SUPREME COURT OF QUEENSLAND

CITATION:	*Bankier v HAP2 Pty Ltd* [2019] QSC 101
PARTIES:	**MICHELLE ANN BANKIER** (plaintiff) **v** **HAP2 PTY LTD** ACN 005 806 744 (defendant)
FILE NO:	BS No 2715 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30, 31 July, 1, 2, 6, 7 and 10 August 2018
JUDGE:	Martin J
ORDER:	**Judgment for the plaintiff. The amount of the judgment will be determined after further submissions are received.**
CATCHWORDS:	TORTS – NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ADVICE, STATEMENTS AND NON-DISCLOSURE – PROFESSIONAL ADVISERS – where the plaintiff suffered serious injuries in a car accident – where the plaintiff had been awarded nearly $2 million in damages for her injuries suffered, future loss, medical expenses and associated matters – where the defendant was a financial planner engaged by the plaintiff to advise her with respect to investing a large part of the sum she had been awarded – where the defendant had not read the judgment awarding damages to the plaintiff – where the plaintiff borrowed money for investments and made significant withdrawals from her capital to fund her lifestyle and business enterprises – where the value of the plaintiff's investments significantly decreased – whether the defendant was negligent in failing to warn the plaintiff of material risks caused by her conduct CORPORATIONS – FINANCIAL SERVICES AND MARKETS –

FINANCIAL SERVICES PROVIDERS – where the plaintiff suffered serious injuries in a car accident – where the plaintiff had been awarded nearly $2 million in damages for her injuries suffered, future loss, medical expenses and associated matters – where the defendant was a financial planner engaged by the plaintiff to advise her with respect to investing a large part of the sum she had been awarded – where the defendant had not read the judgment awarding damages to the plaintiff – where the plaintiff borrowed money for investments and made significant withdrawals from her capital to fund her lifestyle and business enterprises – where the value of the plaintiff's investments significantly decreased – whether the defendant warned the plaintiff that the advice he gave was based upon incomplete or inaccurate information

LIMITATION OF ACTIONS – where the defendant pleads that the plaintiff's actions commenced after the expiration of the statutory limitation period – whether the plaintiff's actions are time-barred by operation of the *Limitation of Actions Act* 1974 (Qld)

Civil Liability Act 2003 (Cth), s 11, s 22

Corporations Act 2001 (Cth), s 945A, s 945B

Limitation of Actions Act 1974 (Qld), s 10

ABN AMRO Bank v Bathurst Regional Council (2014) 224 FCR 1, cited

Austrust Ltd v Astley (1993) 60 SASR 354, cited

Cigna Insurance Asia Pacific Ltd v Packer (2000) 23 WAR 159, cited

Commonwealth v Cornwell (2007) 229 CLR 519, cited

Darley Main Colliery Co v Mitchell (1886) 11 App Cas 127, cited

Esanda Finance Corp v Peat Marwick Hungerfords (1997) 188 CLR 241, cited

Jamieson v Westpac (2014) 283 FLR 286, cited

Mutual Life & Citizens' Assurance Co Ltd v Evatt (1970) 122 CLR 628, cited

Pullen v Gutteridge, Haskins & Davey Pty Ltd [1993] 1 VR 27, cited

Ratcliffe v VS & B Border Homes Ltd (1987) 9 NSWLR 390, cited

Tomasetti v Brailey (2012) 274 FLR 248, cited

Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, cited

COUNSEL: D J Campbell QC and B Hall for the plaintiff
R S Ashton QC for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
Moray & Agnew Lawyers for the defendant

[1] In 1997 Michelle Bankier was seriously injured in a motor vehicle accident. She was 16 years old at the time. Five years later she was awarded nearly $2 million in damages for the injuries she suffered and for her future loss, medical expenses and associated matters.

[2] In 2002 the plaintiff engaged Anthony Avery, a financial planner, to advise her with respect to investing a large part of the sum she had been awarded. Mr Avery was then the principal of Avery Financial Planning Pty Ltd (AFP). He sold that business in March 2010 and the company changed its name to HAP2 Pty Ltd.

[3] The plaintiff says that AFP, through Mr Avery, breached its duty to her in the advice he gave or failed to give and, as a result, she has suffered a loss.

The claim

[4] The claims pleaded against the defendant are in negligence, breach of the contract of retainer, and statutory claims. They all involve the same set of facts.

[5] The claim for breach of contract was not pressed. This action commenced on 23 October 2014. Thus, the limitation date is 23 October 2008. The plaintiff conceded that, as nearly all the breaches of contract were alleged to have occurred before that date, there was no point in pursuing any relief which might be available for a breach of contract after 23 October 2008.

[6] The defendant pleaded that the causes of action accrued more than six years before the proceeding was commenced and were, therefore, time-barred by operation of s 10 of the *Limitation of Actions Act* 1974. The defendant gave only scant attention to this important issue. I deal with the limitation point, so far as I understand it to have been asserted, later in these reasons.

The injuries suffered by Ms Bankier and their effect

[7] Ms Bankier was a passenger in the vehicle involved in the accident. Her mother (Jennifer Bankier) was the driver; her father, another passenger in the car, was killed. The impact caused her to be thrown forward and bent double around her seatbelt. This caused a significant injury to her spine and internal injuries, most particularly to her bowel. She spent several months in hospital and, at the time, there was uncertainty about whether she would ever walk again and, if she could, the extent to which this would be possible. She suffers from “short bowel syndrome” because most of her bowel has been removed as a result of the accident. Her recovery was relatively slow. She completed her final year of high school over two years

because she was only able to attend school for short periods of time. The pain and other issues badly affected her concentration. She was unable to walk independently and, at first, used a wheelchair, but she progressed from this to a walker and then a walking stick and then was able to walk independently. She completed grade 12 and achieved an OP 4.

[8] Ms Bankier applied for and was accepted into a marine biology course at Griffith University to commence in 2000. She was residing on the Gold Coast at that time.

[9] The hearing of Ms Bankier's personal injuries claim took place before the District Court of New South Wales and judgment was delivered on 12 September 2002. In her reasons, Gamble ADCJ found that:

(a) due to the accident, the plaintiff had suffered injuries which would incapacitate her for the rest of her life and would disable her more as she aged,

(b) her injuries were severe and her health and mobility would deteriorate over time,

(c) due to the accident and the injuries she had sustained, her ability to lead a normal life had been significantly impaired and that the severity of her non-economic loss was 85% of a most extreme case,

(d) as a result of the accident Ms Bankier had a residual earning capacity of $150 a week,

(e) but for the accident she would have completed her Bachelor's Degree in Marine Biology at the end of 2003 and would have retired at the age of 65,

(f) because of the injuries the plaintiff would now retire at 50 years of age in February 2031,

(g) her capacity to perform both the practical and intellectual aspects of any work had been seriously prejudiced by the injuries she suffered in the accident.

[10] Other matters which were the subject of Gamble ADCJ's reasons and which are relevant to these proceedings are the following findings:

(a) the plaintiff is unable to sit or stand for long periods of time,

(b) she is unable to walk great distances or to work consistently without rest periods,

(c) the deterioration of her spinal condition was a certainty,

(d) her mobility will deteriorate and her pain levels will increase,

(e) she is unable to undertake any heavy physical work,

(f) her disabilities for the 15 year period after she was aged 36 years old would include ambulatory difficulties requiring the use of walking aids and, after the age of 50, her disabilities would cause further reduced physical tolerance.

[11] In her reasons the trial judge awarded specific sums for future expenses, including:

(a) $55,630 for medical and other attendances,

(b) $43,521 for future medication,

(c) $118,597 for pain management,

(d) $67,000 for equipment,

(e) $65,411 for travel including international air travel and a motor vehicle, and

(f) $436,000 for future economic loss (including superannuation).

[12] Additional sums were awarded for:

(a) dietary needs and supplements - $171,000,

(b) future surgery - $51,820, and

(c) home modifications of $69,339.

[13] Of the total judgment awarded, over $1.1 million related to medical and associated expenses.

[14] Since the trial of her damages action, Ms Bankier has shown considerable courage and determination. She has substantial difficulties with her diet which must be of a special kind due to her shortened bowel. But, she has done things which might not have been thought possible shortly after her injury – for the most part because of her own personal strength.

The damages award

[15] Ms Bankier was awarded $1,958,758. After refunds and other expenses she received $1,746,682. From that she paid the following amounts:

(a) $392,000 - to pay out the mortgage over the Burleigh Heads unit

(b) $100,000 - to her mother

(c) $50,000 - to her brother

(d) $20,000 - for renovations to her unit

[16] The amount available to her for investment was $1,184,600 and, of that sum, $1,132,109 was invested on Mr Avery's advice.

The pleadings

[17] The Fourth Amended Statement of Claim (FASOC) is a lengthy document which descends to great detail about the duties owed by, and the failures of, the defendant. In some respects it resembles the kind of list which is seen in claims for special damages in personal injuries actions. For example, it is alleged that the defendant:

> "62(f) failed to obtain the plaintiff's relevant personal circumstances or alternatively failed to make reasonable inquires [sic] in relation to the plaintiff's personal circumstances regarding:
>
> …
>
> (xxii) the need for and associated cost of gym membership"

[18] The FASOC has many long lists of failures of the defendant. But, of all of the many breaches of duty alleged against the defendant no loss is identified as having been caused by any one of them. Rather, it is pleaded in this way:

> "75. Due to the matters pleaded at paragraphs 62 to 69 above [i.e., the breaches of duty], the plaintiff did not implement the Alternative Investment Strategy."

[19] The Alternative Investment Strategy is defined in paragraph 1A of the pleading to mean the strategy pleaded at paragraph 68(i). That strategy takes up nearly two pages of the pleading and includes both actions that should and should not have been taken. It is necessary to set it out in order to understand the plaintiff's pleaded case:

> "68. … in providing the Financial Advice, the defendant failed to provide the Financial Advice in a way that was appropriate for the plaintiff's relevant personal circumstances by:
>
> …
>
> (i) failing to advise as to an Alternative Investment Strategy that was appropriate for the plaintiff's relevant personal circumstances, that:
>
> (i) had the primary goal of reducing the risk of loss to the damages as a capital sum in order to:
>
> (A) secure the plaintiff's living standards for the remainder of her life; and
>
> (B) produce a cash flow plan based upon future investment earnings, future entitlement to income from Centrelink, and possible future use of the damages as a capital sum to support the plaintiff's living needs for the remainder of her life;
>
> (C) secured [sic] the payment of her future medical and other expenses identified in the judgement;
>
> (ii) established the plaintiff's needs, goals and budgets and managed the damages to give effect to them;
>
> (iii) identified the damages as a sum that represented the plaintiff's expected future income and living expenses;
>
> (iv) identified that both the damages as a capital sum and income earned from the investment of the damages were both necessary to fund the plaintiffs future living expenses;
>
> (v) identified that a goal of $55,000 for living expenses after tax per year could be achieved for the plaintiff concurrent with retaining the value of the damages as a capital sum having regard to the plaintiff's:
>
> (A) investment asset position;

(B) Investor Risk Profile;

(C) future entitlement to income from Centrelink;

(vi) advised the plaintiff that increases in expenditure beyond $55,000 after tax per year would directly impact on the ability of the damages to support the plaintiff's living needs for the remainder of her life;

(vii) advised the plaintiff that alternative strategies included investment:

(A) in risk-free assets with a low return, with income and capital used to fund living needs with a minimal capital remaining towards the end of the plaintiff's life, and making use of future entitlement to income from Centrelink; or

(B) of some funds into a cash account and the remainder in a "conservative" to "balanced" portfolio, and using superannuation, with the plaintiff able to use the income and capital to fund living needs and making use of future entitlement to income from Centrelink;

(viii) advise[d] the plaintiff to retain her Home;

(ix) did not recommend the funding [of] investments through borrowing money;

(x) identified the plaintiff's limited capacity to work due to the Injuries;

(xi) did not recommend or involve investing in the Agribusiness Investments"

[20] It became apparent during the trial that assessment of the Strategy involved the adoption of a hypothetical investment in a balanced portfolio based on a Morningstar index and allowing for withdrawals from the portfolio limited to $54,000 a year (indexed to inflation). Morningstar Inc is a financial services firm which analyses shares and other financial products and publishes indices based upon that analysis.

