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## **GRIFFITHS V KERKEMEYER**

Miscellaneous Paper No 4

Queensland Law Reform Commission  
August 1993

QUEENSLAND LAW REFORM COMMISSION

Draft Report

on

GRIFFITHS V KERKEMEYER

August 1993

(i)

## PREFACE

At the end of June 1993, the Attorney-General asked the Commission to consider whether there should be any limitations imposed on *Griffiths v Kerkemeyer* awards in personal injury litigation and in *Griffiths v Kerkemeyer*-type awards in Lord Campbell's actions. The Attorney-General requested the Commission to report to him by the end of September 1993.

The Commission has produced this Draft Report for circulation to individuals and organisations who may have a particular interest in the issues raised by this reference. Arguments for and against reform are set out on pages 37 to 41 of the Draft Report. The Commission's tentative proposal is set out on page 43.

Unfortunately, given the urgent nature of this reference, a relatively short time has had to be set for receipt of submissions. It may not be possible to include late submissions in our deliberations.

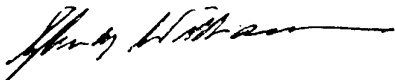
**Submissions should be received by 10 September 1993.**

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(ii)

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## 1. INTRODUCTION

A common law action for negligence which allows a plaintiff to sue a tortfeasor (wrongdoer) for damages for personal injury may arise as a result of injuries sustained in a motor vehicle accident, an accident occurring during the course of a person's employment, or as a result of accidents occurring in the ordinary course of life.<sup>1</sup> When an injury occurs at a person's place of employment there is a statutory right to compensation at common law where the employer's negligence caused the injury as well as a right to make a claim for statutory benefits under the *Workers' Compensation Act 1990 (Qld)*<sup>2</sup> whether or not the employer was at fault.<sup>3</sup>

Claims for damages may be made under various heads of damage.<sup>4</sup> For example, compensation can be claimed for pain and suffering, loss of amenities, loss of enjoyment of life, loss of earning capacity. Where the injured person's need for reasonable domestic assistance or nursing services is provided commercially, the cost of such services can be claimed.<sup>5</sup> The head of damage commonly referred to as *Griffiths v Kerkemeyer*<sup>6</sup> represents a subheading of domestic assistance or nursing services, where those services are provided gratuitously by friends or relatives of the injured person. The *Griffiths v Kerkemeyer* claim relates to the injured person's need for such gratuitous services.

## 2. TERMS OF REFERENCE

The Attorney-General has requested the Queensland Law Reform Commission to consider whether there should be any limitations imposed on *Griffiths v Kerkemeyer* awards in personal injury litigation and on awards for loss of domestic services in

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<sup>1</sup> For example, such accidents may occur on another person's property, creating occupier's liability.

<sup>2</sup> *Workers' Compensation Act 1990 (Qld)*, s. 5.1. Any benefits paid to the injured worker from the Workers' Compensation Fund are deducted from any subsequent assessment of damages at common law.

<sup>3</sup> For motor vehicle accidents in Queensland, compulsory premiums paid by car owners ensure the availability of compensation funds for payment of awards of damages in common law actions. A limited compensation scheme exists for criminal injuries (see chapter LXVA ss663A - 663E *Criminal Code*).

<sup>4</sup> A "head of damage" is a classification used by the courts to indicate the type of damages involved in a claim. For example, pain and suffering. *Paff v Speed* (1961) 105 CLR 549 at 558-559.

<sup>5</sup> For example, *Sailes v The Nominal Defendant (Qld)* Supreme Court 18 August 1993, Unreported, Byrne J. In that case the plaintiff was a tetraplegic. His wife left him soon after the accident. The trial judge recognised the plaintiff's right to independent living in his home and not to be institutionalised. Future attendant care and housekeeping to be provided commercially was assessed at \$1,107,186 in a total award of \$2,701,347.

<sup>6</sup> (1977) 139 CLR 161.

Lord Campbell's actions<sup>7</sup> which are assessed on similar principles to *Griffiths v Kerkemeyer*. The Attorney-General has requested a Report on this matter by the end of September 1993.

### 3. THE LAW PRIOR TO THE DECISION IN *GRIFFITHS v KERKEMEYER*

Prior to the decision of the High Court of Australia in *Griffiths v Kerkemeyer*<sup>8</sup> it was uncertain whether an injured plaintiff who required long term care<sup>9</sup> was able to obtain compensation in a common law action for such care unless there was a legal or moral obligation for the injured person to pay the provider of the services for care.<sup>10</sup> It was only when there was such an obligation which produced a financial loss to the plaintiff that the courts were prepared to award compensation for that loss.<sup>11</sup> As a consequence, no compensation was awarded if the services were performed gratuitously by, for example, a "dutiful daughter,"<sup>12</sup> husband or wife.<sup>13</sup> Luntz notes that the treatment by the Courts of gratuitous services was in marked contrast to their treatment of charitable gifts given to injured persons and their dependants:<sup>14</sup>

In the latter circumstances the Courts express themselves to be 'revolted' by the idea that the benefit given by the charitable donor should be 'diverted' from the victim to the 'wrongdoer', yet they seemed to look with equanimity on the notion that a wife should devote her life entirely to caring for, say, a quadriplegic husband, thereby saving the defendant from paying damages for the fees of a professional nurse.

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<sup>7</sup> By letters to the Commission of 29 June 1993 and 2 August 1993. Lord Campbell's actions are actions pursuant to ss12-15C *Common Law Practice Act 1867* for damages, brought by dependants of a person killed as a result of another person's negligence. The Commission is also undertaking a related reference on s 15C of the *Common Law Practice Act 1867* and has issued a Draft Report on that reference.

<sup>8</sup> (1977) 139 CLR 161.

<sup>9</sup> Long term care could include the provision of assistance with everyday activities such as dressing, eating and helping with bathing as well as medical services.

<sup>10</sup> *Blundell v Musgrave* (1956) 96 CLR 73 at 79.

<sup>11</sup> *Renner v Orchard and Anor* [1967] QWN 3. See also *Blundell v Musgrave* (1956) 96 CLR 73.

<sup>12</sup> *Renner v Orchard and Anor* [1967] QWN 3.

<sup>13</sup> *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649.

<sup>14</sup> Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.2.



The approach of the Courts led, in some cases, to the practice whereby plaintiffs entered into contracts with members of their families for the provision of services, which would otherwise have been provided gratuitously, so that a legal liability was created.<sup>15</sup> The plaintiff could recover in such circumstances even though the parties to the "contract" may have had an understanding that the contract would not be enforced if the action for damages failed. However, as Luntz notes,<sup>16</sup> in some cases the plaintiff would not be able to enter into a contract because he or she was unconscious when the care was given. Also, in most cases people would never think of entering into binding legal relations in relation to services provided on a voluntary basis. Megaw J in *Wattson v Port of London Authority*<sup>17</sup> in reply to the suggestion that a legally binding obligation was necessary to allow the husband to recover a loss of wages sustained by a wife in giving up work to look after him said: "That is not how human beings work". His Lordship suggested that it would be "a blot on the law" to allow recovery where the wife had held the husband to a contract, but to deny it "if she behaves like an ordinary decent human being."

