IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S111 of 2014

BETWEEN:

**RHIANNON GRAY BY HER TUTOR KATHLEEN ANNE GRAY**
Appellant

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and

**COREY RICHARDS**
Respondent

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# APPELLANT'S SUBMISSIONS

HIGH COURT OF AUSTRALIA
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THE REGISTRY SYDNEY

Filed on behalf of the Appellant
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## APPELLANT'S SUBMISSIONS

### PART I: INTERNET CERTIFICATION

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

### PART II: ISSUES

2. Whether the expense incurred by a disabled plaintiff in payment of fund management fees to manage the head of damage identified as fund management, is a compensable head of damage recoverable from a negligent tortfeasor?

3. Whether the expense incurred by a disabled plaintiff in payment of fund management fees on income into the fund is a compensable head of damage recoverable from a negligent tortfeasor?

4. Whether the failure to allow fund management fees on the head of damage identified as fund management and fund management fees on fund income is inconsistent with the principle of *restitutio in integrum*?

### PART III: SECTION 78B NOTICES

5. The appellant 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).

### PART IV: DECISIONS BELOW

6. The decisions of the trial judge and the Court of Appeal of NSW are yet to be reported. The media neutral citation of each is:

   (a) *Gray v Richards* [2011] NSWSC 877 (16 August 2011).
   (b) *Richards v Gray* [2013] NSWCA 402 (2 December 2013).

### PART V: FACTS

7. The appellant, Rhiannon Gray, was born on 31 August 1992. She is now 21 years of age. There is no dispute that the appellant's life expectancy was a further 67 years from the date of trial. She sustained an extremely severe traumatic brain injury and requires constant care as a result of a motor vehicle accident that occurred on 22 August 2003, when she was 10 years of age.

8. The appellant brought proceedings in the Supreme Court of NSW through her mother as tutor in respect of injuries sustained in the accident. As she was a rear seat passenger, the respondent admitted liability. The proceedings were ultimately compromised part-heard in the sum of $10 million plus fund management expenses to be assessed.

9. It is undisputed that the appellant is a person incapable of managing her affairs and accordingly, the verdict after payment of out-of-pocket expenses must be paid to a manager to be held and managed as part of her protected estate pursuant to ss. 77 and 79 of the *Civil Procedure Act* 2005 (NSW).[1]

10. Section 41 of the *NSW Trustee & Guardian Act* 2009 empowers the Supreme Court to declare that a person is incapable of managing their own affairs and by order appoint a suitable person as manager of their estate or commit the management of their estate to the NSW Trustee & Guardian.

11. On 2 September 2011, White J in the Equity Division of the NSW Supreme Court made orders pursuant to s.41 of the *NSW Trustee & Guardian Act* appointing The Trust Company Limited as manager of the appellant's estate.[2]

12. The judgment monies were paid directly to The Trust Company Limited as manager of the appellant's estate pursuant to s.77 of the *Civil Procedure Act* 2005 (NSW). Pursuant to s.79 of the *Civil Procedure Act,* money paid to the manager of a protected person's estate is to be held and applied by the manager as part of the estate.

13. The final judgment entered for the appellant was in the sum of $12,151,000, which included fund management costs of $2,151,000.[3] Fund management was calculated on a corpus of $9,929,000 which was the settlement of $10 million less payment of a Centrelink charge, Medicare charge and reimbursement of s.83 expenses.[4] The award allowed by the trial judge for fund management allowed not only the calculation of fund management on the corpus of the fund (being $9,929,000) but also included an allowance of fund management on the head of damage identified as fund management and fund management on the income into the fund. The sum of $12,151,000, less the expenses referred to above, was paid to The Trust Company Limited to manage on behalf of the appellant pursuant to s.79 of the *Civil Procedure Act.*

14. It was common ground between the parties that the damages should include an allowance for fund management fees incurred in managing the judgment monies. However, the parties were in dispute in relation to four issues relevant to the quantum of the head of damage identified as fund management.[5]

15. The first issue can be described as "*fund management on fund management*". This issue focuses on whether in calculating fund management fees an allowance should not only be made in respect of fees calculated as necessary to manage the corpus of the fund, not including

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1 Court of Appeal Judgment dated 2 December 2013 paragraph 4
2 Exhibit 4.
3 McCallum J Judgment dated 15 December entered 16 December 2011.
4 Exhibit M.
5 Paragraph 6 of the trial judge's judgment dated 16 August 2011; paragraph 6 in the Court of Appeal Judgment. See also T 207.30 – 40.

fund management itself, but also an amount to manage the funds awarded for that purpose.[6]

16. The second issue has been described as "*fund management on fund income*". This focuses on whether in calculating fund management, an allowance should be made not merely in respect of the capital of the fund but also an amount to manage the income predicted to be derived from the fund during its existence.[7]

17. These issues were the subject of the first instance judgment of the trial judge Justice McCallum, dated 16 August 2011, who found in favour of the appellant on both issues. It was in respect of those two issues that the respondent was successful in reversing the trial judge's decision in the Court of Appeal.[8] As a result, the allowance for fund management was reduced from $2,151,000 down to $1,495,000. The sum of $1,495,000 was calculated on the corpus of $9,929,000 only with no allowance for either:-

(a) The cost of managing the award of $1,495,000 for fund management, or

(b) The cost of managing the income derived by the fund over its existence.

