[2014] WASCA 15

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	WAINWRIGHT -v- BARRICK GOLD OF AUSTRALIA LIMITED [2014] WASCA 15
CORAM	**:**	PULLIN JA NEWNES JA MURPHY JA
HEARD	**:**	9 AUGUST 2013
DELIVERED	**:**	24 JANUARY 2014
FILE NO/S	**:**	CACV 92 of 2012
BETWEEN	**:**	SHEILA WAINWRIGHT Appellant AND BARRICK GOLD OF AUSTRALIA LIMITED Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	BOWDEN DCJ
Citation	**:**	WAINRIGHT -v- BARRICK GOLD OF AUSTRALIA LIMITED [2012] WADC 79
File No	**:**	CIV 1291 of 2007
Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	BOWDEN DCJ
Citation	**:**	WAINRIGHT -v- BARRICK GOLD OF AUSTRALIA LIMITED [2012] WADC 79 (S)
File No	**:**	CIV 1291 of 2007

Catchwords:

Damages - Personal injury - Assessment of loss - Past economic loss - Earning capacity - Mitigation - Remote working location - Whether it was reasonable to refuse work in remote working location despite finding of capacity to do so

Nature of appellate review

Circumstances in which appellate court will reassess damages itself

Damages - Personal injury - Assessment of loss - Future economic loss - Earning capacity - Future earning prospects

Damages - Personal injury - Assessment of loss- Past economic loss - Finite period of total incapacitation

Legislation:

Nil

Result:

Appeal allowed in part

Category: A

Representation:

Counsel:

Appellant	:	Mr D R Clyne
Respondent	:	Mr B L Nugawela

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Greenland Legal Pty Ltd

Case(s) referred to in judgment(s):

Adams v Ascot Iron Foundry Pty Ltd (1968) 72 SR (NSW) 120
Arnott v Choy [2010] NSWCA 259

Baird v Roberts [1977] 2 NSWLR 389
Bowen v Tutte (1990) Aust Torts Reports 81-043
Commonwealth of Australia v Chessell (1991) 30 FCR 154
CSR Readymix (Australia) Pty Ltd v Payne [1998] 2 VR 505
Elford v FAI General Insurance Company Ltd [1994] 1 Qd R 258
House v R [1936] HCA 40; (1936) 55 CLR 499
Husher v Husher [1999] HCA 47; (1999) 197 CLR 138
Kavanagh v Akhtar (1998) 45 NSWLR 588
Kendirjian v Ayoub [2008] NSWCA 194
Lloyd v Farone [1989] WAR 154
Lombardo v Henne (Unreported, NSWCA, 2 December 1977
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42; (2008) 237 CLR 66
McCartney v Orica Investments Pty Ltd [2011] NSWCA 337
McCracken v Melbourne Storm Rugby League Football Club Ltd [2007] NSWCA 353; (2007) Aust Torts Reports 81-925
Medlin v State Government Insurance Commission [1995] HCA 5; (1995) 182 CLR 1
Miller v Jennings [1954] HCA 65; (1954) 92 CLR 190
Montemaggiori v Wilson [2011] WASCA 177
Munce v Vinidex Tubemakers Pty Ltd [1974] 2 NSWLR 235
Pene v Murphy [2004] WASCA 103
Setton v Eves [2006] WASCA 3
State Government Insurance Commission v Hitchcock (Unreported, WASCA, Library No 970089, 11 March 1997)
State Government Insurance Commission v Toomath (1996) 23 MVR 319
The Commissioner of Taxation of the Commonwealth of Australia v St Helens Farm (ACT) Pty Ltd [1981] HCA 4; (1981) 146 CLR 336
Tucker v Westfield Design & Construction Pty Ltd (1993) 46 FCR 20
Wade v Allsopp (1976) 50 ALJR 643
Wainwright v Barrick Gold of Australia Ltd [2012] WADC 79
Wainwright v Barrick Gold of Australia Ltd [2012] WADC 79 (S)
Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531
Watts v Rake [1960] HCA 58; (1960) 108 CLR 158

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1 **PULLIN JA**: This is an appeal by the appellant against the allegedly inadequate award of damages for personal injury suffered due to the negligence of the respondent. Murphy JA has referred to the relevant evidence given at the trial and to the relevant findings of fact made by the trial judge.

2 The grounds of appeal allege, in effect, that the trial judge erred:

(a) in assessing future economic loss by assessing retained earning capacity at a figure which was too high (ground 2);

(b) in failing to award appropriate damages for when the appellant was totally incapacitated for a period of several months (ground 1);

(c) by making a manifestly inadequate award of general damages (ground 3).

Ground 2

3 The trial judge found that the appellant's capacity to use her skills as a geological technician have been destroyed by the accident, but that she was left with the capacity to do office work/clerical duties. That approach was correct, but the trial judge then found that the appellant's retained capacity was solely exercisable in remote locations. This meant that the retained earning capacity was assessed by the trial judge at a higher figure than would have been the case if that earning capacity were exercisable in Perth. Remuneration for office work in Perth would be at a rate less than the rate of remuneration for work at remote mining locations.

4 For the reasons given by Murphy JA, the trial judge erred by assuming that it was unreasonable for the appellant not to continue to exercise the retained earning capacity in clerical work at a remote location rather than in Perth. I agree with Murphy JA that it would not be appropriate to remit the matter for a fresh trial on the question of quantum. I agree that the Perth rate would be the same rate as the remote location rate, but with the food allowance deducted. The consequences are set out in the schedule to Murphy JA's reasons. The parties should be given the opportunity to consider the figures prior to the making of final orders.

5 There was no error on the trial judge's unchallenged findings of fact in not making an allowance of the kind referred to in ***Wade v Allsopp*** (1976) 50 ALJR 643. I adopt the reasons of Murphy JA on that point. In

relation to other issues raised by the parties and not mentioned above, I agree with Murphy JA.

6 Ground 2 should be upheld.

Ground 1

7 The trial judge erred in failing to make any allowance for the time that the appellant was totally unfit for any work. I agree with Murphy JA's disposition on this point and therefore ground 1 should be upheld.

Ground 3

8 For the reasons given by Murphy JA, ground 3 should be dismissed.

9 **NEWNES JA**: I agree with Murphy JA.

MURPHY JA:

Introduction

10 This is an appeal with respect to an award of damages in a personal injuries case.

11 In March 2003, the appellant was employed by the respondent as a geological technician in a remote mine location, the Plutonic mine, on a two-week-on/one-week-off fly-in/fly-out roster. On 24 November 2003, the appellant was injured during the course of her employment when she slipped and fell.

12 Whilst she was never able to resume work in the field as a geological technician, in general terms and except for certain limited periods, the appellant continued to work at the mine site on her usual roster, performing office duties instead, from around the date of the accident until 6 April 2005. Although only performing office duties in this period, the appellant alleged in her particulars of claim that she was paid her pre-accident wage for this period. The appellant left her position doing light duties work at the mine site on 7 April 2005 (but was thereafter in receipt of worker's compensation payments for a period). She has never returned to the workforce since.

13 Whilst she remained off work, the appellant, in about mid-2006, received certain offers from the respondent to return to her clerical duties at the mine site. She, in effect, refused these offers. Her employment was then terminated by the respondent, in September 2006.

14 The learned primary judge found that from the date of the accident the appellant was not capable of performing her pre-accident duties as a geological technician, but that she retained the capacity to perform light duties: ***Wainwright v Barrick Gold of Australia Ltd*** [2012] WADC 79 [521] - [522]. (Unless otherwise indicated, all references to paragraph numbers in these reasons are references to paragraph numbers in his Honour's reasons for judgment).

15 The judge assessed damages for lost earning capacity, in substance, on the basis of the differential between the appellant's pre-accident earnings as a geological technician and the appellant's retained capacity to work in light duties in remote locations.

16 The appellant contends that the judge's award for past and future economic loss was too low by reason of a number of alleged errors, including that damages ought to have been assessed by reference to the appellant exercising her retained earning capacity in Perth, rather than at remote locations. It was said, in effect in this regard, that the judge inflated the value of the appellant's retained earning capacity by assuming that she would exercise her retained earning capacity in light duties entirely at remote locations and thereby diminished her damages claim by adopting a higher remuneration rate payable for such work at remote locations as opposed to such work in Perth.

17 Whilst the question of the judge's award for lost earning capacity was the principal focus in the appeal, the appellant also alleged that the award for non-pecuniary loss was outside of, and below, a sound discretionary range.

18 In general terms, for the reasons which follow, the appeal should be allowed in part in that damages for economic loss should have been assessed on the basis that the appellant's retained earning capacity for office work after 6 April 2005 was exercisable in Perth rather than at remote locations.

