HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

RHIANNON GRAY BY HER TUTOR KATHLEEN ANNE GRAY — APPELLANT

AND

COREY RICHARDS — RESPONDENT

Gray v Richards
[2014] HCA 40
15 October 2014
S111/2014

ORDER

1. *Appeal allowed in part.*

2. *Vary order 2 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 December 2013 by replacing the sum of $11,424,000 with the sum of $12,034,000.*

3. *The respondent pay interest to the appellant on the sum of $539,000 at the rate prescribed by the Uniform Civil Procedure Rules 2005 (NSW) from 16 December 2011.*

4. *The parties are to file written submissions within 14 days from the date of these orders in relation to costs both in this Court and in the courts below, such submissions to be limited to five pages.*

On appeal from the Supreme Court of New South Wales

Representation

A S Morrison SC with I J McGillicuddy for the appellant (instructed by Beilby Poulden Costello)

P J Deakin QC with B A P Kelleher and K A James for the respondent (instructed by TL Lawyers)

CATCHWORDS

Gray v Richards

Damages – Measure of damages in actions for tort – Appellant suffered brain damage as a result of respondent's negligence – Appellant incapable of managing own financial affairs – Administrator appointed to manage appellant's estate – Where requirement for management of funds arose as a direct result of respondent's negligence – Where administrator charged fees on all funds under management – Whether appellant entitled to recover costs associated with management of damages awarded for purpose of managing funds under management – Whether appellant entitled to recover costs associated with managing predicted future income of managed fund.

Words and phrases – "damages", "discount rate", "fund management".

Civil Procedure Act 2005 (NSW), ss 76, 77, 79.
Motor Accidents Compensation Act 1999 (NSW), s 127.
NSW Trustee and Guardian Act 2009 (NSW), s 41.

1 FRENCH CJ, HAYNE, BELL, GAGELER AND KEANE JJ. In *Todorovic v Waller*[1], Gibbs CJ and Wilson J summarised the principles which regulate the assessment of damages for personal injuries as follows:

> "In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he seeks damages."

2 Generally speaking, the third of these principles operates so that a plaintiff does not recover damages for costs he or she might incur in managing a lump sum awarded by way of damages. That is because such costs are not regarded as a loss resulting from the plaintiff's injury. In *Nominal Defendant v Gardikiotis*[2], Brennan CJ, Dawson, Toohey and Gaudron JJ said that:

> "it is contrary to common sense to speak of the accident causing a need for assistance in managing the fund constituted by [the] verdict moneys in circumstances where [the plaintiff's] intellectual abilities are not in any way impaired."

3 To similar effect, McHugh J said[3] that damages are not recoverable where:

> "the plaintiff seeks damages, not for expense necessarily incurred as the result of a disability caused by the defendant's negligence, but for an expense arising merely from the size of an award of damages and the exercise of a choice by the plaintiff as to how to invest those damages. The expense of exercising that choice is not the consequence of the plaintiff's injury."

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1 (1981) 150 CLR 402 at 412; [1981] HCA 72.

2 (1996) 186 CLR 49 at 52; [1996] HCA 53.

3 *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 55.

4 The decisions of this Court in *Nominal Defendant v Gardikiotis*[4] and *Willett v Futcher*[5] refined this aspect of the operation of the third principle in *Todorovic v Waller* so that, in a case where a defendant's negligence has so impaired the plaintiff's intellectual capacity as to put the plaintiff in need of assistance in managing the lump sum awarded as damages, expense associated with obtaining that assistance is a compensable consequence of the plaintiff's injury. In such a case, "the liability for the [management expenses] is a loss flowing directly from the wrong and is recoverable as damages caused by the wrong"[6]; and, in accordance with the first and second of the principles stated in *Todorovic v Waller*, the inclusion of such a component in the lump sum award ensures that the plaintiff receives full restitution for the harm he or she has sustained.

5 In this appeal, two questions arise out of this refinement of the operation of the third principle stated in *Todorovic v Waller*. The first question is whether an incapacitated plaintiff is entitled to recover costs associated with managing that component of damages which has been awarded to meet the cost of managing the lump sum recovered by way of damages. The second question is whether an incapacitated plaintiff is entitled to recover costs associated with managing the predicted future income of the managed fund.