18. The third issue was whether an additional amount of $650,000 should be deducted from the corpus of the settlement before calculating fund management fees.[9]

19. The fourth issue was whether the calculation of fund management fees should be based upon the rates charged by The Trust Company Limited or those charged by the NSW Trustee and Guardian.[10]

20. The third and fourth issues were the subject of the second judgment of the trial judge dated 8 December 2011, in which she found in favour of the appellant on both issues. The respondent unsuccessfully appealed on both of those issues to the Court of Appeal and this aspect of the Court of Appeal judgment is not the subject of complaint by either party in the High Court.

21. The third judgment of the trial judge dated 13 April 2012 related to costs. The issue of costs in the Court of Appeal will need to be reconsidered if this appeal is upheld in the High Court.

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6 Court of Appeal Judgment paragraph 7.

7 Court of Appeal Judgment paragraph 8.

8 Court of Appeal judgment, paragraphs 135–148 per Bathurst CJ, with whom Beazley P, McColl JA and Meagher JA agreed and Basten JA in a separate judgment also agreed, paragraphs 195–206.

9 Court of Appeal Judgment paragraph 11.

10 Court of Appeal Judgment paragraph 11.

## PART VI: ARGUMENT

**Fund on Fund Management**

22. The clearest way to identify this head of damage is to use the illustration relied on at trial and adopted by the trial judge at paragraph 19 of the trial judge's first judgment.[11] Assuming the cost of fund management on a corpus of $10 million over a 67 year life expectancy was $2 million, the total verdict would be $12 million to be received today and managed over the appellant's lifetime. However, the appellant, who is under a legal incapacity, will have no better ability to manage the additional $2 million for fund management than the initial $10 million representing the corpus of the fund. It therefore follows that the award of a component for fund management would itself need to be managed and would in turn give rise to fund management fees.

23. At trial, Senior Counsel for the respondent correctly conceded that the amount set aside for fund management was to be treated as part of the corpus of the fund under management.[12] It therefore follows that the amount awarded for fund management itself must be managed.

24. The trial judge noted in her first judgment that it was difficult to fault the logic of the appellant's claim for such an allowance.[13] Her Honour noted that the amount calculated for fund management on the corpus of the damages (not including the fund management fee itself) would form part of the funds under management.[14] Her Honour also noted that the fund management fee, being a calculation of a future loss, itself had been reduced by reason of the calculation pursuant to the mandatory 5% statutory discount rate.[15] Finally, Her Honour noted that the head of damage identified as fund management would also be the subject of charges as the payment to the manager (trustee) of the fund management component of the damages award is not made by way of payment to the manager (trustee) as an advance but rather forms part of the overall judgment which is to be managed pursuant to s.79 of the *Civil Procedure Act*.[16]

25. In those circumstances and absent any allowance for the management of the amount given to the manager (trustee) for fund management, there would be a shortfall equivalent to the cost of managing the amount awarded for fund management. Her Honour pointed to the competing first instance authorities on this issue and noted the overriding requirement of *restitutio in*

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11 Paragraph 19 of the trial judge's judgment dated 16 August 2011.
12 T 207.30 – 40.
13 Paragraph 18 of the trial judge's judgment dated 16 August 2011.
14 Paragraph 24 of the trial judge's judgment dated 16 August 2011 and s.79 of the *Civil Procedure Act*.
15 Paragraph 20 of the trial judge's judgment dated 16 August 2011 and s.127 of the *Motor Accidents Compensation Act* 1999 (NSW).
16 Paragraph 24 of the trial judge's judgment dated 16 August 2011 and s.79 of the *Civil Procedure Act*.

*integrum.*[17] Her Honour also found the logic of the appellant's contention in respect of a shortfall to be "irresistible".[18]

26. Her Honour noted that there was competing authority in decisions of single Judges, however, there was no appellate authority on point.[19] Her Honour noted that Hunter J in *Bacha v Pettersen* allowed this head of damage and proceeded to calculate the allowance on the basis that the relevant fund included the fund management fee itself.[20]

27. Her Honour also noted that a contrary view was reached by Burchett AJ in *Buckman v M & K Napier Constructions Pty Ltd.*[21] Her Honour noted that Burchett AJ was troubled by the perceived difficulty of a calculation that, theoretically, must be repeated to infinity. The trial judge, however, noted that she was provided with assistance from an actuary and an accountant who were in agreement as to this calculation whereas it appeared that Burchett AJ did not have such assistance.[22]

28. It is to be noted that Her Honour had before her evidence from experts engaged by both parties. It was acknowledged by both Mr Watt, an accountant engaged on behalf of the respondent, and Mr Plover, an actuary engaged on behalf of the appellant, during the joint expert conclave, that the calculation of fund on fund management, and for that matter fund on fund earnings (to be dealt with separately) was not mathematically challenging and could be calculated.[23] The experts agreed on the calculations, which Her Honour relied upon for the purpose of entering judgment.[24] Based on the charges of The Trust Company Ltd, the experts agreed that the calculation of fund management on the corpus of the fund alone, not including an allowance for fund management on fund management, totalled $1,495,000. If fund management was allowed on the head of damage identified as fund management, then the cost of fund management would increase to $2,034,000. Further, if fund management on earnings into the fund was to be added to fund management on fund management, the fees increased to $2,151,000 over the appellant's 67 year life expectancy. These calculations were made applying the 5% discount rate as mandated by s.127 of the *Motor Accidents Compensation Act* 1999 (NSW).

