

AUSTRALIAN INSURANCE LAW
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**Recent Developments
in Assessing Damages for Personal Injuries.**

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Some practical aspects of the assessment of
damages.

1. Fund management and administration expenses, with particular reference to *Willett v Fletcher* [2005] CLR 627, [2005] HCA 47 and *Smith v Hanrahan* [2006] WADC 20.
2. Services to third parties with particular reference to *CSR Ltd v Eddy* [2005] HCA 64.
3. Collateral benefits with particular reference to *Diamond v Simpson [No 1]* (2003) Aust Torts Reports 81-695 (CA NSW) (gratuitous services by an institution) and *Richards v Mills* [2003] WASCA 97 (private insurance benefits).
4. Section 93F of the Workers Compensation and Injury Management Act 1981 with particular reference to *Murray River North Pty Ltd v Midgley* [2006] WASCA 104.

Fund Management

Todorovic v Waller (1981) 150 CLR 402.

3% multiplier, no further allowance for inflation, for future changes in rates of wages or prices, or for tax on income from damages award. Mason J at 442: "In the vast majority of cases the injured plaintiff will be without investment capacity or experience, he will be dependent on others for advice and if he obtains expert advice he will have to pay for it."

Campbell v Nangle (1985) 40 SASR 161.

P under legal disability due to brain injury. King CJ at 192:

"If the plaintiff has been rendered ... incapable of managing his affairs so that the fund resulting from the damages must be managed for him, the fees payable to the manager will reduce the real return from the investment. Unless an amount is included ... to compensate for those fees the plaintiff will not receive the full restitution to which the law entitles him ... I should say for the sake of completeness that the same is true, in my opinion, where the plaintiff's incapacity ... does not result from the wrong but is antecedent to it, being the result of legal disability or some other cause."

Nominal Defendant v Gardikiotis (1996) 186 CLR 49.

- Damages can be awarded for expenses incurred in managing verdict moneys if the expenses are due to physical impairment suffered as a result of the accident. Otherwise no recovery of management costs unless plaintiff is intellectually impaired.

Brennan CJ, Dawson, Toohey and Gaudron JJ at 52: "as a result of the defendant's negligence or by reason of some pre-existing disability".

McHugh J at 55: "Unless a defendant's wrong has caused a disability that requires the plaintiff to obtain assistance in managing his or her verdict moneys, the cost of such assistance is not caused by the defendant's negligence and is not recoverable..."

Gummow J at 67 said King CJ in *Campbell* was correct. At 69 "Here there was no finding that the tortious act gave rise to the need to incur the cost of fund management and there was no suggestion of intellectual disability preceding or consequent upon the accident."

"The cost of fund management is not recoverable as damages from the defendant unless it is necessitated by disabilities resulting from the defendant's negligence. That being so, it must follow that if, as the result of the defendant's negligence, the plaintiff's money must be managed by others, no "allowance" should be deducted from the damages. In that situation, the plaintiff has no choice as to how he or she will use the verdict moneys.

The fee for fund management is necessarily incurred as a consequence of the defendant's negligence. It is illogical, therefore, to make an "allowance" on the hypothesis that, if the plaintiff did not have the disability, he or she would or might have incurred expense in the management of verdict moneys which the plaintiff would not have had but for the disability." McHugh J at 55.

Observations and questions

1. It is a question of causation. The need does not arise from the size or fact of the award, but from accident caused or antecedent disability.
2. Why is pre-existing disability, legal or otherwise, compensable, if as Mason J said in *Todorovic*, most plaintiffs need advice and may have to pay for it, and as McHugh and Gummow JJ said in *Gardikiotis* the rule that the defendant takes the plaintiff as found?
3. Why the adoption, obiter and without stated reasons (by all judges bar McHugh J) of an obiter remark by King CJ?
4. What damages could be awarded for fund management expenses which are due to physical incapacity?
5. Does the decision allow for fund management expenses for intellectual incapacity not amounting to legal disability for the purposes of RSC Order 70?