6 Both these questions were answered in the negative by the Court of Appeal. For the reasons which follow, the Court of Appeal erred in its answer to the first question, but was correct in its answer to the second question.

Background

7 The appellant was born on 31 August 1992. On 22 August 2003, she sustained a traumatic brain injury when a motor vehicle driven by the respondent collided with a motor vehicle in which she was a passenger. As a result of her injury, she has been left with a significant intellectual impairment and requires constant care. She has no prospects of future remunerative employment.

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4 (1996) 186 CLR 49 at 52, 54, 67.

5 (2005) 221 CLR 627 at 643 [51]; [2005] HCA 47.

6 *Campbell v Nangle* (1985) 40 SASR 161 at 192, approved in *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 67.

8 On 19 July 2006, the appellant commenced proceedings (through her mother as tutor) in the District Court of New South Wales claiming that the respondent was liable in negligence for her loss. On 3 August 2011, those proceedings were compromised on terms which obliged the respondent to pay the appellant $10 million ("the compromise monies"), plus an amount of damages, to be assessed at a later date, to cover expenses associated with managing the compromise monies ("the fund management damages")[7].

9 Section 76 of the *Civil Procedure Act* 2005 (NSW) ("the CPA") requires that the compromise of proceedings involving a person under a legal incapacity must be approved by a court in order to be effective. The terms of the compromise were approved by the Supreme Court of New South Wales (Hoeben J)[8]. In that regard, the respondent conceded[9] that his negligence had rendered the appellant incapable of managing her own affairs and acknowledged[10] that the compromise monies and the fund management damages would, in due course, be paid to a fund manager in accordance with s 41 of the *NSW Trustee and Guardian Act* 2009 (NSW) ("the TGA") and ss 77 and 79 of the CPA.

10 Although it is necessary, for the purposes of these reasons, to distinguish between the compromise monies and the fund management damages, that distinction is possible in this case only because the parties settled only part of their litigation. They agreed on the amount to be allowed for all heads of damages except one: the amount to be allowed because, by his negligence, the respondent had rendered the appellant unable ever to manage her own financial affairs. The parties agreed to leave that latter amount for judicial determination.

11 It would be wrong, in these circumstances, to treat the compromise monies as if that amount was the whole of the damages which should be allowed to the appellant on account of the respondent's negligence. The compromise amount was not, and is not to be treated as if it were, the amount in which a verdict or judgment would have been entered for the appellant.

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7 *Gray v Richards* (2011) 59 MVR 85 at 86 [2].

8 *Gray v Richards* (2011) 59 MVR 85 at 86 [3].

9 *Gray v Richards* (2011) 59 MVR 85 at 86 [5].

10 *Gray v Richards* (2011) 59 MVR 85 at 86 [6].

12 On 2 September 2011, the Supreme Court of New South Wales (White J) made orders, pursuant to s 41 of the TGA[11], declaring the appellant incapable of managing her own affairs and appointing The Trust Company Limited ("the Trust Company"), rather than the NSW Trustee and Guardian ("the NSW Trustee"), as manager of her estate. White J also made an order, pursuant to s 77 of the CPA[12], that the compromise monies, together with any fund management

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11 Section 41 of the TGA provides, relevantly:

> "(1) If the Supreme Court is satisfied that a person is incapable of managing his or her affairs, the Court may:
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> (a) declare that the person is incapable of managing his or her affairs and order that the estate of the person be subject to management under this Act, and
>
> (b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee."

12 Section 77 of the CPA provides, relevantly:

> "(1) This section applies to money recovered in any proceedings on behalf of ...
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> (a) a person under legal incapacity,
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> ...
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> pursuant to a compromise, settlement, judgment or order in any proceedings.
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> ...
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> (3) ... the court may order that the whole or any part of such money not be paid into court but be paid instead to such person as the court may direct, including:
>
> (a) if the person is a minor, to the NSW Trustee and Guardian, or
>
> (b) if the person is a protected person, to the manager of the protected person's estate."

damages, be paid to the Trust Company in its capacity as manager of the appellant's estate.

The proceedings before the primary judge

13 On 8 August 2011, McCallum J began the first of two hearings for the purpose of determining the quantum of the appellant's entitlement to fund management damages. Over the course of those hearings, four issues arose for determination by her Honour; only the two questions referred to above remain alive in this Court.

