By Jane Campbell

Recovering costs for funds management

How to claim appropriate damages and select a financial manager

The common law provides that a plaintiff incapable of managing their financial affairs who is seeking compensation for personal injury can recover the cost of funds management. How do lawyers not only claim appropriate damages for funds management but guide clients in selecting the most suitable financial manager?[1]

The leading case on the calculation of funds management in Australia is the 2014 High Court decision in *Gray v Richards*[2] (*Gray*). The law is clear that a financially incapable plaintiff should not have to meet the cost of funds management from the judgment sum. If no allowance is made for funds management, there will be a shortfall.[3]

CAPACITY

Legal and financial decision-making capacity

As a personal injury lawyer, you need to assess your client's *legal* decision-making capacity. As this is not the focus of this article, I recommend the excellent recent paper on this topic by Jed McNamara presented at the recent Australian Lawyers Alliance (ALA)'s Queensland Conference.[4]

Children do not have legal or financial decision-making capacity. Adults are presumed to have capacity, unless and until it is determined otherwise. An adult may lack legal or financial capacity, or both, and this may change over time.

Considering financial capacity pre-settlement

If you doubt your client's financial capacity early on, then you will need to consider whether they have any income or assets that require attention in the period between when you take instructions and final settlement. The options to weigh up are as follows.

Self-management

Some clients will have capacity to manage modest sums, such as Centrelink payments. No action is needed for them pre-settlement.

Informal management

Some clients, such as children, will not have capacity but also will not have any significant income or assets, so informal management of their affairs, such as by their parents, is appropriate.

Informal management is also usually fine for adult clients whose modest income and assets are being managed by a parent, sibling, or spouse.

Tribunal appointment

If formal management is appropriate, then an inexpensive option for adults may be for a family member to seek orders from the Civil and Administrative Tribunal in the state or territory in which they live.

Tribunal orders will specify the extent of substitute decision-making allowed, that is, which income or assets can be managed by who and for how long. Either a family member (usually) or a trustee company (only if necessary) may be appointed.[5] Usually, the appointed manager does not get paid for their time during this interim period pre-settlement.[6]

A tribunal appointment will not have adverse consequences for you or your client post-settlement. It may also prove helpful as a test of the suitability of the manager.

Determining financial capacity to manage the settlement sum

Will your client have the capacity to manage the anticipated settlement sum, and possibly other assets? The consequences of a decision on financial capacity are significant.

A client with capacity cannot claim damages for funds management and will be free to make their own decisions about their settlement funds. The upside is that your client will not be restricted; the downside is that they will not be protected.

A determination of lack of capacity means you can claim damages for funds management and a substitute financial decision-maker must be appointed. The upside for your client is the extra compensation money and the protection and support that goes with professional management. The downside is less freedom.

Extent of impairment

Not all impairments entitle a plaintiff to damages for funds management. The plaintiff must be impaired to the extent of requiring assistance in managing the funds.

In *Gray* the High Court stated:

> 'The decisions of this Court in *Nominal Defendant v Gardikiotis* and *Willett v Futcher* refined this aspect of the operation of the third principle in *Todorovic v Waller* so that, in a case where a defendant's negligence has so impaired the plaintiff's intellectual capacity as to put the plaintiff in need of assistance in managing the lump sum awarded as damages, expense associated with obtaining that assistance is a compensable consequence of the plaintiff's injury.'[7]

Cause of impairment

A plaintiff can also claim the cost of funds management if their intellectual incapacity to manage their own affairs did not result from the defendant's wrong but preceded it,[8] for example, if a person was a child or had a pre-existing intellectual incapacity.

Physical or other disability

It was suggested in *Diamond v Simpson (No1)*[9] that living with physical disability alone is insufficient to claim an award for funds management. However, the entitlement of a plaintiff whose capacity to manage their affairs is compromised by living with physical disabilities only could more accurately be described as undecided.[10]

It is possible that some courts may use their broad discretionary powers where it is clear that the person is vulnerable and needs protection.

Not quite yet incapable

In an appropriate case, an allowance may be made for the chance that the plaintiff will become incapable of managing their own affairs.[11]

Borderline capacity

Borderline cases are tricky as the law requires a decision to be made about financial capacity. It is difficult to weigh up protections and freedoms, and the extent to which a decision on capacity may, for better or worse, become permanent.

