

Damages for the costs of fund management for infant plaintiffs

Pellow v NRMA

An infant plaintiff can recover the costs of fund management fees on the verdict sum until the age of 18 years.

In *Pellow v NRMA*¹ Justice Studdert of the Supreme Court of New South Wales considered whether a plaintiff with a pre-existing disability (such as infancy) which prevented him or her from managing the damages award was entitled to recover the costs of fund management fees on his or her verdict sum until the cessation of the legal disability (in the case of infants, until the age of 18 years). He held that the costs of fund management were recoverable, noting that '(t)he point is an important one which does not appear to have arisen directly in the past'.²

Pursuant to Section 4 of the *Damages (Infants and Persons of Unsound Mind) Act*, damages awarded to an infant plaintiff are to be paid into court and 'shall, unless the court otherwise directs, be paid out to the Public Trustee'.³ The fund is held on trust 'for the maintenance and education or otherwise for the benefit of the minor'.⁴ Justice Studdert reviewed *Nominal Defendant v Gardikiotis*,⁵ where it was held that fund management fees are recoverable where a need 'has been created as a direct consequence of the defendant's wrong' or 'the necessary product of the defendant's negligence', notwithstanding that they may also be 'a

means of maximising the compromise sum'.⁶ His Honour observed that 'a decision taken on behalf of these infant plaintiffs to incur the cost of fund management is not a decision which is "free" or "voluntary"'.⁷ In the present case, however, *Gardikiotis* was distinguishable as each plaintiff was 'under a disability, albeit a legal one, which compels the investment of any judgment fund'.⁸

After referring to *Ren v Mukerjee*,⁹ His Honour concluded:¹⁰

'I find what was said in the High Court in *Gardikiotis*, both in the joint judgment and in the judgment of Gummow J, and by King CJ in *Campbell* to be most persuasive.

Neither of these plaintiffs suffer from a mental disability caused by the defendants' negligence and the position would be altogether different if the plaintiffs, not having suffered mental disability because of the defendants' tort, had a choice as to whether to invest the verdict monies for themselves. However, neither plaintiff has a choice because of her infancy. Neither plaintiff has a capacity to manage a large fund, and the law determines that each plaintiff will remain disabled until she attains the age of 18 years.

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Whilst the “but for” test is not the test of causation, the issue of causation is essentially a common sense issue: see the dicta from the joint judgment in *Gardikiotis* previously cited. The necessity of fund management was a reasonably foreseeable consequence of negligently causing harm to each of these infant plaintiffs because of the long-settled legal disability the law imposes upon each child. The expense of fund management necessarily attends damages awarded for the physical harm caused by the defendants’ tort and, having considered the above authorities, I am satisfied that the test of causation has been satisfied. It follows that each plaintiff is entitled to have included in her assessment the reasonable cost of fund management until the cessation of her legal disability at the age of 18 years.’

Comment

Damages for the costs of fund management fees are recoverable in

situations where there is a causal link between the defendant’s negligence and the need for fund management;¹¹ for example, in cases of causally related incapacity and where the plaintiff had a pre-existing disability such as infancy.

Recently, in *Willett v Futcher*, the Queensland Court of Appeal (Davies, Jones and Holmes JJ) considered the scope of the services to which regard should be given in assessing damages for reasonable costs of fund management. The Court held that management fees are recoverable in cases where a need ‘has been created as a direct consequence of the defendant’s wrong’ or ‘the necessary product of the defendant’s negligence’, notwithstanding that they may also be ‘a means of maximising the compromise sum’.¹²

Where a professional trustee is appointed, even though a consequence of those obligations may be that the standard of services provided is higher than the unassisted decision-making of an adult with no particular skill, training or interest, costs are recoverable at the higher standard. This is

because the plaintiff has no choice but to accept such services. However, in *Willett v Futcher* the court distinguished between those services that are necessary to perform the obligations under the trust (which are recoverable), from those services that are performed in the exercise of discretions but which are not necessary to discharge the obligations of trustee (which are not recoverable). **PL**

Endnotes: **1** [2004] NSWSC 152 (*Pellow*). **2** *Ibid* at [2]. **3** The court may make an order for the appointment of a private trustee (discussed in P Seymour, *Appointing a private trustee: Have you considered it?* (2002) 51 *PLAINTIFF* 22) or for the removal of the public trustee and replacement with a private trustee, see T Cockburn, *Transfer of estate management: M v Protective Commissioner* (2002) 53 *PLAINTIFF* 46). **4** Section 5. **5** (1996) 186 CLR 49 (*Gardikiotis*). **6** *Pellow* at [15] – [16] (footnotes omitted). **7** *Ibid* at [11]. **8** *Ibid* at [12]. **9** (1996) ACT SC 1199 Miles CJ (where *Gardikiotis* was relied upon to allow the costs of fund administration where the need for fund management did not arise from incapacity attributable to injury but by reason of the plaintiff being an infant). **10** *Pellow* at [16]-[18]. **11** *Willett v Futcher* [2004] QCA 30 (*Willett v Futcher*) at [16]; discussed T Cockburn (2004) *PLAINTIFF* 62, pp40-1. **12** *Ibid* at [15] – [16].

TIM PAINE, NSW
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Liability of prison authorities for escapees

State of New South Wales v Godfrey [2004] NSWCA 113

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INTRODUCTION

In *Home Office v Dorset Yacht Co*¹ the House of Lords held a prison authority liable in negligence for damage caused

to yachts in the ‘immediate vicinity’ of the prison by juveniles ‘in the course of their escape from custody. In *State of New South Wales v Godfrey* the NSW