Morris v Zanki (1997) 18 WAR 260

- *Campbell* and *Gardikiotis* applied. Expenses must be referable to tort-caused disability.
- No inconsistency with *Todorovic*, but recurrent expenditure should be assessed on the basis that the fund will reduce to zero, following *GIO (NSW) v Rozniak* (1992) 27 NSWLR 665 (“divided by 2 or some other divisor”).
- Damages not limited to initial fund establishment fee as in *Miller v MVIT* (unrep, SCT WA FCt, 4 May 1988, Library 7106).
- Damages allowed for expenses incurred in maximising returns on fund because plaintiff has lost that capacity (but no finding that plaintiff, a wood-cutter, had a pre-accident capacity to manage large fund).
- Plaintiff can choose trustee but damages should not be assessed on a higher basis than if Public Trustee were appointed. “What is not compensable is a cost which is not necessarily incurred but results from a choice as to how to invest...”

Willett v Fitcher (2005) 221 CLR 627

- Award of \$3.85M. Trial judge allowed management fees (\$180,000) but not investment advice expenses (about \$600,000). Plaintiff’s appeal dismissed by Court of Appeal (Qld).
- Trial judge distinguished management fees and investment advice fees.
- CA saw trial judge as drawing a line at the point where in the performance of trustee’s obligations, “the trustee goes beyond the range of unassisted decision-making which an able adult of no particular skill, training or interest in the subject would make”.

- The fees claimed were in five categories:
 - **Establishment fees*: establishing account and preparing investment plan.
 - **Discretionary portfolio management fee*: ongoing fee based on percentage of assets for decision making and fiduciary obligations
 - Advisory portfolio management fee*: as above and including strategic and investment advice and contact with plaintiff, family and care providers.
 - Underlying investment manager fees – initial brokerage fee (third party)*: fund manager’s fees and brokerage.
 - Underlying investment manager fees – ongoing brokerage fee (third party)*: as above.

*allowed by trial judge

“It would not be useful to attempt to give a list of all of the kinds of expenditure that would be chargeable against the estate. But one example of such an expenditure is immediately relevant. Where a trustee company engages a third party to act as stockbroker in connection with a dealing in listed securities forming part of the trust fund under administration, the brokerage chargeable on that transaction would be a sum properly expended and chargeable against the estate under administration.” (at [34], underlining added)

“The question should be answered: an amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund... Because the allowance to be made is for remuneration and expenditure *properly* charged or incurred, the distinction drawn by the Court of Appeal between fees for services necessary to enable Perpetual to perform its obligations, and fees for services not necessary to perform those obligations, becomes inapposite. The services properly to be provided by an administrator must first be identified. And the identification of what remuneration and expenditure is properly charged or incurred, as with the identification of the amount of remuneration and expenditure properly allowed, will require close attention to the statutes governing those matters.” (at [49])

“The plaintiff can make no decision about the fund. 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 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. That requires comparison with the position the plaintiff would have been in *without* the award of a lump sum for damages.” (at[51])

SUMMARY (*WILLETT*)

- The costs of managing the verdict awarded to a person incapable of doing so include the remuneration and expenses properly charged and incurred by the administrator of the fund during its intended life.
- No distinction should be drawn between investment advice and other services.
- Assessment depends on statutory provisions imposing duties on administrator and fee limitations.
- Evidence is important.

Smith v Hanrahan [2006] WADC 154

- Issue was quantum of fund management fees on \$1.325M.
- Claim for:
 1. Establishment fee - \$16,563
 2. PT management fees @6.6% of income - \$14,480
 3. Financial advice - \$15,059
 4. Tax returns - \$2,071
- D contended that item 3 should be disallowed.

