

BETWEEN:

RHIANNON GRAY BY HER TUTOR KATHLEEN ANNE GRAY
Appellant

and

COREY RICHARDS
Respondent



APPELLANT'S REPLY

PART I: INTERNET CERTIFICATION

1. The appellant certifies that this reply is in a form suitable for publication on the Internet.

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PART II: REPLY

2. The key point of principle that divides the parties is whether fund management should be assessed on the corpus of the fund alone or whether it should include an amount to manage the head of damage identified as fund management and an amount to manage the income into the fund. The appellant submits that it should include these amounts as a matter of principle. The respondent submits that it should be limited to the corpus of the fund even though the amount allowed for fund management will also need to be managed at a fee.

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3. In response to paragraph 10, the respondent overlooks the fact that the fund manager, The Trust Company Limited, will charge fees on the funds under management annually.¹ The funds under management, pursuant to s.79 of the *Civil Procedure Act*, will include not only the capital of the fund (which includes an amount for fund management) but will also include income into the fund. Just as the capital of the fund will need to be managed on an annual basis, the income into the fund will also need to be managed.

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4. The respondent misrepresents or misunderstands the appellant's argument in paragraph 18 of its submissions. The appellant does not contend that "*an award for fund management is a special head of damage that is required to be treated separately from all other heads of damages*". On the contrary, the appellant contends that the head of damage identified as fund

¹ See para 68 of the respondent's submissions. See Exh N – letter from The Trust Company dated 13/12/11 at Blue Book Vol 1, 456-457; and Exh F(2), report of Corey Plover, Cumpston Sarjeant Pty Ltd, dated 9 November 2010, Blue Book Vol 1 at 143.

management should be treated like any other head of damage. In this regard, just as fund management is awarded to manage all heads of damage which make up the corpus of the fund, including future losses such as economic loss, nursing care, etc, fund management should also be awarded on the head of damage identified as fund management which is also a future loss.

5. Fund management is a head of damage which relates to a future loss. Accordingly, the calculation of fund management on the corpus of the fund (not including fund management) has been discounted on the 5% discount tables to take into account the current day value of the loss. As such, the head of damage identified as fund management will also need to be managed so as to return income after tax so as to ensure it will meet all future fund management costs. As the head of damage identified as fund management will also need to be managed, fund management charges will be incurred on that head of damage in the same way as fund management expenses will be incurred in managing other heads of damage representing future losses such as future economic loss, future nursing care and so forth.
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- 20 6. In response to paragraph 19, the respondent has misrepresented or misunderstands the appellant's submissions.² The appellant does not submit that the discount rate creates a shortfall. On the contrary, provided the funds are invested and return a net income, after tax and inflation are taken into account, equivalent to the discount rate, then there will be no shortfall. The appellant submits that the failure to award fund management on the head of damage identified as fund management, which will need to be managed like all other heads of damage, and the failure to award fund management on income into the fund, will result in an inevitable shortfall. The charge levied by the fund manager on the head of damage identified as fund management, and on income into the fund (which will both need to be managed), if not allowed will by necessity be deducted from the appellant's award of damages. Accordingly, the appellant's award of damages will be reduced to pay for these additional charges. This is the shortfall raised by the appellant. This shortfall is not fictional but rather was acknowledged by both experts who gave evidence at the hearing.³
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- 40 7. In paragraphs 20 through to 22 and 77, the respondent selectively uses the calculations set out in Table 1 and Table 2 attached to the Court of Appeal judgment and referred to by the Chief Justice at paragraphs [85]-[90] of his judgment.⁴ It is misleading for the respondent to suggest that the appellant will receive more than she has lost as stated in paragraph 22. Table 2 reflects that the fund must generate an annual income in order to last the appellant's 67 year life expectancy. The notion that the fund will earn an annual income is the basis of the discount rate. It is therefore illogical to

² The same misrepresentation or misunderstanding appears in paras 24, 47, 52, 53, 54, 57, 83, 84 and 85 of the appellant's submissions.

