

Bourke trading as Air Manymak v Jeffs [2006] NTCA 12

PARTIES: BOURKE, Michael John and RAYNER, Elizabeth trading as AIR MANYMAK

V

JEFFS, Peter and JEFFS, Elaine

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION

FILE NOS: AP 2 of 2006 (20017216)
AP 3 of 2006 (20017213)

DELIVERED: 16 NOVEMBER 2006

HEARING DATES: 12 and 13 JULY 2006

JUDGMENT OF: MARTIN (BR) CJ, ANGEL &
SOUTHWOOD JJ

APPEAL FROM: NORTHERN TERRITORY SUPREME
COURT, 154 of 2000 (20017213)
12 JANUARY 2006

CATCHWORDS:

DAMAGES

Appeal – measure of damages in action for torts where liability admitted – loss of earning capacity – causation – mitigation of damage – burden of proof – future economic loss – error in calculation – deduction of tax and calculation based on net loss – appeal dismissed – cross appeal allowed.

Adams v Ascot Iron Foundry Pty Ltd (1968) 76 SR (NSW) 120, applied.
Jones v Dunkel (1959) 101 CLR 298; *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418, cited.

Un v Schroter & Others [2003] NTCA 2; *Bridge Printery Pty Ltd v Mestre* [1999] NSWCA 342, considered.
Medlin v State Government Insurance Commission (1995) 182 CLR 1; *Cullen v Trappell* (1980) 146 CLR 1; *Todorovic v Waller* (1981) 150 CLR 402 at 440; *Shaw v The Commonwealth of Australia* (1993) 116 FLR 376, followed.

REPRESENTATION:

Counsel:

Appellant:	J Reeves QC
Respondent:	B G Bradley

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Priestleys

Judgment category classification:	A
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bourke trading as Air Manymak v Jeffs [2006] NTCA 12
No. AP 2 of 2006 (20017216) and No AP 3 of 2006 (20017213)

BETWEEN:

**MICHAEL JOHN BOURKE &
ELIZABETH RAYNER trading as AIR
MANYMAK**
Appellant

AND:

PETER JEFFS & ELAINE JEFFS
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 16 November 2006)

THE COURT :

Introduction

- [1] On 30 October 1998 the respondents were injured in an airline crash. Liability for damages was admitted by the appellant and a trial was held before a Judge of this Court as to damages sustained by both respondents.
- [2] The appellant appeals against the awards of damages alleging a number of errors by the learned trial Judge. The primary complaint is that the trial Judge erred in finding that Mr and Mrs Jeffs were entitled to awards of

damages in respect of past economic loss for the period commencing May 2001 and in respect of ongoing and future economic losses. For two years prior to April 2001 Mr and Mrs Jeffs had been employed at Palumpa. They made a “voluntary” decision to move to Wagin in Western Australia and, having moved in April 2001, experienced difficulties in obtaining employment. The principal questions argued on appeal were whether the evidence established the necessary causative link between the injuries sustained in the crash and the economic loss suffered by Mr and Mrs Jeffs while living at Wagin and whether the trial Judge erred in determining that the appellant bore the burden of proving that the decision to move to Wagin was unreasonable.

[3] Associated with the principal complaints were contentions that the trial Judge erred in respect of a number of findings of fact relating to the decision to move to Wagin. The particulars of the principal ground of appeal assert the following errors:

- In finding that the respondents’ primary reason for moving to Wagin was due to their injuries which in turn led to a loss of earnings.
- In failing to find that the primary reason for Mrs Jeffs moving to Wagin was to be close to her family and was for lifestyle reasons rather than as a result of any injury suffered by her as a result of the plane crash.
- In failing to find that the primary reason for Mr Jeffs moving to Wagin was because Mrs Jeffs wanted to be close to her family and was for

lifestyle reasons rather than as a result of any injury suffered by his wife as a result of the plane crash.

- In making a positive finding of fact that the more important reason for Mr Jeffs leaving Palumpa was the difficulties Mr Jeffs had in carrying out the work expected of him because of the physical and psychological injury sustained by him as a result of the plane crash when there was no evidence to support such a finding.
- In failing to find that there was employment available to the respondents in the Northern Territory and Western Australia, and that the respondents could have obtained employment of a similar nature and remuneration to the employment at ALPA, but that they choose not to do so; consequently any reduction in earnings could have been avoided had they sought and obtained such alternative employment.
- In finding that the respondents' move to Wagin was a lifestyle choice and that any consequent reduction in earnings was due to that move rather than any inability to undertake more remunerative employment.
- In finding that the evidence of the respondents concerning their decision to move to Wagin was on the balance of probabilities substantially because of the effects of injuries suffered by the respondents whereas on the whole of the evidence properly considered it was clear that the effects of the injuries were not the basis for the move to Wagin.

- In law in holding that the appellant bore the onus of demonstrating that the decision of the respondents to move to Wagin was unreasonable.
- In failing to find that the appellant had demonstrated on the balance of probabilities that the decision of the respondents to move to Wagin and thereby earn lesser remuneration was based on considerations that were unrelated to the cause and the effect of the injuries suffered by the respondents.

History/Injuries

- [4] Mr Jeffs was born on 7 April 1939 in Western Australia. Mrs Jeffs was born on 20 September 1952. They married in 1993.
- [5] After leaving school at the age of 14, Mr Jeffs worked as a labourer for a little over three years before learning to shear sheep. For the next 16 years he worked as a sheep shearer. The trial Judge found that Mr Jeffs did not experience any back complaints during this time.
- [6] At the age of 33 Mr Jeffs commenced employment as a metropolitan bus driver. After approximately three years as a driver Mr Jeffs obtained a job as a national park ranger with the National Parks Authority of Western Australia. For six years Mr Jeffs was based at the Yanchep National Park approximately 50 kilometres north of Perth after which he transferred to the Serpentine National Park approximately 50 kilometres south of Perth. After six years at Serpentine Mr Jeffs transferred to the Porongurup National Park approximately 300 kilometres south of Perth. Following a few years at

Porongurup, at the age of about 50 Mr Jeffs worked as an orderly at a repatriation hospital in Perth and as a labourer with a concreting company.

- [7] In about 1990 Mr Jeffs moved to Leonora, a goldfield town in Western Australia. He worked at Leonora for about two years as an accommodation and maintenance worker. It was at Leonora that Mr and Mrs Jeffs formed a relationship.
- [8] Mrs Jeffs grew up on a farm between Toodyay and Bolgart approximately 120 kilometres north-east of Perth. Having completed year 11 at Northam Senior High School, Mrs Jeffs left school at the age of 16 and returned to work on the family farm. At the age of 17½ years, Mrs Jeffs obtained a position as a sales clerk at the Bolgart Co-operative Store.
- [9] Mrs Jeffs married at the age of 20. She continued in part-time employment at the Co-operative Store as a shop assistant while she and her husband lived on and worked a farm. Between 1976 and 1978 Mrs Jeffs and her husband travelled around Australia after which Mrs Jeffs' husband obtained work as a ranger at the Yanchep National Park. Mrs Jeffs worked at an inn at the park as a catering assistant and barmaid as well as performing home duties in the motel and hotel facility. After two years in Yanchep, Mrs Jeffs and her husband moved to Kalbarri approximately 650 kilometres north of Perth, where they lived for four years. They then moved to Wallaroo, approximately 230 kilometres north of Perth. Mrs Jeffs worked as a pre-primary teacher's aide while also caring for her husband and the two

children of the marriage. The family moved to Willyung National Park, approximately 50 kilometres from Perth, in 1997 where Mrs Jeffs worked for Target as a supervisor.

[10] In 1990 Mrs Jeffs separated from her husband and moved to Leonora, where she worked for a mining company as an accounts clerk. As mentioned, it was while living at Leonora that Mrs Jeffs formed a relationship with Mr Jeffs.

[11] Mr and Mrs Jeffs were married on 20 May 1993. They moved to Dhurkali, an Aboriginal community in the Sandy and Gibson Deserts of Western Australia, approximately 1600 kilometres east of Perth and 1040 kilometres north of Kalgoorlie. Mr Jeffs was employed as an administrator of the community and Mrs Jeffs was appointed as a store manager.

[12] After a little over two years in the Dhurkali community, Mr and Mrs Jeffs moved to Kununurra. Mr Jeffs worked for nine months with the Aboriginal and Torres Strait Islander Commission while Mrs Jeffs secured part-time employment as an accounts clerk at the Kununurra Bakery. After approximately 12 months they moved to Turkey Creek, an Aboriginal Community approximately 200 kilometres south of Kununurra. Mr Jeffs was the community administrator. Mrs Jeffs worked as a receptionist and part-time bookkeeper. After about 12 months, together Mr and Mrs Jeffs took over the community roadhouse on the Great Northern Highway where they worked for approximately two and a half years.

- [13] On 15 June 1998 Mr and Mrs Jeffs commenced employment with the Arnhem Land Progress Association (ALPA) as relief store managers. They worked for short periods of time at a number of communities including Lake Evella, Elcho Island, Ramingining and Milingimbi. They were responsible for running the community stores while permanent managers were absent. Mr and Mrs Jeffs attended a cross-cultural training course at Gove.
- [14] The Milingimbi Community Council offered Mr and Mrs Jeffs permanent positions as store manager and assistant manager at Milingimbi. They accepted. At that time Mr Jeffs was 59 years of age and Mrs Jeffs 46. Their plan was to work for five years and then to seek a further five year term. The trial Judge found that providing Mr Jeffs remained in good health, both planned to work until Mr Jeffs turned 70.
- [15] Mr and Mrs Jeffs left Milingimbi by plane on 30 October 1998. They intended to take leave and attend a 21st birthday celebration in Perth before returning to Milingimbi to start their employment on 15 December 1998. After flying to Maningrida, Mr and Mrs Jeffs intended to board another plane to travel to Darwin, but as there was no pilot for the other plane they continued their journey on the plane that had transported them from Milingimbi to Maningrida. On the journey from Maningrida to Darwin the plane crashed.

Subsequent work history

- [16] Mr and Mrs Jeffs were admitted to The Royal Darwin Hospital. They were discharged on 10 November 1998 and moved into serviced apartments where they stayed for seven days. During this period Mrs Jeffs' daughter stayed with them for five days and did everything for them. Because they had no family in the Northern Territory, Mr and Mrs Jeffs decided to travel to Rockingham in Western Australia to stay with Mrs Jeffs' sister. They remained in Rockingham from 17 November 1998 until returning to Darwin on 9 March 1999.
- [17] After returning to Darwin, medical practitioners pronounced Mr Jeffs fit to return to work. Mr Jeffs gave evidence that he was still experiencing pain, but was determined to return to work. Mr Jeffs undertook work for ALPA as a resident manager or relief manager at various communities. Mrs Jeffs worked in the Darwin office of ALPA in a position created for her answering telephones and working at the computer.
- [18] Early in April 1999 Mr Jeffs flew to Palumpa, approximately 400 kilometres south of Darwin, to assist the store manager. After two weeks he took over as manager.
- [19] Mrs Jeffs accompanied her husband to Palumpa. They flew in a Cessna 210. Mrs Jeffs felt sick throughout the journey and was physically ill after the flight. She remained at Palumpa for about two weeks and assisted Mr Jeffs in the store within her limitations. Mrs Jeffs was unable to undertake any

lifting, packing of shelves or sweeping because she was in pain, particularly in her neck, shoulders, hips and lower back.

[20] After two weeks in Palumpa, Mrs Jeffs flew back to Darwin. She remained working in the Darwin office of ALPA until 22 May 1999. Mrs Jeffs then drove a 4 wheel drive to Palumpa in order to join her husband.