What was the content of the duty owed by the defendant to Ms Bankier?

[21] In order to determine the plaintiff's claim it is necessary to assess what occurred in light of the duty owed to her by the defendant. Both parties agree that a duty was owed, but differ slightly as to its content.

[22] The defendant, in its Amended Defence, describes the duty as being one "to take reasonable care and skill only in the performance of its services which it provided."

[23] The plaintiff contends for a wider duty. She argues that the defendant had a duty to warn her of material risks. That appears to have been conceded in the defendant's written submissions. The general principles which emerge from the authorities are:

(a) the primary duty is to exercise that standard of reasonable care which is expected of a reasonably competent person professing the skills of a financial planner or adviser,[1]

(b) the duty arises when the adviser knew or ought reasonably to have known that the client would rely upon the advice,[2] and

(c) the duty extends to the provision of a warning about material risk.[3]

[24] The requirement that a warning be given was considered in *ABN AMRO Bank v Bathurst Regional Council* where the Full Court of the Federal Court considered the advice which had been given to some local councils. The Court accepted that the following principles[4] were applicable:

(a) The core obligation of a financial adviser is to warn the investor of the "material risks" of a potential investment. A "material risk" is a risk to which the investor would attach significance.

(b) An investor is entitled to be warned of the fact that projected rates of return and growth might not be achieved and that there is an element of commercial risk-taking involved for which the investor must be prepared to take responsibility.

(c) Where an investor has suffered a loss because the investment was "unsuitable" for them, such that no financial adviser would have made an unqualified recommendation in the circumstances, the adviser will be liable to put the investor back in the position they would have been in had they not invested.

[25] In considering these matters it is appropriate to take into account the experience and expertise of the plaintiff.[5] Ms Bankier had neither relevant experience nor expertise. Ms Bankier accepted that she did know the difference between capital and income and that her income would be created by the investments which were to be made for her. She also accepted that she knew she had to preserve the capital to produce the income. These acknowledgements, and others, were obtained in cross-examination and, while they demonstrated that she had absorbed some of the general financial information provided by Mr Avery, they did not constitute either experience or expertise.

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1 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628

2 *Esanda Finance Corp v Peat Marwick Hungerfords* (1997) 188 CLR 241, 252 (Dawson J)

3 *ABN AMRO Bank v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65

4 At [1106]

5 *Austrust Ltd v Astley* (1993) 60 SASR 354, affirmed (1996) 67 SASR 207

[26] Whether something is a "material risk" or an "unsuitable" investment will depend upon a number of matters including the particular circumstances of the investor. This leads to the first of the issues which the parties agreed needed to be resolved.

What enquiries and investigations should Mr Avery have made to determine Ms Bankier's personal circumstances; and does this extend to understanding the award made by Gamble ADCJ?

[27] Mr Avery was criticised for not seeking or obtaining a copy of the reasons supporting the award of damages. Mr Ashton QC accepted that it would be idle to contend that it would not have been a good idea to do so. It was argued for the plaintiff that, had Mr Avery read the judge's decision he would have had a better idea of her vulnerability and, therefore, would have provided advice more attuned to her situation.

[28] The plaintiff argued that there were two reasons which require a financial adviser to be familiar with a client's personal circumstances before advice is given.

[29] First, there is the "know your client" rule which is contained in the Financial Planning Association of Australia's Rules of Conduct, Rule 108. Secondly, s 945A of the *Corporations Act* (as it then stood) required an adviser to determine "the relevant personal circumstances in relation to giving the advice" and to make "reasonable enquiries in relation to those personal circumstances."

[30] Each party called an expert witness to give evidence about various aspects of the advice which was given and the consequences of that advice. Mr Richards (who was called by the defendant) said that, in circumstances such as these, the adviser would need to know what was in the judgment but would not need to understand the "science behind the numbers." Mr Green (who was called by the plaintiff) said that planners "must inform themselves of all the information necessary to advise the client. That may be completed by simply contacting the lawyer, who may give them a very detailed piece of advice as to the state of play of the client."

[31] Mr Ashton QC submitted that it was open to the court to find that Mr Avery had acted reasonably in accepting the "apparently informed instructions" of the plaintiff and her mother. I do not accept that. This is a case in which a financial adviser should have taken steps to obtain a comprehensive understanding of the constraints upon the client's capacity to invest and the expenses which were to be incurred apart from the expenses of investing. Mr Avery did not know about, and thus made no specific allowance for, matters such as: the cost of future surgery, the cost of equipment in the future to assist her in her day to day life, and the cost of future domestic assistance. He was quite vague when questioned about these matters – he "didn't exactly know" the cost of future surgery, he "thought" that costs for pain management had been allowed for in the budget, and with respect to making an allowance for the cost of equipment which would be needed he said: "the allowance that was made for future equipment, I would imagine, would have come out of growth that there should've been in the portfolio."

[32] Mr Avery said that he was satisfied that the information given to him by the plaintiff's mother was sufficient to satisfy the "know your client" rule. There will always be circumstances in which a financial adviser can rely upon what he or she was told by a client as being sufficient to

satisfy the need to understand the "relevant personal circumstances." This was not such a circumstance. Mr Avery was advising a client who he knew had suffered serious injuries and had been incapacitated for some time and had an obviously limited capacity to earn. Mr Avery should have made further enquiries, he should have read the reasons of the trial judge and, if he was uncertain about their meaning, he should have sought some advice.

[33] While Mr Avery knew, in a general sense, about his client's physical and medical condition he had not properly investigated her personal circumstances and so he was not aware of the extent of future expenses that she would have to bear – for example, it was likely that Ms Bankier would have to incur significant costs (perhaps exceeding $1,000,000) associated with medical care. Similarly, he was not aware of the extent of the future domestic assistance that his client would require or the extent to which she would need to modify her residence to suit her disability. Further, he was not fully aware, and did not take into account, the fact that she suffered from conditions that would cause her physical condition to continue to deteriorate and thus require increasing levels of treatment.

[34] Had Mr Avery undertaken an appropriate level of enquiry into the circumstances of the plaintiff, he would have become aware, in addition to the matters referred to above, of the following:

(a) the extent to which she could not engage in full-time employment,

(b) that her capacity to earn any income had been found to be in the order of $150 a week until the age of 50,

(c) that, in the future, she would require significant assistance with household and domestic tasks, and

(d) she would need to modify any accommodation to suit her disabilities.

What risk of harm would the plaintiff face if the judgment sum was dissipated?

[35] The risk was obvious. Unless she maintained a sufficient sum, she would not be able to afford the treatment and other costs associated with her condition. This was known to Mr Avery. In a file note of 8 October 2002, he recorded:

> "She is restricted in her diet and ability to work and exsert [sic] much effort therefore she has been paid out $1,966 million and she may not be able to work. … She has significant medical expenses and **this money has to last her the rest of her life**." (emphasis added)

[36] The extent of the risk and the dire consequences of the plaintiff not being able to afford the necessary care for the remainder of her life were not in issue. While Mr Avery was not aware of all the matters taken into account by the judge when assessing damages (because he had not read the judgment) he knew enough to understand that any substantial reduction in the amount available to the plaintiff would have a greater effect than a similar reduction would have to an otherwise able-bodied person. Those effects included that she might not be able to afford:

(a) future medical and associated expenses,

(b) domestic and other assistance, and

(c) appropriate modifications to her accommodation.

The parties' powers of recollection

[37] Generally speaking, neither Ms Bankier nor her mother had particularly clear recollections of the details of events or conversations. This is not surprising. Ms Bankier had many other things to occupy her attention, in particular, her physical recovery and how she might lead her life following her catastrophic injuries. Her mother was also, no doubt, consumed by concern for her daughter.

[38] Mr Avery said that the file notes he made recorded the important or key issues discussed in meetings, as it was important to have a record of those issues. He relied, to a very large extent, on the file notes made during or soon after his meetings and conversations with Ms Bankier. Where there is a difference in recollection between the parties I prefer to rely on the evidence which is consistent with the notes which were made at the time.

[39] Many of the events the subject of this trial occurred more than ten years ago and it is not surprising that memories fade. Ms Bankier was not Mr Avery's only client and the regular written advices given to her are, in many respects, obviously of general application and applicable to a broad range of clients. Mr Avery sometimes purported to recall important details of conversations which were not recorded in his file notes. In cross-examination he said that he did have conversations with her in which he warned her against, for example, excessive travel costs. Such a statement would have been a very important part of the advice he was giving her. But there are no records of that having taken place at the time the travel money was sought. Where he gave evidence of a discussion or other statement which is not the subject of a file note then I do not accept that his recollection is, in general, reliable.

Ms Bankier meets Mr Avery

[40] Mr Avery had been involved in the financial services industry since 1977 and had worked as a financial planner from about 1992. He had met the plaintiff's parents in 1996 and advised them about some financial issues. He met Ms Bankier a few times when he was advising Jennifer, her mother, but did not provide any advice to her. Notwithstanding what Ms Bankier has said in her affidavit I find that any conversations about investment which he had with her before 2002 were at a very general level and could not be considered as advice.

Ms Bankier purchases a unit at Burleigh Heads

[41] The first time Ms Bankier received assistance from Mr Avery with respect to a financial matter concerned the purchase by her of a unit at Burleigh Heads. In early 2002 Ms Bankier became aware that there was a unit for sale near where she was then living. She also knew that the trial in relation to her personal injuries claim was to occur in the middle of 2002. She sought advice from Mr Avery about the wisdom of purchasing that unit. She was in the unfortunate position of having no income and no assets and so standard bank finance was not available to her. She says that Mr Avery told her that he thought it would be a sensible move to purchase the unit. He denies that but says that he thought that if the purchase could be financed in the

short term it would be a good idea. I consider it to be more likely than not that he would have passed that view on to Ms Bankier.

[42] Mr Avery arranged an introduction for Ms Bankier with a lending institution which was prepared to finance the purchase by way of a loan with capitalised interest to be paid out when she received her compensation. That is what happened. There is nothing to suggest that Mr Avery had any more to do with the transaction than to provide some initial advice and then put the parties in touch with each other.

[43] Ms Bankier purchased the property for about $355,000, paid the usual stamp duty and other fees and, when the loan was concluded, paid approximately $35,000 in interest.

