ARE FUND MANAGEMENT APPLICATIONS STILL A "GRAY" AREA?

Presented by

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A. INTRODUCTION:

1. In a motor vehicle accident in 2003 Rhiannon Gray suffered a catastrophic brain injury. At the time of the accident Miss Gray was 10 years of age. (I am indebted to Bede Kelleher whose paper "*Fund Management – What's Left?"* I have accessed for some of the material reproduced in this paper).

2. Miss Gray brought a case for damages in the Supreme Court of New South Wales in 2011. Liability was not an issue, however, several heads of damages were. Those of you familiar with these type of cases would not be surprised to learn that the issues to the forefront of the debate would have been matters such as the nature and extent of care required, future medical needs and the provision of special housing and/or transport. There was no issue that Ms Gray was a legally incapacitated person as a consequence of the negligence of the defendant who required fund management.

3. Had the question of the incapacity of Miss Gray not been clear then a preliminary issue would have been to decide whether Miss Gray was entitled to recover damages for costs she might incur in managing a lump sum awarded by way of damages.

B. RELEVANT LEGISLATION:

4. S.76 of the *Civil Procedure Act, 2005 (CPA)* provides for the procedure where proceedings are settled that are commenced by or on behalf of or against a person under a legal incapacity. The section specifically provides that, except with the approval of the Court, there may not be any compromise or settlement of any proceedings covered by the section, nor any acceptance of any money paid into Court in any such proceedings.

5. S.77 of the *CPA* provides for the payment of money recovered on behalf of any person under a legal incapacity. All such money is to be paid into Court except that the Court may order that that money, or any part of it, may be paid to the NSW Trustee and Guardian (NSWTG) (in the case of a minor) or, if the person is a protected person, to the manager of the protected person's Estate.

6. S.79 of the *CPA* provides for the application of money by the manager of a protected person's Estate and requires that manager to hold and apply such funds as part of that person's Estate.

7. S.41 of the *NSW Trustee and Guardian Act, 2009* empowers the Supreme Court to declare that a person is incapable of managing his or her affairs and by order appoint a suitable person as manager of the Estate or commit the management of the Estate to the NSWTG.

C. THE AUTHORITIES:

8. In *Todorovic v Waller (1981) 150 CLR 402 at 412* Gibbs CJ and Wilson J summarised the principles regulating the task of assessment of damages for personal injuries and set them out 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 for ever, 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 with the plaintiff to prove the injury or loss for which he seeks damages."*

9. As I indicated above, generally speaking, damages are not recovered for the cost of managing a lump sum awarded. That is because such costs are not regarded as a loss resulting from the plaintiff's injury. As was pointed out again by the High Court in *Nominal Defendant v Gardikiotis* by Brennan CJ, Dawson, Toohey and Gaudron at (1996) 186 CLR 49 at [2]:

> *"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."*

10. Justice McHugh also said in *Gardikiotis* at [20]:

> *"20. In my view all the foregoing cases, except Chira and so much of Treonne as required the deduction of an 'allowance', were correctly decided in accordance with the principles which I have set out in this judgment. These cases were determined on the basis that a defendant is liable in damages only for those expenses which are the consequence of the physical or mental harm that has resulted from that defendant's negligence."*

11. In *Gray's* case the plaintiff at the time of the accident was aged 10 years. Clearly the issue of her being a minor did not arise in the proceedings but that issue could have some importance in certain cases. Recently I was in a case in which there was a contest about the entitlement to fund management. The circumstances were that the plaintiff's parents were killed in an accident and there was a compensation to relatives action, from memory. Bernard Gross QC was for the plaintiff and mounted a substantial claim for fund management. We argued that the plaintiff was not entitled to damages under that head because it was in effect the tort of the defendant

that had created the need for the management of the funds. It was in fact the age of the plaintiff that necessitated that action. At the time I gave a guarded advice indicating that the argument against us was certainly arguable but it brings to mind the issue for cases in which there is an overlap of time between when a plaintiff is injured and when damages are received. This is an issue for another day.

