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

Comment

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

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

Where a professional trustee is appointed, even though a consequence of those obligations may be that the standard of services provided is higher than the unassisted decision-making of an adult with no particular skill, training or interest, costs are recoverable at the higher standard. This is because the plaintiff has no choice but to accept such services. However, in *Willett v Futcher* the court distinguished between those services that are necessary to perform the obligations under the trust (which are recoverable), from those services that are performed in the exercise of discretions but which are not necessary to discharge the obligations of trustee (which are not recoverable). PL

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

TIM PAINE, NSW

Liability of prison authorities for escapees

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

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INTRODUCTION

In *Home Office v Dorset Yacht Co*[1] the House of Lords held a prison authority liable in negligence for damage caused to yachts in the 'immediate vicinity' of the prison by juveniles 'in the course of' their escape from custody. In *State of New South Wales v Godfrey* the NSW

Court of Appeal held that no relevant duty was owed to a plaintiff injured by a prison escapee 'hundreds of kilometres from, and months after, an escape'.[2]

> "The court held that the place, time, and nature of offence to which the duty would extend were indeterminable, as was the class to whom it would be owed."

THE FACTS

The first plaintiff was working at a newsagency in western Sydney when the escapee, Hoole, entered with a shotgun and held her up. She was 23 weeks' pregnant and the trauma led to the premature birth of the second plaintiff. Hoole had escaped from Bathurst Gaol more than two months earlier.

At first instance Shaw J found for the plaintiffs, both within an established category of case and by reference to general principles. He referred to the right of prison authorities to control prisoners (even after an escape), the vulnerability of the plaintiff (who was pregnant), an assumption of responsibility (Hoole had been entrusted to the Department's custody) and the likelihood that Hoole would avail himself of any opportunity to escape and commit serious crimes (he was a heroin addict).

NO ESTABLISHED CATEGORY

These reasons were demolished on appeal by Spigelman CJ, with whom the other members of the court agreed: '[n]o authority has gone so far';[3] '[t]here is no authority which recognises a duty of care to the public at large, beyond the immediate vicinity of the gaol';[4] and '[i]f *Dorset Yacht* does represent the law in Australia, its application should ... be confined to the course of the escape'.[5]

The Chief Justice observed that where the right to control was relevant, it 'was combined with a capacity to assert control',[6] explaining why injuries occurring within a prison are distinguishable from those occurring after an escape when, 'by definition, the authority no longer has any element of control'.[7]

Pregnancy did not place the plaintiff at greater risk than other members of the public, nor did working in a newsagency.

Further, the assumption of responsibility to retain Hoole in custody was a statutory obligation, imposed in the public interest, rather than an obligation to take care of those at risk,[8] which would arise where, for example, the plaintiff is the defendant's employee or pupil.

PRINCIPLES OF NEGLIGENCE

Spigelman CJ based his rejection of any general duty on indeterminacy and the possibility of conflicting duties. The place, time, and nature of offence to which the duty would extend were indeterminable, as was the class to whom it would be owed. The state's prisoners were progressively declassified, and although this system involved a risk of escape 'the superimposition of a common law duty could distort the penal decision-making process by encouraging such decisions to be made [defensively]'[9], rather than with a view to preparing the prisoner for release.[10]

IS *DORSET YACHT* GOOD LAW?

Spigelman CJ, in the course of his judgment, made the surprising comment that '[t]he courts have traditionally been more protective of personal injury damage' than of property damage. 'There is no principle in tort law by which this court could legitimately distinguish between a claim for damage to the suspension of a motor car which runs into a pot-hole ... and a claim for personal injury to an occupant of the car.'[11]

The fact that *Dorset Yacht* concerned property (ownership and) damage and *Godfrey* personal injury cannot distinguish the cases. *Godfrey* rested on the indeterminacy of place (which necessarily includes the 'immediate vicinity'), time and class of persons at risk. Even if there is a principled basis for distinguishing a prisoner 'in the course of' the escape from one who has got away but remains 'on the run', the possibility of conflicting duties would appear to be equally relevant in both. PL

Endnotes: **1** [1970] AC 100. **2** [2004] NSWCA 113 at [34] **3** [2004] NSWCA 113 at [20] **4** [2004] NSWCA 113 at [31] **5** [2004] NSWCA 113 at [34] **6** [2004] NSWCA 113 at [50] **7** [2004] NSWCA 113 at [48] **8** [2004] NSWCA 113 at [47] **9** [2004] NSWCA 113 at [77] **10** [2004] NSWCA 113 at [79] **11** *Brodie v Singleton* [2001] HCA 29, per Gleeson CJ at [44].