14 As to the first of these questions, the respondent accepted that the component of the award for fund management damages would itself fall to be managed as part of the fund and would therefore attract its own management charges. Nevertheless, he contended that no allowance should be made for that.

15 The first question was referred to below and in this Court as the "fund management on fund management" issue. That description was no doubt a convenient shorthand, but it tends to obscure the point now made by the appellant, namely that this expense is not an expense separate and distinct from other expenses covered by fund management damages, but is integral to the expense of fund management. In order to avoid this distraction, it is proposed to refer to this issue as "the fund management damages issue".

16 The second question was whether the appellant was entitled to a component of the fund management damages to cover, not only the cost of managing the funds under management, but also the cost of managing the income predicted to be earned on, and reinvested as part of, the funds under management. This issue was referred to as the "fund management on fund income" issue.

Decision of the primary judge

17 The primary judge resolved both of these issues in favour of the appellant.

18 In relation to the fund management damages issue, several matters were not in dispute. First, it was common ground that the Trust Company would charge the appellant fees for managing the fund, and that those fees would be calculated as a percentage of the total funds under management, ie, as a percentage of the compromise monies plus the fund management damages[13].

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13 *Gray v Richards* (2011) 59 MVR 85 at 87 [10].

19 The appellant's tutor negotiated with the Trust Company in relation to the fund management charges it required in order to accept appointment as fund manager. Ultimately, the Trust Company and the appellant's tutor agreed upon fund management expenses made up of an ongoing Estate Management Fee and Investment Platform Fee of 0.550 per cent per annum calculated on the total of the funds under management. No issue arose as to whether this fee arrangement was contrary to any statutory provision regulating such fees.

20 Secondly, it was common ground that the amount that would be paid to the Trust Company in respect of the compromise monies was only $9,929,000, being the settlement of $10 million less payment of a Centrelink charge, a Medicare charge and an amount already paid by the respondent to the appellant to provide for her care. Accordingly, the starting point for the calculation of fund management damages was agreed to be $9,929,000[14].

21 Finally, it was agreed for the purposes of calculating the fund management damages that the duration of the fund would be 66 or 67 years from the date of trial, representing the appellant's assumed life expectancy[15].

22 The primary judge explained[16] the logic of the appellant's claim by reference to the following illustration:

> "[I]f the cost of managing a damages award of $10m over the relevant term were, for example, $2m (20% of the corpus), the total verdict would be $12m, to be received today and managed over time. A plaintiff under incapacity would have no better ability to manage the additional $2m than the initial $10m. It follows that the award of a component for fund management would itself give rise to future management expenses in the order of $400,000 (assuming fees charged on that amount at the same rate of 20%). The additional $400,000 in turn would cost a further $80,000 to manage, which would cost a further $16,000, and so on."

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14 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,854 [10]; cf *Gray v Richards* (2011) 59 MVR 85 at 87 [11]. Before the primary judge the starting point was $9,934,000, but that figure had been reduced by agreement by the time the matter reached the Court of Appeal.

15 *Gray v Richards* (2011) 59 MVR 85 at 95 [53].

16 *Gray v Richards* (2011) 59 MVR 85 at 88 [19].

23 Her Honour accepted[17] the logic of the appellant's claim formulated in this way on the basis that the expert evidence of an actuary resolved the theoretical problem of multiple iterations referred to by her Honour[18].

24 The primary judge upheld this aspect of the appellant's claim, reasoning[19] that s 79 of the CPA, which provides relevantly that "money paid ... to the manager of a protected person's estate is to be held and applied by the manager as part of that estate", meant that the fund management component of the appellant's damages could not be seen as being "held by the manager beneficially on account of his future fees."

25 It should be noted that the issue on which the parties were joined before the primary judge in respect of the quantum of fund management expenses was whether fund management expenses should be awarded at the rates charged by a private trustee, such as the Trust Company, or at the rates charged by the NSW Trustee[20]. In resolving that issue in favour of the appellant, the primary judge accepted the evidence of the appellant's tutor as to her preference for a manager other than the NSW Trustee, and found that "her decision in that respect was entirely reasonable."[21] The respondent did not seek to challenge that finding of fact in the Court of Appeal or in this Court. This appeal, therefore, has proceeded on the unchallenged assumptions that a manager other than the NSW Trustee should have been appointed to manage the appellant's damages, and that the amount to be allowed for the fund management component of the appellant's damages should be assessed by reference to the fees charged by that manager. There is, therefore, no occasion to consider the validity of either of those assumptions, whether in this case or more generally.

