IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S111 of 2014

BETWEEN: **RHIANNON GRAY by her tutor KATHLEEN GRAY**
Appellant

and

COREY RICHARDS
Respondent

RESPONDENT'S SUBMISSIONS

Part I – INTERNET CERTIFICATION

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II – ISSUES

2. Whether any allowance for the cost of managing the head of damage identified as fund management expenses, is a properly recoverable head of damage.

3. Whether any allowance for managing an assumed return on investment inherent in the discount rate, is to be included in the calculation of the present value of the future cost of fund management.

4. Whether the appellant should be permitted to raise for the first time in this Court the argument that the calculation of damages for fund management falls outside the scope of s.127 of the *Motor Accidents Compensation Act* 1999 (NSW).

5. Whether the appellant's contention that a refusal to allow either or both of the above head of damages is inconsistent with the principle of *restitutio ad integrum* arises from a misconception of the principles underlying the application of a discount rate.

Part III –S.78B NOTICES

6. The respondent certifies that there is no reason for notice to be given to Attorneys-General in compliance with s.78B of the *Judiciary Act* 1903 (Cth).

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Part IV – FACTS

7. The respondent agrees with the recitation of facts in paragraphs 7-21 of the appellant's Submissions except for the matters set out below.

8. In respect of paragraph 13, it is not correct to assert that the sum of $12,151,000 less expenses was paid to the Trust Company. The amount paid to The Trust Company was consistent with the orders made by the trial judge on 16 December 2011 [Special Leave Application Book p.59].

9. In respect of paragraph 16 the respondent says that that use of the word predicted is inconsistent with the proper application of a discount rate.

10 10. Paragraph 17(b) is incorrect in asserting that there was no allowance made for "*the income derived*". The initial evidence was that the Trust Company would charge a fee of 0.688% per annum on the funds managed. Accordingly, the method of calculation by the Trust Company, the appellant's trustee, is on the funds under management annually rather than on any income as asserted. It should also be noted that consistent with Ex. KLH2 (Application Book p.193) the established management investment ongoing platform fees were reduced on 13 December 2011 to 0.550% per annum inclusive of GST resulting in a reduction in the management fee of approximately $300,000.

Part V – APPLICABLE STATUTES

20 11. The respondent agrees with the applicable statutes identified by the appellant.

Part VI - ARGUMENT

Introduction

12. In 1981, five members of the court put aside their personal differences in approach to lay down a clear set of principles governing the award of damages in personal injury cases including a fixed discount rate to be applied in order to calculate the present value of all future losses[1].

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1 *Todorovic v Waller* [1981] 150 CLR 402

13. The principles laid down by the Court in *Todorovic* were endorsed by every state Parliament in legislation which mirrored the Court's approach by implementing a discount rate fixed by Parliament[2].

14. With the common law and parliament acting in tandem, the law has prescribed a consistent and predictable body of principles governing the award of damages that have worked well for at least three decades in providing fair and reasonable compensation to injured plaintiffs. The principles have been applied and upheld in this Court in cases involving an award of damages for fund management[3] and should not now be disturbed.

10 15. Before the judgment at first instance in this case:

14.1 There had not been a single decision in Australia awarding fund management expenses on income that the fund would earn in addition to the cost of managing the corpus of the damages awarded. The only decision on the issue had rejected the claim[4].

14.2 Further, there had only been one decision in which a Court had awarded the cost of managing the fund management fees themselves in a case where the judge in question gave no consideration to any of the underlying principles or the authorities relevant to the matter[5]. In every other case in which the issue had arisen, the claim was denied[6].

20 16. It is accordingly submitted that the five members of the New South Wales Court of Appeal were clearly correct in unanimously rejecting the trial judge's approach in the present case. Although Basten JA provided his own reasons, it is to be noted that all other members of the court agreed with the Chief Justice.

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2 See Annexure "A" – Schedule of Legislation

3 *Nominal Defendant V Gardikiotis* [1996] 186 CLR 49; *Willett v Futcher* [2005] 221 CLR 627

4 *Rottenbury v Rottenbury* [2007] NSWSC 215 per Hislop J [paras 50-53]

5 *Bacha v Pettersen* [Hunter J] NSWSC 20 September 1994

6 *GIO of NSW v Rosniak* [1992] 27 NSWLR 665 per Meagher JA [p.698G]; *Buckman v M&K Napier Constructions Pty Limited* [2005] NSWSC 546 per Burchett AJ [13]; *Haywood v Collaroy Services Beach Club Limited* Hidden J NSW S.C., 16 June 2006 unreported [para 8], *Lewis v Bundrock* [2008] QSC 189 Martin J [6-17] and *Traeger v Harris [No. 4]* 2011 WADC 45 per Schoombee DCJ [373-379]

The Alleged "shortfall"

17. The appellant's argument in relation to both the issues raised is dependent upon the assertion that without a change in the law there will be an alleged "shortfall" in the damages awarded to the appellant. For the reasons set out in greater detail later in the submissions, the respondent submits that upon proper analysis there is nothing that can be categorised as a "shortfall" in the sums awarded.

