BY BRIAN DONOVAN QC, SYDNEY

Damages

Considerations on the loss of ability to care for others in *Sullivan v Gordon*

The traditional category of common law damages for personal injury includes damages for pain and suffering and loss of amenities of life. These came to be known under the shorthand heading "General Damages". General damages also included other non-specific amounts for general future expenses. The question of what was included within the phrase "general damages" was never clear. The term was general and the boundary was moveable. In *Griffiths v Kerkemeyer* (1977) 139 CLR 161 the High Court allowed, as a separate component of damages outside the boundaries of general damages, a sum of money which represented the notional debt which the Plaintiff would have to members of his or her family for the care they provided when he or she was not able to look after him/herself.

The principles in *Griffiths v Kerkemeyer* were further developed by the High Court in *Nguyen v Nguyen* (1991) 169 CLR 245 and *Van Gervan v Fenton* (1992) 175 CLR 237. These cases dealt with care which had to be provided from others to the Plaintiff. The problem remained about how courts should deal with care which would previously have been provided by the Plaintiff to others. In a sense the fact that the Plaintiff could no longer provide that care was said to be no loss to the Plaintiff. The issue came before the New South Wales Court of Appeal in *Burnicle v Cutelli* (1982) 2 NSWLR 26 in which the majority of the Court (Reynolds JA and Mahoney JA) held that the loss of ability of an injured mother to provide services to her family was compensible but only as part of the general damages and not under a separate heading as special damages. Glass JA dissented. It would follow that the cost of engaging a housekeeper to look after the children could not be awarded as a specific head of damages but could only be included within the general damages lump sum. As will be recalled, even before the time of the statutory limits on non-economic loss damages, general damages had always been subject to an unwritten upper limit which probably at the present time, depending on the particular State jurisdiction, will be about $300,000 to $350,000. It can be seen that if the costs of care for the children of the family have to come out of the general damages sum the Plaintiff would be significantly disadvantaged.

Burnicle v Cutelli was recently the subject of re-examination by the New South Wales Court of Appeal. In *Sullivan v Gordan* (1999) NSW CA 338 CA No.40456/96 judgment delivered 22 September 1999, a special bench of five judges was convened. The matter involved a claim for the costs of looking after the Plaintiff's family because the Plaintiff could no longer do so under the *Motor Accidents Act*. However, the decision dealt with the concept of general damages under the common law and reversed the decision in *Burnicle v Cutelli*. The primary judgment was delivered by Beasley JA.

The Appellant suffered frontal lobe damage which had a significant effect on her ability to order her aspects of daily life including personal care of herself and her children and her financial affairs. There was a further problem which might be summarised as a finding of disinhibition which had led to further children being born outside of the marriage after the accident. There was a subsidiary argument that the Defendant should not be responsible for the care of those children because the chain of causation was broken and the care required for those children was as a result of the Plaintiff's own behaviour. The Court disposed of that argument fairly briefly noting that the mental condition which led to this problem was itself a result of the accident.

Returning to the main issue the Appellant claimed to be in need of personal assistance on a daily basis for herself and her child. Beasley JA referred to a number of cases including *Donnelly v Joyce* (1974) QB 5454 per Megaw LJ at 462; *Griffiths v Kerkemeyer* above at 193-194 per Mason J and per Stephen J at 180; *Graham v Baker* (1961) 106 CLR 340; *Nguyen v Nguyen* (1991) 169 CLR 245 at 262 - 263; and *Van Gervan v Fenton* (1992) 175 CLR 327. Her Honour referred to the judgment of ▶

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Dawson, Toohey and McHugh J in *Nguyen* at 262-263:

> "The Plaintiff's loss in *Griffiths v Kerkemeyer* was caused by his physical disability. It was in accordance with accepted principle to assess part of that loss by reference to the cost of the services which were required to satisfy the need to which the disability gave rise... The novelty lay in giving the Plaintiff the cost of those services even though he had not paid, and would not pay, for them, in order that he, and not the Defendant should reap the benefit."