12. The High Court in *Gray v Richards [2014] HCA 40* then examined the above principles and said:

> *"4. The decisions of this Court in … Gardikiotis and Willett v Futcher … refined this aspect of the operation of the 3rd principal in Todorovic … 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 of the [management expenses] is a loss flowing directly from the wrong and is recoverable as damages caused by the wrong'; and, in accordance with the first and second principles stated in Todorovic …, 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."*

D. <u>GRAY ITSELF:</u>

13. In *Gray* the question of the correct method of calculation of the cost of funds management including the question of what components constitutes the corpus to be managed and the reasonableness of the fund manager who was selected were issues that remained at large until resolved by the High Court.

14. Gray's case involved a catastrophic injury and the quantum of the matter was settled for the sum of $10million inclusive of paid out of pocket expenses but leaving the question of the proper amount for fund management to be agreed or assessed.

15. There was in fact no agreement as to the quantum of the fund to be managed and the hearing ensued before McCallum J but the hearing was interrupted by substantial adjournment. Significant evidence was called of an actuarial and accounting nature. At trial a number of questions were raised and, as can be seen from what follows in this paper, by the time the matter reached the High Court only two questions remained the subject of challenge. The questions that were raised at trial were:

i. The proper method for establishing the quantum on which the cost of fund management was to be calculated.

ii. In terms of the selection of a manager of the fund, whether it was reasonable to choose a private manager in place of the NSW Trustee and Guardian (NSWTG).

iii. Number 2 above raised the question of the comparison of costs and the reasonableness of same between private fund managers as opposed to the NSWTG.

iv. Whether there were any hidden costs in the fees and charges said to be levied by the NSWTG pursuant to the various pieces of legislation. This turned out to be largely a non-issue.

v. The question of whether damages for the cost of managing the fund management component of a damages claim were permissible. In other words, whether once the fund management amount is calculated (i.e. $10million plus that amount) whether the cost of fund management includes the total amount of those two components.

vi. Whether the cost of managing the fund should include an allowance for a 5% return on investment. In other words, whether an incapacitated plaintiff is entitled to recover costs associated with managing the predicted future income of the managed fund based on the calculations performed using the discount rate.

16. The resolution of the issues is found in a number of judgments:

i. *Gray v Richards [2011] NSWSC 877* dealing with issues 5 and 6 above.

ii. *Gray v Richards (No. 2) [2011] NSWSC 1502* dealing with issues 1 to 4 above.

iii. The plaintiff was successful on all 6 issues at trial.

iv. Issues 2, 3, 5 and 6 were the subject of an appeal to the NSW Court of Appeal.

v. In *Richards v Grey [2013] NSWCA 402* the defendant succeeded on issues 5 and 6 but lost on the balance.

vi. The Plaintiff sought special leave to appeal and that special leave was granted.

17. The High Court in its Judgment in the Appeal posed the questions to be answered as follows:

> *"5. In this appeal, two questions arise out of this refinement of the operation of the third principle stated in Todorovic … 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."*

18. The High Court answered the first of the above questions "Yes". It answered the second question "No".

E. THE SIX ISSUES CONSIDERED SEPARATELY

T**he amount or the corpus of the fund.**

19. After deductions for statutory repayment from the settlement of $10million there was a sum available of $9,934,000. The plaintiff of course argued that the whole of that sum was to be administered and therefore in any calculation of fund management fees that was the figure to be used.

20. The defendant relied on *GIO v Rosniak (1992) 27 NSWLR 665* and contended in accordance with what Mahoney JA said at [668D] that expenses likely to be paid out early in the term of the management should in fact be deducted from the amount of the fund.