[21] Mr Jeffs was given and completed a two year contract at Palumpa. The trial Judge accepted the evidence of Mr Jeffs that during this two year period he experienced pain in his lower back, right shoulder and right knee. Her Honour found that the injury sustained by Mr Jeffs made it difficult for him to carry out his work at Palumpa. Mrs Jeffs gave evidence of observing Mr Jeffs working in the store while he was in a lot of pain.

[22] Mrs Jeffs worked for two hours in the morning and two hours in the afternoon. She also worked two hours a day on weekdays at the health clinic. The trial Judge accepted the evidence of Mrs Jeffs that she experienced difficulties in performing her work at Palumpa. She was suffering depression and lethargy and needed assistance to place items in trolleys so that she could put them on the shelves. Mrs Jeffs gave evidence that she was keen to return to work and went to Palumpa with a view to working, but there were limits because of her inability to lift anything. During June, July and August 1999 Mrs Jeffs worked eight hours a day during the week and two and a half hours on Saturday. In re-examination Mrs Jeffs stated that she took pain killers to enable her to continue to work

and the work undertaken in eight hours could have been done in four to five hours before she was injured in the plane crash.

[23] In May 2001 Mr and Mrs Jeffs moved to Wagin in Western Australia. They purchased a house in Wagin. Employment was difficult to obtain. Both were in receipt of unemployment benefits. Mr Jeffs obtained part time work, three days a week, supervising the building of a nature trail.

[24] Mrs Jeffs obtained work at an aged care centre working as a carer ten hours per week. She remained in that employment until November 2004 and, during that period of employment, studied and obtained her Certificate 3 in Aged Care. Mrs Jeffs said in evidence accepted by the trial Judge, that with limitation she was able to perform duties such as mopping, vacuuming and washing. She resigned in November 2004 because the aged care centre took in patients requiring a higher level of care and she was unable to cope physically with the job requirements which included giving residents between four and six showers a day.

[25] From 2001 Mrs Jeffs was also employed at the Wagin Newsagency for between 15 and 20 hours per week. There were times when she could not work because of pain from her injuries. New owners took over the newsagency and the employment of Mrs Jeffs ceased on 30 June 2005.

[26] In 2004 Mr Jeffs contacted ALPA. This contact resulted in Mr Jeffs being employed to assist the store manager at Batchelor in the Northern Territory for approximately 14 days in October 2002. Mr Jeffs found the work of

stocking the shelves painful and tiring. At the conclusion of the period at Batchelor, Mr Jeffs accepted a temporary position as the manager of the take away food section of the store at Ramininging. After four months Mr Jeffs was offered a position on Melville Island, but decided to return to Wagin because he found the separation from his wife too difficult.

[27] Mr Jeffs returned to Wagin in August 2002. In late January 2003 he obtained employment for three months driving a truck spreading fertiliser on farm paddocks. He worked five days a week and seven hours a day. The driving conditions were rough and caused him a great deal of pain in his back which radiated down into his hips.

[28] In May 2003 Mr Jeffs secured employment as a consultant with a company called Job Futures. He found that constant sitting caused considerable aggravation in his back and the job was depressing. In June 2004 Mr Jeffs purchased a van and took up business as a courier. This business involved driving nine 300 kilometre round trips each week. Each journey took approximately five hours. Mrs Jeffs drove one run each week. She gave evidence that she drove with pain and took pain killers.

[29] At the time of trial in September 2005 Mr Jeffs was continuing to operate the courier business. Mrs Jeffs was working six hours a week with a young man who suffered from Asperges, a condition similar to autism. Her role was to teach him life skills. It was Mrs Jeffs' intention to look for other

employment and she gave evidence that she was willing to undertake any form of work within her physical limitations.

- [30] As the move to Wagin is the critical fact under examination on this appeal, and this involves an examination of their reasons for moving, it is necessary to have regard to the injuries sustained by Mr and Mrs Jeffs and their condition at the time of moving from Palumpa to Wagin. The question of causation can only be determined by having regard to the entirety of the circumstances which existed at the time the decision to move was made.

Injuries – Mr Jeffs

- [31] The trial Judge summarised the injuries sustained by Mr Jeffs in the following terms:

“Mr Jeffs’ suffered fractured lumbar vertebrae at L1, L2 and L3, abdominal injuries, a whiplash injury, right shoulder injury, he was aware of the rupture of the biceps with prominence in the upper arm, right knee swelling, post-traumatic stress and anxiety. He suffered pain in his lower back, right shoulder and right knee.”

- [32] In a report dated 5 May 2004 Dr Desmond Williams, an orthopaedic surgeon whose evidence was accepted by the trial Judge, described the persisting injuries as follows:

- “4. This patient has significant persisting injuries related to the violent incident of the aircraft crash on 30th October 1998, and these include:
 1. Pain in the right shoulder and presence of an acromioclavicular joint and glenohumeral arthritic change, and with subacromial spurring and subacromial

bursitis, and complete rupture of subscapularis and supraspinatus tendons and long headed biceps tendon presenting major right shoulder pathology.

2. In the cervical spine where he has had a soft tissue neck injury, he has evidence of mid cervical degenerative change and segmental stiffness.
3. In the thoracolumbar spine where he has evidence of the significant wedging of the L1 vertebral body at 50% of its height, he has multilevel degenerative change in the thoracic and lumbar area, so he has had soft tissue injury and fractures, and the symptoms related to underlying degenerative change.
4. In his right and left hips he has early hip arthritis, shown in the right hip by the restriction in the internal rotation clinically, and defined in the x-rays, and there is mild disability here in the right hip at 5% and the left hip at 5% but I have no clear evidence that the accident played a direct role in the arthritis as it may simply be related to his aging.
5. In his right knee where he has had constant pain persisting since the accident, he has pan-compartmental arthritis with most marked changes in the medial compartment, and here he has a significant disability related to traumatic progressive arthritis. He has the symptoms related to these areas discussed in the text of the report.
5. The aircraft accident of October 1998 was a very forceful impact injury and he has had ongoing symptoms persistent since that time, so we see the pathologies and symptoms as related to that incident was discussed in the text of the report.
6. His problems have stabilised such that he can move towards settlement.
7. I have outlined that his right shoulder requires further assessment with an MRI study and the potential for surgical procedures to improve the function, such as an arthroscopic

subacromial shaving has to be considered, and any final decision on surgical management will hinge on clarifying the pathology.

In his right knee [he] has significant osteoarthritic change and there will be a progression that leads to a total knee replacement within a five-year period.

His cervical and thoracolumbar spinal injuries require intensive swimming and exercise schedules in management.

I further mention the psychological issues need appropriate assessment as I believe his withdrawal from care and coping with these severe difficulties with minimal supervision of management, reflect a significant ongoing psychological component to his reaction to the injuries.”

[33] In terms of percentages, Dr Williams described the “permanent residual disabilities” in the following terms:

- “1. right shoulder, expressed as a percentage disability of the right upper arm at elbow and above as 30% permanent residual disability
2. cervical spine, expressed as a percentage of the cervical and thoracolumbar spinal areas represents a 10% permanent residual disability relating to soft tissue injury and underlying degenerative change and the cervical stiffness.
3. the thoracolumbar spine represents a 10% permanent residual disability but expressed as a percentage disability of the whole functional spine, and represents soft tissue injury with the wedging fracture at L1 level and multilevel degenerative changes in the thoracolumbar spine.
4. the right knee where he has had ongoing pain since the accident with pan-compartmental arthritis and permanent residual disability as 20% expressed as a disability of the right lower limb at knee level and above.

5. the hips – I have outlined the right and left hips have a 5% disability related to early hip arthritis, and in terms of the direct relationship to the accident this is far from clear.”

[34] Dr Williams reviewed Mr Jeffs on 8 December 2004. In a report dated 13 December 2004, while confirming the estimated permanent disability at the same levels with respect to the right shoulder, right knee and hips, Dr Williams expressed the view that the previous estimated disability at 10% in the thoracolumbar spine could be as high as 20% because he observed a significant wedging fracture at L1 with widespread degenerative change. Dr Williams also expressed the following opinions with respect to the prognosis for the future and the working capacities of Mr Jeffs:

- “vi) He is limited with regard to his work capacities and he is apparently coping with courier driving in the setting of the country town of Wagin. He is limited with regard to heavy lifting, repetitive spinal bending and with upper limb activities above shoulder level. There is a range of restrictions in his medium to long term work capabilities.
- vii) It may well be that the air crash injuries and disabilities lead to premature retirement from the workforce but I note he is aged 65 so I would see him losing any work capabilities in the open market certainly within the next five years. I would see this occurs within the coming two years with significant increased symptoms that will require orthopaedic review and management strategies that will interfere with work capacities.
- viii) My treatment recommendations currently are conservative with swimming and exercise schedules and pain-relief and anti-inflammatory drugs with the review observations by his general practitioner and an orthopaedic surgeon with regard to the need for any intervention managements and specific areas of needs.

- ix) The prognosis is that there will be a gradual deterioration in his functional capacities in these areas of injury where he has had soft tissue injuries and exacerbation of symptoms from underlying degenerative change.

In the thoracolumbar area where he has the major wedging fracture, there will be progressive degenerative change.

I see these progressive changes emerging over the coming period of 2-5 years.”

[35] Dr Williams reviewed Mr Jeffs in June and September 2005. In a report dated 2 September 2005 Dr Williams summarised the ongoing problems in the following terms:

“In May 2004 ongoing problems included neck pain and stiffness, right shoulder pain and poor function, back pain on standing, sitting and bending, and constant right knee pain.

The features on clinical review were cervical crepitus on motion with the right shoulder having painful abduction arc between 120-140°, the obvious clinical rupture of the biceps tendon, tenderness over his upper lumbar spine, some restriction in right hip motion in internal rotation, and marked crepitus in the right knee on motion compared to minor crepitus in the left knee on motion. Further, in the right knee there was an effusion and synovitis so it was an irritable knee and he had a limited walking distance of some 50 m.

In his cervical spine he has cervical osteoarthritic change in the mid and lower cervical areas, so his injuries are soft tissue flexion/extension type sprain injuries with exacerbation of symptoms from mid-cervical degenerative change. In his thoracic spine he has some mild degenerative change and in the lumbar spine he has multi-level liping of endplates, in keeping with mild disc degeneration, and the anterior wedging deformity of the L1 vertebral body with some measured 50% loss of vertebral height anteriorly, so it was a significant compression injury to the L1 vertebrae which affects the adjacent disc areas in terms of progressive degenerative change. Further, the films have defined fractures at L2 and L3 of a more

minor degree than that evident in the initial films and in the pelvis he has mild degenerative changes in the hips.

X-rays of the knees showed advanced degenerative change in the medial compartment of the right knee and the right patellofemoral joint area and there were mild to moderate degenerative changes in the left knee. We are seeing then more active degenerative change in the right knee and his injury included impact to the right knee with exacerbation of symptoms from underlying degenerative change so there will be some element of progression of arthritic change in the right knee related to his injury.

In his right shoulder there is some degenerative change evident in the glenohumeral joint and acromioclavicular joints and an ultrasound of the right shoulder shows rupture of the long head of biceps and some subacromial subdeltoid bursal thickening. Further, there was major disruption and retraction of subscapularis and supraspinatus tendons.

He therefore has a major injury to the right shoulder including the tears of the rotator cuff, tendonopathy in the rotator cuff, the rupture of the biceps tendon and the subacromial bursal thickening and impingement.

In my report of May 2004 I expressed the opinion, with regard to the residual disability present in his injured areas, that overall there were significant disabilities identified and while there is some element of underlying arthritic pathology these consequences have emerged following the severe forces involved in the trauma of the aircraft accident.

As well as the physical consequences of injury, this patient suffered psychological problems and issues that are ongoing which were reflected as a Post Traumatic Stress Syndrome.

