SUPREME COURT OF QUEENSLAND

CITATION:	*Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd* [2011] QCA 188
PARTIES:	**AIRCRAFT TECHNICIANS OF AUSTRALIA PTY LTD** ACN 056 942 904 (appellant/cross-respondent) **v** **ARCHIE STEPHEN ST CLAIR** (respondent) **ARCHIE STEPHEN ST CLAIR** (appellant/cross-appellant) **v** **TIMTALLA PTY LTD** ACN 010 951 836 (respondent)
FILE NO/S:	Appeal No 9961 of 2010 Appeal No 10865 of 2010 SC No 5637 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2011
JUDGES:	Fraser, Chesterman and White JJA Judgment of the Court
ORDERS:	**In Appeal No 10865 of 2010:** **1. The appeal is dismissed;** **2. Archie Stephen St Clair is to pay Timtalla's costs of the appeal to be assessed on the standard basis.** **In Appeal No 9961 of 2010:** **1. The appeal is allowed in part:** **(a) The order made in the Trial Division that ATA pay Timtalla's costs of the proceedings be set aside;** **(b) In lieu thereof, it is ordered that Archie Stephen St Clair pay Timtalla's costs of and incidental to the proceedings to be assessed on the standard basis;**

2. Otherwise, the appeal is dismissed with costs.

In the cross-appeal, Appeal No 9961 of 2010:

1. The judgment in favour of Archie Stephen St Clair for $1,729,566 is varied;

2. Instead, judgment is to be entered for Archie Stephen St Clair in the sum of $2,313,846;

3. ATA is to pay Archie Stephen St Clair's costs of and incidental to the cross-appeal to be assessed on the standard basis.

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – SPECIAL RELATIONSHIPS AND DUTIES – where the appellant, Mr St Clair, sustained personal injuries in a helicopter accident – where the upper actuator bearing failed – where the helicopter was owned by Timtalla Pty Ltd ("Timtalla") and leased to the appellant – where the helicopter was serviced by an employee of Choppercare Pty Ltd ("Choppercare"), a wholly owned subsidiary of Timtalla – whether Choppercare was the agent for Timtalla – whether Timtalla was vicariously liable – whether Timtalla owed a non-delegable duty of care to the appellant – whether Timtalla owed a similar non-delegable duty to see that Aircraft Technicians of Australia Pty Ltd ("ATA") exercised reasonable care

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – IN GENERAL – where the helicopter involved in the accident was a Robinson helicopter – where the upper actuator bearing failed – where the failed bearing was an NTN bearing – where a Robinson bearing should have been installed – whether the trial judge drew an incorrect inference as to the date the incorrect bearing was installed

EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS AND WEIGHT AND SUFFICIENCY OF EVIDENCE – WITNESSES – GENERALLY – where the respondent, Timtalla Pty Ltd, failed to call a witness – whether an inference could be drawn in favour of the appellant, Mr St Clair

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the cross-appellant, Mr St Clair, sustained serious injuries in the accident leaving him an incomplete paraplegic – where the cross-appellant argued that the trial judge took an unduly pessimistic view of the likely course his employment had he not been injured – where the cross-appellant argued that the damages for past economic

loss were inadequate – whether the trial judge erred in calculating damages with respect to past economic loss

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – INTEREST – GENERAL PRINCIPLES – whether the trial judge erred in failing to award any interest on Mr St Clair's claim for special damages

PROCEDURE – COSTS – OTHER MATTERS – where the trial judge reserved the issue of costs and sought written submissions – where the trial judge ordered ATA to pay Mr St Clair's costs on the indemnity basis – where the trial judge also ordered ATA to pay Timtalla's costs on the standard basis – whether the trial judge erred in ordering ATA to pay Mr St Clair's costs on the indemnity basis – whether the trial judge erred in making a *Sanderson* order with respect to Timtalla's costs

Civil Aviation Act 1988 (Cth)
Civil Aviation Regulations 1988 (Cth)
Uniform Civil Procedure Rules 1999 (Qld), r 363

Bennett v Jones [1977] 2 NSWLR 355, considered
Besterman v British Motor Cab Company Ltd [1914] 3 KB 181; [1915] All ER 1111, considered
Browne v Dunn (1893) 6 ER 67, cited
Bullock v London General Omnibus Co [1907] 1 KB 264; [1907] All ER 44, considered
Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520; [1994] HCA 13, considered
Calderbank v Calderbank [1975] 3 All ER 333; [1975] 3 WLR 586, cited
Christmas v Nicol Bros Pty Ltd (1941) 41 SR (NSW) 317, considered
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Commonwealth of Australia v Gretton [2008] NSWCA 117, cited
Cullen v Trappell (1980) 146 CLR 1; [1980] HCA 10, considered
Fire and All Risks Insurance Co Ltd v Callinan (1978) 140 CLR 427; [1978] HCA 31, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, considered
Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, applied
Kondis v State Transport Authority (1984) 154 CLR 672; [1984] HCA 61, cited

Lackersteen v Jones (No 2) (1988) 93 FLR 442; [1988] NTSC 72, considered
Leichhardt Municipal Council v Montgomery (2007) 230 CLR 22; [2007] HCA 6, considered
Salomon v Salomon & Co Ltd [1897] AC 22; [1899] All ER 33, cited
Sanderson v Blyth Theatre Co [1903] 2 KB 533, considered
Scott v Davis (2000) 204 CLR 333; [2000] HCA 52, considered
Soblusky v Egan (1960) 103 CLR 215; [1960] HCA 9, cited
Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161; [2006] HCA 19, considered

COUNSEL: G J Newton SC, with M S Trim, for the appellant/cross-respondent in Appeal No 9961 of 2010 and for the respondent in Appeal No 10865 of 2010
J A Griffin QC, with G M Egan and T G Lambert, for the respondent/cross-appellant in Appeal No 9961 of 2010 and for the appellant in Appeal No 10865 of 2010

SOLICITORS: CLS Lawyers for the for the appellant/cross-respondent in Appeal No 9961 of 2010 and for the respondent in Appeal No 10865 of 2010
Cleary & Lee Lawyers for the respondent/cross-appellant in Appeal No 9961 of 2010 and for the appellant in Appeal No 10865 of 2010

[1] **THE COURT:** Mr St Clair was the plaintiff in an action heard in the Trial Division in which he claimed damages for personal injuries against Timtalla Pty Ltd ("Timtalla") as first defendant and Aircraft Technicians of Australia Pty Ltd ("ATA") as fifth defendant. The action was not pursued against the second, third or fourth defendants. On 20 August 2010 he obtained judgment in the sum of $1,729,566 against ATA. His action against Timtalla was dismissed. On 24 December 2010 ATA was ordered to pay Mr St Clair's costs of the action on the standard basis from its commencement to the date of an offer to settle, and thereafter on the indemnity basis. ATA was also ordered to pay Timtalla's costs of the action to be assessed on the standard basis.

[2] ATA has appealed against both judgments, the latter appeal being brought pursuant to the leave of the trial judge. Mr St Clair ("the plaintiff") has cross-appealed against the award of damages on the ground that it is inadequate. He has separately appealed against the dismissal of his action against Timtalla and seeks an award of damages against it in the same amount as that awarded, at trial or on appeal, against ATA.

[3] The plaintiff owned and controlled a company, The Shankman Pty Ltd ("Shankman"), which hired a Robinson R22 Helicopter ("the helicopter") from Timtalla in or about January 1994. The terms of the hire were brief and were agreed orally between the plaintiff and one of the directors of Timtalla, Mr Costa or Mr Webb. The plaintiff and Messrs Costa and Webb were well known to each other.

[4] The only express terms of the agreement for hire were that (i) the plaintiff would pay Timtalla $100 for every hour which the helicopter flew and (ii) after every 100 hours' flying time Timtalla would arrange to have the helicopter undergo a routine maintenance service. There was no agreed duration for the hire which was therefore determinable on the giving of reasonable notice.

[5] Shankman's business was aerial mustering of cattle in the Northern Territory. The plaintiff was employed by Shankman as pilot and musterer.

[6] The R22 helicopter was described by the trial judge as:

> "… manufactured by the Robinson Helicopter Company in the United States of America. It is one of the most common models of rotary wing aircraft on the Australian register and is frequently used for aerial mustering. The aircraft is relatively light and seats two people."

[7] On 21 June 1994 the respondent was flying the helicopter to Alice Springs from a cattle station where he had been mustering cattle. His wife was a passenger in the aircraft. *En route* he descended from a height of about 700 feet to about 100 feet to check on the condition of some cattle he had observed in an unexpected location. He commenced to climb back to the cruising altitude of 700 feet but at 200 feet the helicopter lost power and crashed. Both the plaintiff and his wife were seriously injured.

[8] It was common ground, at trial and on appeal, that the immediate cause of the helicopter losing power was the failure of what was called "the upper actuator bearing" which was part of the mechanism which transmitted power from the engine to the rotating shaft to which was attached the rotary wings of the helicopter. When the bearing failed no rotational force could be applied to the shaft thereby depriving the wings of velocity and lift.

[9] The bearing which failed had been manufactured by a company described in the judgment and submissions as "NTN". The bearing was described as an "NTN bearing". The trial judge explained the significance of the NTN bearing:

> "[12] As with all aircraft, proper maintenance is an essential element of safe operation. The Robinson maintenance manual for the R22 contained a number of warnings including the following in the section on the drive train:
>
> WARNING
>
> The A647-4 bearing in the A184-3 upper bearing assembly has modified internal clearance by RHC.
>
> DO NOT SUBSTITUTE
>
> [13] The "upper bearing assembly" includes the actuator bearing. Thus, the warning at s 2.140 of the Maintenance Manual is relevant:
>
> > "The failure of either of the actuator bearings in flight could cause loss of power to the rotor system and could result in a serious accident."

> [14] The upper actuator bearing is located on the clutch shaft. The manual notes that the first indication of an impending bearing failure is usually a noticeable increase in bearing noise. It says that the noise will almost always start at least several hours before the bearing actually fails and long before there is any increase in the bearing temperature.
>
> [15] At s 1.001 of the manual there is a legend which explains the meaning of notes contained throughout the manual. The presence of the heading "WARNING" indicates "an operation, practice, procedure, etc that, when not correctly followed, could result in personal injury or loss of life".
>
> [16] The R22 had been manufactured in such a way that it required a particular type of special bearing with a modified internal clearance."

The NTN bearing was not one of the "particular type … with a modified internal clearance." It was accepted that the cause of the bearing's failure was the inadequate internal clearance which inhibited the free movement of the balls within the bearing.

[10] The trial judge explained the mechanism of the bearing failure and subsequent crash. His Honour quoted from a letter sent by the helicopter's manufacturer to the plaintiff's solicitors:

> "The reason for fitting a special non-commercial bearing involves (the) … choice of the shaft diameter. … (the manufacturer) used a shaft diameter .0005 inch larger than is recommended for commercial bearings … . However, this change in shaft fit made it imperative to use a special bearing with increased internal radial clearances.
>
> When a commercial bearing with normal internal fits is pressed onto a shaft with a larger than normal diameter, the inner ring of the bearing is forced to expand outwards. The expansion tightens the bearing and deprives the balls of clearances they need for proper operation. Without proper clearance, loading on the balls and rings is increased and the tight fit causes increased heat due to friction. This combination leads to early bearing failures … ."

[11] The trial judge then reviewed the expert evidence and concluded that:

> "… (the) failure came about because the NTN bearing did not have sufficient clearance and the cage of the NTN bearing was weaker than the Robinson approved bearing."

[12] The plaintiff's case against Timtalla was that the NTN bearing had been installed in November 1992, (and was therefore on the helicopter when Timtalla hired it to Shankman), by Choppercare Pty Ltd, ("Choppercare") a wholly owned subsidiary of Timtalla, which was itself liable, or was vicariously liable for its negligence. The case against ATA which succeeded was that it had been engaged by Timtalla to conduct a 100 hourly service in July 1993 and the employee who undertook the services, Darren Fisher negligently failed to observe that an NTN bearing had been fitted, and remove it.

The plaintiff's appeal on liability

[13] As mentioned the plaintiff failed against Timtalla but succeeded against ATA. The plaintiff submits that Timtalla is liable on 3 bases:

(i) Choppercare carried out the November 1992 service as agent for Timtalla which was therefore vicariously liable for the negligence of its servant;

(ii) Timtalla itself owed a non-delegable duty to see that reasonable care was taken in the work done by Choppercare and was liable because it did not use reasonable care;

(iii) There was a similar non-delegable duty to see that ATA exercised reasonable care in the service of the helicopter in July 1993 and Timtalla was liable for Fisher's failure to use reasonable care.

[14] There was at trial a contest of fact about the time when the NTN bearing was fitted to the helicopter. Bases (ii) and (iii) of the case against Timtalla would fail unless the plaintiff proved that the NTN bearing was fitted by Choppercare in November 1992. The trial judge found that it was installed then. His Honour said:

> "[27] In November 1992 Gary Avey was working for Choppercare Pty Ltd, a company which, at the time, was controlled by the directors of Timtalla and which later became Avaid Pty Ltd (the second defendant). In that month, he installed an upper clutch assembly in the helicopter. At that time the helicopter was in north Queensland and Avey took the clutch assembly with him when he travelled there to work on both the helicopter and other aircraft. It is no criticism of Mr Avey to say that his memory of the work he did was prompted almost entirely by documents he had been shown prior to giving evidence. One would not expect anything more about what would have been routine work performed on 13 November 1992. He relied on a requisition form for a part number which coincided with the Robinson clutch assembly to support the contention that he installed a Robinson bearing. The requisition form, though, is dated 14 November 1992, the day after he performed the work. He agreed that it would be very odd for a requisition form to be filled out for a part that had been installed earlier. This is an example of the difficulties faced by both parties in attempting to establish what occurred nearly two decades ago by reliance upon the patchy memory of witnesses and documents which relate to mundane activities.
>
> …
>
> [38] The evidence with respect to the installation of an upper actuator bearing in the helicopter was confined to the installation which took place in November 1992. There was no evidence that the bearing had been replaced after that time. There was evidence that the clutch assembly is

> routinely replaced after 2,000 hours unless there are other problems which occur. In the absence of any evidence suggesting that any replacement bearing was installed after November 1992 and notwithstanding the documents relating to the issue of genuine parts in November 1992, I have come to the conclusion that the plaintiff has established that it was more likely than not that the NTN bearing was installed in the helicopter in November 1992."

