.
>
> 45. On 7 January 2014 the Plaintiff presented to Blackwater hospital. The note records "Pain thoracic spine radiating to neck" (Ex 6 Tab 6.38). This is the first reference to neck pain (and is consistent with what Dr Baker was told 2 weeks later – see below).

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[50] If there are errors, then they are Mr Morton's. I detected none of significance.

[51] As will be seen the neck pain only commenced two weeks before he saw Dr Baker on 22 January 2014.

[52] Ie consistent with Dr Baker's view that a C 6/7 prolapse would present with pain in that area rather than the forearm.

46. On 22 January 2014, (Ex 6 Tab 1.1), Dr Baker was told that the neck pain had "started two weeks ago"[53]. The Plaintiff gave a history of having no past history of neck trouble (PMH "no neck trouble"). He also gave a history, which seems to be correct, of **three months prior** getting posterior shoulder pain and tingling in the hand, with cramping and pain in the arm. The Plaintiff related that he "**started**" getting posterior shoulder pain and tingling in the hand whilst he was in the crib hut. The Plaintiff mentioned to Dr Baker the previous left forearm injury (which he placed in March 2013)[54] but did not mention any neck or shoulder injury, nor tingling in the arm or hand, associated with that incident – only the left arm (Ex. 6 Tab 1.1).

47. On 14 February 2014 the Plaintiff spoke to Ms Carusi at WorkCover. (Ex 6 Tab 14.187) Importantly:

(a) He denied the injury happened over a period of time;

(b) He said he sustained the injury the day he went to hospital for checks on his heart (25 October 2013);

(c) He mentioned changing out the roller as being the only thing he could think of which might have caused the injury. He did mention that he was doing " a lot of above head work";

(d) He said he didn't feel anything until after he was in the crib hut when he sat down and started getting pain;

(e) He said that it was hard to say exactly what had caused it because he didn't fall down or anything like that.

48. The following appears in Ms Carusi's note (Ex 6 Tab 14.178):

> *"*What symptoms are you experiencing?*
> *-getting a pain in the arm joint just underneath the shoulder.*
> *-got worse, I started walking out crib room tingling in the hand and up the wrist area.*
> *-tingling went up the arm*
>
> **How long have symptoms been present?*
> ***-this is the first time I felt symptoms to this area***
> *-pain relief was for my arm*
> *- I kept working and got the NSC, thinking that it would go away.*
>
> …

[53] See Dr Baker's notes.
[54] This demonstrates how unreliable memory of the timing of events can be.

** when did you first seek treatment?*
-went to Blackwater Hosp.
-completed test for heart attack.
-they then advised it could be nerve thing and then advised I should see my own GP" (emphasis supplied)

49. There was no mention of a history of symptoms. Indeed, an injury over time was positively denied. None of that is consistent with the Plaintiff's case. The Plaintiff gives a clear history to Ms Tyquin of the onset of shoulder symptoms and tingling symptoms on 25 October 2013. This is consistent with the history given to Dr Baker some weeks earlier. It is inconsistent with the plaintiff having shoulder or neck symptoms, or altered sensation in his arm, prior to 25 October 2013.

50. When the Plaintiff spoke to Ms Tyquin at WorkCover on 10 March 2014 (Ex6 Tab 14.171) he mentioned:

(a) The pain in his shoulder started on 25 October 2013;

(b) He mentioned the accident with the loader (which he said was in April 2013) in which he mentioned he banged up his arm. There was no mention of his head or neck or shoulder, nor mention of altered sensation in the left arm associated with that incident.

(c) He mentioned "…was just doing day to day work. Lifting, driving loader."

(d) He told Ms Tyquin (Ex6 Tab 14.171), that his job was "supervisor of conveyor belts, heavy lifting, machinery"."

[81] Taken in isolation these are powerful submissions. But they ignore three points at least.

[82] The first is that what is recorded depends very much on the questions asked and Mr Souz's understanding of what information was relevant to convey. All involved thought that this was a new and different problem post 25 October 2013 and one of sudden onset. On both sides of the case it is accepted that there were new and different symptoms radiating up the arm to the shoulder. The initial view was that Mr Souz had suffered a heart attack. It would be understandable if Mr Souz wanted to emphasise the new nature of the problems he was having. Up to some point in time the concentration was on this new problem, not on the preceding and lesser symptoms.

[83] Secondly, the submission glosses over the significance of a medical certificate issued by Dr Directo on 2 January 2014. Dr Directo there recorded a provisional

diagnosis of "right shoulder pain secondary to impinged nerve" with Mr Souz having been seen at the practise for this condition for the first time on 29 June 2013 with a date of injury of 26 June 2013 with the worker's stated cause being "hit L forearm from metal door". The recorded findings are: "continuous pain on the right shoulder, radiating to the right forearm, described as tingling". It is not in issue that Mr Souz has never had right shoulder or arm pain and so the certificate contains an obvious error. But it is clear that by then he attributed the ongoing symptoms back to the subject incident.

[84] So if, as the defendant contends, Mr Souz has come wrongly to believe that there was a relationship between these symptoms and the incident then he did so very early on when his symptoms were much fresher in his mind, when there was no suggestion of a damages claim, and when he had every reason to be as accurate as he could be.