- “Having regard to the fact that trust funds are under the control and management of the Public Trustee, in my view decisions and measures which relate to the investment of such funds are taken "in respect of" the exercise of that control or management. It follows that expenses incurred by the Public Trustee in relation to the investment of trust funds (such as brokerage) are incurred in respect of the control or management of the trust estate and can be recouped from the trust pursuant to s 39(1) of the *Public Trustee Act*. In my view there is no reason to distinguish between the use of a broker (which relates to the acquisition and disposal of investments) and obtaining investment advice (which relates to the trustee's need to regularly review the trust investments). (at [43], underlining added)

“Whilst the circumstances of each trust will vary, it is clear in my view from what was said by the Full Court in *Morris v Zanki* (see par 20 above) and by the High Court in *Willett v Futcher* (see par 27 above), and from the statutory duties referred to in s 18(1)(a) and (3) and s 20(1) of the *Trustees Act*, that it would be proper for a prudent trustee in this State to regularly obtain qualified investment advice in respect of a large protective trust which is intended to serve the many and varied needs of the beneficiary for a considerable period of time. It is difficult to envisage a prudent trustee in that situation doing otherwise. Such advice might be provided to the trustee by an in-house advisor, or by an external consultant. Either way, compliance with such responsibilities will inevitably impose costs upon the trustee.”

Notes on *Smith v Hanrahan*

A protective trustee will not always need to take independent advice. It will depend on:-

- the amount of the discretionary component;
- the likely term of the trust;
- how the award is calculated; and
- how the fund will be disbursed: [58].

The test is what is properly chargeable to the trust fund: [60].

No observations made with respect to averaging over life of the trust or effect of tax deductibility.

What about legal disability due to age?

- *Pellow v NRMA* [2004]NSWSC 152.
Studdert J allowed a 10 year old plaintiff fund management damages to age 18.
Also *Ren v Mukergee* [1996] ACTSC 1199, Miles CJ.

And what about the cost of managing a plaintiff's existing estate – apart from the damages award?

- Are these principles coherent?
- Do the decisions truly reflect the stated principle that it is the plaintiff's need for an administrator that is compensable or are they really about the preservation of the particular award?
- Do the decisions discriminate unfairly against those who are vulnerable though not legally incapable?
- Why are brokerages regarded as compensable when a Court has no interest in what a plaintiff does with his or her damages?

Examples of assessments

Chapman v Katheappa [2001] WADC 49, Nisbet DCJ.

- Apportionment 70/30. Fees calculated on net award and then reduced for contributory negligence.
- Allowed, assuming 95% outside Common Fund:
 - 1.25% for establishment;
 - 1.1% on purchase of residence;
 - 6.6% on income earned outside Common Fund;
 - taxation returns \$330 pa; and
 - quarterly portfolio reviews at \$2400 pa.
- Judge declined to average the future fee on income (as in *Morris v Zanki*) stating that 6% tables took account of the diminishing return of the fund.
- Total allowance \$53,859 on damages of \$713,338
- On appeal, no increase was made to this head despite overall increase in award.

Baldwin v Heath [2004] WADC 68 O'Sullivan DCJ

- Same allowances were claimed as in *Chapman*.
- Public Trustee's calculations based on 3% inflation but not disallowed, despite rule in *Todorovic*.
- Fee on income averaged at 50% over life of trust in accordance with *Morris v Zanki*.
- Tax deductibility at top marginal rate (48.5%) taken into account to reduce recurrent expenditure on Tax returns and investment reviews but not Public Trustee's fees. "Plaintiff only entitled to estimated actual costs.."
- Allowance of \$220,237 on a corpus of \$7M.

Issues as to damages for fund management expenses.

- Pre-existing disability seems to be accepted as a basis for an award but this seems to be inconsistent with the rationale for not allowing such damages to those not under disability. McHugh J's implicit dissent in *Willett* and the importance of the issue will probably lead the High Court back to this question.
- The rationale for allowing all fees and expenses properly charged by a trustee should be revisited because anyone managing a fund – disabled or not - will incur certain fees such as brokerage and these would seem to involve choices rather than necessity. The comparison is said not to be made with an uninjured plaintiff with a lump sum, yet it is precisely on such a comparison that the disabled plaintiff is distinguished from the non-disabled one in the first place.