The payments to family members and others

[44] In her affidavit, the plaintiff says that Mr Avery had never suggested to her that there was any problem with her repaying the money that she owed her mother or making the payment to her brother. It was not suggested that she sought his advice on those payments. Rather, the complaint is that he did not warn her not to make the payments or advise her of the effect that the payments might make on her capital.

[45] So far as the payment to her mother was concerned, the plaintiff said that she had "repaid her for the amount that she had supported me over the last couple of years after I moved out of home." She was asked:

> "Was it something, though, that you had to do, or was it something that you decided that you wanted to do? – – – I wanted to do that."

[46] Mr Avery says (in his affidavit) that at their first meeting Ms Bankier told him that "she intended to make a number of payments from her compensation prior to investing the balance." They included some matters for which she was strictly liable (mortgage, furniture etc) and some for which she was not, such as those to her mother and brother. The latter payments were made because, on my appreciation of all her evidence and the history of her injury, she felt morally obliged to make them. I do not accept that she would have acted differently even had she been told of the effect the payments would have on her capital.

The first formal meeting – 1 October 2002

[47] Mr Avery recorded, in a file note, what occurred at what I will describe as the first, formal meeting at which his advice was sought.

[48] The record Mr Avery kept of the meeting which occurred on 1 October 2002 is instructive. He records it taking place at Mrs Bankier's house. Ms Bankier says it occurred at the AFP offices at Bowen Hills. She is mistaken.

[49] Mr Avery records the following about Ms Bankier's physical condition:

(a) "She was in a family car accident some 5 years ago."

(b) "She had major internal injuries, back and leg."

(c) "Shelli['s][6] accident caused her to loose [sic] half of her intestine and has problems with her leg and back. She is restricted in her diet and ability to work and exsert [sic] much effort therefore she has been paid out $1,966 million and she may not be able to work. What she would like to do is finish her marine biology course and then do a photography course and be a self employed photographer. But of course she can only work casually."

(d) "She has significant medical expenses and this money has to last her the rest of her life. She wants to achieve both growth and income from the balance of this money. She would like to invest $1 million into a portfolio that is going to produce that income. The income that she is going to require we worked out to be $54,000 net of tax pa. We are going to have to come up with a portfolio that is going to produce this. We want to make sure we have some growth in the portfolio. The balance of $283,000 she would like to invest into direct property such as units possibly using neutral [sic] gearing strategies."

(e) "The budget is included. Her risk profile is 'Moderately Conservative' although we are going to make her a 'Balanced' investor."

[50] Ms Bankier does not have a good recollection of what occurred at the meeting. In her affidavit she says that she "believed" that she completed a financial planning questionnaire and risk profile with the help of her mother and Mr Avery. She said that she did not "specifically remember completing these documents". She also believes that she signed a client agreement.

[51] The financial planning questionnaire includes a short budget. This document was completed by Mr Avery but, he says, the information in it was based on instructions from Ms Bankier and her mother. I prefer Mr Avery's account of what occurred on this point. It is consistent with his practice (on which he was not challenged) and it is a rational step to take at that time. Mr Avery says that he explained the purpose of the budget and told the two of them that it would be used to determine what Ms Bankier would need to live on. He said he explained that the compensation monies could be invested and that those investments could earn an income which, after tax, would have to cover the living expenses budget. He says he explained the importance of sticking to the budget for this purpose and to ensure that Ms Bankier did not have to "eat into capital" by selling any of her investments. In her affidavit, Ms Bankier did not deny working on a budget but said that she did not remember doing it nor did she remember Mr Avery telling her that she needed to "stick to a budget of $54,000 per year." But, in cross-examination, she agreed that she recalled generating the living expenses document which totals $54,000 and that there was information in the budget that Mr Avery could only have obtained from her.

[52] In her affidavit, Ms Bankier says that Mr Avery told her that if she paid out the mortgage on the unit and made the payments to her family members then he would be able to invest the balance of the monies to generate an income for her. She deposed to the following in her affidavit:

> "… He said to me that if we did this he would easily be able to generate about $80,000 per annum in income, and that he would be able to grow my

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[6] Mr Avery referred to Ms Bankier as Shelli – a contraction of Michelle.

> compensation monies at the same time so that they would increase and increase over the years. As noted above, I don't recollect there being any discussion of my living expenses being $54,000 at the meeting. Rather, all the talk was about the $80,000 that would be available to me like a wage each year. I remember thinking that I had friends with good jobs who earned about $80,000 per year and that this was a lot of money and a very good wage, particularly if I didn't have a mortgage or rent to pay. It made me feel quite wealthy because it seemed like a lot of money. Also, because Mr Avery kept saying he would be able to steadily grow the compensation sum itself, I felt like I would receive more than $80,000 in future years as the primary sum got larger. … These things that Mr Avery said to me made me feel quite rich and I remember thinking to myself something to the effect like 'well, I've got over a million dollars, I'm a millionaire.' … Mr Avery said that 'wealth creation' was the purpose of investing and this would give me security such as I would never need to worry about money, which was a big relief to me."

[53] The assertion that Mr Avery had assured the plaintiff that she would receive $80,000 a year is important in a number of respects. It is relevant to her memory of what she was originally told and her attitude over the following years to the expenditure of money on travel and on establishing a business. In cross-examination, she was asked if she could give Mr Avery's exact words on the matter of the $80,000. She said:

> " … I would receive 80,000 a year from the amount of 1.3 million that would be invested, it wasn't a problem, no worries, I'd be looked after for the rest of my life, I could focus on rebuilding my life and my rehab and didn't have to worry about money."

[54] Ms Bankier was not able to identify any reference in the many documents in this case to any record of Mr Avery saying that she would receive income of $80,000 a year.

[55] Mrs Jennifer Bankier had a particularly poor memory of what occurred in discussions involving her daughter and Mr Avery. Except when it involved the sum of $80,000. In her affidavit, Mrs Bankier said that Mr Avery had told them "that he would produce an income of about $80,000 or more per year for her to live from." She did not recall him saying anything about Ms Bankier needing to have a budget or having living expenses of $54,000, or any other amount, per year. In her examination in chief the following exchange took place:

> "Now, you mentioned there was discussion about investments. Do you remember what was specifically discussed? – – – That he hoped to achieve an income of about 80,000 for her from those investments for her living, and I was really pleased to hear that because that meant she'd be right. That was one of my main concerns, was that – that she'd be okay."

[56] In cross-examination, Mrs Bankier's memory deteriorated further. In effect, she could only remember the figure of $80,000 being mentioned and no others. Her inability to recall may have been caused by her desire not to play a role in making financial decisions for her daughter. In her affidavit, she said:

> "I took her to the meetings, and I participated a little bit in the meetings, but all decisions were up to Michelle."

An income of $80,000 a year?

[57] A representation, if made, that Ms Bankier would receive an annual income of $80,000 is very important. It would be a vital part of any financial planning for Ms Bankier's future. It was clear from many of her answers that this belief formed part of the plaintiff's understanding of her own financial position and fortified many of her decisions on spending money. But it was not pleaded.

[58] It is reasonable to expect that a statement to the effect that the plaintiff would receive an annual income of $80,000 would, if it had been made, be referred to somewhere in all the documents generated in this case. It is not. It is also reasonable to expect that, had such a statement been made, it would have been relied upon in the pleading as another example of negligence on the part of the defendant. It is not. There is no record of Ms Bankier or her mother confronting Mr Avery at any point and asking him why the plaintiff was not receiving $80,000 income a year.

[59] I can accept that Ms Bankier believes that she was told that she would receive that amount in income every year. But she was not told that. Both she and her mother are mistaken and either misheard or misconstrued what was said at that first meeting.

The second meeting – 22 October 2002 – and following

[60] On 22 October, Ms Bankier and her mother attended their second meeting with Mr Avery at his office. Before the meeting he had prepared a Statement of Financial Advice (SOA) which was to be the first of many he gave to the plaintiff. It set out the investments he recommended she adopt – based on the information that she had given him at the first meeting.

[61] In that SOA the following notes appear:

> "Your current annual budgeted expenditure is $54,000. These expenses are higher than usual for a single person because of your special dietary requirements and ongoing medical and rehabilitation expenses."
>
> "With the balance of your funds (about $1m) you wish to implement a long-term investment strategy to provide adequate tax effective income to meet current and projected living expenses. You estimate that you will require about $54,000 pa, indexed to inflation."

[62] Elsewhere in the SOA there is a table entitled "Current Annual Expenditure" which sets out estimated expenses of the plaintiff. While there is an estimate for "Food necessity for medial [sic] needs" of $12,000, there is no entry for medical or rehabilitation expenses.

[63] Mr Avery proposed, and the plaintiff accepted, that she should establish a cash management account from which she could draw money for her daily living expenses. In accordance with his advice, Ms Bankier also established an "asset choice account" into which dividends were to be

paid and from which investments would generally be made. Ms Bankier did not have access to this account and required Mr Avery to release funds from time to time.

[64] Mr Avery continued to provide SOAs on a regular basis to Ms Bankier. They were similar in composition to the first SOA. In them, Mr Avery made recommendations about investments and asked for the return of signed authorities, application forms and so on. He also organised meetings approximately every six months in which he provided portfolio valuations to Ms Bankier. As time went on, the reports became more complicated and additional advice was given.

[65] From time to time, Mr Avery would ask the plaintiff to complete a Budget Form to assist in the understanding of her expenditure and what was required for her living expenses. She was not assiduous in supplying these documents.

The plaintiff's efforts to engage in remunerative work and her spending habits

[66] The plaintiff's courage and commitment after her injury led to her concluding her high school studies and then to commence studying for an arts degree majoring in marine biology at the Griffith University campus on the Gold Coast. She was in her second year of those studies when the trial relating to her injuries was heard. At that time she was able to live independently in rented accommodation. The effects of her injuries meant that she could not manage a full-time course and so the degree was going to take her some six or seven years to complete. For various reasons unrelated to this case, but which were influenced by her injuries, she did not complete that degree.

[67] Ms Bankier then looked for something which would provide her with an income. She decided upon a career in surf photography and started a business called BlueSphere Photography. This might seem bizarre, given her injuries, but she felt able to engage in that work because she hoped it could be done without the need for her to move quickly or frequently. Initially, she had some success in this venture and she sold some photographs to surf magazines. Eventually, her physical limitations meant that she could not compete with other people who were taking photographs of that kind. She did, though, travel overseas to photograph surfing competitions and expended substantial amounts of her capital in doing so.

[68] On 8 March 2004 the plaintiff spoke to Mr Avery by telephone and told him that she wanted money to pay for some trips to San Diego, South Africa, and Hawaii for the purposes of engaging in surf photography. She accepted that in that conversation he told her that those expenses would need to be funded by selling some of her portfolio. That advice was followed up in an SOA of 25 March 2004 in which the following appears:

> "This scope of advice is specifically in relation to additional investments and the redemption of $25,000 required for travelling expenses and does not include advice on other areas such as estate planning, taxation, insurance, retirement planning etc."

[69] It was not suggested that any specific warning was given about the effect that such a sell off of part of her portfolio might have.

