SUPREME COURT OF QUEENSLAND

CITATION:	*Case & Anor v Eaton & Anor* [2016] QSC 239
PARTIES:	**CAMILLA LORINE CASE** (first applicant) **KRISTEENA LORINE HILL (BY HER LITIGATION GUARDIAN CAMILLA LORINE CASE)** (second applicant) **v** **BRYAN ALLAN EATON** (first respondent) **AAI LIMITED (ABN 48 005 297 807)** (second respondent)
FILE NO/S:	SC No 437 of 2016
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	30 September 2016
DELIVERED AT:	Cairns
HEARING DATE:	30 September 2016
JUDGE:	Henry J
ORDER:	**THE ORDER OF THE COURT IS THAT:**

1. The compromise of this proceeding on the following terms be sanction pursuant to s 59(1) of the *Public Trustee Act*, 1978:

1.1. That the second respondent pay the second applicant damages in the sum of $261,309.00, being primary damages in the sum of $250,000.00, together with further damages in the sum of $11,309.00 for management fees ("the compromise sum");

1.2. That the second respondent pay the second applicant her costs of and incidental to this proceeding, including the costs of this application, to be assessed on the standard basis ("the standard costs").

2. The Public Trustee of Queensland ("the Trustee") be appointed to receive, hold and manage the balance of the compromise sum after deduction of the amounts identified in paragraphs 6.1 of this Order on trust for the second applicant until she attains 18 years.

3. The Trustee be empowered to invest the balance of the compromise sum and any accretions in such investments as trustees are empowered to invest under the *Trusts Act*, 1973.

4. The Trustee apply such moneys for the maintenance, benefit and support of the second applicant.

5. Within seven (7) days of this Order, the second applicant's solicitors serve a copy of it on the trustee.

6. Within twenty-eight (28) days of this Order or of the second respondent's receipt of the last of any statutory clearances or charges in relation to the compromise sum (whichever is the later to occur), the second respondent pay the compromise sum as follows:

6.1. To any statutory body having a charge over the compromise sum, the amount necessary to satisfy the charge; and

6.2. To the Trustee, the balance; whose receipt shall, in each case, be a sufficient discharge for the second respondent.

7. No interest is to be payable by the second respondent in respect of the compromise sum if the payment in 6.2 is made within 28 days of the Second Respondent receiving the last of the notices from statutory bodies referred to in 6.1.

8. The second respondent pay the standard costs to the Trustee within twenty-one (21) days of their assessment or prior agreement between the second respondent and the Trustee as to their amount.

9. The second applicant's costs of and incidental to this proceeding, including the costs of this application, be assessed on the indemnity basis ("the indemnity costs").

10. The Trustee pay the indemnity costs to the second

applicant's solicitors from the moneys received under paragraph 6 of this Order within twenty-one (21) days of their assessment or prior agreement between the second applicant's solicitors and the Trustee as to their amount.

11. **The Registrar of the Court place the opinion of Counsel read on this application in a sealed envelope marked "Not to be opened without an Order of the Court".**

12. **Each of the parties, the Trustee and the applicant's solicitors have liberty to apply in respect of these Orders.**

CATCHWORDS: DAMAGES – TORT – PERSONAL INJURIES – DAMAGES AWARDED – CLAIM FOR FUND MANAGEMENT FEE – CAUSATION – PRINCIPLES OF COMPENSATION – where the second applicant's father was killed in a vehicle accident when she was three months old – where the second applicant is still non sui juris – where the ensuing claim for loss of dependency was settled on terms, subject to the sanction and directions of the court or Public Trustee pursuant to s 59 of the *Public Trustee Act* – where the application seeks orders sanctioning terms of the settlement of the second applicant's claim for damages – whether fund management fees properly fall within the damages resulting from loss of dependency because of the death of the second applicant's father – whether the second applicant is entitled, in a claim of this kind, to recover damages for management fees likely to be incurred in managing the amount otherwise paid to her as damages

Civil Proceedings Act 2001 (Qld), s 64
Public Trustee Act 1978 (Qld), s 59
Succession Act 1981 (Qld), s 66
Supreme Court Act 1995 (Qld), s 17, s 18