The case at trial

19 The appeal raised certain issues about how the parties approached the case at trial. It is convenient to outline that at the start.

20 The appellant pleaded, in par 14 of her amended statement of claim, that as a result of her injuries she 'suffered a loss of earning capacity and is likely to suffer loss of income and loss of superannuation benefits for the rest of her working life until the age of 65 and beyond' (BB 102). In

the appellant's particulars of claim, she claimed past economic loss on the basis of her wages as a geological technician without any deduction for any retained earning capacity. She claimed future economic loss on the basis that, taking into account contingencies including retained earning capacity, she had lost 75% of her income-earning capacity as a result of the accident.

21 The appellant led evidence to the effect that as a direct, and, in effect, immediate result of the accident, she sustained injuries to her right leg, knee and ankle, to her left elbow, to her back, and that she developed deep vein thrombosis (DVT) in her right leg, for which she was prescribed Warfarin (a blood thinning agent). She also led evidence to the effect that, over time, she developed psychiatric injury as well as a multitude of other physical complaints and symptoms which were, she alleged, caused by the accident and which rendered her totally incapacitated for work up to the time of trial, and she claimed that thereafter she was left (taking into account contingencies) with a retained earning capacity of only 25% of her pre-accident capacity.

22 The respondent submitted that the appellant's credibility was seriously in issue. Amongst other things, the respondent tendered surveillance footage of the appellant at various dates in 2006, 2007, 2010 and 2011, which showed the appellant undertaking certain tasks and activities.

23 The respondent's case was to the effect that the appellant was fit to return to work as a geological technician shortly after the accident. Alternatively, it contended that she was physically and psychiatrically fit for work in light duties from at least 7 April 2005, when she ceased working [333].

24 The respondent tendered, by consent, a schedule showing remuneration paid by the respondent to various clerical officers at its Plutonic mine site from 2003 to 2011 (GB 560 - 562). One of the entries related to the wages paid to a receptionist who commenced at the site in May 2006. The schedule was tendered as indicative of the remuneration the appellant would have earned with the respondent had she continued as a clerk at the Plutonic mine site (trial ts 1204 - 1205).

25 With apparent reference to mitigation, the respondent also invited the court to find that it was unreasonable for the appellant not to accept the offers made by the respondent to the appellant to return to her light duties

position on site in 2006 (trial ts 1219). The appellant denied that contention (trial ts 1314 - 1315).

26 In closing, senior counsel for the appellant submitted:

> *We say that as a result of the plaintiff's physical symptoms and psychological condition, at best she's only fit for clerical sedentary duties but not as a geotechnician in remote areas. And I think that, with respect, is the state of the evidence. And it's not a situation where we've said from the beginning that she's not fit for any work at all.*
>
> Your Honour will recall … we've applied a discount of 25 percent for adverse contingencies and retained earning capacity.
>
> Because if it was just adverse contingencies you'd normally speak of 5 or 6 percent as being the discount. We've applied a discount of 25 percent to make some allowance for retained earning capacity in accordance with the principles in ***Bowen v Tutte*** … But the difficulty with obtaining employment in the open job market was identified in ***Wade v Allsop***, which is often quoted in these sorts of cases …
>
> … And that's why it's important to take that into account in assessing what the chances are of her exercising her retained earning capacity in the open job market. …
>
> And the point we come back to … is: if it wasn't for the accident she wouldn't be in that position, she'd be working as a full time geotechnician with the defendant (ts 1318 - 1320). (emphasis added)

Primary judge's findings

Credibility findings

27 His Honour found that 'all the medical experts relied upon the accuracy of [the appellant's] description of injuries and symptoms', and that in that regard her credibility was 'crucial' to the determination of the case [364].

28 After reviewing the appellant's evidence in detail, his Honour concluded:

> I find that she has consistently portrayed both her physical/psychological symptoms as more widespread than they are and I do not accept her evidence that she has been unfit for gainful employment since she ceased work in 2005 [399].

29 The above findings are not challenged in this appeal.

Findings generally as to injuries

30 The judge made the following findings of fact which are unchallenged in this appeal (see [450] - [520], [531]).

31 As a result of the fall on 24 November 2003, the appellant sustained the following physical injuries, namely injury to her:

- right leg;
- right knee;
- right ankle;
- left elbow; and
- back.

32 The appellant particularised her claim on the basis that she continued to receive her pre-accident wage until 6 April 2005.

33 Since, in effect, April 2005 there has been essentially nothing wrong with the appellant's right leg, her right ankle, her left elbow or her back.

34 She also suffered 'life-threatening' DVT in her right leg as a result of the accident. By April 2004 the DVT was almost completely resolved, except for residual recanonising and thrombosis in the right popliteal vein. As a result of the thrombosis there was a slightly higher chance of another thrombosis occurring, an increased risk of bleeding, a requirement for constant blood monitoring whilst on Warfarin, and an increased risk that any trauma could cause bleeding and/or if any significant bleeding occurred, it could create complications.

35 The appellant was required to, and did, wear a pressure stocking, and suffered from mild post-thrombotic syndrome.

36 The appellant continued to work at the mine site (except for brief periods) on light duties from 24 November 2003 to 6 April 2005. The DVT did not prevent her from performing light duties. She ceased taking Warfarin in April 2007.

37 Currently, the appellant's popliteal vein remains incompetent, which affects the blood flow through the vein.

38 The appellant has no residual disability from the DVT, other than the incompetent popliteal vein together with a slightly increased risk of a thrombosis recurring.

39 As to the right knee:

(a) between 24 November 2003 and September 2006 the appellant had mild to moderate generalised pain which did not prevent her from performing light duties;

(b) the appellant underwent surgery for the torn medial meniscus in September 2006;

(c) the appellant's last complaint of pain in the right knee was in March 2007; and

(d) the appellant's work capacity was not restricted on a day to day basis, but there is a residual mild permanent disability of the knee due to the nature of the surgery.

40 As to her right ankle, the appellant suffered relatively minor soft tissue damage which did not result in any residual disability.

41 As to her back, the appellant suffered soft tissue lumbar injury which settled in a relatively short period of time. This did not result in any permanent disability or prevent her from working in a clerical capacity.

42 Overall, the appellant has been fit for work for clerical duties since April 2005 (with the exception of the short period of time where she was totally incapacitated following knee surgery).

43 As to her psychiatric position, the appellant suffered a mild to moderate depressive episode in April 2005 and continues to suffer from a mild adjustment disorder with depressed mood. Her psychiatric condition was not of such severity as to prevent her from performing light duties.

44 The judge also said that he was not satisfied that the shingles, abdominal pain, shoulder pain and loss of libido, of which she had complained, were related to the accident. He was also not satisfied that the appellant suffered from a general pain condition as had been alleged, and that even if she had fibromyalgia or a similar syndrome, he was not satisfied that it was related to the accident.

45 The judge summarised his conclusions in respect of working capacity in the following manner:

> I find that when Ms Wainwright ceased work in 2005 she was capable of at least performing light duties and is currently fit to perform those duties. There is no physical or psychological condition or a combination of both that leads to a contrary conclusion.
>
> I do accept however that from the date of the accident Ms Wainwright was not capable of performing work as a geo-technical and is not capable of returning to anything other than light duties.
>
> Although I have found she has exaggerated her injuries, Ms Wainwright did suffer a life threatening DVT and still has an incompetent popliteal vein and did injure her back, elbow, right ankle, right knee, and right leg and later suffered from depression.
>
> Notwithstanding that I have rejected Dr Harper's conclusions as to her incapacity; the issues he raises about employability are relevant. The very fact of the accident, and the injuries suffered, irrespective of their severity, and Ms Wainwright's age would lead employers to shy away from appointing her to anything other than a light duty positions [521] - [524].

DVT - future management

46 As noted earlier, the appellant has the residual disability of an incompetent popliteal vein and a slightly increased risk of a thrombosis recurring.

47 There was some conflicting evidence at trial as to the manner in which the appellant should manage the risk of recurrence of DVT in the future. In this appeal, the appellant in particular referred to the evidence of Dr D'Souza, the general practitioner, to the effect that in relation to any flying in the future, the appellant would need anti-coagulant injections daily or twice daily around the time she flies, but that he would defer to the expert opinion of a haematologist on that issue (trial ts 581). However, a note dated 1 May 2011 by Dr Baker, a haematologist, was to the effect that for 'short term' flights, the counter-pressure stockings would be an effective way to manage the risk of recurrence of DVT, and that for longer term flights, anti-thrombotic therapy should be considered (GB 169). The judge would appear to have generally accepted Dr Baker's evidence [461].

Findings on past economic loss

48 The judge said that there was no claim for past economic loss prior to 7 April 2005 (although in supplementary reasons, the judge amended the award for past economic loss to reflect payments made before 6 April 2005 pursuant to the *Workers Compensation and Rehabilitation Act 1981*

(WA): ***Wainwright v Barrick Gold of Australia Ltd*** [2012] WADC 79 (S) [6].)