Luntz suggests that:

Limitations on the recovery of damages for voluntary services imposed in recent years by statute<sup>18</sup> could lead to a revival of the practice of entering into agreements purporting to create a legal liability.<sup>19</sup>

In England immediately prior to *Griffiths v Kerkemeyer*<sup>20</sup> the common law had been developed to a point where compensation was based on the needs of the plaintiff, rather than on the legal or moral obligation of the plaintiff to pay for the services provided. In *Donnelly v Joyce*<sup>21</sup> the English Court of Appeal held that a plaintiff could recover the fair and reasonable cost of nursing services provided by a relative or friend regardless of whether there was a legal or moral obligation on the part of the plaintiff to pay for those services. Megaw J said that:

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<sup>15</sup> See for example, *Haggan v De Placido* [1972] 2 All ER 1029.

<sup>16</sup> Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.3.

<sup>17</sup> [1969] 1 Lloyd's Rep 95 at 102.

<sup>18</sup> See pp 21-29 below.

<sup>19</sup> Luntz H. *The Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.3 footnote 5. In *Housecroft v Burnett* [1986] 1 All ER 332 (CA) it was said that the measure of damages awarded under the new approach should not be such as to encourage the making of sham agreements, but in many instances now that is out of the control of the Courts.

<sup>20</sup> (1977) 139 CLR 161.

<sup>21</sup> [1974] QB 454.

The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages - for the purpose of the ascertainment of the amount of his loss - is the proper and reasonable cost of supplying those needs.<sup>22</sup>

Following *Donnelly v Joyce*<sup>23</sup> the Full Court of the Supreme Court of South Australia applied the concept of "need" in *Beck v Farrelly*<sup>24</sup> and held that the plaintiff was entitled to recover compensation for the need for the assistance which was provided voluntarily by his family.

#### 4. HIGH COURT: GRIFFITHS V KERKEMEYER

In 1977, the issue came before the High Court of Australia in the case of *Griffiths v Kerkemeyer*.<sup>25</sup> The plaintiff had been injured in a road accident caused by the negligence of the defendant. He became quadriplegic. He was awarded damages which included an amount for services provided gratuitously by his fiancée and members of his family prior to the trial, and also an amount for services likely to be rendered by them in the future.

The Court held that a plaintiff's loss is the incapacity to take care of himself or herself and that this loss is demonstrated by his or her need for the services. Once the need for the services is established, there is a right to recover damages for the reasonable cost of meeting the need. The fact that the services have been or will be provided by a relative or friend on a gratuitous basis is irrelevant.

The Court considered the kind of assistance for which compensation might be awarded. Gibbs J observed that a relative or friend may provide care of a kind that would otherwise have to be provided in a hospital or nursing home, or by a paid nurse or team of nurses working in the plaintiff's home. Alternatively, the service provided may be of a domestic nature - for example the relative or friend may do housework that the injured plaintiff is unable to do. In some cases the relative or friend may suffer financial loss by providing the service - he or she may

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<sup>22</sup> [1974] QB 454 at 461-462.

<sup>23</sup> [1974] QB 454.

<sup>24</sup> (1975) 13 SASR 17.

<sup>25</sup> (1977) 139 CLR 161.

have to give up employment or forego wages that would otherwise have been earned. In other cases the relative or friend may assume a heavy physical or emotional burden but may not suffer actual financial loss, either because he or she has no outside employment or because it is possible to perform the services in his or her spare time.<sup>26</sup>

However, the Court concluded that, whatever the cost to the provider, the compensable loss is not that which may be incurred by the provider, but the plaintiff's incapacity and consequent need for services.<sup>27</sup>

The High Court's decision in *Griffiths v Kerkemeyer* did not create an open-ended liability for defendants. Gibbs J suggested a two-stage test:<sup>28</sup>

First, is it reasonably necessary to provide the services, and would it be reasonably necessary to do so at a cost? ... Next, is the character of the benefit which the plaintiff receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer? If not, the damages are recoverable.

## 5. POLICY CONSIDERATIONS

The High Court in *Griffiths v Kerkemeyer*<sup>29</sup> articulated a number of policy reasons which supported its decision. It also demonstrated that the principle was arguably consistent with the accepted principles of the assessment of damages in cases where a person is injured by the wrongdoing of another.

### (1) It is fair and just.

The Court<sup>30</sup> agreed with the view of Bray CJ in *Beck v Farrelly*<sup>31</sup> that to compensate the plaintiff in these circumstances is "in accord with popular

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<sup>26</sup> (1977) 139 CLR 161 at 163.

<sup>27</sup> (1977) CLR 161 at 174-175 per Stephen J and at 192 per Mason J.

<sup>28</sup> (1977) 39 CLR 161 at 168-9.

<sup>29</sup> (1977) 139 CLR 161.

<sup>30</sup> (1977) 139 CLR 161 at 168 per Gibbs CJ; 175 per Stephen J and 193 per Mason J.

<sup>31</sup> (1975) 13 SASR 17 at 21.

conceptions of justice". As Lord Reid said in *Parry v Cleaver*.<sup>32</sup>

It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have to have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large and that the only gainer would be the wrongdoer.

**(2) It compensates for the unpaid care usually provided by women in our society.**

In *Griffiths v Kerkemeyer* the services were provided by the injured person's fiancée. Often in an extended family there will be a non-income earner who is in a position of being able to assume responsibilities for providing such services. More often than not, that person is either a spouse or mother of the injured person. As Stephen J said, the services are often provided by a wife or woman relative.<sup>33</sup>

**(3) It spreads the loss.**

The theory of loss distribution recognises that, in some situations, it is not appropriate to merely shift the burden of a loss from one individual to another and, accordingly, seeks to achieve a fair allocation of the losses involved in modern living conditions. It advocates the distribution of costs which may be regarded as the more or less inevitable by-product of a desirable but dangerous activity among all those who benefit from such an activity. In the context of liability insurance, losses are distributed by sharing them among all policy holders who carry insurance on a particular kind of risk.<sup>34</sup>

In *Griffiths v Kerkemeyer*, Stephen J acknowledged that a friend or relative who gratuitously provides services to an injured person is unlikely to have any capacity to distribute the loss. He therefore concluded that:<sup>35</sup>

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<sup>32</sup> [1970] AC 1 at 14.

<sup>33</sup> *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 170.

<sup>34</sup> Fleming J. *The Law of Torts* (8th ed 1992) 8-11.

<sup>35</sup> *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 176.

a result which allows the injured person to recover damages in respect of the provider's services, so that he may be in a position to reimburse the provider, is a desirable policy goal; the wrongdoer, likely to carry liability insurance, will provide a much better loss distributor.

**(4) It does not encourage contractual arrangements at the expense of gratuitous care.**

The High Court echoed the abhorrence expressed in *Donnelly v Joyce*<sup>36</sup> at the possibility of the extent of a wrong-doer's liability depending on whether the person providing services to an injured plaintiff required the plaintiff to enter a binding contract as a condition to the provision of assistance or on whether the injured plaintiff retained sufficient capacity and showed sufficient foresight to agree to pay for the services.<sup>37</sup>

**(5) It compensates the plaintiff for the need for services.**

Since the true loss is the plaintiff's loss of capacity which occasions the need for the service, it is irrelevant whether he or she has had or will have to pay for the service or whether it has been rendered gratuitously. Therefore it does not matter whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider.