[70] Ms Bankier also sought transfers to her working account from time to time. For example, on 27 May 2004 she asked for $12,000 to be transferred to her working account. And on the 21 July 2004 she sought a transfer of $8000 to that account. On 29 July 2004 she asked for $10,000 to be transferred to that account. A further request was made on 3 October 2004 for $10,000 to be paid to cover her credit card and other expenses.

[71] On 11 November 2004 Mr Avery spoke to the plaintiff by telephone. He records in his affidavit, but not in a file note, that he told her that AFP had been trying to see her since July of that year for her review and that he wanted to speak to her about her portfolio and budget given her recent spending. During that conversation the plaintiff asked for a further $10,000 to be transferred into her working account. In the absence of a file note to that effect I am not prepared to accept that he spoke to her about spending.

[72] Six days after that conversation Ms Bankier rang Mr Avery asking for a further $10,000 to be transferred and she told him she was leaving for Hawaii on 9 December. Mr Avery records in his affidavit, but not in a file note, that he told her that her budget and portfolio needed to be reviewed given her spending levels. Again, in the absence of a file note to that effect I am not prepared to accept that he spoke to her about spending.

[73] On 15 December 2004 the plaintiff's mother came to the offices of AFP to sign documents consistent with advice given in an SOA of 25 November 2004. A note of that meeting records that: "We need to get Shelli and her mum in to go over a budget and look at portfolio income and growth to make sure this can sustain itself and fund Shelli's expenses for her photography business." There was no evidence that that was said to Ms Bankier and, in any event, it does not record that any warning was given about the consequences of excessive spending.

[74] On 31 January 2005 the plaintiff and her mother met with Mr Avery. A note of the meeting records:

> "We did not get a chance to discuss Shellies [sic] budget as they were in a hurry but said after Shellies [sic] Photo Ehibition [sic] is over they will do it and come back to me to determine if portfolio income is covering expenditure."

[75] In April 2005, the plaintiff sent an email to Mr Avery in which she told him that she had identified a house at Palm Beach as a possible investment. She had previously mentioned to Mr Avery her interest in direct property investment.[7] In her email she made the following statements:

> "I have done my budget with my household/living expenses coming [i]n at about 3000 a month at most (30 000 to 35000 a year.)
>
> The BlueSphere/business expenses would be on top of this … Mum could give you exact figures since she is my admin expert and has done the expenses and tax. I could further cut down the monthly expenses.
>
> …

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[7] Recorded in the SOA of 21 October 2002

> At our last meeting you mentioned briefly that the investments were bringing in about $60,000 a year. Is this correct? Mum says the last tax year shows an income of 44,000, but is this because it is showing the figures for last fiancial [sic] year?
>
> What do you think? I am keen on making this sort of investment …
>
> Would you be able to work out the figures and see if it would be viable? for the business costs call Mum and she can fill you in. … anyway just thinking it would be [a] good idea otherwise soon houses here will be out of my reach completely.
>
> Please let me know what you think! …"

[76] The defendant says that the email is an important document for two reasons:

(a) it demonstrates that the plaintiff was aware of the importance of her living expenses, and

(b) there is no mention of an annual income of $80,000 – only to $60,000 or $44,000.

[77] In a telephone call which followed that email, Mr Avery says he told the plaintiff and her mother that if she "spends any money on BlueSphere travelling etc she will have to draw down on capital." Ms Bankier was uncertain about this, perhaps reluctant to agree that it had occurred, but I accept that this statement was made.

[78] In 2005 Ms Bankier came to the realisation that her physical restrictions meant that she could not continue taking and selling photographs of people engaged in surfing competitions. She decided to use her skills as a photographer to engage in landscape photography. In order to sell her work she would run a stall in one of the many markets which operate on the Gold Coast. This also required a significant physical effort in setting up the stall, standing at the stall, and then packing it up at the end of the day. In 2006 she decided that she could cope more easily with the demands of selling her work by taking a lease on a shop. She reasoned that it would be less physically demanding for her if she did not have to set up and take down a stall every week. The plaintiff identified premises at Burleigh Heads and sought some assistance from the defendant.

[79] She had a discussion with Mr Avery and he told her a number of things. One was that she should prepare a business plan – which she did. In that document – under the heading "Reason for a gallery" – she said:

> "I have spent a lot of my money and work on my business every day from home so wish to take that a step further and have a real presence for BlueSphere, in order to have a good turnover. I will then not have to use my capital to continue to fund my business."

[80] This statement demonstrates her recognition that her business activity had been funded, to that point, out of capital.

[81] The planning for the shop was haphazard. In a draft list of outgoings written by Mr Avery the amount for rent was less than half what was eventually paid ($27,000 v $60,000) because the

smaller space which was originally sought became unavailable. And there was no allowance for wages because the plaintiff thought she could run the shop by herself.

[82] The business was a disaster. It commenced in April 2007 and never turned a profit. Apart from the usual strains associated with a new business, the health of the plaintiff prevented her from engaging in some of the tasks necessary for such a venture. It is probably the case, though, that even if she did not have the restrictions imposed by her injuries she would not have succeeded.

[83] In June 2006 Mr Avery had valued her portfolio at $1,565,200. At the end of 2008, Mr Avery visited the plaintiff at the shop. He told her that her share investments had dropped to about $700,000. In December 2008 she received a Portfolio Valuation Report from AFP in which she was advised about the downturn in markets around the world. The business was slowly wound down and closed in late 2009.

[84] Mr Avery's appointment as the plaintiff's financial adviser ended on about 30 June 2010.

What precautions would a reasonable person in the position of Mr Avery have taken to deal with the risk?

[85] The plaintiff argues that the defendant should have been warned about three matters:

(a) spending money in excess of her estimated living expenses,

(b) borrowing money for investments, and

(c) starting her business in 2007.

[86] It is argued for the plaintiff that she believed it was safe for her to do each of those things because she was not warned about them. She says that had she been so warned, she would not have spent money in excess of her estimated living expenses, borrowed money for investments, or started her business in 2007.

[87] The plaintiff contends that the risk could have been prevented by the defendant warning her that her actions could have an adverse consequence upon her ability to afford her future expenses. In particular, she identifies the following as matters about which she should have been warned:

(a) making payments to her mother and brother,

(b) travelling in 2004 and 2005,

(c) borrowing money to invest in agri-businesses, and

(d) borrowing money to purchase an investment property.

[88] The warnings, the plaintiff argues, ought to have been: specific, blunt, clear, in plain and simple English, in writing, and given in such a way that the plaintiff had a clear choice between doing an action (and incurring the effect of that action) and some other step which would not have the harmful consequences of which she complains.

[89] At the same time, the plaintiff argues that the risks were not obvious risks that would have been apparent to a reasonable person in her position.

[90] On that argument, it is necessary to consider what the plaintiff had been told by Mr Avery. Ms Bankier was cross-examined about her meetings with Mr Avery and the SOAs which she had received. In bald terms she knew or was aware of the following before she engaged in spending on travel or on establishing her BlueSphere business:

(a) That her capital was made up of her investments (shareholding) and her income came only from those investments.

(b) That her capital had to be preserved in order to produce her income.

(c) Her "future medical expenses and [her] other needs were all to be sustained from the fund constituted by [her] share portfolio."

(d) The income she received was taxable.

[91] On the other hand, Mr Avery knew or must have known:

(a) About her background and family circumstances.

(b) That the award was the largest sum of money that Ms Bankier had ever had to deal with.

(c) That she had no or limited exposure to financial dealings involving the investment of money.

(d) That the award had to be dealt with so that it would satisfy her financial needs for the rest of her life.

(e) That she was exposed to large medical expenses for the rest of her life.

(f) That she would not earn enough from her own endeavours to support herself.

[92] In those circumstances, an adviser should ensure that the client knew the full consequences of any relevant action and the effect that would have on the capacity of the client to continue to meet her expenses.

What was the plaintiff's state of mind?

[93] In order to determine whether any warnings that could have been given would have been effective it is necessary to take into account the assumed state of knowledge of the plaintiff and her state of mind. In other words, no matter what the situation actually was, what did she think it was?

[94] In making this assessment, one must bear in mind the provisions of s 11 of the *Civil Liability Act* 2003, in particular, sub-section (3):

> "(1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm (*factual causation*);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (*scope of liability*).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1) (a)—should be accepted as satisfying subsection (1) (a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

[95] Notwithstanding the declaration of inadmissibility in s 11(3), several questions were asked of Ms Bankier about that very issue and, except where she made statements against interest, I have ignored her answers.

[96] As I have set out above, Ms Bankier held the (unfounded) view that she could expect to receive $80,000 a year in income derived from investments. She also said (in her affidavit) that Mr Avery repeatedly told her that, in addition to generating $80,000 a year for her, he would be able to grow the compensation monies over time and increase them. On that basis, Ms Bankier believed that "if [she] ever occasionally spent a little more than $80,000 per year then this money would grow back over time. … [she] could basically live on $80,000 per year and this was [her] mindset at this time."

[97] I have found that Ms Bankier was not told that she would receive $80,000 a year on which she could live. She was told in, for example, the SOA of 21 October 2002, that she was liable to income tax of about $10,566 on an income of $58,049. Ms Bankier acknowledged that she looked at the pages in which it was shown that, after taking into account tax and a capital growth drawdown, she would receive $62,496 and that would result in no surplus. She was asked:

"And the estimate is net income; net's after tax. Do you accept that? – – – Yes; yeah.

> Less total income – less total expenses; that's not just living expenses. Annual surplus – zero. Remember reading all that? – – – I don't remember that specifically.
>
> But you accept that you would've read it? – – – I would've read it with Mr Avery explaining; yes."

[98] The misunderstanding that she would receive $80,000 a year after tax permeated the plaintiff's thinking. For example:

> "I also felt that the income stream of $80,000 per year that Mr Avery anticipated meant that I could follow surf photography without worrying about having a steady wage."
>
> "Because he kept saying to me that he could easily earn me an income stream of $80,000 per year, I believed that I would have at least $80,000 a year to live on, if not more."
>
> "I did not prepare a budget and I do not recollect Mr Avery telling me to do so. I was not concerned at the time, however, as I felt like the $80,000 each year was a lot of money and that I would be able to live within that. I also thought that Mr Avery would tell me if I was drawing too much money because, for the reasons explained above, I thought he had only planned to give me $80,000 per year and would say something if I was drawing more than that."

[99] Her general understanding about her financial position was that she was "rich." When she was asked in cross-examination about whether Mr Avery had expressed concern about the level of her drawings she said:

> "And can I put to you that he told you that your spending was significantly more than you had estimated, and if it continued, it would affect the performance of your portfolio? Did he tell you that? – – – No.
>
> And is that again do you say you can't recall it or he didn't – he didn't say it? – – – Not that it was so negative that it sticks out as something that I remember. He was always very positive, reassuring. You know, from him, I had the impression that I had loads of money, but I was rich, but I was set up.
>
> Well – – –? – – – And that nothing was really – nothing was a problem.
>
> He, of course, didn't say – – –? – – – So not to worry.
>
> I'm sorry. He didn't say that, did he, that you've got loads of money, you're rich, and nothing's a problem. He didn't say that to you? – – – The impression that I got from the start, yes, that I was rich and wealthy."