21. At the time of trial there had not been an application to the Protective Division of the Supreme Court of NSW to appoint a financial manager. In passing I note that this appointment of the financial manager became very significant because ultimately one was appointed in a separate hearing before Justice White at which the defendant was not present. Evidence was led as to the reason a private trustee should be appointed as opposed to the NSWTG. This evidence was led to satisfy the Court that the private trustee was a suitable person as required by s.41 of the *NSW Trustee and Guardian Act, 2009*. That in the end result had a significant bearing on the Appellate Court's consideration of the reasonableness of the fees charged by the private trustee as opposed to the fees charged by the NSWTG.

22. Returning to the defendant's application, it had an evidentiary difficulty in establishing the identity of those matters referrable to Justice Mahoney's judgment because the settlement agreed upon was a global amount. There was no separation of the quantum amount in terms of particular amounts for

particular items. In *Rosniak* there had been a contested trial on the issues of the relevant heads of damage and in *Rosniak's* case the amounts attributable to each could be readily identified. *Gray's* case was different. The contest in *Rosniak* produced evidence about the intentions as to future expenditures and again no such evidence was available in *Gray's* case.

23. This is an important lesson. Any party in such a dispute should take heed. From the plaintiff's point of view to avoid such a challenge, obviously an agreement as to a global amount without contest is preferable. From a defendant's point of view, some effort should be made to identify particular heads of damage and the likely timing of expenditure, i.e. future intentions. I concede that such an approach is not always possible.

24. This issue could not be considered in the first *Gray* case because, as I indicated before a manager had not been appointed. However, by the time of *Gray (No. 2)* Justice White, sitting in the Protective Division of the Supreme Court, had appointed a manager. It is not difficult to see how this issue arises. As noted above, the settlement was for $10 million inclusive of past out of pocket expenses. Those expenses were deducted from the corpus said to be the relevant amount for consideration in terms of funds management. The defendant therefore argued that a number of other sums were likely to be expended and they were as follows:

    i. The solicitor/client costs in the sum of $200,000.00. It was important that this amount had been identified by Justice Hoeben on the approval application by the plaintiff's legal advisors as us usually the case.

    ii. Past *Griffiths v Kirkemeier* damages which were said to be calculated in the sum of $373,000.00 as claimed by the plaintiff or alternatively the sum of $200,000.00 which apparently was the sum identified by Justice Hoeben as a recommendation for payment to the plaintiff's mother on the approval application. As we all know however, even though these damages are claimed and awarded, there is no obligation on a plaintiff to pay them out to the parties who have provided the assistance for which the damages are payable.

    iii. There was a suggestion of the need for house modifications and a swimming pool and the defendant contended that these amounts should be deducted from the amount to be considered in terms of the calculation of fund management fees.

25. In the trial evidence regarding (iii above) was lacking so the defendant sought to tender the plaintiff's schedule of damages going to the point of the cost of modifying the house and the construction of the swimming pool. There was considerable debate about this and objection by the plaintiff, which objection was upheld. The defendant then sought to call for the advice provided by the plaintiff's counsel to Justice Hoeben on the approval application. As you would know, in such cases an advice is prepared

usually by Senior Counsel confirming the reasonableness of the settlement reached and the reasons for that settlement approach.

26. Ultimately, after much skirmishing, the matter returned to Justice McCallum and the schedule of damages was ultimately admitted but this was to no avail as her Honour found that the whole of the initial fund was to be paid to the trustee appointed by the Protective Division. Her Honour was not satisfied that there was any evidence sufficient to come within the terms of *Rosniak*. This ground was the subject of an unsuccessful appeal to the Court of Appeal. In passing I also note that in the Court of Appeal, Justice Basten in a separate judgment, indicated he would have allowed a deduction of $200,000.00 for solicitor/client costs but this was a minority view on that point.

Choice of Manager Appointed on behalf of the Plaintiff.

27. In *Gray* Justice White in the Protective Division appointed a manager of the Estate of the plaintiff who was in fact a private manager. The defendant took the position that a private manager would charge higher fees than the TSWTG. The defendant was not represented in the Protective Division as is the usual case.