- The averaging of commission fees over the life of the Fund is somewhat problematic, being based on the premise that the fund will reduce to zero. On the basis of *Willett* the compensable loss is the cost of and incurred by the trustee. The trustee's obligations are statutory (*Trustees Act 1962*) and require that person to act with care diligence and skill. Good financial management may increase the corpus beyond what is necessary to preserve for the life of the trust. *What then is the rationale for assuming that the fund will be exhausted?*
- The tax deductibility of expenses incurred in earning income does affect the actual cost to the plaintiff's fund of the services required. In each case it will be a matter of evidence depending on the size of the fund and the expected income stream and capital growth as to what marginal rate applies.
- To what extent is a plaintiff under disability entitled to damages for management of a pre-existing estate?
- What degree of intellectual incapacity is required in order to ground a claim for such damages?
- What needs may be created by virtue of physical disability only for fund management services? Do they form part of care requirements?

Services to third parties

- *CSR Ltd v Eddy* [2005] HCA 64 overruled *Sullivan v Gordon* (1999) NSWLR 319 in deciding that a plaintiff is not entitled to be compensated for incapacity to render non-remunerative services to others on the basis that:-
 - the incapacity does not result in economic loss; and
 - *Sullivan v Gordon* damages are not analogous to those allowed pursuant to the *Griffiths v Kirkemeyer* exception.
- Loss of such capacity is compensated in general damages in the same way as loss of capacity to render services to voluntary sporting and other associations, i.e. as a loss of amenity.
- The plaintiff's damages, awarded in mesothelioma case, for his inability to look after his arthritis-afflicted spouse, were accordingly disallowed.

- *Sullivan v Gordon* involved a brain-damaged plaintiff who lost the capacity to care for her children and was compensated in damages on the basis of an analogy with *Griffiths v Kirkemeyer*. The Court of Appeal, comprising five judges, unanimously overruled *Burnicle v Cutelli* [1982] 2 NSWLR 26 and implicitly disapproved of the decision in *Maiward v Doyle* (1983) WAR 210 which allowed general damages only for loss of ability to care for a family.

- In *Sullivan* Mason P said at 324:

“ This case does not involve the issue of a plaintiff's “need” to care for persons other than her own children. Different considerations probably apply in the case of persons for whom no legal obligation of care exists and who are not members of the plaintiff's household being cared for at the time of the accident (for example, ageing parents).”

■ POINTS DECIDED

- Damages for gratuitous services are an exception to the general rule that loss of capacity is only compensable to the extent that it is productive of financial loss.
- *Griffiths v Kirkemeyer* is limited in its application to the plaintiff's accident-caused needs. It is anomalous and not to be extended.
- Incapacity to perform legal and moral obligations damages is not compensable on policy grounds by reference to moral and legal obligations operating within a family or by analogy with loss of earning capacity.
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Critique.

- It is anomalous that a family can recover under the Fatal Accidents Act for the loss of services of homemaker/caregiver wrongfully killed on the basis that the services lost have pecuniary value, pursuant to *Nguyen v Nguyen* (1990) 169 CLR 245, and within the limits of reasonableness stated in that case, but an injured plaintiff not be compensated for incapacity for such services.
- The decision discriminates against those who, out of familial obligation (as opposed to other reasons which might apply to other voluntary work), exercise their economically valuable work capacity without remuneration and against their innocent beneficiaries.
- The risk of incoherence in the common law (McHugh), and the invidious nature of assessment in such cases (Gleeson CJ, Gummow and Heydon JJ) did not prevent *Griffiths v Kirkemeyer* and *Nguyen v Nguyen* being decided and repeatedly upheld. Reasonable test criteria and recovery limits are capable of being set. It is regrettable that despite there being three sets of reasons no dissent was expressed.