Fox v The Commissioner for Main Roads [1988] 1 Qd R 120, cited
Gray v Richards (2014) 253 CLR 660, cited
Maggs v RACQ Insurance Ltd (2016) QSC 41, not followed
Nominal Defendant v Gardikiotos (1995) 186 CLR 49, applied
Rouse v Shepherd [1994] 35 NSWLR 250, not followed

COUNSEL: G R Mullins for the applicant

M A Edwards for the respondent

SOLICITORS: Maurice Blackburn Lawyers for the applicant
Bray Lawyers for the respondent

[1] HIS HONOUR: Andrew Hill was struck by a police car and died on the 24th of April 2003, leaving a widow, Camilla and their three month old daughter, Kristeena. The ensuing claim for damages for loss of dependency by Camilla and Kristeena, by her litigation guardian Camilla, was eventually compromised by terms of settlement reached on 3 August 2016.

[2] Clause 2 of those terms relevantly provided:

> "This claim was settled on terms that, subject to the sanction and directions of the court or the Public Trustee ("the sanctioning body") as to payment of settlement monies pursuant to section 59 of the *Public Trustee Act*, the respondent will pay the applicants:
> (a) the sum of $775,000, inclusive of all statutory refunds, plus costs and outlays on a standard basis to be assessed;
> (b) reasonable costs of the sanction of this settlement;
> (c) reasonable management fees of the settlement monies payable to Kristeena Hill (as determined by the sanctioning body), if ordered by the court."

[3] Kristeena is still a child, thus a person under a legal disability in consequence of which s 59 of the *Public Trustee Act 1978* (Qld) requires the compromise of her claim be sanctioned by this court. The primary damages order sought before me in effecting a sanction of the compromise, involves the second respondent's payment of $250,000 to Kristeena, effectively her share of the settlement sum referred to in clause 2(a) of the terms of settlement. For reasons given separately today, I will make that order. It is common ground I should also make costs orders and consequential orders contained in the draft order before me, including orders appointing and empowering the Public Trustee.

[4] At issue is whether the court should order the second respondent to pay further damages for management fees in respect of the primary damages order. The proposed quantum of those further damages is $11,309, being the Public Trustee's estimate of the fees likely to be incurred in managing Kristeena's funds. It is common ground that estimate, described in correspondence by the Public Trustee's solicitor as administration fees, but actually including fees such as an asset management fee, is intended to cover the managing of the primary damages and is within the meaning of the reasonable management fees referred to at clause 2(c) in the terms of settlement.

[5] The question is whether Kristeena is entitled in a claim of this kind to recover damages for the cost of managing the amount otherwise to be paid to her as damages. This question was resolved adversely to an applicant in a similar position in *Maggs v RACQ Insurance Ltd* (2016) QSC 41, a single Supreme Court Judge decision, relied upon by the second respondent. That decision,

while not binding on me, would ordinarily be persuasive. However, the applicant here relies upon the application of apparently compelling reasoning in High Court authority, not referred to in the reasons in *Maggs*.

[6] In *Maggs*, the applicant was entitled, pursuant to s 64 *Civil Proceedings Act* 2011 (Qld) to recover "the damages [the court] considers to be proportional to the damage to [the applicant] resulting from the death". The successful respondent argued that the statutory entitlement did not allow recovery of fund management fees as damages. The learned Judge concluded that that entitlement limited the recoverable damages and there was no basis to extend the recoverable damages to include damage not resulting from the death that arises post the assessment of those damages.

[7] The statutory entitlement to damages in the present dependency claim flows from the provisions applicable at the time of the loss, ss 17 and 18 *Supreme Court Act* 1995 (Qld) to which s 66 *Succession Act* 1981 (Qld) is the companion provision. In particular, s 18(1) empowered a Court to "give such damages as the court may think proportioned to the injury, resulting from such death to the parties, respectively for whom and for whose benefit such action shall be brought…" It is undoubtedly correct, as decided in *Maggs*, that the statutory entitlement limits the recoverable damages. The court may therefore only "give such damages as the court may think proportioned to the injury resulting from the death". The generality of those words heralds the appropriateness of reference to relevant case law for guidance.