## 6. THE AMOUNT OF COMPENSATION

Where no money has actually been paid and no contractual liability exists, the assessment of damages proved to be a difficult calculation. In the United Kingdom Court of Appeal in *Donnelly v Joyce*,<sup>38</sup> the Court accepted that compensation for the need for gratuitous services could properly and reasonably be based on the mother's loss of wages resulting from her caring for the injured son. The majority of the High Court in *Griffiths v Kerkemeyer* rejected this approach. Mason J stated:<sup>39</sup>

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<sup>36</sup> [1974] QB 454.

<sup>37</sup> (1977) 139 CLR 161 at 168 per Gibbs J and at 193 per Mason J.

<sup>38</sup> [1974] 1 QB 454. See analysis by Graycar R. *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 92-93.

<sup>39</sup> *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 193.

But [*Donnelly v Joyce*] does not decide that this is the true measure of the relevant head of damage ... In general, the value or cost of providing voluntary services will be the standard or market cost of the services.

Similarly, Stephen J<sup>40</sup> after discussing *Donnelly v Joyce* referred to a comment in *Winfield and Jolowicz on Tort* suggesting that the cost<sup>41</sup>

will not, of course, necessarily be the same as the earnings given up by the friend [or relative] who renders the assistance.

Gibbs J did not address the issue.

The care provider may have to give up a well-paid job to provide the care to the injured person or, despite the emotional and physical burden of caring for the injured person, may suffer no actual financial loss.<sup>42</sup> In either case, it is the plaintiff's loss which is compensated and that loss is the need for the care.

Accordingly, the amount of the loss is the value of the care which has to be provided. The fact that there are persons, prompted by motives of concern for the plaintiff, who are prepared to provide the services gratuitously is not something that should diminish the damages to the advantage of the defendant. It is only right that in the circumstances the plaintiff should benefit rather than the wrongdoer whose negligence was the cause of the plaintiff's loss.<sup>43</sup>

## 7. APPLICATION OF THE PRINCIPLE IN *GRIFFITHS v KERKEMEYER*.

Following the decision of the High Court, the State courts confined the *Griffiths v Kerkemeyer*<sup>44</sup> principle in various ways which, in some cases, have been

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<sup>40</sup> Id 180-181.

<sup>41</sup> *Winfield and Jolowicz on Tort* (10th ed 1975) 577.

<sup>42</sup> Graycar R. *Before the High Court: Women's Work\* Who Cares?* (1992) 14 Sydney Law Review 86 at 104 notes:

\*But of course not many women are brain surgeons or High Court Judges. Most women who work outside the home earn considerably less than men.\*

<sup>43</sup> (1977) 139 CLR 161 at 169 per Gibbs J; at 175 per Stephen J; and at 192-193 per Mason J. See also *Nguyen v Nguyen* (1990) 169 CLR 245 at 261-262, per Dawson, Toohey and McHugh JJ.

<sup>44</sup> (1977) 139 CLR 161.

ultimately overruled.<sup>45</sup>

In *Johnson v Kelemic*<sup>46</sup> two members of the New South Wales Court of Appeal expressed reservations about *Griffiths and Kerkemeyer*. Samuels JA, after noting that in that case no claim had been made under *Griffiths v Kerkemeyer*, was "not persuaded that the husband's services satisfy the test propounded by Gibbs J."<sup>47</sup> In his view, "not every item of assistance and support rendered by one member of a family to another ought reasonably to be regarded as sounding in damages". Similarly, Mahoney JA did not consider this "a case in which *Griffiths v Kerkemeyer* has operation"<sup>48</sup> because the nature of the services was "not such as may normally be obtained for reward, and are such that they are or partake of the normal incidents of family life".<sup>49</sup> He stated:<sup>50</sup>

Some at least of the services in fact provided compromise ... substantially the kinds of things which members of a family might be seen as doing for disabled persons in the family group, in the course of their ordinary day to day living.

Although Mahoney JA conceded that turning the plaintiff at night (which needed to be done several times) was more akin to the work of a nursing aide, he was not persuaded that if services of that kind were not provided by her family, the plaintiff would "engage some person simply to provide them for reward."<sup>51</sup>

These observations were cited with approval in *Kovac v Kovac*<sup>52</sup> which has come to be associated with the "reasonableness" test. The plaintiff was a woman whose husband was available to care for her because he had a partial incapacity for work and was in receipt of Workers' Compensation. Samuels and Mahoney JJA reduced the *Griffiths v Kerkemeyer* damages by reference to notions about what kinds of support family members routinely provide for one another. Samuels JA noted what he considered the policy arguments for limiting recovery of damages

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<sup>45</sup> See for example, the judgments in *Van Gervan v Fenton* (1992) 175 CLR 327 which overruled various State court judgments.

<sup>46</sup> (1979) FLC 78,487 at 78,493.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Id* 78,496.

<sup>49</sup> *Id* 78,495.

<sup>50</sup> *Id* 78,496.

<sup>51</sup> *Ibid.*

<sup>52</sup> [1982] 1 NSWLR 656 (Reynolds JA dissenting).

under *Griffiths v Kerkemeyer*.<sup>53</sup>

I emphasise the domestic nature of the services, the husband's availability to perform them, and the absence of any financial loss on his part; and the lack of 'sacrifice', or of substantial emotional or physical pressure caused by the routine which the husband has been carrying out.

Samuels JA also noted that he considered it would be "incongruous to contemplate the plaintiff reimbursing her husband for the services he has provided for her."<sup>54</sup>

Mahoney JA expressed the view that *Griffiths v Kerkemeyer* awards had become increasingly large, and that the "[the principle] results in the creation of an anomaly"<sup>55</sup> that led to over-compensation.<sup>56</sup>

Mahoney JA also questioned the application of *Griffiths v Kerkemeyer* in cases where the services "are such as would reasonably be seen as provided, according to the incidents of ordinary or family life"<sup>57</sup> and concluded;<sup>58</sup>

there would be no relevant sense of outrage in the defendant not having to bear that cost: indeed, it would, I think, be felt by the ordinary man to be unreasonable if the plaintiff sought to have the services other than as before.

Even if it were appropriate to award damages under *Griffiths v Kerkemeyer*, Mahoney JA considered that a principle of reasonableness was required in its application. As a result, the damages for future assistance were considerably reduced.<sup>59</sup>

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<sup>53</sup> Id 669.

<sup>54</sup> Id 670.

<sup>55</sup> Id 676.

<sup>56</sup> Id 677.

<sup>57</sup> Id 678.

<sup>58</sup> Id 680.

<sup>59</sup> *Kovac v Kovac* was approved by the Queensland Full Court in *Carrick v Commonwealth* [1983] 2 Qd R 365 and by the SA Full Court in *Bettoncelli v Bettoncelli* (1988) 135 LSJS 211.