[85] The defendant contends that a further implication should not be drawn, that is, that Mr Souz was asserting to Dr Directo that the symptoms had been present since the incident. The certificate is brief and not clear on this point, but it is of some significance that the doctor recorded that the injury was consistent with the worker's description of the cause, which was the loader incident. The alternative box to tick was "uncertain". Dr Directo had seen Mr Souz on 19 July, so only a few weeks after the subject incident. It is difficult to believe that the causal connection would have been accepted without question if the doctor was told that these symptoms were entirely new and had come on only latterly or if the doctor thought that the presentation was inconsistent with the presentation some months before.

[86] Again, I acknowledge that this is far from conclusive proof.

[87] Thirdly, the submission takes no account of the sort of man Mr Souz is, and the motivations that he had. Mr Souz intent was to preserve his position at his workplace. I am sure that his intent was to downplay his symptoms so as to get back to underground work. As well he was unsophisticated, unused to the ways of doctors and WorkCover clerks, and unread. How this impacted on his dealings with the doctors and clerks can only be a matter of conjecture.

Some miscellaneous points

[88] Counsel for the defendant argued that Mr Souz would not have been allowed underground if he was as bad as he claims. The argument is not without force but the fact is that Mr Pickstone did allow Mr Souz to go underground and his statement indicates that he was plainly conscious that Mr Souz was in pain and taking painkillers throughout that time. The improbability involved is met, again to a degree, by Mr Souz's evidence that he was allowed underground but with the intent that he coordinate activities rather than perform any strenuous work. As I mentioned he was highly regarded as having expertise with conveyor belts and he claims, and in this he was not contradicted, that his employer was having problems with its conveyor systems through this time. To understand the problems Mr Souz said he had to see the conveyors. Thus on the one hand there was a worker very keen to get back to his work, and on the other an employer in need of his peculiar skills. It is explicable that he was permitted underground in the circumstances.

[89] A further point made by the defendant concerns the evidence of wasting in the left arm observed by Dr Baker. On examination on 22 January 2014 Dr Baker found marked weakness and wasting of the triceps muscle of the left arm.[55] The doctor said that such wasting could not have gone unnoticed by medical practitioners had it been present in August 2013 when Mr Souz was cleared to return to work. The extent of the wasting seen in January was consistent with a frank prolapse occurring on or about 25 October. While obviously consistent with the defendant's premise that the prolapse is unrelated to the incident of 26 June 2013 the observation does not refute the plaintiff's premise that damage to the disc was suffered in the loader incident and absent that damage the frank prolapse would not have occurred at a later point in time. While the presence of such weakness and wasting would have been conclusive proof of a large frank disc prolapse it is not essential to the argument that such extensive weakness and wasting be present in, and prior to, August.

[90] A point in favour of Mr Souz's claims is the difficulty that he had getting back to work. The initial view that Mr Souz may have broken his arm was proved wrong after radiological tests. He was told that he had bruising to the arm. Nonetheless Mr Souz struggled to get back to full function. All witnesses agreed on that. The extent of his struggle is at least consistent with a view that he had problems other than bruising.

[91] That he was having considerable problems in getting back to work is supported to a degree by his attendance records. He returned to work a week after the loader incident having taken only his rostered days off. It is evident from the foregoing testimony that he was initially on light duties. But the records suggest that even that was too much for him. After his five rostered days off following the loader incident he worked six days. One of those days is marked "R" in the records indicating that he worked in mine rescue, but Mr Souz says that he has never in fact done so. The inference is that he was being looked after and not really working. He then took one day of paid sick leave and six days of annual leave from 11 July until 8 August, along with 14 rostered days off. So in that four week period he worked only seven days and one of those is shown as a six hour day instead of the usual 10 hours.

[92] His evidence concerning that period was that he was not having holidays on his days of annual leave but rather that the amount of painkillers he was taking, and the impact on his sleep, became too much for him, so he needed time off. None of this proves the point, but it is consistent with Mr Souz's account, that he was having significant problems and consistent with his problems being over and above bruising.

[93] As well, the extent of the pain killing medication consumed by Mr Souz provides some support for the claim that he was having problems over and above bruising. The GP notes record significant quantities of Endone, Panadeine Forte and Tramal being consumed.[56]

[94] So, there are points each way but none are conclusive.

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[55] Exhibit 6 tab 5 paragraph 10.

[56] See the file note provided by Dr Campbell: Exhibit 16 paragraph 3.

Summary and conclusion

[95] I do not, of course, seek a level of scientific certainty here. Senior counsel for the plaintiff cited the remarks of Lee J in *Gaudry v Pacific Coal Pty Ltd*:[57]

> It is also timely to re-state the principle that it is not the function of a court of law to resolve questions of medical or indeed any other science. In this regard, I can do no more than refer to a passage in the judgment of Connolly J in *Obstoj v Van Der Loos*[58] with which I respectfully agree. His Honour said:
>
> > "…it should be emphasised that it is no function of a court of law to resolve questions of medical, or indeed any other science. The present state of medical art and understanding is of great assistance to a court in attempting to resolve a question such as the central issue in this action but, at the end of the day, many other factors enter into it.
> >
> > …
> >
> > The function of a court of law in a situation such as this is to determine whether, for whatever reason, it is more probable than not that there is a causal relationship between the accident and the plaintiff's post-accident condition."