[15] This finding of fact is challenged by ATA and Timtalla which, on this point, adopts ATA's submissions. If the challenge is successful, and the finding is set aside, the factual basis for the plaintiff's claim against Timtalla would disappear. It would, in that event, be unnecessary to consider the parties' submissions on vicarious liability and non-delegable duty.

[16] It is therefore appropriate first to consider the challenge to the finding.

[17] It will be seen that the trial judge considered the case for the installation of the NTN bearing by Choppercare in November 1992 as a sufficiently compelling circumstantial one.

[18] Timtalla contends that the evidence did not allow the inference that Mr Avey fitted the NTN bearing. The evidence said to be inimical to the inference falls into two classes. The first is Mr Avey's own evidence supported, it is said, by contemporary documents that the clutch assembly consisted of Robinson parts. The second class of evidence is the observations of the aircraft engineers who serviced the helicopter after November 1992. These are said to show that the bearing was a Robinson one.

[19] Mr Avey gave evidence that in 1992 he was employed by Choppercare. His principal responsibilities were the maintenance of helicopters of a type other than the R22. He was to travel to Cairns in November of 1992 to service one such helicopter. He was told that the helicopter "needed a clutch change while (he) was up there, so it was more economical to get (him) to do it while (he) was there." He took the "clutch assembly" with him to Cairns. He described it as "a factory new one" which he got from Choppercare's store and for which he had to sign a requisition. The requisition form was put into evidence. It was not in Mr Avey's handwriting and was dated 14 November 1992, a date which the trial judge found significant. Mr Avey had performed his work on the helicopter on 12 and 13 November. The requisition form identifies the helicopter and the customer as "Chopperline", a name formerly used by Timtalla. The form is headed "Choppercare Pty Ltd Requisition Form". It shows Mr Avey as the engineer who requested the parts which are described as "new" and comprising a clutch assembly and V-belts set.

[20] Mr Avey recorded the work done in the helicopter's logbook. The description was:

> "new clutch + clutch shaft and drive belts fitted iaw R22 M/M. clutch S/N 2121 shaft S/N 2513 above mentioned items factory new and zero time. job no 3706 refers."

The requisition form also referred to Job 3706. The cipher "S/N" indicates a serial number. "iaw" means "in accordance with." "M/M" is "manufacturer's manual".

[21] The serial numbers on those parts are the same as the serial numbers ascribed to a clutch shaft and sprag clutch released (by which is presumably meant supplied) by the Robinson Helicopter Company ("RHC") in the USA on 9 May 1991. The shaft and clutch were part of a clutch assembly all of which were described in the release certificate as "newly manufactured".

[22] This evidence is said to show that Choppercare had bought from RHC a newly manufactured clutch assembly which was taken by Mr Avey to Cairns and fitted by him onto the helicopter.

[23] Mr Avey could not explain why the requisition form was dated 14 November 1992. The date, subsequent to the fitting of the clutch assembly for which he had taken the part with him did "appear to be out of the ordinary".

[24] The upper actuator bearing which failed was part of the clutch assembly. It was not supplied by RHC as a separate part. Nor is it separately fitted. Mr Avey would have had no occasion to handle or fit the bearing separately from the entire clutch assembly.

[25] The second class of evidence was given by Mr Fisher who serviced the helicopter in July, September and November of 1993 and Mr Smith who serviced it in April 1994.

[26] In 2010 Mr Fisher had no recollection of ever "(coming) across any unapproved parts" in the helicopter and no recollection of any NTN bearing in the clutch assembly.

[27] Mr Smith serviced the helicopter at a cattle station in the Northern Territory in April 1994. He inspected the clutch actuator as required by the manufacturer's manual. He checked the bearing for friction by moving it "left and right in relation to the aircraft" which is "all that is required". He got "relatively close" to the bearing to inspect it and had no reason to believe it was not "a legitimate Robinson bearing".

[28] Mr Webb, a director of Choppercare, said that he had ordered parts from RHC and he had never bought any NTN bearings. He knew of no one in Choppercare who had bought NTN bearings. When, however, the possibility that Mr McMillan, Choppercare's or Timtalla's chief engineer, may have bought NTN bearings and fitted them into an RHC assembly he answered equivocally that the question should be put to Mr McMillan. The trial judge regarded Mr McMillan's absence from the witness box as significant.

[29] There is evidence, as Timtalla submits, that Choppercare acquired from RHC in mid-1991 a newly manufactured clutch assembly which would have included an upper actuator bearing. Mr Avey took a clutch assembly to Cairns and noted that the assembly he fitted had the same serial numbers as the one supplied to Choppercare by RHC.

[30] That evidence supports the finding for which Timtalla contends. Against it, and in favour of the inference drawn by the trial judge, is that the clutch assembly, including an upper actuator bearing, was known to have been fitted to the helicopter in November 1992, and that when it crashed 20 months later, in June 1994 the upper actuator bearing was an NTN one. Records were kept in the aircraft log of all mechanical work performed on the helicopter in the interim. There is no record of

the replacement of the clutch assembly or an upper actuator bearing. In the ordinary course of events had the part been replaced it would have been noted in the log.

[31] The evidence of the Aircraft Engineers, Messrs Fisher & Smith, does not detract from the availability of the inference. Mr Smith performed a 100 hourly service on the helicopter in April 1994. The trial judge observed in [37] of his Honour's reasons that Mr Smith did not give evidence that he had positively identified the bearing as a Robinson approved bearing. Contrary to one of ATA's submissions, that observation accurately reflected Mr Smith's answer to the question whether the bearing was a legitimate Robinson bearing; Mr Smith said only that he "had no reason to believe otherwise". Mr Smith might reasonably not have noticed the NTN bearing because, as the trial judge also mentioned in paragraph [37] of his Honour's reasons, there was evidence (from Dr Gilmore) that the use of the helicopter would result in the bearing seals becoming covered with grease and dirt.

[32] Mr Fisher worked on the helicopter at various times, most relevantly in July 1993. The trial judge found in [89]-[93] of his Honour's reasons that on that occasion Mr Fisher removed the bearing seal and cleaned and regreased the bearing, so that the identifying features of the cleaned NTN bearing should have been clearly visible to him. On the other hand, Mr Fisher did not deny that the NTN bearing had by then been fitted but merely that he had no recollection of it. That was unsurprising. On his evidence, which he did not give until 2010, he had last worked on Robinson helicopters in 1994. Mr Fisher's evidence that he had no recollection of any NTN bearing in the helicopter in July 1993 is therefore a slender reed upon which to hang a submission that the trial judge should have found that the NTN bearing had not been substituted by the time Mr Fisher worked on the helicopter.

[33] The trial judge reviewed the evidence about what maintenance and/or repair work was undertaken on the helicopter between November 1992 and June 1994. They consisted only of regular 100 hourly services, each of which was performed by a licensed mechanic who made a note of the work performed in the helicopter's maintenance logbook. From the fact that the clutch assembly, which included the upper actuator bearing, had been replaced in November 1992 and that there was no evidence that the clutch assembly, or bearing, had been replaced after that time, the judge inferred that the NTN bearing was included with the clutch assembly fitted by Mr Avey. His Honour found support for the inference in the fact that Timtalla did not call Mr McMillan, Choppercare's chief engineer, to give evidence with respect to the suggestion, raised in evidence, that Choppercare may have bought NTN bearings for installation onto Robinson Helicopters. He was available to give evidence and his absence was unexplained.

[34] The evidence as a whole supported the inference drawn by the trial judge that the NTN actuator bearing was fitted to the helicopter in November 1992. Indeed it seems the only sensible conclusion from the facts. Timtalla's challenge to the finding fails. It is necessary to turn to consider the plaintiff's submissions that Timtalla should have been held liable for Choppercare's negligent installation of the NTN bearing.

[35] Timtalla owned and operated a fleet of helicopters which it maintained until 1990 when it established Choppercare to conduct that aspect of its business. There was evidence from Mr Costa that Choppercare was formed to be "a separate maintenance organisation" in June 1990. Choppercare "was always run as a

separate profit centre … it had its own manager, it's (sic) own chief engineer, and it was run by them as a separate entity."

[36] Sometime in early 1993 employees of Choppercare approached Messrs Costa and Webb with a proposal that they buy Choppercare. A sale was agreed and the company ATA became the owner of the business. Choppercare changed its name to Avaid Pty Ltd, ceased trading and went into administration or liquidation.

[37] The trial judge noted that Timtalla's vicarious liability for any negligence on the part of Choppercare required a consideration of the relationship between the two companies. His Honour recorded the respective submissions that "when Choppercare serviced the helicopter on 14 November 1992, it did so as agent of Timtalla" and that "Choppercare … was simply performing work for Timtalla pursuant to a contract." His Honour said of the facts:

> "[58] As has been referred to above, Choppercare performed the service on the helicopter in November 2002. That is known from the aircraft's logbook and maintenance records. There was no evidence of any charge being raised by Choppercare or any payment being made by Timtalla for that work. In fact, there was no evidence to establish a commercial relationship between Timtalla and Choppercare.
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> [59] In his evidence-in-chief, Mr Costa agreed that Timtalla and Choppercare treated each other at arm's length. I note that that answer (as with many others) was in response to a leading question.
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> [60] There was little documentary evidence about the relationship between Timtalla and Choppercare. Mr Costa said that Timtalla's maintenance section had always been run as a separate profit centre and "when it [Choppercare] formed into its independent company, … it had its own manager, its own chief engineer, and it was run by them as a separate entity". That description appears to be inconsistent with his later reference to Choppercare as "our own maintenance organisation" which he distinguished from a third party. When Mr Costa was being cross-examined about the use of compliant parts in helicopters he said that "once we purchased the aircraft it was under our maintenance control, it was under our chief engineer who had the ongoing responsibility of overseeing the maintenance for that aircraft." That was clearly a reference to Choppercare as *our* maintenance control. He made a similar reference to Choppercare being "our maintenance organisation". But that is not conclusive of anything. It demonstrates a connection in the mind of Mr Costa but that does not establish the legal relationship.
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> [61] Other evidence was given by mechanics and LAMEs who had worked for Timtalla or Choppercare in the early 1990s. They were not able to say for whom they had worked at any particular time and appeared, not surprisingly, to regard those companies as being closely linked.

> [62] Lewis Webb, the other director of Timtalla, also gave evidence. He sat in the court for most of the evidence, including that of Mr Costa and former employees. He would have witnessed the uncertainty of those persons as to particular dates or when a particular chief engineer was engaged and other, similar, matters relating to the conduct of both Timtalla and Choppercare. He did not enter the witness box armed with any information which could throw light on many of the details which had been the subject of earlier questioning. He appeared unconcerned about when particular licences were held by either Timtalla or Choppercare and had made no effort to provide any chronology which would establish when certain people were in particular, relevant positions such as chief engineer.
>
> [63] Although there was not much evidence from Timtalla about its relationship with Choppercare; the onus did remain on the plaintiff to demonstrate the true nature of that relationship."

[38] He rejected the respondent's submission that Choppercare acted as agent in the replacement of the clutch assembly. His Honour referred at some length to the judgment of Gleeson CJ in *Scott v Davis* (2000) 204 CLR 333, and concluded:

> "[69] Choppercare was not in the position of an agent. It had responsibilities under the *Civil Aviation Act* 1988 (Cth) and the *Civil Aviation Regulations* 1988 (Cth) such that it had to act in a manner dictated by that legislation and could not have been subject to Timtalla's direction or control as to the manner of undertaking the servicing of the helicopter."

[39] The respondent's submissions on agency were:

> (i) Prior to 1990 when Choppercare commenced operations Timtalla had a fleet of about 20 helicopters which it maintained itself.
>
> (ii) Choppercare was a wholly owned subsidiary of Timtalla. The directors of both companies were identical.
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> (iii) Mr McMillan had been chief engineer of Timtalla at the time Choppercare was incorporated and thereafter Mr McMillan continued to report to Messrs Costa and Webb, the directors of both companies. Mr Costa's reference to McMillan as "our chief engineer" indicated uncertainty as to whether McMillan was employed by Timtalla or Choppercare in November 1992.
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> (iv) The evidence was confusing and contradictory as to the relationship between Timtalla and Choppercare and which of them was the employer of aircraft engineers.
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> (v) Timtalla's failure to call McMillan as a witness should have led the trial judge to infer that "Choppercare's relationship with Timtalla was not one of independent contract … and that

> … Choppercare and its employees had serviced Timtalla's aircraft as part of Timtalla's "own maintenance organisation" … ."

(vi) The trial judge placed too high an onus on the respondent to prove the relationship between Timtalla and Choppercare particularly when the relevant facts were within the knowledge of Timtalla.

(vii) The authorities relied upon by the trial judge, *Scott, Soblusky v Egan* (1960) 103 CLR 215 and *Hollis v Vabu* (2001) 207 CLR 21 were irrelevant as relating to an owner's liability with respect to the use and operation of a vehicle not to its servicing or repair. The position of repairer is different. The owner's vicarious liability for the negligence of the repairer is founded on the authority that vests in the repairer to repair, and not the degree of direction and control he may lawfully exercise over the repair.

(viii) An aircraft mechanic, Peter Tonycliffe who serviced the helicopter in April 1993 described himself as an employee of Timtalla and Mr McMillian as chief engineer of Timtalla.