29. At trial, in cross-examination, Mr Watt, an expert accountant engaged on behalf of the respondent, conceded that unless fund management is

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17 Paragraph 40 of the trial judge's judgment dated 16 August 2011.

18 Paragraphs 54–55 of the trial judge's judgment dated 16 August 2011. This comment was made in relation to considering "*fund management on fund earnings*", however, it is equally applicable to fund management on fund management.

19 Paragraph 22 of the trial judge's judgment dated 16 August 2011.

20 *Bacha v Pettersen* – SC of NSW 20 September 1994 unreported: see also paragraphs 27 and 28 of the trial judge's judgment dated 16 August 2011

21 [2005] NSWSC 546 at [13]. See also paragraph 28 of the trial judge's judgment dated 16 August 2011.

22 Paragraph 31 of the trial judge's judgment dated 16 August 2011.

23 T 204.05 – 25.

24 Exhibit M.

calculated on the head of damage allowed for fund management, there would be a shortfall and the fund would not last the projected 67-year life expectancy of the appellant.[25]. This accorded with the expert evidence of Mr Plover, an actuary called on behalf of the appellant.[26]

30. The trial judge correctly identified that as the appellant was under a legal incapacity, her estate had to be managed, including any award for fund management. Her Honour also correctly identified that the manager will pay himself periodically as fees are earned, just as he will pay carers and other future expenses as they accrue. Accordingly, fund management fees will also be generated in managing the head of damage identified as fund management.[27]

31. At trial the respondent did not dispute that the amount awarded for fund management fees would also require management but disputed that any allowance should be made for this management.[28] The respondent did not suggest at first instance or in the Court of Appeal that the cost of fund management on fund management could be avoided by any upfront payment to the manager. The respondent bore the onus of proof in relation to such a contention in respect of mitigation but did not make such a submission nor, indeed, was the matter raised in argument. More importantly, the respondent led no evidence that there were managers in the marketplace who were willing to separate the fund management fee as an upfront fee and waive all future charges in relation to managing the fund management fee. Rather, the evidence of Mr Plover was to the effect that fund managers do charge fees on re-invested earnings and on the entirety of the awarded sum.[29]

32. The cost of fund management is a recognized head of future loss which has been affirmed by the NSW Court of Appeal in *GIO of NSW v Rosniak.*[30] It has also been affirmed by the High Court in *Nominal Defendant v Gardikiotis*[31] and *Willett v Futcher.*[32]

33. The cost of future fund management, on the corpus of the fund, not including fund management itself, is calculated by applying the 5% discount rate as required by s.127 of the *Motor Accidents Compensation Act* 1999 (NSW). Once it is acknowledged that the cost of future fund management is a calculation of a future loss, it falls within the same category as other future losses such as future wage loss, future nursing care and so forth. It therefore follows that if fund management is to be calculated on all heads of

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25 T 205.15 – 206.25

26 Exhibit F2 – report of Corey Plover, Cumpston Sarjeant Pty Ltd dated 9 November 2010, p.7

27 Paragraph 24 of the trial judge's judgment dated 16 August 2011.

28 T 207.30 - 40

29 Exhibit F2 – report of Corey Plover, Cumpston Sarjeant Pty Ltd dated 9 November 2010, p.7

30 (1992) 27 NSWLR 665 at 693F-G.

31 (1996) 186 CLR 49 at 54.9 – 55.3.

32 (2005) 221 CLR 627 at 631[10] and 643[51].

damage, including future wage loss and future care, then it should also be calculated on the allowance for future fund management.

34. The reasoning of the majority in the Court of Appeal is to be found in the judgment of the Chief Justice. Despite acknowledging the logic in making an award of damages for fund management on fund management, the Chief Justice refused to make such an award on the ground that he did not believe that it was appropriate to do so.[33]

35. The first reason given by the Chief Justice at paragraph [145] of his judgment was that as a matter of general principle a Court is not concerned with what a plaintiff does with his or her lump sum damages. This principle was relied on by the respondent both at trial and in the Court of Appeal. It can be found in the judgment of Gibbs CJ and Wilson J in *Todorovic v Waller* where the following statement appears:-

> "*Certain fundamental principles are so well established that it is unnecessary to cite authorities in support of them. In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum; the Court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the Court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he seeks damages.*"[34]

The principle relied upon by the Chief Justice was taken from the third point in the above quote. What His Honour failed to acknowledge was that *Todorovic v Waller* was not a case involving a plaintiff who was under a legal incapacity.

36. The correct approach in dealing with a plaintiff who is under a legal incapacity was set out by the High Court in the judgment of McHugh J in *Nominal Defendant v Gardikiotis* as follows:-

> "*Damages may therefore be awarded for the expense of managing a plaintiff's verdict monies when the plaintiff's disabilities prevent him or her from managing those monies and the disabilities are the foreseeable consequence of the defendant's negligence. Damages may also be awarded for the expense of investment advice where, as the result of the defendant's negligence, the plaintiff is no longer able to make adequate decisions concerning his or her own financial affairs.*

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33 Court of Appeal Judgment paragraphs 144 and 145.

34 *Todorovic v Waller* (1981) 150 CLR 412.3.