[96] This, I think, is orthodox principle. More recently the High Court in *Tabet v Gett*[59] confirmed the principle. Alan Wilson J neatly summarised the effect of that case, for my purposes, in *Cowen v Bunnings Group Limited*:[60]

> "[21] More recently the High Court again both explained this approach to causation, and confirmed its continuing validity, in *Tabet v Gett*. Kiefel J (with whom Hayne, Crennan and Bell JJ agreed) said that the purpose of proof at law, unlike science or philosophy, is to apportion legal responsibility — and that requires the courts, by a judgment, to '*reduce to legal certainty questions to which no other conclusive answer can be given*'.
>
> [22] Earlier, Kiefel J had spoken of the way the courts undertake this exercise. The common law, her Honour said, requires proof by the person seeking compensation that the negligent act or omission caused the loss or injury constituting the damage; but all that is necessary for that purpose is for the plaintiff to show that, according to the course of common experience, the more probable inference arising from the evidence is that the defendant's negligence caused the injury or harm. '*More probable'* means, she said, no more than that upon a balance of probabilities such an inference might

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[57] [1996] QCA 525.
[58] (W. 203 of 1985, 13 April 1987, unreported).
[59] (2010) 240 CLR 537.
[60] [2014] QSC 301.

> reasonably be considered to have some greater degree of likelihood. But it does not, as Kiefel J emphasised, require certainty."[61]

[97] In assessing the probabilities I do not overlook the importance of the records. Mr Morton has helpfully collected a number of authorities and again I repeat his submission:[62]

> "55. In Withyman v NSW [2013] NSWCA 10 at [65] , reference is made with apparent approval to the helpful discussion of "credibility" by Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 at p431 as follows:
>
> > ""Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others**? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred.** Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part." (emphasis supplied.

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[61] Footnotes omitted.

[62] Again any errors are counsel's responsibility. None were fatal.

56. In Camden v McKenzie [2007] QCA 136 Keane JA observed that:

> "… the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."[63]

57. In Evans v Braddock [2015] NSWSC 249 at [70]-[77] Hallen J, after referring to Watson v Foxman (1995) 49 NSWLR 315, said:[64]

> "[71] In that case, his Honour was talking of a cause of action founded on s 52 of the *Trade Practices Act 1974*(Cth) or s 42 of the *Fair Trading Act 1987* (NSW): see the discussion by McDougall J in *Harbour Port Consulting v NSW Maritime* [2011] NSWSC 813, at [10] - [18]. However, as McLelland CJ in Eq also pointed out, the views apply to all types of litigation.
>
> [72] I also remember what was said by Emmett J (as his Honour then was) in *Warner v Hung*, in the matter of *Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* (No 2) [2011] FCA 1123; (2011) 297 ALR 56, at [48]:
>
> > 'When proof of any fact is required, the Court must feel an actual persuasion of the occurrence or existence of that fact before it can be found. Mere mechanical comparison of probabilities, independent of any belief in reality, cannot justify the finding of a fact. Actual persuasion is achieved where the affirmative of an allegation is made out to the reasonable satisfaction of the Court. However, reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the consequences flowing from a particular finding are considerations that must affect whether the fact has been proved to the reasonable satisfaction of the Court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences (see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2).'
>
> [73] The credibility of a witness and his, or her, veracity may also be tested by reference to the objective facts proved

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63 Cited with approval by Leeming JA (with whom Barrett JA and Tobias AJA agreed) in NSW v Hunt (2014) NSWCA at [47]. A useful collection of similar observations is found in The Nominal Defendant v Cordin [2017] NSWCA 6 per Emmett AJA at [164] to [165].

64 Cited with apparent approval in The Nominal Defendant v Cordin [2017] NSWCA 6 per Emmett AJA at [165].

> independently of the evidence given, in particular by reference to the documents in the case, by paying particular regard to his, or her, motives, and to the overall probabilities: *Armagas Ltd v Mundogas S.A. (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, per Robert Goff LJ, at 57. Also see, In the matter of *Kit Digital Australia Pty Ltd (in liq)* [2014] NSWSC 1547, per Black J, at [7].
>
> [74] A court, in cases involving events which occurred long before the litigation, usually prefers to rely upon contemporaneous, or near contemporaneous, documents, which will often provide valuable and, usually, more revealing, information than what may be flawed attempts at recollection of those facts by persons with an interest in the outcome of the litigation: *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, per Jagot J, at [1247]. Greater weight is usually accorded to such documents, as often they provide a safer repository of reliable fact, particularly when it is clear that they have been prepared by a person with no reason to misstate those facts in the documents and where there is no suggestion that the documents are other than genuine: *Hughes v St Barbara Mines Ltd [No 4]* [2010] WASC 160, per Kenneth Martin J, at [157]."

[98] I bear these considerations in mind. However the documents here of course are not documents independent of the plaintiff. Their accuracy is reliant on the plaintiff being accurate and complete in his explanation to the record taker. I have previously reflected on the factors impacting on the plaintiff. And these records have their limitations. They are generally short, cryptic and made for the purpose of dealing with the presenting problem not for providing full information for a forensic analysis of causation for examination later by a Court.

[99] Nonetheless, taken on their face the medical and other records are not consistent with the plaintiff's present assertions. There are possible explanations for that, some more persuasive than others, but they are not entirely satisfactory. The record that seems to me to provide the strongest support for the defendant's argument is that of the attendance on Dr Baker on 22 January 2014. However, if his notes be read as meaning that no symptoms of this precise type had previously been experienced then his record is explicable and consistent with the plaintiff's case. But the evident failure to mention the previous problems is a strong point against the plaintiff's claim that they were present.

[100] The crucial assessment is whether Mr Souz was likely to have interpreted Dr Baker's questioning (and those of others) as directed to the symptoms that came on more recently, and have failed to appreciate the relevance of the symptoms that dated back to June 26. Once it be conceded that is possible the case is reasonably clear. It is necessary to bear in mind that Mr Souz is not a sophisticated man. He left school in grade 9 and unable to read, then and now. He did not strike me as the type to complain. He is of good character. Even allowing for those features, unsupported by other testimony, I would not be prepared to accept that possibility.

