# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Wells v Australian Aviation Underwriting Pool Pty Ltd* [2003] QSC 226 |
| PARTIES: | **ROBYN LUCELLE WELLS**<br>(plaintiff)<br>v<br>**AUSTRALIAN AVIATION UNDERWRITING POOL PTY LTD (ACN 004 489 810)**<br>(defendant) |
| FILE NO/S: | SC No 8085 of 1999 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| DELIVERED ON: | 21 July 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 26 – 30 May 2003 |
| JUDGE: | McMurdo J |
| ORDER: | **1. Claim dismissed.**<br>**2. Unless the plaintiff serves upon the defendant's solicitors and delivers to the court a submission as to costs within 7 days of today, the plaintiff is to pay the defendant's costs of the proceedings to be assessed.**<br>**3. In the event that such a submission is delivered, the defendant is directed to serve upon the plaintiff's solicitors and deliver to the court a submission as to costs within a further 7 days.** |
| CATCHWORDS: | INSURANCE – CONSTRUCTION OF POLICY - where plaintiff injured in a motor vehicle accident – where plaintiff made claim for payment of a disability benefit under an accident insurance policy – where defendant to pay the plaintiff $500,000 if plaintiff, as a result of any bodily injury, suffered an "Permanent Total Disablement" as defined in the policy – whether alleged disablement must have been solely and independently of any other cause, the result of any injury suffered – whether an injury sufficiently causing a disablement would cease to be so if the insured suffers a later injury which of itself would have caused a disablement<br><br>INSURANCE – CONSTRUCTION OF POLICY - where |

insurance policy provides bodily injury must directly result in a permanent and total disablement lasting twelve calendar months which, at the end of the period must be beyond hope of improvement – where disablement must prevent the insured engaging in each and every occupation or employment for wage or profit for which the insured is reasonable qualified – whether plaintiff prevented from engaging in an occupation for which he was reasonably qualified – whether plaintiff suffered a permanent and total disablement beyond hope of improvement

*Fidelity and Casualty Company of New York v Mitchell* (1917) AC 592, considered
*Jason v Batten (1930) Ltd* [1969] 1 Lloyd's Reports 281, considered
*QBE Insurance Limited v Jande* (1995) 8 ANZ Insurance Cases 61-270, considered

COUNSEL: C Heyworth-Smith for the plaintiff
S Couper QC for the defendant

SOLICITORS: Melrose King & Emerson for the plaintiff
Hunt & Hunt for the defendant

[1] **McMURDO J:** This is a claim for payment of a disability benefit under a policy of accident insurance. The plaintiff, Mrs Wells, entered into the policy with the defendant for a period of cover for the year commencing 1 October 1995. The policy insured against injury during that period to her husband, Mr Brian Colin Wells. The defendant promised to pay an amount of $500,000 if Mr Wells suffered "Permanent Total Disablement", as defined in the policy, resulting from such an injury. Her case is that Mr Wells suffered an injury in a motor accident or about 17 August 1996 which resulted in his disablement in this sense. The policy also provided for the payment of benefits for temporary disablement. The defendant has paid amounts totalling $62,400 on that basis. It is common ground that if the plaintiff is entitled to the permanent total disablement benefit, it must be reduced by this sum. The claim is then for an amount of $437,600.

[2] At August 1996, Mr Wells was aged 59 years and he had enjoyed a long career in the aviation industry. He was a qualified pilot and aircraft maintenance engineer. He and Mrs Wells were the proprietors of a firm called Downs Aeromarine Services, based in Toowoomba. Nearly all of its business involved one customer. That was Stahmann Farms Inc, which had a farm hear Pallamallawa in New South Wales. The work involved both flying and aircraft maintenance. Some of the flying was difficult low level flying for which Mr Wells had a particular accreditation.

[3] As the defendant admits, Mr and Mrs Wells were involved in a motor vehicle accident in New South Wales on or about 17 August 1996. It is also admitted that Mr Wells suffered a "bodily injury" as that term is used in the policy.[1] Broadly speaking, the issues for determination are whether Mr Wells has suffered a

[1] Statement of Claim para 4.1 admitted by further Amended Defence para 3(a)

permanent total disablement as defined and, if so, whether that was caused in the relevant sense by the accident. These issues involve questions of the proper interpretation of the policy as well as factual questions concerning Mr Wells' medical condition.

**The Policy – Issues of its interpretation**

[4] Clause 2 of Section 3 of the policy is as follows:

> "If cover is stated in the Coverage Schedule as NOT being limited to Flight Risk Only, and if during the Policy period of cover the Insured Person suffers bodily injury directly resulting in one of the Events against which a sum assured appears in the Schedule of Compensation, we will pay to you the relevant amount stated in the Schedule of Compensation. Our liability under this paragraph is subject to paragraphs 3-9 (inclusive) below."

The Schedule of Compensation lists events, with their relevant amounts, which include the events of permanent total disablement, temporary total disablement and temporary partial disablement. Each of these terms is defined by Section 2 of the policy, as is the expression "bodily injury", upon which the defendant places particular reliance as indicating the extent of the required causal connection between the injury and the alleged disablement.