> *In both cases, damages are payable by the defendant because the expense is the necessary product of the defendant's negligence and is not the result of the free, informed and voluntary act of the plaintiff. The expenses have been brought about by the loss of the plaintiff's ability to do what that person was capable of doing before the occurrence of the tort which gives rise to the claim for compensation."*[35]

Further, s.79 of the *Civil Procedure Act,* as already submitted, dictates that a plaintiff who is under a legal incapacity must have their damages managed. It is in this context that the third principle cited by Gibbs CJ and Wilson J in the matter of *Todorovic v Waller* needs to be considered.

37. In support of the proposition that all charges, including charges on the head of damage identified as fund management, are recoverable, the High Court in *Willett v Futcher* at paragraph [51] held as follows:-

> *"...The plaintiff can make no decision about the fund. An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The 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, as far as possible, in the position he or she would have been in had the tort not been committed. That requires comparison with the position the plaintiff would have been in without the award of a lump sum for damages. It does not, as the distinction adopted by White J supposes, require or permit comparison with the position that the plaintiff would have been in had the disabling injuries not been sustained but the plaintiff nonetheless had a lump sum to invest. That comparison is irrelevant and inapt. In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of the period."*[36]

Noting that the head of damage identified as fund management is to be included in the fund to be managed, it will also attract charges. Accordingly, in order to place the plaintiff, as far as possible, in the position she would have been in had the tort not been committed, fund management charges should be allowed for the head of damage identified as fund management.

38. In this context, the Chief Justice's comment in the Court of Appeal that it was not appropriate to make an award of damages for fund management on fund management was not in accordance with established legal principle where the plaintiff is under a legal incapacity. The appellant will not do

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35 *Nominal Defendant v Gardikiotis* [1995-1996] 186 CLR 49 at 54.9-55.3.

36 *Willett v Futcher* [2005] 221 CLR 627 at 643[51]. See also at 631[10].

anything with her damages as a matter of law. Whilst a plaintiff who is not under a legal incapacity can choose to do what they like with their damages, including purchasing property and avoiding mortgages, etc, the appellant does not have that capacity by law. Rather, the damages must, by law, be managed and invested on her behalf. As the law imposes management on a plaintiff under a legal incapacity, her damages will be subject to charges over which she has no control.[37] As the damages to be invested will include an amount set aside for fund management, that amount will also be subject to fund management charges.

39. His Honour's proposition in this regard is inconsistent with High Court authority and contrary to law.[38] If His Honour's comment was correct, it would eliminate fund management entirely as a head of damage, for plaintiffs under a legal incapacity, and not merely fund management on fund management.

40. The second reason given by the Chief Justice at paragraph [146] was it was open to the appellant to choose a fund manager with the approval of the Court and to negotiate the terms upon which the fund management fees would be paid. It was suggested that some form of up-front fee be paid to the fund manager as an advance on fees which would allegedly avoid the ongoing charges. This proposition was not raised with the appellant, either at trial or in the Court of Appeal, was not submitted by the respondent and was not the subject of any evidence in the proceedings. There was no evidence that pointed to any fund manager who has undertaken fund management on this basis. Further, given that the charges for fund management will vary according to the gradually reducing amount under management, particularly for a fund to be managed for a period of 67 years, even the prediction of an appropriate up-front payment would be almost impossible except on an arbitrary basis. In the absence of evidence, it is equally possible that the up-front fee that a fund manager may hypothetically request could be greater than the calculation of fund management on fund management and fund management on fund earnings. Finally, there was no evidence that there was in fact a fund manager in Australia who was prepared to undertake the management of the appellant's damages over a 67 year period on the basis of one up-front fee.

41. More particularly, the respondent did not plead a failure to mitigate in this respect, did not lead evidence, or submit that the proposal adopted by the Chief Justice was available or open or even under consideration. The appellant was given no opportunity to address this matter because it was not raised with the appellant either at trial or in the Court of Appeal. The reasoning of the Chief Justice has no regard to the operation of s.79 of the *Civil Procedure Act*, which requires the entire estate to be managed as an undifferentiated fund. As Basten JA in a separate judgment acknowledged,

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37 Section 79 of the *Civil Procedure Act* 2005 (NSW).

38 *Nominal Defendant v Gardikiotis* [1995-1996] 186 CLR 49 at 54.9-55.3 and 60.9-61.3; also *Willett v Futcher* [2005] 221 CLR 627 at 631[10] and 643[51].

absent some legal arrangement which is not presently contemplated, such an arrangement may tend to tie the plaintiff to one fund manager.[39]

42. The third reason given by the Chief Justice at paragraph [147] is that the calculation of fund management on fund management involves speculation as to the performance of the fund. His Honour's reasoning, if correct, would apply to all future losses which by necessity are speculative. This reasoning is incorrect in principle as the performance of the fund is no more speculative than determining the income from the investment of the sum awarded. Just as fund management can be calculated on the corpus of the fund which includes future losses such as future economic loss, future nursing care, etc, then it can also easily be calculated on the head of damage identified as fund management. Just as fund management on the corpus of the fund, including future losses such as economic loss and nursing care, is calculated by applying the 5% discount rate mandated by s.127 of the *Motor Accidents Compensation Act,* it can also be calculated on the head of damage identified as *"fund management"*. To exclude the calculation of fund management on fund management on the basis that such a calculation involves speculation as to the performance of the fund, lacks logic. The calculation is conducted by applying the 5% discount rate mandated by s.127 of the *Motor Accidents Compensation Act.*

43. The fourth and final reason given by the Chief Justice at paragraph [147] is that the calculation of fund management on fund management involves multiple iterations. This reasoning is contrary to the evidence as the experts engaged by both parties were able to agree on this calculation.[40] The Chief Justice himself had previously acknowledged this head of damage could be readily calculated,[41] as did Basten JA.[42]

44. Bathurst CJ's reasoning (with whom the other members of the Court, except Basten JA, agreed) accordingly lacked any real basis for upholding the appeal and declining to award fund management on fund management.