[101] However, I was impressed by the witnesses that the plaintiff called attesting to the presence of significant symptoms in the neck prior to 25 October 2013. That five witnesses would be mistaken about that may not be impossible but it is highly improbable.

[102] As well, in assessing the probabilities the fact of a major insult to the head, and so potentially then to the neck, quite capable of causing damage to the disc, in the loader incident strikes me as of considerable significance. Indeed Dr Campbell said that the incident as described to him (which matches closely to my impression from hearing all the witnesses) was "highly likely" to cause a neck injury.[65]

[103] Conversely a significant weakness in the defendant's case is that there is no evidence of any event occurring on 25 October that was remotely likely to cause a large prolapse of a disc in the neck. I acknowledge that Dr Baker pointed out:

> "A cervical disc protrusion such as I diagnosed in the Plaintiff can be caused by quite minor everyday events. A violent sneeze or something of the sort can finally rupture the disc. In the vast bulk of cases of cervical disc protrusion it is the combination of a degenerate state of the cervical spine (such as this man had, albeit not unusual for his age) together with some event that is finally the straw that breaks the camel's back."[66]

[104] Despite that observation Dr Baker accepted that it would be unusual for a significant disc prolapse to occur without some obvious triggering event.[67] Dr Campbell said that it was only a "remote possibility" that a prolapse could occur in such circumstances.[68] And Mr Souz's description of the events of 25 October leading up to the sudden onset of the new symptoms do not suggest any activity that would place forces on the neck that would amount even to the impact of a "violent sneeze".

[105] In my view, while there can be no certainty about the finding, the hypothesis that the disc prolapse was consequent upon and relevantly caused by the forces involved in the incident of 26 June 2013 for which the defendant is liable can "reasonably be considered to have some greater degree of likelihood", sufficient to satisfy the balance of probabilities test, than the defendant's alternative hypothesis. For the purposes of this litigation I find causation to be established.

DAMAGES

[106] I turn then to the heads of damage.

General Damages

[107] General damages for pain and suffering are to be assessed in accordance with section 306O and 306P of the WCRA, the general damages calculation provisions in section 130 of the *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld) ("the

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[65] Exhibit 16 paragraph 4.
[66] Exhibit 6 tab 5 paragraph 5.
[67] And see the cross examination at T3-11/10-23.
[68] Exhibit 16 paragraph 10.

WCRR"), and Schedules 8, 9 and 12 of the WCRR. I am referred to my analysis in *Allwood v Wilson & Anor*.[69]

[108] The parties are agreed that Item 85 of Part 6 of Schedule 9 applies i.e. that the dominant injury is to the cervical spine and that it is properly described as a serious injury.

[109] Item 85 provides for an injury scale value (ISV) range of 16 to 40. The plaintiff contends for an assessment at the top of the range with a 25% uplift to allow for the psychiatric consequences of the injury, the defendant in the middle of the range.

[110] The guidance that is provided in the legislation is not determinative. Under the heading of "Comment about appropriate level of ISV" the Item provides:

> An ISV at or near the bottom of the range will be appropriate if—
>
> (a) the injured worker has had surgery and symptoms persist; or
>
> (b) there is a fracture involving 25% compression of 1 vertebral body.
>
> An ISV in the middle of the range will be appropriate if there is a fracture involving about 50% compression of a vertebral body, with ongoing pain.
>
> An ISV at or near the top of the range will be appropriate if—
>
> (a) the injured worker has had a fusion of vertebral bodies that has failed, leaving objective signs of significant residual nerve root damage and ongoing pain, affecting 1 side of the body; and
>
> (b) there is a DPI of about 28%.

[111] Dr Campbell assessed a 25% whole person impairment related to the cervical spine injury. Dr Flanagan, a psychiatrist, assessed a 17% impairment related to the psychiatric consequences. Senior Counsel for the plaintiff points out that the latter injury alone would justify an ISV assessment of between 11 and 40 under Item 11 of the Schedule.

[112] There is no doubt that the impact of the cervical spine injury on Mr Souz has been severe. He has lost all earning capacity. He is opioid dependent. He needs someone to care for him to a degree. He is in constant pain. However he does not have the compression fractures referred to in the Item, and, while he has had fusion surgery, it has not failed in the sense intended - leaving objective signs of significant residual nerve root damage affecting one side of the body. I cannot accept that the cervical spine injury alone merits an assessment at the top end of the range.

[113] The presentation is complicated by the psychiatric injury. It too is relatively severe. I accept the plaintiff's submission that "whilst there is some overlap between the

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[69] [2011] QSC 180.

consequences of the physical injury and mental disorders, they produce quite different symptoms and have quite different impacts on the plaintiff's enjoyment of life."

[114] In my view the maximum dominant ISV is adequate to reflect the level of impact of these injuries. I assess an ISV of 40. The damages then are $86,750.[70]

[115] Interest on general damages is not recoverable against an employer (s 306N(1) WCRA).

Past Economic Loss

[116] The plaintiff claims $429,634 under this head. The calculation assumes virtually constant employment at the plaintiff's pre-accident (i.e. 2013) wage. The evidence suggest that there has been no great change in wages since then.

[117] There is no complaint about the accuracy of the calculation but the defendant submits that there must be some discounting for the fact that the Cook Colliery closed in mid-2015 and the likely dislocation that would have caused Mr Souz.