[5] That definition of "bodily injury" is as follows:

> ""Bodily Injury" means external and visible injury to the person which:
>
> (a) is sustained by the Insured Person within the geographical limits stated in the Coverage Schedule; and
> (b) is caused by an accident; and
> (c) solely and independently of any other cause, except illness directly resulting from, or medical or surgical treatment rendered necessary by, such injury, occasions the death or disablement of the Insured Person within twelve calendar months from the date of the accident by which such injury is caused."

From paragraph (c) of this definition, the defendant contends that Mr Wells' alleged disablement must have been, solely and independently of any other cause, the result of any injury he suffered in this motor accident. The defendant disputes that Mr Wells has been or is under a permanent total disablement as defined, but alternatively it says that there were several causes of that disablement, of which any injury from this accident was but one. It says that another cause was an alleged pre-existing condition, not in itself sufficient to have resulted in a disablement prior to this accident. Another cause is said to be one or more distinct medical conditions which post-date the accident. The defendant goes so far as to argue that if his injury from the accident had been the sole and independent cause of a permanent total disablement, nevertheless Mr Wells has been burdened with further medical problems which would also have made him disabled, with the consequence that his further misfortune should put paid to the disablement benefit.

[6] As I have mentioned, the defendant admits that Mr Wells suffered bodily injury within the meaning of the policy. It thereby admits that he suffered an injury which satisfies the requirements within paragraph (c) of the definition of the term. So it is conceded that his injury from the accident was solely and independently of anything else, the cause of *a* disablement. Returning to clause 2 of Schedule 3, the plaintiff must then prove that this is a bodily injury "directly resulting" in a permanent total disablement of Mr Wells. Admission of a bodily injury involves the admission of a disablement, but not a permanent total disablement. The plaintiff must prove that disablement, and she must prove that it directly resulted from the injury sustained by the accident. At least if assessed without regard to the definition of "bodily injury", the causal connection required by clause 2 could exist in the case where the disablement is contributed to by a pre existing condition, and it would exist where the injury directly caused the total permanent disablement notwithstanding the occurrence of a subsequent injury or illness which of itself would have caused that disablement. The defendant's submission is that the expression "directly resulting" in clause 2 is affected by the causal requirement within the definition of bodily injury. Obviously the policy must be construed as a whole, and the meaning of one clause could be affected by the content of another, although different expressions are used within the two provisions. If so, there is no reason why the meaning of "directly resulting" should be qualified by what the defendant submits is meant by "solely and independently of any other cause", for the meaning of that phrase might be indicated by the use of "directly resulting" in clause 2. In my view, the problem with the defendant's submission in relation to the required causal nexus is in the meaning it attributes to "solely and independently of any other cause".

[7] Some pre-existing disposition, not of itself an illness, is not plainly to be characterised as another cause of a disablement. For the defendant, there was heavy reliance upon the judgment of Fisher J in *Jason v Batten (1930) Ltd* [1969] 1 Lloyd's Rep 281 at 290-91 and some of the cases there cited. There is a need for care in the application of what is said as to the proper interpretation of a different policy which is in similar, but not identical, terms. But the policy there is similar enough to make its analysis helpful to the present case. It provided for payment if the insured person sustained any bodily injury "resulting in and being – independently of all other causes – the exclusive direct and immediate cause of the injury or disablement of the insured person". It further provided that no benefit would be payable for a death, injury or disablement directly or indirectly caused by or arising or resulting from or traceable to a physical defect or infirmity which existed prior to an accident. The plaintiff there suffered from arterial disease before his motor vehicle accident, six days after which he suffered a coronary thrombosis. It was established that stress associated with the accident precipitated the coronary thrombosis, but it was also established that the plaintiff would have had a coronary thrombosis about three years later if the accident had not occurred. It was held that there were two concurrent causes, the pre-existing arterial disease and the formation of a blood clot from the anxiety caused by the accident. Fisher J distinguished *Fidelity and Casualty Company of New York v Mitchell* [1917] AC 592 on the basis that in that case, the pre-existing state of the insured was not an actual disease but only what was described as a potestative tendency.[2] The same distinction appears at p 291, where Fisher J set out a passage from MacGillivray on Insurance Law 5th ed (1961), Vol 2, p 806, par 1684. But the defendant's submission is that Mr Wells' pre-existing "disenchantment with and anxiety related to his flying duties", although

[2] At p 597

not a disease but at most a predisposing tendency, should be seen as another cause of his alleged disability. It is a submission which is apparently inconsistent with the principal case cited for it, and in my view it should not be accepted.

[8] Similarly, the submission in relation to matters from which Mr Wells began to suffer after 1997 is inconsistent with the proper interpretation of this definition of bodily injury. Once there is an injury which, solely and independently of any other cause, occasions disablement, then the relevant requirement of the definition is satisfied. There is nothing in the definition of "bodily injury" which suggests the extraordinary result that an injury, sufficiently causing a disablement to be thereby a "bodily injury" would cease to be so if the person suffers a further misfortune which of itself would have made him disabled. Somewhat plainer language would be required to express an agreement to that effect.