18. The Appellant's argument on "shortfall" fails due to two misconceptions of the principles governing the calculation of damages. Firstly that an award for funds management is a special head of damage that is required to be treated separately from all other heads of damages. There is no authority to support such an approach. It is further contrary to the trite principle that damages, once separately calculated are awarded once and for all as a judgment sum. In short the award of a sum for fund management on the corpus of damages.

19. The second error is the assertion that the mere application of a discount rate creates a shortfall[7]. The utilisation of a discount rate, as discussed further below, cannot result in a shortfall.

20. As Bathurst CJ records in his reasons, the evidence adduced on behalf of the appellant at trial demonstrated that, if fund management charges were payable on the assumed income derived from the fund, the monies accruing to the appellant would total $12.6m after 25 years with a retained capital sum of over $9m [Bathurst CJ – [85], [89] and [Table 2].

21. Whilst the Chief Justice is undoubtedly correct in stating that the table is "unlikely to reflect reality" [90], on the assumptions the appellant and her expert Mr Plover ask the Court to accept as set out in Table 2, by the time the fund is exhausted, the appellant's drawings would total more than $33m. The figures do not include the further amounts claimed by the appellant under her fund on fund argument.

22. It is submitted that on any view of the facts, such an outcome would offend the "cognate" principle governing the law of damages referred to by the Court in *Haines v Bendall* that a plaintiff cannot recover more than he or she has lost[8].

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7 See paragraphs 55, 60, 61, 64 of the Appellant's submissions.

23. The fundamental principles which the appellant has failed to allow for in the current appeal may be summarised from the authorities in the following terms:

21.1 The discount rate is intended to be of general application to all personal injuries cases where a lump sum calculation of a future loss is required[9];

21.2 The discount rate is intended to take into account a number of factors incapable of precise calculation, but including inflation, changes in wages and prices and tax upon income generated by the notional investment of the sum awarded[10];

21.3 No further allowance should be made for such factors[11]; and

10 21.4 The court has no concern with what the party would or might do with the damages awarded[12].

24. For the reasons explained in greater detail later in these submissions, the respondent submits that the appellant's argument that the discount rate of itself creates a "shortfall", is misconceived.

25. If some different approach to the application of section 127(1) is to be allowed or the current state of the law is to be changed in the case of damages awarded for funds management, such a reform is a matter for the legislature[13].

26. Sitting in the House of Lords, Lord Hutton referred to the High Court's decision in *Todorovic*, and said:

20 "*If the law is to be changed, it can only be done by Parliament which, unlike the judges, is in the position to balance the many social, financial and economic factors which would have to be considered if such a change were contemplated*".[14]

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8 *Haines v Bendall* [1991] 1991 172 CLR 60 per Mason CJ, Dawson, Toohey and Gardron JJ p.63

9 *Todorovic* (supra) at pp.409, 424-424, 449-451, 463-464 and 479

10 *Todorovic* (supra) at pp.409, 440, 459 and 478; *Rosniak* (supra) p.614F-G; *Blackwell* (supra) p.435 and *Rottenbury* (supra) p.52(e). See also McCallum J – 8 December 2011 [para 54]

11 *Todorovic* (supra) p.409, 419-420, 458, 468 and 478-9; *Rosniak* (supra) p.614G

12 *Todorovic* (supra) P.412, 421 and 465

13 *Todorovic v Waller* (supra) per Gibbs CJ and Wilson J (p.424.60). See also comment by Brennan CJ in *Nominal Defendant v Gardikiotis* [1996] 186 CLR 49 at p.51. Bathurst CJ [142]

14 *Wells v Wells* [1999] 1 AC 345 at p.264

Fund on Fund Argument

27. In respect of paragraph 23 of the appellant's Submissions, the respondent submits that the comment by Senior Counsel for the respondent is not properly categorised as a concession but rather an example of the normal interchange between a trial judge and senior counsel. The response amounted to no more than an acceptance that such an outcome was binding on the trial judge, expressly preserving the respondent's position[15].