[100] Shortly after that exchange, she was asked whether Mr Avery had ever used these words – "You're rich. You've got plenty of money. You've got nothing to worry about." Ms Bankier said that that was the impression she had. She didn't agree that he used those words but said he used words to that effect. Later, she said: "I thought I had a lot of money …"

[101] When Ms Bankier was contemplating entering into a lease for her proposed shop she felt comforted by the idea that she could get by on a capital amount of $1,000,000. In her affidavit, Ms Bankier said, after referring to having received an annual portfolio review in June 2007:

> "… At this stage, the document demonstrated the investments were worth $1,307,681.71. Again, my thinking at the time was that the investments were growing quite significantly when compared to the previous updates. I was pleased with this, but it does not surprise me because it was consistent with what Mr. Avery had always said to me would occur. It also gave me comfort because at that stage the business was in its early days in the retail shop and I understood that there would be expenses associated with this that were out of the ordinary expenses that I would need to bear before the business started to turn a profit. Because the compensation sum kept growing this did not give me great concern because I felt that if I spent up to $300,000 on the business, I would still have a million dollars or more invested by Mr. Avery and that would continue to grow over time and I could rebuild from there."

[102] When questioned about her thinking which led to entering into a lease for her shop she said:

> "Yes, the expenses were high for the – the business expenses and the information that was supplied to me, which is all that I relied on from Mr Avery, the reviews, which were consistently unclear and I didn't understand, where that – was that in '06, I had $1.56 million. So my mind, going into the gallery, I could have those expenses going into the gallery if it was $300,000, if it worked and we went into profit, that was awesome; if it didn't work, I'd be still well over a million dollars and – – –
>
> I think you say that – I'm sorry? – – – And from that I could rebuild. So I based my decision based on the information given to me by the person I trusted with my money, and I was reliant on the information that was given to me.
>
> Well the information you're referring to is a portfolio valuation at 1.3 million. Is that right? – – – One point two.
>
> One point three? – – – One point three? In – I believe in June '06 it's stated at the front of the review that it is 1.565, to the best of my memory."

[103] Ms Bankier was uncertain in her evidence about the basis of her belief that she could spend $300,000 without any great problem. When asked what she told Mr Avery about the use of $300,000 her responses consisted of statements such as:

> "I don't remember exact words, but that was a predominant thing in my mind going into the setting up of the gallery."
>
> "I feel that I did say that because it was a strong thing for me going into setting up the gallery. … I can't remember exact words."

[104] She was then asked:

> "So you told him where you – that you had this $300,000 figure in mind and you explained to him where it came from? – – – Yes.

> Into your mind. I see. And what did he say to that? – – – I can't remember exact words. He was very supportive and helpful in going into the setting up of the gallery.
>
> And what did he say about the analysis that you'd done that you could afford to spend $300,000 on it? – – – I – I don't remember."

[105] I do not accept that Ms Bankier's state of mind with respect to being able to spend the $300,000 on establishing the shop was based on anything specific said by Mr Avery. It was a view which she formed without any particular contribution by him. Similarly, there is nothing to support the "impression" she formed that she was "rich and wealthy." There is nothing in any of the SOAs which would cultivate such an idea. I do accept that Mr Avery expressed considerable confidence, at the beginning, in his ability to create a suitable return on her investment. And Ms Bankier remembered that and took him at his word. It, in the absence of appropriate warnings, contributed substantially to her view of her world.

[106] Ms Bankier's family history is relevant for this consideration. The Bankiers were not a wealthy family. It was put this way in the plaintiff's written submissions:

> "Ms Bankier was born in South Africa but had immigrated to Australia via the United States in 1990. She and her family had travelled by yacht for two and a half years from South Africa to the United States, where they left the yacht, and relocated to Australia at the beginning of 1990. Initially, they lived in a tent at Redcliffe, Queensland before settling in a house at Bellbowrie.
>
> Ms Bankier's family were not wealthy. They did not trade in shares, and they had little in the way of investments. As for Ms Bankier herself, her only source of income came from a part time job that she had as a sales assistant in a retail store in Indooroopilly shopping town."

[107] The notion that she was rich is more likely to have arisen from the fact that she was a young person who had received more money than she might previously have ever contemplated being hers.

[108] While I find that she had an inaccurate understanding of her financial position and that part of that (the income of $80,000 a year) was not due to anything said by Mr Avery, her overall position was conditioned by the advice she received. That advice was not tempered by any specific warning about the effect her spending would have on her capacity to fund her medical expenses. Rather, it was generally limited to statements to the effect that her spending required the sale of part of her portfolio. I turn to consider those "warnings."

Were warnings given? If so, what were they?

[109] The extent of the warnings alleged by the plaintiff to have been necessary are contained in paragraph 61 of the FASOC. So far as is relevant it asserts:

> "61. … a reasonable and prudent financial adviser would:
>
> (g) when providing written recommendations to the client also provide an explanation of the nature of the investment risks involved with

such investments and the strategy associated with the investments in terms that the client is likely to understand;

…

(i) advise or warn the client on the impact of the client's own actions on the ability to implement the financial plan or to achieve the desired lifestyle and financial goals if the client does not follow any budgetary parameters or restrictions upon which the advice is based;

(j) advise or warn the client on the impact of any investment decision which falls outside the advice provided in the financial plan;

(k) if all necessary personal and financial information has not been obtained, warn the client that the advice given may be incomplete or inaccurate;"

[110] The defendant identifies two categories of what it says were warnings conveyed to the plaintiff: those contained in documents it provided to her and those conveyed orally by Mr Avery.

The "documentary warnings"

[111] Mr Avery says that, with respect to written warnings, they have been "traced" in paragraphs 29-44 of his submissions. Those paragraphs refer to some SOAs and other documents, but no "warning" is identified. At most, they contain some explanations of investment principles and some very general advice about the state of the investment markets. They do not go beyond saying that expenses over the budgeted amount of $54,000 would have to be satisfied by liquidating parts of the portfolio. In circumstances where Ms Bankier had been told that Mr Avery's strategy would result in her portfolio increasing, they do not constitute a warning of the kind referred to above.

The "oral warnings"

[112] Mr Avery relies upon what he told Ms Bankier at their meetings when finances were discussed and, in particular, what he says were "oral warnings" at various times. In his submissions these were described by reference to his affidavit. I now turn to the contents of those identified paragraphs.

[113] On 8 March 2004 he had a telephone conversation with Ms Bankier. She told him that she needed $25,000 for travel associated with her work as a freelance photographer. He told her that those expenses would need to be funded by selling off some of her portfolio as she had only budgeted for $5000 per year for travel. Her response was that she was comfortable spending this amount of money as it would help her business in the long run and she would make it work. Mr Avery says: "This was subsequently a recurring theme in my discussions with her where I would raise concerns about her expenditure and she would justify it as being for her business."

[114] On the 11 November 2004 Mr Avery and Ms Bankier had another telephone conversation in which she asked for a further $10,000 to be transferred into her account. He told her that he

had been trying to see her since July for her review and that he wanted to speak with her about her portfolio and budget given her spending. For the reasons given earlier, I do not accept that there was a conversation about spending.

[115] On 15 December 2004 she attended the offices of AFP to sign various documents related to some new investments. There is a file note (Mr Avery was not present) but no indication of what, if anything, Ms Bankier was told on that occasion.

[116] In April 2005 they met and Mr Avery told Ms Bankier that she would need to reduce her living expenses to avoid eating into her capital. She said that she would and that she would "stick to a drawings budget of around $35,000 per year." Mr Avery told her that any money spent on her business would be drawn against capital.

[117] In a telephone conversation of 16 May 2005, Ms Bankier told Mr Avery that she wanted to buy a new car. He told her that he was concerned about her expenses and the long-term impact on her portfolio. This is not reflected in his file note of that conversation and I do not rely on it.

[118] On 1 June 2005 AFP provided Ms Bankier with a written Statement of Additional Advice. It concerned her recent proposed expenditure and the cost of her new car. Some of the capital had to be sold to fund these expenses. The Advice noted that there were expenses of some $41,000 and went on to say: "We have recommended that you redeem $15,000 of the funds from the Challenger Howard Mortgage Trust. This fund is fairly liquid and has been intended to use towards cash flow shortfalls over time."

[119] The advice given on 1 June 2005 was typical of most of the advice ordinarily given. There was a notation of the expense involved and a statement that some investments would need to be sold in order to fund that expense. No warning was given of the consequences to the plaintiff of that particular action.

[120] A more cogent piece of advice was given at a meeting on 29 June 2005. Mr Avery says that he explained to Ms Bankier that he had concerns about her spending and its impact on the portfolio. He told her that her spending had significantly exceeded the income generated by the portfolio which meant that she was eating into capital. He told her that this was not sustainable in the long term. She replied that she understood and that she saw her spending on her business as an investment in her future and that that she would make it work.

[121] The conversations which Mr Avery had with Ms Bankier are dealt with later in these reasons.

[122] Mr Avery and Ms Bankier had a meeting at the offices of AFP on 4 May 2006. At that meeting Mr Avery records in a file note that they went through her portfolio, discussed its performance, and that she was very comfortable with it. The file note records that Mr Avery made a recommendation that she invest $40,000 into the Great Southern Olive Project and to do that by means of a 10 year loan with interest prepaid for one year. He notes that "the reason for that is that she is going to set up her business next year and hopefully turn over enough money to be able to claim her tax losses. This is the year where she needs more of a tax deduction and we want to also then produce further income going forward from the Olives from five years on."

[123] They then discussed the business plan which she had prepared with respect to her proposed shop and Mr Avery notes: " … she's done a very thorough job of preparing a business plan for her photographic gallery and that probably won't really start for at least another 6 months yet."

[124] Mr Avery did not explain why Ms Bankier would need to generate tax deductions for a business which he had told her would not be viable. In his affidavit, he says that the business plan showed that the business would run at a loss and that he again told her the business was not viable. This inconsistency was not explained by him.

[125] In the written submissions provided for the defendant there are references to other parts of his affidavit and some are described as constituting "oral warnings." That is a very generous description for some of them. For example, one oral warning is described in paragraph 249 of his affidavit in this way: "During this meeting I again raised my concerns about Michelle's level of drawings. I told them she should look for ways to reduce her expenditure, particularly on the business." A similarly bland piece of advice is recorded at paragraph 260 of the affidavit.

[126] Another warning is said to be demonstrated in paragraph 300, which is evidenced by a file note. That concerns a meeting on 5 June 2008 in which it is recorded that Ms Bankier was turning over in excess of $25,000 a year but that she had losses carried forward of $190,000 and thus would have at least a loss of $100,000 on the shop. Mr Avery says that he specifically told both Ms Bankier and her mother that she could not keep up the level of drawings she was making from her portfolio to supplement the business and that Ms Bankier said that the business would improve.

[127] There is no warning recorded in the file note for that meeting.

[128] The final "warning" relied upon by Mr Avery occurred at a meeting with Ms Bankier and her mother at the Burleigh Heads shop on 10 October 2008. The file note records him saying words to the effect:

> "Shelli's current net value of her investment portfolio is $800,000.
>
> I advised Shelli that she needs to review the situation Christmas 2008 to review whether the business is consistently the same even during the busy Christmas period.
>
> I advised her that depending upon the results; she may need to consider selling the business (if that was possible, and I asked her), or shutting up the shop, and trying to get the shop re-leased, and just pay the rent, that way she would be able to save on the other costs apart from rent. (Michelle is currently spending $15,000 a quarter, which is about the same as the rent).
>
> So the business is effectively going broke. I was very blunt about this fact. I had talked to her about this the last time I sat down with her.
>
> I said to her (very seriously) that she cannot continue to be funding this business and her lifestyle to this extent or she will be using up all her capital that she was given when she had the car accident, which was supposed to look after her for the rest of her life."