[40] The submissions should not be accepted. The trial judge was right to reject the contention that Timtalla was liable vicariously for any negligence in Choppercare essentially for the reasons given by his Honour. The contention founders on two obstacles. The first is one of fact. The second is the limited scope given to agency in this legal context.

[41] The plaintiff's submissions give insufficient weight to the finding of fact, not challenged, that Mr Avey was employed by Choppercare. The submissions also pay insufficient regard to the separate corporate identities of Choppercare and Timtalla. The fact that they shared directors and that one was a wholly owned subsidiary of the other does not, obviously, detract from the basic premise that they were separate and distinct legal entities: *Salomon v Salomon & Co Ltd* [1897] AC 22. The submission also ignores the evidence that Choppercare was incorporated to take over and operate Timtalla's maintenance and servicing operations and to run as a "separate profit centre".

[42] The plaintiff bore the onus, as the trial judge rightly observed, of establishing the agency he alleged. The fact that the task was difficult because of the lapse of time between the events in question and the trial, and the lack of documentary records between two closely related companies, did not mean the onus did not have to be discharged.

[43] Some particular submissions should be noticed. Mr Tonycliffe's evidence was irrelevant. It related to work done on the helicopter of no interest to the litigation and his understanding of who employed him many years earlier.

[44] Mr McMillian's absence from the witness box did not compel the inference that Choppercare was Timtalla's agent for the purposes of servicing the helicopter in November 1992. The judgments in *Jones v Dunkel* (1959) 101 CLR 298 make it clear that the absence of testimony which might have been called does not "make up any deficiency of evidence" (312) but allows the drawing of an inference from facts

which have been proved. "Agency" is not itself a fact. It is a conclusion to which facts give rise. The plaintiff's submission does not identify a fact, relevant to the conclusion, which might be inferred because Mr McMillian did not give evidence.

[45] The submissions do not provide any sufficient basis for doubting the trial judge's finding that the respondent had not established any relationship between Timtalla and Choppercare so as to make the latter the agent of the former.

[46] The law is equally unfavourable to the plaintiff's argument.

[47] *Scott* was a case in which the pilot of a light aeroplane owned by the defendant, Mr Davis, flew it negligently and injured a passenger, a boy, whose parents had asked Mr Davis to arrange a "joy-ride". The owner of the aircraft, who remained on the ground and unable to communicate with the pilot, was said to be vicariously liable for the pilot's negligence. The High Court rejected the claim. In particular the High Court refused to extend the principle of vicarious liability found in cases concerning owners of motor vehicles the drivers of which were negligent, *Soblusky* being perhaps the best known, to other categories of case. Gummow J held that "the vicarious liability principle" for which *Soblusky* was authority should be confined to cases involving motor vehicles. Hayne J (440) was of the same opinion. The judgments emphasised the uncertain ambit of the principle underlying vicarious liability in cases other than those involving employer and employee.

[48] Gleeson CJ appeared to approve the judgment of Jordan CJ in *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 at 320 in which, speaking of the vicarious liability of an owner for the negligence of a driver his Honour said:

> "… in order to fix with vicarious liability a person other than the negligent driver himself, it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the right to direct and control his course of action."

[49] Gleeson CJ remarked that Jordan CJ had not merely applied "the question-begging label "agent"", but had explained "what he meant by it" and (342-3) rejected a wider proposition that Mr Davis was vicariously liable for the pilot's negligence because the pilot was using the aeroplane at Mr Davis' request and for his purposes.

[50] Gummow J said (204 CLR 333 at 418-419):

> "The doctrine of vicarious liability in modern times derives support from the notion that a party who engages others to advance that party's economic interests should be placed under a liability for losses incurred by third parties in the course of the enterprise. Further, the employer is seen as a suitable means for the passing on of those losses through such means as liability insurance and higher prices for the goods and services supplied by the enterprise. Such notions of economic efficiency have little part to play in supporting any broad principle respecting the bailment of chattels or in supporting the imposition of liability upon a party in the position of Mr Davis. Where the supposed principle by which it is submitted a case ought to be decided has no … content, the invitation is to enter a legal category of meaningless reference, and the real determinant of

> a decision expressed to be reliant upon it would lie elsewhere." (footnotes omitted)

[51] Hayne J said (436):

> "… what is significant in what I have called the general fabric of vicarious responsibility, is that, in a commercial setting, much will turn upon the distinction between a contract of service and a contract for services. That is, much will depend upon the distinction between the relationship of employer and employee and that of employer and independent contractor. Vicarious responsibility will be imposed on the employer in the former case for negligent acts or omissions in the course of the employment but will not be imposed on the employer in the latter case. In drawing the distinction … questions of control, and power to control, will often loom large. Further, it is necessary to keep at the forefront of consideration that the control or power to control which will fall for consideration is the control or power given or withheld by a commercial bargain struck between the parties. That is, the vicarious responsibility of A, who contracts with B for B to perform a task, is much affected by the nature of the contract which those parties make. If A stipulates that he or she will have the right to control the way in which B performs the task, it is likely that A will be held to be vicariously responsible for the negligence of B in the course of performance of that task. By contrast, if A stipulates only for the performance of the task and, under the agreement, A has no right to control how B does it, A will ordinarily not be vicariously responsible for B's negligence." (footnotes omitted)

[52] The question of vicarious liability and the principles underlying it, including the characterisation of circumstances which may give rise to it, were considered again in *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said (167):

> "Whatever may be the justification for the doctrine, it is necessary always to recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another (for whose conduct the first is said to be vicariously liable) to do something that is of advantage to, and for the purposes of, that first person. Yet it is clear that the bare fact that the second person's actions were intended to benefit the first or were undertaken to advance some purpose of the first person does not suffice to demonstrate that the first is vicariously liable for the conduct of the second. The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second. But there is an important, albeit distracting, consequence that follows from the observation that the first person seeks to gain benefit or advantage from engaging the second to perform a task. It is that the relationship is one which invites the application of terms like "representative", "delegate" or "agent". The use of those or other similar expressions must not be permitted to obscure the need to

> examine what exactly are the relationships between the various actors."

[53] Later their Honours said: (171-2)

> "Hitherto the distinction between independent contractors and employees has been critical to the definition of the ambit of vicarious liability. The view, sometimes expressed, that the distinction should be abandoned in favour of a wider principle, has not commanded the assent of a majority of this Court.
>
> In *Scott*, the majority of the Court rejected the contention that the owner of an aircraft was vicariously liable for the negligence of the pilot of that aircraft if the pilot operated the aircraft with the owner's consent and for a purpose in which the owner had some concern. The argument that "a new species of actor, one who is not an employee, nor an independent contractor, but an 'agent' in a non-technical sense" should be identified as relevant to determining vicarious liability, was rejected. … But neither … was there established the principle that A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A)."

[54] These passages are inimical to the respondent's submissions as to agency. It is as well to refer to that part of Gummow J's judgment referred to in the passage last quoted. His Honour said (204 CLR 333 at 422-423):

> "The question then is – what principles … support the appellants' case? The law of vicarious liability is pressed into service along with notions of "agency". Reliance was placed upon the idea of one charged or "delegated" by another to perform a "task" and under "control" in doing so. These are indeterminate terms … . A contrast is drawn between "true" agency and the legal nature of the "agency" said to be exercised by the pilot in this case but what this involves is not explained by the appellants. To use the term "agent" is to begin but not to end the inquiry whether the appellants make out their case. The appellants' submissions eschew the hard questions that would have to be answered in their favour.
>
> What the appellants seek to have this Court do is to introduce a new species of actor, one who is not an employee, nor an independent contractor, but an "agent" in a non-technical sense. They then seek to advance this indeterminacy by attaching vicarious liability to the defendant whose social connection with that actor occasioned their injuries."

[55] Much the same problems bedevil the plaintiff's submissions which do not come to grips with the task of establishing why, as a matter of legal principle, Timtalla should be held liable for Choppercare's negligence in supplying and/or installing the NTN bearing.

[56] The trial judge did not expressly find whether the relationship between Timtalla and Choppercare was that of employer and employee, or employer and independent

contractor. His Honour determined the point against the plaintiff by reference to notions of control and direction. Such as it was the evidence supported a conclusion that the relationship was that of employer and independent contractor. The separate corporate existence of Choppercare and its employment of licensed aircraft mechanical engineers to conduct aircraft maintenance suggests strongly that Choppercare was conducting its own business and was not Timtalla's employee. The notation on the requisition form that the work was done for Timtalla as a "customer" points in the same direction. Such a conclusion would be fatal to the respondent's appeal against Timtalla.

[57] The trial judge preferred to rest his decision on control. There may be some doubt about the suitability of such a concept as the determinant for vicarious liability but if control is a yardstick then the relationship between the parties must be such that the person who was said to be vicariously liable must have the right of control over the way in which the person performing the task did it. By contrast, as Hayne J pointed out in *Scott*, if the relationship between them was only that one would perform the task for the other there would not be vicarious liability. There is a complete absence of evidence on the point. Nothing is known of the terms of the engagement between Timtalla and Choppercare. The task, though, was a specialist one which could be performed only by a licensed and qualified engineer. It was not of a nature as to allow Timtalla to have specified how the replacement of the clutch assembly was to be performed.

[58] The judgments appear to show that it is not sufficient to make A vicariously liable for the tortious negligence of B by designating B as A's agent. There must be something in the relationship between A and B, in the interaction between them, to show that the designation is appropriate and apposite. It will not be enough to show that B acted at A's request and that the actions conferred a benefit on A. If A's control over B is to be the ingredient which establishes agency the evidence must show what degree of control was, or could have been, exerted; the manner in which control was or could have been exerted; and the matters with respect to which control was or could have been exerted. Without some such analysis the term "control" is devoid of meaning.

[59] In this case the evidence showed only that:

- Timtalla and Choppercare were separate companies;
- Choppercare had its own employees;
- Timtalla was a customer of Choppercare;
- Choppercare was asked to replace the clutch assembly on Timtalla's helicopter, and did so; and
- Choppercare was not paid for the work in the past.

This amounts to no more than proof that the work was done by Choppercare at the request of Timtalla for the latter's benefit. This is insufficient to establish agency. There is a complete absence of evidence on the topic of "control".

[60] The trial judge was right to reject the respondent's arguments on agency and vicarious liability.

[61] The trial judge then considered the alternative basis for imputing liability to Timtalla, that it had a non-delegable duty to see that reasonable care was taken in

the installation of the clutch assembly and that if such care were not taken, as appeared to be the case because Mr Avey installed the NTN bearing, it was in breach of the duty. The plaintiff does not appear to have argued before the trial judge that there was a similar non-delegable duty owed to him by Timtalla with respect to the service undertaken by ATA in July 1993. That argument was advanced on appeal.

[62] The plaintiff relied upon *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. His Honour referred to the judgments in that case and noted:

> "[73] In *Fitzgerald v Hill* (2008) 51 MVR 55; [2008] QCA 283 McMurdo P engaged in a careful analysis of the origins and essential features of a non-delegable duty. Her Honour synthesised the various authorities in the following way:
>
> > "[66] … The non-delegable duty of care is a special duty to ensure that reasonable care is taken for the safety of those to whom it is owed. It is not vicarious; it is a personal duty, breach of which requires fault. It is an onerous duty in that if a defendant owing the duty to a claimant does not take reasonable care to avoid a foreseeable risk of injury which eventuates causing damage to a claimant, then liability cannot be avoided by the defendant engaging another to carry out the defendant's responsibilities.
> >
> > [67] Whether the duty arises in a particular case will depend on the relationship between claimant and defendant. It is well established that this non-delegable duty is owed by a school authority to a pupil and by a hospital to a patient. Factors which support the existence of the duty include whether the relationship is one where the defendant has a high degree of control, the claimant is vulnerable, or the claimant has a special dependence on the defendant. The categories of situations where a non-delegable duty of care is owed are not closed, but courts should exercise care in extending them."
>
> [74] The following situations have been recognised as giving rise to a non-delegable duty of care:
>
> (a) employer – employee: *Kondis v State Transport Authority* (1984) 154 CLR 672;
> (b) hospitals – patients: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553;
> (c) schools – students: *Commonwealth v Introvigne* (1982) 150 CLR 258;
> (d) occupiers – contractual entrants: *Watson v George* (1953) 89 CLR 409, *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38; and
> (e) bailees for reward: *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

> [75] As is noted by McMurdo P the categories of situations where a non-delegable duty of care is owed are not closed. The plaintiff has not identified any recognised category into which this case would fall but says that it comes within the general description in *Burnie Port Authority* referred to above."

[63] His Honour rejected an argument that the duty on Timtalla was non-delegable because of the "hazardous or dangerous nature" of servicing a helicopter. He referred to *Burnie Port Authority* at 558 and concluded:

> "[81] The relationship between Timtalla and the plaintiff did not fall into any of the recognised categories which give rise to a non-delegable duty of care. The plaintiff seeks to extend the reasoning in *Burnie Port Authority* to cover Timtalla but he has not satisfied the preconditions for application, that is, he has not established that Timtalla had undertaken the care, supervision or control of him or the property of another or was so placed in relation to him or his property as to assume a particular responsibility for his safety, in circumstances where he might reasonably expect that due care would be exercised."

[64] This second basis for alleging that Timtalla should have been found liable to pay him damages can be disposed of more briefly. For the purposes of the submission the plaintiff postulates that both Choppercare and ATA were independent contractors whom Timtalla engaged to service and maintain the helicopter. The duty which it could not delegate, or discharge, by trusting the work to an independent contractor was strict and was one "to ensure that reasonable care is taken". If the contractor to whom a task was delegated did not take reasonable care the person making the delegation will have breached his duty "to see that reasonable care was taken".