26 It is also to be noted that, before the primary judge, no evidence was adduced, and indeed no suggestion made, that another private fund manager could have been engaged at a lower rate of charge, or would have charged for its services otherwise than as a percentage of the total funds under management.

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17 *Gray v Richards* (2011) 59 MVR 85 at 88 [18].

18 *Gray v Richards* (2011) 59 MVR 85 at 90 [31].

19 *Gray v Richards* (2011) 59 MVR 85 at 89 [24].

20 *Gray v Richards (No 2)* [2011] NSWSC 1502 at [6].

21 *Gray v Richards (No 2)* [2011] NSWSC 1502 at [73], [82].

27 In relation to the fund management on fund income issue, the primary judge proceeded on the footing that the capacity of the fund to earn income was critical to its adequacy[22]. Her Honour accepted[23] that income derived from the management of the fund and reinvested by the manager would itself become part of the managed fund and, accordingly, would incur its own fund management fees. Her Honour observed[24] that:

> "if income earned by the fund is excluded from the calculation of fund management costs ... there will be a shortfall in the damages allowed on that account and there will be insufficient money to manage the [appellant's] damages."

28 In order to avoid that anticipated shortfall, her Honour held that there should be an allowance for fund management on fund income[25].

29 In reaching that conclusion, her Honour regarded it as relevant[26] that, pursuant to s 127 of the *Motor Accidents Compensation Act* 1999 (NSW) ("the MACA"), the discount rate applicable in the present case was five per cent.

30 Section 127 of the MACA provides:

> "(1) Where an award of damages is to include compensation, assessed as a lump sum, in respect of damages for future economic loss which is referable to:
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> (a) deprivation or impairment of earning capacity, or
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> (b) loss of expectation of financial support, or
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> (c) the value of future services of a domestic nature or services relating to nursing and attendance, or

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22 *Gray v Richards* (2011) 59 MVR 85 at 95 [54].

23 *Gray v Richards* (2011) 59 MVR 85 at 95 [54].

24 *Gray v Richards* (2011) 59 MVR 85 at 95 [54].

25 *Gray v Richards* (2011) 59 MVR 85 at 95 [55].

26 *Gray v Richards* (2011) 59 MVR 85 at 94 [48].

(d) a liability to incur expenditure in the future,

the present value of the future economic loss is to be qualified by adopting the prescribed discount rate.

(2) The ***prescribed discount rate*** is:

(a) a discount rate of the percentage prescribed by the regulations, or

(b) if no percentage is so prescribed—a discount rate of 5%.

(3) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages."

31 The primary judge observed[27] that: "The discount represents the net earning capacity of the fund over time." Apparently on the footing that the discount rate in s 127 of the MACA reflected a statutory assumption as to the actual net earning capacity of the damages awarded to a plaintiff, her Honour held that an award of damages reflecting the cost of managing fund income was necessary to preserve the longevity of the fund[28].

32 In the upshot, the primary judge gave judgment for the appellant in the amount of $12,151,000, comprising $10 million in respect of the compromise monies, and $2,151,000 in respect of fund management damages. The parties are agreed that the sum of $656,000 reflects the appellant's success on both issues before this Court, while the sum of $539,000 reflects the appellant's success solely on the fund management damages issue.

Decision of the Court of Appeal

33 On 2 December 2013, the Court of Appeal of the New South Wales Supreme Court (Bathurst CJ, Beazley P, McColl, Basten and Meagher JJA) overturned the decision of the primary judge in respect of both issues[29]. In the

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27 *Gray v Richards* (2011) 59 MVR 85 at 92 [41].

28 *Gray v Richards* (2011) 59 MVR 85 at 97 [62].

29 *Richards v Gray* (2013) Aust Torts Reports ¶82-153.

result, the appellant's damages in respect of fund management were reduced from $2,151,000 to $1,495,000.