The clearest case applying the reasoning of *Kovac v Kovac* and, as Graycar notes,<sup>60</sup> "extending it to include the general principle of mitigation" is the decision of the Queensland Full Court in *Veselinovic v Thorley*.<sup>61</sup>

In *Veselinovic v Thorley* the Court allowed the injured female accident victim to recover damages for care provided by the husband but held that, in the circumstances of the case, the appropriate measure of damages was not the market cost of employing a person to provide the services but, rather, the actual financial loss suffered by the provider of the services. Thomas J was of the view that, where the services were provided by someone who by doing so would suffer a smaller loss than the cost of engaging outside assistance, then the provider's loss should prima facie be the measure of the plaintiff's loss.<sup>62</sup>

Where a family is a discrete unit and its members combine in a reasonable way to overcome the effects of an injury to one of them there is much to be said for treating the family as a unit when attempting to perceive a plaintiff's loss when one spouse surrenders his earning capacity to meet his spouse's needs. The limits are to be found in the area of reasonableness and the principles of mitigation.

The award for past care was thus reduced by \$64,700 and the award for future care was halved.

Not all Courts endorsed the response to *Griffiths v Kerkemeyer* reflected in *Kovac v Kovac* and *Veselinovic v Thorley*.

Kirby J in *Hodges v Frost*<sup>63</sup> noted the important public policies served by the *Griffiths v Kerkemeyer* principle:<sup>64</sup>

- \* It encourages the provision of non-institutional care by acknowledging the work of the care providers.
- \* "Such services may prove to be more efficacious and certainly more congenial than paid services in respect of which there would be no dispute as to recovery."

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<sup>60</sup> Graycar R. *Before the High Court: Women's Work: Who Cares* (1992) 14 Sydney Law Review 86 at 96.

<sup>61</sup> [1988] 1 Qd R 191 (decided in 1984, though not reported until 1988).

<sup>62</sup> Id 200. The provider husband had been in receipt of Workers' Compensation and unemployment benefits and was therefore at home and seen as available to care for his injured wife.

<sup>63</sup> (1984) 53 ALR 373. This case involved a claim by an injured woman with respect to gratuitous household services provided by her husband. Before the injury the wife did the housework and preferred the husband not to do it.

<sup>64</sup> Id 379-380.

- \* "[Such services] may be available during longer hours."
- \* "Encouraging such facilities may actually minimise the liability of defendants."
- \* "A rule against such compensation could have a tendency to force injured persons to secure more expensive, less convenient, less readily available and less congenial paid services."
- \* "[B]y depriving some victims of injury of the opportunity of compensation for proper assistance, it could result in a proportionate increase in compensation under other heads of damages such as for pain and suffering"
- \* "[W]hat is being compensated for [under *Griffiths v Kerkemeyer*] is the loss of the injured victim's own capacity, not the benevolent activities of relatives and friends. True it is, to put the money value on that loss of capacity, regard is had to the nature, intensity and duration of the gratuitous services. However, the compensation, though calculated with these services in mind, is not for the services but for the loss of capacity which the services may help to evidence."

Kirby J criticised the attempted "gloss" on *Griffiths v Kerkemeyer* by Courts following the approach of *Kovac v Kovac* and *Veselinovic v Thorley*.<sup>65</sup>

Some of the observations in the Court of Appeal of the Supreme Court of New South Wales evidence an attempted retreat from some of the implications of *Griffiths v Kerkemeyer*. True it is, the decision introduces a new and, in some ways, an anomalous principle for compensation in actions of tort in Australia. On the other hand, there are important public policies which support the principle. However that may be, until the principle is modified by legislation or qualified by the High Court, it is the duty of this Court to apply it.

Where the cases have imposed limitations on recovery, the Judges have referred to Gibbs J's two-stage test

as if it were the definitive statement of the *Griffiths* principle and as if his second stage required a reduction where services are being supplied as part of the 'ordinary currency of family life and obligation'.<sup>66</sup>

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<sup>65</sup> Id 390.

<sup>66</sup> Graycar R. *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 98.

But, as Graycar observes,<sup>67</sup> the other judgments in *Griffiths v Kerkemeyer* simply do not support such an approach:

First, neither Stephen nor Mason JJ laid down any such broad proposition, so Gibbs J's 'test' does not necessarily represent the views of all the members of the Court. Secondly, had Gibbs J intended that recovery would be limited in situations where family or close friends provided the necessary care, he may well have applied that approach in *Griffiths* itself.

Although the High Court held that the costs must be *reasonable* in the circumstances of the case, where there is a choice of treatment, a more stringent test may be applied. For example, in *Sharman v Evans*<sup>68</sup> the majority of the High Court looked at the health benefit to the plaintiff as opposed to the costs involved in the treatment. Gibbs and Stephen JJ stated that:<sup>69</sup>

If cost is very great and benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits.

A further limiting factor which the courts have placed on the principle in *Griffiths v Kerkemeyer*<sup>70</sup> relates to the legal liability to pay for services when the services would be available free in a public hospital. Whether free hospital treatment is available depends upon the wording of the legislation setting out the charter of the hospital in question. The cases which have considered this<sup>71</sup> have denied recovery unless there was an obligation to pay the hospital charges. Luntz<sup>72</sup> states that the better view is that the defendant should be given the benefit of any free hospital services which the plaintiff may obtain. In Queensland public hospitals are entitled to impose fees and charges in respect of patients who have received or have a right to receive compensation in respect of the injury, illness or disease

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<sup>67</sup> *Ibid.*

<sup>68</sup> (1977) 138 CLR 563.

<sup>69</sup> (1977) 138 CLR 563 at 573.

<sup>70</sup> (1977) 139 CLR 161.

<sup>71</sup> See for example, *Tyrrell v Tyrrell* (1980) 25 SASR 73, *Lyons v Lyons* [1981] VR 497, and *Handley v Datson* [1980] VR 66.

<sup>72</sup> Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.2.4.

being treated at the hospital.<sup>73</sup>

## 8. THE CURRENT LAW - *VAN GERVAN v FENTON*<sup>74</sup>

The question of the method of assessment of *Griffiths v Kerkemeyer* awards came before the High Court again in *Van Gervan v Fenton*.<sup>75</sup> The issue before the High Court was whether damages should be assessed by reference to earnings foregone by the care provider or by reference to the cost of obtaining those services commercially.

The plaintiff in that case was very seriously injured in a motor vehicle accident caused by the negligence of the defendant. As a result of that accident, the plaintiff needed almost constant care which had been and would for some time in the future be provided at home by his wife. Prior to the accident which injured her husband, Mrs Van Gervan had been employed as a nurses' aide but had given up that work to devote herself to caring for her husband on an essentially full-time basis.

The trial judge had found that the injured plaintiff needed his wife to be in the home to care for him for a very large part of each day, making outside employment impracticable for her. Damages were awarded for past gratuitous nursing care in a sum approximating the net wages lost by the plaintiff's wife; and in respect of future care, the damages were assessed at her former net wages less travelling expenses.

The main issue in dispute was the assessment of the relevant *Griffiths v Kerkemeyer* damages which the trial judge calculated by reference to the income foregone by Mrs Van Gervan when she reduced her paid work outside the home, and ultimately ceased altogether, so as to care for her husband on a full-time basis. Cox J found that:<sup>76</sup>

[it] is no longer practical for [the plaintiff's] wife to undertake outside employment, other than on a very spasmodic basis.