[9] Once the expression of "solely and independently of any other cause" is properly understood, there is not such a tension between that expression and that of "directly resulting" in clause 2 of Section 3. In particular, there is no basis for giving "directly resulting" something other than its ordinary meaning.

[10] The plaintiff must prove that Mr Wells' bodily injury directly resulted in his "permanent total disablement", which the policy[3] defines as follows:

> ""Permanent Total Disablement" means disablement lasting twelve calendar months which at the expiry of that period is beyond hope of improvement and which would prevent the Insured Person engaging in each and every occupation or employment for wage or profit for which he or she is reasonably qualified by training, education or experience."

Therefore, a disablement must last twelve calendar months and, at the end of that period, it must be beyond hope of improvement. The improvement would have to be of an extent to make the person no longer disabled in the sense described. The parties have different contentions as to what constitutes hope of improvement. For the plaintiff, it is submitted that beyond hope of improvement means that improvement is "unlikely". I am unable to accept that submission. In my view there might be a hope of improvement although it is more probable than not that the improvement would not eventuate. On the other hand, I think that the hope must be one for which there was a rational basis.

[11] The extent of the disablement must be such as to prevent the person from engaging in each and every occupation or employment for wage or profit for which he or she is reasonably qualified by training, education or experience. It is not sufficient that the person be disabled from engaging in his or her usual occupation or employment. For the defendant, it is submitted that a person must be *entirely* prevented from engaging in any occupation or employment of the relevant kind. Its submissions rely upon the difference between "temporary partial disablement" and "temporary total disablement" which are respectively defined as follows:

> ""Temporary Partial Disablement" means disablement which prevents the Insured Person from engaging in a substantial part of his

3 Section 2

> or her usual occupation or employment or, if he or she has no occupation or employment, from attending to a substantial part of his or her usual affairs."
>
> "Temporary Total Disablement" means disablement which entirely prevents the Insured Person from engaging in his or her usual occupation or employment or, if the Insured Person has no occupation or employment, from attending to his or her usual affairs."

For a temporary disablement, the distinguishing feature is whether the disablement prevents the person from engaging in a "substantial part" of his or her usual occupation or employment, or instead "entirely" prevents him or her from doing so. For the defendant, Mr Couper QC submits that Mr Wells could not have been under a permanent total disablement if he was not disabled to the extent which would have brought him within the definition of temporary total disablement. In my view this submission should be accepted. In the definition of permanent total disablement the insertion of the word "entirely" before "prevent" would not alter its effect. According to that definition, a person is sufficiently disabled only if he or she cannot at all engage in any relevant occupation or employment.

[12] Again some care is required in the consideration of other cases which involve policies of a different wording. An example is *QBE Insurance Limited v Jande* (1995) 8 ANZ Insurance Cases 61-270, which was relied upon for the defendant. The policy in that case defined "temporary total disablement" as something which "prevents the Insured Person from carrying out all the normal duties of his or her usual occupation". That definition required proof that the insured person was unable to perform each and every duty of his occupation. The difference between such a definition and the present one was noted by Sheller JA at p 76, 035.[4] A person might be able to perform one of the duties of a relevant occupation but still be prevented from engaging in that occupation. What needs to be assessed is whether that which the person can do is sufficient to enable him to at all engage in the occupation or employment. That which could be done might be such a small part of the required work that he is still entirely prevented from engaging in the occupation.

## Mr Wells' Condition

[13] I find that in his accident in August 1996, he suffered concussion and was unconscious for a short period, but apart from a scalp laceration, he appeared to have suffered no other injury at the time and he was not detained in hospital. Shortly afterwards, however, he complained of headaches and an inability to judge distances, and he discontinued his flying. The plaintiff's case is that he suffered post-concussional syndrome, causing symptoms of headache, dizziness, fatigue, irritability, difficulty in concentrating and performing mental tasks, impairment of memory, insomnia and reduced tolerance to stress or emotional excitement. The defendant denies that Mr Wells suffered post-concussional syndrome. Alternatively, it denies that any post concussional syndrome was serious enough to prevent him from engaging in any relevant occupation or employment during the

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4 Citing what was said by Professor Sutton in the third edition of his Insurance Law in Australia at para 9.54

twelve months from the accident, or that it was a condition for which there was no hope of improvement.

[14] Dr J N M McIntyre is a practising psychiatrist who first saw Mr Wells in April 1997 and who has been treating him since. In his oral evidence, he described post-concussional syndrome in these terms:

> "Post-concussional syndrome is believed to arise following a brain injury which on the face of it is thought to be trivial. It's not a major brain injury involving protracted loss of consciousness but it's a blow to the head or a rapid deceleration of the head in which the brain moves within the skull. There may be transient loss of consciousness. There is normally apparent early recovery from a physical point of view. The person doesn't become comatose or paralysed or show any neurological signs of the kind but that injury is followed by a cluster of symptoms including most commonly headache, mood changes, irritability, anxiety, sleep difficulty and a very common complaint of memory impairment. It was formerly thought that there was no demonstrable brain injury to account for this but with newer more modern imaging techniques that are available it can be shown that in a high proportion of people complaining of these symptoms who are felt to have post-concussional stress disorder, there are subtle abnormalities in brain function of a lasting kind.
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> Q. Is it a condition or syndrome that falls within the psychiatric purview or neurological purview or does it straddle the fence?
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> A. It straddles both.
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> Q. You have mentioned here an alternative in that same paragraph would be an adjustment disorder with anxiety and depressed mood. Is anxiety a symptom as well of the post-concussional syndrome itself or something quite separate?
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> A. Anxiety is generally a consequence of having post-concussional syndrome. The person doesn't feel well. They don't feel that they have their pre-accident capacities. They wonder what their symptoms portend and if they're going to have some worsening condition with time and that thought often makes them very hypochondriacal and often makes them very anxious."