34 It will be necessary to refer in some greater detail to the reasons of the Court of Appeal in due course but it is sufficient here to note that damages for the cost of managing the fund management component of the appellant's award were disallowed by reference to the third principle in *Todorovic v Waller*[30]. The component of damages for the cost of managing the fund's income was disallowed on the basis that s 127 of the MACA does not mandate either the maintenance of a five per cent net return over the life of the fund, or the making of necessary adjustments to the quantum of damages awarded to ensure that result.

35 The appellant appealed to this Court pursuant to a grant of special leave by French CJ and Bell J on 16 May 2014.

The fund management damages

36 The appellant's principal contention was that the Court of Appeal's decision was a departure from the first principle stated in *Todorovic v Waller*. In particular, it was said that to disallow the components of damages in question is apt to produce a shortfall in the appellant's estate equal to the cost of the Trust Company having to manage the fund management component of her damages and the fund's income. The shortfall was said to be unavoidable having regard to the requirement in s 79 of the CPA that both fund management damages and fund income must be managed as part of the appellant's estate.

37 The respondent's principal contention in response was that recovery of the costs associated with managing the fund management component of the appellant's damages and the income of the fund was precluded by s 127 of the MACA. It was also said that this outcome was warranted by the third principle in *Todorovic v Waller*.

38 Bathurst CJ began[31] his consideration of this issue by recognising that there is "a certain logic" in the approach of the primary judge. Nevertheless, his Honour applied the third principle in *Todorovic v Waller*, saying[32] that "it does

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30 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,875 [145].

31 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,875 [144].

32 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,875 [145].

not seem ... appropriate" to extend the refinement of that principle, upheld in *Willett v Futcher*[33], "to awarding a further amount to cover fees for managing that fund by the multiple iterations proposed."

39 Bathurst CJ gave two broad reasons for that conclusion. First, "[t]he court is required … to provide what is a reasonable amount for the costs of managing the fund."[34] The court would fail in that duty if it accepted the appellant's claim because it is:

> "open to … those representing [the appellant], to choose a fund manager with the approval of the court and to negotiate the terms on which the fund manager will be paid. The court should not … order additional amounts on the assumption that fees would also be paid on the amount set aside for fund management costs or indeed on the basis that in the particular case the chosen manager levies fees in such a way as to require the amount set aside for fund management to itself be managed."[35]

40 Basten JA was of a similar opinion, resolving this aspect of the case as "a policy question". His Honour concluded[36] that:

> "[t]he liability of the [respondent] is not necessarily dictated by a particular means of calculating the cost of managing [the appellant's] award. In principle, the [appellant] should reasonably be required to offer the fund manager prepayment of fees by transferring the equivalent of a satellite fund, notionally set aside for that purpose, calculated by reference to the corpus of the main fund."

41 The second reason given by Bathurst CJ for rejecting this aspect of the appellant's claim was that the calculation of the amount to cover the cost of managing fund management was unacceptably uncertain. It involved:

> "either speculation as to the performance of the fund in any given year, or assumptions as to the rate of dissipation of the fund management award

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33 (2005) 221 CLR 627 at 643 [51].

34 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,875 [146].

35 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,875-66,876 [146].

36 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,884 [200].

> which in all probability will bear little relation to reality. The uncertainty of speculation involved is even more apparent when the calculation is done in multiple iterations to produce the ultimate result. … To provide further funds would lead to the [appellant] being over-compensated. It was in this sense that Meagher JA in *Rosniak (No 1)*[37] used the expression 'double counting' in rejecting a claim of this nature."[38]

42 Basten JA did not accept that difficulty of calculation was a sound reason for rejecting the appellant's claim, pointing out[39] that "[i]n practice the calculation can readily be undertaken".

An unreasonable expense?

43 One strand of the reasoning which informed this aspect of the Court of Appeal's decision was a concern that the arrangement approved by White J was unreasonable. As to this, the appellant contended that the concern of the Court of Appeal that the appellant could or should have negotiated more reasonable terms on which the fund was to be managed was without any evidentiary foundation, and, in any event, should have been (but was not) the subject of a plea by the respondent that the appellant had failed to mitigate her loss.

44 In this Court, the respondent accepted that the appellant was entitled to recover damages for future outgoings, including the cost of managing the fund held for her benefit by the Trust Company; but did not accept that this cost was to be assessed by reference to the whole of the fund held for her. The respondent argued, relying on the fourth principle stated in *Todorovic v Waller*, that the appellant was required to prove the loss for which she sought damages, and had failed to discharge her burden of proof in this regard.