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<sup>73</sup> *Public Hospital (Third Party Patients) Validation of Fees and Charges Act 1991 and Public Hospital (Fees and Charges) (Amendment) Regulations 1991*. See *Field v The Nominal Defendant (Qld)* [1992] 2 Qd R 288 and *Tille v Parkinson* [1992] 2 Qd R 323.

<sup>74</sup> (1992) 175 CLR 327.

<sup>75</sup> (1992) 175 CLR 327.

<sup>76</sup> *Van Gervan v Fenton* Supreme Court of Tasmania, unreported Judgment of Cox J 30 April 1990 at 20.

and thereby determined that the cost to the wife of undertaking the care of her husband

would be less than the cost of providing help from [an] Agency.

*Donnelly v Joyce*,<sup>77</sup> *Housecroft v Burnett*<sup>78</sup> and *Vaselinovic v Thorley*<sup>79</sup> were cited as authority for the view that the appropriate award in respect of *Griffiths v Kerkemeyer* damages was a sum approximating the net wages lost by the plaintiff's wife.<sup>80</sup>

The Full Court of the Supreme Court of Tasmania unanimously dismissed the plaintiff's appeal.<sup>81</sup> Green CJ held that none of the judgments in *Griffiths v Kerkemeyer* required the damages to be assessed by reference to the market cost and referred to observations in *GIO v Planas*,<sup>82</sup> *Hodges v Frost*<sup>83</sup> and *Veselinovic v Thorley*<sup>84</sup> as authority for the view that the commercial rate is not necessarily the appropriate measure of the damages. Wright J agreed and also referred to *Kovac v Kovac*.<sup>85</sup> He held:<sup>86</sup>

The limits are to be found in the area of reasonableness and the principles of mitigation.

The High Court held that in spite of the important judgment of the Full Court of the

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<sup>77</sup> [1974] QB 454.

<sup>78</sup> [1986] 1 All ER 332.

<sup>79</sup> [1988] 1 Qd R 191.

<sup>80</sup> Id 20. See discussion in Graycar R. *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 94.

<sup>81</sup> The Full Court of the Supreme Court of Tasmania, 19 March 1991 unreported.

<sup>82</sup> [1984] 2 NSWLR 671.

<sup>83</sup> (1984) 53 ALR 373.

<sup>84</sup> [1988] 1 Qd R 191.

<sup>85</sup> [1982] 1 NSWLR 656.

<sup>86</sup> The Full Court of the Supreme Court of Tasmania, 19 March 1991 unreported at 7. Crawford J did not accept this approach. However, he agreed with the result, noting that some of the services provided by Mrs Van Gervan since the accident were provided by her prior to it and she would have to provide them if the accident had not occurred. It followed, therefore, in his view, that the accident had not created a need for services that it would be reasonably necessary to provide at a cost.

Supreme Court of Queensland in *Veselinovic v Thorley*,<sup>87</sup> the wages foregone by a care provider are not an appropriate criterion to determine the value of services provided gratuitously to an injured person. The Court held that, as a general rule, the market cost or value of those services is the fair and reasonable value of such services.<sup>88</sup>

What gives the plaintiff the right to an award for damages is the need for the services. It follows that the damages which he or she receives are not determined by reference to the actual cost to the plaintiff of having those services provided nor by reference to the income foregone by the provider of the services. The damages must reflect the value of the services to the plaintiff. Because the market cost of services is ordinarily the reasonable and objective value of the need for those services, the market cost, as a general rule, is the amount which the defendant must pay as damages.<sup>89</sup>

There may be some cases where the market cost is too high to be the reasonable value of the services. Examples given by the court are where the cost of providing the services at a remote location is much greater than providing those services in a densely populated area or where there is so little competition to provide the services that, judged objectively, the market cost is not the reasonable value of the circumstances. In case of such a service it might be necessary to discount the market cost or value of the services needed by the plaintiff on the ground that the market cost or value was unreasonable in the circumstances.<sup>90</sup>

However, the court held that it would be rare indeed that the income foregone by the care provider was an appropriate guide to the value of the services required by the injured person. This is so whether the income foregone is more than the value of the services or less than the value of the services. In either case it is irrelevant. It is the market cost which will ordinarily represent the objective value of the services.<sup>91</sup>

Gaudron J referred to the controversy surrounding the true value of work which is usually perceived as "women's work" whether that work is done in the home or in the paid work force.<sup>92</sup> In doing so she indirectly referred to the gender equity

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<sup>87</sup> [1988] 1 Qd R 191.

<sup>88</sup> (1992) 175 CLR 327 at 331.

<sup>89</sup> *Van Gervan v Fenton* (1992) 175 CLR 327 at 333-334; *Griffiths v Kerkemeyer* (1977) 139 CLR at 193, per Mason J.

<sup>90</sup> (1992) 175 CLR 327 at 334.

<sup>91</sup> (1992) 175 CLR 327 at 334 and at 349.

<sup>92</sup> (1992) 175 CLR 327 at 348.

issue raised by Stephen J in *Griffiths v Kerkemeyer*.<sup>93</sup>

It was noted by the High Court that in some cases the income foregone by the care provider may be appropriate as a starting point. It may be relevant to have regard to previous earnings if the work involved is roughly comparable with the services provided and there is no genuine market rate to which regard can be had. The same considerations apply if there is simply no comparable commercial rate.<sup>94</sup> However, generally the market value of those services will be the appropriate measure.

An analysis of the facts in *Van Gervan v Fenton* is sufficient to show why the income foregone by the care provider will rarely correspond with the value of the services provided. In that case, the plaintiff's wife had been a nurses' aide but the evidence did not indicate that the nature and duration of the services provided by her as a nurses' aide corresponded with the nature and duration of the services which she provided to her injured husband. Indeed the evidence was to the contrary.

While many of the services provided to the injured person might have been of the kind provided by a nurses' aide, his wife worked as a nurses' aide for only 40 hours per week. Her attendance on her husband was virtually constant. She lost her freedom to work where she pleased and she was confined to the matrimonial home for long periods. She lost her freedom to engage in social and other activities outside her home after ordinary working hours. The nature and duration of the services provided by her to her injured husband were not comparable with the nature and duration of the services for which she was paid as a nurses' aide. Consequently her earnings provided no reasonable basis for the calculation of the plaintiff's damages.<sup>95</sup>

The Court pointed to sound policy reasons why the law should reject the income loss by the provider as a criterion for measuring the plaintiff's loss:<sup>96</sup>

**\*First**, fairness to the provider as well as to the plaintiff requires that the plaintiff should have the ability to pay the provider a sum equivalent to what the provider would earn if he or she was supplying those services in the marketplace. It does not seem reasonable that the defendant's liability to pay damages should be reduced at the indirect expense of the provider by invoking notions of marital or family obligation to provide the services free of charge or at less than market rates. Yet post-*Griffiths* awards have

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<sup>93</sup> (1977) 139 CLR 161 at 170-171.

<sup>94</sup> (1992) 175 CLR 327 at 339 and 348.

<sup>95</sup> (1992) 175 CLR 327 at 339.