[65] The plaintiff relies upon *Burnie Port Authority* in which Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said: (550-551)

> "It has long been recognized that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and "more stringent" kind, namely a "duty to ensure that reasonable care is taken". Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken.
>
> …
>
> In *Kondis v State Transport Authority*, in a judgment with which Deane J and Dawson J agreed, Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of

> work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the common "element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken" is that "the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised." It will be convenient to refer to that common element as "the central element of control". Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person." (footnotes omitted)

[66] The respondent submitted:

> "… all occupants of the helicopter from the time of hire were plainly vulnerable to defects in the helicopter of which (they) … would be unaware … . …operators and passengers would assume that … appropriate steps had been taken to ensure compliance with the requirements of the maintenance manual with respect to safety, and that appropriate inspections had taken place to confirm that that was so. The circumstances were therefore such that a duty equivalent to that owed by an employer to an employee was applicable."

[67] The case is not that of employer and employee and it does not assist the plaintiff to assert that it is. The case is one of the engagement of an independent contractor to perform a service which was done without reasonable care resulting in injury to a third party. The question is whether the circumstances come within the description given in *Burnie Port Authority*, that Timtalla undertook the care, supervision or control of the plaintiff or was so placed in relation to him as to assume a particular responsibility for his safety where the plaintiff reasonably expected that that care would be exercised. An affirmative answer will extend the category of case in which the non-delegable duty is recognised.

[68] Recent decisions of the High Court suggest that the imposition of non-delegable duty, or strict liability, is exceptional. The categories of case in which it applies should not therefore be expanded without some compelling reason. Save, perhaps, for cases which are very closely analogous to existing categories the expansion of categories should not be undertaken by an intermediate appellate court.

[69] The reasons for this reluctance may be seen in the judgments in *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22. This case concerned personal injury suffered by a pedestrian who fell through a flimsy cover concealing an open manhole. The cover was put in place by contractors engaged by the local authority to perform work on a road and adjacent footpath. Gleeson CJ said: (29)

> "In practice, the difference between a duty to take reasonable care and a duty to ensure that reasonable care is taken matters where it is not an act or omission of the defendant, or of someone for whose

> fault the defendant is vicariously responsible, that has caused harm to the plaintiff, but the act or omission of some third party, for whose fault the defendant would not ordinarily be vicariously responsible. … In some cases, a duty to take care involves a duty to act personally. That kind of non-delegability should not be confused with a case where the engagement of a third party to perform a certain function is consistent with the exercise of reasonable care by a defendant, but the defendant's legal duty is not merely to exercise reasonable care but also (if a third party is engaged) to ensure that reasonable care is taken. In such a case, the third party's failure to take care will result in breach of the defendant's duty. The legal consequence is that the circumstance that the third party is an independent contractor does not enable the defendant to avoid liability. It is because of its practical effect of outflanking the general rule that a defendant is not vicariously responsible for the fault of an independent contractor that the identification of this special responsibility or duty is important."

[70] Later his Honour said: (34-35)

> "A "special" responsibility or duty to "see" or "ensure" that reasonable care is taken by an independent contractor, and the contractor's employees, goes beyond a duty to act reasonably in exercising prudent oversight of what the contractor does. In many circumstances, it is a duty that could not be fulfilled. How can a hospital ensure that a surgeon is never careless? If the answer is that it cannot, what does the law mean when it speaks of a duty to ensure that care is taken? It may mean something different. It may mean that there should be an exception to the general rule that a defendant is not vicariously responsible for the negligence of an independent contractor. … If the law were frankly to acknowledge that what is involved is not a breach by the defendant of a special kind of duty, but an imposition upon a defendant of a special kind of vicarious responsibility, a different problem would have to be faced. It would be necessary to identify and justify the exceptions to the general rule that a defendant is not vicariously responsible for the negligence of an independent contractor, and to provide a means by which other exceptions may be identified when they arise."

[71] Hayne J noted the rationale for the imposition of a non-delegable duty on employers given by Mason J in *Kondis*, that the employee's safety was in the employer's hands and that the employee could reasonably expect that reasonable care would be taken so there was no unfairness in imposing a non-delegable duty to devise a safe system of work. Hayne J said of the analysis (74-75):

> "Whether similar considerations can be seen to be in play in two other examples of non-delegable duty … namely, the duty owed by a hospital to its patients and the duty owed by a school authority to pupils … need not be decided. It may be noted, however, that in the case of both the hospital and the school, the party that owes the duty has control of the circumstances to which the beneficiary of the duty is exposed, and the beneficiary of the duty, in the one case because

> of infirmity and in the other because of age, is unable to assert any independent control over the way in which he … is treated … as Gummow J noted in *Scott* … the criteria identified may explain at least some cases where a non-delegable duty has been held to exist, and thus be "historically descriptive", but it is greatly to be doubted that such criteria are "normatively predictive".
>
> … Mason J gave a third example of non-delegable duty in *Kondis* – the liability owed by an occupier of land to those who were then classified as invitees. Classification of entrants … has since been discarded as a consideration relevant to the definition of the content of the duty of care owed by an occupier of land to entrants to the land. Whether, or in what circumstances, this particular form of non-delegable duty survives this re-expression of the occupier's duty … are questions that do not arise directly in the present matter. Nor do similar questions about the nature or extent of duties owed by hospitals to patients or by school authorities to pupils arise. It is sufficient to notice that decisions of this Court after *Kondis*, in particular *Scott v Davis* and *New South Wales v Lepore*, point out the many difficulties that lie behind adopting principles cast in terms of non-delegable duties. Not least of these difficulties is that a non-delegable duty is a form of strict liability and *Burnie Port Authority v General Jones Pty Ltd*, in its treatment of the rule in *Rylands v Fletcher*, shows the disfavour with which strict liability is now viewed." (footnotes omitted)

[72] Crennan J agreed with the reasons of Gleeson CJ and of Hayne J.

[73] Callinan J said (87):

> "… recent authority of this Court leans strongly against non-delegability and absolute liability in tort cases. *Northern Sandblasting Pty Ltd v Harris*, which might suggest otherwise, has almost certainly been at least impliedly overruled by *Jones v Bartlett*, and *Soblusky v Egan*, which appeared to impose, by means of a special and oppressive form of vicarious liability, non-delegability in substance, has at least to be doubted as a result of the reasoning of this Court in *Scott v Davis*." (footnotes omitted)

[74] In *Scott* Gummow J was similarly critical of the imposition of non-delegable duty. His Honour said (416-417):

> "Further, with respect to any doctrine of "non-delegability", there is a difficulty in identifying any principle which dictates an expansion of liability such that the defendant becomes, in effect, the insurer of some activity even when it is performed by another. The explanation of the cases given by Mason J in *Kondis* was accepted in *Burnie Port Authority v General Jones Pty Ltd*. In *Kondis*, Mason J identified (i) cases where the defendant "has undertaken the care, supervision, or control of the person or property of another" and (ii) cases where the defendant is so placed in relation to the person or property of the plaintiff as "to assume a particular responsibility" for the plaintiff's safety, in each case where the plaintiff might reasonably expect the exercise of due care. Such an approach requires some caution in its

> general application. It may explain the cases on "non-delegability"; but many other cases not decided on that basis also may have answered the criteria stated by Mason J. How then does the court decide a fresh case where the preferred criteria are historically descriptive but not normatively predictive? Some caution is required because the characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty."

[75] The judgments serve as a distinct warning against expanding the scope of non-delegable duty or strict liability. This case is one of an ordinary type where the owner or bailee of a chattel delivers it to a tradesman or a technician for service or repair. Whether the object of the contract be an aeroplane, motor vehicle or boat it is a foreseeable consequence that if the work is performed carelessly injury may result to those in the plane, vehicle or boat or those in its proximity when the defectively performed work results in mechanical breakdown. The court was not referred to any case in which the owner of a chattel has been found liable for the negligence of the independent contracting repairer.

[76] The notion that there be such liability is contrary to what was said in many of the passages cited from *Scott*, *Sweeney* and *Leichhardt Municipal Council*. The plaintiff's case does not have the features described by Hayne J in *Leichhardt Municipal Council*. Timtalla did not have control of the circumstances to which the plaintiff, the beneficiary of the alleged duty, was exposed. That is to say it did not control the employment of the aircraft maintenance engineers, or the purchase of parts, or the performance of specialist services. Nor was the plaintiff unable by age or infirmity, or any other suggested reason, unable to assert any independent control over the way in which he was treated. He could have commissioned his own inspection of the helicopter, or had it tested for airworthiness.

[77] The plaintiff's submission seeks to apply to a common place situation a duty of a strict and onerous kind which the law, on the authorities, dislikes.

[78] Lastly the plaintiff put his case against Timtalla on the basis that it was itself negligent in not commissioning a check of the airworthiness of the helicopter at the time it was hired to Shankman. The respondent identifies four facts which are said to give rise to the duty. They were:

> (i) The age of the helicopter;
> (ii) A perusal of the logbook would have shown instances of the upper actuator bearing having been regreased a practice not recommended by the helicopter's manufacturer and which may have indicated that the bearing was not "a Robinson bearing";
> (iii) The inspection of the bearing was relatively simple;
> (iv) A perusal of the logbook would have shown that there had been no inspection to ascertain whether non Robinson bearings had been fitted.

[79] The argument must be rejected. It was not pleaded or litigated, as counsel for Timtalla point out. The plaintiff sought to maintain his contention by referring to paragraph 6 and 11A of the Fourth Further Amended Statement of Claim but these

do not plead the duty, or facts giving rise to it, which are the basis of the submission. Paragraph 6 pleaded that Timtalla:

> "… owed to the (respondent) a duty of care to take all reasonable precautions to ensure that the … Helicopter … was at all material times in a safe mechanical condition for use … ."

Paragraph 11A pleaded a duty on Timtalla:

> "To ensure that the … (NTN) bearing … installed … on 14 November 1992 was replaced with the correct … bearing … and that such bearing remained so installed between the date of replacement and 21 June 1994."

[80] It will be noted that there is no allegation of a duty to "(commission) a 'check' on the 'airworthiness of the Helicopter' at the time (of) (the) (hire) to (Shankman)". Nor are the facts relied upon in the submission pleaded as giving rise to that or any other duty.

[81] Breaches of the duty alleged in paragraphs 6 and 11A are apparently those set out in paragraph 14. It is not necessary to set out the contents of that paragraph. It is enough to record that none of the particulars of breach is a failure to inspect the helicopter at the time of the making of the agreement for hire to determine whether it was airworthy, or whether unauthorised parts had been fitted.

[82] The trial judge rightly rejected the plaintiff's arguments that Timtalla owed it a duty to ensure that Choppercare and/or ATA exercised reasonable care in servicing the helicopter. The plaintiff's appeal against the dismissal of his action against Timtalla should be dismissed with costs.

ATA's appeal on liability

[83] ATA was found to be liable for the negligence of its employee Mr Darren Fisher in failing to observe during his July 1993 service of the helicopter that the NTN bearing had been fitted. The trial judge found:

> "[87] On 22 July 1993 he serviced the helicopter. As might be expected, he could not recall what was done and relied on his notes in the worksheet he completed with respect to the service.
>
> [88] In 1994 he was interviewed by Mr Chadbourne as part of his investigation into the accident. Mr Chadbourne made notes of the conversation. He recorded the following:
>
> > 'Darren states that he took bearing off of clutch shaft in workshop during sheave replacement. Sheave serial number sticker is sprag clutch serial number and so was transferred to new sheave. Seals from bearing were removed. Bearing cleaned and then regreased. Outer race retaining nuts removed to facilitate seal removal.'
>
> [89] Mr Fisher had no recollection of that conversation but he agreed that the process described would 'make sense'.

I accept that the conversation took place and accurately recorded what Mr Fisher did during that service. It follows from the finding I made with respect to the time at which the NTN bearing was installed that Mr Fisher must have removed the seals and cleaned and regreased the bearings of the NTN bearing.

[90] There was a substantial amount of evidence about the appearance of the Robinson approved bearing and the NTN bearing. The seals were different colours and the NTN bearing had letters and numbers impressed on the seal in a manner in which they could, when clean, be easily seen.

[91] The helicopter was serviced again by Mr Fisher on 21 November 1993. In April 1994 a 100-hourly service was performed by Jeremy Smith of A & A Air Services.

[92] The plaintiff submits that Mr Fisher should have, during the process of re-greasing, noticed that the letters 'NTN' were embossed on the seal and that there were other numbers and letters. None of those numbers and letters had any relevance to serial numbers in the Robinson manual. It was also argued that the difference in colour of the seals was also something which should have alerted Mr Fisher. The fact that the bearing had the letters NTN on it should have been sufficient to alert a person conducting maintenance, because NTN is a well known manufacturer of commercial bearings. Mr Fisher, having previously serviced Robinson R22 helicopters, should have noticed that there was a difference in the bearing which he was re-greasing from those bearings which he had dealt with in other R22 helicopters. The failure to do so was substantial. The duty that a person in Mr Fisher's position has in these circumstances is considerably higher than it would be when dealing with an engine or machine which is static and situated on the ground. The standard of care necessarily rises in accordance with the principles in *Burnie Port Authority* in these circumstances.

[93] I am not satisfied that there has been sufficient evidence to establish on the balance of probabilities that Mr Fisher did contaminate the bearing when he re-greased it in 1993. But, he should have realised that the bearing he was working on was not an approved bearing. The details of the Robinson approved bearing are set out in the manual. A specific warning was prominently displayed in the manual (see [11]). The failure to take action - either by, at least, investigating further to determine the provenance of the bearing or, more prudently, replacing it with an approved bearing - was a serious breach of the duty owed by Mr Fisher and, through him, ATA.

[94] Had these breaches not occurred, then the NTN bearing would have been replaced by an approved Robinson bearing

> and the failure would not have occurred. Dr Gilmore's view was that the more robust nature of a Robinson bearing would have meant that, as it approached failure, there would have been the 'warning' noise referred to by Dr Casey.
>
> [95] The plaintiff has established that ATA breached the duty it owed him and that the failure of the bearing was, in part, due to that breach."