There is certainly a difference of medical opinion in this case as to whether Mr Wells had suffered post-concussional syndrome but there was no substantial dispute that there is a recognised condition involving symptoms of this kind.

[15] Within two months of his accident, Mr Wells was referred to Dr Barrie Morley, a consultant neurologist. He then complained to Dr Morley of "unreliable recent memory, impaired concentration, imbalance and disorientation, head pain, and sundry other complaints, all of which have followed (the) motor vehicle accident". Mr Wells gave evidence of having suffered symptoms of those kinds together with excessive fatigue and irritability, effectively from the date of his motor vehicle

accident. His credibility was strongly challenged. There are certainly instances, some of which I shall mention below, in which I am not satisfied of the accuracy of his evidence. Nevertheless I find that he did suffer from symptoms of the various kinds I have mentioned, and effectively from the accident.

[16] Of the specialists who gave evidence, the first to assess him was Dr Morley, who said in his first report (28 October 1996) that all of his symptoms are sequelae to his (motor vehicle accident) injuries, and are common following any moderately severe cerebral concussion. He was of a similar view in his report of December 1996. After he had seen Mr Wells again in February 1997, Dr Morley reported that he had improved gradually at first but had recently begun to experience a "peculiar, specific, lightheadedness, occurring only on yawning, even when seated". In his June 1997 report, he again expressed the opinion that his symptoms were sequelae to the moderately severe cerebral concussion sustained in the accident, although he had not seen him since February. He saw Mr Wells again in May 1998, when Mr Wells described a problem with his balance in the form of a tendency to fall. Dr Morley then reported that although Mr Wells' headache, memory complaint and psychological symptoms were all attributable to the accident, the complaint as to balance was not: it was separately caused. Dr Morley saw him again on 8 June 2000, when Mr Wells complained of "muscle jerking episodes in his sleep for the past eight months", described as myoclonic episodes. Dr Morley then wrote, and confirmed in his oral evidence, that these were not due to the motor vehicle accident. The drug which had been prescribed for them by Dr McIntyre was clonazepam, which Dr Morley thought would preclude Mr Wells from any pilot work. In his oral evidence, he agreed that with the benefit of hindsight this myoclonus was probably one and the same as the sleep disorder identified in Dr Morley's first report in October 1996. Dr Morley ultimately agreed that it was likely that he was suffering from disturbed sleep patterns, unrelated to the motor vehicle accident, as early as October 1996, and that fatigue caused by disturbed sleep would contribute to poor concentration and short term memory as well as to headaches. The effect of his evidence is that it is likely that at least some of Mr Wells' symptoms within the year from the accident were due to post-concussional syndrome, but that some of them were differently caused. Further, there was a subsequently arising problem of a balance difficulty which is not attributable to the accident.

[17] The history is further complicated by what Dr McIntyre identifies as the onset of clinical depression from about April 1998. Dr McIntyre said that Mr Wells was not suffering from this depression as at June 1997, and the cross examination of him suggested that the depression did not arise until 1998. This means that it is difficult for the defendant to suggest that any of the symptoms experienced in the relevant twelve month period were due to depression, and I am satisfied that he did not begin to suffer from depression until some time after one year from the accident. Having regard to what I have said above as to the interpretation of the policy, if Mr Wells was disabled in the relevant sense as at August 1997, the subsequent development of depression as a further disabling matter would not put paid to the plaintiff's entitlement. The relevance however of this subsequently arising condition is that it diminishes the use which can be made of the evidence of Mr Wells' health after the end of the twelve month period as a means of assessing whether his condition at the end of that period was beyond hope of improvement. The same applies to the condition of a balance difficulty identified by Dr Morley. In other words, Mr Wells may well be presently unable to engage in any relevant occupation or employment,

but given the identification of these other matters, his present condition says relatively little about his condition as at August 1997 and the then prognosis.

[18] Dr McIntyre has always expressed the view that Mr Wells has suffered a post-concussional syndrome. Some particular weight should be given to his opinion, because he has treated Mr Wells from early 1997 to the present. Dr McIntyre explains that although most people suffering from this condition do recover within twelve months, there is a proportion of 10% to 14% who still have symptoms of the condition beyond that time. He added that "in the longer term after that (twelve months from the concussion) there are no really long-term studies of which I am aware that have followed people up over five or ten years". Notwithstanding the absence of such studies, he felt able to express the opinion in a report of June 1997 that "the long term prognosis is unclear but in view of his age, the persistence of symptoms over time and the nature of his profession I think it is extremely unlikely he will return to flying duties or to his responsibilities as an aircraft engineer" and that "on the balance of probabilities and taking all his circumstances into account I am of the opinion he is unlikely to be able to return to commercial employability in his profession before his anticipated retirement age". Mr Wells was by that stage already 60 years of age.