<sup>96</sup> (1992) 175 CLR 327 at 335-336.

been reduced on this on similar theories.<sup>97</sup> Moreover, a plaintiff should be entitled to arrange his or her affairs in the way in which that person pleases and should not be constrained by monetary considerations from dispensing with gratuitous services and obtaining outside services if they are desired. Indeed, the relationship between the provider and the plaintiff may continue to exist in some cases only because outside help is able to be obtained."

**"Secondly**, since there is no binding agreement with the provider to continue to provide the services, the Court would have to make a finding as to whether the care would continue to be provided and, if so, for how long... The relationship between the parties may end for any one of the myriad reasons which bring about the end of relationships. But the predictability of a relationship continuing in this class of care is made more difficult than usual by the effect that the plaintiff's condition and needs may have on the emotional needs of those involved in caring for him or her. The use of the market cost criterion enables the plaintiff to be properly compensated by the award of a reasonable sum whether or not the gratuitous care provider continues to provide that care."  
[Emphasis added]

If the injured plaintiff and the person who provides care for him or her are living together as husband and wife or in some other personal and permanent relationship, a question arises as to whether the spending of time together and the provision of other minor services of the kind that were incidental to their relationship before the injury should be the subject of compensation when the plaintiff's injury creates a need that is satisfied by those services. The provision of such services is usually in the context of a relationship where mutual services are provided. Services are provided by each partner to the other as a normal incident of the relationship between them. Where one party is precluded by injury from providing any services to the other, then the mutuality of services is destroyed.

Accordingly, it is appropriate to omit from the list of services to be paid for by the defendant, some of the time spent or some of the minor services rendered by the care provider to the plaintiff where those services would have been provided in any event as an incident of an antecedent personal relationship between them, *provided* the plaintiff is able to offer services to the care provider in return. If the plaintiff is unable to offer services to the care provider in return, but some pecuniary allowance would be fair compensation to the care provider for the plaintiff's failure to do so, the plaintiff should recover as damages, a capital sum representing that allowance - assuming that sum does not exceed the market value.<sup>98</sup>

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<sup>97</sup> See *Johnson v Kelemic* [1979] FLC 90-657; *Kovac v Kovac* [1982] 1 NSWLR 656; *Carrick v The Commonwealth* [1983] 2 Qd R 365.

<sup>98</sup> *Van Gervan v Fenton* (1992) 175 CLR 327 at 340-341 per Brennan J but cf. at 344 per Deane and Dawson JJ.



Gaudron J dealt with the argument that it was proper to have regard to the fact that the services were being provided by Mrs Van Gervan in her own home on the basis that, to the extent that she was providing such domestic services before Mr Van Gervan became ill, the need for which he should be compensated was only for those services that were not previously provided for him. According to Gaudron J, there are only two bases on which it could be argued that some reduction should be made by reason that Mrs Van Gervan provided domestic services before her husband became ill:

- (1) that there was a pre-existing need to the extent of the services previously provided and thus no need resulted from the accident:

\*That assumes that the services were provided because they were needed and not as part of the give-and-take usually involved in domestic arrangements. There is no justification for an assumption of that kind, involving, as it does, incompetence and selfishness of a very high order.\*<sup>99</sup>

- (2) \*that the accident would have given rise to a need for the services of a wife, but that to the extent that Mr Van Gervan already had the services of a wife, no need actually resulted. At best, that equates a wife to an indentured domestic servant - which she is certainly not.\*<sup>100</sup>

Deane and Dawson JJ said that:<sup>101</sup>

domestic services which are undertaken, as part of the mutual give-and-take of marriage by persons in a marital relationship for the benefit of one another and of their matrimonial establishment, [cannot] legitimately be seen as converted into *additional* services necessary to attend to the accident-caused needs of an injured plaintiff in circumstances where they would have been performed in the same way and to the same extent in any event.

An important qualification to this is that such services will be taken out of the ordinary give-and-take of marriage to the extent that the injuries to the wife or husband preclude her or him from providing any countervailing services.<sup>102</sup>

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<sup>99</sup> *Van Gervan v Fenton* (1992) 175 CLR 327 at 350.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Van Gervan v Fenton* (1992) 175 CLR 327 at 344.

<sup>102</sup> *Ibid.*

To that extent, the continuing gratuitous services provided by the spouse assume a different character and should be treated as additional services which have been or will be provided by that spouse to look after the accident-caused needs of the injured plaintiff.

In the instant case:<sup>103</sup>

in ascertaining the extent of the wife's additional services, account [should] be taken of the drastic curtailment of the appellant's ability to do things for his wife (and himself) in return. Nonetheless, it would be illegitimate to treat the burden of additional care which the wife has assumed in the context of a devoted marriage and in the environment of her own home as converting her into the equivalent of a full-time live-in housekeeper to be remunerated not only for the active services which she renders to her husband but on the basis that time spent with her husband in her own home is to be treated as if it were services rendered to a stranger in a strange environment.

In response to the argument that it is unfair that the companionship and some of the services provided by the wife as an ordinary incident of their marital relationship should reduce the liability of the wrongdoer whose negligence caused the husband's injuries, Deane and Dawson JJ stated:<sup>104</sup>

it appears to us that the notions of fairness which support account being taken, in the assessment of compensation, of *additional* services which are gratuitously provided to attend to a plaintiff's accident-caused needs are not compelling in relation to services and companionship which would have been provided in any event as an incident of a pre-existing and continuing relationship.

Furthermore, Deane and Dawson JJ note that there is an unreality involved in speaking of what is fair in a road accident case in terms which would be appropriate if the negligent defendant or "wrongdoer" was personally bearing the burden of any verdict:<sup>105</sup>

In fact, of course, it is the community generally, or that section of it which consists of the owners of motor vehicles, which bears that burden. Were it otherwise, a

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Id* at 345.

<sup>105</sup> *Id* at 346.

plaintiff's verdict for serious injuries would be likely to be left unsatisfied.<sup>106</sup>

Deane and Dawson JJ also drew attention to the fact that some legislatures<sup>107</sup> have legislated to reverse the decision in *Griffiths v Kerkemeyer*.<sup>108</sup> Their Honours said that this was an indication that an over-generous approach by the courts to compensation based upon the need for services which are provided gratuitously may be seen to conflict with the interests of the community as a whole.<sup>109</sup>

## 9. STATUTORY RESTRICTIONS ON THE PRINCIPLE IN *GRIFFITHS v KERKEMEYER*

In an attempt to reduce the cost to defendants or their indemnifiers of compensation awarded to plaintiffs, some States and Territories have legislated to modify the law in relation to the principle in *Griffiths v Kerkemeyer*.<sup>110</sup> Only the Tasmanian legislation operates in relation to injuries caused by any negligent wrongdoing. The legislation in other jurisdictions only operates in relation to motor vehicle and work accidents.

All the statutory provisions apply both to nursing and attendance services as well as to household or domestic services.

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<sup>106</sup> Note also in Queensland, in relation to accidents causing injury to workers occurring during the course of employment, the cost of damages is spread between all employers who contribute to a compulsory Workers' Compensation fund. Where there is no such insurance scheme, Commonwealth benefits may be payable to alleviate some of the burden on the injured person and his or her care-givers, in which case the loss or at least portion of it is spread among all taxpayers.