[118] The plaintiff's calculation assumes only one week between jobs. While possible (and the plaintiff relies on Mr Saxon's experience of a job offer on the day he ceased work), that is a very optimistic view of the probabilities. There was ample evidence that Mr Souz was highly skilled and employment was certainly available in the mining industry after the Cook Colliery closed. However I consider that it is probable that Mr Souz would have taken the opportunity to have a break between jobs. Certainly his discussion with Dr Flanagan suggest that he was thinking hard about his future and intending to get away from the seven day a week work life that he had pursued for a very long time.[71]

[119] The defendant makes four further points with potential relevance, albeit more in relation to a period more than five years post injury:

(a) Dr Baker's evidence that within five or 10 years, Mr Souz would have symptoms arising from the degenerative condition of the neck likely to be responsible for curtailment of his ability to work underground - any economic loss after age 60 should be severely truncated;[72]

(b) Mr Souz told Dr Flanagan that he was thinking of acquiring a caravan park "within five years or so";

(c) The references in the general practitioner's notes of 22 January 2015 pain in the right leg on and off; to 2 April 2015 to restless leg syndrome, bilateral calf pain; hypertension; and two attendances before injury, 23rd of June 2012 and 27 November 2012, and numerous attendances after injury, indicating noncompliance with diabetes medication and regime and the consequences of it;

(d) As Mr Souz was getting older, he may have found it harder to get, maintain and perform the heavy work of coal mining and its associated tasks.

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[70] Schedule 12 Table 3 Item 8 *Workers' Compensation and Rehabilitation Regulation* 2014 (Qld).
[71] Exhibit 5 page 10 paragraph 6.2.
[72] Exhibit 6 tab 4 page 9.

[120] I would have thought that the points made in paragraphs (a) and (c) should have been the subject of pleadings and were not, but no point was taken, and the plaintiff certainly had notice of Dr Baker's views.

[121] As usual there can be no certainty about this. I propose to discount the plaintiff's calculations by approximately 5% to allow for the various contingencies. I allow $405,000 for past economic loss.

Future Economic Loss

[122] It is common ground that Mr Souz has no residual earning capacity. A claim is made for $995,557. The assumptions adopted are full time employment in the mining industry on a net weekly wage of $2,115 to age 68 with a 10% discount for contingencies.

[123] Sections 306J and 306L WCRA are relevant to this head of loss.

[124] There is considerable force in the defendant's submissions that I have summarised above but there are countervailing considerations.

[125] As to Dr Baker's prediction it cannot be taken as certain that Mr Souz would have had symptoms sufficient to prevent him working in the mining industry, but he was at risk. Indeed, Dr Baker's concession that Mr Souz was in much the same position as everyone else his age[73] somewhat lessens the impact of this prediction. The principles explained in *Malec v JC Hutton Pty Ltd*[74] apply. And symptoms that might cause someone to give up underground mining work may not cause them any difficulty in a wide variety of more sedentary occupations.

[126] While the "caravan park" comment was hardly a concrete plan it indicates an attitude and an unsurprising one for a man who had spent so long, working so hard. I refer again to the discussion with Dr Flanagan about cutting back on his work.

[127] The onset of other medical problems is relevant and the issues concerning diabetes of considerable importance.

[128] While I bear those matters in mind, nonetheless it is evident that Mr Souz was not the sort of man to stand idle, nor is there any evidence that the medical problems would have any particular impact on his earning capacity.

[129] I propose to allow an amount that assumes a loss of income based on the mining wage to age 61 years, i.e. 10 years post injury discounted by 20%, and thereafter a loss adopting a 70% discount on that wage for a further 5 years. I allow $410,000.

Loss of work benefits

[130] Mr Souz enjoyed certain benefits in his employment at the Cook Colliery. He was required to live in camp at Blackwater and his meals were provided. He travelled back to his home in Rockhampton on his days off.

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[73] T3-9/15 – 10/6.

[74] (1990) 169 CLR 638.

[131] The saving to him in not having to purchase meals was at least $45.00 per day or $225 per week. There is no reason to think that these benefits would not have continued until the closure of the colliery in mid-2017. His employment was secure. His loss to that point was about $31,000.

[132] Thereafter the loss is put as a loss of opportunity and depends on whether and when Mr Souz would have regained work after the closure and whether the benefit would have been provided at that workplace. It is very likely it would have been – living in camps is a ubiquitous feature of life in the mining world. Counsel applies a 25% deduction to the calculation for the chance that the benefit would not have been provided which seems appropriate, if not generous to the defendant. The loss since mid-2017 I put at $4,725.

[133] I will assume a 5 year future in the mining industry and assess the future loss at $39,150.

[134] I allow $75,000 under this head.

Loss of superannuation benefits

[135] I allow 9.25% of the past economic loss assessed, as claimed - $37,460.

[136] For the future the loss is claimed at 10.5% of the amount assessed, presumably relying on the decision of the Court of Appeal in *Heywood v Commercial Electrical Pty Ltd*[75] but with an adjustment to allow for the change in the legislated levy rates since that decision.[76] No argument is advanced against that claim. I allow future loss at $43,050.

Past Paid Assistance

[137] The plaintiff claims a loss of $150 per week from 20 November 2014 – a total of $25,200. The defendant disputes the claim contending that no amount can be allowed because of the restrictions contained in the legislation.