28. It is to be noted at the outset that the appellant's argument set out at paragraphs 33 and 42 of her submissions relies upon on an acceptance of the application of the 5% discount rate imposed by statute. This is inconsistent with the contrary proposition later advanced by the appellant at paragraphs 52-56.

29. It is submitted that the manner in which the appellant's submissions approach the reasoning of the Court of Appeal attempts to isolate particular passages from the totality of the court's consideration of the principles extracted from relevant authorities at paragraphs [95-112] of the reasons of the Court of Appeal.

30. The cited passage at paragraph 35 of the appellant's Submissions was referred to by the Chief Justice at paragraph [105]. The submission that the Chief Justice failed to acknowledge that *Todorovic* was not a case involving a plaintiff who was under legal incapacity is incorrect. His Honour the Chief Justice was clearly aware of this matter as is readily apparent from paragraphs [113] and [144].

31. The identified "*correct approach*" set out by McHugh J in *Gardikiotis,* as cited at paragraph 36 of the appellant's submissions, is identified and quoted by the Chief Justice in full at paragraph [124] and relied on by him at paragraph [136].

32. The quotation at paragraph 37 from *Willett v. Futcher* was referred to by the Chief Justice at paragraph [125]. What however has been left out of the passage quoted by the appellant at paragraph 51 are the important prefatory words to the cited paragraph:

> *"In a case like the present, where a plaintiff must have an administrator appointed to manage his or her financial affairs because of the plaintiff's*

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15 T.207.42

incapacity to deal with those matters was caused by the defendant's negligence, the plaintiff is awarded a lump sum of damages which is to compensate the plaintiff for losses past, present and future."

33. When read in its entirety paragraph 51 of *Willett* is consistent with *Gardikiotis* and the reasoning of the Court of Appeal that the tortiously induced need for funds management is available as a head of damage. The appellant's entitlement to such an award based upon the present value of a future loss, has never been disputed by the respondent.

34. Nothing in the authorities cited by the appellant lead to the conclusion that the Chief Justice's reasoning was contrary to established legal principle where the plaintiff is under a legal incapacity.

35. What the authorities cited by the Chief Justice clearly establish is that the cost of fund management, if tortiously caused, is an available head of damage. It is to be calculated as all such heads of damage, by calculating the present value of the future loss according to the applicable discount rate.

36. The task of the Court, it is submitted, is accordingly to receive evidence and calculate according to the applicable discount rate the present value of the future loss of the management of the corpus of damages over the expected lifetime of the disabled person; in this case the cost to be charged on the corpus of $9,929.000 over the appellant's expected 67 year lifetime.

37. That calculation gives rise to a mathematically certain figure. That figure in turn represents the totality of the damages which the plaintiff is to be awarded <u>for the need to have the corpus managed.</u>

38. Nothing in the process of reasoning of the Court of Appeal is contrary to that proposition. The assertion at paragraph 39 of the appellant's submissions is with respect without foundation.

39. The cited paragraph does not support the appellant's submission at paragraph 40 that the Chief Justice suggested some form of upfront fee. Basten JA made such a suggestion at [196] however that reasoning is obiter.

40. The argument developed in the appellant's submissions at paragraph 40 is firstly speculative and secondly inconsistent with binding authorities. What is made clear in *Todorovic* is that the proper method of calculating the present value of a future need is to engage in what has been called the fiction of regular utilisation – that is to assume that the fund will be drawn down in such a manner that the damages will reduce to zero at the expected date of death or cessation of need.[16] Such an approach necessarily excludes any shortfall. The mandated approach laid down by *Todorovic* involves a calculation that includes a discount for the early receipt of the totality of the damages before the bulk of the future expenses are required to be paid.

41. In respect of paragraph 41 the reliance upon on the separate judgment of Basten JA is misconceived. If anything, the proposition advanced by Basten JA in the passage cited goes against the contention raised by the appellant.

42. The third asserted error in respect of the reasoning of the Chief Justice at paragraph [147] is set out in paragraph 42 of the appellant's submissions. The Chief Justice was in the respondent's submission identifying the logical problem in the argument advanced by the appellant.

43. To avoid speculation as to the performance of the fund the Chief Justice reasoned that it required one of two impermissible approaches to the calculation of the cost of managing the fund. To do so would either require speculation, or prognostication as to the performance of a fund in any given year or make assumptions as to the rate of dissipation that bear little relation to reality. The first is self evidently correct and falls into the category of inadmissible evidence that the statement of the court sets its face against in *Todorovic*.