[19] Dr Duke is another psychiatrist who examined Mr Wells, but in his instance, not until March 1999. He then wrote a report expressing the view that Mr Wells had suffered post-concussional syndrome. However, in his oral evidence his opinion was heavily qualified when two matters were brought to his attention. He said that his view would have been different had he known of Dr McIntyre's diagnosis of clinical depression as at early 1998, or had he known that Mr Wells had been performing some work in the supervision of aircraft maintenance and the certification of maintenance work, notwithstanding his symptoms. As discussed below, the evidence establishes to my satisfaction that Mr Wells had indeed been performing such work. Dr Duke had been told by Mr Wells that he had done no work since the accident. Given these qualification to his report, and the fact that Dr Duke did not see Mr Wells during the relevant twelve months, his opinion is of relatively little significance to the outcome here.

[20] There was also evidence from another psychiatrist, Dr B Klug. He was called in the defendant's case, and in evidence-in-chief, two reports by him were tendered. The first is dated 27 November 1997, relating to his examination of Mr Wells on two occasions in that month. Dr Klug there expressed an opinion that Mr Wells had developed a "post-concussional disorder with a mixture of cognitive and anxiety-depressive symptoms as a result of the head injury" but that he had "improved significantly from a psychiatric point of view". He said that Mr Wells "still suffers from mild anxiety and irritability and occasional low mood largely related to his financial difficulties and unemployment" but that "his remaining emotional symptoms contribute little to his continuing incapacity for work". In his opinion, Mr Wells was "not incapacitated for flying for psychiatric reasons". His report of 5 April 2002 refers to an examination two days earlier. The view then expressed was that Mr Wells showed no clinical evidence indicative of depression or any other psychiatric disorder, and was not psychiatrically incapacitated. In the course of his cross examination, a further report, dated 8 February 2002, was tendered. That report was not written from an examination of Mr Wells but instead was based upon Dr Klug's perusal of a very large amount of written material. Dr Klug there said that Mr Wells, as at 17 August 1997, was prevented by disablement from engaging

in the occupations of pilot and aircraft maintenance engineer as well as "other occupations of (*sic*) employment for which he was reasonably qualified by training, education or experience", as the result of the motor vehicle accident. Further, he was then of the opinion that Mr Wells' condition, as at 17 August 1997, could probably be described as beyond hope of improvement. For the defendant, Mr Couper QC sought to avoid the effect of this report by pointing out that it did not result from a recent examination of Mr Wells. He submitted that more weight should be given to the subsequent report of April 2002 which did follow such an examination. However, the two reports seem to deal with different matters. The February 2002 report addresses Mr Wells' condition as at 17 August 1997, and directly the relevant issues for the policy as I have interpreted it. The later report addresses more Mr Wells' condition as at April 2002, the limited relevance of which has already been discussed. The February 2002 report also puts the report of November 1997 in a somewhat different light. Overall, when his report of 8 February 2002 is considered, his evidence would seem to strongly support the plaintiff's case. There is a difficulty, however, in that the apparent tension between his February 2002 report and his earlier report was not explored by either side. There was also no explanation of the content of the "medical evidence of Mr Wells' ongoing condition after 17 August 1997" to which Dr Klug had regard in expressing the opinion in February 2002 that Mr Wells' condition could probably be described as beyond hope of improvement. It is possible that Dr Klug had a reliable, complete and accurate body of evidence from which he formed his opinion but I do not know whether that is so. Lastly, without the benefit of some explanation of what Dr Klug means by "beyond hope of improvement", I am not entirely sure as to what is the effect of his opinion upon that matter. All of this means that although Dr Klug's evidence does provide very substantial support for the plaintiff's case, I do not think that I should simply accept it in its entirety. It needs to be read in the light of other evidence, and with a consideration of its limitations of the kinds just discussed. That other evidence includes that of other conditions suffered by Mr Wells after 17 August 1997, as well as the sleep disorder identified by Dr Morley, none of which was particularly identified or discussed in Dr Klug's report of February 2002. It also includes the evidence of work actually performed by Mr Wells.

[21] Dr John Cameron is a consultant neurologist who prepared a number of reports about Mr Wells from about March 1998. At one stage he was prepared to accept that Mr Wells may have developed some mild post-concussional disturbance but in his view the effects would have been of no more than two to three weeks' duration. His opinion seems to have been substantially influenced by his understanding that post-concussional syndrome cannot last for more than twelve months. That understanding does not seem to come from any research, by him or anyone else, but more from his not having seen any person suffering the condition for that length of time. I did not understand it to be suggested to other witnesses, such as Dr McIntyre, that there was no basis for a professional view that post-concussional syndrome could last at least beyond twelve months. I am satisfied that post-concussional syndrome could last beyond twelve months and I am not persuaded by Dr Cameron's evidence to reject the proposition that Mr Wells was still suffering from this condition as at August 1997.