1. You refer to page 4 of Dr Baumwol's report in which he refers to assessment of this patient in that his pains are musculoskeletal in origin and x-rays show degenerative changes in the joint and I believe that there is a need to much more accurately and clearly define the underlying pathologies related to his musculoskeletal problems, particularly in the area of the right shoulder, the neck where the injury is defined as a whiplash injury, and the lumbar spine where there is the identified compressed fracture of the L1 vertebrae.

The detail of the severity of the fracture as a 50% anterior collapse of the vertebral body is not discussed and the potential therefore for adjacent disc levels to develop progressive arthritic changes is not discussed. Further, the identified fractures in the earlier x-rays is not discussed and thus the other vertebral levels in which we will see arthritic changes potentially emerging is not discussed. Therefore, it is my view that if you identify the problems as musculoskeletal then they have to be fully defined in terms of pathology and causation and management needs.

2. With regard to the back injury, being a compressed fracture of the L1 vertebral body, there were in earlier x-rays the identified fractures in the upper lumbar vertebral bodies and in the report of April 2004 it is noted that there is multi-level lipping of endplates, in keeping with early disc degeneration. That report defined the anterior wedging deformity of the L1 vertebral body as demonstrating a 50% loss of vertebral body height anteriorly and this reflects a severe compression fracture.
3. With regard to his lumbar spine injury and his other air-crash-caused injuries, he is clearly incapacitated with regard to labouring type employment and this would include work that involves stresses on the spine of frequent bending or lifting or awkward spinal postures.

Further, limitations with regard to right shoulder upper limb function include heavy lifting, repetitive upper limb activities and above shoulder activities.

He is therefore limited with regard to the work stresses in the cervical and lumbar spinal areas and further in the peripheral joints of the right shoulder and right knee.

4. It is noted he is presently working as a light courier operator. He is quite limited with regard to his functional capacities related to the right shoulder, right knee and his spine and I would see him coping with that work activity on a year-to-year basis with a need to assess annually his capabilities.

I would not see him as being fit for that work activity for greater than perhaps another year or two. He certainly would not continue these work activities for a period of 4-5 years as I see his

problems emerging as significant problems that will require further major intervention within that timeframe.”

[36] Dr Williams gave evidence. The trial Judge accepted his evidence and referred to some of it in the following passages of her reasons for judgment:

“[40] Dr Williams stated Mr Jeffs has significant spine and shoulder pathology and was to be congratulated for continuing to work given his significant disabilities. Dr Williams was of the opinion that many people would have given up work well before this point.

[41] Dr Williams agreed that Mr Jeffs could cope with light courier duties with appropriate support. He stated Mr Jeffs would not be able to cope with heavy lifting, repetitive bending or heavy and repetitive upper limb activities. Dr Williams expressed the opinion that he estimated Mr Jeffs would have a work capacity limited to a further two to three years. He will need an arthroplasty for his right knee. His right shoulder is inoperable. Dr Williams expressed the opinion that a lot of other people in this situation would have stopped all activity by now.

[42] In re-examination Dr Williams stated that the injuries sustained by Mr Jeffs in the plane crash were severe trauma. He stated that overall the force of the crash exacerbates symptoms from an underlying pathology if it does not create the new pathology. The two key areas of significant new pathology are in the lumbar region with the fracture and in the shoulder with the rotator cuff and the biceps tendon rupture. In addition to these matters the plane crash exacerbated the symptoms in Mr Jeffs’ right knee and brought forward the need for a knee replacement by about five years. The need for a right knee arthroplasty will come in the next two to three years.”

[37] Mr Jeffs also suffered psychological injury. The learned trial Judge summarised the evidence of a general adult psychiatrist, Dr Stephen Proud, in the following passages of her reasons for judgment:

“[46] Dr Proud stated [in a report dated 21 April 2004] that Mr Jeffs gave the impression of a stoic person who was down-playing his illness and who tended to focus on his wife’s problems rather than his own. He described Mr Jeffs as suffering from post traumatic stress disorder and major depression which was wholly and solely related to the plane crash of 30 October 1998. He described his capacity for work from a purely psychiatric point of view as mild, permanent partial incapacity for work secondary to his major depression which he noted will persist for the foreseeable future. He noted that part of his major depression is related to his post traumatic stress disorder, and his wife’s disorder, and will respond to treatment. However, he also stated that a part of his major depression is related to ongoing problems with pain in his lower back and knee and this appears to be permanent hence he will be left with some permanent depressive symptoms.

[47] In his report dated 22 July 2004, Dr Proud noted there had been no significant change to Mr Jeffs physical or psychiatric condition since he had last examined him. He commented that Mr Jeffs’ sex drive, concentration, short term memory, motivation and enjoyment are low. He had difficulties sleeping and suffered nightmares about the plane crash and suffers anxiety with respect to flying in planes.

[48] Dr Proud considered that Mr Jeffs would benefit from counselling and antidepressants but noted Mr Jeffs reluctance to participate in such treatment.

[49] Under cross examination, Dr Proud agreed that on the account given to him, Mr and Mrs Jeffs were both out of the plane fairly quickly. He agreed Mr Jeffs had returned to full time employment. He also agreed it is good from the point of view of a person’s psychiatric health that they could go back to work. He stated he had seen many

people force themselves to do this and then crack. Work distracts Mr Jeffs from his symptoms.

[50] Dr Proud agreed it was his opinion that from a psychiatric point of view, Mr Jeffs was fit to work. He also agreed that Mr Jeffs was at an age that would lead to age degenerative change in his spine. He agreed that it was possible some of Mr Jeffs' problems were connected with the aging process. Dr Proud gave evidence Mr Jeffs is coping with the long periods of driving associated with his work. He stated that Mr Jeffs finds the work tiring and has to stop and stretch every 50 kilometres or so because of the pain in his back. Dr Proud considered Mr Jeffs ability to continue to cope with his work was a tribute to his personality and because of financial necessity. He agreed that from a psychiatric point of view, Mr Jeffs could keep on with his job. Dr Proud had suggested Mr Jeffs go to counselling, but Mr Jeffs had declined. If he did undertake such treatment it would assist him and there is treatment available in Western Australia.

[51] Under re-examination, Dr Proud said he thought the treatment more likely to help with issues of guilt and depression than with post traumatic stress disorder."

[38] A clinical psychologist, Ms Lynette Mutton, also provided reports and gave evidence concerning the mental state of Mr Jeffs. The trial Judge summarised that evidence in the following terms:

“[52] Ms Mutton prepared a report dated 31 August 2005 and a treatment summary dated 31 August 2005. These documents were tendered Exhibit P18. In this report, Ms Mutton sets out the psychological symptomatology that are attributed to the plane crash (page 46):

- Re-occurring feelings of depression
- Frequent bouts of weeping

- Acute anxiety, particularly at the thought of being in a plane
- Extreme anxiety whilst in a plane
- Repeated flash-backs of the crash
- Disturbing memories of the crash and the injured passengers
- General sleep disturbance – 4 to 5 times a night
- Ongoing nightmares
- Reduced libido
- Significantly heightened irritability
- Exaggerated ‘startle’ response
- Uncharacteristic outbursts of anger
- Social and personal withdrawal
- Severe deterioration of self-esteem
- Persistent and pathological guilt feelings over his perceived ‘inadequacies’ at the plane crash, particularly in relation to his wife’s injuries.
- Disruption of cognitive functioning:
 1. Inability to concentrate
 2. Memory problems

3. Inability to think clearly or make decisions
4. Acute deterioration in frustration tolerance

These symptoms are characteristic of Chronic Post Traumatic Stress Disorder (CPTSD) with Concomitant Depression.

- [53] Ms Mutton noted that areas of difficulty for Mr Jeffs included the loss of the close intimate relationship he used to enjoy with his wife and other personal and social relationships, difficulties in coping with stress, feelings of frustration, lack of fitness, loss of effective cognitive functioning and loss of self esteem.
- [54] Ms Mutton describes Mr Jeffs as a fiercely independent self sufficient man who does not share his problems readily. She does suggest his undergoing psychological sessions once the compensation process is completed.
- [55] Under cross examination Ms Mutton acknowledged that she may have been in error in listing a broken arm as part of the physical injuries suffered by Mr Jeffs. She stated in her opinion, Mr Jeffs return to work was probably premature in terms of his physical and emotional injuries. She described both Mr and Mrs Jeffs as minimising and ignoring a lot of their physical and emotional injuries. They were trying very hard to get on with their lives. She considered Mr Jeffs was psychologically capable of working in his courier business although it cost him a great deal emotionally. She agreed the courier job does provide him with independence, flexibility to manage his pain better and self esteem. Ms Mutton stated it was her opinion Mr Jeffs would continue to work as long as he can but the depression is still an issue.”

Injuries – Mrs Jeffs

- [39] Mrs Jeffs sustained a whiplash injury to her neck, broken right wrist, badly bruised chest, shoulders and hips, lacerations to her right knee and badly

bruised feet and toes. In the following passages of her reasons, the trial Judge summarised evidence given by Dr Williams concerning the physical injuries and residual disabilities suffered by Mrs Jeffs:

“[52] Dr Williams gave evidence he is an arthritis surgeon dealing in the upper and lower limb. Dr Williams had prepared a total of four reports between 5 May 2004 and 2 September 2005 concerning Mrs Jeffs. These reports were tendered and marked Exhibit P10.

[53] In his report dated 5 May 2004, Dr Williams noted that Mrs Jeffs current problems were pain in the trochanteric area which is the boney prominence at the hip joint area. He stated she had a poor sleep at night and lumbar pain radiating to the right shin. She has odd sensations in her right hand fingers and at the tips of the thumb, index and ring finger. Dr Williams states in this report that Mrs Jeffs has significant ongoing anxiety and depression. There was significant restriction in her right shoulder motion. There was bursal bunching present. There was mild crepitus in her knees on motion, calluses to her feet, tenderness in the area of her elbow and degenerative disc space narrowing at C4/5 of her cervical spine. Dr Williams made reference to the deep vein thrombosis in Mrs Jeffs’ left leg. He also referred to reports he had received from other specialists including psychologists. Dr Williams stated that:

‘The evidence is that her presentation of symptoms, both physical and psychological, are related to the aircraft accident of October 1998.’

[54] Dr Williams outlined matters that needed further investigation and evaluation. He provided a list of percentage disabilities. This list of percentage disabilities was set out in his report dated 20 June 2005 at page 3:

‘In terms of assessment of permanent residual disability related to the accident, I would see residual disabilities as follows:

1. In the cervical spine she has a 15% permanent residual disability, expressed as a percentage disability of the whole functional spine.
2. In the right shoulder there is disability of the order of 15%, expressed as a percentage disability of the right upper limb at elbow and above.
3. In the left elbow there is a lesser disability than earlier assessed and I see it at 10%, expressed as a percentage disability of the left upper limb at elbow and below.
4. In the lumbar spine there is an annoying mild level of disability at 5%, expressed as a percentage disability of the whole functional spine.
5. In the pelvic and hip area there is a mild level of disability of the order of 5%, expressed as a percentage disability of the pelvis and hip.”

[55] Dr Williams also stated at page 4:

- ‘5. With regard to work, I have noted in the text of the report that she ceased employment as a carer but continues to work part-time in a newsagency and assists her husband in a courier business with her work being on average some 20 hours per week. She is maintaining those work capabilities.
6. This patient is permanently unfit for employment as a carer. A carer has tasks that involve stresses on her spine and upper limbs that are out of keeping with the capacities with which she presents. In a carer’s tasks there are sudden risk situations that the patient is exposed to that are unavoidable and therefore with her residual disabilities it becomes a dangerous work situation.
7. I believe she will cope with work as a newsagency assistant or courier driver’s business assistant and I

see her fitness for part-time work activities and she is currently doing 20 hours a week which is basically a half week schedule and she will maintain that level of capacity. It is unlikely she will build up to fulltime work commitments and capacity.’