49 The judge said that the appellant's gross pre-accident wage was $1,021 per week, and that, in addition, an allowance should be made for the cost of food being provided whilst working on the Plutonic mine site which he valued at $129 per week, giving a total pre-accident salary as a geological technician of $1,150 gross per week ($1,021 plus $129).

50 With respect to the period from 7 April 2005 to trial, his Honour took the salary rate for clerical duties at the mine site ($980 per week gross), to which he again added the food allowance ($129 gross per week), to give a 'light duties' employment salary of $1,109 per week (gross). This compared with the pre-accident salary of a geological technician of $1,150 per week (gross).

51 He then applied corresponding rates net of tax, and awarded past economic loss based on the difference between her pre-accident salary and the 'light duties' salary at the mine site, together with certain adjustments for bonuses and medical benefits, which he found, in effect, were applicable to geotechnical work but not light duties work. He also made an allowance for lost superannuation.

Findings on future economic loss

52 The judge accepted that the appellant would have worked until the age of 65 years. He calculated future economic loss again based on the difference between, in effect, her pre-accident salary and her 'light duties' salary' at the mine site, again with certain adjustments for bonuses and medical expenses.

Findings on general damages

53 The judge allowed $50,000 for general damages in respect of the DVT, injuries to the right knee, right ankle, left elbow, back and psychological condition, in light of two periods of hospitalisation, the requirement to wear support stockings, pain and suffering, loss of general amenities, inconvenience and interference with work and other domestic activities, and past and current psychological difficulties.

The events of and up to September 2006

54 As the events of, and leading up to, the respondent's termination of the appellant's employment in September 2006 assumed significance in the appeal, it is appropriate to set out the more salient findings of the

judge in that regard. Insofar as they contain references to the appellant's complaints of her symptoms, they should be read in the context of the judge's findings as to credibility referred to earlier.

55 The appellant remained at work as rostered until she flew back to Perth on 18 December 2003. She saw a general practitioner, Dr Adonis, on 19 December 2003. Dr Adonis diagnosed DVT in her right leg, and referred her to Murdoch Hospital. She was given treatment and was prescribed Warfarin tablets. She was discharged from Murdoch Hospital on 24 December 2003. She was referred by Dr Adonis to Dr Baker, who specialises in DVT, because of concerns about the dangers of Warfarin and the fly-in/fly-out nature of her work.

56 On 10 February 2004, Dr Adonis reported that she was still suffering right intermittent leg swelling and queried whether the requirement to wear heavy work boots, even whilst doing light duties, was aggravating her right leg.

57 On 7 April 2004, radiological evidence indicated that the DVT had almost completely resolved, although there was some residual thrombosis in the right popliteal vein. (Incompetence of the popliteal vein was still present in a radiological report of 29 November 2010.)

58 Dr Baker, a clinical haematologist and consultant physician, saw the appellant on 20 August 2004 and reported that the only residual effect of the DVT was mild post-thrombotic syndrome, particularly with prolonged standing. He said the appellant needed to use a pressure stocking in the next few years. Dr Baker said that the appellant should be able to return to her pre-injury employment whilst on Warfarin, providing she had regular monitoring, and his only concern was her remote work location in that if she suffered any further injury, she may have excessive bleeding. He said that he had a number of patients on Warfarin with fly-in/fly-out employment. He thought that if the appellant ceased Warfarin, she would have a one in five chance of the thrombosis recurring over the next five years. Dr Baker said that the risk of major bleeding whilst on Warfarin was 1% to 2% per year, and suggested she remain on it until the position regarding recurrence became clearer. He noted that in April 2005 she was doing well at work and was keen to cease the use of Warfarin.

59 Throughout this period, the appellant continued to perform light duties, although there were some brief periods where she was certified as totally unfit for work. Dr D'Souza, another general practitioner, had said that there was no restriction in her capacity to perform clerical duties.

60 The appellant ceased work in April 2005. Dr D'Souza said that it was about this time that other symptoms evolved and the appellant's knee pain became worse and that Warfarin became more of an issue. The appellant was focussed on Warfarin being the cause of her multiple pains and problems. Dr D'Souza felt that the appellant needed vocational rehabilitation.

61 Around January 2006, Dr D'Souza recommended the appellant begin rehabilitation with light duties in Perth, graduating to normal duties over a period of time.

62 The appellant saw Commonwealth Rehabilitation Services (CRS) in March 2006.

63 On 20 April 2006, the respondent advised a rehabilitation officer with CRS that it was able to offer the appellant clerical duties at the mine site and possibly clerical duties at their state headquarters in Perth. When advised of this, the appellant expressed concerns about her mental health and asked for assistance in that regard.

64 Dr D'Souza advised the rehabilitation officer that it would be appropriate to start a graduated return to work on clerical duties at a local, rather than remote, location, on a three day week, four hour day.

65 Dr D'Souza said, in evidence, that he recommended office-based duties in Perth because even though the respondent had offered to monitor the appellant's blood in the north-west, there were other problems relaying the results and there was also a risk that any further injury involving bleeding in a remote location would complicate her medical position.

66 On 23 May 2006, the respondent advised CRS that it would ensure onsite monitoring of Warfarin, and that general clerical duties were available for a four week period in Perth with the remainder of the work on the mine site. The respondent said that the appellant would need to work up to an eight hour shift in order to return to the mine site.

67 CRS concluded that substantial gains were unlikely, and vocational rehabilitation was not recommended due to a number of issues. However, CRS thought that the appellant should be counselled by a clinical psychologist and, if deemed medically appropriate, referred for a pain management/activity based program to improve her physical and psychological state.

68 By letter dated 4 August 2006, the respondent repeated its offer of light duties at the mine site in the following terms (GAB 1):

> The purpose of this letter is to once again offer you Alternative Duties at the Plutonic mine site. The role we envisage for you involves office/clerical work. You may commence immediately.
>
> Your office duties, hours and roster will be tailored to accommodate any medical restrictions. We also confirm that INR [blood clotting] monitoring can be undertaken on site, as suggested in Dr Baker's report of 22 November 2005. You will be remunerated at your current rate of worker's compensation payments. As you have previously performed clerical duties (before and after your disability) you will be familiar with the duties involved in this role.
>
> We look forward to having you back on board as soon as possible and we would be grateful if you could contact [Ms Martin] or in her absence, the site Nurse … to make the necessary arrangements for your return to the Plutonic site.

69 The offer was not accepted. Instead, by letter dated 17 September 2006, the appellant wrote to the respondent and asked for her belongings to be returned to her in Perth. The respondent, on 21 September 2006, then terminated her employment on the basis that she was not able to return to her pre-accident employment as a geological technician.

70 Dr D'Souza (who was shown the respondent's letter dated 4 August 2006 in cross-examination (trial ts 570 - 571)) said that the appellant did not tell him of the 4 August 2006 job offer. He said that in retrospect, bearing in mind she had been flying in and out to the mine site whilst on Warfarin for a year and a half, that he probably would not have been concerned about her taking the job, other than his concern that if there was an accident it could be potentially serious. (As to that concern, see [65] above.)

71 In September 2006, Dr D'Souza reported that the appellant was fit for restricted duties.

Grounds of appeal and the principal arguments

72 The appellant's grounds of appeal allege that:

> 1. The judge erred in fact and in law in his assessment of past economic loss in that such assessment failed to give proper recognition to the appellant's diminished earning capacity consequent upon her accident related injuries.

> The error of fact is that the trial judge awarded past economic loss on the basis that the appellant was fit for light duties from 7 April 2005 to trial but failed to award damages on the basis of total unfitness for the period 27 September 2006 when the appellant underwent right knee surgery which rendered her totally unfit until 11 January 2007 when she was again certified fit for light duties after recovering from that surgery.
>
> 2. The judge erred in law in his assessment of future economic loss in that the assessment fails to properly recognise the appellant's diminished earning capacity and her consequential inability to compete in the open job market.
>
> 3. The judge erred in law in awarding the appellant damages for non-pecuniary loss in the sum of $50,000 such award being sufficiently below the range of a sound discretionary judgment and so low as to amount to an erroneous assessment of the entitlement of the appellant to damages for non-pecuniary loss and in reaching that assessment erred in not accepting the evidence of Mr Richard Langham, pharmacologist, which was tendered by the respondent's counsel by consent and which provided significant corroboration of the appellant's complaints of symptomology during the time that she was prescribed and took Warfarin.

73 I will address the error of fact in ground 1, and ground 3, later in these reasons. At this point, however, it is appropriate to mention the errors of law raised in grounds 1 and 2.