A lawyer can make a call based on the evidence, including the medical evidence and the attitude of the client. However, the final decision will be made by the court or tribunal. A lawyer unable to make a call on this point can approach the court or tribunal for a decision.

MANAGEMENT OPTIONS

In broad terms, where a plaintiff lacks capacity, the court retains control of their funds until the disability terminates.[12] Rules relating to the retention of control of funds derive either from the inherent powers of the Supreme Court authorising the making of rules of court derived from equity, or specific legislation.[13]

The rules provide that damages payable to those without capacity must be paid into a court or to a public trustee, to be administered on behalf of the plaintiff, unless the court otherwise directs.

Up until relatively recently, such funds were almost always managed by the court or the local public trustee. Things started to change in the late 1990s and early 2000s when private trustee companies began to actively seek this type of work.

Currently, the main funds management choices for adults are:

- public trustee; or
- private management – either a private trustee company or a person such as a family member.

When the funds requiring management are for a child, the courts will generally appoint trustee companies (public or private), rather than a family member.

Usually, small sums payable to children are paid to the local public trustee to be managed until they turn 18. However, when the child is nearly 18, the court may instead be prepared to release the funds to the parents for informal management.

Where the sums payable to children are reasonably large, management by a private trustee company should be considered, especially where the incapacity may last beyond age 18.

In Victoria, unlike the other jurisdictions, the Senior Master's Office of the Supreme Court retains and manages funds in court.

Public trustee

Public trustees are government agencies established by legislation to provide services to the public, including financial and administrative services to those who cannot manage their own affairs.

They have community-service obligations requiring them to take on those who need their services. Some are partly government subsidised, but most largely fund their operations from the fees they charge clients. This could lead to a perception of a conflict of interest.

Fees can be very difficult to decipher, and various government reports have highlighted the service difficulties encountered by clients.

Given large client numbers and relatively limited resourcing, public trustees necessarily take a bureaucratic approach to management. Most interactions are over the phone. The service is minimal and reactive rather than proactive.

Other than for small settlements, their fees may not be very different to those offered in the private sector.

Private management

In order to be appointed, private managers must prove their suitability. They must provide evidence of credentials and experience, and the fact that they have thought through how to invest the plaintiff's funds.[14]

Private managers in most jurisdictions are subject to court or government oversight.[15] For example, in NSW, the Trustee and Guardian provides supervision and monitoring, whereas in Queensland this is provided by the Civil and Administrative Tribunal.

Private trustee companies

Australia once had many private trustee companies, but after the federal government took over their regulation in 2009, there was considerable consolidation. Now that Equity Trustees has acquired Australian Executor Trustees[16] there are only three main providers offering personal injury trustee services: Equity/AET, Perpetual and Australian Unity.

Their service offerings vary. Some favour a vertically integrated model, providing in-house investment platforms and products, committing to manage any perceived conflicts of interest. Others obtain separate or independent financial advice for their clients, accepting additional scrutiny and avoiding perceived conflicts.

The courts are generally familiar with these providers. When making appointments the courts are focused on ensuring that a well-informed choice is made by the protected person and their family.

A suitable person

A suitable person, such as a family member, can be appointed as financial manager. They must be willing to respect the relevant decision-making 'principles' and be compatible with the protected person.[17]

Relevant factors in favour of appointing a family member include:

- familiarity with the protected person's situation, which enhances understanding;
- proximity, which enables more frequent interaction and likely influence;

- the ingredient of love and affection and unquestioning devotion to the protected person, which can improve the quality of the protected person's life; and
- professional education or training by the family member, which does not necessarily guarantee good management but suggests at least the possibility that they would not be unfamiliar with the management of large sums of money.[18]

Generally, the courts strongly favour trustee companies, however, from time to time, in appropriate circumstances they have appointed a family member, especially one supported by professional financial advice.[19]

CALCULATION METHODOLOGY

Unlike for lost earnings and the costs of care, the calculation method for funds management is not explicitly prescribed by legislation.[20]