[138] There is undisputed evidence that Mr Souz requires domestic assistance. He in fact receives such assistance from a Mrs Walker, who gave evidence. Mr Souz lives in Mrs Walker's residence and pays her $300 per week. The arrangement between them is that $150 of that sum goes towards rent and $150 as payment for the services that she provides. The "services" provided were described by Mrs Walker as including cleaning, cooking, laundry, medication, shopping and driving. Mr Souz and Mrs Walker were strangers prior to the commencement of this arrangement[77] and Mrs Walker would not continue to provide the services if she was not being paid to provide them.[78] Mrs Walker works as an Assistant in Nursing ("AIN"). Counsel for the plaintiff contends that she provides these services in her "professional capacity" as an AIN.

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[75] [2013] QCA 270.
[76] See *Superannuation Guarantee (Administration) Act* 1992 (Cth) s 19.
[77] T1-44/6-13; T2-83/3-10.
[78] T2-84/ 33-34.

[139] The argument depends on the preclusion in s 306H WCRA and the definitions of "gratuitous services" and "paid services" in s 306D WCRA. The relevant legislative provisions are:

> **306C Application of sdiv 1**
>
> This subdivision sets out the principles a court must apply in awarding damages for services that are provided, or are to be provided, to a worker by another person after the worker sustains an injury.
>
> **306D Definitions for sdiv 1**
>
> In this subdivision—
>
> ***gratuitous services*** means services, other than paid services, that are provided to a worker by a member of the worker's family or household, or by a friend of the worker.
>
> ***paid services*** means services that are provided to a worker at commercial rates by another person in the person's professional capacity or in the course of the person's business.
>
> ***services*** means services of a domestic, nursing or caring nature.
>
> **…**
>
> **306H Services not required by or provided to worker before injury**
>
> (1) This section applies if the worker usually did not require or was not provided with particular services before the worker sustained the injury.
>
> (2) A court can not award damages for the cost or value of any services provided to the worker after the worker sustained the injury, or that are to be provided to the worker in the future as either gratuitous services or paid services, if the services that have been provided to the worker after the worker sustained the injury are gratuitous services.

[140] In one sense it is a peculiar argument to say that the services that Mrs Walker provides are "gratuitous" given the fact that they are paid for, and to a stranger. But that, the defendant says, is the effect of the legislation.

[141] Senior Counsel for the plaintiff cited *Foster & Anor v Cameron*[79] as authority for allowing the claim. *Foster* was concerned with hybrid claims – claims that were for services provided that were both provided gratuitously and paid for. There the plaintiff's lawn mowing had been performed by family members but on six or seven occasions by a lawn mowing contractor. It was held that the gratuitous provision of the lawn mowing did not preclude the plaintiff from obtaining damages. There the services were plainly provided by the contractor as part of its business and so were "paid services" as defined. That is not the case here, so the case is not directly applicable.

[142] The parties approached the interpretation problem from different directions. The plaintiff contends that s 306H precludes the awarding of damages only if the services

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[79] [2011] QCA 48.

in fact provided after injury are "gratuitous services" as defined and that to be so described they must be provided by a "member of the worker's family or household, or by a friend of the worker". It is said that Mrs Walker is none of those things.

[143] The defendant contends that even though the services are paid for they are not within the definition of "paid services". That is so because they are not provided by Mrs Walker in her "professional capacity or in the course of [her] business". It follows that they are gratuitous services, so it is submitted.

[144] Assuming that the defendant's argument that these services are not provided in a professional capacity is right, which I think it is, the fact that the services are not "paid services" as defined is not the end of the matter. I think the decision in *Foster* stands at least for that much. The question posed by the plaintiff still must be answered – is Mrs Walker a member of the plaintiff's "household" for the purposes of the section?

[145] Butterworth's *Australian Legal Dictionary* gives the definition of "household" as "a group of people, whether related or not, who live collectively in one house". In that sense Mrs Walker plainly is a member of the household in which Mr Souz resides. The oddity here is that the only reason that the two people are living in the one residence is that one is prepared to provide, on payment, services to another. The question whether the legislation, by its terms, catches such an arrangement? The way the defendant approaches the legislation is to assert that all that needs to be shown is that the two people live in the one residence. But that could have been said and was not.

[146] More commonly to be a member of a household implies some relationship over and above residence under the one roof – a relationship by marriage, or of blood, or say of service, such as a servant. I note that in both the Shorter Oxford Dictionary and the Macquarie Dictionary there is a reference to "family" - as in members of a family living together - in the course of the first of several definitions provided. Dictionary definitions, of course, have their limitations.

[147] Here the phrase is "a member of the worker's family or household, or by a friend of the worker". The reference to both "family" and to "friend" suggests that the legislature had in mind some relationship between the worker and the provider that was more than that of two strangers living under the one roof. The context seems to me to strongly suggest something more.

[148] And to be pedantic, Mr Souz has moved to live under Mrs Walker's roof, not the converse. He may have joined her household, but I think no one would say that she had joined his. And it is the "worker's household" that is in question.

[149] Finally this is a statute limiting rights provided by the common law. As McMurdo P held in *Kriz v King*[80] in respect of s 59 of the *Civil Liability Act* 2003 (Qld) which restricted the same common law right:

> "Because s. 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously: *Potter v. Minahan*; *Bropho v. Western*

[80] [2007] 1 Qd R 327 (Jerrard JA and Helman J agreeing).

> *Australia*; *Coco v. The Queen* and *Grice*. For that reason s. 59(1)(c) should be interpreted in the way which least diminishes a claimant's common law rights to damages for gratuitous services."[81]

[150] While the question is not free from doubt, the better view it seems to me is that in the circumstances Mr Souz is not precluded from claiming damages. The services which Mrs Walker has provided are not within the definition of "gratuitous services" in s 306D. That being so the preclusion in s 306H does not apply.