74 There was some overlap between ground 1 (dealing with past economic loss) and ground 2 (dealing with future economic loss). In relation to each ground counsel for the appellant contended that the judge erred in law in two respects.

75 The first alleged error of law was that the judge failed to consider and determine an issue at trial, namely whether it was not unreasonable for the appellant not to continue in the light duties employment at the mine site which she was given after the accident and which she remained doing until she left in April 2005. The appellant alleged that the judge failed to consider and determine whether it was not unreasonable for her to return to work at the Plutonic site in all the circumstances, in particular having regard to the fly-in/fly-out nature of the work, her DVT, her Warfarin treatment which thinned her blood and made her susceptible to adverse consequences of excessive bleeding if she injured herself, and the remoteness of the location. The appellant also contended that it was not unreasonable for her not to return to site even after she ceased taking

Warfarin in 2007, particularly as her popliteal vein remained reduced (appeal ts 18 - 19).

76 The appellant contended that these were fundamental mitigation points, which the judge was required to address whether or not they were specifically drawn to his attention at trial. In relation to mitigation, the appellant relied upon, in particular, the observations of McHugh J in ***Medlin v State Government Insurance Commission*** [1995] HCA 5; (1995) 182 CLR 1, 22 - 23.

77 The appellant said that because of the uncertainties in this case, the proper approach for the judge was to make a global assessment by applying a single discount figure to take into account retained earning capacity and contingencies in the manner adopted in ***Bowen v Tutte*** (1990) Aust Torts Reports 81-043, and ***Pene v Murphy*** [2004] WASCA 103. Counsel suggested a 50% discount on this approach. Alternatively, he submitted that, in the circumstances, the judge should at the very least have assessed lost earning capacity by reference to the appellant exercising any retained earning capacity in light duties in Perth, as opposed to at remote locations.

78 The appellant accepted that there was no direct evidence presented at trial as to the rate for light duties in Perth, but said that the court could use the rate for light duties at the mine site, but take off the meal allowance which, it was said, the court could infer would not be given to a person working on light duties in Perth. The judge had accepted that the remote site food allowance was worth $129 per week.

79 In support of his submissions, counsel for the appellant relied upon passages of the appellant's evidence at trial to the effect that the appellant could no longer 'cope' with continuing to work on site, and that she had concerns about the risks to her if she further injured herself at a remote location. He submitted that there was medical evidence to support that concern. (See, eg, trial ts 217 - 221, 502 - 503, 570).

80 The second alleged error of law was to the effect that whilst the judge had regard to the fact that the appellant lost the capacity to work as a geological technician, he made no, or no real, allowance for it.

81 Counsel for the appellant said that the second alleged error of law was more relevant to ground 2, but that in relation to ground 1 it was a 'fall back position' (appeal ts 15). With particular reference to future economic loss, the appellant alleged, in effect, that having regard to the injuries caused by the accident, and the facts that the appellant was

aged 57 at the time of trial, and that she had been out of the workforce for seven years, 'to suggest that she could return to earning full-time wages on a permanent basis [was] wholly unrealistic' and 'it is appropriate in the circumstances that a global assessment should have been made given the finding of fitness for light duties but not full duties'. Reference in this regard was made to ***Wade v Allsopp*** (1976) 50 ALJR 643, 647.

82 The respondent submitted that the judge did not err in law as alleged. It referred to the unchallenged findings of fact to the effect that the appellant had a retained earning capacity to work in office duties on the mine site as at and from 7 April 2005. The respondent also alleged that there was no issue at the trial as to whether, even if the appellant had the capacity to work doing light duties at the mine site, the appellant nevertheless acted reasonably in leaving work in April 2005, or in declining a return to work in 2006 for reasons unrelated to incapacity.

83 As to the appellant's reliance on ***Wade v Allsopp***, the respondent submitted that the appellant did not make that submission at trial, and that in any event, the judge had regard to the potential difficulties in the appellant finding work in the future but found, in effect (at [524]), that those difficulties did not attend her residual capacity to work in light duty work for mining companies on site (appeal ts 38). The respondent submitted that there was no proper evidentiary basis to support a finding that some additional allowance should be made, and no error was disclosed in the judge's reasons in that regard.

84 As to the use of a percentage discount in accordance with ***Bowen v Tutte*** and ***Pene v Murphy***, the respondent said that there was evidence available to the judge to support the approach he took and that no error of principle is disclosed in him not adopting the percentage discount approach referred to in those cases. The respondent submitted that the appellant had not led evidence of Perth rates of remuneration for office work, and that, accordingly, she could not complain if the judge used the rate for that work in remote locations.

85 The respondent also submitted that if the court finds that the judge erred, then the matter should be sent back for retrial, given the judge's findings on credibility (appeal ts 49 - 50).

86 Both parties also, in effect, made reference to the interaction between the legal onus on a plaintiff and the evidentiary onus that may devolve upon a defendant.

The earlier disposition of the cross-appeal

87 In supplementary reasons, the judge amended the amount allowed in respect of loss of past superannuation to $14,245: ***Wainwright v Barrick Gold of Australia Ltd*** [2012] WADC 79 (S) [3]. The respondent brought a cross-appeal claiming that the amount allowed for loss of past superannuation should be disallowed as the appellant had led no evidence that the respondent did not pay her superannuation entitlements. The appellant conceded the cross-appeal and an order was made on 21 December 2012 that the award of the judge be reduced by the amount of $14,245. The appellant's concession had the effect that there was ultimately no award for loss of past superannuation.

Appellate review

88 An assessment of damages has many of the characteristics of a discretionary judgment: ***The Commissioner of Taxation of the Commonwealth of Australia v St Helens Farm (ACT) Pty Ltd*** [1981] HCA 4; (1981) 146 CLR 336, 381; ***Montemaggiori v Wilson*** [2011] WASCA 177 [29]. Generally speaking, an appeal from an assessment of damages for non-economic loss in relation to personal injuries from a judge sitting without a jury is to be determined in the same manner as an appeal from the exercise of discretion by a trial judge. An error must be identified within the terms of ***House v R*** [1936] HCA 40; (1936) 55 CLR 499, 504 - 505: ***Kendirjian v Ayoub*** [2008] NSWCA 194 [175] - [176]. Even in relation to economic loss, there is a similar need for appellate restraint in review of the past and future hypotheticals of damages for lost earning capacity: ***McCartney v Orica Investments Pty Ltd*** [2011] NSWCA 337 [126]. In that case, Giles JA (Macfarlan JA and Young JA relevantly agreeing) said, after a review of the authorities [126] - [127]:

> These cases take up the estimation in, and the need for appellate restraint in review of, the past and future hypotheticals of damages for lost earning capacity. The restraint is in accord with review of a discretionary decision. The cases are in line with like restraint in other areas where there is necessary imprecision and evaluation in determining the likelihood that a past hypothetical event would have occurred or a future hypothetical event will occur. That will, of course, not always be the case: the likelihood may turn on a finding of fact or otherwise not be particularly evaluative. But, as was said in ***Harper v Bangalow Motors*** (CA, 24 July 1990, unreported), in an expression of relevant principles endorsed in ***Diamond v Simpson*** (No 1) at [15]–[16], the approach of appellate restraint applies '[i]f … the decision reflects a degree of judicial prophesy [sic] or speculation'.

> These cases also accord with the basis for restraint endorsed in ***Singer v Berghouse***, namely, that a different evaluation may be no better and will come at undue expense and detraction from the finality of litigation. That basis for restraint has been applied more broadly. In ***Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*** [2008] HCA 42; (2008) 237 CLR 66, involving the discretion to give judicial advice to a trustee, Gummow ACJ and Hayne and Heydon JJ said at [190] that the proceedings -
>
> > … illustrate the particular care that must be taken by appellate courts, in such circumstances, in disturbing the conclusions of a trial judge in arriving at such decisions, except in the limited circumstances explained by this Court in ***House v R***. Unless restraint is employed in cases of the present kind, in disturbing the orders of trial judges, the risk is run that escalating litigation is encouraged; the resolution of the substantive dispute is delayed; legal costs are incurred in disproportion to the value of assets at stake; and other public and private costs are improvidently incurred. Against such outcomes, this Court has frequently expressed, and reasserted, the need for particular appellate restraint.

89 There is some authority to the effect that mere mathematical errors may, in any event, be corrected by an appellate court: ***State Government Insurance Commission v Hitchcock*** (Unreported, WASCA, Library No 970089, 11 March 1997) 14; see also ***Elford v FAI General Insurance Company Ltd*** [1994] 1 Qd R 258, 265.