³ Blue Book Vol 1 at 72 line 15-73 line 25. See also Exh F(3), report of Mr Plover, Cumpston Sarjeant Pty Ltd, dated 9 November 2010 at Blue Book Vol 1 at 143.

⁴ Blue Book Vol 2 at 575-577 and 630-631; a clearer reproduction of Tables 1 and 2 are annexed to the report of Mr Plover dated 5 August 2011 at Blue Book Vol 1 at 174-175.

acknowledge that the fund will earn income but then refuse to acknowledge that that income will need to be managed pursuant to s.79 of the *Civil Procedure Act*.

8. The respondent's submissions continually misrepresent what the discount rate, imposed by s.127 of the *Motor Accidents Compensation Act*, reflects.⁵ Mr Plover, an actuary, explained what the discount rate reflects using a simple example on page 7 of his report dated 6 July 2011 under the heading "*Flawed Mathematical Reasoning*".⁶ It is clear from the example provided by Mr Plover that in order to ensure that the appellant receives fair compensation, earnings must be added to the fund at the same rate as the discount rate. This interpretation of the discount rate is also applied in *Luntz Assessment of Damages for Personal Injury & Death* (4th Edition) 2002 pp. 355-357 at para 6.1.2-6.1.4. This is what Mr Plover meant when he used the term "*unwinding the discount*" in his report dated 6 July 2011⁷ and was the subject of evidence before the trial Judge,⁸ who dealt with the issue.⁹ The application and effect of the discount rate is a proper matter for expert evidence. It is not the appellant's case that the discount rate undercompensates the appellant. On the contrary, it is the appellant's case that the fund will need to be managed so as to earn income at the discount rate in order to avoid her being undercompensated.
9. As the fund is required by law to be managed pursuant to s.79 of the *Civil Procedure Act*, and the fund will include income over time, both the amount set aside for fund management and the income into the fund will also need to be managed. This is what Table 2 attached to the Court of Appeal judgment and referred to in the judgment of the Chief Justice at paragraphs [85]–[90] reflects. It is the income which will be managed by the manager that forms the basis of the claim for fund on fund income.
10. In response to paragraph 40 of the respondent's submissions, the respondent overlooks the fact that the fund must earn income at the discount rate so that the regular drawings reflect the regular expenses incurred by the appellant. If income is added back into the fund then there will be no shortfall. As already submitted, the income which is added back into the fund, and which will need to be managed by the fund manager, is the basis of the claim for fund management on fund income. See paragraph 8 above.
11. Paragraphs 36, 43 and 44 of the respondent's submissions are based on fund management being awarded on the corpus of the fund alone. No allowance is made for the cost of managing the head of damage identified as fund management or for managing the income into the fund on an annual basis. The Chief Justice in the Court of Appeal noted that to determine the actual income into the fund would require speculation and

⁵ See paras 23-25 and 66-74 of the respondent's submissions.

⁶ Exh F(3) Blue Book Vol 1 at 164.

⁷ Exh F(3), Blue Book Vol 1 bottom of page 163 leading into 164.

⁸ Blue Book Vol 1, at 60 line 25 to 63 line 30, and at 81 line 25 to 82 line 5.

⁹ Judgment of McCallum J, 16 August 2011, Blue Book Vol 2 at 474 [42]- 477 [51].

was impermissible pursuant to *Todorovic v Waller*. The effect of the Chief Justice's judgment is to discount the allowance for future losses by the discount rate of 5% and ignore any income which will need to be managed. Such an approach, with respect, is illogical.