Beasley JA at para 45 said that the claim under consideration raised the question of whether the Plaintiff's claim was compensible on a *Griffiths v Kerkemeyer* basis. Her Honour noted the varying views in *Burnicle v Cutelli* and in the cases following *Burnicle v Cutelli*. She examined the case of *Sturch v Wilmot* (1997) 2 QdR 310 in which the Queensland Court of Appeal had upheld a similar claim for care of children. This was because it was analogous to the *Griffiths v Kerkemeyer* principle and that there were policy reasons in favour of it. Accordingly in Sturch the care for the children which arose as a result of the Plaintiff's shortened life expectancy and future early death, led to compensation for the care of the children during the "lost years" after she had died.

Beasley JA set out the arguments of senior counsel for the Respondent/ Defendant in *Sullivan v Gordon*. First in *Sullivan* the Plaintiff had the children after the accident. Second it was said that there was a problem of causation and third the Plaintiff had not acted reasonably in having the children. Her Honour said: "I find it difficult to see the legal or practical logic for the first of these arguments. She dismissed the second and third arguments saying that the chain of causation had not been broken. Accordingly the Court of Appeal allowed sixty to sixty five hours per week of child care until the child (who had been with the Plaintiff) turned sixteen years of age.

On 26 August 1999 Wright J in the Supreme Court of Tasmania handed down a decision in *Target & A & E Price v Target* serial No.87/1999. The deceased was twenty-seven years old. She had two children aged nine and eight at the time of trial. She had not worked between the ages of sixteen and twenty-seven. She had been engaged in full time household duties. Her de facto husband continued the care of the children after her death. The claim was under Lord Campbell's Act on behalf of the children. His Honour noted that the principle in *Griffiths v Kerkemeyer* was of a different nature from the principles governing a claim under Lord Campbell's Act being a claim for dependence after the death of a parent or supporter. It should be noted that the de facto husband was not a co-plaintiff in the present case. He was the one who was carrying out the care. The action was brought on behalf of the children alone.

"The question of what was included within the phrase 'general damages' was never clear. The term was general and the boundary was moveable"

Wright J rejected counsel for the Defendant's submission that the provisions of the *Common Law (Miscellaneous Actions) Act* 1986 disentitled the Plaintiff to succeed on any claim formulated upon the notional cost of any past or future care of services to be provided for the two bereaved children. His Honour noted that Mr Price, the surviving de facto spouse carried out the care. That role could equally have been fulfilled by a caring relative or friend. His Honour said:

> "Provided that the children are recompensed solely on the basis of the care now given from a source other than their mother, it seems that any discount to the commercial value of that support which is provided by their father as the care-giver, should only result from a deduction from the time which the evidence establishes he directs to household duties which can be fairly attributable to satisfying his own personal needs..."

His Honour said that the fact that Mr Price received social security benefits was not relevant. His Honour said that the only sensible approach for the Court was to make an allowance for housekeeping services on the assumption that the same would be provided over an eight hour day seven days a week. He allowed that the claim should be reduced by one third because part of the housekeeping duties would be for the benefit of Mr Price himself.

The general question of the Plaintiff's loss has been a developing question for courts. Over recent decades the analysis of what that loss is has become more sophisticated. We have passed a long way from the time where the loss was looked on essentially as pain and suffering and loss of amenities of life, loss of wages and medical treatment. *Griffiths v Kerkemeyer* focused on the loss to a Plaintiff created by the Plaintiff's need for care. *Sullivan v Gordon* looks at the requirements of the Plaintiff in his or her daily life to provide services to others and the loss that the Plaintiff has when those services cannot be provided. The services may arise under a legal duty or under a moral duty. The Courts at one time seemed to take the view that the requirement to provide those services was not the Plaintiff's loss but the loss of those dependent upon the Plaintiff. The final step was to recognise the loss but allow it only as part of general damages. The next step has been to recognise that loss as an economic loss belonging to the Plaintiff. The argument is that the Plaintiff's husband will have the duty to provide the services and if the Plaintiff cannot provide them he or she will have to pay for them or alternatively enter into some moral obligation to the person who does. The moral obligation is similar to the obligation in *Griffiths v Kerkemeyer*. The loss therefore becomes the Plaintiff's financial loss. *Sullivan v Gordon* makes it clear that the loss is now a specific financial loss.