[129] Ms Bankier has a different recollection of that meeting. She said that Mr Avery appeared very grim and upset and repeatedly said that he was sorry. She says that they did not talk about her business to any great extent because the real focus was on the falling share market.

[130] I accept that Mr Avery's file note of the meeting is more reliable. It evidences that that was the first time Mr Avery ever explicitly warned Ms Bankier that her spending on the business could lead to the loss of the capital sum upon which she had to rely for the rest of her life. Until then the only direct "warning" was the expression of opinion that the business would not be viable. Anything said to her before then about spending was fairly low-key. It was generally along the lines that part of her portfolio would have to be sold to pay for travel and so on. There had been no connection made between spending, the dissipation of her essential capital resource and the effect that would have on her future.

What would Ms Bankier have done had warnings been given?

[131] Ms Bankier said that she had always followed Mr Avery's advice. Mr Avery denied that, saying that she made her own decisions. He did not identify any times where she rejected his advice.

[132] The most common type of advice he gave her is to be found in the SOAs. In those SOAs he would propose the disposal or purchase of shares or other securities and there is no instance of that type of recommendation being rejected. Ms Bankier left the investment strategies to Mr Avery.

[133] I do not doubt that, had Mr Avery warned Ms Bankier about the real consequences of her spending, of her investment in agri-business, of her borrowing money for a Palm Beach property and of her entry into the Burleigh Heads business, she would not have gone ahead with those ventures.

Investing in agri-business

[134] In early 2005 the investments made on Ms Bankier's behalf were returning an income and Mr Avery started looking for ways in which she could minimise her tax. He advised her that she should invest in Great Southern Vineyards and Great Southern Plantation Woodlots. Each of them attracted substantial taxation benefits. In each case, she borrowed the full amount of the investment from the scheme promoter but also carried the risk, should the business fail, that she would be liable to repay the loans. As it happened, the businesses did fail, but the amount invested (and lost) was not great – $9,500 for Great Southern Vineyards and $3,000 in Great Southern Plantations.

[135] It was contended that these investments were financed by a margin loan. That is not correct. The loan was an ordinary facility advanced by the scheme promoter which was repayable in accordance with its terms – it was not conditional upon the investment retaining a certain value.

[136] The businesses failed and Ms Bankier remained liable to repay the loans. This, it was argued, was an unwise investment and inconsistent with a balanced portfolio. I am persuaded by the effect of the evidence of Mr Richards (the financial expert called by the defendant) that, while it was a marginal investment, it was not necessarily negligent to recommend it. He was asked:

> " … Would you agree that such an investment, which includes borrowing money to fund the investment, was inappropriate for someone in the position of Ms Bankier?
>
> Mr Richards: Your Honour, if the only thing she did was invest in agribusiness, it's inappropriate, but it – when you're looking at whether or not an isolated investment is appropriate, it can only be looked at in the context of her entire portfolio. For example, if she invested half a million dollars into agri, I would find that inappropriate. It would be too big a weighting in the context of her overall portfolio. So in order to answer the question, I can only answer it when I'm looking at exactly how much she invested, which I understand was about eight per cent of her portfolio at the time.
>
> It's probably borderline, your Honour, but – and it also – I must say, it also depends on what other investments she had in her portfolio at that point. It's certainly not a safe option. In terms of diversification, there's benefits. In terms of what was known about agribusiness at the time of the advice, based on the research at the time, it probably just got a tick. Certainly, in hindsight you wouldn't touch it, but hindsight's a wonderful thing. What we've got to base our decision on is what was known about agribusiness investments at the time. And I'd say it just gets a tick, your Honour, but I've got to be honest, it just gets a tick."

The Palm Beach property

[137] In the first part of 2005 Ms Bankier became aware of a property for sale at Palm Beach. She thought it would be a good investment on the basis of her understanding of the local property market. On 6 April 2005, she sent Mr Avery an email which demonstrated that she had given considerable attention to the prospect of purchasing the property. For example, she referred to: the purchase price, her living expenses, the BlueSphere expenses (which she said could be lowered), and that he had told her that her investments were bringing in $60,000 a year. She asked him to "work out the figures and see if it would be viable."

[138] The complaint made by the plaintiff about this investment is that Mr Avery advised her to (and she did) borrow the whole amount of the money needed for the purchase – $395,000. Ms Bankier says that the appropriate advice would have been for her to use her own capital to purchase the property.

[139] Mr Avery denies giving advice on how the property should have been financed and, indeed, says that his advice was not sought on that point. He did prepare calculations of the potential cost of the purchase and gave that information to Ms Bankier and her mother. Mr Avery says that he told Ms Bankier that the purchase would result, assuming a rental income of $280 a week, in an annual loss of about $22,685. In evidence he said that he did not support the purchase and told Ms Bankier that it was not viable. That is not reflected in any file note he made.

[140] There is no written evidence that there was any advice that the property should be paid for out of capital. In his affidavit, Mr Avery said that Ms Bankier and her mother told him that they would prefer to maintain the investments in the portfolio and "to fund the purchase via a

loan." No note is made of such an important expression. A handwritten note of 7 April 2005 by Mr Avery records: "discussed purchase of Palm Beach house with Shelley and Jenny and agreed … Shellie to be $340k and we will arrange finance for the lot." AFP did arrange the finance. In all the circumstances, I regard it as more likely than not that the financing of the purchase was done on Mr Avery's advice. It was something well outside Ms Bankier's experience and competence.

[141] The issue which arises out of this transaction is the unnecessary expenditure on interest and the acquisition of an asset which, unlike other investments in her portfolio, could not be partially liquidated by Ms Bankier.

[142] Ms Bankier is now a joint tenant with her partner of the Palm Beach property and it is valued at $875,000.

The business plan and the shop lease in Burleigh Heads

[143] On 18 October 2005 Mr Avery received a telephone call from Ms Bankier. The conversation concerned her intention to lease a shop so that she could sell her photographs. He took a file note in which he records that:

> "Shelli is considering leaseing [sic] a shop for exhibiting her photos. I told her to work out all expenses and potential income and get details of the lease and do [a] business plan before rushing into it. I advised that I thought it was not a viable option but she says she can make it work."

[144] Ms Bankier was cross-examined on this and was a little vague in her answers. It was put to her that Mr Avery told her that her proposal was not a viable option and she agreed. Later she said that she could not remember the exact words which were used. I accept that the file note made by Mr Avery is an accurate summary of the conversation and that she was told that he thought that leasing a shop was not a viable option. Very early in her cross-examination Ms Bankier was asked:

> " … So this was within your contemplation, this matter of expenditure on living expenses and the like, eating into capital, if you weren't sticking to the budget? – – – Yes. I was told by Mr Avery very early on, at the start, when I had the 1.3 million amount, after paying out those first costs and expenses, that I would get 80,000 a year, no worries.
>
> …
>
> Now – but if you'd been told it was 54, you'd have stuck to 54? – – – Yes.
>
> And if you'd been told the business wasn't viable, you wouldn't have gone into it; that is the gallery? – – – I wouldn't have done it; yes."

[145] Later in her cross-examination, the following exchange took place with respect to Ms Bankier opening the gallery at Burleigh Heads:

> "Yes. Now, can I put it to you that he told you that that was not a viable option, your proposal [indistinct]? – – – Yes.

> He told you that, that it was not viable? – – – I don't remember the exact words.
>
> …
>
> I'm putting to you when you spoke on the telephone on the 18th of October 2005, he told you that your proposal to open the gallery was not viable? – – – I – I can't quite remember the exact wording.
>
> But you accept that he said something like that, used the word – – –? – – – I'm not sure. Because it wasn't meant to be a big money earner. It was – it was for something for me to focus on, purpose, meaning, because I had the income from the portfolio, and I was backed up by a large amount of money that I had at the time. So, yeah, I can't quite remember the – the words."

[146] In accordance with advice from Mr Avery, Ms Bankier prepared a business plan and Mr Avery assisted with the preparation of the financial aspects of that plan. An important aspect of the plan is the absence of any provision for wages. Mr Avery agreed in cross-examination that Ms Bankier didn't have the physical capacity to attend to the shop full-time. A consequence of that is that she would need to employ, as she did, staff to assist her. Thus, one of the most expensive parts of conducting business was not included in the plan. This was something which was clearly within Mr Avery's area of expertise and upon which he should have advised. Further, he did not warn her that she had a choice between commencing the business or preserving her assets so that she could have them for future expenses.

[147] As a part of the creation of the business plan, Mr Avery compiled a handwritten document which set out a list of expenses for operating the gallery. It included rental of $27,000 a year. On that basis, the gallery would incur an annual loss of $10,500. Ms Bankier was asked these questions:

> "Just going back again to that […] it appears to suggest a loss of $10,500. Do you see that? – – – Yes.
>
> And you understood that at the time? – – – Yes.
>
> Obviously, it would be more of a loss if the rent is 60,000, more than twice the estimate – of more than twice the first calculation? – – – Yes.
>
> You had to pay that each year? – – – Yes.
>
> So you understood that at the time? – – – Yes.
>
> You knew that you would be operating at a loss? – – – Yes."

[148] Mr Avery does not suggest that his initial advice about viability was taken any further. He didn't tell Ms Bankier that if she went into that business there was a likelihood that it would have an adverse impact on her portfolio. Similarly, Mr Avery could not recall saying anything to the effect that going into that business was likely to mean that she wouldn't be able to afford future medical costs and expenses.

[149] Between the time when Ms Bankier commenced the preparation of her business plan and the entry into a lease, the shop which she had originally wished to rent became unavailable and she was required to pay a much higher rent. The first shop had a rental of $27,000 a year while

the shop she eventually occupied had a rent in the order of $60,000 a year. Mr Avery knew of this increase in rent but did not give any clear warning about the adverse effect this would have should the business be unsuccessful.

[150] Ms Bankier entered into the lease and, at that point, committed herself to pay the rent on the shop for the next three years. No advice was given about the adverse effect that this would have on her capacity to afford future medical expenses if the business was, as Mr Avery thought it would be, a failure.

Did Mr Avery breach his duty to Ms Bankier?

[151] Mr Avery owed a duty to warn Ms Bankier of the material risks of a potential investment. He did not do this with respect to either the Palm Beach property or the Burleigh Heads shop. There is greater disclosure with respect to the Great Southern investments and, given the small proportion they represent in Ms Bankier's total portfolio, I do not regard them as being of significance.

[152] The other aspect of the conduct of Mr Avery which constitutes a failure on his part is the omission to warn about spending. Ms Bankier was a confident, perhaps headstrong, young person who was determined not to let her injuries confine her. But, she was owed a duty, at least, to warn her about the full consequences of her spending. It was not enough to say that she would have to eat into her capital to pay for her travel. That was only a primary consequence. The material risk to which, I find, she would have attached significance, was the harm it would do to her capacity to fund her medical expenses. Notwithstanding her enthusiasm for her photography and its associated activities, I am satisfied that she would have changed her ways and she would have reduced her spending if she had been adequately alerted to the effect it would have on her financial position. Ms Bankier was reminded every day of the physical effects of the accident. She was confined to a special diet. She tired easily. This was not a condition which could be forgotten. She had to adjust her activities to account for her disabilities and there was no prospect that she ever forgot or overlooked that.