<sup>107</sup> See *Common Law (Miscellaneous Actions) Act 1986* (Tas), s.5; *Transport Accident Act 1986* (Vic), s.93(10)(c); *Workers' Compensation Act 1987* (NSW), s.151K; *Motor Accidents Act 1988* (NSW), s.72; and cf. *Law Reform (Miscellaneous Provisions) (Amendment) (No.2) Act 1991* (ACT), s.33(2).

<sup>108</sup> (1977) 139 CLR 161.

<sup>109</sup> (1992) 175 CLR 327 at 346.

<sup>110</sup> (1977) 139 CLR 161. Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.9 describes this legislation in the following terms:

"As part of the blatantly cynical political exercise designed to reduce the insurance premiums of motorists at the expense of seriously injured victims and their families, four States have enacted legislation to place limits on or abolish completely damages for gratuitous services rendered to the victims."

*Tasmania*

In Tasmania the legislature has abolished claims for compensation for gratuitous services rendered to plaintiffs as a result of all types of accidents occurring after 18 December, 1986 by enacting section 5 of the *Common Law (Miscellaneous Actions) Act 1986 (Tas.)*. The section precludes an award of damages for the value of services of a domestic nature or services relating to nursing and attendance where the injured person has not paid or is not liable to pay for the services. It is to be noted that the effect of this section can be avoided by the injured person entering into a contractual arrangement with the person who is to provide the services.

When the Bill was introduced it was stated that the decision in *Griffiths v Kerkemeyer*.<sup>111</sup>

"has had far-reaching implications for insurers. It is no longer appropriate to reduce the allowance for future nursing care on the basis that if a male claimant gets married his wife may take over many of these services at no cost, nor can past services rendered be disregarded because they were rendered voluntarily and gratuitously. ... The fundamental objection to gratuitous service awards is that the plaintiff is compensated for losses not actually incurred by him and in respect of services provided by someone else."

It was further noted that some claims included a *Griffiths v Kerkemeyer* component as high as forty per cent of the total claim and that it was accepted legal practice to include such a claim as a matter of course when making a claim for damages for personal injuries regardless of the amount of the claim.<sup>112</sup>

Abolition of the *Griffiths v Kerkemeyer* head of damage was premised on the twin bases that the amounts of the claims were too high and that the injured person did not really suffer any loss where the services were provided gratuitously. This would appear to ignore the alleviation of pain and suffering which occurs when care is provided by a person known to the injured person as well as the sacrifices made by the care provider in providing the care.

It would also appear to discriminate against plaintiffs who are financially unable to pay someone to care for them and to favour those who had been advised to enter into a contractual agreement for those services which might otherwise be provided gratuitously.

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<sup>111</sup> Second Reading Speech introducing the *Common Law (Miscellaneous Actions) Bill 1986*, Parliamentary Debates 26 November, 1986 at 4510.

<sup>112</sup> Second Reading Speech introducing the *Common Law (Miscellaneous Actions) Bill 1986*, Parliamentary Debates 26 November, 1986 at 4511.

Further, the reference to the inability of the courts to reduce damages on the basis that a male claimant may get married and his wife may provide such services gratuitously underlines the discriminatory assumption which devalues the economic contribution to the community of women who perform unpaid work as carers.

In relation to motor vehicle accidents, section 27A of the *Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.)* allows a benefit to be paid<sup>113</sup> for "daily care" where there is a liability for payment of damages to a person in respect of bodily injury and as a result of that injury appropriate scheduled benefits are payable under Tasmania's Motor Vehicle Accident Compensation Scheme to that person.<sup>114</sup> "Daily care" refers to the injured person's need for treatment, therapy, nursing services, assistance, supervision, services for rehabilitation or other care for at least two hours a day for an indefinite period. If the court is satisfied that the person requires "daily care", the amount payable in respect of care required as a result of the injury after the date of judgment shall not be included in the amount of damages awarded.<sup>115</sup> If the court certifies that the person requires daily care then the Motor Accidents Insurance Board shall pay the appropriate scheduled benefits for so long as the person needs those benefits because of the bodily injury giving rise to the liability to pay for the daily care.<sup>116</sup>

### Victoria

Victoria has abolished claims for damages in respect of gratuitous services rendered to victims of motor vehicle accidents that occurred on or after 1 January, 1987 by enacting section 93(10)(c) of the *Transport Accident Act 1986 (Vic.)*. This section is in terms similar to section 5 of the Tasmanian *Common Law (Miscellaneous Actions) Act 1986* and therefore could be avoided by contractual arrangements between the parties.<sup>117</sup>

One of the objectives of the legislation was stated to be the reduction of the cost to

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<sup>113</sup> By the Motor Accidents Insurance Board.

<sup>114</sup> **Note,** Tasmania has a two-tiered system for compensating victims of motor vehicle accidents. There is a no-fault component which provides scheduled benefits to injured people regardless of whose fault may have caused or contributed to the accident. Further, if the injured person is able to establish that his or her injuries were caused or contributed to by the fault of another, he or she can seek to recover damages at common law in respect of those damages. Owners of motor vehicles are required to pay an annual premium which makes up a pool from which the no-fault benefits and the common law compensation are paid.

<sup>115</sup> Subs 27A(3) *Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.)*.

<sup>116</sup> Subs 27A(5) *Motor Accidents (Liabilities and Compensation) Act 1973 (Tas.)*.

<sup>117</sup> Graycar R. *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 99.

the Victorian community of transport accidents.<sup>118</sup>

In relation to motor vehicle accidents which occurred before 1 January, 1987 the compensation payable for the provision of services of a domestic nature or services relating to nursing and attendance, may not exceed an amount calculated in accordance with a formula which relates to the average weekly earnings of all employees for Victoria. This effectively places a cap on the amount which can be awarded to injured persons for the provision of gratuitous services.

In relation to accidents which occur at work, there is an abolition of a claim for damages under the *Griffiths v Kerkemeyer* principle in subsection 135A(10)(b) of the *Accident Compensation Act 1985 (Vic.)*.

### *New South Wales*

The New South Wales' legislature has limited the amount of compensation which can be awarded under the *Griffiths v Kerkemeyer* principle in relation to injuries sustained in motor vehicle accidents. For motor vehicle accidents which occur after 1 July, 1987, section 72 of the *Motor Accidents Act 1988 (NSW)* provides that where the services are rendered by members of the injured person's family or household the award shall not include compensation for the value of the services of a domestic nature or services relating to nursing and attendance except in accordance with the section.<sup>119</sup> The remainder of the section sets out limitations on the amount which can be awarded.

Compensation can only be awarded where the services are provided for not less than six months and for not less than six hours per week. The first six months and the first six hours are not compensable.<sup>120</sup> If the services would have been provided even if the person had not been injured, there is no allowance for compensation.<sup>121</sup> If the services are to be provided for not less than 40 hours per week the amount of compensation is to be calculated in accordance with a formula which relates to the average weekly earnings of all employees for New South Wales.<sup>122</sup> If the services are provided for less than 40 hours per week the amount of compensation shall not exceed the amount calculated at an hourly rate

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<sup>118</sup> Second Reading Speech introducing the *Transport Accident Bill 1986*, Parliamentary Debates 8 May, 1986 at 2022 and 2025.