28. Before White J there was evidence, which of course was uncontested, that the plaintiff's mother (the tutor) had in the past experienced difficulties dealing with the NSWTG. As that evidence was uncontested, his Honour accepted it and used it as a reason to support the proposition that the private manager should be appointed.

29. When the matter came back for argument on the reasonableness of the choice of the private manager as opposed to the NSWTG the defendant took the position that the evidence (to which it was not privy) did not explain why the NSWTG was not in fact a reasonable choice of manager. The defendant relied on *Tu Tran v Dos Santos (No 2) [2009] NSWSC 336*. In that case upon hearing argument the Court in fact did a Solomon and in effect awarded a figure approximating the position between the two sets of fees, namely the higher and the lower.

30. At first instance, her Honour distinguished *Tu Tran*. Her Honour was also impressed by the findings of White J which begs the question about the desirability of having the defendant represented in the Protective Division in case findings made there in its absence could affect a situation such as this down the track.

31. The importance of the above is demonstrated by what the Court of Appeal said when it came to consider this question and that is as follows:

> *"158. The question is what is reasonable compensation in these circumstances. Whilst it is true that the fee of the NSW Trustee is somewhat lower than that of the Trust Company, the fees proposed to be charged by the Trust Company as ultimately negotiated are competitive with the fees of the other private trustees whose fees are in evidence. The establishment fee charged by the trust company is $24,000.00 lower than that charged by Perpetual Trustee Company Limited whilst its management fees including the management expense ratio are significantly lower for the first $3 million of the fund, although 0.08% higher for the balance. In the case of ANZ Trustees Limited, although the trust company's establishment fee is $1,000.00 higher, its management fees are lower and in respect of the first $5 million, significantly so. As all the fees are a matter of public disclosure it can be assumed they were set in a competitive and informed market."*

32. It should be noted that the Court of Appeal in considering the reasonableness question compared private funds but did not compare the private funds to the NSWTG.

33. The Court continued:

> *"159. In addition to those matters it is also necessary to take into account the concern of the respondent's mother in relation to the NSW Trustee which the primary judge recognised was legitimate, the length of the life of the fund, the need for constant communication between those having day to day care of the respondent and the fund manager and to the fact that White J approved of the appointment of the trust company knowing of the fee differential between that company, the other private trustees and those of the NSW Trustee. Taking all those factors into account, it seems to me to be reasonable to award an amount for fund management fees on the basis of those charged by the trust company."*

34. By the time the matter was considered by the High Court the nuance of this had slightly changed. Their Honours said:

> *"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… 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' . … *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."

35. The underlined words above would suggest that the defendant in fact had an opportunity to challenge that finding of fact made but elected not to do so. When one looks at the chronology clearly that challenge was not available to it and the High Court's words seem to put a gloss on the matter that simply was not warranted.

36. Recently in a case I had this situation arose. The calculation of fees on the basis of the use of a private fund manager was about $275,000.00. The calculation for the NSWTG was about $55,000.00. Those of you who do this sort of work will know that those are not calculations made by lawyers but by forensic accountants who apply actuarial tables. The difference between those two figures was enormous and even more significant seeing it was only on a corpus of a little under $700,000.00.

37. My case was also a little different in that in my case the mother, who was the next friend, wanted to be appointed as the financial manager and have the day to day decision making power in the application of the funds. There would of course be fees charged to a fund manager which were calculated by the forensic accountants. Interestingly, the amount calculated by the plaintiff in that case was based only on the calculation of the fund manager's fees but not the financial manager's fees. If it was the latter then the calculation would have been almost double. The choice of trustee therefore is a critical matter for both plaintiff and defendant.

38. In passing it should also be noted that simply being appointed as a trustee does not entitle a person to be able to charge fees. This is not the case where the NSWTG is appointed or a licenced trustee company is appointed because they have a statutory right to charge fees.