44. The second option is clearly barred by reason of authority. So much is apparent from *Todorovic*. The respondent submits that the Chief Justice was properly identifying that the award of costs of fund management is of itself compensation for the management of the fund over time.

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16 Gibbs CJ and Wilson J in *Todorovic* at 414.5; *GIO of NSW v. Rosniak* (1992) 27 NSWLR 665 per Meagher JA at 700C. *Rosniak* was a funds management case and was not challenged by the appellant either at first instance or before the Court of Appeal.

45. By way of example assume that the evidence establishes that the cost of managing a corpus of $10,000,000 over a plaintiff's predicted lifetime is $2,000,000. A Trial Judge would in delivering her judgment make an order that the plaintiff's is entitled to a judgment against the defendant of $12,000,000.

46. The element of double counting identified by the Chief Justice in paragraph [147] occurs by reason of the plaintiff's erroneous argument. It looks to the fact of investment that the fund manager will charge on the judgment sum of $12,000,000 invested with it. What the argument fails to address is the fact that the $12,000,000 already includes a figure of $2,000,000 that has already been allowed for the management of the corpus of $10,000,000. This is the double counting identified by his Honour, the Chief Justice at paragraph [147] and by Meagher JA in *Rosniak* – p.698G.

47. In all personal injury cases, and in particular catastrophic cases such as this, a significant portion of the judgment sum will include damages for past losses unaffected by the discount rate. Yet the foundation for the shortfall alleged involves an assertion that the whole judgment sum is subjected to a 5% discount.

48. In short, the respondent submits that the approach taken by the Court of Appeal is entirely consistent with settled principle. The head of damage is identified, calculated by reference to the present value of the future loss and added to the judgment sum to be invested.

49. The distinction drawn, as properly noted in *Gardikiotis,* is that in cases where the plaintiff is under a legal disability, the Court has a protective concern with what happens to the money. That concern, it is respectfully submitted, is limited to the proper recognition that such funds are required by law to be managed. It is the tortious, causal nexus which gives rise to the entitlement to the damage. The head of damage is accordingly calculated. As laid down in *Todorovic,* the court does not otherwise concerns itself with what will or may be done with the money following the judgment.

50. The argument of the appellant leads the Court to impermissibly concern itself with actual investment when an order is made pursuant to s.79 of the *Civil Procedure Act* 2005 (NSW). The common law permits the head of damage. The section

serves to identify the only persons to whom the judgment sum can be paid to – see also s.77(4). It is a protective provision and cannot of itself give rise to a further head of damage.

51. With respect to the appellant's submission at paragraph 45, the reasoning of Basten JA is irrelevant as his comments are strictly obiter.

52. The appellant's argument that there is a shortfall created by reason of a failure to award fund on fund management arises from the incorrect assertion that s.79 is relevant to the calculation of damages.

53. Much is made in the appellant's submissions of the concept of shortfall. The very idea of shortfall is inconsistent with established authority. The appellant's argument seeks to take into account what will actually occur with the money rather than addressing on the usual basis the reasonable calculation based upon likely future expenses as discussed in *Todorovic.*

54. The argument of shortfall can only be supported by the following reasoning:-

(i) Firstly that the award of the cost of fund management is different from all other heads of damages and requires a court to take into account the actual investment after final judgment contrary to *Todorovic.* To do so again offends the once and for all rule and is contrary to the calculation of future needs and losses by the application of a discount rate.

(ii) Secondly the shortfall argument appears to depend on a contention that that there is a legally available method of calculating damages for future losses/needs against which the discount rate can be measured. The appellant's argument appears to rest on the following basis. Assuming that a loss of $50 per week over a 25 year period was found by a trial judge. Logically the loss would be expressed as $50 x 25 years x 52 weeks. As the discount rate reduces that amount, so the argument goes there must, ergo, be a shortfall. That reasoning is clearly wrong in law. The purpose of the discount rate is to take into account the early receipt of future expenses. It is the sole legal method of calculation of future losses and cannot be productive of any shortfall.

55. A further fundamental problem in the appellant's case is the failure to distinguish between actuarial tables simpliciter and the components encapsulated in the discount rate as identified in *Todorovic.* The actuarial tables referred to by the appellant , as clearly identified by *Todorovic,* simply reflect the present value dollar amount required for an investment at a return indicated by the parallel discount rate for the sum to reduce to zero dollars by the date of expected death or end of expected need.