[84] ATA submitted that the trial judge led himself into error by repeatedly using the expression "Robinson approved bearing" and similar expressions when by 1993 Robinson had not issued any document which described approved bearings or listed approved manufacturers. The submission cannot be accepted. Details of the bearing were set out in the maintenance manual as the trial judge remarked in [93] of the reasons; the prominent warning, reproduced in [12] of the trial judge's reasons, described the relevant bearing as "[t]he A647-4 bearing" which has "modified internal clearance by RHC". The trial judge's references to the "Robinson approved bearing" were no more than shorthand references to the bearing described in that part of the manual. It is convenient to adopt the same shorthand in these reasons, recognising that it leaves open the question whether the differences between the Robinson approved bearing and the NTN bearing should have been apparent to Mr Fisher when he worked on the helicopter.

[85] ATA submitted that there was no satisfactory evidence which justified the trial judge's affirmative answer to that question. ATA emphasised that the external dimensions of the bearings were the same, the difference between the internal clearances of the bearings were detectable only by the use of equipment which was not available to Mr Fisher when he performed his work in July 1993, and Robinson had not published any list of approved manufacturers or any description of the Robinson approved bearing which was sufficient to distinguish its appearance from that of the NTN bearing.

[86] There was, however, a substantial body of evidence that there were marked noticeable differences between the external and internal features of the NTN bearing and a Robinson approved bearing. The evidence included:

(i) A letter from the Robinson Helicopter Company dated 2 August 1995 stated that Robinson masked the seals and never painted them, whereas the NTN bearing seal was painted grey; red silicone rubber was used to manufacture the NTN seal, but Robinson always used bearings with black rubber seals; and all the bearings assembled by Robinson at the relevant time had been sealed with a named sealant, but the NTN bearing had no grey sealer between the bearing outer ring and seal. Photographs of damaged seals which had been removed from the crashed helicopter clearly showed the markings "NTN" and "6306LD" impressed in the bearing seal. Robinson had never used NTN bearings on the upper clutch shaft. Between May 1998 and January 1989 about 2,480 of these bearings were manufactured by NHBB (whose bearings had no markings on the seal) and the remaining bearings, about 300 in total, were manufactured by "MRC" and "Fafnir". All other Robinson bearings were manufactured by NHBB. Thus the vast majority of Robinson

approved bearings were manufactured by NHBB and had no markings on the seal.

(ii) Mr Hole provided a report for the Civil Aviation Authority. He examined photographs of the remains of the bearing and bearing housing in the helicopter after the accident and of the grease seals bearing the identity marks "NTN" and "6306LB", which was a commercial bearing and not an approved Robinson bearing, as well as a "genuine Robinson clutch assembly bearing". Mr Hole reported that the genuine Robinson bearing seals had no markings "which indicates that this is a genuine Robinson bearing".

(iii) Mr Hole also reported that the cage which fitted around the circumference of the inner ring and housed the spherical steel balls, which would have been visible to Mr Fisher after he removed the seal, was made from a brass alloy and appeared to be more solid than the ball cage in commercial bearings. Photographs in evidence clearly depicted the different appearances of the cages, including the noticeably more robust construction of the Robinson approved bearing cage.

(iv) ATA referred the Court to evidence that NTN had supplied a bearing with an apparently similar cage, but that bearing bore a part number which differed from the designation "6306LD" found on the part in the crashed helicopter: that evidence was therefore of no relevance to the present issue.

(v) Mr Chadbourne, an Air Worthiness Inspector with the Civil Aviation Safety Authority, made an investigation into the external, visual differences between a commercial bearing and the Robinson bearing. He gave evidence that "the commercial bearings have markings on the grease seals on the outside of the piece identifying the manufacturer and the type of the bearing and … the genuine Robinson bearing did not have any of those markings on … it."

(vi) Dr Gilmore, an engineer with expertise in this field, gave evidence that the "NTN" marking clearly indicated to a person familiar with bearings that it was manufactured by NTN Corporation. That company was a commercial bearing manufacturer. The NTN markings embossed on the seals were quite clearly visible. Whilst the marks could be covered by grease or dust, they would be visible if the bearing was washed and reassembled. Like Mr Hole, Dr Gilmore also referred to the difference between the pressed steel cage used by NTN and the more robust, machined brass cage in the Robinson approved bearing.

[87] Contrary to ATA's submission, there was persuasive evidence that Mr Fisher should have known of those differences.

[88] The plaintiff called Mr McGee, who had completed a factory overhaul course for clutch assemblies at the Robinson factory in 1988. He gave evidence that the Robinson bearing was a sealed unit. The grease was intended to remain in the bearing for its life, whereas other commercial bearings required periodic greasing. That evidence was consistent with the absence from the maintenance manual of any

procedure for greasing the bearing. Consistently with Mr McGee's evidence, Dr Gilmore's opinion was that a licensed aircraft maintenance engineer "would have been aware that the genuine Robinson bearing was a sealed bearing, the bearing did not need to be cleaned internally, grease was not to be replaced or supplemented, and the bearing was only to be overhauled by Robinson certified personnel", and the "action of cleaning and regreasing would … have prompted questioning as to why that particular bearing did in fact require such maintenance i.e. it was most probably not a genuine Robinson bearing as the Robinson bearings did not require such maintenance."

[89] A transcript of a conversation between the plaintiff's lawyers and Mr McGee on 3 June 2005, which was reproduced in Dr Gilmore's supplementary report, included a statement by Mr McGee that "they [Robinson Helicopter] make it clear to you when you do the maintenance course at the factory that it is a modified bearing and that you can't substitute it with a commercial bearing …". As Dr Gilmore observed "the bearings seen at the maintenance course would not have had NTN on the seals." That must have been so, since Robinson had never used NTN bearings in the relevant part. Keeping in mind also the critical importance of the integrity of this bearing which was flagged in the maintenance manual, the inference was readily available that Mr Fisher who, like Mr McGee, gave evidence that he was "factory trained" to work on the Robinson helicopter, should have known of and been alert to the differences between the Robinson approved bearing and the noticeably less robust NTN commercial bearing.

[90] As to the differences in colour of the bearing seals, when it was suggested to Mr McGee that he did not know what colour the seals might be he answered "only from my experience". That answer suggested that he was familiar with the difference between the colour of the seal on the Robinson approved bearing and the colours of the seals on commercial bearings. He did not depart from that evidence. ATA referred to Mr McGee's evidence in cross examination that it would be "possible" that manufacturers might change vendors for parts like bearings, the colour of a seal might change within the same part number, before the accident he had not "directly" known whether NTN bearings were approved, and he did not "necessarily" know who was "the vendor". That evidence was equivocal. It, and Dr Gilmore's similar evidence, did not require the trial judge to reject the evidence about the significance of the colours of the seals. The inference remained open that the distinctive colour and unequivocal markings on the seal of a NTN bearing should have distinguished that commercial bearing from a Robinson approved bearing in the eyes of a licensed aircraft maintenance engineer qualified to work on the helicopter.

[91] ATA referred also to Mr McGee's statement in his report that the Robinson approved bearing, though given a number in the warning in the manual, was an "unserialised item" and that made it very hard to ascertain whether or not that bearing was removed or installed. It was no doubt preferable for such an important part to be impressed with a Robinson serial number, but Mr McGee's statement did not detract from the significance of the noticeable differences in the seal colour and in the cage structure between the NTN bearing and a Robinson approved bearing.

[92] The structural difference seems to be quite marked. The commercial bearing has a noticeably less robust cage. The inference that so much should have been apparent to licensed aircraft maintenance engineers who, like Mr McGee and Mr Fisher, were

trained to maintain the particular helicopter, was expressed by Dr Gilmore in his evidence. He said that "as soon as you pulled the seal off the NTN bearing you would say to yourself, '… this isn't a Robinson bearing, is it'". Although a licensed aircraft mechanical engineer might not know what a Robinson bearing looked like if it was sealed, "you would have to know that the Robinson cage was a machined – if you knew that the Robinson cage was a two-piece machine riveted cage and you took the seal off the NTN bearing, you would realise that that isn't a machined cage, it's a pressed steel cage"; that would be obvious and, "[y]ou don't have to be a [licensed aircraft maintenance engineer] to know that … any fitter and turner would know that".

[93] The inference that a qualified engineer should have appreciated that the NTN bearing was not a Robinson approved bearing remained available even though Robinson had not published that fact or advertised the differences between the bearings in the manual or in any other document available to the public. When Dr Gilmore was asked whether, prior to the accident, there was any publication available to maintenance engineers in the field which explained what a genuine Robinson bearing looked like externally, Dr Gilmore responded that he thought "that was their job." ATA referred to a statement by Dr Gilmore that for a person to recognise that the bearing was not a genuine Robinson bearing, the person would have to be aware that Robinson only used NHBB, MRC and Fafnir bearings, and never an NTN bearing. Dr Gilmore added, however, that:

> "… if the seals were removed from the bearing to allow cleaning and regreasing, the physically different size and construction of the bearing cage would be visually evident (a solid machined cage for the Robinson and a lighter pressed steel construction for the NTN). I assume that a [licensed aircraft maintenance engineer] authorised to work on Robinson Helicopters would be aware of the characteristics and markings on the correct OEM (original equipment manufacturer) bearings which should be installed, and recognise them through experience, familiarity and training".

[94] It does not seem a surprising conclusion that an engineer who was factory trained to work on a part which was known to be integral to the safe operation of the helicopter should have been able to distinguish it from a prohibited commercial substitute.

[95] ATA also referred to the evidence of Mr Chadbourne that he obtained the information about the different markings on the bearing seals from Robinson, it was not spelt out in the Robinson manuals, it was not something that he knew before he investigated it, and he did not know whether or not Robinson had ever approved NTN bearings. Considered in isolation that evidence provided some support for ATA's argument, but Mr Chadbourne added that if a licensed aircraft maintenance engineer experienced with Robinson aircraft saw a bearing with a NTN embossment and a NTN number which was not a number referred to in the maintenance manual, that should "ring alarm bells for him". Mr Chadbourne gave evidence that any licensed aircraft maintenance engineer who had been working on Robinson helicopters and who had not been working with unapproved parts would find it surprising to see numbers and markings on the bearing because a Robinson bearing had no marks on it.

[96] Mr Chadbourne also gave evidence that the marking "6306LB" on a NTN bearing would not appear on a Robinson bearing and it did not appear in the manual for the

helicopter. Not only would there be nothing in the manual to confirm the approval of the NTN part numbered 6306LB, but that number would be inconsistent with the number that does appear in the manual. ATA submitted that this evidence did not advance the plaintiff's case because the evidence was that most Robinson approved bearings had no markings on them and the evidence did not preclude the possibility that some Robinson approved bearings (those not manufactured by NHBB) did have markings on them. The possibility that a relatively small number of the helicopters might have borne markings on the seals does not detract significantly from the force of Mr Chadbourne's evidence, and the other evidence discussed earlier, that a licensed aircraft maintenance engineer should have been surprised to find NTN markings on a bearing.

[97] ATA relied upon correspondence between the Civil Aviation Authority and Robinson Helicopter Company after the accident as an indication that it was difficult to identify whether a particular bearing was a Robinson approved bearing. On 18 July 1994 Mr Oliver, a senior airworthiness inspector with the Civil Aviation Authority, wrote to Mr Frank Robinson of the Robinson Helicopter Company and stated that investigations had indicated that an incorrect bearing ("NTN6306LB") had been fitted to the helicopter, that Mr Oliver's research had unearthed advice from R22 Maintenance Organisations that the only identification that could be seen on the Robinson supplied bearing was "FAFIR306PP" on the bearing dust seal, and that it appeared that no other identification marks were visible on that bearing to permit maintenance personnel to confirm that the bearing was a genuine Robinson supplied bearing. Mr Oliver suggested that to make the bearing more readily identifiable it might be appropriate to permanently mark on the side of the bearing inner race its part number and perhaps a "S/N". On 3 August 1994 Mr Oliver wrote another letter to Mr Frank Robinson in which Mr Oliver noted that the Authority was still trying to determine if the clutch actuator bearing was a Robinson supplied item and, for that purpose, asked for the dimensional changes specified for the bearing and the type of grease Robinson specified. This correspondence is not of great weight in the fact finding exercise. The trial judge did not err by acting upon the evidence of the witnesses, which was largely consistent in the identification of the differences between the bearings. Furthermore, although Mr Oliver referred to the absence of identification marks which enabled maintenance personnel to "confirm" that the bearing was Robinson approved and that the authority was yet to "determine" if the bearing was genuine, his letter of 18 July 1994 plainly conveyed that investigations had indicated that an incorrect bearing had been fitted. It was unsurprising that the Authority would nonetheless seek confirmation from the manufacturer of the helicopter.

[98] ATA pointed out that it was not put to Mr Fisher in cross examination that he should have appreciated that a NTN bearing was not an approved Robinson bearing and nor were the grounds for that conclusion put to him. The point is not without substance, but it is relevant that most of the evidence upon which the plaintiff relied in this respect was contained in documents made available to ATA before Mr Fisher gave evidence. ATA was on notice of the plaintiff's case about the differences between the bearings and could have adduced evidence on the point from Mr Fisher, if he had any relevant evidence to give.

[99] The last qualification might be significant. Mr Fisher did not deny that the bearing in the helicopter was a NTN bearing. He said only that he could not recall. He had no recollection of "NTN anything to do with that clutch assembly". He had no

recollection of any number relating to the clutch assembly. When Mr Fisher was pressed in cross examination to give details of the Robinson procedure for his work of greasing the bearing, he did not answer the question. Instead he said that he had not worked on the bearings since 1994. That was 16 years before he gave evidence. It is not surprising that he seemed unaware of the fact that the maintenance manual, the relevant parts of which were in evidence, did not prescribe any such procedure for the service he performed. Perhaps it was thought that Mr Fisher's apparent failure of recollection made it a pointless exercise for the cross examiner to put to him that he should have appreciated that a NTN bearing was not an approved Robinson bearing. In any event ATA did not submit that it complained to the trial judge of the omission to put that to Mr Fisher or that it asked his Honour to reject the plaintiff's case on that ground. ATA did not submit at the trial or in this appeal that the omission to put those matters to Mr Fisher amounted to a breach of the rule of fairness in *Browne v Dunn* (1893) 6 ER 67 such as required the trial judge to reject the plaintiff's case. In these circumstances the failure to put the relevant matters to Mr Fisher does not justify the Court in overturning the trial judge's findings of fact.