39. Even where a private trustee is appointed (such as a next friend) then an application can still be made for an order that fees are able to be charged: see *Ability One Financial Management Pty Ltd & Anor v J.B. by his tutor A.B. [2014] NSWSC 245*; *JMK v RDC and PTO v WDO [2013] NSWSC 1362.*

Contest between appointment of a private trustee and the NSWTG.

40. It is generally accepted that private trustees' fees are higher than the NSWTG. Defendants therefore argue that it is unwarranted that the plaintiffs be entitled to go to a private trustee and have their funds managed because this will ultimately end up in a greater payment by the defendant. The argument is that that choice is not reasonable.

41. I have set out above the way the trial judge, Court of Appeal and High Court dealt with this issue all to the detriment of the defendant in that case. From a defendant's point of view it is to be argued that that case is confined to its facts. The plaintiffs would gain some insight into the manner in which their cases must be prepared. If there is a legitimate reason from a personal point of view why a tutor would have misgivings about the NSWTG then that should be made very clear in the evidence on any application. It would seem that if such evidence existed that would be very powerful evidence in the light of what has been said at the various levels of consideration in *Gray's* case. From the defendant's point of view in the absence of such evidence the argument remains as to the reasonableness between the competing entities.

42. I remind you of course that the appointment of a fund manager in the Protective Division is made in the absence of the defendant. In those circumstances the injured party is the defendant and the next friend (tutor) is the moving party, namely the plaintiff. The application is generally brought on the papers and examined in chambers by the Judge. It has been suggested that there is no standing for a defendant to be heard on the issue as it has nothing to do with the actual proceedings between the plaintiff and the defendant. However, it is very clear that the decision in such an instance could have adverse ramifications for a defendant. It is a dilemma for defendants therefore and one which must be very carefully considered. This is particularly so bearing in mind that there generally is not a particular time that an application for a particular trustee is made. These disputes are by and large fought out leading up to the trial and in the settlement process and at a time before a trustee is in fact appointed. If this is the case that would be very much to the advantage of the defendant. On the other hand, a plaintiff may benefit by bringing an application to have the trustee appointed before the conclusion of the proceedings for the reasons which I have set out above.

The Question of the fee structure of the NSWTG.

43. This issue took up a great deal of argument and time in the trial. Considerable expert evidence was called over many adjourned periods by both parties. Ultimately, the issue had very little effect on the outcome of the trial.

44. The final two issues were those issues considered by the High Court as I have indicated above. Those issues appear below.

The cost of fund on fund:

45. This issue was determined at trial in favour of the plaintiff and therefore adversely to the defendant. The Court of Appeal overturned the trial Judge on the issue and therefore the matter was considered after special leave was granted by the High Court.

46. The following argument was mounted by the plaintiff:

    i. As indicated above, the need for fund management must be created by the tort committed by the defendant: Gardikiatos; Willet v Futcher [2005] HCA 47.

    ii. Those of you who are familiar with this area will understand that one can only calculate the fund management fees after all other heads of damage are either agreed or awarded.

    iii. The cost of the management of the funds therefore fell to be invested and therefore should be considered.

    iv. If the cost of the fund management was not included there would therefore be a shortfall in the damages that should have been awarded to the plaintiff.

    v. The argument from the plaintiff incorporated reference to Bacha v Petersen NSWSC 20 September, 1994 per Hunter *J.*

47. The Defendant opposed the order unsuccessfully at first instance but successfully in the Court of Appeal. The defendant referred to *Rosniak (No. 1)*. Also cited were:

    - *Buckman v Napier Constructions Pty Ltd [2005] NSWSC 546;*
    - *Haywood v Collaroy Services Beach Club Limited [2006] NSWSC 566; and a further decision from the Queensland Supreme Court, namely*
    - *Lewis v Bundrock [2009] 1 QDR 524*.

48. Those cases effectively rejected the claim on the basis that the sum to be calculated was uncertain because of the need for forensically accounting for an endless "iteration" of the sum to be awarded.