90 The following additional observations of the High Court in ***Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*** [2008] HCA 42; (2008) 237 CLR 66 [120] are also pertinent. There, the court said that it is incumbent on an appellant in an appeal against a discretionary decision, in respect of which a number of factors may be relevant, who alleges that particular matters were not taken into account by the primary judge, to demonstrate that the primary judge's attention was drawn to those matters, at least unless they are fundamental and obvious.

The first alleged error of law

Legal principles

91 In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings: ***Medlin v The State Government Insurance Commission*** (16). The correct question is whether, as a result of the accident, the plaintiff has been rendered less capable of earning income:

Medlin v State Government Insurance Commission (17). In determining that question, the court looks at the plaintiff's capacity for work beyond the particular employment in which he or she was engaged at the time of the accident: ***Medlin v State Government Insurance Commission*** (17).

92 Earning capacity is, however, an intangible asset which only has a value to the extent to which it may be exploited financially. Consequently, no compensation is payable for loss of earning capacity unless the loss is or may be productive of financial loss: ***Medlin v State Government Insurance Commission*** (16, 18); ***Husher v Husher*** [1999] HCA 47; (1999) 197 CLR 138 [7]. A plaintiff must prove his or her loss which includes the quantification in money that should be adopted in the sum awarded: ***Watts v Rake*** [1960] HCA 58; (1960) 108 CLR 158, 159 (Dixon CJ). Where a question arises as to whether a plaintiff could have obtained employment within their post-accident capacity, the question is not really one of mitigation of damages as the plaintiff must prove that such employment is beyond his or her capacity: ***Medlin v State Government Insurance Commission*** (21); ***McCracken v Melbourne Storm Rugby League Football Club Ltd*** [2007] NSWCA 353; (2007) Aust Torts Reports 81-925 [72] - [73].

93 In general, it is desirable for a plaintiff to call precise evidence of what he or she would have been likely to earn but for the injury and what the plaintiff actually did earn (past loss) and was likely to earn after the injury (future loss). Nevertheless, the failure to call such evidence by a plaintiff does not necessarily result in nominal damages, although, if the plaintiff calls incomplete evidence, it may be difficult to complain of a low award for lost earning capacity: ***Setton v Eves*** [2006] WASCA 3 [26]; ***Montemaggiori v Wilson*** [31]; ***Baird v Roberts*** [1977] 2 NSWLR 389, 398. Similarly, a defendant who fails to adduce evidence with respect to a plaintiff's retained earning capacity, in the discharge of any evidential onus that might arise, runs the risk that the court may find a retained earning capacity which is lower than that which would apply if proper evidence had been adduced by the defendant and accepted.

94 In a case where the plaintiff had alleged total incapacity but there was found to be diminished capacity rather than total incapacity, Glass JA in ***Lombardo v Henne*** (Unreported, NSWCA, 2 December 1977, referred to in ***Commonwealth of Australia v Chessell*** (1991) 30 FCR 154, 166, said:

> Reference was made to the absence of any evidence of what the plaintiff could in the future earn in the exercise of such earning capacity as he retained. There was discussion as to whether this constituted an omission

> in the plaintiff's case or in the defendant's case. In the present trial I am of opinion that it represented a gap in the defendant's proofs on one of two alternative bases. The plaintiff made a case that he was, by reason of physical injuries and the neurotic increment to them, unable to do any work at all and would probably remain in this condition after the trial. In these circumstances, there devolved an evidentiary burden upon the defendant to establish that the plaintiff did retain some earning capacity and what he could earn by exercising it. Alternatively, there was a true onus on the defendant to make out a case that the plaintiff had not mitigated his damage, namely, that he had unreasonably declined the opportunity to rehabilitate himself and could, if rehabilitated, earn up to a certain level. But whether it be the plaintiff's or the defendant's proofs which are deficient in this respect, I do not think the failure has the usual consequence that the party in default loses on the issue. If, for example, it is the plaintiff who is in default, the judge cannot rule against him and decline to assess his damages at all. If it is the defendant's default, the judge cannot disregard the possibility that the plaintiff may in the future earn more than he was earning at the time of the trial. In each case he is obliged to make the best assessment he can on the materials which have been placed before him. The consequence, however, for a plaintiff in default is that he runs the risk that the trial judge may set his retained earning capacity at a higher level than may be established by evidence. The consequence for the defendant in default is that the judge may set it at a lower level than he can by evidence establish.

95 In the same case, Samuels JA said:

> I agree with what my brother Glass has said upon the question of the evidence to which he referred. The case of ***Allan v Loadsman*** [1975] 2 NSWLR 789, is cited from time to time as authority in support of the proposition that the plaintiff carries the burden of leading evidence to establish the diminution of his earning capacity in a case where that is the nature of the claim which he makes. That is perfectly true; but it is necessary to emphasise that that was a case in which the plaintiff's claim was for diminished earning capacity and not a case such as the present, where the plaintiff's claim was that he had been totally deprived of earning capacity by the injuries and their consequences. In a case such as this it cannot, I think, be expected that a plaintiff should present two cases. Firstly, the main case, in which a total loss of earning capacity is asserted; and, secondly, an alternative case, in which some diminished earning capacity is put forward and supported by evidence of the nature of the job which the plaintiff can still carry out, and the rate which he could earn by doing so. If the plaintiff fails to make good his claim that he has been totally incapacitated, as happened here, and if the defendant, although disputing the initial claim, offers no evidence in support of the lesser disability for which he is contending, the judge may very well be left in the position of having to make an assessment upon inadequate material. In that event, as my brother Glass has pointed out, one party or the other may conceivably have a result less favourable than if the proper evidence were

> in. I appreciate that it is often the view of defendants that they are required to do little more than to dispute the case which the plaintiff makes. I cannot understand, however, why, if the defendant's case is that the plaintiff is better able to work than he says he is, an attempt is not made to offer evidence of the kind of work he can do and the money which he can earn.

96 The case of ***State Government Insurance Commission v Toomath*** (1996) 23 MVR 319 was one in which it was held (Rowland & Ipp JJ) that an evidential burden had not shifted to the defendant. In that case, the plaintiff's pleaded case was that whilst he could no longer work as a plant operator, he retained the capacity for other work such as truck driving. However, he led no evidence as to the salary that a truck driver could earn.

97 Evidence as to possible earning capacity post-accident should ordinarily be directed to the kind of work which, after the accident, the plaintiff would be in a position to undertake; the likelihood that he or she would be able to obtain such work; and the remuneration which he or she might expect to derive from it: ***Baird v Roberts*** (397).

98 A decision by a plaintiff to leave their employment does not automatically mean that the plaintiff has not suffered a compensable loss of earning capacity for the period after the departure from that position. Thus, for example, a plaintiff is not precluded from recovering lost earning capacity in that period if the plaintiff's decision was a 'natural step in a chain of causation' in the context of what is reasonable between the appellant and the respondent in determining the respondent's liability for damages in tort: ***Medlin v The State Government Insurance Commission*** **(**10 - 12) (Deane, Dawson, Toohey & Gaudron JJ); ***Kavanagh v Akhtar*** (1998) 45 NSWLR 588, 597 - 598.

99 Further, even if a plaintiff voluntarily leaves their current employment for reasons unconnected with the injuries caused by the defendant's tort, that does not necessarily preclude a claim for lost earning capacity. As the plurality observed in ***Medlin v State Government Insurance Office***:

> Counsel for the plaintiff further submitted that, even if the conclusion had been properly reached that the premature termination of the plaintiff's University appointment had not been relevantly caused by the accident, that was not necessarily the end of the plaintiff's claim for damages for loss of earning capacity in relation to the four and a half year period until the plaintiff reached sixty-five years. There is obvious force in that submission. *A plaintiff is not precluded from recovering damages for loss*

> *of earning capacity merely by reason of the fact that he or she voluntarily left employment which was unsuitable or in which he or she was unhappy. The continued availability of such employment will, of course, be relevant to the question of the existence and extent of any loss of earning capacity* and a finding that a plaintiff's termination of employment was not the product of an accident-caused loss of earning capacity will necessarily preclude the calculation of damages on the basis that it was. *Such a finding does not, however, mean that damages cannot be recovered for loss of earning capacity in relation to the period subsequent to the termination of that employment if there is in fact an accident-caused loss of earning capacity which has been or will be productive of financial loss during that subsequent period* (11 - 12). (emphasis added)

100 As to mitigation, the burden of proving a plaintiff has failed to mitigate his or her damages rests on the defendant: ***Watts v Rake*** (159). In the discharge of that burden, the defendant must not only show how a plaintiff's claim ought to be mitigated, but also to what extent it ought to be mitigated: ***Tucker v Westfield Design & Construction Pty Ltd*** (1993) 46 FCR 20, 27. If a defendant establishes that the plaintiff has failed to mitigate their loss, the tribunal of fact is required to assess the plaintiff's damage on the footing that he or she had taken the hypothetical action and been endowed with its hypothetical benefits: ***Munce v Vinidex Tubemakers Pty Ltd*** [1974] 2 NSWLR 235, 239; ***Arnott v Choy*** [2010] NSWCA 259 [155]. A person will not have acted reasonably to avoid loss if he or she allowed baseless factors to outweigh cogent ones: ***Arnott v Choy*** [155].