[56] Under cross examination, Dr Williams agreed that as people get older they experience degenerative changes. Dr Williams gave evidence under cross examination of the work that Mrs Jeffs was required to undertake as a carer and as a shop assistant. He stated that he would describe her best work situation as desk or bench work where she was not unduly stressing her upper limbs with heavy lifting or repetitive activities. He stated he believed Mrs Jeffs could work part time, that she had significant underlying pathology and it was his belief long periods of work would see these symptoms emerge. Dr Williams did not agree with the suggestion put to him that Mrs Jeffs could be in full time employment. He stated he considered Mrs Jeffs had significant pathology and that he saw her work path as part time. He stated “She needs a part time position with a flexible workstation within the functional limitations that she presents”. Dr Williams said he accepted that Mrs Jeffs had major psychological issues.”

[40] The trial Judge accepted the evidence of Dr Williams and other medical practitioners called by Mrs Jeffs. Her Honour also referred to the evidence of Dr Max Baumwol, a general and laparoscopic surgeon, who agreed in cross-examination that when he examined Mr and Mrs Jeffs there was no evidence of conscious or unconscious exaggeration of symptoms. The trial Judge referred to the evidence of Dr Baumwol that given the problems experienced by Mrs Jeffs, approximately 20 hours per week of light work would be about her reasonable working capacity. Her Honour also referred to evidence given in re-examination by Dr Baumwol as to what he meant in giving that evidence:

“Under re-examination, Dr Baumwol gave evidence that what he meant when he agreed Mrs Jeffs was capable of 20 hours per week light work was that he did not think she was able to do what she could do prior to the accident. He stated she was clearly making an effort to do what many people would not make an effort to do. If she was working 20 hours a week plus and was coping with that, then that is what she is obviously able to do.”

[41] As to the mental state of Mrs Jeffs, the trial Judge accepted the report and evidence of the clinical psychologist, Ms Mutton. Again, it is convenient to take the summary of Ms Mutton’s evidence from the reasons of the trial Judge:

“[66] Ms Mutton gave evidence that she is a clinical psychologist with a general practice. Ms Mutton prepared a report concerning Mrs Jeffs dated 31 August with a summary of treatment dates attached. This report is marked Exhibit P17. In this report, Ms Mutton lists Mrs Jeffs psychological symptomatology which she concluded in her report are symptoms characteristic of chronic Post Traumatic Stress Disorder with concomitant depression. Ms Mutton stated at page 5 of her report:

‘Although the medical treatment for her physical injuries is completed, Mrs Jeffs still suffers continuous severe pain, which reaches acute levels if she tries to do anything physical. Even when sitting resting there is still a level of pain in her body, which is very exhausting and demoralizing. Prior to the plane crash Mr[s] Jeffs led a very active, fruitful life, gardening, mowing lawns, knitting, crotchet, sewing etc. The constancy and severity of her pain prevents her from enjoying any of these activities now. When travelling in a vehicle Mrs Jeffs feels every bump in the road and has to interrupt the journey a number of times to stretch and rest her body. Mrs Jeffs is determined to keep working as much as she can in spite of the pain. She has therefore found a number of jobs in Wagin, but the acute physical pain she suffers whilst working results in her ending each day feeling totally exhausted both physically and mentally. Mrs Jeffs tries to look for jobs

with a limited physical component, but her ongoing pain still has a major impact on her. She is currently employed as a Carer to an Asperger Syndrome adult for 6 hrs per week. Mrs Jeffs has a particular interest and skill in this area of employment and prior to the plane crash had been doing further studies in this area. However since the crash she has found trying to study very difficult. The reason for this is the significant deterioration in her cognitive functioning as detailed under symptomatology above.'

- [67] Ms Mutton then stated the psychological treatment for Mrs Jeffs had been complex and difficult covering a number of areas. Ms Mutton described the treatment for Mrs Jeffs' condition as being painful and exhausting and by definition often impossible to completely resolve. She described Mrs Jeffs as being completely tenacious in her commitment to treatment and that she had made significant progress. Ms Mutton described in some detail Mrs Jeffs' fear of flying and stated that Mrs Jeffs is likely to suffer a permanent and severe fear of flying. Ms Mutton details the anguish and despair experienced by Mrs Jeffs in coming to terms with the significantly different lifestyle she is now forced to accept. These include the affect on her relationship with her husband, both physically and emotionally, her permanently injured and damaged body, her loss of emotional strength and capacity to help and support others, her impaired cognitive functioning which prevents her from further study, her loss of employment options, her loss of energy and interest in her many hobbies and activities and the need to leave the Northern Territory, the pessimistic attitude of self criticism that these factors generate.
- [68] Ms Mutton referred to the detrimental effect having to deal with pain had upon Mrs Jeffs. In her report, Ms Mutton addresses Mrs Jeffs' reduced capacity for work as a consequence of her symptoms. There is a list of the dates that Mrs Jeffs attended for treatment and the treatment sessions she will require over a period of a further year.
- [69] Under cross examination, Ms Mutton gave evidence she thought Mr and Mrs Jeffs were the kind of people who would try to push themselves to cope with any circumstances while they have the energy and motivation to do so. She considered they both minimised and tried to ignore a lot of their physical

and emotional injuries. They were trying hard to get on with their lives. Ms Mutton agreed in cross examination that there would be an improvement in Mrs Jeffs' condition once the compensation process had been completed. When asked about Mrs Jeffs' ability to work through her pain, Ms Mutton gave the following answer (tp 193):

‘She has an incredibly strong personality, with a very positive outlook on life and they are the characteristics which probably allow her to tolerate levels of discomfort and pain that a lot of other people wouldn’t be able to do’

[70] In re-examination, Ms Mutton gave evidence that it was her opinion Mrs Jeffs would be left permanently with symptoms of Post Traumatic Stress Disorder and depression.”

Leaving Palumpa - Choosing Wagin – Reasons of Trial Judge

[42] As we have said the decision to move to Wagin must be assessed by having regard to all the circumstances that existed at the time the decision was made. These circumstances include the physical and mental states of Mr and Mrs Jeffs brought about by the injuries sustained in the plane crash.

[43] The trial Judge found both Mr and Mrs Jeffs to be “credible and reliable witnesses”. As to Mr Jeffs, her Honour found that notwithstanding injuries affecting his capacity to work, Mr Jeffs persisted with employment. Her Honour also found that Mr Jeffs suffers from feelings of apprehension when travelling by plane and from psychological problems including frightening dreams and interrupted sleep. Her Honour accepted the evidence of Dr Proud that Mr Jeffs suffered post-traumatic stress disorder and major depression wholly related to the plane crash.

[44] The trial Judge summarised her findings with respect to Mr Jeffs and his working capacity in the following terms:

“[89] Mr Jeffs is now 66 years of age. His intention is to remain in employment till he is 70 years of age. He may well work past this age if he is physically able to do so. He has demonstrated through the years since the plane crash occurred, his determination to remain in the work force. He has continued in employment despite enduring considerable pain particularly in his back, right shoulder and right knee. This pain has reduced his capacity for work, it now takes him longer to perform certain tasks. The pain is tiring and debilitating. The evidence of Mr Jeffs is substantially supported by the medical evidence presented in these proceedings. Dr Williams estimates that Mr Jeffs will undergo progressive degenerative change within the next two to three years. Dr Williams gave evidence to the effect that apart from the consequence of the injuries from the plane crash, Mr Jeffs would be expected to have some elements of degenerative change given his age. Dr Williams has recommended a physiotherapy and exercise program. Dr Williams, in detailing Mr Jeffs’ injuries and his continuing involvement in employment, noted that many people would have given up work well before this point and stopped all activity by now.

[90] Mr Jeffs is to be commended for the efforts he has made to work through his pain and overcome the effects of his injuries. Dr Proud commented that Mr Jeffs was a stoic person who downplayed his own illness and tended to focus on his wife’s problems rather than his own. He described Mr Jeffs as suffering from Post Traumatic Stress Disorder and major depression. Counselling has been suggested but to date Mr Jeffs has not wished to seek any counselling or treatment for the psychological effects of his accident. From a psychiatric point of view, Dr Proud assessed Mr Jeffs as fit for work.”

[45] As to Mr Jeffs’ motivation for leaving Palumpa and moving to Wagin, the trial Judge summarised the evidence given by Mr Jeffs in the following passages in her reasons for judgment:

“[19] Mr Jeffs gave evidence he did not renew the contract at Palumpa. He stated this was because there was no one on the community who could assist him with stocking the shelves. He had to do this himself. He experienced high levels of pain, particularly in his back, radiating to his hips and pain in his shoulder and right knee. This combined with the fact that they had been there through three wet seasons and for seven months of the year, the only ingress and egress from Palumpa was via aircraft. His wife lived in constant fear that some emergency would arise and she would have to be evacuated by aircraft. She had suffered from an extreme fear of flying since the accident.

[20] Under cross examination Mr Jeffs agreed that closer contact with family was a reason for his wife wanting to move to Wagin in Western Australia and this was a reason for him not renewing his contract in the Northern Territory. He agreed there were other similar stores in the Northern Territory and Western Australia and there would be those that were not cut off by floodwaters during the wet season.”

[46] Later in her reasons, the trial Judge made the following finding relating to the motivation of both Mr and Mrs Jeffs:

“[92] Part of their reason for moving from Palumpa to Wagin in May 2001, was Mrs Jeffs’ expressed desire to be closer to family. While I have found this desire became stronger because of the effects of the plane crash and accelerated their decision to return to Western Australia, it is a factor that would be expected to play a part in their future plans. I have already detailed the other reasons for their decision to leave the Northern Territory.”

[47] As to Mrs Jeffs, her Honour was satisfied that Mrs Jeffs had undergone a very distressing experience which has had long term physical and psychological consequences. Her Honour found that Mrs Jeffs had “sustained the injuries as outlined in her evidence” and that since the accident she had been in “continual pain” which she was required to manage

with pain killing drugs. The trial Judge specifically found that Mrs Jeffs has “persevered through pain, discomfort and depression to do what she can to rehabilitate herself back into the workforce and to continue her pre-accident active life”. Her Honour added that “this effort has been in circumstances where many others would have given up altogether”.

[48] Dealing with psychological damage, the trial Judge summarised the effects as follows:

“[124] I accept that Mrs Jeffs has suffered psychological effects in addition to her physical injuries. I accept her evidence that she has feelings of being disconnected from the world around her, she has suffered depression, lack of ability to concentrate and an extreme fear of flying. Her concentration has been affected. She was unable to complete a course of study that she attempted after the accident. Her relationship with her husband has been affected and her libido reduced.”

[49] Specifically as to leaving Palumpa and moving to Wagin, the trial Judge summarised the evidence given by Mrs Jeffs:

“[87] Mrs Jeffs gave evidence that during the wet season the only way in or out of Palumpa is to fly. She tried to overcome her fear of flying but her attempts did not work. She stated that she made a decision to leave Palumpa because she wanted to be near her family, she needed to be away from the situation at Palumpa and Mr Jeffs was not getting better with his pain.

[88] Mrs Jeffs gave evidence that she and her husband purchased a house in Wagin near Perth in Western Australia and moved there to live.

[89] Mrs Jeffs was cross examined concerning her evidence about working in Palumpa and her decision to leave and move back to Western Australia. Under cross examination Mrs Jeffs gave evidence she and her husband went to live in Wagin in May

2001 when they left Palumpa. They chose Wagin because it was a family community and they did not want to live in the city. In Wagin, employment was difficult to obtain. Mr Jeffs returned to the Northern Territory for a few months to work at Batchelor for Arnhemland Progress Association. Mrs Jeffs obtained a job at Waratah Age Care Hostel in Wagin.”