The calculation principles accepted by the courts in *GIO v Rosniak*[21] (*Rosniak*), *Willett v Futcher*[22] (*Willett*) and *Rottenbury by his tutor Wren v Rottenbury*[23] (*Rottenbury*) may be described as follows:

- assume that equal amounts will be expended each year for the benefit of the plaintiff;
- assume that the capital amounts reduce the fund balance uniformly to exactly zero over the plaintiff's life expectancy (this is sometimes referred to as 'straight-line reduction');
- project the fund balances each year to enable a calculation of the financial management fees charged each year;
- discount these financial management fees to present values using the relevant discount rate applicable to damages calculations in that jurisdiction; and
- add up all the discounted fees to get a total lump-sum figure reflecting a future stream of management fees.[24]

In *Gray*, the High Court accepted the above principles, and clarified the calculation inputs (as outlined below) and methodology.

Lawyers should bear in mind that the legally recoverable costs of funds management are not necessarily an accurate reflection of 'real-world' costs. For example, costs may be higher if annual expenditure is lower in the early years such that investment balances are not reducing from day 1 in a 'straight line' to life expectancy.

Obtaining estimates

Evidence is required in support of a claim for the cost of funds management. A number of actuarial specialists can provide comprehensive reports to compare the legally recoverable costs of funds management under a range of scenarios and financial managers.

Cumpston Sarjeant, who were involved in *Gray*, publish an online calculator that provides estimates of funds management costs. The calculator is free to use but requires the inputs noted below. Furzer Crestani, chartered accountants, provide tables based on the published fees of some of the public trustees.

Written estimates can be obtained from some public and all private trustees who specialise in personal injury. It is important for plaintiff lawyers to obtain accurate estimates specifically generated for their clients in each case, to ensure up-to-date fee inputs.

Calculation inputs

The necessary inputs to the calculation are:

- the sum to be managed;
- the discount rate;
- the duration of management; and
- the relevant fees.

The sum to be managed

In *Rosniak*, the Court accepted that the calculation should exclude any amounts that will not be invested because they will be paid out immediately.[25] This is usually taken to include statutory repayments to Centrelink, Medicare and the NDIS.

In *LF Bell as litigation guardian for DC Bell v Pfeffer*,[26] Dutney J concluded that, when calculating future management and investment fees, the correct starting point is the amount actually to be received by the administrator.

However, in *Gray v Richards*,[27] McCallum J made clear that, s83 payments[28] and advances aside, there was no basis for deducting any sum from the damages before the calculation of the cost of funds management is made, given the uncertainties as to when and in what circumstances any payments would be made. This is cited as authority that there should be no deduction for expenses such as the legal-fee gap, past gratuitous-care payments[29] or the cost of purchasing a home.

It had previously been argued that only those components pertaining to future losses require investment management. However, this argument was examined and rejected in *Rosniak*,[30] which was approved by the High Court in *Gray v Richards (No 2)*.[31]

COMPARISON OF FUNDS MANAGEMENT OPTIONS					
Capacity to manage settlement funds?	**No**			**Yes**	**Unclear**
Substitute financial decision-maker?	Public trustee	Private trustee company	Family member	N/A	Need to ascertain yes or no
Can claim damages for funds management?	Yes	Yes	Yes	No	Only if no capacity
When suitable?	Smaller settlements Funds for children to age 18 only, when little or no access anticipated or contact needed	Larger settlements Access to funds and good communication required	Adults with smaller settlements, when there is a suitable family member	Adults	Vulnerability due to age, social environment
Pros	Cheaper than private	Better service	Less expensive as family member not paid to be decision-maker	Human rights	Protection from exploitation
Cons	Poor service, little communication, low transparency	More expensive	Alternative arrangements may be needed later if or when family member no longer available or suitable	Need awareness of high discount rate (must invest well), as well as Centrelink preclusion period and NDIS CRA	Difficult to later escape the system
Comments/ suggested reforms	Need more government funding Need differently structured funding to remove conflicts and distortions to their intended role Consumer protections to ensure transparency and awareness of options	Consolidation means few options, reduced competition on fees and service Consumer protections to ensure transparency and awareness of options	Need better systems of government supervision Require professional advice for added scrutiny?	Need to invest wisely so should be able to recover the cost of advice and investments	Perhaps a time-limited management role enabling financial education?