[151] There remains the question of what amount should be allowed. Mr Morton submits that there is no evidence of what the need for services might be and what the commercial cost of satisfying that need might be. The plaintiff adopts the amount paid to Mrs Walker as reflecting that cost. Of course, the amount paid does not necessarily reflect the true commercial cost. If, out of pity, Mrs Walker had agreed to provide services for say $10 per week, or if, out of rapaciousness, she had required that Mr Souz pay $1000 per week[82] the plaintiff would not be compelled to adopt the former as the commercial cost, nor the defendant forced to accept the latter. Indeed as best I can see, the figure of $150 was adopted out of mere convenience to the two parties and without any precise agreement as to the services that would be rendered or why that figure was otherwise fair.

[152] However there is some other evidence that Mr Morton's submission overlooks. Mr Souz was seen by an occupational therapist, Ms Flynn. She was not cross-examined. She was familiar with Mr Souz's living arrangements and described them as "quite unique". She assessed that he needed 8 hours assistance a week and 9-10 hours if he moved into separate accommodation. Experience in everyday living suggests that these estimates, given Mrs Walker's evidence of the services provided, are not unreasonable. Ms Flynn provided information on various rates, depending on the service in question, ranging from $50 to $70.[83] So the evidence supports an amount well in excess of $150 per week. Effectively the claim is limited to three hours per week on the lower end of the range of current rates. There isn't the slightest doubt that Mr Souz would need more assistance than that.

[153] I will allow $25,200 as claimed.

Future Paid Assistance

[154] The same arguments and facts apply as for past assistance.

[155] The claim made is for $110,970 representing care and assistance at $150 per week over 30 years and discounted by 10%.

[156] I see no reason not to allow the amount claimed. If anything it understates the potential loss considerably.

Special damages

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[81] At [18], footnotes omitted.
[82] I do not, of course, accuse Mrs Walker of either sentiment.
[83] See Exhibit 4 pages13-14.

[157] Counsel for the plaintiff tendered a schedule setting out the damages claimed.[84] The damages total $47,609.74. There are various assumptions underlying the schedule which are in dispute. The disputed claims are set out followed by my response in bold:

(a) A claim is made for $6,424.75 under the heading "Medicare Notice of Charge – deemed (dated 30.09.17)". The defendant submits that deemed Medicare charge is of no evidential value. - **There is no analysis of the Medicare Notice of Charge sufficient to satisfy me that the charge relates to the expenses for which the defendant ought to be liable. Medicare simply assumes that to be so. As the defendant pointed out in its submissions there are other medical issues and attendances that are unrelated.**

(b) Under "Pharmaceutical" a claim is made for $1,500 for the cost of medicines at $25 per week from 26 June 2013 to 21 August 2014. The defendant submits that the record does not show Mr Souz spending $25 a week from the 26th of June. It shows very little expenditure - only about $20 - before 25 October 2013 - **The plaintiff made no response to this submission. The claim must be moderated by the evidence. I will allow $1,000 of the amount claimed, restricting the claim to 42 weeks.**

(c) A claim is made for $4,382.40 for travel. The assumption is of fortnightly travel to Rockhampton from 1.12.14 (when the plaintiff relocated to Yeppoon) to the present for attendances on general practitioners and a psychologist. The defendant submits that the assumption was not borne out by the evidence - **Again no response is made to the submission. No analysis of the evidence was made to persuade me that the claim as formulated is accurate. No doubt there have been many such journeys for the stated purpose, but the claim is really in the nature of a claim for general damages. In the absence of any precise evidence I will allow one-half of the amount claimed as at least not overstating the loss.**

[158] I allow $39,000 under this head of loss.

Interest

[159] Interest on past monetary losses is governed by s 306N WCRA. It relevantly provides:

> **306N Interest**
>
> (1) A court can not order the payment of **interest** on an award for general damages.
>
> (2) https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-027?query=VersionDescId%3D%2299ef6c05-1f36-46b2-ae77-1162f3551f61%22+AND+VersionSeriesId%3D%22b6537c36-4a2c-45c5-a2db-fe6d14a74c68%22+AND+PrintType%3D%22act.reprint%22+AND+Content%3D(%22interest%22)&dQuery=Document+Types%3D%22%3Cspan+c

[84] Exhibit 23 page 26.

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(a) must not be more than https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-027?query=VersionDescId%3D%2299ef6c05-1f36-46b2-ae77-1162f3551f61%22+AND+VersionSeriesId%3D%22b6537c36-4a2c-45c5-a2db-fe6d14a74c68%22+AND+PrintType%3D%22act.reprint%22+AND+Content%3D(%22interest%22)&dQuery=Document+Types%3D%22%3Cspan+class%3D'dq-highlight'%3EActs%3C%2Fspan%3E%2C+%3Cspan+class%3D'dq-highlight'%3ESL%3C%2Fspan%3E%22%2C+Search+In%3D%22%3Cspan+class%3D'dq-highlight'%3EAll+Content%3C%2Fspan%3E%22%2C+All+Words%3D%22%3Cspan+class%3D'dq-highlight'%3Einterest%3C%2Fspan%3E%22%2C+Point+In+Time%3D%22%3Cspan+class%3D'dq-highlight'%3E26%2F02%2F2018%3C%2Fspan%3E%22 - H3
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36-4a2c-45c5-a2db-fe6d14a74c68%22+AND+PrintType%3D%22act.reprint%22+AND+Content%3D(%22interest%22)&dQuery=Document+Types%3D%22%3Cspan+class%3D'dq-highlight'%3EActs%3C%2Fspan%3E%2C+%3Cspan+class%3D'dq-highlight'%3ESL%3C%2Fspan%3E%22%2C+Search+In%3D%22%3Cspan+class%3D'dq-highlight'%3EAll+Content%3C%2Fspan%3E%22%2C+All+Words%3D%22%3Cspan+class%3D'dq-highlight'%3Einterest%3C%2Fspan%3E%22%2C+Point+In+Time%3D%22%3Cspan+class%3D'dq-highlight'%3E26%2F02%2F2018%3C%2Fspan%3E%22 - H5 at the appropriate rate; and