56. *Todorovic* took this concept further so as to remove the need to receive evidence of such matters as the effect of a range of factors including inflation and tax on the discount rates on the simple investment return expressed in the actuarial tables. Ultimately the figure of a 3% discount rate arrived at by the majority of the High Court was not only a compromise as between the various judgments but was explicit recognition that the discount rate took into account a range of factors and presumed a rate of return net primarily of tax and inflation but also the other speculative figures involved in the calculation of the present value of future expenses.

57. Paragraphs 37, 55, 60 and 67 of the appellant's submissions indicate the source of the misunderstanding. Each paragraph asserts that the discount rate itself creates the shortfall. This is a clear misunderstanding of the stated purpose and operation of a discount rate.

58. The task of a trial judge is to identify at the time of the award of damages the tortiously created need and the proper compensation of those needs by reference to the principle of *restitutio* as is reasonable between the parties. The task in this case in respect of an award for fund management where the plaintiff's need for management has been tortiously caused, is to identify the present value of the cost of that need.

59. That is done, as in every case, by obtaining evidence of the likely future fees charged by a fund manager. The cost is then calculated by the standard application of the discount rate. That generates the cost of fund management of the corpus and is added to the sum to be invested. The fact that s.79 requires the payment to a fund manager does not give rise to a further tortiously created need.

60. Accordingly, s.79 is a largely irrelevant consideration. It is not a question of whether the damages must be managed. It is a question of whether the need for fund management is tortiously created; if so the discount rate is employed to calculate the totality of the plaintiff's loss.

61. It is also to be borne in mind that, as the earlier authorities confirm, fund on fund calculation necessarily involves an infinite regression with each component of the fund management charges being brought in and made subject to a further fund management expense. Whilst a figure is able to be produced by actuarial calculations, the process necessarily involves further uncertainty and unpredictability in the amount claimed.

62. Amongst the matters relied upon by the Chief Justice in rejecting the appellant's claim is that the calculation of the amount to cover fund management involves either speculation or assumptions [147].

63. It is submitted that the facts of the present case support his Honour's approach. On two occasions the trial judge accepted the submission put on behalf of the defendant that the evidence adduced on behalf of the plaintiff was not sufficient for the court to be satisfied what charges would "in fact" be levied by the Trust Company for managing the verdict monies[17]. Having given the plaintiff (only) leave to adduce further evidence on the issue, the plaintiff produced a further letter from the Trust Company indicating that the previously quoted rates would be significantly reduced[18]. The net result was a reduction in the amount of the Trust Company's fund management expenses of approximately $300,000.

64. The point is well made by Justice Brennan (then sitting as a member of the Full Court of the Federal Court of Australia) where his Honour said:

> "*It is necessary to ensure that the procedure of discounting accords with, and is not assumed to replace, the principles which govern the assessment of damages for personal injuries. Else discounting may yield an amount of beguiling but spurious specificity.*"

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17 *Gray v Richards (No. 1)* [2011] NSWSC 877 [37] and *Gray v Richards (No. 2)* [2011] NSWSC 1502 [89]

18 Letter 13 December 2011 the Trust Company to the plaintiff's solicitor

65. The passage immediately following the quoted passage was expressly adopted by Mason J in *Todorovic*[19].

Fund Management on Fund Earnings

66. The first point which needs to be emphasised in respect of this aspect of the appeal is that identified in para [138] of the reasons of the Chief Justice. His Honour emphasises at the outset that to allow such a claim would be contrary to the requirements of s.127(1). This point has not been referred to anywhere in the appellant's submissions and the only answer to the proposition that can be gleaned from what has been put forward is the appellant's attempt to now rely upon the new argument never previously raised in any court below that fund management costs are for some inexplicable reason not covered by the terms of s.127(1).

67. It is asserted at paragraphs 49 and 50 that it is common ground the Trust Company charge an annual management fee on the capital sum of the fund and that the Chief Justice noted at [135-137] that the Trust Company fees included a charge on income into the fund. Those propositions were not common ground and are rejected.

68. The evidence of the fee structure informing the calculation of the cost of fund management is set out in the letters from the Trust Company as a fee per annum on the amount of money in the fund. [20]

69. The Chief Justice at paragraphs [86] and [136] of the judgment of the Court of Appeal explains that the "charge on income" is no more than a supervision fee charged by the New South Wales Trustee and Guardian at a rate of 4% of the gross annual investment income of the fund capped at $2,000 per annum.[21] There is no evidence of any other fee charged by the Trust Company on income.