49. The chronology of the litigation on this issue reveals:

    i. The trial Judge concluded she was not bound to follow what Justice Meagher had said in *Rosniak* and accepted the plaintiff's submission and awarded damages for the fund on fund component of the fees.

    ii. The Court of Appeal (sitting as a Bench of 5 on request by the defendant because of the attack on *Rosniak* that was made) said that damages are once and for all and that the Court does not concern itself with what happens to the money post award. The Court of Appeal therefore upheld what Justice Meagher had said in *Rosniak* and adopted two of the central principles of *Todorovic*. Further, the Court of Appeal held that any award should not reasonably include costs then levied on that award by the fund manager appointed. This was because there was speculation and uncertainty during the life of the fund and it would make any further award in effect over compensatory.

    iii. The High Court rejected the entire reasoning of the Court of Appeal holding that the award was an expense separately incurred and therefore one to be compensated. Their Honours said:

        "45. Contrary to the view of Bathurst CJ …, the issue is not whether 'the 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 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 Willet … in accordance with the first of the Todorovic … principles, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said:

            '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.'"

Their Honours further said:

"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 s79 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 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."

50. It follows that there are some grey areas still alive, those being evidentiary areas going to the question of the reasonableness of the choice of the private manager over a public manager and the consequent costs of same and the reasonableness of those costs.

The issue of fund management on fund income:

51. The plaintiff was unsuccessful on this issue in the High Court. Basically, the matter was argued using expert evidence. The plaintiff's argument was that the fund would earn income and therefore that income would need to be invested and therefore that investment would incur fees. The plaintiff's argument was that if those fees were not incorporated in to the calculation the plaintiff would be short-changed. The defendant argued on the basis of the principles set out in *Todorovic* such that:

    i. Damages as far as possible are designed to put the plaintiff in the same position as if the injuries were not sustained.

    ii. A damages award is once and for all.

    iii. The Court does not concern how the plaintiff uses the award and

    iv. The burden lies on the plaintiff to prove the injury or loss

52. There was considerable debate about the effect of the discount rate as it applies to any fund. The High Court dealt with this issue as follows:

> *"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 [55] 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. S.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:*

> *'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)"*

53. Eventually the Court came to this conclusion on the issue:

'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 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."

F. IS THERE ANY GREY AREA LEFT:

54. The following matters are noted from the above:

i. The defendant is at a distinct forensic disadvantage by not being able to appear in the Protective Division and this is an issue that should be borne in mind.

ii. A plaintiff should be alive to the need for evidence to justify a selection of a private trustee whose fees would normally be higher as opposed to the NSWTG.

iii. The question of the reasonableness of the costs in circumstances where there is a contest as to who is the appropriate fund manager remains a live issue. As can be seen from the above, there seemed to be a change in consideration from the Court of Appeal to the High Court which to my mind was not warranted. As far as I can tell the defendant in all of this litigation agitated every issue it could in the strongest possible terms. To my mind the comparison should be between the public manager's costs and the private manager's costs.

iv. There is often an issue as to whether a private manager such as a tutor could be appointed as the financial manager on a day to day basis and therefore have a limiting effect on the fees charged by a trustee. This will often happen in circumstances where a fund is not large (e.g. in the case I had it was well under $1 million) and the tutor was reasonably capable of dealing with the day to day funding of the plaintiff's needs in circumstances where it would not be warranted to go back on a regular basis to a private manager or a public manager to obtain permission for such expenditure. This is a very practical matter and should be carefully considered in each case.

v. There is also an issue, which has also not really been highlighted in this paper, as to the statutory powers of remuneration and whether any fee structure infringes the NSWTG Act or Regulations or similar State legislation.

vi. The issue first mentioned in this paper was the need established for the appointment of a manager but that should not be assumed in every case and from a defendant's point of view this remains an issue of some importance, largely dependent on medical evidence.

vii. 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. An incapacitated plaintiff is not entitled to recover costs associated with managing the predicted future income of the managed fund. Absent legislative intervention that would seem to be a position which will be maintained.

Dated: Friday, 24th April, 2015.