Questions arise as to what may flow from this decision. We are all aware of

how *Griffiths v Kerkemeyer* has led to multiple claims for domestic services even where the injury is relatively minor. Things such as vacuuming the floor, washing the dishes and carrying out the laundry are now all regularly included in such claims. There has been some judicial resistance to some of these claims. The ultimate test, of course, is what is reasonable?

The decision in *Sullivan v Gordon* potentially could lead to a whole range of new claims. For example the father who cannot kick the football with his son may be said to have a moral duty to arrange or to pay for someone else to come and kick the football with his son. That of course is an extreme example. I do not know whether that claim would succeed. However, there are a multitude of claims which may succeed. An example might be the mother who can no longer drive a car and therefore cannot drive her children to school. Another example may be the parent who has some memory problems as a result of an accident and can no longer assist their child with the child's homework. That is not necessarily an extreme situation. Particularly where children follow a parent's professional course at a University or another tertiary institution, the parent might otherwise be able to provide a great deal of assistance and coaching. After the accident the parent may have to arrange for this help (or perhaps the child just goes without). Whether the child goes without or not *Sullivan v Gordon* suggests that the loss is the Plaintiff's loss even if the Plaintiff does not expend the money in obtaining the tutor. The money is therefore recoverable.

In *Sullivan v Gordon* there was an argument by the Defence that the birth of the new child was the Plaintiff's own decision and therefore the cost of looking after the child was something the Plaintiff had voluntarily created. The Defendant was no longer liable. The basis was a novus actus, a breach in the chain of causation and/or a failure to mitigate.

In *Sullivan's* case there was some brain injury which was said to have affected the Plaintiff's judgment therefore the conception of future children could be attributed to that lack of judgment. Although the Court considered that argument in *Sullivan v Gordon* it seems quite clear from the substance of the judgements that even where a person is not brain injured and later becomes the parent of a child, then such a consequence is foreseeable and comes within the general scope of the damages.

There were some very important matters raised by Mason P. The decision of Beasley JA was agreed to by all the members of the Court. Mason P added some further matters of principle which recognised the worth of the women's labour. His Honour said:

> "The exclusion of services performed for others ignores the true subject matter of the compensated loss which is the Plaintiff's accident created need, regardless of whether or not it is productive of financial loss....For many women and some men, their own needs extend to ▶

care for other members of the family as naturally as they extend to the capacity to attend to their own personal functions. There is no distinction in point of principle... Indeed, to draw the distinction only serves to discriminate against those who devote themselves to the care of others within the family household (usually women) to the benefit of the wrongdoer. (See generally R Graycar, *Compensation for Loss of Capacity to Work in the Home* (1985) 10 CID LR 528; *Sturch v Willmott* (1997) 2 QDR 310 at 321)."

His Honour said that it was difficult and unreal to disentangle the domestic duties performed by a household member in fulfilment of compelling moral duties to another member. Further his Honour said:

"Acknowledgment that a mother's interrupted capacity to make her usual contributions to a household is compensible involves the law's belated recognition of the economic value of such work...."

Mason P examined the limits of the need. He said:

"To my knowledge, the existing case law does not extend beyond compensating for the interrupted capacity to care for infant children in a household family or to do general housework for the benefit of the spouse or children in a household family... In *Randall v Dull* (1994) 13 WAR *Griffiths (v Kerkemeyer)* was applied to a wife's inability to perform "voluntary" cleaning work in a hairdressing salon, but she was in partnership with her husband in that business."