Collateral Benefits

Diamond v Simpson [No1] (2003) Aust Torts Reports 81-695. NSW Court of Appeal.

Allowance of over \$600,000 for the costs of care provided by the Spastic Centre set aside because:

- the plaintiff was under no obligation to pay; and
- the need for the services did not fall within *Griffiths v Kirkemeyer*.

- Reference to *Blundell v Musgrave* (1956) 96 CLR 73: nno recovery unless plaintiff is out of pocket or under legal obligation to pay.
- Compensatory nature of damages considered.
- *Griffiths v Kirkmeyer* anomalous and confined.
- *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569 considered. Was the benefit one which was intended to relieve the wrong-doer of liability for damages?
- Held, that “on the *Espagne* approach the services of the Centre constitute subventions given out of benevolence with the intention that no payment was to be made by the plaintiff”.
- The Centre was merely fulfilling its charitable objective.

Richards v Mills [2003] WASCA 97

- Employer maintained a group disability policy.
- Plaintiff entitled to receive benefits based on 75% of her salary.
- “The benefits in question in this case are to be enjoyed notwithstanding that employment has ceased; and the benefits were paid for during employment by the services rendered by the respondent in the employment. The purpose of the benefits is not to compensate the respondent for the damages she sustained in the accident nor is it a payment in lieu of salary any more than any other pension is a payment in lieu of salary. It is simply one of the fruits of the respondent's past service, payable upon the onset of disability. It is a benefit “both independent of and cumulative upon whatever right of redress against others might arise out of the circumstances of” the onset of that disability (*National Insurance Co of New Zealand Ltd v Espagne* (*supra*) per Dixon CJ at 573).” Per Steytler J at [51]

Section 93F

- *Murray River North Pty Ltd v Midgley* [2006] WASCA 104, *Marshall v Lockyer* [2006] WASCA 58
- "(1) Unless an agreement or determination that the degree of disability of the worker is not less than 30% is recorded for the purposes of section 93E —
 - (a) the amount of damages to be awarded is to be a proportion, determined according to the severity of the disability, of the maximum amount that may be awarded; and
 - (b) the maximum amount of damages that may be awarded is Amount A, but the maximum amount may be awarded only in a most extreme case of a disability of less than 30% in degree."
- "Amount A" was \$293,990 at the material time. Damages in *Midgley* were conventionally assessed at \$322,122.
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"The appellant contends that s 93F(1)(a) requires a court to compare the severity of the subject disability with a most extreme case of a disability of a degree less than 30 per cent which is likely to cause substantially greater economic and non economic loss. The Court is not required to contemplate the worst kind of injury of the type suffered by the respondent. There can be a range or class within which a disability of a particular kind may qualify as a most extreme case of a disability of less than 30 per cent in degree. Further, the quantum of economic loss is a relevant but not determinative factor in assessing the relative severity of an injury. Injuries received in older age may have a disproportionate impact."

per McLure J in *Marshall v Lockyer* at [327], approved by Steytler P in

Midgley at [6]

"Under 93F, the proportion of Amount A is to be determined solely by reference to the severity of the disability. As Handley JA said in *Dell v Dalton*, this is an issue like other issues in the assessment of damages, and its resolution will involve questions of fact and degree, and matters of opinion, impression, speculation, and estimation, calling for the exercise of common sense and judgment. An appeal court will only be entitled to intervene and disturb the ultimate conclusion of the trial Judge in accordance with the ordinary principles governing appellate review of awards of damages for personal injury. See *Dell v Dalton* (*supra*), at 533 - 534. The assessment is quasi discretionary in nature: *Fitness First Australia Pty Ltd v Vittenberg* [2005] NSWCA 376 at [40]. The parameters of the evaluation cannot be defined with precision: *Ellis v Rantzos* [2005] NSWCA 266 at [43], and see also *Henry Walker Eltin Contracting Pty Ltd v Hrstic* [2005] NSWCA 253." Per Pullin J at [35].