[8] In *Nominal Defendant v Gardikiotos* (1995) 186 CLR 49, the High Court clarified the circumstances in which an injured plaintiff might recover, as a head of damage in a claim for damages for personal injury, the costs of managing a fund where the plaintiff was obliged to rely upon the skills of an external funds manager in order to invest the funds. The New South Wales Court of Appeal in that matter allowed fund management fees as a head of damage for the plaintiff who had suffered an injury and was confined to a wheelchair for the rest of her life. Importantly though, she was not incapacitated by reason of any physical or mental incapacity from actually managing the fund.

[9] The majority of the High Court, agreeing with Gummow J, concluded at p 52:

> "We agree with his Honour, substantially for the reasons he gives, that the respondent should not have been awarded damages for management of the funds constituted by the verdict which she obtained. We note that no claim was made that, as a result of her physical disabilities, the respondent will incur additional expense in managing her financial affairs. And as at present advised, we are of the view that any difficulties the respondent will experience in that regard are compensated for by the award of general damages.
>
> As with the question whether an accident was the result of a defendant's negligence, the question whether a need results from an accident is essentially a question of common sense: it is not a question to be

> answered by application of the "but for" test. True it is that, but for the accident, the respondent would not have a verdict to invest and, thus, would not need assistance in its management. But it is contrary to common sense to speak of the action causing a need for assistance in managing the fund constituted by her verdict monies in circumstances where her intellectual abilities are not in any way impaired. It would be otherwise in the case of a plaintiff who was intellectually impaired as a result of the defendant's negligence or by reason of some pre-existing disability." (citation omitted, emphasis added)

[10] The final sentence of the above-quoted passage is of obvious significance here. The disability of Kristeena, giving rise to the need for another to carry the cost of managing her money, is her age. That was a legal disability she had at the time of her father's death, and which will continue for some years yet, until she is 18. It was, in the sense aforementioned, a pre-existing disability. The defendant must, in that sense, take the plaintiff as it found her – a minor whose need for assistance in managing any fund awarded was foreseeable at the time of her father's death and occasioned by the same event entitling her to such an award.

[11] This reasoning is also consistent with the current state of the law in relation to personal injury, summarised in the reasons of the High Court in *Gray v Richards* (2014) 253 CLR 660 at 665-666:

> "In Todorovic v Waller, Gibbs CJ and Wilson J summarised the principles which regulate the assessment of damages for personal injuries as follows:
>
> > "In the first place, a plaintiff who has been injured by the negligence of a 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 his injuries. Secondly, damages for one cause of action must be recovered once and for ever, 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." …
>
> 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. In such a case, "the liability for the [management expenses] is a loss flowing directly from the wrong, and is recoverable as damages caused by the wrong"; and, in accordance with the first and second of the principles stated in Todorovic v Waller, the inclusion of such a component in the lump sum award

ensures that the plaintiff receives full restitution for the harm he or she has sustained." (citation omitted)

[12] In *Maggs*, the Court's reasoning relied upon two single-judge decisions. In the first, *Fox v The Commissioner for Main Roads* [1988] 1 Qd R 120, Thomas J noted at the outset at 121:

> "When a protection order is made, the Public Trustee has the right to charge a once only commission on the amount of damages, and to make a further charge of a specified percentage of the income derived from the fund ...
>
> It was submitted that a practice has developed of adding a further component to a damages award so as to protect the plaintiff from these imposts. In short, it was submitted that a proper assessment of damages should take account of these post-judgment charges and assess such an amount as would ensure that the plaintiff will get the benefit of the damages assessed. A number of reported decisions were referred to in which such allowances had been made, and for convenience, I shall list them ... No doubt other instances could be found. The question is whether such an allowance is on principle justified."

[13] His Honour referred to a number of earlier decisions, including *Platz v Caccato* (1983) QSC 559; *Houghton v Gillis* (1984) QSC 691; and *Flynn v Fahey* (1986) QSC 650. The cases referred to by his Honour were claims for damages for personal injury. No distinction was drawn by his Honour between cases in which awards for funds management had been made in claims for damages for personal injury and where awards had made in claims like the present under a Lord Campbell's action.