45 Contrary to the view of Bathurst CJ[40], the issue is not whether "[t]he court should … order additional amounts" in respect of fund management damages. The ascertainment of the cost of managing the fund management damages is not an exercise separate and distinct from assessing the present value of fund

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37 *Government Insurance Office (NSW) v Rosniak* (1992) 27 NSWLR 665 at 698.

38 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,876 [147].

39 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,884 [197].

40 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,875-66,876 [146].

management expenses as part of the appellant's future outgoings. The expenses in question are not incurred separately from the cost of fund management; they are an integral part of that cost. In *Willett v Futcher*, in accordance with the first of the *Todorovic v Waller* principles, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said[41]:

> "An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The incurring of the expenses is a direct result of the defendant's negligence. The damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she would have been in had the tort not been committed."

46 In addition, the question of reasonableness of fund management expenses is not at large as a matter of judicial discretion. The court does not make an open-ended judgment about the reasonableness of the fund management expense component of damages. The court is not concerned to regulate the market for the provision of fund management services. The court's concern is to ensure that the plaintiff's actual loss is compensated. There is, for example, no scope for the court to say that the amount is simply "too much" as a matter of intuition or impression if the plaintiff has no practical ability to bargain for a lesser charge.

47 The real question is whether the management arrangement with the Trust Company was so unreasonable in its terms that it could not be regarded, as a matter of common sense, as a consequence of the appellant's injury. If the fund management expense component of an award reflects actual market conditions, and is not contrary to any statutory control, then it may be seen, as a matter of common sense, as an expense consequent upon the tortfeasor's wrong and, therefore, compensable.

48 One can understand the concern which weighed with Bathurst CJ and Basten JA that, notwithstanding the requirement of s 79 of the CPA that the fund be held by the manager and applied as part of the protected estate, a reasonable accommodation must be made, as between the plaintiff and the manager, in relation to the management of the fund. It may be that where a reasonable arrangement is not made, the expense in question can fairly be seen, not as a loss consequential on the plaintiff's injury, but as a loss attributable to an

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41 (2005) 221 CLR 627 at 643 [51].

unreasonable bargain with the manager. But in the present case there was no issue as to whether the appointment of the Trust Company sanctioned by the order of White J was a reasonable response by the appellant (or those representing her) to the need to engage a manager of her estate; and there was no evidence that the Trust Company, in charging its management fees on the whole of the fund, was not acting in accordance with the practice of the market, or that its rates of charge were outside the market. Nor was there any suggestion that the Trust Company's charges were contrary to any statutory provision regulating such fees.

49 The only ground on which the respondent had challenged the reasonableness of the management fees payable to the Trust Company in the Court of Appeal was the "gross disparity between the amounts charged by [it and the NSW Trustee]." It is noteworthy that the Court of Appeal did not uphold this ground. It is not apparent that it could have done so without also setting aside the primary judge's conclusion[42] that:

> "having due regard to the orders made by White J, but also on the strength of the evidence before me, ... the tutor's choice of a private manager was entirely reasonable."

50 As noted above, it was not suggested that the appellant's tutor's preference for the appointment of the Trust Company, rather than the NSW Trustee, to manage the appellant's fund was unreasonable.

51 It may also be noted that the feasibility or reasonableness of the transfer of "the equivalent of a satellite fund" to the manager postulated by Basten JA[43] was not litigated by the parties at first instance. As a result, there was no evidence as to whether such a transfer would be feasible in the market for fund management services.

52 The respondent argued that s 127(1)(d) of the MACA supported the conclusion of the Court of Appeal on this issue because it requires an assessment to be made of the present value of the appellant's future outgoings, including fund management expenses, separately from that component of fund management expenses which will be incurred because the fund includes fund management damages. That argument must be rejected.

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42 *Gray v Richards (No 2)* [2011] NSWSC 1502 at [82].

43 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,884 [200].