The High Court said that the 'Court should be slow to pre-empt the decisions of a trustee charged with the prudential management of a large sum of money that is required to meet the needs of a severely disabled plaintiff over a lengthy period of time'.[32]

The discount rate

The High Court set the discount rate at 3 per cent in *Todorovic v Waller*,[33] but since then legislatures in all states and territories have made legislative amendments, increasing the discount rate for some, if not all, types of accidents.

A discount rate is applied because, in calculating the present value of future expenditure, it is assumed that the plaintiff will invest the capital sum awarded and generate investment earnings.[34] It is also assumed that inflation and tax will erode earnings. As the discount rate makes allowances for these matters, no further allowance should be made.[35]

The duration of management

The duration of management may be to age 18, or life expectancy or another specified date. If life expectancy is still at issue during settlement negotiations, it is possible to obtain funds-management estimates for still-to-be-agreed life-expectancy estimates.

The relevant fees

All financial management fees payable by a protected person will form part of the funds management calculation.[36] These fees are usually categorised as:

- establishment fees (one off);
- management fees (for the trustee or other entity to be the substitute decision-maker);
- financial advice fees (if not included in management fees);
- investment fees (administration and investment);
- tax return fees; and
- government supervision fees (where relevant).

Note that the courts have rejected suggestions that deductions should be made for the investment and advice costs that an ordinary person might in any event occur.[37]

The public trustees publish their fees on their websites, though they can be very difficult to interpret and may change without much notice.

Most private providers can turn around quotes quickly. Their fees may vary slightly, case by case, depending on all the relevant circumstances.

Navigating the options

The most suitable manager for your client will depend on all the circumstances. The table above may help you and your client think through the pros and cons and the issues to bear in mind.

Where private management is being considered, it is helpful for lawyers to contact the providers and arrange introductions, or at least to provide names and numbers to call. Ideally meetings can take place in advance of the settlement conference, so that your client can go into that conference feeling informed about their options.

Private providers are able to explain the relevant rules that make up the protective system in the client's state or territory, and their service offering. They can explain their fees and the benefits of private management. This helps families make an informed choice.

PROVING REASONABLENESS OF CHOICE

The courts do not insist that the plaintiff select the funds manager with the lowest fees.[38] However, reasons do need to be provided to appoint a particular fund manager.[39]

In *Gray v Richards*,[40] McCallum J noted that uncontested evidence had been put before White J in the Protective List of the NSW Supreme Court that, in the past, the mother had experienced difficulties in dealing with the NSW Trustee and Guardian. Both McCallum J and White J had accepted this evidence and used it as a reason to support the proposition that the private manager should be appointed.[41]

McCallum J in the NSW Court of Appeal in *Gray v Richards (No 2)* noted that: 'The question is what is reasonable compensation in these circumstances,' and that the various fees put into evidence were set 'in a competitive and informed market'. In concluding that the selection of a private trustee was reasonable, the Court also took into account 'the need for constant communication between those having day-to-day care of the respondent and the fund manager'.[42]

The plaintiff must prove that their choice of financial manager and the relevant fees are fair and reasonable.

Plaintiff lawyers can support their client's choice of manager by:

- obtaining funds management estimates from a number of providers, so as to demonstrate market fee rates;
- ensuring that their client has met their preferred provider and one other for comparison purposes; and
- ensuring that their client understands the differences between the options and can articulate the reasons for their decision.

Settlement, approval and appointment

Legislation or rules of court in each jurisdiction provide that settlements for those without capacity will not be valid without the sanction or approval of the court.[43]

The process for approval of the settlement and appointment of the financial manager varies depending on the jurisdiction and circumstances. This is not the focus of this article.

Remember to always check if there are existing orders in place before organising the new appointment post-settlement. Otherwise, it can be quite tricky and time consuming to sort out later, especially if different state jurisdictions are involved.

The post-appointment process

Settlement funds are released to the financial manager after they have been appointed.

As soon as the defendant/insurer makes the statutory repayment to Centrelink, income-support payments to your client and/or their carer may cease in line with the new preclusion period and relevant carer means testing.