[153] Her view of the world was formed not only by her own ambitions and beliefs, but also by the initial statements by Mr Avery about her investments and how they could be made to grow. I accept that Ms Bankier did tend to see her world through rose coloured glasses but that would have been obvious to Mr Avery. He was not, of course, her guardian or fiduciary but he was aware of the purpose of the award made in her favour even if he had not properly familiarised himself with the reasoning behind it. The reaction by AFP to Ms Bankier's requests for funds – often nothing more than a transfer as sought – was capable of being seen by her as further confirmation that she had sufficient money to engage in these pursuits.

Disability pension and superannuation

[154] Two matters which assumed a prominence during the trial which would not have been expected by a reader of the pleadings were:

(a) whether, and when, Ms Bankier would be entitled to receive a disability pension, and

(b) whether some or all of the judgment sum should have been invested in superannuation.

Relevance of a disability pension

[155] The FASOC does not contain a specific pleading related to a disability pension. It is adverted to, in a general way, in the following paragraphs:

(a) 61(c)(vii) "obtain information from the client including … the client's social security entitlements"

(b) 61(d) "use the information obtained about the client … to prepare a financial plan"

(c) 62(f)(viii) "the defendant … failed to obtain the plaintiff's personal circumstances regarding … her Social Security entitlement and how they could be used to assist with providing the required income"

[156] It was contended on behalf of Ms Bankier that Mr Avery should have taken into account the possibility/likelihood of her being entitled to receive a disability pension. Mr Avery said that he understood that there was a deferment period for such a pension and that that she would have been subject to some asset or income testing. To his knowledge she would not have become eligible for some years and, because of that, he proceeded on the basis that it could be dealt with later.

[157] The plaintiff's case on this point was not burdened with precision. I was not directed to any legislation which applied either then or now. And the plaintiff seemed content to rely upon some vague expressions of what each of the expert witnesses understood to be the case. Nothing was put to Mr Avery other than some broad statements about possible entitlement. Assuming, for the sake of argument that Ms Bankier might have become eligible for a disability pension after some 15 years, there was no evidence that would allow me to understand what the requirements were for such a pension and what Ms Bankier might have received had she been entitled.

[158] It appears to have been accepted that Ms Bankier would have had to wait for the exploration of a deferment period of 15 years. I do not regard it as a breach of the duty owed by Mr Avery for him not to take into account an undefined sum which might not be received.

Should the award have been invested in superannuation?

[159] The only reference, oblique though it is, to superannuation in the pleadings is contained in the description of the "Alternative Investment Strategy" in para. 68(i)(vii)(B) of the FASOC:

> " … failing to advise … the plaintiff that alternative strategies included investment:
>
> (A) in risk-free assets with a low return, with income and capital used to fund living needs with a minimal capital remaining towards the end of the plaintiff's life, and making use of future entitlement to income from Centrelink; or
>
> (B) of some funds into a cash account and the remainder in a "conservative" to "balanced" portfolio, and **using superannuation**, with the plaintiff able to

> use the income and capital to fund living needs and making use of future entitlement to income from Centrelink;" (emphasis added)

[160] By the time the plaintiff made her written submissions that glancing blow had become a full blooded attack on the defendant with an assertion that Mr Avery owed a duty to Ms Bankier to "advise her that she could invest the whole or part of the judgment sum in superannuation and thereby receive a tax-free income." That was not a contention supported by the pleadings. It was not referred to in the experts' reports and really only became an issue during cross examination of Mr Avery and then the evidence given concurrently by Mr Green and Mr Richards.

[161] The law governing superannuation is a dark wood into which few can venture with confidence. Even at the relevant time there was no certainty about the way in which a superannuation fund might be treated in the future. Because the matter arose, as it were, on the run, the financial experts were not in a position to offer any conclusive opinion on the subject. There was no evidence that Ms Bankier could have obtained a tax-free benefit from superannuation within a reasonable time of such an investment. I was not referred to any legislation which would support an argument that Ms Bankier could have placed the award into a superannuation fund and immediately reaped a benefit. Neither Mr Green nor Mr Richards had any confidence that she would have been able to obtain payments from a superannuation fund without going through a series of steps none of which were satisfactorily explained. The plaintiff has not established that there was any negligence or statutory breach with respect to this aspect of the claim, nor has it been established that a notional investment in a superannuation fund should be taken into account on the assessment of damages.

Effect of the *Civil Liability Act* 2003

[162] The plaintiff argued that s 22 of the *Civil Liability Act* 2003 (CLA) did not provide any protection for Mr Avery. That section sets out a definition of the standard of care for professionals.

[163] The anterior question is: was Mr Avery a professional for the purposes of the CLA? A "professional" is defined in s 20 to be a "person practising a profession." The term "profession" is not defined in the CLA. Accepted dictionary definitions of "profession" vary:

> "a vocation requiring knowledge of some department of learning or science",
>
> "a paid occupation, especially one that involves prolonged training and a formal qualification" and
>
> "a vocation in which a professed knowledge of learning is used in its application to the affairs of others or in the practice of an art founded upon it."

[164] A financial adviser comes within the last of those definitions. Thus, the CLA applies to Mr Avery.

[165] Section 22 provides:

> "(1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer

professional opinion by a significant number of respected practitioners in the field as competent professional practice.

(2) However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.

(3) The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

(5) This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service."

[166] No protection is afforded to liability arising from the giving, or not giving, of advice – see s 22(5).

[167] The CLA applies so far as Mr Avery's advice concerning investments and so on is concerned. The only evidence of peer professional opinion came from Mr Green and Mr Richards. Mr Green's opinion was that Mr Avery's advice was substantially deficient in all respects. Mr Richards' opinion was more generous but all the evidence adduced does not support a finding that Mr Avery "acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice." Thus, no protection is afforded by this section.

The *Corporations Act* Claim

[168] It was not disputed that the *Corporations Act* 2001 (as it then provided) applied to the defendant.

[169] The plaintiff asserted breaches of s 945A and s 945B of the *Corporations Act*. Those sections provided:

"944A Situation in which Division applies

This Division applies in relation to the provision of personal advice (the *advice*) in the following circumstances:

(a) the advice is provided:

by a financial services licensee (the *providing entity*); or

by a person (the *providing entity*) in their capacity as authorised representative of a financial services licensee (the *authorising licensee*), or of 2 or more financial services licensees (the *authorising licensees*); and

(b) the advice is provided to a person (the *client*) as a retail client.

Subdivision B—Requirements relating to basis of advice

945A Requirement to have a reasonable basis for the advice

(1) The providing entity must only provide the advice to the client if:

(a) the providing entity:

(i) determines the relevant personal circumstances in relation to giving the advice; and

(ii) makes reasonable inquiries in relation to those personal circumstances; and

(b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and

(c) the advice is appropriate to the client, having regard to that consideration and investigation.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

…

945B Obligation to warn client if advice based on incomplete or inaccurate information

(1) If:

(a) the advice is based on information relating to the client's relevant personal circumstances that is incomplete or inaccurate; and

(b) the providing entity knows that the information is incomplete or inaccurate, or is reckless as to whether it is incomplete or inaccurate;

the providing entity must, in accordance with subsections (2) and (3), warn the client that:

(c) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and

(d) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's relevant personal circumstances.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The warning must be given to the client at the same time as the advice is provided and, subject to subsection (3), by the same means as the advice is provided.

(3) If the Statement of Advice (see Subdivision C) is the means by which the advice is provided, or is given to the client at the same time as the advice is provided, the warning may be given by including it in the Statement of Advice.

Note: The Statement of Advice must at least contain a record of the warning—see paragraphs 947B(2)(f) and 947C(2)(g)."

[170] The consequence of a breach is set out in s 953B:

"953B Civil action for loss or damage

(1) This section applies in the following situations:

(a) a person:

(i) is required by a provision of this Part to give another person (the *client*) a disclosure document or statement (the *required disclosure document or statement*); and

(ii) does not give (within the meaning of section 940C) the client anything purporting to be the required disclosure document or statement by the time they are required to do so; or

(b) a person:

(i) gives another person (the *client*) a disclosure document or statement that is defective in circumstances in which a disclosure document or statement is required by a provision of this Part to be given to the client; or

(ii) is a financial services licensee and gives, or makes available to, another person (the *client*) a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, that is defective, reckless as to whether the client will or may rely on the information in it; or

(c) a person contravenes section 945A, 945B, 949A or 949B.

In paragraph (b), *give* means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

(2) In a situation to which this section applies, if a person suffers loss or damage:

(a) if paragraph (1)(a) applies—because the client was not given the disclosure document or statement that they should have been given; or

(b) if paragraph (1)(b) applies—because the disclosure document or statement the client was given was defective; or

(c) if paragraph (1)(c) applies—because of the contravention referred to in that paragraph;

the person may, subject to subsection (6), recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) and (4)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (b) or (c).

(3) For the purposes of subsection (2), the, or a, *liable person* is:

(a) if the person first-referred to in paragraph (1)(a), (b) or (c) is a financial services licensee—subject to subsection (4), that person; or

(b) if the person first-referred to in paragraph (1)(a), (b) or (c) is an authorised representative of only one financial services licensee—that financial services licensee; or

(c) if the person first-referred to in paragraph (1)(a), (b) or (c) is an authorised representative of more than one financial services licensee:

(i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee; or

(ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees.

(3A) For the purposes of paragraph (3)(c):

(a) section 917C is taken to apply, despite section 917F; and

(b) section 917D is taken not to apply.

(4) If:

(a) paragraph (1)(b) applies; and

(b) an alteration was made to the disclosure document or statement before it was given to the client; and

(c) the alteration made the disclosure document or statement defective, or more defective than it would otherwise have been; and

(d) the alteration was not made by, or with the authority of, the person who would, but for this subsection, be the liable person because of paragraph (3)(a);

then, so far as a person has suffered loss or damage because the disclosure document or statement was defective because of the alteration, the liable person is the person who made the alteration, rather than the person referred to in paragraph (d).

(5) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(6) A person is not liable under subsection (2) in a situation described in paragraph (1)(b) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

(7) This section does not affect any liability that a person has under any other law."

[171] So far as is relevant, s 945B requires a person in Mr Avery's position to warn a client if the advice being given is based upon incomplete or inaccurate information.

[172] In circumstances where advice is being given with respect to the appropriate investments which should be made, then the matters which are material to that advice include the costs which will be incurred by the client over and above those which would be incurred by a client without the physical injuries suffered by Ms Bankier. Mr Avery accepted that he was unaware of: the cost of future surgery, the cost of future equipment which Ms Bankier would need, the cost of future domestic assistance, and the loss which would occur in the future due to her inability to obtain a level of financial certainty. All of those matters were essential to take into account in the formulation of an investment strategy. Mr Avery did not provide the warning required by s 945B. As a result, s 953(1)(c) is engaged and Ms Bankier is entitled to recover any loss or damage suffered as a result of the contravention.