70. The appellant's submission at paragraph 50 fails to acknowledge that *Rosniak* was a case in which the cost of funds management was calculated by reference only to

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19 *Todorovic* (supra) at p.443 and (not surprisingly by Brennan J pp.466-467)
20 Letters of the Trust Company dated 17 August 2010 and 13 December 2011.
21 see also letter of Trust Company 13 December 2011

the income into the fund[22] and unlike the present case, there was evidence of the actual rates of return of the manager[23].

71. *Rosniak* was a case decided on its own facts and by reason of the fact that in that case income into the fund was the sole source of the fee structure. Accordingly, there was no obligation on the Chief Justice to follow the specific method of calculation set out in *Rosniak.* In fact, contrary to the appellant's submissions, it would have been a fundamental error for him to have done so[24]

72. The submission raised in paragraph 52-56 that the calculation of damages for fund management is not captured by s.127 of the Act was not raised at first instance, in the Court of Appeal or in the application for special leave. What is abundantly clear from the judgments of the Trial Judge and the Court of Appeal is that the appellant has always conducted her case on the basis that the 5% discount rate applied and that the assumed rate of return of the fund was 5%. This is consistent with the appellant's argument recorded by the Chief Justice at paragraph [61] of the Reasons of the Court of Appeal at paragraphs 39 and 47 of the first judgment of the Trial Judge. It is also the argument advanced by the appellant at paragraphs 57-65 of her submissions in this court.

73. It is simply not open for the appellant to now seek to raise this new point[25].

74. Even if permitted, the argument however can be disposed of. There can be no doubt that the cost of a tortiously created need for fund management is a future expense. Consistent with authority, the method of calculating it is to use discount rate to calculate the present value of the future need. Consistent with what is said in *Todorovic,* Parliament in New South Wales has mandated it in the words of s.127(1)(d) of the Motor Accidents Compensation Act. Such an interpretation is consistent, if necessary, with the Second Reading Speech set out a paragraph [98] of the reasons of the Court of Appeal.

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22 *Rosniak supra at 683G* per Mahoney JA

23 Rosniak supra at 696A per Meagher JA

24 *Planet Fisheries Pty Ltd v La Rosa* [1968] 119 CLR 118 pp.124-5; *Vairy v Wyong Shire Council* [2005] 223 CLR 422 per Gleeson CJ and Kirby J p.425[2]

25 *Coulton v Holcombe* [1986] 162 CLR 1

75. The interest referred to at paragraph 52, from the cited passage in *Gardikiotis,* is with respect a limited interest. It is an interest for the purpose of calculating a head of damage tortiously caused. Nothing in *Gardikiotis* or *Willett* takes the proposition further.

76. It has never been the respondent's contention that the cost of fund management is built into the 5% discount rate as asserted at paragraph 55 of the appellant's submissions. It has always been the respondent's case that the application of the 5% tables, being a discount rate, precludes any consideration of what is in fact done with the money.

10 77. As is clear from [Table 2] of the Reasons of the Court of Appeal, if the appellant's contention is adopted, the respondent would be required to pay fund management fees on a lifetime fund of approximately $33m. That is without any further allowance being made for the cost of fund on fund management being added back in as contended for by the appellant. In those circumstances it is readily apparent that to adopt the appellant's argument, rather than leading to fair and reasonable compensation as between the parties, would lead to significant over-compensation.

78. The proposition put at paragraph 58 of the submissions that the Chief Justice stated at paragraph [139] that the discount rate did not equate a net income or net earning rate is incorrect. The Chief Justice clearly indicated at paragraph [139] that the cost
20 of earning income is taken into account for the discount rate under s.127. His Honour correctly identified in that paragraph the underlying reason for the adoption by this Court of a 3% discount rate in *Todorovic.*

79. The emphasised passage relied upon by the appellant in paragraph 58 is not a statement of principle but a recording of the historical matters as they came before the High Court in *Todorovic.* The Chief Justice at paragraph [112] having reviewed the applicable passages from *Todorovic* as set out in paragraphs [100 to 109] of the Reasons of the Court of Appeal and by reference to *The Commonwealth v. Blackwell* [1987] HCA 44; 1987 163 CLR 428 at paragraph properly concluded at [112] that the discount rate was -

30 *"Designed to take into account the effect of inflation and the notional tax on income earned from the fund. Neither the Act 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 the interest will be earned at a constant rate throughout the life of the fund although these assumptions underpin the calculation of the discount rate."