[100] ATA submits that the trial judge applied a more stringent standard of care to Mr Fisher than to Mr Smith when his Honour found in [37] of the reasons that Mr Smith "had no particular reason to take any more notice of the bearing than any other part and he did not give any evidence about how he might have detected a non-genuine bearing … in contrast with his discovery of the non-genuine bearing in VH-HRU [a different helicopter] – this occurred as a result of a CASA directive when he was specifically inspecting VH-HRU for that purpose." The submission overlooked the point made by the trial judge earlier in the same paragraph that the accumulation of grease and dirt through use of the helicopter would make identification of the imprint on the seals of the bearing's manufacturing origin difficult for Mr Smith who (unlike Mr Fisher) did not remove the seal, grease the bearing, and clean it. The same point requires rejection of ATA's further submission that Mr Smith's failure to notice that the NTN bearing had been installed severed the causal connection between the negligence of ATA, through Mr Fisher, and the accident.

[101] The regulations made under the *Civil Aviation Act* 1988 (Cth) required Mr Fisher to carry out the maintenance in accordance with the approved maintenance information from Robinson and the maintenance manual did not expressly require engineers to check the provenance of any part. ATA relied upon those matters, and upon the facts that the bearing had not been the subject of a prior complaint about its suitability for purpose and no problem had been identified in any earlier service, for its submission that it did not owe any duty to determine the provenance of the components of the engine in the helicopter. ATA also submits that the trial judge engaged in impermissible hindsight reasoning by holding that ATA had breached its (admitted) duty to take reasonable precautions and to service the helicopter in a competent and professional manner.

[102] These submissions are based upon the false premise that ATA owed a duty to investigate the provenance of a component in the helicopter's engine during every service where there was no reason to doubt that the part was approved by the manufacturer. The trial judge did not impose any such duty. On the facts found by his Honour, ATA was put on notice that the bearing was not an approved part. The maintenance manual set out what was required during every 100 hourly

inspection of the upper actuator bearing and it did not prescribe the removal of the seal or the greasing of the bearing. Mr Fisher embarked upon that additional work in addition to the work prescribed in the manual. In performing that work, the marks identifying NTN as the bearing manufacturer, the colour of the bearing seal, and the appearance of the bearing cage should have become apparent. Mr Fisher should have known from the training he undertook as part of his qualifications that those features differed from the features of the specially modified bearing which Robinson had designated in the maintenance manual. In those circumstances, and where personal injury or loss of life was identified in the maintenance manual as a risk of failing to heed the emphatic warning against the substitution of the designated bearing, there is no reason to doubt that Mr Fisher's duty of care extended to investigating the provenance of the bearing.

[103] The trial judge's conclusion that ATA, by Mr Fisher, negligently failed to observe that a NTN bearing had been fitted should be affirmed. ATA's negligence contributed to the accident in the way explained by the trial judge in [94]-[95] of his Honour's reasons.

[104] ATA submits that the trial judge erred in not finding that the plaintiff was guilty of contributory negligence. The grounds upon which ATA relies for that submission were rejected by the trial judge in the following passage of his Honour's reasons:

> "*Flying too close to the ground*
>
> [104] The defendants referred to *Civil Aviation Regulations* which, in that part of Australia, required a minimum altitude of 500 feet. The defendants acknowledge that the regulations permitted mustering at lower altitudes but said that that was only permitted when needed for the job and with essential crew on board. This allegation is a misconception. There is no relationship between any breach of a civil aviation regulation as to a minimum altitude or with respect to the nature of the flight being undertaken. Assuming that the plaintiff was in breach of the regulations there was no connection between the risk and the alleged contributory negligence. To take the defendants' argument to its logical extreme would mean that a person in the plaintiff's position would be negligent if he descended below 500 feet at any time. That would make it difficult to land. There was no relationship between the failure of the bearing and either the height at which the helicopter was or any manoeuvre the helicopter was undertaking at the time. On all the evidence, it would have been just as likely that the bearing would have failed when the helicopter was on its final descent to land in Alice Springs. There is nothing in this allegation.
>
> *Failure to employ the correct technique for autorotation*
>
> [105] The defendants concentrate on an answer given by the plaintiff with respect to the actions he took immediately following the reduction in rotor RPM caused by the bearing failure. In examination-in-chief he said:

> 'I was doing 65, 70 knots, flying cruise and, bang, went straight into a lot rotation, I kept – which is – I dropped the collective down, pushed the cyclic forward, pedals in, and then I kept the throttle on…I had the throttle opened still, the engine RPM's started climbing up rapidly. I ended up cutting the throttle back to idle at the time. This is all happening in the instant. The helicopter pulled sideways on me. The rotor RPM, it was just dropping, you can just – I had – the cyclic – it was shaking, and really I don't remember much after that, sir, …'

[106] In cross-examination, the plaintiff was taken to Exhibit 11 which is the 'Pilots Operating Handbook' for a Robinson R22. It contained 'R22 Helicopter Safety Notice 6N-29'. The notice highlights the contrast between the way in which a pilot in a fixed wing aircraft would react to an emergency and the manner in which a helicopter pilot should react in a similar emergency. It emphasises that to make the aircraft go down a pilot will rapidly lower the collective with very little movement of the cyclic stick. It emphasises that a helicopter pilot must never abruptly push the cyclic stick forward. In answer to questions the plaintiff accepted that he did push the cyclic forward. He appeared to be attempting to draw a distinction between pushing the cyclic forward and pushing the cyclic forward to a very small extent. That was not pursued in cross-examination or re-examination. Hector Matheson was called by the defendants to give evidence as an expert with respect to the manner in which a helicopter should be operated in circumstances faced by the plaintiff. Mr Matheson said that the correct use of the cyclic after putting the collective down was to bring the cyclic to the rear to maintain the disc attitude in relation to the horizon. He was asked:

> 'What would happen if you pushed the cyclic forward? -- You will get a very, very marked decreased in RPM.
>
> What affect would that have on the helicopter? -- It will increase the rate of decent (sic). It will produce a nose-down attitude and you are going – you are going to carve off altitude very quickly.'

[107] In cross-examination Mr Matheson was asked to comment on the inference which could be drawn from circumstances where there was no damage to the bubble or the front of the helicopter but there was damage to the rear of the helicopter. He said that that would suggest that there had been a flaring prior to touch down and he accepted that there had probably been some elements of autorotation for that to have occurred. The helicopter did land on its skids as is desirable

> in these circumstances and Mr Matheson drew the conclusion that the helicopter had touched down at a slow speed because the plaintiff had flared the aircraft.
>
> [108] The factor upon which the defendants rely is the plaintiff's evidence that he pushed the cyclic forward. There is no evidence as to the extent to which he pushed that forward save that the manner in which the helicopter landed strongly suggests that the cyclic was not pushed so far forward as to increase the damage which would have been caused had an otherwise perfect autorotation been achieved. In any case, the defendants did not lead any evidence by which I could assess the difference which might have been caused by the plaintiff by him pushing the cyclic forward to any extent. The relevant witnesses agreed that the events occur in a very short space of time and there is little time in which a pilot can react. Given the manner in which the helicopter did finally touch down I think that it is more likely than not that the plaintiff did react in an appropriate way or, at least, he did nothing to exacerbate the damage done to the helicopter or to him.
>
> …
>
> *Not accurately recording the flying hours of the helicopter*
>
> [111] The plaintiff gave evidence that he did not make accurate records of the flying time of the helicopter. I will deal with this issue later. With respect to an assertion of contributory negligence, a failure to properly record the flying time of the helicopter will not, of itself, be a contributory factor to the damage suffered. The defendants, though, say that had the flying time been properly recorded then the helicopter would have had a least one more 100 hourly inspection prior to the accident. It is put this way by the defendants: 'Another inspection of the bearing might well have detected the deterioration of the bearing before it ultimately failed' however that overlooks the evidence that neither the clutch assembly nor the upper actuator bearing were serviced during a 100-hourly inspection. In any case, the defendants have to establish to the relevant standard that the conduct of the plaintiff did contribute to the accident and subsequent damage. The submissions made by the defendants do not demonstrate that, had the proper hours been recorded, there would have been another service and that such a service would have been likely to discover the faulty bearing."

[105] ATA repeated the substance of the arguments put to and rejected by the trial judge, but it did not attempt to identify any flaw in his Honour's reasons. Those reasons explain why there is no sufficient basis for holding that the plaintiff was guilty of the contributory negligence alleged by ATA. In the absence of criticism of any particular aspect of the trial judge's reasons it is unnecessary to elaborate upon them.

The plaintiff's appeal on quantum

[106] The plaintiff challenges the amount of the award for past economic loss from the date of the accident on 21 June 1994 until judgment on 20 August 2010 assessed by the trial judge at $130,000 with interest at five per cent for 16 years of $104,000.

[107] He also contends that the trial judge ought to have awarded interest on the amount of his special damages for which he outlaid money.

(i) Past economic loss

[108] There was no challenge that the plaintiff sustained very serious injuries in the accident leaving him an incomplete paraplegic with many physical and emotional deficits which impacted and will impact significantly on his capacity to engage in remunerative work. He complains that the trial judge took an unduly pessimistic view of the likely course of his employment had he not been injured. To consider whether that complaint is well founded it is necessary to look at the plaintiff's employment history. He was born in Alice Springs in 1957. His father was on the land. He attended the Alice Springs State High School until he was 14, describing himself as a not very good student. He went to work for a local butcher and, eventually, became a master butcher working in various establishments, including managing a wholesale meat outlet. He participated in rodeos, horse breaking, mustering and was an oil rig worker off the Western Australia coast.

[109] The trial judge summarised the plaintiff's involvement with fixed wing aircraft and helicopters:

> "[116] In 1980 the plaintiff obtained an airplane licence and in 1981 he began courses that would enable him to become a helicopter pilot. The plaintiff readily admitted that his lack of formal education had caused him difficulty and he failed a number of the theory-based exams that required him to answer essay-style questions. He finally obtained a helicopter licence in 1984 and a commercial helicopter licence in 1985. Initially he struggled to find work as a helicopter pilot and so he commenced working for companies controlled by Mr Costa and Mr Webb at Caloundra as a means of gaining experience in the industry. This work was with a company called Chopperline Pty Ltd. The plaintiff was not paid for that work, and so he also worked in the mornings as a butcher to support himself.
>
> [117] In about 1986 the plaintiff left Chopperline to take up a position as a helicopter pilot with the Australian Agricultural Company in Mt Isa. There was no satisfactory accommodation for the plaintiff's partner and child in Mt Isa at that time, so in about 1988 he moved with his family back to Alice Springs and re-commenced working as a butcher. He earned substantially less money butchering than he had from his work as a helicopter pilot.
>
> [118] After some time the plaintiff gained work as a pilot in Alice Springs before trying to start-up a charter flight helicopter business of his own. It did not succeed. Instead,

> after a brief period in the United States, the plaintiff devoted his attentions to contract mustering through the company he had set up in preparation for his charter flight business, Shankman.
>
> [119] By 1993, the plaintiff was firmly based in Alice Springs and was married to his second wife, Sue Coker. His business as a contract musterer grew and was centred on helicopter mustering, though the plaintiff also did some ground mustering. In conducting this business in the Northern Territory, the plaintiff ultimately arranged for the hiring, over time, of three Robinson R22 helicopters from companies controlled by Messrs Costa and Webb. These helicopters were leased to the plaintiff for $100.00 per hour, based on the time entered into the helicopters' logbooks. Included in these helicopters from January 1994 was VH-HQX, the helicopter that the plaintiff was in when he crashed on 21 June 1994."[1]

[110] After the plaintiff's injuries had stabilised he attempted to earn an income. His Honour described his activities during this period as follows:

> "[141] … He attempted, for example, to conduct an ostrich farm. The loss that resulted from that was more likely to be due to the market rather than due to his physical condition. He admitted that everybody in Australia attempting to conduct ostrich farms lost money because of changes in market conditions.
>
> [142] I accept that the plaintiff made genuine attempts to earn income and was, no doubt, stymied to a considerable degree by his physical incapacity.
>
> [143] In 2002 the plaintiff left Australia for the United States to live and to work. It is pointed out that he earned no income in 2001, no doubt because he did not have the requisite permission to work, and that this should not be taken into account as his decision to move was not a result of the accident. Since moving to the United States the plaintiff has engaged in a number of enterprises, the most successful of which has been as a sculptor in which he has been retained by the town of Grapevine in Texas to product various sculptures for public purposes."[2]

[111] The plaintiff's case at trial was that he would have expanded his helicopter and ground mustering business to lease a second helicopter from Messsrs Costa and Webb and employ another pilot to fly it. He expected, thereby, to earn additional income of $30,000 per year. The plaintiff relied on reports prepared by Mr Norbert Calabro, a forensic chartered accountant. In his final updated report Mr Calabro advanced two scenarios, the more favourable estimating past loss of earning capacity based on the plaintiff's 1994 earnings at $1,126,970.

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1 AR 3339-3340.

2 AR 3343-3344.

[112] Mr Calabro had prepared a joint report with Mr Ben Gordon of Vincents[3] who had been retained on behalf of ATA and Timtalla. Those parties subsequently retained Mr Paul Green also of Vincents and he and Mr Calabro prepared a joint report[4] and gave concurrent evidence at the trial.