(b) must be related in an appropriate way to the period over which the loss was incurred.

(3) The appropriate rate is the rate for 10 year Treasury bonds published by the Reserve Bank of Australia under '**Interest**https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-027?query=VersionDescId%3D%2299ef6c05-1f36-46b2-ae77-1162f3551f61%22+AND+VersionSeriesId%3D%22b6537c36-4a2c-45c5-a2db-fe6d14a74c68%22+AND+PrintType%3D%22act.reprint%22+AND+Content%3D(%22interest%22)&dQuery=Document+Types%3D%22%3Cspan+class%3D'dq-highlight'%3EActs%3C%2Fspan%3E%2C+%3Cspan+class%3D'dq-highlight'%3ESL%3C%2Fspan%3E%22%2C+Search+In%3D%22%3Cspan+class%3D'dq-highlight'%3EAll+Content%3C%2Fspan%3E%22%2C+All+Words%3D%22%3Cspan+class%3D'dq-highlight'%3Einterest%3C%2Fspan%3E%22%2C+Point+In+Time%3D%22%3Cspan+class%3D'dq-highlight'%3E26%2F02%2F2018%3C%2Fspan%3E%22 - H6 rates and yields—capital market' as at the beginning of the quarter in which the award of **interest** is made.

[160] Senior Counsel for the plaintiff advances the "appropriate rate" as 2.75%. No contrary submission was made by counsel for the defendant.

[161] For past economic loss the calculation should be performed on the amount allowed less WorkCover weekly benefits. The exhibit suggests those total $44,044,[85] but counsel for the plaintiff submits, again without complaint from the defendant, that the correct amount is $32,000. I will adopt the plaintiff's submissions.

[85] Exhibit 1 tab "Quantum" page5.

[162] No claim is advanced for interest on special damages or past loss of work benefits.

Future Expenses

[163] A claim is made for $115,854.10. Again the assumptions underlying the claim are said not to be made out. The principal assumptions are:

(a) Attendances on a general practitioner on a fortnightly basis for the remainder of Mr Souz's life expectancy;
(b) The continuing cost of pharmaceuticals at a commercial rate again for Mr Souz's life expectancy;
(c) Travel from Yeppoon to Rockhampton on a fortnightly basis for the next 30 years to obtain treatment.

[164] Senior Counsel for the plaintiff advised me that the future claim for pharmaceuticals must be limited to no more than $30 per week, that being the amount notified to the defendant by the Statement of Loss and Damage.

[165] There is a fundamental problem with these claims. No treatment appears to have any beneficial effect. Why then should the cost be visited on the defendant indefinitely? Mr Souz has a dependency on the drugs which needs to be dealt with. That may take time but there is no certainty that he will, or should, be on these drugs for the rest of his life.

[166] A further problem is the cost. The Pharmaceutical Benefits Scheme requires that the commercial cost be paid but only for a period. What that period might be is unknown. The defendant submitted that a relatively short period should be adopted, say 12 months. The annual concessional safety net figure is currently $384, with pharmacists empowered to reduce the cost by $1.00 – so a weekly cost of $6.40.

[167] Finally it is not known where Mr Souz will live over the next 30 years, nor that he will travel to and from Yeppoon to Rockhampton. In fact there are many general practitioners resident in and practising in Yeppoon. It is not clear to me why it is reasonable to visit those costs on the defendant.

[168] I will allow the following:

(a) Attendances on a general practitioner on a monthly basis for 30 years: $7,200;
(b) Pharmaceutical expenses - $30 per week for 24 months and thereafter $6.40 per week for 28 years: $8,220
(c) Counselling as claimed: $4,226.50
(d) Travel: the return trip from Yeppoon to Rockhampton for two years and thereafter a 5 kilometre round trip fortnightly, on the assumption that Mr Souz can, acting reasonably, access a practitioner within a couple of kilometres of his home: $8,000.

[169] I allow $27,646.50 under this head of loss.

Summary

[170] In summary I assess the damages as follows:

Head of damage	
General Damages	$86,750
Past Economic Loss	$405,000.00
Past Loss of Superannuation	$37,460.00
Interest on past economic loss	$17,950.00
Future Loss of Earning Capacity	$410,000.00
Future Loss of Superannuation Benefits	$43,050.00
Loss of Work Benefits	$75,000.00
Past Paid Assistance	$25,200.00
Future Paid Assistance	$110,970.00
Future Expenses	$27,646.50
Special Damages	$39,000.00
Total	**$1,278,026.50**
Less WorkCover refund	$152,077.46
Net Total	**$1,125,949.04**

Orders

[171] There will be judgment for the plaintiff against the defendant for $1,125,949.04.

[172] I will hear from counsel as to costs.