[50] Later in her reasons, the trial Judge referred to the submission by counsel for the appellant that for personal reasons Mr and Mrs Jeffs decided to change their lifestyle and move to Wagin. Counsel contended that because of the economic situation in Wagin, Mr and Mrs Jeffs could only obtain employment at a rate lower than their earnings in Palumpa and, therefore, they were not entitled to claim damages for economic loss following such a “lifestyle decision”. The trial Judge rejected those submissions and it is appropriate to set out her Honour’s summary of her reasons for rejecting the submissions which provide the context for a further finding by her Honour concerning the reasons that prompted Mr and Mrs Jeffs to move from Palumpa to Wagin:

“[131] I do not accept this argument. The evidence given by Mr and Mrs Jeffs and referred to above needs to be taken in context.

[132] On all of the evidence, Mr and Mrs Jeffs have done their utmost to continue in the workforce, to work to their fullest capacity and to minimise the amount of their claim for economic loss.

[133] On all the medical evidence there is no conscious or unconscious exaggeration of their symptoms by either of them. Doctors have variously described them as persons with a strong work ethic and a stoic personality. There is evidence that they have persevered with employment despite the pain and discomfort from their various physical injuries

and the psychological effects the plane crash has had on each of them.

- [134] Immediately after the response given by Mrs Jeffs in her evidence which has been quoted above, she gave the following evidence (tp 38):

‘What were your observations as to how he was coping with performing his duties?---It was taking him longer to do things. He was working with pain and whenever I asked if he was all right he’d say ‘I’m okay’. He would not take medication because he doesn’t believe, it’s the type of person he is. He just thinks that your body heals itself.’

- [135] With respect to her own condition, Mrs Jeffs gave evidence that while she worked at Palumpa she was in pain, she was limited in her ability to work in the store because she could not do any lifting. It is her evidence that although there were periods during which she worked eight hours a day, this was work she could have done in four to five hours prior to receiving the injuries she suffered in the plane crash.
- [136] Mrs Jeffs gave extensive evidence about her fear of flying and her concerns about having to leave Palumpa in a time of emergency during the wet season when the roads were cut off by floodwaters and the only way in or out was by light aircraft.
- [137] Mr Jeffs also gave evidence about the level of pain he was suffering while he worked at Palumpa. He suffered pain in his back, shoulder and right knee. This was all from injuries sustained in the plane crash. Mr Jeffs had stated that his pain levels made the work difficult and tiring. He did not have staff capable of doing work such as unpacking stock when it arrived and he had to do most of this work himself.
- [138] Mrs Jeffs gave evidence that she was aware of the pain levels suffered by her husband and the difficulties he had in coping with the work.

[139] Mr Jeffs gave evidence he was aware of his wife's fear of flying and her concerns about being cut off by floodwaters during the wet season. This made him feel concerned for her well being.

[140] I found Mr and Mrs Jeffs to be credible and reliable witnesses. I accept their evidence as to the injuries they sustained in the plane crash. I accept their evidence as to the subsequent effect of these injuries upon them, the physical pain and difficulty they have had and continue to endure and the psychological effects from the accident. I accept the evidence of Mrs Jeffs that her capacity for work is currently limited to 15 to 20 hours per week. The evidence of Mr and Mrs Jeffs is substantially supported by the medical evidence which I have summarised in the course of these reasons for judgment. They have both been quite extraordinary in their determination to continue in the workforce despite the physical limitations they each experience as a consequence of the plane crash and the psychological consequences of the accident.

[141] On the evidence there were a number of reasons for coming to a decision to leave Palumpa community in May 2001 and move to Western Australia. A desire to be near family was one of the reasons. However, it is reasonable to conclude that the desire to be near family was heightened by their own physical and psychological problems resulting from the plane crash. On all the evidence a desire to be near family was not the only reason or even the primary reason for their leaving Palumpa. The more important reasons were the difficulties each of them had in carrying out the work expected of them because of the physical and psychological injuries they sustained in the plane crash. Added to this, was the fear and apprehension of flying particularly with respect to Mrs Jeffs."

[51] Having made the findings to which we have referred, the trial Judge then stated that she had applied the principles of causation discussed in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 and cited a passage from the joint judgment of Deane, Dawson, Toohey and Gaudron JJ

which is set out in para [71] of these reasons. After addressing the legal principles, the trial Judge referred to submissions on behalf of the appellant to the effect that Mr and Mrs Jeffs had not explained why they did not move to another community accessible by road during all seasons where employment could readily have been obtained. Her Honour then found that the decision to move to Wagin was not unreasonable and expressed her findings in the following terms:

“[146] On the evidence presented to the Court, there was nothing unreasonable about the decision to move to Wagin. The pain factor that both Mr and Mrs Jeffs were experiencing and the evidence as to the affect of their injuries on their capacity to work, was a significant factor in their decision to leave Palumpa.”

[52] The trial Judge then addressed the question of the burden of proof:

“[147] The issue of burden of proof in these matters was raised in the High Court decision of *Watts v Rake* (1960) 108 CLR 158, Dixon J at 159:

‘... The law of course places upon a plaintiff who sues in tort for unliquidated damages the burden of satisfying the tribunal of fact of the damages he has suffered both special and general and of the quantification in money that should be adopted in the sum awarded. That is the legal burden of proof which rests upon him throughout. Only in one respect is the burden of proof upon the defendant and this is when he sets up matter in mitigation of damages. If it appears satisfactorily that damage in a particular form or to a particular degree has been suffered by the plaintiff as a result of the wrong but the defendant maintains that the plaintiff might have avoided or mitigated that consequence by adopting some course which it was reasonable for him to take, it seems clear enough that the law places upon the defendant the burden of proof upon the question whether by the course suggested the damage

could have so been mitigated and upon the reasonableness of pursuing that course. Probably in claims for damages for personal injuries a question of the burden of proof in mitigation of damages is unlikely to arise often in any serious form. But it may do so; for example if the plaintiff declines to submit himself to some surgical procedure or medical treatment. But while the foregoing are the burdens of proof which the law places upon the parties, states of fact may be proved by the evidence as the case advances or may appear as inferences which the evidence supports and those states of fact may authorize or even demand findings in favour of a party unless and until some further or other state of fact is made to appear by evidence. There are, in other words, presumptions of fact as well as presumptions of law’.”

- [53] The trial Judge specifically found that the appellant had not proved on the balance of probabilities “that the course adopted by the plaintiffs was unreasonable or that it would have been reasonable to pursue another course, namely, to seek employment in another community”.

Move to Wagin – Evidence of Mrs Jeffs

- [54] Mrs Jeffs gave evidence prior to her husband. In her evidence she said that while in Palumpa she was living with pain and her husband was working with a lot of pain. Mrs Jeffs spoke of her physical difficulties in working in the Palumpa store and of her depression and lethargy. Asked how she physically felt at the end of eight hours of working at Palumpa, Mrs Jeffs said she felt very drained and very sore. She said she used tablets “all the time to actually work” being pain killers that were mainly morphine based. As to the effect of the pain killers, Mrs Jeffs said they made her feel “like

you're standing outside your body and not being yourself". Notwithstanding those difficulties, Mrs Jeffs said she enjoyed being at Palumpa.

[55] Mrs Jeffs was cross-examined at some length about her fear of flying and alternative means of transport. The cross-examination even extended to the availability of travel by barge. In the context of her fear of flying, Mrs Jeffs explained that when driving from Palumpa to Darwin in the dry season she needed to stop many times because she was unable to drive for longer than half to three quarters of an hour by reason of pain in her hips, lower back and neck.

[56] When first asked why she left the employment at Palumpa, Mrs Jeffs spoke of the difficulties of leaving Palumpa during the wet season when the only mode of travel was by aircraft. After explaining those problems, Mrs Jeffs gave the following evidence:

“Q. And so why did you come to the decision to leave that community?

A. His contract had expired in April and we talked about the wet season and not being able to get out and he was very, very concerned for my well-being and my family. I was wanting my family, I was really missing them, by then because we didn't have the contact and I just needed to be away from that situation and Peter wasn't getting any better with his pain.

Q. What were your observations as to how he was coping with performing his duties?

A. It was taking him longer to do things. He was working with pain and whenever I asked if he was alright he'd say 'I'm okay'. He would not take medication because he doesn't

believe, it's the type of person he is. He just thinks that your body heals itself."

Q. Now what was your relationship with Peter like at that stage when you made the decision to move?

A. I was happy to be going but we weren't close.

Q. And had you been close before?

A. Yes, very, very much so.

Q. And why do you think you weren't as close?

A. I actually think I distanced myself. I think that I just felt like I was not in my own body, that I was just performing my life, but not really enjoying it."

[57] Mrs Jeffs was cross-examined about the reasons for moving to Wagin:

"Q. And Wagin, I think you told us was some distance, a couple of hundred kilometres south of Perth?

A. Yes.

Q. And it's in some wheat belt area, it's not where you were born is it?

A. No.

Q. And it's not near where your husband was born either is it?

A. No.

Q. Where do your daughters live?

A. Perth.

Q. What is that took you and your husband to Wagin?

A. Financial reasons.

Q. Financial reasons - why Wagin?

A. Financial reasons.

Q. Why Wagin?

A. We had a home in Perth as an investment property we bought in 1994. We sold that and bought a house in Wagin for financial reasons, because we could not afford to buy a home in Perth. We did not know what our future would be. We did not want any overhead financial burden on us, as well as what we're going through.

Q. Now why Wagin? Why did you pick Wagin? Is it a particularly pretty area?

A. Yes.

Q. You didn't have any family there?

A. No.

Q. Or relations around there?

A. No.

Q. So you had no ties to that when you picked that town?

A. No.

Q. And it's a town of about 2000 people, isn't it?

A. Correct.

Q. And how far from Narrogin?

A. 50 kilometres.

Q. Narrogin's the nearest big town?

A. Yes.

Q. Are there some other biggish towns around there?

A. Katanning.

Q. How big is Katanning?

A. A little bit bigger than Narrogin.

Q. And how big is Narrogin?

A. I think Narrogin's got about 4000 people. Katanning would be the same, I'd say.

Q. Now you had a place in Perth. That was the one in Mawson - -
-?

A. Manson Street, Swan View.

Q. And Swan View's a suburb of Perth, isn't it?

A. Yes.

Q. And you had that house and you sold that in 2002, did you?

A. Yes.

Q. Because while you were working in the Northern Territory, you'd rented out that house, hadn't you?

A. Yes.

Q. And were getting income from it?

A. Yes.

Q. So then you decided to leave the Northern Territory and you'd choose Wagin to settle in?

A. Yes.

Q. You buy a house there?

A. Yes.

Q. And did you sell the one in Perth to pay for the one in Wagin?

A. Yes.

...

Q. In respect of the house in Perth, you bought that in 1994, did you?

A. No.

Q. When did you get the house in Perth?

A. It was bought in 1990-91. I can't remember.

Q. And had you paid that house off?

A. Yes.

Q. And when you sold that house, how much did you sell it for?

A. \$89,000.

Q. And then you bought the house in Wagin. How much did you purchase that for?

A. \$61,000.

Q. And that's the house you currently live in?

A. Yes.

Q. And you had the house in Perth, your daughters were in Perth. Why didn't you live in Perth if you'd paid that house off?

A. Because we're not city people. We were brought up in the country. I don't like city life.

Q. Well the house you had in Perth, had that just been purchased as an investment, had it?

A. Yes.

Q. You never intended to live there?

A. No.

...

Q. All right. So you sold the house in Perth and you bought the house in Wagin?

A. Yes.

Q. And you were able to pay that house off?

A. Yes.

Q. And you and your husband chose Wagin, because it's a nice community, a farming community?

A. We chose Wagin because we were able to buy a home there, and be financial and not only because it was a nice town. It was within 2 ½ hours and 900 kms of coastline of Western Australia.

Q. All right, well you had had a house in Perth?

A. Yes.

Q. And you decided you didn't want to live in Perth and you came back to the Territory, so you looked for somewhere in the country?

A. Yes.

Q. And you were able to sell your house and you made enough money out of that to buy one in Wagin?

A. Yes.

Q. And when you made your decision on Wagin, did you look at the prospects of employment there?

A. Yes, we did.

...