[113] Mr Green calculated a maintainable income stream on three bases – averaging the plaintiff's income for the 1991, 1992 and 1993 years; the 1991 and 1993 years; and the 1991 to 1994 years. That process gave a range from $77,656 to $128,310 for the value of the loss of the plaintiff's earning capacity.

[114] The trial judge observed:[5]

> "… I have difficulty in accepting that the plaintiff's life would have been as planned and prepared as he may, quite truthfully, have thought it was going to be. Given the work history of the plaintiff, I am of the view that the approach taken by Mr Green in his report in which he averaged the pre-injury net income for the four years preceding the accident is a more accurate manner of assessing the plaintiff's loss than to simply adopt the financial year preceding the accident as was done by Mr Calabro. This approach is, I think, supported by the fact that the plaintiff had been a helicopter pilot for some time prior to the accident and to adopt only one year does not provide a fair representation of his past income."

His Honour noted, rightly, that the plaintiff conducted his business "quite haphazardly" so far as accurate record keeping was concerned which made rendering invoices to clients unsatisfactory. This pointed against him running a successful business, particularly employing other people. His Honour thought that the plaintiff's failure in record keeping might even have led to trouble with aviation authorities.

[115] The trial judge did accept that the plaintiff made genuine attempts to earn income after 1995 but was hampered "no doubt … to a considerable degree by his physical incapacity".[6] As set out in his statement of loss and damage[7] and endorsed in his evidence, the plaintiff was and is in constant pain, walks with difficulty and, in the past, needed leg callipers and elbow crutches. Falls have resulted in many broken bones. Nonetheless, he and his then wife (who had also been seriously injured in the accident) attempted a range of enterprises including a mobile food outlet, ostrich farming and the sale of clothing, all of which were financially unsuccessful.

[116] The plaintiff's success in Grapvine, Texas, producing public "outback" sculptures has been little short of extraordinary. He has been sent to advise on public sculpture maintenance in Grapvine's sister city in Austria and to Mexico. His contract is year to year with the City but he has been able to make an income as a sculptor greater, ultimately, than that which he achieved as a helicopter pilot in 1994 although, as his Honour found, that is vulnerable.

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3 AR 2192.
4 AR 1829.
5 AR 3343; Reasons [139].
6 AR 3344; Reasons [142].
7 AR 2519 and following.

[117] His Honour concluded that the plaintiff's past employment history was indicative of how he was likely to act in the future, that is, moving quite regularly between jobs, as suggested by Mr Green, rather than adhere to the development of his helicopter mustering and other business activities until well into the future as proposed by Mr Calabro.

[118] The plaintiff contends that the trial judge ought not to have accepted Mr Green's approach and calculations because, in effect, they failed to give proper emphasis to the change in earnings in 1994 brought about by operating his own helicopter business rather than working for wages notwithstanding his failure in setting up a tourist business with helicopters in WA earlier. There is other criticism of Mr Green's calculations but they need not be discussed because his Honour selected the top of Mr Green's range. The plaintiff is also impliedly critical of ATA and Timtalla for relying on Mr Green who proposed lower figures than did Mr Gordon. For what it is worth, Mr Green explained that he had been largely occupied in the merger of two firms of accountants when the earlier report was prepared by Mr Gordon under his general supervision. Mr Green was the expert witness put forward by ATA and Timtalla and he was cross-examined on his figures. There is nothing in this point.

[119] The plaintiff contends that the appropriate loss should be one of $40,000 per annum over the 16 years since the accident to trial – a figure broadly in accordance with Mr Gordon's assessment – rather than seeking to support Mr Calabro's figures. ATA and Timtalla have criticised this as a departure from the plaintiff's trial case. The plaintiff is not bound on appeal to the quantum which was advocated for at trial. He may accept broadly, as he does, the fact finding by the trial judge but seek to identify error in the weighing of the various factors.

[120] There is no doubt that the plaintiff had had a chequered past employment career prior to the accident but he was then still a young man clearly interested in travel and adventure. In the year prior to the accident he had found an occupation that he enjoyed and which gave him a significantly better financial return. Those are both factors which would suggest a reasonable likelihood that he would continue to do that work, at least for a time, and the evidence showed that that type of work was available. Although the trial judge had a broad discretion in assessing this aspect of the plaintiff's claim, his Honour might with benefit have considered that the plaintiff had persevered in his studies to be a pilot and, despite his considerable physical disabilities, attempted many ventures, culminating in his realisation of a talent for sculpture. This suggests that in weighing the various contingencies about how the plaintiff might have exploited his pre-injury capacity for remunerative employment, his Honour failed to put in the balance the positive indicators. In focussing only upon the less favourable, the plaintiff was deprived of a more appropriate assessment of his past loss of earning capacity.

[121] His Honour was, with respect, correct in concluding that the plaintiff was unlikely to operate a successful expanded business, but he was more likely to have persevered at helicopter and ground mustering much along the same lines as he had done over the previous year. The plaintiff's earnings in the 1994-1995 years of $69,549, as assessed by Mr Calabro, were the subject of criticism by Mr Green because of the failure to deduct helicopter hire charges of approximately $15,400. If that figure is taken into account then there remains a round figure of say $54,000 representing his remuneration in that year. The plaintiff now contends for a loss of

$40,000 per annum for 16 years. That figure anticipates steady full employment, albeit discounted, over the whole period. That cannot be sustained against the uncontroverted evidence. The plaintiff may have continued for a few more years in his 1994-1995 activities but, as his Honour found, his history simply did not permit anticipated employment steadiness over 16 years.

[122] It is artificial to consider the loss as a loss per annum against this plaintiff's background as will occur when a plaintiff has been in constant employment in the same job over some years. In truth, the compensation for past loss of earning capacity which would likely have been exploited, in this case, should be seen as more in the nature of a "global" figure. The $130,000 allowed by his Honour expressed as a per annum figure is $8,125 but takes into account the plaintiff's earnings post accident. The plaintiff submits that a better guide is to consider what his Honour has allowed as future loss of earning capacity which he has fixed at $50,000 per annum. But that figure is dominated by his new-found skill as a sculptor.

[123] If the positive contingencies had appropriately been taken into account by his Honour balanced by the plaintiff's past employment history, a loss represented by $25,000 per annum, would better represent the effect of the accident injuries on the plaintiff's earning capacity to trial – which produces an amount of $400,000.

[124] Interest at five per cent on that amount over 16 years is $320,000. Superannuation at six per cent on $400,000 is $24,000.

(ii) Interest on special damages

[125] The trial judge failed to make any award for interest on the plaintiff's claim for special damages. Although ATA and Timtalla contend that his Honour was correct not to award any interest on past special damages it was the case that his Honour made no reference to interest at all and it may well have been an oversight since he awarded interest on other heads of damage and explained[8] why he did so for the whole period.

[126] The plaintiff claimed $196,910.37 for out of pocket expenses as set out in his final Statement of Loss and Damage.[9] ATA and Timtalla contend that the plaintiff did not prove when the relevant expenses were incurred, thus he had not proved his entitlement to interest and it could not be concluded that all payments were made as at the date of accident.

[127] His Honour reduced some of the claims (which the plaintiff does not challenge) and allowed special damages as follows:

Hospital expenses (admitted) in the amount of $47,619.97.

Travelling expenses claimed for $7,875 and allowed in the sum of $4,000.

Pharmaceutical expenses claimed in the amount of $82,815.40 and allowed in the sum of $50,000.

Special aids claimed in the amount of $58,600 and allowed in the amount of $40,000.

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8 AR 3348; Reasons [171].

9 AR 2519 and following.

His Honour rounded those figures and allowed an amount of $150,220 of which $102,600 was paid by the plaintiff.

[128] The Statement of Loss and Damage made clear what items had been paid and what had not been paid. Furthermore, the plaintiff affirmed[10] that he had paid for all travelling expenses, pharmaceutical expenses and aids, that is, the loss had already been experienced by the plaintiff.[11] In the written submissions interest was claimed on the amount of those special damages which had been paid for by the plaintiff.[12] ATA and Timtalla made no challenge to that claim and did not challenge the plaintiff's figures in cross-examination.[13] In their pleadings ATA and Timtalla each acknowledged that interest on special damages should be allowed.[14]

[129] Consistently with the practice in this State interest is generally awarded on special damages which have actually been paid at five per cent over the whole period from injury to trial on the assumption that the amounts claimed will have been paid progressively between the date of the accident and the date of trial. In *Cullen v Trappell*[15] Gibbs J said:

> "…[T]he award of interest should always be approached in a broad and practical way, and this matter should not be allowed to assume disproportionate importance either at the trial or in the judge's consideration of the matter."[16]

In *Bennett v Jones*[17] Moffitt P said:[18]

> "It would be regrettable that the exercise of jurisdiction to award interest had the consequence of adding in any significant way to the complexity of personal injury litigation, by the plaintiff being deprived of an award of interest, because he failed accurately to detail in time and degree each past economic and personal detriment. Thus, for example, as pointed out in *Jefford v Gee*, where loss accrues fairly uniformly throughout the period, some rule of thumb, such as half the loss for the full period at the accepted interest rate will be appropriate." (footnote omitted)

[130] Interest should be allowed on $102,600 at five per cent per annum. The trial judge explained why he allowed interest on other heads of damage over the whole period and there is no reason to depart from that approach. Interest for 16 years amounts to $82,080.

(iii) Summary

[131] The following changes should be made to the table showing the plaintiff's award of damages appearing at [171] of his Honour's reasons:

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10 AR 88.
11 *Fire and All Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427 at 432.
12 AR 3282.
13 AR 134.
14 AR 3138 and 3148.
15 (1980) 146 CLR 1.
16 At 22.
17 [1977] 2 NSWLR 355.
18 At 364.

			$
General damages			150,000.00
Interest on general damages			22,400.00
Special damages			
Hospital expenses			
Travelling expenses			
Pharmaceutical expenses			
Special aids			
Z-Coil shoes	$ 5,600.00		
Orthopaedic shoes	$ 3,000.00		
Hoists/lifts	$40,000.00	48,600.00	150,220.00
Interest on $102,600 of special damages			**82,080.00**
Past economic loss			**400,000.00**
Past superannuation loss			**24,000.00**
Interest on past economic loss			**320,000.00**
Future economic loss			533,355.00
Future loss of superannuation			20,000.00
Past care			120,000.00
Interest on past care			96,000.00
Future care			148,563.00
Future medical expenses			16,640.00
Future physiotherapy etc			53,244.00
Future pharmaceutical expenses			53,244.00
Future surgery			12,000.00
Future psychiatric treatment			8,800.00
Future architectural adjustments			25,000.00
Future requirements			78,300.00
TOTAL			**$2,313,846.00**

Costs orders

[132] The trial judge reserved the issue of how the costs of the proceeding should be disposed after receiving extensive written submissions. In a reserved decision his Honour ordered ATA to pay the plaintiff's costs of and incidental to the proceedings on the indemnity basis from the date of the plaintiff's offer (11 April 2000) and on the standard basis for the balance. His Honour further ordered ATA to pay Timtalla's costs of and incidental to the proceedings on the standard basis. ATA appeals (with leave) the orders that it pay the plaintiff's costs

on the indemnity basis from the date of the offer and Timtalla's costs (the *Sanderson* order).

[133] ATA has argued that his Honour ought to have declined to award indemnity costs because it was not reasonable to expect ATA to have appreciated that there was evidence to establish that the failed bearing was in the helicopter when it was serviced by Mr Fisher, ATA's employee, in 1993 and he ought to have observed the differences between the bearing and a Robinson-approved bearing.

[134] The plaintiff has filed a notice of contention that this part of the costs judgment should be affirmed on a ground other than that relied upon by his Honour, namely, that the trial judge erred in holding that the offer of settlement of 11 April 2000 was not made in accordance with the relevant provisions of the *Uniform Civil Procedure Rules*.

[135] ATA also contends that the trial judge ought to have declined to make a *Sanderson* order and instead have ordered that the plaintiff pay Timtalla's costs because it was not reasonable for the plaintiff to have sued and to continue its proceedings against Timtalla and there was nothing in the conduct of ATA which made such an order a proper exercise of the discretion to award costs.

[136] The plaintiff also raised a ground of contention in relation to this order, namely, that in holding that a *Sanderson* order was appropriate his Honour erred in failing to place any sufficient weight on the fact that ATA did not disclose that it was insured and that ATA's case was conducted jointly with that of Timtalla.

[137] ATA accepts that the appeal in relation to costs is an appeal against the exercise of a discretion to which the well-known principles enunciated in *House v The King*[19] apply.

(i) Indemnity costs order

[138] The plaintiff made an offer to settle the proceedings on 11 April 2000. The offer was, relevantly, in the following terms:

> "TAKE NOTICE that the plaintiff, ARCHIE STEPHEN ST CLAIR, pursuant to Rule 353 of the Uniform Civil Procedure Rules 1999 offers to settle the plaintiff's claim in this action on the following terms and conditions:-
>
> 1. The first and fifth defendants will pay to the plaintiff the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) in satisfaction of the plaintiff's cause of action for general damages, special damages and interest.
>
> 2. The said sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) is inclusive of any refund that may be due to:
>
> 2.1 the Department of Social Security pursuant to the provisions of the Social Security Act 1947, as amended;

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19 (1936) 55 CLR 499; [1936] HCA 40.

2.2 the Commonwealth Rehabilitation Service;

2.3 all monies due and owing to the Health Insurance Commission pursuant to Section 24 of the Health and Other Services (Compensation) Act of 1995.

3. The first and fifth defendants will, in addition to the sum of FIVE HUNDRED THOUSAND [sic] ($500,000.00) pay the plaintiff's party and party professional fees and disbursements on the Supreme Court Scale to the date hereof together with the necessary costs of acceptance only to be taxed.

4. This offer remains open for acceptance for a period of 14 days from the service of this notice, shall then lapse [sic]."