[22] Mr Wells was assessed by a psychologist, Mr Dent. He conducted extensive tests as to Mr Wells' cognitive functioning and personality. He saw Mr Wells, when assessed in November 1997, as fully oriented with an ability to concentrate well within average limits when not fatigued. However, he demonstrated some "very

mild problems with speed of information processing during complex speed and accuracy tasks". He thought Mr Wells was functioning within the superior range of intelligence, his recent memory functioning was well within average limits for his age as was his performance on tasks associated with planning, organising and problem solving. His performance and tests relating to "new learning" showed mild impairment. His overall conclusion was that there were indications of "very mild cognitive difficulties with speed of information processing and inconsistent verbal new learning". It appeared to him that Mr Wells may have suffered a post-concussional syndrome during the months following the accident but from which he had made a "reasonably good recovery … with respect to his cognitive functioning". He thought that he was cognitively capable of performing "structured and well defined occupations such as parking attendant, sales person, clerk, bar attendant, driving instructor, training officer" but that "it may be very difficult for Mr Wells to obtain paid employment" because he was close to retirement age, lacked confidence and self esteem in his ability to work, and suffered from mild depression and had been concerned with physical complaints such as lethargy, headaches and dizziness.

[23] There was also evidence from a general practitioner, Dr Gillespie, who wrote a brief report in March 2001. Dr Gillespie had examined Mr Wells for the renewal of his pilot's licence on several occasions prior to this accident, most recently in November 1994, on which in each case he was passed fit to fly with no neurological, cardiovascular or psychological problems. There was also a report of September 1997 from Dr M P Horwood, who then thought that Mr Wells had developed a post-traumatic mixed anxiety depressive syndrome, from which he was then unfit to fly or act as a licensed aircraft maintenance engineer. He added that in six to thirtysix months he could be fit again. Lastly, Dr M R Dahl, a general practitioner in Toowoomba, was called. She had seen Mr Wells in September 1996, when she had referred to him to Dr Morley.

[24] Ultimately I am satisfied, particularly from the evidence of Dr McIntyre, that Mr Wells did suffer post-concussional syndrome as a result of his injury in this accident. The questions which then arise are whether the condition was such as to have disabled him in the relevant sense for twelve months, and whether he was beyond hope of improvement at the expiry of that period.

**Mr Wells' work since the Accident**

[25] Mr Wells has done very little flying since this accident. He described some few attempts which he says, for various reasons, plainly demonstrated to him that he was unfit to fly. His evidence of these attempts is not entirely consistent with other evidence, especially that of a co-pilot, Mr Lawrence. Mr Wells had prepared something in the nature of diary notes of some of these attempts at flying, but it emerged that there was a fair amount of reconstruction involved in their preparation. It is clear, however, that Mr Wells effectively stopped work as a pilot after this accident. I accept that he did so because he believed that he was unable to engage in this work. That belief is consistent with what I have found to have been genuine symptoms. Prior to the accident, he had not been completely happy in his flying work, and I am prepared to accept, as the defendant submits, that he had some disenchantment and anxiety relating to flying duties which predated the accident. Dr McIntyre said so in his report of 25 August 1997. Nevertheless, I find that it was his post-concussional syndrome which caused him to cease work as a pilot. It is

clear enough that symptoms of the kind from which he was suffering would present at least a very substantial impediment to the performance of a pilot's duties. The fact that there was some pre-existing anxiety does not, for reasons I have explained above,[5] deny a direct causal relationship between the injury and what I find was his inability to fly during at least the period of twelve months from the date of the accident.

[26] Prior to the accident he also worked as an aircraft maintenance engineer. As I have mentioned, most of his work was for one customer, and the maintenance work was closely associated with his pilot's duties. But the evidence shows that there is a distinct occupation of licensed aircraft maintenance engineer. It is necessary then to consider whether he became prevented from engaging in that occupation, for which he was well qualified by training and experience. Contrary to what he had said to many of the doctors who examined him, he did perform some work as an aircraft maintenance engineer after the accident. This is demonstrated by evidence of invoices which his firm sent to its client Stahmann Farms Inc and other clients, as well as from the tax returns of his firm for the few years after the accident. The content of the invoices, with the benefit of Mr Wells' evidence, demonstrates that he performed at least supervisory work, i.e. that he felt competent to supervise the maintenance work of others, and to certify that their work had been satisfactorily performed. He agreed that it was not uncommon for a licensed aircraft maintenance engineer to certify work done by someone else who did not have the appropriate licence to certify his or her own work. He denied that many licensed aircraft maintenance engineers made their living in that way. But in the plaintiff's case, evidence was given by another engineer to the effect that some engineers did only supervisory work. That witness was Mr Mittendorff. His evidence was to the effect that there was not full time work available for Mr Wells as a licensed aircraft maintenance engineer performing only supervisory work in Toowoomba at any relevant time, because other maintenance firms in Toowoomba had their own licensed engineer. As I accept Mr Mittendorff's evidence, I find that some licensed aircraft maintenance engineers perform only supervisory work, and that the impediment to Mr Wells finding full time work of that kind came from the limited size of the relevant employment market in Toowoomba, rather than from what the occupation involves. The issue of whether Mr Wells was prevented from engaging in the occupation of an aircraft maintenance engineer is affected by what is the range of duties expected of persons in that occupation. As it is not uncommon for an engineer to perform only supervisory and certification work, a person who is able to perform those duties is not prevented from engaging in the occupation. Mr Wells may have found work as a full time engineer involved in supervisory and certification work had some other engineer left another maintenance firm and created an employment opportunity for him. It seems to me that the fact of his disablement should not turn upon whether there was at any relevant time that opportunity.