101 In relation to mitigation, the appellant in particular relied on the judgment of McHugh J in ***Medlin v The State Government Insurance Commission***. There, McHugh J said that in ***Adams v Ascot Iron Foundry Pty Ltd*** (1968) 72 SR (NSW) 120, 139, Walsh JA (as his Honour then was) had observed:

> [C]orrectly in my opinion, that, if a person has the post-accident capacity to do a particular job but a question as to the reasonableness of a refusal to do it arises, the onus is on the defendant to show that the refusal was unreasonable. Walsh JA gave as an example the case where the plaintiff is offered work at a remote place. Similarly, where a plaintiff with impaired earning capacity resigns from a position that he or she is capable of retaining and sustains a financial loss, the onus is on the defendant to prove that the resignation was unreasonable (22).

102 In ***Adams v Ascot Iron Foundry***, an employee sued his former employer, claiming that he had contracted silicosis as a result of exposure to injurious dust and impurities, which rendered him totally incapacitated from working. After the employee was injured, the employer made two

offers of further employment to the plaintiff to perform duties in areas free from silica dust. The first offer related to employment in the 'core-room' and the second related to work in the office. The employee rejected both offers on the ground of his inexperience in the work offered and, as to the first offer, on the additional ground that the core-room was filled with fumes which would, in any event, aggravate his condition. Walsh JA drew a distinction between a plaintiff not undertaking the employment offered by the defendant on grounds of alleged incapacity, and not undertaking it on other grounds, even though capacity existed. His Honour said:

> If the starting point is a known degree of incapacity (either admitted or found to exist), which prevents the plaintiff from following the employment in which he had been engaged, but leaves him capable of doing other kinds of work and, if he has admittedly refused a particular position which has been shown to have been available to him, then, in my opinion, *a distinction has to be made according to what is the nature of the reason assigned for his refusal. If the reason is that he was, because of incapacity produced by the defendant's wrong, unfit to do that work, in my opinion, the onus is on the plaintiff to prove that this was so, as part of the burden that lies upon him to establish his case as to the degree of his incapacity*. If he obtains a finding that he was unfit to do the work, no question of the 'reasonableness' of his refusal remains for consideration. *If, however, it is admitted or found that he had the capacity to do the work, it will only be in rare cases that a question whether nevertheless it was reasonable for him to refuse it will arise. But, if it does arise, in my opinion, the onus of proof on that question lies upon the defendant.*
>
> For example, if a plaintiff with a back injury has been offered a job requiring only light work, but claims that he refused it, with or without a trial period, because, in doing it, he suffered or would suffer disabling pain, the onus is on the plaintiff. But, if the job which has been offered is at Milparinka and the plaintiff and his family, including children attending a high school, have their home in Sydney, and he will not take it because he is unwilling to go to live in such a place, the onus is on the defendant on the question whether or not his refusal is unreasonable.
>
> In the present case, it appears to me that questions of both kinds could have required consideration in relation to the offers of employment made by the appellant to the respondent. The plaintiff appears to have claimed that, because of inexperience, he could not do any useful work in an office job which was offered to him. From this perhaps it could be inferred that the payment to him of wages for that job would be really an act of charity or bounty which he would be unwilling to accept. Again, he appears to have claimed, in relation to the second offer, that it was not bona fide, and also that he would have had to work with and under people between whom and himself there was ill feeling. Questions raised by claims such as these seem to be questions as to the reasonableness of the plaintiff's attitudes and

> claims, and I think that the onus of proof in regard to them was on the defendant. But the plaintiff claimed also that a job in the core-room, although it was free from silica dust, would expose him to fumes which would aggravate his condition. On such a question, which depends upon what the plaintiff's condition was and upon the degree of incapacity it imposed upon him, I am of opinion that the onus was on the plaintiff (139). (emphasis added)

Disposition

103 In substance, the judge found that the appellant's capacity to use her skills as a geological technician had been destroyed by the accident, but that her capacity to do office work/clerical duties had been left unimpaired, and he approached the award for damages for economic loss on that basis. In principle, that approach was sound, although, for reasons which I will develop, in my respectful view there has been an error in the application of that approach insofar as his Honour has, in effect, assessed loss of earning capacity on the basis that the appellant's retained capacity was solely exercisable in remote locations.

104 The appellant had the skills and experience to carry out light duties, and prior to the appellant's employment as a geological technician, her work history included working in clerical/office occupations in Perth (trial ts 79 - 80). Indeed, she had only commenced geotechnical work in the 12 months preceding the accident [9] - [12]. The primary judge found, and the finding was plainly open, that the appellant had the retained earning capacity to do 'light duties' such as office work.

105 After the accident she exercised her retained earning capacity by working at the Plutonic mine site performing office/clerical duties for approximately 16 months. When she left her light duties employment at the mine in April 2005, she left 'voluntarily' in the language of ***Medlin v State Government Insurance Commission*** in the passage referred to in [99] above. There was, for example, no suggestion that the respondent did not wish to keep her on. There was also no evidence or suggestion that the duties she performed on site in the 16 months prior to 7 April 2005, or the respondent's invitations for her to return to such duties in 2006, were other than a reflection of the respondent's ordinary and genuine demands for labour. There was also evidence to the effect that the respondent regarded her as a good worker when she was performing light duties after the accident (trial ts 823, 833, [10]).

106 Nevertheless, her voluntary departure from working in an office at the Plutonic mine site would not, of itself, provide a sufficient reason for

assessing economic loss wholly by reference to the rate applicable to light duties at a remote site.

107 Fly-in/fly-out employment at remote mining locations involves considerations which do not apply to work in Perth, including flights and transfers to and from airports, the isolation of the remote working environment and lengthy periods from home. On the facts of this case, the rate for office duties on site at the time of the accident was $980 per week (gross), plus the food allowance of $129, giving a gross weekly sum of $1,109. As noted earlier, the judge found, in effect, that bonuses and medical cover would apply to geotechnical work but not light duties work. As the appellant in effect contended, it is reasonable to infer that remuneration for office work in Perth would be no more than rates of remuneration for such work at remote mining locations, and that in Perth the rates of remuneration would not include the food allowance paid for such work in remote locations.

108 In assessing the appellant's claim for lost earning capacity wholly by reference to the light duties rate applicable at the Plutonic mine site, the judge appears to have assumed, without directly considering and deciding, that it was unreasonable for the appellant not to continue to exercise her retained earning capacity in clerical work at the Plutonic mine or some similar remote location.

109 In my respectful view, that was an error. The appellant's failure to continue her fly-in/fly-out employment at the respondent's remote mining location after April 2005 raised, on the facts of this case, more than simply a question of her capacity to do light duties work generally. It raised a question of mitigation. In the particular circumstances of this case, the generalised finding that the appellant retained the capacity to work in light duties was not the end of the inquiry in relation to the proper assessment of economic loss. It is true that the question of mitigation received little attention at trial. At trial, the primary focus was on whether or not the appellant lacked the capacity to do any work at all by reason of the injuries sustained in the accident. Nevertheless, in closing, the respondent contended that the appellant had acted unreasonably in not returning to work on site in August 2006 when invited by the respondent to do so (trial ts 1218 - 1219). Effectively in response to that submission, senior counsel for the appellant submitted that the legal burden was on the respondent to prove that the appellant had 'failed to mitigate her loss and that failure was unreasonable', and that the respondent had failed to discharge that onus (trial ts 1314 - 1315).

110 In my respectful view, the judge erred in failing to address and consider the question of mitigation, on which the respondent bore the onus of proof. It was not open to the judge, on the facts as found and on the uncontroverted evidence, to make an assessment of past economic loss in the way that he did without addressing the questions of whether the appellant's decision to leave work at the mine site in April 2005, and her refusal to accept the offers of employment in 2006, were unreasonable. In relation to future economic loss it was necessary for the judge to consider whether it would have been unreasonable for the appellant to exercise her retained capacity in Perth, rather than at the Plutonic mine site or at some similar remote mining location, until the age of 65 years. These points were apparently lost sight of by the judge having regard, presumably, to the primary focus of the parties at trial. Nevertheless, mitigation was an issue that necessarily required consideration and determination on the facts of the case, particularly as the parties had made reference to mitigation in their closing submissions. In my view, the appellant succeeds on grounds 1 and 2 with respect to the first alleged error of law.