45. Basten JA, in a separate judgment, also upheld the appeal but on a quite different basis. He acknowledged that this head of damage identified as fund management on fund management could be calculated but thought as a matter of policy a limit should be placed on the amount awarded.[43] Despite suggesting at paragraph [196] of his judgment that there were significant reasons for not attempting an upfront payment, His Honour thought the appellant should be required to offer the fund manager prepayment of fees by transferring a satellite fund notionally set aside for that purpose. This implies a failure to mitigate loss which was not pleaded, submitted, argued or raised either at the trial or in argument in the Court of Appeal. It is also contrary to His Honour's own criticism of the restrictions

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39 Paragraph 196 of the Court of Appeal Judgment.
40 T 204.05 – 204.25 and Exhibit M.
41 Paragraphs 93-94 of the Court of Appeal Judgment
42 Paragraph 197 of the Court of Appeal Judgment.
43 Paragraph 200 of the Court of Appeal Judgment.

that any form of prepayment would impose upon moving the fund in the future.[44]

46. The effect of the expert evidence was that by not allowing fund management on fund management, a shortfall would inevitably result and the fund would not last the projected 67-year life expectancy of the appellant.[45] The failure to award damages to properly compensate the appellant for a tortiously inflicted injury offends the principle of *restitutio in integrum* as expressed in the NSW Court of Appeal in *GIO of NSW v Rosniak*[46] and the High Court in *Willett v Futcher*.[47]

47. If what is really involved is an exercise in policy as Basten JA appears to concede, then why should the loss and the shortfall be borne by the severely disabled person and not by the tortfeasor/compulsory third party insurer? There cannot be much doubt about which party is in the better position to meet the loss occasioned by the tort.

**Fund Management on Fund Earnings**

48. The issue of fund management on fund income (earnings) needs to be considered in the context of fund management charges.

49. It was common ground that The Trust Company Limited charge an annual management fee on the capital sum of the fund, which includes the various heads of damage including fund management and earnings into the fund, all of which will reduce as the fund is gradually drawn down.[48]

50. Bathurst CJ noted that in *GIO of NSW v Rosniak*, the Court of Appeal had to determine the income into the fund in order to determine the amount to allow for fund management as fund management fees were in part charged on this income. He also noted that in the present case, The Trust Company Limited fees included a charge on income into the fund.[49]

51. Despite acknowledging that in *Rosniak*[50] the Court of Appeal arrived at an arbitrary calculation of income into the fund based on a 5% return, the Chief Justice declined to follow *Rosniak* and allow a similar approach in this matter.

52. His Honour's first reason at paragraph [138] is that pursuant to s.127 of the *Motor Accidents Compensation Act*, the discount rate is assumed to take into account the cost of earning income, which includes fees payable as a consequence. Whilst this assumption is correct for a plaintiff who is not

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44 Paragraph 196 of the Court of Appeal Judgment. See also our submissions at paragraphs 35 and 36 above.

45 T 205.15 – 206.25 and Exhibit F2 – Report of Corey Plover, Actuary, Cumpston Sarjeant Pty Ltd, dated 9 November 2010, page 7.

46 (1992) 27 NSWLR 665 at 677B-D.

47 [2005] 221 CLR 627 at 631[10] and 643[51].

48 Exhibit N. See also Bathurst CJ at paragraphs 135 -136 of the Court of Appeal judgment.

49 Paragraphs 135-137 of the Court of Appeal Judgment.

50 *GIO of NSW v Rosniak* (1992) 27 NSWLR 665 at 698C

under a legal incapacity, it is not correct for a plaintiff who is under a legal incapacity and whose judgment must be managed. The passage referred to by the Chief Justice from pages 60–61 of *Nominal Defendant v Gardikiotis* does not support the proposition put forward by him. The passage cited by His Honour from *Nominal Defendant v Gardikiotis* contains the following exception:-

> *"However, this contention misconceives the role of a Court in awarding common law damages. Except in those cases where the plaintiff is under a legal disability, a Court has no interest in what the defendant's negligence has had on the plaintiff."* (our emphasis)[51]

53. Rather, *Nominal Defendant v Gardikiotis* is authority for the proposition that fund management fees, however they are made up, are also a recoverable head of damage for an intellectually disabled person.[52] This was also affirmed by the High Court in *Willett v Futcher.*[53]

54. If the first reason put forward by the Chief Justice was correct, then not merely would there be no fund management on the income earned by the fund, but there would be no fund management on that element of the judgment which related to future losses (such as future economic loss and future care) which have themselves been reduced on the 5% statutory discount rate. Yet that proposition was never put or considered. *Nominal Defendant v Gardikiotis* stands for the proposition that fund management is to be added to the damages allowed.