[27] Mr Wells also performed other work in the nature of monitoring the records of an aircraft engine's performance, described as "trend monitoring". This is work performed with the benefit of computer software, but it requires some judgment by the engineer which is why it must be carried out by a licensed aircraft maintenance engineer.

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5 See [11]

[28] In his evidence, Mr Wells sought to create the impression that he performed very little work deserving of remuneration. He claimed that invoices were rendered by his firm, and paid by the customer, in circumstances where really no effective work was performed, and the customer knew it. I do not accept this evidence. He also said that he had not "touched an aircraft"[6] after unsuccessful attempts to work on aircraft in 1996 shortly after the accident. He denied that at any time after August 1996 that he had climbed a ladder to look at an aircraft. But Mr Mittendorff described a number of occasions in which he saw Mr Wells working, or at least appearing to work, with tools upon an aircraft.

[29] Mr Mittendorff recalls that Mr Wells was at his workplace, the Stahmann Farms hanger at Toowoomba airport, in effect on every working day after the accident. His evidence is at odds with the impression Mr Wells would wish to give, which is that he made very infrequent and inconsequential visits to that workplace. The tax returns of the Wells' firm for the 1997 and 1998 years are indicative of the extent to which Mr Wells was able to perform remunerative work. In the 1997 year, the firm derived gross income from "fees and part sales" of $22,113.02, with operating expenses of $7,611.77. In the year to 30 June 1998, gross income for fees and part sales amounted to $29,188.12, against which there were purchases of $1,818.27 and operating expenses of $6,217.00. Mrs Wells did not perform any of the work from which this income was derived. Nor is any expense shown for wages or sub-contractors. The extent of the income revealed by those profit and loss statements corresponds with the invoices. It fairly reveals that in the year commencing 1 July 1997, through Mr Wells' work, the firm was able to generate an operating profit in excess of $20,000. This is a modest income but this is likely to be due to the small market in which the firm provided its maintenance services. Mr Mittendorff's evidence shows the existence of a number of other maintenance organisations in Toowoomba. Importantly, the amount of work which Mr Wells was able to do was considered sufficient to warrant the business being kept open and, upon Mr Mittendorff's recollection, to warrant Mr Wells' presence at his workplace on a daily basis.

[30] It is also significant that he chose to renew his accreditation as an aircraft maintenance engineer in early 1997. He claims that he did so although he believed that he was not well enough to remain licensed, but with the hope that his health would improve. Yet he does not claim that he should not have been doing the supervisory and certification work, monitoring and other work for which he was rendering fees. It seems to me to be more likely that he renewed his engineer's licence so that he could continue to do work for which that licence was necessary.

[31] Mr Wells claimed that the amounts charged to and paid by Stahmann Farms, apparently for this supervisory and certification work, were attributable to an agreement with that client whereby it was to pay a certain amount per year, so that these amounts were paid pursuant to that agreement rather than in consideration of any particular supervisory work. He said that under this agreement, his firm would be paid a set amount per year, determined on the first day of the American financial year, which he believed was 1 March, and that invoices would then be rendered throughout that year so that they would add up to that predetermined figure. No document was tendered to evidence this alleged agreement. It is not apparent from Mr Wells' oral evidence or otherwise, as to what amount or amounts were allegedly

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[6] Transcript p 42

agreed at the beginning of the years commencing 1 March 1997 and 1998. Nor was there any attempt to reconcile the invoices with some agreed total sum for maintenance over any year. It seems to me that the invoices refer to quite distinct instances of the provision of services, inconsistent with an arrangement for an agreed yearly total as claimed by Mr Wells.

[32] He also claimed that there were occasions when he would charge Stahmann Farms a fee of $60, not for any valuable service but to cover what he asserted were his travelling expenses of going from his house in Toowoomba to the Toowoomba airport. As I see the matter, he was paid for the services he provided when at the airport, rather than for travelling to and from it for no good purpose. The fact is, as he had to concede, that he did certify the maintenance work of others, when that certification could be done only by someone who was a licensed aircraft maintenance engineer. Moreover, his claims of this kind tend to detract from the weight I might otherwise give to his evidence that he was unable to perform any maintenance work of what I would describe as a "hands-on" kind.

