Measure of damages in actions for tort

Zoë Hillman reports on *Gray v Richards* [2014] HCA 40.

Introduction

As a result of the respondent's admitted negligence, the appellant, Rhiannon Gray, suffered a traumatic brain injury. Ms Gray was left in need of constant care, with no prospect of future remunerative employment and in need of assistance in managing the lump sum payment that was awarded to her as damages. Two issues arose for the High Court's consideration:

- Was Ms Gray entitled to recover costs associated with managing that component of damages which had been awarded to meet the cost of managing the remainder of the lump sum awarded to her?; and
- Was Ms Gray entitled to recover the costs associated with managing the predicted future income of the managed fund?

Revisiting the principles regulating the assessment of damages for personal injury

Four principles are applicable to the assessment of damages for personal injury. Those principles were summarised in *Todorovic v Waller* [1]:

1. The sum of damages to be awarded shall, as nearly as possible, place the injured party in the same position as if they had not sustained the injury;
2. Damages are to be recovered once and forever, typically as a lump sum (subject to statutory exceptions);
3. The court is not concerned with how the plaintiff uses the sum they have been awarded; and
4. The plaintiff carries the burden of proving the injury or loss in respect of which they seek damages.

In considering the application of these principles, the High Court previously had determined that the cost of managing a lump sum damages payment is not in turn recoverable as damages if the injury sustained by the plaintiff did not cause the need for assistance in managing the fund[2].

However, if the injury sustained by a plaintiff had impaired the plaintiff's intellectual ability, thereby necessitating assistance to manage the damages fund, the cost of such assistance is recoverable as damages flowing from the defendant's conduct[3].

Application of the principles to Ms Gray's case

1. Terms of settlement agreed by the parties

Ms Gray, through her mother as tutor, originally had brought proceedings against Mr Richards in the District Court. Those proceedings has been settled on terms that the defendant would pay to Ms Gray:

- $10 million (referred to in the High Court's judgment as the 'compromise moneys'); and
- a sum to be assessed at a later date to cover the expenses associated with managing the compromise moneys (referred to as the 'fund management damages').

2. First instance assessment of fund management damages

As a threshold issue, s 76 of the *Civil Procedure Act 2005* (NSW) required that the settlement agreed by the parties be approved by the court because Ms Gray was under a legal incapacity. In the course of the Supreme Court proceedings in which Ms Gray's settlement was approved, the defendant conceded, among other things, that the compromise moneys and the fund management damages would be paid to a fund manager. A declaration was made that Ms Gray was incapable of managing her own affairs and The Trust Company Limited (TCL) was to be appointed manager of Ms Gray's estate.

Proceedings for the assessment of the fund management damages ensued[4]. Two key findings were made.

First, in considering amounts to be included in the fund management damages assessment, the primary judge held that the defendant was liable to pay the costs associated with managing the fund management damages. The judge accepted that Ms Gray, by reason of her incapacity, was not able to manage that component of her damages which was to account for the costs of managing the compromise moneys. Consequently, the cost of managing the fund management damages was to be included as part of the assessment of the fund management damages. That amount was capable of being determined by an actuary, and expert evidence on quantum was accepted. In the course of making her decision, the primary judge found that the decision of Ms Gray's tutor to appoint TCL as fund manager 'was entirely reasonable'.

Secondly, the primary judge determined that an amount of damages also was to be awarded to cover the cost of managing the future income of the plaintiff's funds under management. Her Honour held that any income derived from the management of the fund and reinvested by the manager would be subject to management fees and an amount should be allowed for those fees. In reaching that conclusion, the primary judge considered that the discount rate applicable under the *Motor Accidents*

Compensation Act 1999 (NSW) to the value to be attributed to future economic loss was supportive of the assumption that the plaintiff's damages fund was likely to generate income that would be reinvested.

3. Decision of the Court of Appeal

The Court of Appeal overturned the decision of the primary judge on both issues.[5]

Insofar as the costs associated with managing the fund management damages was concerned, the court considered that to allow such costs would require the court to proceed on an assumption that the fees that had been negotiated (that is, fees on the amount set aside for fund management costs) were reasonable. Further, the uncertainty associated with attempting to estimate such fees was unacceptable.

Turning to the question of whether an amount should be allowed for the cost of managing the income of the fund, the court emphasised that the discount rate to be applied in determining the current value of future economic loss could not be used to ground an assumption as to the actual income that would be earned from the fund in the future. To do so entailed the court speculating as to future income of the fund and then attempting to assess a management fee on the basis of its speculation. Such an exercise was not permissible.

4. High Court's decision

In considering the arguments before it, the High Court[6] confirmed that the compromise moneys are not to be understood to be the whole of the damages arising from Ms Gray's injuries. The compromise moneys are simply one component of the damages amount that the defendant was liable to pay, with the remainder of the damages award to be assessed by the court.[7]

The High Court determined that '[t]he 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 [Ms Gray's] future outgoings'.[8] The cost of managing the fund management damages was itself an integral part of the overall cost of management of the fund, and ought to have been included in the court's assessment in accordance with the first of the *Todorovic* principles.

Further, the court was not to be concerned with regulation of the fund management market or, absent evidence, to determine that the amount charged by TCL was excessive. In particular, given the primary judge's finding the decision to engage TCL was 'entirely reasonable', the court was obliged to incorporate the actual cost of TCL in managing the fund management damages as part of its assessment. Consequently, the cost of managing the fund management damages was compensable and the decision of the Court of Appeal on this point was overturned.

However, the High Court upheld the Court of Appeal's decision not to allow an amount of damages in respect of the cost of managing future income of the fund.It was not safe to make the underpinning assumption, that income derived from the fund would be reinvested. The High Court reaffirmed statements made in *Nominal Defendant v Gardikiotis*[9] that a discount rate, adopted under the *Motor Accidents Compensation Act 1999* (NSW) for example, is to be understood as a conceptual tool that provides a hypothetical construct by which a Court can attribute a present value to future economic loss[10]. It does not ground an assumption that a lump sum damages payment will generate income that will be reinvested. To make such an assumption is inconsistent with the third of the *Todorovic* principles. Moreover, there was not sufficient causative connection between any management costs associated with income generated by the fund and the defendant's conduct. Consequently, those costs could not be seen as integral to Ms Gray's loss consequent upon her injury.

Comment

In assessing the damages that are to be awarded in respect of injuries sustained by a plaintiff where such injuries have necessitated assistance to manage the plaintiff's damages fund:

- the cost of managing fund management damages is itself compensable; however
- the cost that may arise if fund income is required to be managed is not to be included in the court's damages assessment.

Endnotes

1. (1981) 150 CLR 402.
2. *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49.
3. *Willett v Futcher* (2005) 221 CLR 627.
4. The first instance decision is reported as *Gray v Richards* (2011) 59 MVR 85.
5. *Richards v Gray* (2013) Aust Torts Reports 82–153.
6. French CJ, Hayne, Bell, Gageler and Keane JJ.
7. At [10].
8. At [45].
9. (1996) 186 CLR 49.
10. At [64].