55. Nor is it obvious from the wording of s.127 that fund management is not recoverable on this element of the damages. If the respondent's proposition was correct, and the cost of managing the fund is included in the statutory 5% discount rate mandated by s.127 of the *Motor Accidents Compensation Act,* then a person who had capacity and whose damages for future losses (such as future economic loss and future care) was reduced on the 5% discount rate would be greatly advantaged over the most severely incapacitated, whose future damages would also have been reduced but who would have to pay for fund management on the earnings of the fund as a result of the operation of s.79 of the *Civil Procedure Act.* Plaintiffs under a legal incapacity have no choice and management is imposed upon them pursuant to s.79 of the *Civil Procedure Act.* A plaintiff who is not under a legal incapacity does not have to incur fund management charges.

56. Further, Parliament expressed no clear intention that fund management was to be included in s.127. The 5% statutory discount rate was inserted into the *Motor Vehicles (Third Party Insurance) Act* 1942, by the *Motor Vehicles (Third Party Insurance) Amendment Bill* dated 10 May 1984. In the second reading speech no reference is made to fund management and

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51 *Nominal Defendant v Gardikiotis* [1995-1996] 186 CLR 49 at 60.9 – 61.1.

52 *Nominal Defendant v Gardikiotis* [1995-1996] 186 CLR 49 at 54.9 – 55.3 and 60.9.

53 *Willett v Futcher* [2005] 221 CLR 627 at 631[10] and 643[51].

specifically there is no reference to fund management being included in the 5% discount rate. The 5% discount rate has been carried over from the *Motor Vehicles (Third Party Insurance) Act* 1942 into s.127 of the *Motor Accidents Compensation Act* 1999. The second reading speech for the *Motor Accidents Compensation Act* makes no specific reference to s.127 nor does it make any reference to fund management. In the absence of a clear intention from the wording of s.127 of the *Motor Accidents Compensation Act* that fund management is to be included in the 5% discount rate, then it should not be included. To include fund management in the statutory discount rate of 5% mandated by s.127 of the *Motor Accidents Compensation Act*, unfairly prejudices plaintiffs who are under a legal incapacity and who have fund management imposed upon them by the operation of s.79 of the *Civil Procedure Act*.

57. It should also be noted that the Chief Justice's comments at paragraph [138] of the Court of Appeal judgment, were challenged by Basten JA at paragraph [181]. At paragraph [181] Basten JA confirmed that the approval in *Gardikiotis* of an amount for the cost of fund management for legally incapacitated plaintiffs is inconsistent with treating the cost as being covered by the discount rate. Basten JA has correctly applied *Nominal Defendant v Gardikiotis.*

58. The Chief Justice's second reason is that the discount rate does not equate to the net income or net earning rate.[54] In saying this, the Chief Justice failed to correctly apply *Todorovic v Waller* and in doing so, failed to equate the net income rate or earning rate to the discount rate, which in turn avoids the very speculation referred to by His Honour. In *Todorovic v Waller* Gibbs CJ and Wilson J stated the following:-

> *"In fixing the discount rate, the fact that for so long the rates applied by the Courts in Australia have been held at a level of 5% and above should not be disregarded. Some downward adjustment is necessary to take account of notional tax. The actuaries' tables show that if the assumption is, as it must be, that the income is earned at the discount rate the necessary adjustment is quite small, particularly when the assumed income is within the range within which most employees' incomes fall in Australia"* (our underlining emphasized).[55]

59. There are other passages in *Todorovic v Waller* which support the conclusion that the discount rate reflects the earnings rate after all deductions are taken into account, including taxation and inflation. Put another way, the discount rate reflects the earnings rate with a downward adjustment to take into account notional tax and inflation. In this regard we draw the Court's attention to the passages at 409.2-409.5, 414.6–414.8, 422.4–422.6, 428.8–429.3 and 436.8–437.5. This interpretation is also applied in Luntz *Assessment of Damages for Personal Injury and Death* (4th edition) 2002 pp 355–357 at paragraphs 6.1.2–6.1.4. The discount rate of

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54 Paragraph 139 of the Court of Appeal Judgment. See also Basten JA at paragraph 202.

55 *Todorovic v Waller* (1981) 150 CLR 403 at 424.3.

3% enunciated in *Todorovic v Waller* has been replaced by a 5% statutory discount rate in s.127 of the *Motor Accidents Compensation Act* 1999 (NSW) and the principle behind the discount rate is to avoid the very speculation relied upon by the Chief Justice.

60. Given that future losses are discounted on the 5% tables, the failure to assume 5% income after tax and inflation and pay the cost of managing this income must inevitably lead to the shortfall conceded by both experts.[56] This is clearly explained by Mr Plover, actuary, in his expert report dated 6 July 2011 at p. 7, where he compares the actual drawdown of a fund excluding earnings to the annual drawdown of a fund which includes fund earnings.[57] It is clear that in order to fairly compensate the injured appellant, the interest and earnings into the fund must be taken into account and must be managed. As noted by Mr Plover, as fund managers reinvest the earnings of the fund, charges will be levied against those earnings. Mr Plover concluded that in light of these factors, it is consistent to include investment earnings at a rate equal to the discount rate.[58] In order for the fund to last it needs to rely on the earnings into the fund, which must also by necessity be managed.