[33] I do not overlook the fact that one of Mr Wells' symptoms was fatigue, and that it is one thing to say that he was capable of performing some work, but another to say that he was able to work sufficient hours to constitute his engaging in the occupation or employment of an aircraft maintenance engineer. But I give particular weight to Mr Dent's assessment that he was able to perform the cognitive tasks involved in his testing over a three to four hour period without excessive fatigue, when he saw Mr Wells in October 1998. In his report of 6 February 1999, he was of the opinion that Mr Wells would be capable at a cognitive level to perform certain types of occupations, such as car park attendant or ticket collector, on a full time or near full time basis. Mr Dent said that it was not unusual for persons undergoing his cognitive testing to experience some tiredness after some hours of testing, but he did not recall anything significant or alarming about Mr Wells' apparent tiredness or inability to continue over the several hours of assessment. In the course of the trial, Mr Wells was cross-examined extensively, and because other witnesses were interposed, his cross-examination continued over three days. He impressed me as alert, intelligent and articulate, and it did not appear to me that he had any unusual difficulty in concentrating during what was a very demanding exercise for a person inexperienced in giving evidence.

[34] I find that during the twelve months from the accident, Mr Wells was able to perform the work of a licensed aircraft maintenance engineer, at least insofar as it involved supervision and certification, trend monitoring, and also the work of propeller balancing, this also being work evidenced by the invoices. I am unable to be satisfied that Mr Wells was precluded from performing other types of work sometimes performed by licensed aircraft maintenance engineers. I do not accept his evidence that the income of his firm was the result of work for which the customer should not have been charged, or which was performed by others. I find that as licensed aircraft maintenance engineers sometimes perform only supervisory and certification work, and that he was able to perform such work, that he was not prevented from engaging in the occupation of a licensed aircraft maintenance engineer.

[35] The fact that his ability to earn income was limited by the particular demand for those services in Toowoomba, given the existence of other maintenance organisations, does not in my view result in his being prevented from engaging in

the occupation. That is a matter going to the demand for someone of that occupation in the place where he then lived. It does not go to his ability to engage the occupation, if and when required.

[36] The result is that whatever was the extent and duration of his post-concussional syndrome, it was not such as to prevent him from engaging in the occupation of an aircraft maintenance engineer.

[37] The definition of permanent total disability requires proof that the insured person is prevented from engaging not only in his or her usual occupation or employment, but in any other for which he or she is reasonably qualified by training, education or experience. Mr Dent formed the view that Mr Wells was cognitively capable of performing "structured and well defined occupations", an example of which was that of a car park attendant. I accept Mr Dent's evidence that Mr Wells would be capable of performing at least that occupation on a full time or near full time basis. For the plaintiff, it is submitted that an occupation of car park attendant does require some training, qualification or experience: the person must be trained in or know how to use a cash register, how to deal with difficult customers and have a knowledge of the security system of the car park. I accept that Mr Wells could not have arrived at a car park and commenced full time employment immediately, without some on-site instructions. But it does not follow that he was not reasonably qualified for the work. Many jobs require specific instructions or training in relation to what is used at a particular workplace. A person may have had experience as a car park attendant in one place but require instruction or training when commencing work at another. The training or education which is relevant here is that which qualifies a person to work in an occupation, rather than pursuing an occupation in the context of a particular organisation and its workplace. In my view, the plaintiff has not established that he was not reasonably qualified to engage in the occupation of a car park attendant.

[38] The plaintiff must also prove that the alleged disablement was beyond hope of improvement at the expiry of the relevant twelve month period. As I have discussed above,[7] the hope must be a rational one, but it need not involve a probability of improvement of greater than 50%. Was there any basis for hoping that his post-concussional syndrome would pass or sufficiently improve? As I have mentioned, there is little assistance to be derived from his subsequent medical history, because he developed some other conditions, unrelated to the accident, so that it is difficult to assess whether the post-concussional syndrome of itself has diminished with time.

[39] I have discussed the different medical opinions on this issue. Dr Klug's report of February is in terms that there was no hope of improvement, but there are limitations upon that evidence as I have mentioned. Dr McIntyre's opinion was that it was extremely unlikely that he would return to flying duties or to his responsibilities as an aircraft engineer. As I have found, however, he had been performing some work as an aircraft engineer. That tends to detract from the use which could otherwise be made of Dr McIntyre's opinion upon that matter. The other reservation I have concerning his opinion on this issue is that he could not point to any recognised professional opinion or research which indicated the extent of recovery in patients who were still suffering from the condition twelve months or

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[7] **At [10]**

so from the relevant accident. As it is a condition which does disappear within twelve months for more than 80% of people, and given the absence of any studies known to Dr McIntyre which have followed up the history of relevant patients over the longer term, there does not seem to me to be an apparently strong basis for an opinion that Mr Wells was beyond hope of improvement as at August 1997, if that was the intended effect of Dr McIntyre's evidence. In short, there is no evidence of any medical opinion based upon reliable experience or research which is to the effect that a person still suffering post-concussional syndrome after twelve months could have no rational hope of improvement. I am not satisfied that Mr Wells' post-concussional syndrome was beyond hope of improvement as at August 1997. For this reason also, the plaintiff has failed to prove that Mr Wells was disabled in the required sense.

**Conclusion**

[40] The proceedings must be dismissed. Subject to any submissions in the light of these reasons, the plaintiff must be ordered to pay the defendant's costs of the proceedings to be assessed.