53 Section 127(1)(d) of the MACA affords no support to the decision of the Court of Appeal on this issue. Section 127(1)(d) recognises a plaintiff's entitlement to compensation for loss which is referable to a liability to incur expenditure in the future. It does not impose a limit upon that entitlement; nor does it contemplate a staged assessment of the present value of future outgoings which a plaintiff is obliged to incur by reason of his or her injuries. Rather, s 127(1)(d) invites an assessment of the present value of *all* future outgoings based on the evidence which establishes the likely expenditure in the future. The appellant's liability in that regard encompasses the whole of the expenses charged for the management of the appellant's fund pursuant to the appointment of the Trust Company rather than the NSW Trustee.

Undue speculation

54 The other strand in the Court of Appeal's reasoning was the concern that the "multiple iterations" proposed by the appellant would lead to unrealistic assessments.

55 It is well settled that "the common law does not permit difficulties of estimating the loss in money to defeat an award of damages" by way of compensation for loss actually suffered[44].

56 The concern which weighed with Bathurst CJ[45], that the calculation of the cost of managing damages awarded for fund management might theoretically involve multiple iterations, was dispelled for practical purposes by uncontested evidence presented at trial[46].

57 There is no element of "double counting" involved here. As noted above, fund management expenses are one component of the loss consequent upon the appellant's injury.

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44 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 349; [1994] HCA 4. See also *Fink v Fink* (1946) 74 CLR 127 at 143; [1946] HCA 54; *Todorovic v Waller* (1981) 150 CLR 402 at 413.

45 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,876 [147].

46 *Gray v Richards* (2011) 59 MVR 85 at 90 [31].

Fund management on fund income

58 In relation to the fund management on fund income issue, Bathurst CJ held[47] that the primary judge had erred in concluding that the discount rate prescribed by s 127 of the MACA expressed a statutory assumption as to the net earnings rate of the damages awarded to the appellant. After reviewing earlier decisions of this Court[48] involving the application of the discount rate, his Honour concluded[49] that:

> "[T]he discount rate applied in respect of damages awarded is referable to the matters referred to in s 127(1)(a)-(d) of the [MACA] and was designed to take into account the effect of inflation and notional tax on income earned from the fund. Neither the [MACA] nor the cases to which I have referred lend support to the proposition that for all purposes a constant rate of diminution to the fund is to be assumed or that interest will be earned at a constant rate throughout the life of the fund, although these assumptions underpin the calculation of the discount rate."

59 Bathurst CJ concluded[50] that the appellant's claim with respect to the fund management on fund income issue should not be allowed. It is sufficient to note the principal reasons[51] for that conclusion:

> "[T]he discount rate assumes a rate of return sufficient to provide the injured plaintiff with fair and just compensation for the claimed loss[52]. The return is assumed to take into account the costs of earning income which would include any fees payable as a consequence. ...

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47 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,867 [103].

48 *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625; [1981] HCA 3; *Todorovic v Waller* (1981) 150 CLR 402; *The Commonwealth v Blackwell* (1987) 163 CLR 428; [1987] HCA 44.

49 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,869 [112].

50 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,874 [138].

51 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,874-66,875 [138]-[139].

52 *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 60-61.

> Even if the cost of earning the income was not taken into account for the discount rate set under s 127, there seems no basis to make an assumption as to the actual income earned for the purpose of the calculation and the court would inevitably be speculating as to what income would be derived from the fund from time to time."

60 Basten JA agreed with Bathurst CJ that the primary judge had erred in holding that the discount rate prescribed by s 127 of the MACA expressed a statutory assumption about a maintainable net earnings rate[53].

61 In this Court, the appellant argued that the Court of Appeal erred in concluding that the potential costs of managing fund income were covered by the discount rate prescribed by s 127 of the MACA. In particular, it was said that Bathurst CJ erred in holding that the discount rate did not represent the net earnings rate of the fund. In that regard, the appellant invoked the observation made by Gibbs CJ and Wilson J in *Todorovic v Waller*[54] which referred to "the assumption … that the income [of the fund] is earned at the discount rate".

62 The appellant's challenge to the reasons of Bathurst CJ and Basten JA on this issue should not be accepted.

63 The discount rate prescribed by s 127 of the MACA does not imply a statutory requirement that the fund should achieve a net future earnings rate of five per cent. Nor does it imply that the award of damages must be supplemented in order to sustain such an income, net of the expenses incurred in achieving it. Section 127 assumes, as does the second of the *Todorovic v Waller* principles, that the return from the fund takes into account the cost of generating that return.