61. The Chief Justice at paragraph [139] of his judgment acknowledged that the discount rate was applied to avoid the need to consider the rate of inflation, consequent changes in wages or prices and the incidence of income tax. As noted from the illustration provided by Mr Plover, the effect of the 5% discount rate is to reduce the plaintiff's award of damages to take into account the net earning power of a lump sum of money, after factors such as inflation and taxation are taken into account.[59] Having reduced the plaintiff's award of damages for future losses by reference to the 5% discount rate, His Honour accepted the respondent's submissions in the Court of Appeal and refused to apply the same rate to the earning rate of the fund. His Honour found that determining the income into the fund involved making two artificial assumptions. The first related to the income into the fund and the second related to the rate of depletion of the fund. As both assumptions were speculative His Honour refused to determine the income into the fund.

62. The trial judge noted that the respondent's submissions at trial, which were the same submissions in the Court of Appeal, entailed a misconception.[60] Her Honour noted that the appellant did not ask the Court to speculate and calculate the actual projected income of the fund. Rather, the uncertainty of the future income, relied on by the Chief Justice in the Court of Appeal, is removed by applying the statutory assumption as to future earnings. In this context, it would be incongruous to reduce the plaintiff's award for future

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56 T 205.20-206.25

57 Exhibit F3, report of Corey Plover, Actuary, from Cumpston Sarjeant Pty Ltd, dated 6 July 2011 pages 6-8.

58 Exhibit F3, report of Corey Plover, Actuary, from Cumpston Sarjeant Pty Ltd, dated 6 July 2011, pages 6-8.

59 See reference at footnote 58 above; see also the evidence of the experts, Mr Plover, Actuary, and Mr Watt, Accountant, at T 192.5 – 196.50.

60 Paragraph 47 of the trial judge's judgment dated 16 August 2011.

losses by imposing the certainty of a statutory discount rate while at the same time denying the availability of that very same assumption when it is relied upon for the purpose of obtaining, rather than reducing, a compensatory award.[61] Her Honour specifically noted that the purpose of prescribing a fixed rate in *Todorovic* was to obviate the need to quantify the actual likely net earnings, which included an allowance for notional tax and inflation, in any particular case.

63. It has been the appellant's contention at all times that the 5% discount rate is impenetrable. In *Todorovic v Waller* the High Court applied a 3% discount rate and held that no further allowance should be made for matters including taxation and inflation.[62] This was an arbitrary application to avoid the lengthy and expensive exercise of calling expert evidence to predict future income return, tax and inflation. Parliament has increased the discount rate to 5% in s.127 of the *Motor Accidents Compensation Act*. If Parliament has determined that the net income rate on lump sums for future losses is 5%, then that 5% return should also be applied to the income return of the fund.

64. Once it is acknowledged that the plaintiff's award of damages for future losses has been reduced by the statutory discount rate to take into account a 5% net return, then it is clear that Parliament considered that the fund would earn net income at the rate of 5% after tax and inflation had been considered. The trial judge noted at paragraph [66] of her judgment the following:-

> *"In determining the plaintiff's entitlement to damages for future liabilities to which she will be exposed as a result of the defendant's negligence, the statute assumes she will be able to invest the amount awarded so as to earn income at 5 per cent. Why should any different assumption be made when the need to quantify future income on the fund arises in the calculation of a different component of her damages?"*

65. Adopting the discount rate as the net income return for the fund on which fund management on fund income is calculated, also provides numerical consistency and will avoid over compensation. The trial judge correctly referred to Clarke JA's judgment in *Treonne Wholesale Meats v Shaheen,*[63] and noted the need for internal mathematical consistency.[64] If the investment rate of return was different to the discount rate, then there would be a greater risk of either under-compensation or over-compensation in assessing fund management on fund income. The risk of either over-compensation or under-compensation can be avoided if the notional investment return is equated to the discount rate. This is also supported by the explanation provided by Mr Plover, Actuary, in his report dated 6 July

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61 Paragraphs 47, 48, 49, 55, 59, 60 and 66 of the trial judge's judgment dated 16 August 2011.

62 *Todorovic v Waller* [1981] 150 CLR 402 at 409.2-5.

63 *Treonne Wholesale Meats v Shaheen* [1988] 12 NSWLR 514 at 531E – 532D.

64 Paragraphs 66 – 68 inclusive of the trial judge's judgment dated 16 August 2011.

2011 at pages 6 and 7, where he compares the actual drawdown of a fund reduced by the statutory discount rate but excluding earnings, to the drawdown of a fund which includes earnings assessed at the statutory discount rate.[65]

66. By applying the discount rate to the net earning rate of the fund, this would avoid the need to call lengthy and costly evidence from actuaries attempting to predict the future income of the fund, including the effect of taxation and inflation, over the projected 67 year life of the appellant's fund. As Gibbs CJ and Wilson J in *Todorovic v Waller* held:-

> "*However, it is most desirable that awards of damages should be predictable, so that settlements may be facilitated, and the task of the Courts eased ... In the interest of securing uniformity throughout Australia this Court should therefore do what it has held that a Supreme Court of one State may not do, and that is to make an arbitrary ruling regarding interest rates of general application.*"[66]

67. Further, the Chief Justice in the Court of Appeal did not offer any valid reason for failing to apply the 5% investment (income) return applied in *Rosniak.*[67] In *Rosniak*, it was acknowledged that whilst the amount of future income into the fund may be speculative, there is no reason not to make an allowance for income, particularly as future losses have been discounted to take into account future income. The fact that the arbitrary assessment of 5% in *Rosniak* happens to coincide with the mandatory discount rate laid down by Parliament is just and fair.