111 The respondent nevertheless contends that in light of the judge's adverse findings as to credibility, it would not be open to this court to make a finding as to whether or not the appellant acted unreasonably in leaving work at the Plutonic mine in April 2005, and/or in not returning to such work following the offers to return to employment in 2006. The respondent contends that if error is established, the matter should be remitted for a fresh trial on the question of quantum.

112 Where an appeal is from an assessment of damages by a judge sitting alone, and because it is recognised that a new trial is an oppressive burden on a successful party, an appellate court will normally seek to undertake the task of reassessment of damages for itself: ***CSR Readymix (Australia) Pty Ltd v Payne*** [1998] 2 VR 505, 516. In that case, however, the court ordered a new trial on the assessment of damages as it would have been at a significant disadvantage in reassessing damages because the trial judge had not determined critical facts involving issues of credibility which bore on the extent to which the plaintiff's present and future capacities for gainful employment had been reduced by the injuries. See also ***Lloyd v Farone*** [1989] WAR 154, 164 (Malcolm CJ) and 167 - 168 (Kennedy J) where the court also ordered a new trial on the assessment of damages for similar reasons.

113 In my view, the court is not at such a disadvantage in this case. The trial judge has made detailed findings of primary fact. He has, in effect, disbelieved the appellant when she said that she was unfit to work in

clerical duties after 6 April 2005, and that finding must be respected. She did have the capacity to do such work. Nevertheless, some of the matters relevant to capacity also assumed, in the particular circumstances of this case involving employment in remote locations, a broader significance relevant to the question of reasonableness.

114 Prior to the accident, the appellant had shown no inclination to work in an office at remote mining locations. At the time of the accident she had been pursuing a career in mining, and it is to be inferred that that was the only reason that she undertook work at a remote location prior to the accident.

115 The logistical and other issues associated with fly-in/fly-out employment would reasonably assume greater significance to a person doing office/clerical duties as a secondary employment option, as opposed to a person pursuing a primary career in mining for which they were technically trained and qualified.

116 In this context, it is to be noted that this was a case in which the appellant had been effectively deprived of her mining career. She had experienced 'life-threatening' DVT and was treated with Warfarin until April 2007. Whilst her general practitioner doubted in retrospect that she lacked the capacity to work in clerical duties at the Plutonic mine site, he nevertheless had concerns about the potential for serious harm if she were subsequently injured in a remote location (see [65] and [70] above). Even after she stopped Warfarin treatment, she needed to guard against the recurrence of DVT, and was advised to wear counter-pressure stockings for that purpose. She also had a residual injury by way of a compromised popliteal vein, and an ongoing mild permanent disability of the right knee.

117 Even though the appellant, on the judge's findings, exaggerated the extent to which, and the physical basis upon which, she could no longer 'cope' with working on site, the above matters provide evidence which indicate that objectively it was not unreasonable for the appellant, quite apart from her alleged incapacity, not to continue undertaking fly-in/fly-out employment at remote mining sites. The legal burden of proof of mitigation was on the respondent. The question of whether the appellant acted unreasonably by, in effect, not exercising her retained earning capacity at remote locations is a question of ultimate and objective fact. It is one in respect of which this court, in the circumstances outlined above, is in as good a position as the trial judge to draw the appropriate inference from the facts as found and otherwise uncontroverted: ***Warren v Coombes*** [1979] HCA 9; (1979) 142

CLR 531, 551. Whatever may have subjectively been in the appellant's mind for refusing to continue to work remotely at the Plutonic mine and in refusing to return to work there in 2006, the undisputed matters and findings referred to earlier point to it being not unreasonable for the appellant to cease to continue working remotely. The burden of proof on the respondent has not been discharged.

118 Accordingly, I would assess lost earning capacity on the basis that the appellant had a retained capacity for clerical duties with her retained capacity being exercisable in Perth on and from 7 April 2005, rather than at remote locations. Although the appellant did not lead evidence as to the rate of remuneration for such work in Perth, for the reasons given in [107] above, I would infer that the Perth rate was, at most, in the order of $980 per week gross (ie, light duties rate without food allowance), or approximately $51,000 per annum gross. That is to be compared with the geotechnical remuneration (including food allowance) of $59,800 gross [536]. It is the difference between the two upon which the calculation for economic loss should be based.

119 On this basis, and using the CPI increases used by the judge, the figures for past economic loss at [536] - [544] would be as set out in part 1 of the schedule to these reasons. Parts 2 and 3 of the schedule set out corresponding figures for future economic loss and superannuation based on the above.

120 The parties should be given the opportunity to consider the figures in the attached schedule, with a view to making any submissions in relation to them, consistently with these reasons, prior to the making of final orders.

121 I should add that, as in the case of ***Setton v Eves*** at [39], this was not a case where it was necessary for the primary judge to adopt a global discount approach in the manner suggested in ***Bowen v Tutte*** and ***Pene v Murphy***. The appellant retained an earning capacity for which she was suited and which she had exercised in the past. There was no reason on the judge's findings not to use the differential between her pre-accident earnings as a geological technician and her retained earning capacity for clerical duties as the basis for the assessment. To the extent that the appellant contends that the judge erred in law in not applying a global discount, in my view, that submission should not be accepted, and even if it were, there is nothing to indicate why a 50% discount should be used as urged by counsel for the appellant in this appeal, having regard to the unchallenged findings of fact.

The second alleged error of law

122 The appellant contended that given her age and the nature of her injuries, she faced a real prospect of unemployment, or unstable or intermittent employment in exercising her retained capacity for clerical/office work. The appellant placed particular reliance on the observations of Stephen J in ***Wade v Allsopp***.

123 In ***Wade v Allsopp***, Stephen J said:

> This is the case of a young man with no established employment record; there is no pre-injury employer possessing any incentive, whether arising from a sense of moral obligation or otherwise, to assist him in his injured condition. His fields of possible employment, already limited by his purely physical disabilities, are further restricted by his behavioural problem and by his speech defect. Although these latter disabilities no doubt only reduce by some percentage his capacity as a potentially useful member of the work force, their effect upon the likelihood of his being selected for any suitable employment when in competition with other applicants who do not suffer from like disabilities must be much more marked. There is no necessary correlation between the extent of diminished capacity to perform useful services as an employee due to disabilities and the extent to which the likelihood of actually gaining employment is diminished by the existence of those same disabilities. When those disabilities are behavioural, and when the employment sought is other than one involving only manual labour, common experience suggests that the lack of correlation will be likely to be gross. To state this is but to recognize that whereas diminished capacity to perform useful services may be expressed by a percentage figure the process of selecting one from a number of applicants for employment is, on each occasion, an all or nothing affair in which the applicant with diminished capacity may each time be wholly unsuccessful (647).

124 The plight and circumstances of the appellant, as found by the judge, are materially different from those applying to the young man who was the plaintiff in ***Wade v Allsopp***. Here, the appellant had, and had exercised in certain periods prior to the accident, a capacity for clerical duties. That capacity was not impaired by the accident. The appellant's case with respect to future loss was that she had a retained capacity which was accepted to be in clerical duties, yet the appellant led no evidence that, in her circumstances after the accident, someone with her age or experience would have any difficulty in obtaining employment in Perth in that field. The judge made findings about the appellant's 'employability' in these terms:

> Notwithstanding that I have rejected Dr Harper's conclusions as to her incapacity; the issues he raises about employability are relevant. The very

> fact of the accident, and the injuries suffered, irrespective of their severity, and Ms Wainwright's age would lead employers to shy away from appointing her to anything other than a light duty positions [524].

125 The judge has thereby found, in effect, that the appellant's age, injuries and the fact of the accident would only affect the prospects of her being selected for employment in work *other than* light duties in the open market for labour. Moreover, the appellant's submission that the judge failed to take account of the fact that she had been out of work for several years, fails to recognise that on the judge's findings, the reason that she was out of the work force with respect to clerical/office duties was as a result of her exaggerated symptoms and complaints.

126 Subject only to the correction with respect to mitigation referred to above, the judge has properly recognised the appellant's diminished earning capacity and her consequential inability to compete in the open market by assessing economic loss on the basis of the difference between what she would have earned as a geological technician and the rate applicable to clerical duties for such work. There was no error, on the judge's unchallenged findings of fact, in the judge not making an allowance of the kind referred to in ***Wade v Allsopp***.

Alleged error of fact in ground 1

127 The judge found that as a result of the operation, the appellant was certified 'totally unfit' for work for a 'short time' and was 'thereafter' certified fit for light duties work with some restrictions [195]. However, the judge did not make any allowance for the 'short time' that the appellant was 'totally unfit' for work.

128 Although the respondent contended that the appellant did not run a case at trial that she was totally incapacitated for a specific period of time as a result of the knee surgery (Appeal ts 64), it nevertheless accepted that the appellant should be awarded damages for the period of time after the arthroscopic procedure that she was proven to be totally incapacitated (Appeal ts 62).