Lawyers need to warn their clients of this and ideally help ensure that they have savings or access to funds (such as an advance payment) to see them through the period between the statutory repayment and funds reaching the substitute decision-maker.

The initial manager's plan

Usually, the first task of a private manager is to organise the preparation of a manager's plan. Ideally a comprehensive plan will be prepared by a financial adviser in consultation with the client and their family (as appropriate), setting out how the funds will be invested and applied to meet the protected person's needs for the full duration of management.

Annual manager reviews

Trustee legislation, in place in all jurisdictions, requires managers to use the care and skill that a 'prudent person' would use in managing someone else's financial affairs.

Investments must be reviewed at least once each year, considering:

- purposes of the trust and the needs and circumstances of beneficiaries;
- diversification of investments;
- nature and risk of investments;
- depreciation, appreciation and income;
- maintaining the value of the trust;
- term of the investment compared to the likely duration of the trust;

- tax liability and inflation;
- associated costs; and
- results of a review of existing investments.

Trustee legislation specifically gives trustees the right to obtain independent and impartial investment advice to order to ensure professional analysis and engagement.

The end of management

Financial management should endure only as long as needed.

The wording in trust orders for children whose only incapacity is their age is usually clear. Management ends when the child turns 18.

In recent times in NSW, court orders appointing financial managers specifically require a review in the lead-up to a child turning 18. Similarly, in Queensland, court orders now refer to the need for the trustee to consider whether or not an administration order should be sought after a child turns 18.

Open-ended orders, however, remain common. For many adults they have unfortunately led to a situation where people have felt trapped and unclear in regard to if or when they might ever 'escape the system'.

In 2022, the ABC reported: 'Those who try to escape the system find the process overwhelming and are often denied their own funds to hire a lawyer to assist.'[44] In reference to the evidence given to the Disability Royal Commission, *Crikey* also reported: 'In almost all cases, people had no idea of the ramifications of a guardianship or financial administration order – or how difficult it is to have them revoked.'[45]

Post-appointment, there is an unfortunate imbalance of knowledge and power. Public and private trustees earn fees based on funds under management and thus there is a financial incentive to retain clients and their investments.

Thankfully, regular reviews of financial management orders are part of the system in some jurisdictions. They provide an excellent opportunity for protected people and their families to be heard.

Lawyers also play an important role in ensuring that the system serves the best interests of the vulnerable. It is important for personal injury lawyers to take care to inform their clients from the outset when financial management will or can end. Make sure your client knows that they can come back to you at any stage if they need to discuss a change of financial manager or the process for proving capacity.

Hopefully this article will help you to not only secure adequate damages for funds management, but also to empower your client to identify the most suitable financial manager for their needs and benefit from professional financial management for as long as needed (and no longer). ■