68. If Parliament sees fit to impose an assumed level of income after tax and inflation then that eliminates the speculative element in relation to the calculation of assumed income into the fund.

69. The Chief Justice also makes reference to uncertainty and a suggestion of over-compensation in paragraph [141] of his judgment. Such comments are contrary to the evidence. It is not apparent that the cost of fund management, including fund on fund management and fund on fund earnings, is any more difficult to calculate than the cost of other future losses. The actual calculation is effectively no more complex than the calculation of compound interest.[68] Further, if allowance is not made for fund management on fund management and fund management on fund income, the experts agree that there would, in all probability, be a shortfall.[69]

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65 Exhibit F3, report of Corey Plover, Actuary, from Cumpston Sarjeant Pty Ltd dated 6 July 2011, pages 6-8.

66 *Todorovic v Waller* [1981] 150 CLR 402 at 423.7.

67 *Government Insurance Office of NSW v Rosniak* [1992] 27 NSWLR 665 at 698C.

68 T 204.5 – 204.25

69 T 205.15 – 206.25

70. The third reason given at paragraph [141] was that notional tax benefits on any fees incurred in deriving the income are not taken into account in the assumed discount rate. This again was a misapplication of *Todorovic v Waller op cit.* The opening remarks at the beginning of the judgment in *Todorovic v Waller* at page 409.3 stipulate that tax is taken into account in determining the discount rate.[70]

71. His Honour the Chief Justice's statement at paragraph [147] that the calculation of income into the fund involves speculation as to the performance of the fund simply cannot be correct. If it were, then no allowance could ever be made for any future loss because there will always be uncertainty in respect of such things as the cost of future care or the likely future income, which will result in an inevitable degree of speculation. That has never excused a Court from making an allowance for future losses. It should not do so in this respect.

**Conclusion**

72. The trial judge delivered a well-reasoned judgment on both fund management on fund management, and fund management on the income into the fund, which was supported by the reasoning of *Todorovic v Waller.* It would be illogical to assume that part of the fund set aside as a single fund would not require management, particularly given that it was already discounted on the assumption that it would be managed. It would be illogical to treat income into the fund differently when it will also be subject to fund management charges. It would be manifestly unjust to make the most severely disabled plaintiffs pay out of amounts supposed to provide for their future needs sums for fund management when those not requiring fund management would not incur any such loss and would thereby be advantaged.

73. This issue of *restitutio in integrum* affects the most disabled and vulnerable compensation victims throughout Australia. The Court of Appeal's judgment is inconsistent with the approach mandated by this Court in *Todorovic v Waller* and in *Willett v Futcher* and also with the NSW Court of Appeal decision in *GIO of NSW v Rosniak.*

74. The Court of Appeal decision is inconsistent with the approach in Western Australia in *Best (by his next friend Catherine Elizabeth Jordan) v Greengrass* [2012] WADC 44, which followed the first instance decisions of McCallum J. The appellant's approach has been supported in NSW in some cases, *Bacha v Pettersen* (Hunter J SC of NSW unreported 20 September 1994) but not in others, such as *Buckman v M & K Napier Constructions Pty Ltd* [2005] NSWSC 546 at [13] and *Rottenbury by his tutor Wren v Rottenbury* [2007] NSWSC 215. Further the first instance decision has been followed prior to the NSW Court of Appeal decision in *Patterson v Khalsa (No. 3)* [2013] NSWSC 1331.

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70 *Todorovic v Waller* [1981] 150 CLR 402 at 409.3; see also 436.8-437.5

75. The manifest injustice to the catastrophically injured in the propositions for which the respondent contends is contrary to authority and the principle of *restitutio in integrum*.

**Costs**

76. In the event that the appellant's Appeal is successful, the first instance costs orders made by the trial judge on 13 April 2012 should be reinstated and the appellant should be awarded her costs in the Court of Appeal, Special Leave Application, and the High Court.

## PART VII: APPLICABLE STATUTES

77. Section 127 of the *Motor Accidents Compensation Act* 1999 (NSW)

78. Section 41 of the *NSW Trustee & Guardian Act* 2009 (NSW)

79. Sections 77 and 79 of the *Civil Procedure Act* 2005 (NSW)

80. The above statutes are still in force at the date of making these submissions.

## PART VIII: ORDERS SOUGHT

1. Appeal allowed with costs.

2. An order that the Respondent's appeal to the New South Wales Court of Appeal be dismissed with costs.

3. The orders of the New South Wales Court of Appeal made on 2 December 2013 be set aside.

4. The cost orders of the New South Wales Court of Appeal made on 28 March 2014 be set aside.

5. The Respondent pay the Appellant's costs in the New South Wales Court of Appeal.

6. The costs orders of McCallum J entered on 13 April 2012 relating to the trial be reinstated.

7. The Respondent pay the Appellant's costs of the application for special leave to appeal and the appeal to the High Court of Australia.

## PART IX

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

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