His Honour said that a court must determine how long a Plaintiff's need would last in *Griffiths v Kerkemeyer* cases and "allow for the ebb and flow of circumstances that would have impacted upon the Plaintiff apart from the tort." Referring to *Carrs v Carrs* (1996) 187 CLR 354 at 360 and 370 his Honour referred to the requirement as being that or providing damages as compensation for the Plaintiff's need "as established by the evidence". He concluded that in future a court will have to make informed hypothetical predictions as to how long a plaintiff uninjured would have cared for another member of his or her household. He also examined the "need" to care for persons other than the Plaintiff's own children and suggested that different considerations might apply in the case of persons for whom no legal obligations of care exists and who are not members of the Plaintiff's household being cared for at the time of the accident. He gave the example of aging parents.

I suggest however, as a matter of principle, that even the care of aging parents should not be excluded. It will be a matter of evidence how likely the care of aging parents in the future may have taken place had the Plaintiff not been injured. The situation is analogous to "loss of a chance"; or on the positive side, the chance of a positive situation occurring. PL

GST Alert

Trick is to get client to stump up on time

Kate Marshall

The GST will impose not only a cost burden on the legal profession but will force solicitors to pay more attention to chasing bills, finalising contractual details and understanding their obligations to clients.

Clients in turn will generally have to pay within 30 days or face a financial penalty for late payment.

Freehill Hollingdale & Page partner, Mr Geoff Mann, who is an adviser to the Law Council of Australia on the GST, said the tax would impose an additional cost on small practitioners' fees and costs. His firm is facing a one-off bill of $50,000 to upgrade its financial software in preparation for the GST.

"That's quite a costly exercise, even when the Government and the tax office have us believe it's quite simple.

"An awful lot of firms will be impacted by cash-flow problems because of the GST, and what is most likely to happen is that they will try to raise fees but competitive pressure will force them to keep [them] down."

The trick for law firms is to ensure clients pay their GST before it falls due to the Australian Taxation Office. Invoicing a client on an accruals basis will trigger a GST liability, so lawyers need to make sure the invoice includes all the details required under the GST act that are not included in "normal" bills. Some GST consultants even suggest that lawyers could bill clients for the GST component of the total bill and seek full payment later, although that issue has not been widely discussed.

Fitting the bill . . . lawyers will need to remember that invoicing clients on an accruals basis will trigger a GST liability.

But Mr Simon Begg, a consultant with Corrs Chambers Westgarth, warned: "If you're too rigorous in collecting bills customers will take their trade elsewhere, so there is a trade-off between offending the customer and collecting in a timely fashion."

Mr Mann has written to the ATO seeking clarification of the "grey area" of how firms should deal with disbursements – the costs incurred when lawyers undertake work on behalf of clients. Examples include barristers' fees, search fees, titles office lodging fees, stamp duty and, arguably, photocopying and phone charges.

Mr Begg said solicitors would have to decide whether to pass on the cost directly to the client, or whether to pay the GST as the client's agent and leave the client to claim back the GST.

"The fact is that they will need to be careful when they are charging disbursements that they handle [the procedure] correctly," he said.

Mr Robert Richards, a member of the Law Society of NSW GST technical response subcommittee, said the biggest issues for solicitors and lawyers were to ensure they had a thorough understanding of their responsibilities to clients and their responsibilities as legal practitioners once the GST came into effect.

He said the Law Society was committed to making certain that the legal profession realised how all-encompassing the GST would be.

"First, this means getting your agreements right, finding out what to put into your documentation, worrying about long-term contracts and making certain you have yourself covered – in fact, worrying about every single transaction.

"Second, solicitors will have to know how to input into the GST system and that it will increase the cost of legal services to clients."

He also warned there would be "real panic" if software manufacturers failed to deliver products on time.

Where the Law Society and the Australian Taxation Office appear to differ is on how many legal practitioners would cross the all-important $1 million business turnover threshold for switching to accruals-based GST remittances.

The ATO's deputy commissioner on GST, Mr Rick Matthews, said many smaller solicitors would be able to choose whether to make the change to accruals-based accounting, since many would still fall below the $1 million threshold.