[139] ATA contended successfully below that the offer was not in accordance with the *Uniform Civil Procedure Rules.* Rule 363 provides that where there are two or more defendants alleged to be jointly or jointly and severally liable to the plaintiff the offer must be made to all defendants and it was not made to the second, third and fourth defendants. Those defendants had been served but had not entered an appearance.[20] His Honour described the departure from the rules as "technical".[21] By its notice of contention the plaintiff says that this was an erroneous conclusion. It is only necessary to consider that issue if the basis upon which his Honour held that an order for indemnity costs was justified was in error.

[140] The plaintiff contended below that if the offer did not comply with the *Uniform Civil Procedure Rules* it was, nonetheless, an offer capable of being accepted[22] which would have led to a valid compromise and it was imprudent not to accept it, thus attracting an order for indemnity costs.[23] Below ATA did not contend that the reason it did not accept the offer of 11 April 2000 was that it was irregular in form.

[141] ATA does not contend that his Honour applied an incorrect test when exercising the discretion to award indemnity costs. His Honour noted that it was a matter for the plaintiff to establish that ATA, in not accepting his offer in April 2000, acted unreasonably or imprudently at the time.[24] ATA contended that as at April 2000 there was no evidence or report from experts which could have led to a finding of liability against either ATA or Timtalla. His Honour concluded:

> "The relevant point, though, is that a finding was made at trial that the fifth defendant [ATA] was responsible for the removal of the particular bearing during the course of servicing the helicopter. This was evidence that emerged during cross-examination of a person who had been an employee of ATA and it had substantial importance for the eventual determination of liability. The circumstances relating to the removal of the bearing were within the corporate

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20 The second and fourth defendants were wholly owned subsidiaries of Timtalla and the court ordered winding up of each had occurred in 1993.

21 AR 3528; Reasons [23].

22 *Calderbank v Calderbank* [1975] 3 All ER 333.

23 *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225.

24 *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [48] and [82]; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at 439-443.

> knowledge of ATA and did not require an expert report to establish that point. The expert reports which were supplied in 2009 and 2010 by Dr Gilmour went more to the point of whether or not the failure was one which took place over time or was, as I found, one which took place without warning."[25]

ATA has argued on appeal there was no factual basis for this conclusion.

[142] ATA also contended that it could not have foreseen the evidence of future economic loss which was adduced for and at trial. In April 2000 the plaintiff had not served a statement of loss and damage. At that time some only of the medical and rehabilitation reports prepared on his behalf had been received.

[143] ATA was aware of the service history of the aircraft and who had carried out work on the helicopter through the service worksheets. It knew, as at April 2000, from the report of Mr McGee of Heliflite Pty Ltd dated 27 July 1995 that a commercial (non-Robinson) bearing had been installed. Mr McGee had concluded:[26]

> "Aircraft suffered major damage due to the failure of an unauthorised Bearing in the Clutch System/Drive Train of the Aircraft.
>
> I am unable to determine the source or the installation time of the Bearing onto the Aircraft."

ATA serviced the helicopter at the request of its owner Timtalla. There was a real likelihood that the NTN actuator bearing was fitted to the helicopter in November 1992 when the clutch assembly was replaced by Mr Avey of Choppercare Pty Ltd. So far as the log books recorded Mr Fisher serviced the helicopter twice in 1993 and regreased the bearing. Notwithstanding ATA's submissions to the contrary, his Honour found that there were discernable differences between the two kinds of bearing. ATA operated an aircraft maintenance business employing Robinson trained personnel. ATA had in its possession other expert reports than that of Mr McGee, including Mr Michael Knight, Mr H Matheson and Mr Bernard Hole. Mr Knight's report mentioned the installation of the commercial bearing and that it was causative of the accident. It also stated that he had been briefed (he had been retained on behalf of ATA and/or Timtalla) with the CASA and BASI document. ATA contends that this does not prove that it had Mr Chadbourne's note of his conversation with Mr Fisher in which he said he greased the bearing. That note was in the CASA file and it is reasonable to infer that ATA could have accessed it. ATA had adequate information at its disposal to make an informed decision.

[144] ATA also contends that there was insufficient evidence relating to the quantum of the plaintiff's claim to make it unreasonable not to accept the offer. There was, as the trial judge noted, no expert evidence relating to economic loss but there were medical and rehabilitation reports available and particulars of damage from the earliest statement of claim. The injuries pleaded were:

> "a. Scarring
> b. Generalised contusions, lacerations and abrasions;
> c. Concussion;
> d. Fractured ribs;

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25 AR 3532; Reasons [26].

26 As deposed to in the affidavit of Mr Peter Axelrod affirmed 24 August 2010, AR 3398 at 3399.

e. Fractured sternum;
f. Motor paralysis of both lower limbs;
g. Spinal fractures;
h. Psychological and/or psychiatric disorders;
i. Bladder dysfunction;
j. Renal dysfunction;
k. Penile dysfunction;
l. Constipation."

Furthermore, in his statement of claim the plaintiff alleged:

> "The plaintiff has suffered much pain and suffering and loss of the amenities and enjoyment of life. He is incapacitated in respect of the performance of most physical functions which he performed without difficulty prior to the subject accident. He lost work and suffered economic loss thereby he will suffer an impairment of his income earning capacity in the future. He lost superannuation benefit entitlement for which he makes claim. He required gratuitous domestic assistance during the course of his recuperation for which he makes claim. He will require ongoing nursing assistance for the rest of his life. His domestic arrangements will need monitoring by an Occupational Therapist on an ongoing basis. He will require home aids. He will require a modified motor vehicle. He will require ongoing medical and/or psychiatric treatment. He may require future surgery. He has otherwise been damnified."[27]

Without more, to an experienced personal injury solicitor, those injuries are indicative of extensive compensatory damages. It did not require an expert accountant's report to illuminate the magnitude of the quantum when there was an offer to settle for $500,000 on the table.

[145] The party receiving the offer of compromise is not required to be absolutely persuaded that it will be unsuccessful should the matter proceed to a hearing and determination before it would be unreasonable or imprudent not to accept an offer to compromise the proceedings. The factors necessary to undertake the balancing exercise, bearing in mind that there would likely be substantial damages, were sufficiently known by ATA in April 2000 to make it imprudent to reject the offer. As the trial judge noted, quoting from *Hazeldene's Chicken Farm,*[28]

> "Of course, deciding whether conduct is 'reasonable' or 'unreasonable' will always involve matters of judgment and impression. These are questions about which different judges might properly arrive at different conclusions."

[146] As his Honour observed, this was not a case in which some substantially new and different evidence became available after the offer. The circumstances of the accident had been investigated by the Civil Aviation Safety Authority and others. The trial judge made no discernable error in reaching the conclusion that it was unreasonable of ATA not to accept the offer when it was made. It was therefore appropriate to order that ATA pay the plaintiff's costs on the indemnity basis from April 2000.

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27 Paras 15 and 16 of the statement of claim, AR 3126.

28 At 440-443; Reasons [24].

(ii) *Sanderson*[29] order

[147] The plaintiff sought an order that ATA pay Timtalla's costs. ATA does not contend that the trial judge acted on any wrong principle in determining whether a *Sanderson* or *Bullock*[30] should be made. His Honour referred to a summary of the relevant principles by Asche CJ in *Lackersteen v Jones (No 2)*:[31]

> "… [T]he following principles seem to be established before a judge can make a 'Bullock' or 'Sanderson' order.
>
> 1. It must be seen to have been reasonable and proper for the plaintiff to have sued the successful defendant.
>
> 2. The causes of action against two or more defendants need not be the same but they must be substantially connected or dependent the one on the other.
>
> 3. While it is essential to find that the plaintiff has acted reasonably and properly that alone is not sufficient. The court must find something in the conduct of the unsuccessful defendant which makes it a proper exercise of discretion.
>
> 4. Finally, in considering whether to make such an order, the court should, in the exercise of its discretion balance overall two considerations of policy: the first, that an unnecessary multiplicity of actions should not be forced on litigants, so that a plaintiff who acts reasonably in joining two or more defendants should not be penalised or lose the fruits of his victory in costs on the basis that he should have either elected or taken separate actions; secondly, that an unsuccessful defendant should not have to pay more than one set of costs merely because he is unsuccessful."

[148] His Honour asked whether it was reasonable for the plaintiff to join Timtalla in the proceedings as a defendant. He quoted Vaughan Williams LJ in *Besterman v British Motor Cab Company Ltd*:[32]

> "… if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame."

The trial judge had concluded[33] that on the pleaded case and as the trial was conducted, the NTN bearing must have been in place when the helicopter was handed over or installed by someone other than the plaintiff during the period it was in the plaintiff's possession. His Honour noted that ATA had not admitted in its pleading that the bearing had been removed by it. His Honour stated:

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29 *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.
30 *Bullock v London General Omnibus Company* [1907] 1 KB 264.
31 (1988) 93 FLR 442.
32 [1914] 3 KB 181 at 187.
33 At [35].

> "Prior to the trial Mr Fisher had told Mr Nunan[34] that he had not removed the bearing and, so, would be contradicting the account of Mr Chadbourne as to what he had said on an earlier occasion. At the trial, Mr Fisher admitted that he had been in a position to detect that an NTN bearing had been installed in the helicopter. The pleading of ATA left in issue an important fact, notwithstanding that it was not in a position to dispute such a fact. In these circumstances, that was conduct which encouraged or compelled [the plaintiff] to continue to press the claim against Timtalla. The conduct of ATA placed [the plaintiff] in a position where he had to continue his action against Timtalla. To do otherwise would have given rise to a substantial risk that if he proceeded only against ATA his claim might have failed altogether."[35]

[149] His Honour also held that because Timtalla and ATA conducted their defences with the same legal representatives:[36]

> "… Timtalla must be taken, at least through its lawyers, to have been aware of the true state of affairs with respect to the removal of the bearing and Mr Fisher's knowledge of what occurred."[37]

[150] The plaintiff had also raised ATA's non-disclosure that it was insured, despite request, as further reason for maintaining proceedings against both, but his Honour did not regard that as a relevant matter. His Honour concluded:

> "I am satisfied that it was reasonable and proper for [the plaintiff] to have sued and continued to sue Timtalla. Further, the causes of action against the two defendants were substantially connected and Timtalla must be taken to have been aware through the joint conduct of its case with ATA of the actions of ATA's agent or employee. Certainly, had [the plaintiff] only sued ATA and failed then it would have been open to him to bring a further action against Timtalla. Multiplicity of actions is frowned upon and should not be forced upon litigants."[38]

[151] The basis upon which the plaintiff sought to recover from Timtalla was either that Timtalla was the principal of ATA and thus liable for the conduct of its agent or because it owed a non-delegable duty of care to the plaintiff. It was the characterisation of the relationship with the plaintiff rather than the fact of the servicing which dominated. It was not unreasonable to sue Timtalla but, if unsuccessful, costs would have to be paid unless some conduct by ATA could be identified which would warrant an order that ATA pay, not only the costs of the plaintiff, but the costs of the successful defendant also.

[152] The conduct alleged was the failure of ATA to admit in its pleadings that the bearing had been removed by one of its employees. A significant part of the trial revolved around identifying the various services on the helicopter and by whom -

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34 Plaintiff's solicitor.

35 AR 3535-3536; Reasons [36].

36 That did not occur until March 2006, see affidavit of Patrick Thomas Nunan sworn 24 August 2010, AR 3363, para 25.

37 AR 3536; Reasons [38]

38 AR 3536; Reasons [39].

more particularly, what occurred in the course of the service and what should have been observed by an experienced and competent aircraft technician trained in Robinson helicopter maintenance. The ultimate conclusion relied upon drawing inferences from many sources of information. That ATA did not admit in its pleadings that the bearing had been removed and cleaned by Mr Fisher was not necessarily determinative of this issue. He had admitted doing so in 1994 to Mr Chadbourne of CASA, had left ATA's employ shortly thereafter and was difficult to trace. He denied the content of the conversation with Mr Chadbourne and that it had occurred. It was not a factual scenario ripe for an admission.[39]

[153] Timtalla and ATA were not represented by the same lawyers until 2006 and no inferences or fixing each with the knowledge of the other relevantly arises. To the extent that his Honour based his reasons for making the *Sanderson* order on that matter he was in error.

[154] No conduct by ATA was identified to justify exercising the discretion in favour of making an order which required ATA to pay Timtalla's costs. Because both were represented by the one set of solicitors and counsel from 2006 the issue of costs will require commonsense or else an expensive exercise of identifying which aspects of the trial were devoted to Timtalla's matters and which only to those of ATA will result.

[155] The appeal on costs should be allowed to the extent that the order that ATA pay Timtalla's costs of and incidental to the proceedings on the standard basis be varied and in substitution an order should be made that the plaintiff pay Timtalla's costs of the proceedings.

Orders

[156] The orders are:

1. In Archie Stephen St Clair's appeal against Timtalla Pty Ltd:
   (a) the appeal be dismissed;
   (b) Archie Stephen St Clair pay Timtalla's costs of the appeal to be assessed on the standard basis.

2. In ATA's appeal against Archie Stephen St Clair:
   (a) the appeal be allowed in part:
      (i) the order made in the Trial Division that ATA pay Timtalla's costs of the proceedings be set aside;
      (ii) in lieu thereof, order that Archie Stephen St Clair pay Timtalla's costs of and incidental to the proceedings to be assessed on the standard basis;
   (b) otherwise the appeal be dismissed with costs.

3. In Archie Stephen St Clair's cross-appeal:
   (a) the judgment in favour of Archie Stephen St Clair for $1,729,566 be varied ;
   (b) enter judgment for Archie Stephen St Clair in the sum of $2,313,846;
   (c) ATA pay Archie Stephen St Clair's costs of and incidental to the cross-appeal to be assessed on the standard basis.

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39 This is a different consideration to the reasonableness of rejecting the offer of settlement.