Q. And what was the position in respect of job opportunities for you?

A. When we bought our house in October through the Great Southern Real Estate Agent, we were told the job prospects in Wagin were very good so we went ahead and we bought the home. When we got down to Wagin in May, Peter went looking for work, wasn't as good.

Q. Wasn't as good?

A. No.

...

Q. Well what did you discuss with Peter that you and he would gain to do when you moved to Wagin, what was your plan?

A. Our plan was to get over the pain that we've in.

Q. The plan for work?

A. Yes.

Q. What was your plan for work?

A. We had no real plans to - I don't understand how you putting that to."

[58] Mrs Jeffs was cross-examined at length about her employment history. The cross-examiner then returned to the question of travelling away from Palumpa during the wet and Mrs Jeffs agreed that, with medication, in an emergency she was capable of going on an aeroplane even though it distressed her. She then gave the following evidence:

"Q. It's not fair to say you left Palumpa because of your fear of being blocked in, in the wet, that's not right is it?

A. Yes, it is.

Q. I thought you told us yesterday, that there were a number of reasons you left, one of them was, you were missing your children, and wanted to be close to family?

A. Yes.

Q. You were missing family, you didn't have contact, you wanted to be closer to them. Another was that Peter's contract had expired in April?

A. No, Peter's contract hadn't expired.

Q. It was expiring in the April?

A. Was expiring in the April. And it wasn't expiring, he could still have gone on working there.

Q. You could've gone on to another region, couldn't you, there were other ALPA posts around or light posts, that you could've gone to, that didn't involve being locked in, in the wet, aren't there?

A. None available to us.

Q. Did you apply?

A. No.

...

Q. Did you look for another job of a similar type in an area where you weren't going to be locked in and have to use aircraft?

A. No.

Q. And they exist in the Northern Territory, I suggest to you?

A. We didn't look for another position.

Q. Because you'd bought the place at Wagin, had you?

A. Yes.

Q. And so it was your aim was to get down closer to Perth and closer to your daughters?

A. Our aim was to work in Aboriginal communities for up to five years, and because of what pain my husband was in, and the loss of a brother-in-law, through his sister, we decided to go south.

Q. Was that partly because you wanted to be closer to your daughters?

A. My daughters were actually overseas at that time.

Q. Was it because you wanted to be closer to your sister?

A. No.

Q. Well, what did you mean yesterday, when you told her Honour that you were missing family, you didn't have contact and that was one of the reasons you left, what did you mean by that?

A. You do miss your family when you're away from them."

Move to Wagin – Evidence of Mr Jeffs

[59] In answer to questions in examination-chief, Mr Jeffs gave the following evidence concerning the decision not to renew the contract at Palumpa and to move to Wagin:

"Q. What was your reasons for not to renew the contract?

A. Partly because I found that there was no-one in the community - I mean I had three Aboriginal ladies in the shop, assisting me in the shop, but they weren't capable of doing - of unpacking the stock when the stock was delivered. I had to

do most of that, 98% of that by myself and I just found that the levels of pain that I was experiencing, plus the fact that we'd been there throughout three wet seasons, and the roads to and from the place were closed completely for seven months of each year, which meant the only ingress or egress from the place, was via aircraft.

Q. Can you recall the date that you left Palumpa?

A. No. It would have been - - -

Q. The month will do?

A. Yeah, well it would have been April.

Q. Were you able to do all the other duties other than unpacking without any problems?

A. Without problems but not without pain, yeah.

Q. Where were you experiencing the pain?

A. Mostly my back, shoulder and knee, right knee, lower back.

Q. Just clarify, what - just excuse me for a moment. Now what injuries did you receive in the plane crash?

A. Fracture in the spine, which - - -

Q. Whereabouts in your spine?

A. Lower spine, there were actually three broken vertebrae, although I wasn't aware of it initially, I found that there was an injury to my right bicep.

Q. What was the nature of the that injury?

A. Well I don't know that the medical terms but they - - -

Q. Just in layman's terms fine?

A. The muscle that connects my bicep to the shoulder was torn away from the shoulder, I had a whip lash, a knee injury, and I obviously suffered internal injuries although this was never confirmed by the Darwin hospital but I have to say after we left the Darwin hospital and went back to the accommodation in Cullen Bay, quite a large amount of blood came away from me in my stools for a considerable period of time, I would say at least three to four weeks, I passed blood every time I went to the toilet.

Q. Did those injuries cause - all of those injuries you just mentioned, did they cause any problems with other parts of your body?

A. Not sure if I understand what you mean.

Q. I'm trying to ask in a non leading way. The - for example did the pain in your back cause you pain anywhere else in your body?

A. Oh yes, yeah sorry I didn't - - -

Q. That's all right?

A. I didn't - yeah well I do - - -

Q. It's my mistake not yours?

A. Pain radiates around to my hips. You know to the upper part of my hips. And the whip lash that I suffered also radiates pain to my shoulder, to my right shoulder.

Q. And while you were at Palumpa where you still experiencing the effects of those injuries?

A. Yes.

Q. And was that impacting on the work you were doing at Palumpa?

A. Yes.

Q. And how was that impacting on the work you were doing?

A. It made the work difficult to carry out on some occasions. Well most occasions, there were some occasions when I couldn't do the work. And of course it was tiring.

A. And prior to the accident, when you were doing the relief work did you enjoy doing that work?

A. Of course.

Q. And did you enjoy doing it after the accident at Palumpa?

A. Yes I - yes I did, yes.

Q. I just want to get this quite clear, if you could just tell us as precisely as you can, the reasons why you decided to not to renew the contract?

A. Okay, I was - resigned myself to accept the fact that the pain was never going to go away, or it certainly wasn't going to go away while I was doing that work, and on top of that my wife Elaine lived in constant fear that during the wet season she would be required - there may be some emergency arise, where she would be required to leave or be evacuated from the community and the only way she could have been evacuated would have been by aircraft.

Q. From your observation, was that a concern to Elaine as well?

A. Well it was - it was of great concern to Elaine and it was - it was because of the concern to her, that it actually concerned me also.

Q. Did that concern have any impact on the relationship between you and Elaine?

A. I suppose it made me cranky.

Q. It made you cranky, all right. So you left Palumpa, Elaine left with you, where did you go?

A. We drove back to Perth and eventually to Wagin. We'd bought a house in Wagin several months before hand. When I'd realized that I wasn't going to be able to continue at Palumpa, after the contract - after the 2 year time of the contract expired - I realized that we weren't - I wasn't going to be able to stay there and we'd bought a house in Western Australia, because that was our home state. And that's where we made our way back to - we made our way back to Wagin."

[60] The cross examiner twice returned to the topic of leaving Palumpa and choosing Wagin:

"Q. Now, when you left Palumpa, your contract was up and you bought the house at Wagin?

A. Well we bought the house previous to that, but yes.

Q. And tell me what is it that made you pick on Wagin, you had no family connection with Wagin did you?

A. No. No, we had no family living in Wagin, no.

Q. All right. Your wife's daughters were in Perth?

A. Yes.

Q. Your children, are they - - -?

A. In and around Perth.

Q. In and around Perth?

A. I have one son here in Darwin.

Q. So what was it that was attractive about Wagin?

A. A house.

Q. And you had a house in Perth didn't you?

A. That's correct, yes.

Q. And that was in a suburb of Perth?

A. Yeah, a western - sorry, an eastern suburb of Perth yes.

Q. And you sold that and were able to buy the house in Wagin with the money you got for that house?

A. That's right, yes.

Q. And had some left over?

A. Yeah, I think there was some left over.

Q. Before going to Wagin did you make inquiries as to the job prospects?

A. Yes.

Q. Who did you make those inquiries to?

A. Well, only briefly. Through the estate agent who handled the sale of the house.

Q. You asked the estate agent, did you ask - - -?

- A. No I didn't ask him, my wife spoke to him about it, because my wife was in Wagin and when she bought the house, or made the arrangements to buy the house and she spoke to him and explained what we were doing up here in the Northern Territory. And he advised her that - well his words to her were, 'You won't have any trouble getting work down here'.
- Q. But that was at the stage where she was down there finalizing the house deal was it?
- A. That's correct, yes, yes, yes.
- Q. So you had already made the decision, at that stage to go to Wagin?
- A. No.
- Q. Well she's down there finalizing a house deal and you're buying the house and you haven't made a decision to go there?
- A. Well, perhaps I said that incorrectly, because when Elaine decided to buy the house, when she wanted to buy the house, she phoned me and asked about buying the house and I said yes, okay. And that was when we made the decision to move down.
- Q. And then she negotiated with the agent to buy the house and she asked him about job prospects?
- A. Yeah, that's correct.
- Q. You'd made, before she started looking at Wagin, you'd made no inquiries about what work was available there?
- A. No.
- Q. Were you intending to work after you left Palumpa?
- A. Of course, yes.

Q. But you hadn't made any inquiries about the job availability?

A. No, not at that particular town, no.

Q. When you finished your contract at Palumpa did you make any approach to ALPA or to anyone else about getting a job at a similar type of settlement that wasn't locked in because of the wet?

A. No, I didn't.

Q. And had the decision been made you'd move back to the west and you knew Wagin, did you?

A. No, I didn't know Wagin at all - I'd never - - -

Q. When did you first go to Wagin, when you moved there?

A. Yes.

Q. Had your wife Elaine, gone to Wagin before?

A. Yes, she had been there before.

Q. So it was her decision that you'd like to go to that place?

A. Elaine made the suggestion to me and I agreed with it, yes. So it was effectively it was both our decision, it was the decision of both of us.

Q. Now your wife told us that one of the reasons you left Palumpa, was you were to some extent, cut off from family, and missing family, didn't have contact with family, would you agree with that?

A. Well we've frequently got family - phone calls from family, who used to tell us that we were too far away and you have to

appreciate that that would effect a woman, considerably more than it would effect a man.

Q. Was your wife keen to be closer to her family?

A. I think she was, yes.

Q. And is that one of the reasons you went to Wagin, which is back in Western Australia?

A. It would have a bearing on it, yes.

...

Q. And then you left that and moved to Wagin and you worked in the way you described to us, and have been able to earn, when you've been able to work?

A. Yes I've earned a living, when I've been able to work.

Q. And you haven't sought to go to another community, even one that's not as remote or cut off, either you or your wife?

A. We've considered it, but we've never done it yes.

Q. And you've never applied to do it?

A. No.

Q. So the position is, you made I'd suggest, a lifestyle change to move to Wagin?

A. That would be correct, yes."

Reasons for Move to Wagin – No Error by the Trial Judge

- [61] In our opinion, the learned trial Judge did not err in her assessment of the evidence or her conclusions as to the reasons why Mr and Mrs Jeffs left Palumpa and moved to Wagin. In the context of both Mr and Mrs Jeffs working under significant physical and psychological difficulties as a consequence of injuries sustained in the plane crash, the trial Judge correctly identified that the joint decision was brought about by a combination of factors which had their origins in the ongoing effects of the injuries.
- [62] Fundamental to the decision to leave Palumpa were the effects of the injuries upon Mr and Mrs Jeffs which made it difficult for them to carry out the work at Palumpa and caused them to suffer continual pain; at times, high levels of pain. They were unable to carry out the work without assistance. As a consequence of the plane crash, Mrs Jeffs suffered an extreme fear of flying which in turn caused her stress during the wet season because of fear that an emergency would require her to fly. Even in the dry season, there were significant physical difficulties for Mrs Jeffs associated with driving from Palumpa to Darwin. Mr and Mrs Jeffs were each concerned for the other. Their relationship was being adversely affected by the problems associated with working at Palumpa which were founded in the injuries each had sustained.
- [63] It is not surprising that in their injury affected states, Mr and Mrs Jeffs sought a change of “lifestyle” which would bring them closer to the family

of Mrs Jeffs. This is the context in which the concession by Mr Jeffs that he made a “lifestyle change” in leaving Palumpa and moving to Wagin is to be assessed. This was not a choice made in other than very difficult circumstances, which circumstances were directly attributable to the injuries sustained by Mr and Mrs Jeffs in the plane crash.