[14] His Honour continued at 123:

> "The matter is plainly arguable in that such post-judgment charges may be foreseeable within the foresight attributed to the modern defendant. In one sense, it is a foreseeable future expense. However there has to be a reasonable limit at which the assessment ends, and it is difficult to see any good purpose being served by varying assessments according to whether it is likely that the assessment will be given effect to by a judgment in favour of the trustee or by direct entitlement to a plaintiff personally. If such a factor is to be brought into account in favour of the plaintiff, why should not the potential disadvantage of the limited investments into which trustees' moneys may be placed also be brought into account? Or why should not the difference between actual costs and party and party costs be recovered as foreseeable damage? Conversely, why should not the advantage preserving the fund from dissipation (a hazard of an ordinary award) be taken into account in the defendant's favour? In truth the Courts should not concern themselves with the workings of the legal system which permit the recovery of damages, or with matters affecting the control or disposition of the fund after award. Such matters ought not be taken into account in fixing the award."

[15] A theme underpinning his Honour's positing of the above-quoted rhetorical questions is that they went to arguably foreseeable causative events and needs in the future, not to a certainty existing from the outset of the loss. As already discussed, the incurring of costs by another to manage the plaintiff's funds in the present matter was a certainty from the jump, because of the plaintiff's age. It is not, and was never, a matter of future choice for the plaintiff as to how she might choose to use the sum awarded to her. The need to manage that sum for her was a cost imposed upon her because of her father's death when she was so young.

[16] Despite his Honour's formidable reputation as a lawyer, this is one instance in which I am not prepared to apply his Honour's reasoning to the case at hand. I am not alone in that regard. I note that *Fox* was not followed by Carter J in *Mullins v Duck* [1988] 2 Qd R 674. His Honour, when considering the claim for damages for personal injury, considered similar cases and expressly disagreed with the decision of Thomas J. In any event, both cases were decided before the decision of *Nominal Defendant v Gardikiotis* and the relevant reasoning of the High Court to which I have already referred.

[17] The second single judge case referred to in *Maggs* was *Rouse v Shepherd* [1994] 35 NSWLR 250. That matter was also decided prior to the High Court decision in *Nominal Defendant v Gardikiotis*. By the time *Rouse* was determined *Gardikiotis* had proceeded through the New South Wales Court of Appeal. The Court of Appeal had taken an even broader approach to the assessment of damages for funds management in permitting Ms Gardikiotis to be awarded damages for funds management in circumstances where she was not under an incapacity, either as a consequence of defendant's negligence or pre-existing incapacity.

[18] The claim for funds management fees in *Rouse* was not only in respect of the costs of funds management while the children were under an incapacity prior to their attaining of adult years, but also thereafter, based on the principles in *Nominal Defendant v Gardikiotis* as promulgated by the Court of Appeal. The presiding judge in *Rouse* appeared to be influenced by a passage in Harold Luntz's "Assessment of Damages for Personal Injury and Death" (3rd edition) that suggests funeral expenses and costs of legal representation at an inquest are not recoverable. His Honour found, despite their reasonable foreseeability, those expenses were not "within the concept of the kind of losses to which the Compensation to Relatives Act (1897), is directed". His Honour also considered the absence of any statutory reference in the Public Trustee legislation to the recoverability of the Public Trustee charges from the tortfeasor suggested that such an amount was not recoverable.

[19] I derive little assistance from such reasoning given the generality of the statutory language with which I am concerned and that the High Court considers management fees are recoverable where the need for them flows from a disability existing at the time of the wrong. Those considerations and the timing of the decision in Rouse cause me to conclude it is of little guidance in the present matter.

[20] Ultimately the conclusion is inevitable, for the reasons already discussed, that the need for management fees was as much a foreseeable outcome as the loss grounding the award to be managed. As much seems inescapable by reason of that need deriving from the legal disability inherent in Kristeena's tender years, a disability existing at the time of the loss and continuing to the present. Affording full respect then to the reasoning

in *Maggs v RACQ Insurance Ltd* I am not prepared to follow it in the present case. I conclude the management fees in this case are recoverable as damages and I will order accordingly.

[21] I order as per the applicant's draft order signed by me and placed with the papers.