12. Further, the respondent correctly points out in paragraph 43 that pursuant to *Todorovic v Waller* any evidence as to the future performance of the fund is inadmissible.¹⁰ Accordingly, the appellant is prevented from leading evidence as to what the fund will actually earn.¹¹ For this reason, applying *Todorovic v Waller* and s.127 of the *Motor Accidents Compensation Act*, the appellant relies on the discount rate to reflect the assumed earnings rate. This reasoning is clearly explained by the expert evidence of Mr Plover, to provide numerical or mathematical consistency, which was not challenged by any other expert evidence at the trial.¹² See paragraph 8 above.
13. In paragraph 46 the respondent raises the issue of double counting which applies to the issue of fund management on fund management. The respondent raised this issue at trial but expressly eschewed it.¹³ The expert evidence did not support a conclusion that double counting was involved. On the contrary, the evidence of both experts was that there would be a shortfall if fund management was not allowed on the head of damage identified as fund management or on fund income.¹⁴ Accordingly, the respondent should not be allowed to suggest double counting in this Court.
14. Paragraph 50 of the respondent's submissions also misrepresents the appellant's submissions for the reasons set out in paras 8 and 12 above.
15. Paragraph 55 of the respondent's submissions does not reflect the evidence. As already noted in paragraph 8 of this reply, the appellant led evidence from Mr Plover, an actuary, as to how the actuarial tables, which reflect the discount rate, are applied.
16. Paragraphs 58 and 59 of the respondent's submissions do not address the issues upon which leave to appeal was granted.
17. Paragraph 61 of the respondent's submissions does not reflect the evidence. We refer the Court to the expert evidence at the trial which confirmed that the calculation of this head of damage was not complex.¹⁵
18. We refer to paragraph 68 of the respondent's submissions and agree that the evidence established that the Trust Company Limited charged a fee per annum on the amount of money in the fund. The amount of money in the

¹⁰ *Todorovic v Waller* [1981] 150 CLR 402 at 409.3.

¹¹ Contrary to the respondent's submission in para 96, there was evidence as to what income such a fund could potentially earn in Exh E which included an extract from the Annual Report of the NSW T & G (2009-2010) in Table 12 at Blue Book Vol 1 at 128.

¹² Blue Book Vol 1 at 59 line 10; and Blue Book Vol 1 at 81 line 30.

¹³ Blue Book Vol 1 at 75 line 40 to 77 line 10. See also Blue Book Vol 1 at 74 lines 30-40.

¹⁴ Blue Book Vol 1 at 72 line 15 to 73 line 25. See also Exh F(2), report of Mr Plover, Cumpston Sarjeant Pty Ltd, dated 9 November 2010, Blue Book Vol 1 at 143.

¹⁵ Blue Book Vol 1 at 71 line 5 to line 25

fund, on an annual basis, includes income into the fund. It is this income into the fund which is the basis of the claim for fund on fund income.

19. In response to paragraphs 66 through to 74 inclusive of the respondent's submissions, the appellant is not raising a new issue. It has been the appellant's position at the trial and in the Court of Appeal that the 5% discount rate does not include the cost of managing the head of damage identified as fund management, nor does it include the cost of managing income into the fund.

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20. In response to paragraph 77, see paragraph 7 above. There is no overcompensation. See also paragraphs 46 and 47 of the trial Judge's judgment dated 16 August 2011.¹⁶

21. In response to paragraph 83, the appellant agrees that there will be no shortfall if the true cost of managing all elements of the damages (including fund on fund and fund on fund income) is allowed.

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22. In response to paragraphs 85 through to 87, the appellant does not seek to unwind the discount rate in the sense suggested but merely seeks to apply what *Todorovic v Waller* says is included in the discount rate. The discount rate does not include the cost of fund management. Therefore, of necessity, it does not include the cost of managing the head of damage identified as fund management nor does it include the cost of managing income into the fund. See paragraphs 7 and 8 above.

23. The appellant relies on her original submissions filed on 18 June 2014 in response to the balance of the respondent's submissions.

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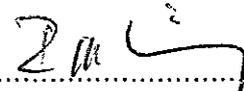
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Blue Book Vol 2 at 476.