Notes: **1** In this article I have used the generic term 'manager' to refer to the role of a financial manager, trustee, manager or administrator. **2** [2014] HCA 40 (*Gray*). **3** A Morrison, 'Calculation of fund management', *Precedent*, No. 109, Mar–Apr 2012, 32–34. **4** J McNamara, '(In)capacity in the legal context', presented 17 February 2023. **5** Generally, the courts will only appoint trustee companies (public or private) as the substitute decision-maker for a child, rather than family members. **6** However, most jurisdictions allow reimbursement for relevant expenses. **7** *Gray*, above note 2, [4]. **8** *Nominal Defendant v Gardikiotis* [1996] HCA 53, [67]–[68] (*Gardikiotis*). See also *Renehan v Leeuwin Ocean Adventure Foundation Ltd* [2006] NTSC 4. **9** [2003] NSWCA 67, [253]. **10** *Smith by his next friend Ronald Kevin Smith v Hanrahan* [2006] WADC 20, McCann DCJ. See also *Burford v Allan* [1993] SASC 3974; (1993) 60 SASR 428 (FC), 442 – although she was not mentally impaired, the plaintiff was allowed an amount for funds management after she turned 18 because of her physical difficulties. **11** In *Harrison v Suncorp Insurance and Finance* [1995] QSC 303, Lee J made a $5,000 allowance for the likelihood that the plaintiff with a fluctuating psychiatric illness may relapse and need his financial affairs managed for him. **12** H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, Sydney, 2002, 614. **13** For example, *Rules of the Supreme and District Courts* (SA), r35.13; *Supreme Court Rules* (Tas), r300; *Rules of the Supreme Court 1971* (WA) O70, r12; *Supreme Court Rules* (ACT), O26, r9; *High Court Rules 1952,* O23, r11(2). Also *Public Trustee Act 1978* (Qld), s67, *Aged and Infirm Persons' Property Act 1940* (SA), s8A, *Guardianship and Administration Act 1986* (Vic), s66(3). **14** *Re L* [2000] NSWSC 721, and see legislative requirements in respect of private managers. **15** No supervision is required for a private trustee company appointed in the ACT. **16** Effective 1 December 2022. **17** See, for example, *Guardianship and Administration Act* 2000 (Qld), s15. **18** *Holt v Protective Commissioner* (1993) 31 NSWLR 227, 242–3. See also *McKinlay v Mahoney* [2011] QSC 279 (*McKinlay*). **19** *McKinlay,* above note 18. **20** C Plover, *History and development of fund management awards* (provided to the author, and previously published on the Cumpston Sarjeant website: <http://www.cumsar.com.au>). **21** (1992) 27 NSWLR 665 (*Rosniak*), 678E as per Kirby J, 692A as per Mahoney JA and 698A as per Meagher JA. **22** [2005] HCA 47 (*Willett*), [5]. **23** [2007] NSWSC 215 (*Rottenbury*) [53]. **24** Luntz, above note 12, 258. **25** *Rosniak,* above note 21, 673–4. **26** [2009] QSC 209. **27** [2011] NSWSC 877 (*Gray v Richards*). **28** Under s83 of *the Motor Accidents Compensation Act 1999* (NSW), once the insurer has admitted liability, they must pay reasonable medical expenses. **29** Other than those ordered by the court to be paid directly to named family members, in sanction orders typically made by the Supreme Court of Queensland. **30** *Rosniak*, above note 21, 678C per Kirby P, 688D per Mahoney JA and 694B per Meagher JA. **31** [2011] NSWSC 1502, [159]. **32** Ibid [97]. **33** [1981] HCA 72; (1981) 150 CLR 402. **34** Statutory discount rates are widely acknowledged to be too high, particularly in the current environment of low interest rates. As noted by Luntz, a too-high discount rate protects insurers and the premium-paying public at the expense of seriously injured people: Luntz, above note 12, 406, 413. **35** *Lewis v Bundrock* [2009] 1 Qd R 524; [2008] QSC 189, [26]; *Gray v Richards (No 2*), above note 31, [38]. **36** *Rosniak,* above note 21, 695; *Willett*, above note 22, [49]. **37** *Rosniak*, above note 21; also *Gardikiotis,* above note 8, 57 per McHugh. **38** *Hulanicki bhnf Hulanicki v Walton* [2014] ACTSC 17, 177; *Morris v Zanki* (1997) 18 WAR 260 (FC); *Tu Tran v Dos Santos (No 2)* [2009] NSWSC 336. **39** *Smith v Reynolds (No 2)* [1990] VicRp 35; [1990] VR 391 – giving reasons for not appointing the public trustee and considering other options. **40** *Gray v Richards,* above note 27. **41** *Richards v Gray* [2013] NSWCA 402, [33]–[34]. **42** *Gray v Richards (No 2)*, above note 31, [159]. **43** For example, the *Supreme Court Rules 1970* (NSW) pt 63, r 11; *Public Trustee Act 1978* (Qld), s59; *Rules of the Supreme and District Courts* (SA), r 35.11; *Supreme Court (General Civil Procedure) Rules 1996* (Vic), 15.08. **44** A Connolly, 'Australians living under state control are testifying at the Disability Royal Commission. But gag laws mean you won't see their faces', *ABC News Online* (20 November 2022) <https://www.abc.net.au/news/2022-11-20/australia-guardianship-trustee-disability-royal-commission/101670046>. **45** A Schultz, 'Power and abuse: disability royal commission puts guardianship under the microscope', *Crikey* (23 November 2022) <https://www.crikey.com.au/2022/11/23/guardianship-disability-royal-commission/>.

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