80. That conclusion is entirely consistent with the passage cited from *Todorovic* at 423-424 by the appellant in paragraph 58. It is notable the Chief Justice has not simply relied upon the passage cited but put it in full context.

81. Moreover, in the underlined section emphasised by the appellant, it is clear that Gibbs CJ and Wilson J were discussing the bare use of actuarial tables as they were prior to the decision of *Todorovic*. The issue in *Todorovic* was whether further evidence in respect of inflation and tax should be received in respect of the use of such tables. Accordingly, the error identified by the appellant in paragraph 58 is without foundation.

82. The other passages referred to in paragraph 59 of the appellant's submission do not represent the holding of the Court but are recitations of prior views of discounting that were not ultimately accepted by the High Court in *Todorovic*. The further cited passages at 428-429 and 436-437 are taken from the minority judgment of Justice Stephens and are of no assistance to the appellant absent any challenge to the correctness of *Todorovic*.

83. The argument advanced at paragraph 60 has been addressed above. On the correct application of the principle underlying the calculation of the present value of a future expense, there is no shortfall by reason of the use of 5% tables.

84. The Chief Justice's reasoning at paragraph [138] in this respect is consistent with authority as he has cited in that paragraph. The appellant's argument relies upon there being a shortfall. The existence of a shortfall is chimerical.

85. The argument proffered at paragraph 61 creates the illusion of a shortfall by its own internal logic. However, that internal logic is not consistent with principle. It only arises if one reaches the conclusion that a factor in addition to the 5% discount rate and an assumed 5% net income return is used. It is the very reason for the assumed return on investment that a discount is made so as not to over-compensate the

plaintiff. The effect of unwinding the discount, as done by the appellant's actuary, is to render nugatory the very principle embedded in the discount rate which is to make a fair and reasonable calculation of the present value of a future expense as between the parties.

86. If some different approach to the application of s.127 is warranted in the case of fund management expenses, as previously submitted, that it is a matter which the New South Wales Parliament should address.

87. The argument advanced by the appellant is contrary to the straight-line fiction of regular utilisation enshrined in *Todorovic*. With respect, the appellant cannot rely upon the straight-line utilisation of the funds to support its primary claim for fund management and then seek to rely upon some different set of post-judgment assumptions for the purposes of this appeal.

88. It is simply incorrect to say that the plaintiff's award of damages for future loss has been reduced by application of the 5% tables as asserted in paragraph 61 because:-

83.1 It is only those components of the plaintiff's total damages that represent future losses that have been the subject of a 5% discount; and

83.2 The damages have been calculated by reference to the 5% discount, but there is no reduction. To speak of a reduction starkly reveals the internal fallacy of the appellant's argument as to shortfall.

89. The correct approach is identified by the Chief Justice in paragraph [138] in recognising the proper function of the discount rate as explained by Hislop J in *Rottenbury v. Rottenbury*.

90. It is incorrect as asserted in paragraph 61 of the appellant's submission that his Honour refused to deal with the matters because they were speculative.

91. The passage of the Chief Justice at paragraph [149] is a doctrinaire explanation of the role of a discount rate which is entirely misunderstood by the appellant in her submissions.

92. In respect of paragraph 67 of the appellant's submissions the Chief Justice was not required to offer any valid reason for failing to apply the 5% discount applied in

Rosniak. *Rosniak* was a case determined on its own facts based upon the historical returns generated by the fund. More particularly, the source of the fee charged was fee on income into the fund. The argument at paragraph 67 is entirely without substance.

93. In *Gardikiotis*, McHugh J expressed the principles governing the use of a discount rate in the following terms:

> "*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.*"

94. The quoted passage was expressly adopted by the Chief Justice at para [125] of his judgment. As previously submitted, the fundamental error undermining the whole of the appellant's case is the appellant's failure to fully appreciate that the figure arrived at as fair and reasonable compensation for an injured plaintiff by the application of the applicable discount rate is "*a hypothetical construct*" which does not attempt in any way to reflect what will actually happen with the verdict monies after judgment has been entered.

95. In any event, although dealing with a different issue, all members of the court in *Gogic's* case pointed out that the purpose of adopting a percentage figure is to provide fair and reasonable compensation for a plaintiff even though in some cases the plaintiff may ultimately receive less than that assumed by the prescribed rate and at other times may in fact receive amounts greater than that achievable by "real-life investors"[26].