[64] As to the choice of Wagin in particular, it is clear from the evidence of Mr Jeffs that Mrs Jeffs made the suggestion and he agreed with it. Western Australia was their home state. They were brought up in the country and Mrs Jeffs did not like city life. Wagin was in country Western Australia and within closer touch of Mrs Jeffs’ family. As Mrs Jeffs explained, Wagin was not only a nice town, it is within two and a half hours of many kilometres of the coastline of Western Australia.

[65] Financial reasons played a significant role in the decision to choose Wagin. Mr and Mrs Jeffs were able to sell their investment property in Perth and could afford to buy in Wagin. They could not afford to buy a home in Perth. Both Mr and Mrs Jeffs understood from information given by a real estate agent that the prospects of finding employment in Wagin were good.

[66] The original grounds of appeal complained of errors in the findings of the trial Judge as to the reasons for leaving Palumpa. However, counsel for the appellant acknowledged that there was evidence capable of supporting a finding that the primary motivation for Mr and Mrs Jeffs leaving Palumpa

was related to the disabilities that each continued to suffer as a consequence of their injuries.

[67] The amended grounds of appeal complain of errors in findings as to the reasons for moving to Wagin. Counsel contended that the choice of Wagin was not related to the injuries and, therefore, Mr and Mrs Jeffs had failed to establish the necessary casual link between their diminished earning capacities and financial losses after April 2001 when they moved to Wagin. Counsel contended that the financial losses after April 2001 were due to the move to Wagin and were not causally linked to the diminished earning capacity.

[68] It is to be acknowledged that in the process of asking whether the plaintiff has proved, as a matter of commonsense and experience, the necessary causal connection between the injuries and financial loss, it is legitimate to examine the reasons given by Mr and Mrs Jeffs for moving to Wagin as a separate exercise from consideration of the reasons for leaving Palumpa. However it is artificial to separate those decisions into strictly isolated compartments. Those decisions are so heavily interrelated that, for the purposes of causation, they are properly viewed as a single decision to leave Palumpa and continue life in a locality more suited to Mr and Mrs Jeffs having regard to their physical and psychological conditions. This is not a case in which an injured person chose a radically different lifestyle such that it can reasonably be said that the decision to choose the new lifestyle was isolated from the decision to terminate the former employment. Mr and Mrs

Jeffs were a middle aged couple suffering significant disabilities while working in unsuitable employment which they could not perform properly without assistance and which aggravated their disabilities. They were in a location remote from medical assistance, the inaccessibility of which during the wet season caused stress to Mrs Jeffs and, in turn, to Mr Jeffs. In their physically and psychologically diminished state, both Mr and Mrs Jeffs wanted to pursue their life in a locality other than a remote locality in the Northern Territory and which was more suited to them and their conditions. As part and parcel of the decision to change localities and “lifestyle”, Mr and Mrs Jeffs arrived at a decision to return to a country area in their home State where they would be closer to family. They chose a locality that offered them an appropriate lifestyle and suited both their preference and financial circumstances. It was a single decision brought about by the ongoing effects of injuries sustained in the crash and influenced by a combination of factors.

Causation - Principles

- [69] The principles are not in doubt. Liability having been admitted, and Mr and Mrs Jeffs having proved that their earning capacity had been diminished, the burden rested upon each of Mr and Mrs Jeffs to prove that the diminution of their earning capacity had caused and would cause them to suffer financial loss. In the context of the move from Palumpa to Wagin, and the relevance of the choice of Wagin to the question of causation, the decision of the High Court in *Medlin* is of assistance.

[70] Professor Medlin was employed at Flinders University in South Australia. He was injured in a road accident as a consequence of the defendant's negligence. In the context of ongoing physical difficulties directly related to injuries sustained in the accident, Professor Medlin "voluntarily" retired four and a half years earlier than he would otherwise have retired. His claim for damages for loss of earning capacity was quantified by reference to the loss of salary and other benefits during that four and a half year period. In those circumstances, the claim "rested on the proposition that, notwithstanding that it flowed from his own decision to accept voluntary retirement, the premature termination of the plaintiff's university appointment had been relevantly 'caused' by an accident-related loss of earning capacity".

[71] The principles were discussed in a joint judgment of Deane, Dawson, Toohey and Gaudron JJ in the following passage which was cited by the trial Judge (6 – 7):

"For the purposes of the law of negligence, the question whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience. *And that remains so in a case such as the present where the question of the existence of the requisite causal connection is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage.* In such a case, the "but for" test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connection would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act

or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. *The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage.* Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision. It will be seen that, on the plaintiff's evidence, the present was such a case.

Nor can the question of causation of damage in a negligence action be automatically answered by classification of operative causes as "pre-eminent" or "subsidiary". *Regardless of such classification, two or more distinct causes, without any one of which the particular damage would not have been sustained, can each satisfy the law of negligence's common sense test of causation.* This can be most obviously so in a case where a "subsidiary" cause operates both directly as a cause of the particular damage and indirectly as a contributing component of a "pre-eminent" cause. As will also be seen, the findings of the learned trial judge left open the likelihood that the present was such a case.” (our emphasis)

[72] Two further passages in the joint judgment are of relevance to the circumstances under consideration (10 and 11):

“The necessary causation between a defendant’s negligence and the termination of a plaintiff’s employment, in the sense that the termination of the employment is the product of an accident-caused loss of earning capacity, can exist notwithstanding the fact that the immediate trigger of the termination of the employment was the plaintiff’s own decision to retire prematurely. If, for example, it appears that a plaintiff’s decision to retire prematurely would not have been made were it not for the fact that the effect of accident-caused injuries is that continuation in employment would subject him or her to constant pain and serious risk of further injury, it may well be that commonsense dictates the conclusion that the plaintiff’s decision to retire prematurely was a natural step in a chain of causation which suffices to designate, for the purposes of the law of

negligence, the termination of the employment as a product of those injuries.

...

In these circumstances, the relevant question was not whether the plaintiff “should” have continued in his University post or whether his decision to retire was not “reasonable” but whether, in the context of what was reasonable between the plaintiff and the defendant in determining the defendant’s liability in damages, the premature termination of the plaintiff’s employment was the product of the plaintiff’s loss of earning capacity notwithstanding that it was brought about by his own decision to accept voluntary retirement.”

- [73] In the context of the appellant’s complaint that the trial Judge erred in holding that the appellant bore the onus of demonstrating that the decision to move to Wagin was unreasonable, it is necessary to consider the interaction between principles of causation and those relating to the duty resting on Mr and Mrs Jeffs to take reasonable steps to avoid or reduce the financial loss caused by the loss of earning capacity. The trial Judge proceeded on the basis that the appellant was advancing a case that Mr and Mrs Jeffs acted unreasonably in failing to take a course open to them which would have avoided or mitigated their losses, namely, taking employment with ALPA elsewhere in the Northern Territory or moving to a locality in Western Australia where employment would have been available to them. Counsel contended that the appellant was not advancing a case of mitigation of damage. Rather the appellant was denying that the loss of earning capacity was productive of loss because Mr and Mrs Jeffs were capable of undertaking a particular type of work which would have been available to

them in localities other than Wagin. This, it was said, amounted to a denial that Mr and Mrs Jeffs had discharged the burden of proving that the loss of earning capacity was productive of financial loss.

[74] The distinction between mitigation of damage and the burden resting on a plaintiff to prove the extent of damage suffered by reason of injury was explained by Sugerman JA in *Adams v Ascot Iron Foundry Pty Ltd* (1968) 76 SR (NSW) 120 in the following terms (132):

“In many, if not most, cases of damages for personal injuries, damages are awarded in respect of a lost or diminished earning capacity of the plaintiff. In such cases loss of earnings in the past and prospective loss of earnings in the future furnish a guide to the measure of such damages. A plaintiff is frequently said by medical evidence to be unfit as a result of his injury for his former employment, but to be capable of doing other forms of work, eg light work with or without particular qualifications. If in such cases a question arises of the plaintiff’s ability to find such other forms of work the problem is not one of mitigation of damages. It is really the plaintiff who is seeking to increase damages by establishing that he has been unable to obtain and in the future may not be able to obtain, or may only be able to obtain intermittently, work of the only kind of which he is capable. In this respect the onus of proof in the sense of the onus of satisfying the jury rests upon the plaintiff as part of the general burden which lies upon him of proving the extent of the damage he has suffered by reason of the injury.

In some cases it is the defendant who seeks to introduce evidence by way of establishing that a particular employment, usually with the defendant himself as the previous employer, within the capacity of the plaintiff is available to him. The present is an example of such a case. In such cases the defendant is really denying, according to the circumstances, that the plaintiff’s incapacity is as extensive as he claims or that his loss of earning capacity is aggravated by the impossibility of obtaining employment with the limited capacity remaining to him.”

[75] The approach of Sugerman JA was cited with approval by McHugh J in *Medlin* (21):

“A further question, and one that can be conveniently considered at this point, is whether, having regard to the loss of earning capacity, the plaintiff failed to mitigate his financial loss by not continuing in employment which would have continued to give him the earnings which he was receiving before the accident. In *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR (NSW) 120, at pp 132-133, Sugerman JA correctly pointed out that, where a question arises as to whether a plaintiff could have obtained employment that was within his post-accident capacity, the question is not really one of mitigation of damages. The plaintiff must prove that such employment is beyond his or her capacity ‘as part of the general burden which lies upon him of proving the extent of the damage he has suffered by reason of the injury’. But here the plaintiff has proved a general impairment of earning capacity and the exact degree of the impairment is not a matter for this Court to decide. Accordingly, the question that then arises is whether the plaintiff failed in his duty to take steps that could have avoided or reduced the financial loss which he claims flowed from that loss of earning capacity.”

Application of Principles to Facts

[76] Mr and Mrs Jeffs were not required to prove that their injuries were the sole cause of their decision to move to Wagin. Multiple causes might exist. The critical question is whether, notwithstanding the intervention of the decision to cease employment at Palumpa and move to Wagin, Mr and Mrs Jeffs proved that as a matter of commonsense and experience the move to Wagin was caused by their injuries. Having regard to the evidence accepted by the trial Judge, but drawing our own conclusions from that evidence, in our view the necessary causative link was established. To adapt the words of the joint judgment in *Medlin*, notwithstanding the fact that the “immediate trigger” for the financial loss was the move to Wagin, the evidence

established that the decision to make that move would not have been made had it not been for the “effect of accident-caused injuries”. Commonsense “dictates the conclusion that [Mr and Mrs Jeffs’ decision to move to Wagin] was a natural step in a chain of causation which suffices to designate, for the purposes of the law of negligence, [the move to Wagin] as a product of those injuries”. In the context of what was reasonable between Mr and Mrs Jeffs and the appellant in determining the appellant’s liability in damages, the decision to move to Wagin “was the product of [Mr and Mrs Jeffs’] loss of earning capacity notwithstanding that it was brought about by [their] own decision” to move to Wagin.

[77] Mr and Mrs Jeffs proved “a general impairment of earning capacity”. While they did not look for another position in the Northern Territory or elsewhere in Western Australia, bearing in mind the extent of the proven disabilities and their inability properly to carry out the duties required of them at Palumpa, and in the absence of evidence that at another locality Mr and Mrs Jeffs would or might have obtained employment within their diminished capacities, in our opinion the evidence in its entirety established that the diminution in their earning capacities was productive of financial loss after the move to Wagin. It is not to the point that had they chosen to work beyond their diminished capacities as they had been doing at Palumpa, Mr and Mrs Jeffs might have obtained employment of a similar nature and remuneration elsewhere with ALPA. Nor is it to the point that, from the point of view of obtaining employment, Wagin was a poor choice.