64 The discount rate does not assume that the fund will produce an annual net income at an equivalent rate or imply that a lump sum award must be adjusted to ensure that result. The discount rate is a conceptual tool deployed for the purpose of arriving at a lump sum reflecting the present value of future losses. In *Nominal Defendant v Gardikiotis*[55], McHugh J explained:

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53 *Richards v Gray* (2013) Aust Torts Reports ¶82-153 at 66,885 [203]-[206].

54 (1981) 150 CLR 402 at 424.

55 (1996) 186 CLR 49 at 61.

> "Use is made of a discount rate to assess the present value of future economic loss and expense because it is perceived to be the conceptual tool best suited to determine what is fair and reasonable compensation for that loss or expense. The discounting exercise is a hypothetical construct and does not attempt to reflect, anticipate or govern the future actions or intentions of the plaintiff. It simply attempts to determine what sum represents the *present* value of the anticipated losses or expenses of the plaintiff. When that sum is determined, then, subject to any allowance for the contingencies of life, the law will equate it with fair compensation for those losses or expenses, irrespective of what the plaintiff intends to do with that sum." (emphasis in original)

65 The obiter observations by Gibbs CJ and Wilson J in *Todorovic v Waller*[56] cannot sustain a different view. In *Todorovic v Waller*[57], Gibbs CJ and Wilson J joined Stephen, Mason, Murphy, Aickin and Brennan JJ in a statement that:

> "where the plaintiff's injuries will make it necessary to expend in the future money to provide medical or other services … the present value of the future loss ought to be quantified by adopting a discount rate of 3 per cent in all cases, subject, of course, to any relevant statutory provisions. This rate is intended to make the appropriate allowance for inflation, for future changes in rates of wages generally or of prices, and for tax (either actual or notional) upon income from investment of the sum awarded. No further allowance should be made for these matters."

66 This statement does not suggest that the cost of managing the income generated by the fund to ensure that it maintains a net income at a given rate is a compensable loss. Indeed, that suggestion would seem to be inconsistent with their Honours' comprehensive dismissal of any "further allowance". Further, it is distinctly inconsistent with the second of the *Todorovic v Waller* principles, which operates on the assumption that the capital and income of the lump sum damages awarded in respect of future economic loss will be exhausted at the end of the period over which that loss is expected to be incurred. And finally, the cost of managing the income generated by the fund is not an integral part of the appellant's loss consequent upon her injury. One could view that cost as an integral part of that loss only if one were to assume that the income of the fund

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56 (1981) 150 CLR 402 at 424.

57 (1981) 150 CLR 402 at 409.

will, in fact, be reinvested in the fund and thereby swell the corpus under management. That assumption cannot be made, given that drawings from the fund may exceed its income. Further, that assumption should not be made, given that to do so would be contrary to the third of the *Todorovic v Waller* principles.

67 Section 127 of the MACA does not warrant a different view. Under s 127 the discount rate is now set at five per cent. That prescription reflects a judgment by the legislature as to the appropriate discount rate, having regard comprehensively to inflation, changes in wages and prices, and imposts on the income of the fund. Such imposts include the costs of managing that income. Section 127 does not, either expressly or impliedly, invite the making of an assessment of damages calculated to maintain a net income from the fund of five per cent per annum.

Conclusion and orders

68 The appellant's challenge to the decision of the Court of Appeal on the first question should be upheld. Her challenge to the decision on the second question should be rejected. The appeal should be allowed in part so that fund management damages recovered by the appellant allow for the cost of managing the fund management component of the appellant's damages. The parties were largely agreed upon the orders to be made in that eventuality. In accordance with that agreement, the orders of the Court should be:

1. Appeal allowed in part.

2. Vary order 2 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 December 2013 by replacing the sum of $11,424,000 with the sum of $12,034,000.

3. The respondent pay interest to the appellant on the sum of $539,000 at the rate prescribed by the Uniform Civil Procedure Rules 2005 (NSW) from 16 December 2011.

69 The parties were not agreed as to the orders for costs in this Court or in the courts below. The parties should be given the opportunity to be heard on the question of costs both in this Court and in the courts below. To this end the parties are directed to make written submissions on these questions of costs within 14 days limited to five pages.