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[26] *BP (SA) Pty Limited v Gogic* [1991] 171 CLR 657 at p666

96. Even if contrary to the above submissions, the court is satisfied that some allowance for the cost of managing income which the appellant asks the court to assume will be generated by the verdict monies is permissible, on the facts of this case the claim must fail because, despite the extensive actuarial and accounting evidence adduced in support of the appellant's case, there was no evidence of what income such a fund had earned, or was likely to earn.

97. Therefore, even if in principle such a claim should be allowed, it must fail in the present case because of the absence of any evidence. In this respect the matter can be contrasted with *Rosniak* where precise evidence was adduced as to the amount which the fund was expected to earn from the investment of the verdict monies.

98. As emphasised by Gibbs CJ and Wilson J (Aickin J agreeing) in *Todorovic*, the discount rate is intended to "reflect" (we submit *inter alia*), both the notional income and the notional tax from the invested fund[27]. If so, the income is already taken into account in calculating the appropriate discount rate and there is no justification for awarding fund management costs on such income as the invested fund may in fact earn in the future after judgment.

99. The appellant has relied upon the West Australian decision of *Best v Greengrass*[28] which followed the decision at first instance in the present case prior to the Court of Appeal's judgment (see para 74). However, the appellant has failed to draw to the court's attention the earlier West Australian case of *Traeger v Harris*[29] in which the claim was rejected. Nor has the court been made aware that the Court of Appeal's approach has been adopted and applied in the Australian Capital Territory by Burns J[30].

Conclusion

100. Neither the language of the legislation nor any of the authorities, provide any support for placing fund management expenses in a different category to other future expenses of which the court is called upon to assess the present value. As the members of the court emphasised in *Todorovic*, the law of damages should be

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27 *Todorovic* pp.423-4
28 *Best v Greengrass* [2012] WADC 44
29 *Traeger v Harris* [No. 4] [2011] WADC 45 per Schoombee DCJ [paras 373-379]
30 *Hulanicki v Walton* [2014] ACTSC 17 (7 March 2014 unreported) Burns J [paras 182-183]

uniform and consistent in accordance with principles which have been clearly spelt out. The proper application of those principles exclude both of the appellant's claims as accepted in the unanimous approach of the Court of Appeal.

101. If, contrary to the respondent's primary submissions, some different considerations are to be invoked in the case of fund management expenses, the matter should be left to Parliament to address.

102. The respondent submits that both of the appellant's claims should be rejected and the unanimous decision of the Court of Appeal upheld.

Costs

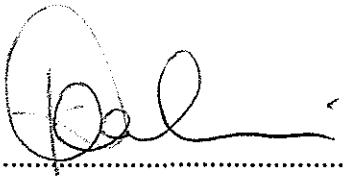
10 103. The respondent seeks an order that costs follow the event of the appeal being dismissed.

104. In the event of the appeal being allowed in whole, the respondent does not dispute that costs should follow the event.

105. In the event of the appeal being allowed in part, the respondent seeks to further address the court (if necessary by written submissions) in dealing with what costs orders are appropriate arising from the court's decision

Part VII:

We estimate that approximately 2 hours will be required for the Respondent's oral argument.

20 Dated: 

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S111 of 2014

B E T W E E N: RHIANNON GRAY by her tutor KATHLEEN GRAY
Appellant

-and-

COREY RICHARDS
Respondent

ANNEXURE "A" TO RESPONDENT'S SUBMISSIONS

This is an annexure to the respondent's submissions filed 11 July 2014, referred to in paragraph 13 of those submissions.

SCHEDULE OF LEGISLATION

DISCOUNT RATE PROVISIONS INTRODUCED FOLLOWING *TODOROVIC v WALLER*

NEW SOUTH WALES

- *Motor Vehicles (Third Party Insurance) Amendment Act* [1984] (NSW) s.5.

QUEENSLAND

- *Common Law Practice Amendment Act* 1981 (QLD) s.5.

SOUTH AUSTRALIA

- *Wrongs Act Amendment Act* 1986 (SA) s.3.

TASMANIA

- *Common Law (Miscellaneous Actions)* Act 1986 (TAS) s.4.

VICTORIA

- *Transport Accident Act* 1986 (VIC) s.93(13).
- *Accident Compensation Act* 1985 (VIC) s.134AB (32), 135A(14) and 135C.

WESTERN AUSTRALIA

- Acts Amendment (Actions for Damages) Act 1986 s.5(1).