Did the plaintiff's own conduct contribute to any loss she suffered?

[173] The defendant pleaded that if the plaintiff did suffer loss as a result of the defendant's conduct, then that loss was caused or contributed to by the plaintiff spending more than she should have and drawing down on capital to fund her lifestyle and business enterprises. No substantial argument was advanced on behalf of Mr Avery in support of that pleading. In any event, the conduct said to amount to contributory negligence was conduct which was engaged in, as I have found, because Mr Avery did not provide appropriate warnings about the consequences of her conduct. Ms Bankier could not withdraw the money which she used for her travel and photography business without asking for the defendant to transfer sufficient funds into her operating account. As I have found that Ms Bankier would have, had she been given appropriate warnings, not withdrawn those funds, then it cannot be said that it was her conduct which contributed to the loss she suffered.

[174] If, contrary to my finding, Ms Bankier's conduct did contribute to her loss, it was not contended that that would have any effect on the *Corporations Act* action.

Has Ms Bankier suffered a loss? And, if so, was it caused by Mr Avery's breach?

[175] The plaintiff has pursued her claims under two heads (breach of contract having been abandoned). Each of them concerns breaches of duty which are differently described but are basically the same.

[176] A major point advanced for the defendant on this topic is that the plaintiff has not identified any loss which has been caused by any one of the multiple breaches of duty alleged against the

defendant. It is correctly pointed out that the claim by the plaintiff (in para. 75 FASOC) is that: "Due to [the breaches of duty] the plaintiff did not implement the Alternative Investment Strategy." But the claim by the plaintiff also alleged (in para. 68(c) of FASOC) that the defendant failed to explain to the plaintiff the implications upon, or risks to, the Investment Strategy in the long term of:

(a) spending beyond budget levels,

(b) making gifts of cash to others,

(c) borrowing money, and

(d) starting, continuing, expanding, and the possible failure of, the business at Burleigh Heads.

[177] Apart from the making of gifts of cash to her relatives, I have found that the defendant breached its duty to Ms Bankier. I am satisfied that as a result of that breach, Ms Bankier wasted money which she could otherwise have maintained in investments.

[178] For Mr Avery it was argued that if, having regard to the calculations made by Mr Richards, the actual performance of the portfolio exceeded that of the hypothetical, there can be no loss in any event and no liability on the part of the defendant. But that overlooks the consequences of Mr Avery having failed to give appropriate warnings which, in turn, led to the dissipation of the fund available for investment. While the investments he recommended may have had greater returns than the industry average (as calculated by Mr Richards) that does not take into account the waste to the asset brought about by Mr Avery's breach of duty.

[179] The parties agreed upon a schedule of damages, should I find for the plaintiff, which took into account a number of scenarios. The two issues which need to be determined are:

(a) Should tax be taken into account at this stage?

(b) Should fees be taken into account?

[180] The question of tax arises because of the proposition, put late for the plaintiff, that she would have invested in superannuation and the income from that would have been tax-free. I have found that the evidence does not support a conclusion of that kind and so tax should be taken into account on income received from investments. The second point concerns the payment of fees to an adviser. It was argued for the plaintiff that a prudent adviser would achieve higher returns such that any commission payable would be negated. But, if one takes into account higher returns in any assessment than any cost in achieving those returns must also be taken into account. I conclude that both tax and fees should be part of any calculation of damages.

[181] Mr Ashton argued that the value of the property held by Ms Bankier at the time of the trial had increased substantially and should also be taken into account as demonstrating that her loss was not as great or was not a loss at all. That, with respect, overlooks the ground upon which damages are ordered in tort, namely, that the plaintiff is to be put in the position which would have obtained had there not been a breach of duty. Had there not been a breach of duty, then Ms Bankier would have had more money to retain in her investments.

[182] As I understand the calculation set out in Exhibit 12, on the findings I have made, the loss suffered by the plaintiff, at 30 June 2010, is $637,508. I will invite the parties to make further submissions about the consistency of that figure with my findings and with respect to the possible "grossing up" of that amount on the basis that it is liable to tax as an assessable recoupment.[8]

The limitation point

[183] So far as is relevant, s 10 of the *Limitation of Actions Act* 1974 provides:

> "(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose—
>
> (a) subject to section 10AA, an action founded on simple contract or quasi-contract or on tort where the damages claimed by the plaintiff do not consist of or include damages in respect of personal injury to any person"

[184] When a defendant pleads that the plaintiff's action was commenced after the expiration of the limitation period then the onus of proving that rests with the defendant.[9] Thus, in this case, HAP2 has to prove that any actual and measurable loss which might have occurred, occurred outside the statutory period.[10]

[185] The defendant did not approach the task of supporting its plea with much enthusiasm. In oral submissions I asked Mr Ashton QC if he was "pursuing the limitation point." His response was that it was mentioned in his supplementary written submission. In that document, only the following appears:

> "The defendant persists in its plea as to time limitations. The proceedings were commenced on 23 October 14 [sic]. By 23 October 2008 any relevant contract breaches had occurred and losses were known."

[186] The occurrence of any "contract breaches" is irrelevant because, as is noted earlier in these reasons, the plaintiff accepts that the cause of action in contract is time-barred and does not pursue it.

[187] Without any further assistance it is not possible to determine whether the reference to "losses" relates only to contract breaches or, more broadly, to the other causes of action.

[188] In the FASOC there is no allegation of any particular loss being incurred at any particular time. Rather, it is alleged that, because of the negligence pleaded earlier in the FASOC, "the plaintiff has suffered loss and damage as at 30 June 2010 in the sum of $759,893 (being the plaintiff's notional asset position of $1,247,854 less the plaintiff's actual position of $503,170 as adjusted by agreement between the parties)." The reference to "agreement between the parties" is to

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[8] *Tomasetti v Brailey* (2012) 274 FLR 248; *Jamieson v Westpac* (2014) 283 FLR 286; [2014] QSC 32

[9] *Pullen v Gutteridge, Haskins & Davey Pty Ltd* [1993] 1 VR 27

[10] *Cigna Insurance Asia Pacific Ltd v Packer* (2000) 23 WAR 159

an agreement, based upon a number of assumptions, about the extent of alleged loss at 30 June 2010.

[189] In the plaintiff's written submissions that pleading is supported by the following contention:

> "As to the date the loss ought be calculated from, it is submitted that the appropriate date is 30 June 2010 being the last day (or near the last day) that Mr Avery was involved as the Plaintiff's financial adviser. At this time, Mr Avery sold his business and the Defendant ceased to be the Plaintiff's financial adviser. Accordingly, there were no actions that occurred after this time that are attributable to Mr Avery and the loss and damage that he had caused is appropriately quantified at this date."

[190] While it might be argued that 30 June 2010 is an appropriate date for the calculation of total loss, whether that is the appropriate date for the purposes of determining when the limitation period started to run needs to be considered in light of the authorities. The relevant date is the date on which the cause of action arose. The cause of action for negligence is incomplete until damage has been suffered:

> "[5] However, to show the existence of a completely constituted cause of action in negligence, a plaintiff must be able to show duty, breach, and damage caused by the breach; accordingly, in the ordinary case, it is at the time when that damage is sustained that the cause of action 'first accrues' for the purposes of a provision such as s 11 of the *Limitation Act*."[11]

[191] The statutory causes of action pleaded by the plaintiff are premised upon proof of loss or damage and, so, the principles governing accrual of causes of action in negligence apply in that context.[12]

[192] The following, relevant principles emerge from the authorities:

(a) A cause of action in negligence accrues when loss first occurs. However, the damage must be more than minimal.[13]

(b) When there is one cause of action which has accrued it covers all subsequent loss and damage which is attributable to the same cause, even if that loss and damage only manifests itself later on by stages.[14]

[193] The plaintiff does not, either in her pleading or in her written submissions, identify any particular loss said to have been caused by any one of the many breaches of duty alleged against the defendant. Rather, it is pleaded:

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[11] *Commonwealth v Cornwell* (2007) 229 CLR 519, [2007] HCA 16

[12] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527

[13] *Ratcliffe v VS & B Border Homes Ltd* (1987) 9 NSWLR 390 at 398

[14] *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132

> "Due to the matters pleaded at paragraphs 62 to 69 above, the plaintiff did not implement the Alternative Investment Strategy."

[194] It is then pleaded that, had the plaintiff been advised to implement the Alternative Investment Strategy, she would have done so and would not have suffered a reduction in her net asset position of $759,893.

[195] The gist of the plaintiff's action is that the defendant breached his duty to her by implementing the strategy he used and giving the advice he did give instead of implementing the Alternative Investment Strategy. But the Alternative Investment Strategy is made up of a number of events which, it is alleged, the defendant should have done or should not have done over an unidentified period of time. The events are described in paragraphs 62 to 69 of the FASOC. These many acts or omissions are all pleaded as being of the same rank in that no priority of importance is assigned.

[196] Where it is alleged that the error on the part of a financial adviser is, in large part, the failure to implement a particular strategy, then it is necessary to fix the time when the damage first occurred. That in itself is not easy. Strategies which are implemented can fluctuate in their effectiveness and are, of course, subject to external influences which might not have been foreseeable to the most astute adviser.

[197] An example of a single piece of financial advice resulting in damage occurring many years later can be found in *Commonwealth of Australia v Cornwell.*[15] Mr Cornwell was negligently advised, in 1965, that he was not eligible to join a particular superannuation fund. He retired in 1994 and, in 1999, claimed the additional benefits he would have received had he been admitted to that particular fund. The Commonwealth contended that his claim was statute-barred on the basis that the employee's loss had been actualised either in 1976, when the fund was replaced, or in 1987, when he joined another fund. The majority[16] held that he had sustained actual loss only on his retirement, so that his cause of action in tort for the negligent advice accrued on that date. They said:

> "[16] In *Hawkins v Clayton*, Gaudron J emphasised the importance for actions for negligence causing economic loss in identifying the interest said to be infringed, whether it be the value of property, the physical integrity of property, or the recoupment of moneys advanced. Thereafter, in *Wardley Australia Ltd v Western Australia*, Mason CJ, Dawson, Gaudron and McHugh JJ observed:
>
> > 'To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-

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[15] (2007) 229 CLR 519

[16] Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ

> present risk of undercompensation or overcompensation, the risk of the former being the greater.'

Their Honours also said:

> 'The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospectiveloss is not enough."

[198] The pleading can be read as if any failure to do or not do one of the listed actions would constitute a breach of duty. That is not a practical approach. Because a cause of action will not accrue where the damage is minimal, I will not consider comparatively minor matters such as the alleged failure to take into account "her need for and associated cost of massage treatment."

[199] The relevant date for consideration of this point is 23 October 2008, being six years before the proceeding was commenced. At that time, Ms Bankier was still being advised by the defendant. She was not advised to liquidate her investments – this would have crystallised her loss. The principle in *Wardley* supports the conclusion that Ms Bankier's loss was not sustained – for the purpose of determining the limitation period – until the investments were realised by advisers retained after Mr Avery ceased to be her adviser. This occurred after 23 October 2008. No argument was advanced that any other action or result of an action attracted the operation of the *Limitation of Actions Act.*

Conclusion

[200] There will be judgment for the plaintiff. The amount of the judgment will be determined after further submissions are received.