[78] If, contrary to the approach of the trial Judge, the question of obtaining alternative employment elsewhere in the Northern Territory or Western Australia is viewed as an issue relating to causation, making our own assessment of the evidence we are satisfied that the chain of causation is not broken. The evidence established that a large number of community stores existed in the Territory that were serviced by ALPA or others. However, the evidence also established that the work in other stores would have been similar to the work undertaken by Mr and Mrs Jeffs at Palumpa. As we have said, the evidence demonstrated that the work at Palumpa was beyond the diminished working capacity of both Mr and Mrs Jeffs. Determined as Mr and Mrs Jeffs were to work, they were unable to carry out all the duties required of them without assistance. The work aggravated their disabilities and adversely affected the quality of their life. When Mr Jeffs returned to the Territory and worked at the Batchelor store for two weeks in October 2002, he was engaged in removing stock from the shelves, rearranging the shelving and placing the stock back on the shelves. He experienced pain and felt extremely tired at night time. Asked, in terms of severity, how he would describe the pain, Mr Jeffs said “probably bad, I suppose”. Later Mr Jeffs worked in the Elcho store. Asked how he was feeling physically after he had been at Elcho, Mr Jeffs replied “pretty much, drained, yes”.

[79] In addition, if Mr and Mrs Jeffs were to be employed in a store serviced by ALPA, they would have been required to undergo a pre-employment medical examination to satisfy ALPA that they were fit to carry out the required

duties because, in the words of the HR Manager for ALPA, Mr Edwards, “there is a certain amount of physical work required” which is “reasonably heavy”. It is plain on the evidence of Mr and Mrs Jeffs and the medical evidence accepted by the trial Judge that Mr and Mrs Jeffs would not have passed such a medical examination by reason of the ongoing disabilities emanating from their injuries.

[80] There was no evidence that employment of a suitable nature was available elsewhere in the Northern Territory or Western Australia. Given their advancing ages and the extent of their disabilities, it is not surprising that Mr and Mrs Jeffs would have difficulty securing employment suitable to their diminished working capacities. The evidence was not capable of supporting a view that the decision to choose Wagin broke the chain of causation.

[81] Although we have approached the issue of employment elsewhere in the Northern Territory or Western Australia as a question relating to causation, in our opinion it is more appropriately viewed as a question of mitigation of damage. Impairment of working capacity and the necessary causal link having been proven, the allegation that Wagin was a poor choice and that financial loss could have been avoided or reduced by moving to a different location is, in substance, a claim that Mr and Mrs Jeffs failed to mitigate their losses. The burden of establishing the failure to mitigate rested on the appellant. There was no evidence that employment of a suitable nature was available elsewhere in the Territory or Western Australia. The trial Judge

found, and correctly in our opinion, that the appellant had failed to prove that the decision to move to Wagin was unreasonable.

[82] **In para 2.10 of the particulars of ground 2, the appellant complains that the Judge erred in finding that Mrs Jeffs would be limited to working 15 – 20 hours a week. We do not agree that her Honour erred. Although Mrs Jeffs had, in the past, worked longer hours, there was a significant body of evidence from Mrs Jeffs and medical practitioners concerning Mrs Jeffs’ working capacity at the time of trial which supported the finding of the Judge. This ground is not made out.**

[83] **For these reasons, the principal complaint found in grounds 1 and 2 of each Notice of Appeal and the errors particularised in ground 2 of each Notice are not made out. Similarly, grounds 4, 5 and 7 relating to Mr Jeffs and grounds 6 and 7 relating to Mrs Jeffs fail.**

Ground 4 – Mrs Jeffs’ Future Medical Expenses

[84] The appellants submitted that the judge erred in allowing as a claim by Mrs Jeffs for future medical expenses the ongoing cost of the drug Duriome. The judge found that Mrs Jeffs had an ongoing need for future medical treatment including medication. That finding is supported by the evidence. The drug Duriome was prescribed by Dr Parry for Mrs Jeffs and was taken by her, according to her evidence, to counter weight gain consequent upon anti-depressant medication **required in connection with her injuries**. That evidence was unchallenged in cross-examination. **A psychiatrist,**

Dr Proud, reported that “for practical reasons, may I suggest that she needs her anti-depressant medication indefinitely”. The judge’s assessment of future medical expenses was open on the evidence and should not be disturbed.

Ground 7A – Mrs Jeffs’ Future Loss of Earning Capacity – Cross Appeal

[85] Ground 7A in the Amended Notice of Appeal in Mrs Jeffs’ action is as follows:

“The learned judge erred in her calculation of the respondent’s economic loss as follows:

- (i) failing to deduct taxation (in) her calculation of the respondent’s economic loss [EJ156];
- (ii) failing to calculate the respondent’s future economic loss at a present lump sum value using relevant tables [EJ156];
- (iii) failing to make any deduction for contingencies in her calculation of the respondent’s future economic loss (EJ156].”

[86] The assessment of the future loss of earning capacity was in the sum of \$61,776.00. The judge found Mrs Jeffs would have retired at age 57 when her husband turned 70. Loss of earning capacity was awarded from the date of trial to age 57, a period of 4 years. In her cross-appeal Mrs Jeffs complains that there was no evidence upon which a finding that she would retire at age 57 could be made.

- [87] At trial Mrs Jeffs sought an award of damages for loss of earning capacity from the date of trial until age 65. She initially claimed \$129,691.00 for future loss of earning capacity from date of trial until age 65 calculated at a rate of \$269 per week. Mrs Jeffs' evidence was that she and Mr Jeffs originally had planned to stay at Milingimbi for five years and their intention was to seek another five year term at the end of that five year period. They intended to stay in Milingimbi until Mr Jeffs turned 70. Mr Jeffs was 59 years of age at the time of his appointment to the Milingimbi store as manager. There was no evidence that Mrs Jeffs would retire permanently from the work force at age 57; rather, the evidence disclosed an intention or plan on the part of Mrs Jeffs to cease working at Milingimbi when her husband turned 70.
- [88] Prior to the accident Mrs Jeffs had a good history of employment in a range of occupations including farm worker, sales clerk, shop assistant, teacher's aide, store supervisor, store manager, accounts clerk, school receptionist, book-keeper and roadhouse manager. It was submitted the evidence showed that Mrs Jeffs enjoyed work and was a person with a strong work ethic and it should be inferred that she was a person who was likely to continue in the work force until 65 years of age or longer. Mr Jeffs is 13 years older than Mrs Jeffs and likely to pre-decease her. It was submitted that Mrs Jeffs and her husband had limited assets and modest incomes and that this increased the probability that Mrs Jeffs would have exercised her capacity for work beyond the age of 57.

[89] In response to this submission, counsel for the appellant submitted that in the absence of questioning as to Mrs Jeffs' intentions beyond the age of 57 no inference could or should be drawn in favour of Mrs Jeffs in this regard. Reference was made to *Un v Schroter & Others* [2003] NTCA 2 at paras [8]-[13]. It was submitted that the trial judge had drawn an inference that Mrs Jeffs would retire at the age of 57 and that no error was shown in the drawing of that inference.

[90] The appellant contended that an inference could not be drawn in favour of Mrs Jeffs who, if asked, could have given direct evidence as to how long she would have worked if uninjured. It was submitted that the principle enunciated in *Jones v Dunkel* (1959) 101 CLR 298 should be applied. Particular reliance was placed on the judgment of Handley JA in *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418. However, there is nothing in the present case leading to the inference that Mrs Jeffs' evidence on that issue would have been unfavourable to her had she been asked and the fact that she was not asked is not conclusive of what inference should be drawn from all the evidence. There is nothing in the trial Judge's factual findings which precludes this Court from looking at the question for itself.

[91] The observations of Mason P in *Bridge Printery Pty Ltd v Mestre* [1999] NSWCA 342 at [4]-[5] are pertinent:

“[4] There are at least three reasons for discounting the weight of a plaintiff’s answer to the question: ‘How long would you have worked if uninjured?’

[5] First, it is necessarily hypothetical. Secondly, the question is usually posed at a time well in advance of the date on which the plaintiff would be faced with the reality of retirement on pension or continuing to work. Thirdly, capacity to work is as relevant as intention to do so.”

[92] As Angel and Riley JJ said in *Un v Schroter & Others*, at [9] “The evidence of the appellant as to what she ‘would have’ done is but one matter to be considered in determining, on the balance of probabilities, what she would have done.”

[93] We reject the submission that no inference could be drawn in favour of Mrs Jeffs’ intention to work beyond the age of 57 because she was not asked to give that evidence directly.

[94] At date of trial Mr Jeffs was 66 years of age. His intention was to remain in employment until he was 70 years of age. The trial judge found [89] that Mr Jeffs may well work past this age if physically able to do so. He had demonstrated through the years since the plane crash occurred his determination to remain in the work force. He had stayed in employment despite enduring considerable pain. He was described as a stoic man by the trial judge. Mrs Jeffs also was hard working and, given the couple’s lack of assets and income, in our view it is to be inferred that Mrs Jeffs was likely to work beyond the age of 57 and probably until she was 60, that is, more probably than not until 60 and it may well be beyond 60. Mrs Jeffs’ loss of

future earning capacity should be calculated from the date of trial until she is 60 years of age.

[95] Counsel for the respondents conceded that the trial judge failed to deduct taxation in the course of her calculation of Mrs Jeffs' future economic loss, *Cullen v Trappell* (1980) 146 CLR 1. It was also conceded that the trial judge failed to calculate Mrs Jeffs' future economic loss figure as a present lump value using the relevant tables and that the calculations for the future loss should be based on net loss calculated on present lump sum values: see generally *Todorovic v Waller* (1981) 150 CLR 402 at 440 and *Luntz* 4th Edition at 6.2.1.

[96] The trial judge allowed \$61,776.00 for Mrs Jeffs' future loss of earning capacity. That figure was based on a pre-accident working capacity of a 38 hour week at \$16.50 per hour totalling \$627.00 per week. Over the four years to when Mrs Jeffs would attain 57 years of age that amounted to \$130,416.00. From that amount the trial judge deducted Mrs Jeffs' working capacity at date of trial which was a 20 hour week at \$16.50 per hour totalling \$330.00 per week. That weekly figure over four years equalled \$68,640.00, which deducted from the figure of \$130,416.00 gave a future loss of earning capacity of \$61,776.00. As was conceded, that calculation failed to take account of taxation.

[97] Mrs Jeffs was born on 20 September 1952 and was 53 years old at the date of trial. A pay of \$627.00 gross per week converts to \$508.00 net per week

after deduction of tax. Pay of \$330.00 gross per week converts to \$292.00 net per week after deduction of tax. Mrs Jeffs' post-accident working capacity of \$292.00 net per week deducted from her pre-accident pay of \$508.00 net per week is a net loss of \$216.00 per week.

[98] On that basis her future loss of earning capacity should be calculated at \$71,280.00 being \$216.00 net per week multiplied by 330 being the 3% discount multiplier for seven years to age 60.

[99] As to contingencies the trial judge in her assessment of damages made no allowance for the loss of employer superannuation contributions which would have been paid on Mrs Jeffs' gross earnings until retirement. In addition, the calculation for future loss of earning capacity assumes that Mrs Jeffs, despite her injuries, will continue to be fully employed for 20 hours per week. We agree with counsel for Mrs Jeffs that there is no rule of law requiring a discount for contingencies to be made; *Shaw v The Commonwealth of Australia* (1993) 116 FLR 376 at 391. Given these matters, there should be no deduction for contingencies.

[100] Both appeals are dismissed. The cross-appeal by Mrs Jeffs is allowed and the judgment in her favour increased to \$474,388.84 to take account of the increased allowance for future loss of earning capacity.