129 The appellant submitted that she was incapacitated from 27 September 2006 until 1 February 2007, based on the progress certificates of her treating GP, Dr D'Souza.

130 The relevant question for determination is, as a result of the knee operation, the period of time for which the appellant was unfit to work in light duties.

The facts relating to the knee operation

131 In August 2005, the appellant saw Dr Robinson, an orthopaedic surgeon specialising in knee injuries. He diagnosed the appellant with a torn medial meniscus of her right knee and organised further scans. He subsequently recommended a right knee arthroscopy, chondroplasty and probable lateral release procedure [177] - [178].

132 On 13 September 2006, the appellant was examined by Dr D'Souza relating to 'ongoing right knee and back pain'. She was certified fit to return to work from 13 September 2006 to 13 November 2006, performing restricted duties (GB 276).

133 On 27 September 2006, Dr Robinson performed a medial meniscectomy repair and smoothed-down damage behind the appellant's kneecap [195].

134 On 21 November 2006, Dr Robinson responded to letters from the respondent's lawyers regarding the appellant's condition. Dr Robinson said that the appellant was not fit to return to 'any work' because of her lower back pain and noted that she could only sit for 10 minutes. However, the doctor said that her right knee operation had been beneficial and that he would 'anticipate that she would have been able to return to work from the point of view of her knee at this stage' (GB 26).

135 On 11 December 2006, the appellant was examined by Dr D'Souza relating to 'post op - right knee arthroscopy'. She was certified totally unfit for work from 11 December 2006 to 31 January 2007 (GB 277).

136 On 22 December 2006, Dr Robinson sent a letter to the respondent's insurer where he recommended further assessment of the appellant's back problems and said that he believed that it was this that was stopping the appellant from returning to office based clerical duties (GB 29).

137 On 1 February 2007, the appellant was examined by Dr D'Souza relating to 'back and right knee pain'. She was certified fit to return to work performing restricted duties. The restricted duties were that she was to not lift anything heavier than 5 kg and to avoid repetitive use of the affected body part (GB 278).

138 On 6 March 2007, Dr Robinson prepared a medico-legal report where he noted that the appellant was complaining of knee pain and that there was inflammation of the repair which was carried out on the medial meniscus of her right knee (GB 34).

Disposition

139 Dr Robinson is an orthopaedic surgeon specialising in knee injuries. He was the surgeon that carried out the knee operation. His opinion in relation to the appellant's fitness to return to work following the knee operation should be preferred to that of her general practitioner, Dr D'Souza.

140 There are no reports relating to the appellant's fitness to return to work during the period after her operation up until the correspondence from Dr Robinson dated 21 November 2006. It would be expected that the appellant would need some time to recover from the surgery before returning to work. In the circumstances, it may be inferred that she was unfit to work as a geological technician for the period 27 September 2006 to 21 November 2006 (55 days). On this basis, and after allowance for the amounts that have been allowed in relation to past economic loss for this 55 day period as a result of the appellant's success on ground 1, the figures (subject to the parties having the opportunity to consider them) would be as set out in part 4 of the schedule to these reasons.

Ground 3

141 As noted earlier, the judge awarded the appellant $50,000 for general damages for the DVT, injuries to her right knee and right ankle, left elbow and psychological condition in light of two periods of hospitalisation, the requirement to wear support stockings, pain and suffering, loss of general amenities, inconvenience and interference with work and domestic activities, and past and current psychological difficulties.

142 Ground 3 alleged:

> The judge erred in law in awarding the appellant damages for non-pecuniary loss in the sum of $50,000 such award being sufficiently below the range of a sound discretionary judgment and so low as to amount to an erroneous assessment of the entitlement of the appellant to damages for non-pecuniary loss and in reaching that assessment erred in not accepting the evidence of Mr Richard Langham, Pharmacologist, which was tendered by the respondent's counsel by consent and which provided significant corroboration of the appellant's complaints of symptomology during the time that she was prescribed and took warfarin.

143 As a preliminary observation, the ground is erroneous insofar as it alleges that Mr Langham's report was tendered by the respondent. It was not. It was tendered by the appellant under s 79C of the *Evidence Act 1906* (WA) (trial ts 1120, appeal ts 27).

144 By ground 3, the appellant alleged that the judge erred in law in that the award for non-pecuniary loss of $50,000 was so low as to be outside of a sound discretionary range. The appellant also alleged the judge erred in law in reaching his award for non-pecuniary loss by not accepting the evidence of Mr Langham which was said to provide significant corroboration of the side effects that the appellant claimed she suffered as a result of taking Warfarin.

145 In relation to the evidence of Mr Langham, the judge found that Mr Langham's report was contentious and that as Mr Langham was deceased by the time of the trial, he was neither examined nor cross-examined on the content of the report. Accordingly, there was no proper opportunity to assess the evidence and the judge did not rely on it [449]. That course was plainly open to his Honour. Moreover, the judge was not satisfied that the appellant's abdominal pain and fatigue, alleged to have been side effects of Warfarin, were related to the tort [484], [487]. The appellant does not challenge any of these findings.

146 Beyond the reference to Mr Langham's report, the appellant did not advance any submissions or arguments to support the contention that the judge's assessment of non-pecuniary loss was outside of a sound discretionary range. There is nothing on the face of it to indicate that the amount awarded was so inordinately low so as to be a wholly erroneous estimate of the damage: ***Miller v Jennings*** [1954] HCA 65; (1954) 92 CLR 190, 195.

147 There is no merit in ground 3.

Conclusion

148 The appeal should be allowed in part to the extent indicated above. The parties should be heard on the question of final orders.

Schedule

Part 1 - past economic loss

Date	Geotech (Gross) pa	Geotech (Net) pa	Clerical Perth (Gross) pa	Clerical Perth (Net) pa	Net loss (Geotech - Clerical Perth)	CPI %
7/4/05 - 30/6/05	59,800	45,472	51,000	39,258	1,368*	3.20
1/7/05 - 30/6/06	61,713	47,339	52,631	40,982	6,357	4.00
1/7/06 - 30/6/07	64,181	49,577	54,736	42,965	6,612	3.60
1/7/07 - 30/6/08	66,491	51,944	56,706	45,094	6,850	3.00
1/7/08 - 30/6/09	68,485	53,939	58,407	46,885	7,054	2.50
1/7/09 - 30/6/10	70,197	55,288	59,867	48,057	7,231	3.00
1/7/10 - 30/6/11	72,302	57,061	61,662	49,613	7,448	2.80
1/7/11 - 12/5/12	74,330	58,481	63,392	50,824	6,626*	-
Total net loss (past) (* not the full year)					49,546	

This would give a primary figure for past economic loss of $49,546. The judge in addition allowed $8,310 net for bonuses and medical coverage about which there was no complaint. Adding the figure of $8,310 to the figure of $49,546 would give a past economic loss figure before interest of approximately $58,000.

Interest on that sum, on the basis used by the judge at [549], would give an additional sum of $12,481.

Part 2 - future economic loss

The relevant weekly figure for future economic loss is derived by taking the net weekly loss as at 12 May 2012 from part 1 above (Geotech (Net) $58,481 less Clerical Perth (Net) $50,284, equals $7,567 divided by 52, equals approximately $146 per week), plus the $9 weekly net sum for

bonuses/medical care allowed by the judge [552], in respect of which there is no complaint. This would equal approximately $155 net per week. Using the multiplier referred to by the judge at [551], the figure for future economic loss would be approximately $57,000. As the sum of $980 per week gross is likely to be somewhat generous in favour of the respondent, in the particular circumstances of this case, the discount for adverse contingencies should be in the order of 2%, giving a total figure for future economic loss of approximately $56,000.

Part 3 - future loss of superannuation

Using the figures in part 2 and allowing the global total allowed by the judge at [561], the figure for loss of future superannuation would be $7,115. Using the figures referred to earlier, this is based on a loss of superannuation per week of $22, giving a future loss of $8,017 using the multiplier used by the judge. Deducting the 15% discount would give $6,815, to which the global sum referred to by the judge should be added of $300.

Part 4 - additional allowance in relation to discrete error

As a result of the appellant's success on the alleged error of fact in ground 1, an additional sum should be awarded relating to the 55-day period that the appellant was totally incapacitated as a result of the knee operation. The appellant's Geotech (Net) rate per annum for the financial year ending 30 June 2007 is $49,577. The net loss of earnings for the 55-day period would be $7,471 ($49,577 x 55/365). However, an amount of $996 ($6,612 x 55/365) has already been allowed in Part 1 for past economic loss for this 55-day period. As such, the additional allowance for loss of earnings during this period would be $6,475 ($7,471 - $996).