<sup>119</sup> Subsection 72(1) *Motor Accidents Act 1988 (NSW)*.

<sup>120</sup> Subs 72(2) and 72(4) *Motor Accidents Act 1988 (NSW)* respectively.

<sup>121</sup> Subs 72(3) *Motor Accidents Act 1988 (NSW)*.

<sup>122</sup> Subs 72(5) *Motor Accidents Act 1988 (NSW)*.

of one-fortieth of the amount determined under subsection (5).<sup>123</sup>

The limitation only applies where the services are rendered by the person's family or household so it would appear that, where services are rendered by others, there is no limitation.

When the New South Wales' provision was introduced it was said that "[u]nder the previous scheme this was a vast head of damages; but it has now gone beyond the figure than can reasonably be covered by insurance. This might be seen as a penalty on volunteers, but it must be remembered that this limitation applies only where the claimant is under no obligation to pass the compensation on to the service provider."<sup>124</sup>

Similar limitations have been imposed in relation to motor vehicle accidents occurring before 1 July, 1987 by the *Motor Vehicles (Third Party Insurance) Act 1942 (NSW)*, section 35C.

In relation to accidents occurring at work, compensation under the *Griffiths v Kerkemeyer*<sup>125</sup> principle is limited in the same way as it is under section 72 of the *Motor Accidents Act 1988 (NSW)*.<sup>126</sup>

The *C.C.H. New South Wales Motor Accidents Practitioners' Handbook* update issued on 30 May 1993 noted that a Bill had been introduced into the New South Wales Parliament to improve benefits for people injured in motor vehicle accidents in New South Wales. Restrictions on access to compensation for home care services provided by a member of the household will be reduced under the proposed changes, thereby recognising the important role of immediate family members in the care of those with serious injury.

The proposed amendment will remove some of the restrictions on access to compensation for home care services. Where a member of the injured person's household or family provides care and services, home care compensation will be available even during the first six months after the accident and for the first six hours of services per week.

However the amount of compensation will continue to be limited to average weekly earnings in New South Wales.

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<sup>123</sup> Subs 72(6) *Motor Accidents Act 1988 (NSW)*.

<sup>124</sup> Second Reading Speech introducing the *Motor Accidents Bill 1988*, Parliamentary Debates, 29 November, 1988 at 3833.

<sup>125</sup> (1977) 139 CLR 161.

<sup>126</sup> S. 151K *Workers Compensation Act 1987 (NSW)*.

### *South Australia*

In South Australia for motor vehicle accidents occurring after 7 February, 1987, damages for gratuitous services rendered only by a parent, spouse or child of the injured person may be awarded subject to limits.<sup>127</sup> Thus, the plaintiff in *Griffiths v Kerkemeyer* would not have recovered in respect of gratuitous services provided by his fiancée.<sup>128</sup>

The total of damages awarded for the recompense of gratuitous services may not exceed four times the State average weekly earnings unless the cost of engaging someone else would be greater, in which case the rate of remuneration may not exceed State average weekly earnings. The State average weekly earnings is defined as average weekly earnings for ordinary hours of work of full-time male employees.<sup>129</sup> Damages for services rendered by other persons are confined to reimbursement of reasonable out of pocket expenses.<sup>130</sup>

### *The Australian Capital Territory*

In the Australian Capital Territory law reform has given statutory recognition to the principles of *Griffiths v Kerkemeyer* and *Van Gervan v Fenton*.

In the Australian Capital Territory the *Law Reform (Miscellaneous Provisions) Act 1955 (ACT)* makes provision for compensation for loss of capacity to do housework.<sup>131</sup> Whilst this is not strictly a *Griffiths v Kerkemeyer* head of damage, the legislature enacted the provision on the basis of *Griffiths v Kerkemeyer*. Subsection 33(2) of the *Law Reform (Miscellaneous Provisions) Act 1955 (ACT)* provides that it is immaterial:

1. whether the plaintiff performed the domestic services for the benefit of other members of the household or solely for his or her own benefit;
2. that the plaintiff was not paid to perform those services;

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<sup>127</sup> Subs 35a(1)(g), 35a(1)(h) and 35a(2) *Wrongs Act 1936 (SA)*.

<sup>128</sup> Nor would recovery have been allowed in *Beck v Farrelly* (1975) 13 SASR 17 where the services for which damages were sought were provided by the plaintiff's siblings.

<sup>129</sup> Subs 35a(6) *Wrongs Act 1936 (SA)*.

<sup>130</sup> Subs 35a(1)(g)(ii) *Wrongs Act 1936 (SA)*.

<sup>131</sup> S 33.



3. that the plaintiff has not been and will not be obliged to pay another person to perform those services; and
4. that the services have been or are likely to be performed (gratuitously or otherwise) by other persons (whether members of the household or not).

The enactment of this provision was to give "a statutory form to the principle in *Griffiths v Kerkemeyer* to allow full compensation for loss of capacity to do housework."<sup>132</sup> The legislature was acting on a recommendation contained in the Report of the Community Law Reform Committee of the Australian Capital Territory.<sup>133</sup> This recommendation effectively extends the *Griffiths v Kerkemeyer* principle in the Australian Capital Territory, rather than, as in other jurisdictions, abolishing or limiting it. The reason for this recommendation was to allow for "reasonable compensation without the injustice of arbitrary and fixed limitations".<sup>134</sup> The Committee noted the limitations in other jurisdictions, especially the New South Wales' limitations, and recommended that they be monitored to determine whether there is any effect on compensation payments and insurance premiums.<sup>135</sup>

### *The Northern Territory*

In the Northern Territory there is a no-fault motor vehicle accident compensation scheme which was established by the *Motor Accidents (Compensation) Act 1979 (NT)*. This scheme replaces the right to sue for damages at common law in relation to motor vehicle accidents only. *Griffiths v Kerkemeyer* claims are therefore no longer relevant to motor vehicle accident compensation in the Northern Territory.

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<sup>132</sup> Second Reading Speech introducing the *Law Reform (Miscellaneous Provisions) (Amendment) Bill 1991*, Parliamentary Debates, 17 October, 1991 at 3884.

<sup>133</sup> Report No. 4 *Loss of Consortium, Compensation for Loss of Capacity to do Housework* The Community Law Reform Committee of the Australian Capital Territory, March 1991.

<sup>134</sup> Report No. 4 *Loss of Consortium, Compensation for Loss of Capacity to do Housework* The Community Law Reform Committee of the Australian Capital Territory, March 1991 at para 26.

<sup>135</sup> *Ibid.*

The *Work Health Act 1986 (NT)*<sup>136</sup> replaces the common law right of an employee injured at work to commence an action for damages, with a right to claim compensation under that Act. Accordingly, *Griffiths v Kerkemeyer* claims are not relevant to workers' compensation in the Northern Territory.

The no-fault Motor Vehicle Accident Compensation Scheme provides<sup>137</sup> that there is payable to or on behalf of a person who has suffered a permanent impairment for not less than two years or which is likely to endure for more than two years, the prescribed amount per hour in relation to attendant care services for the number of hours per week not exceeding the prescribed number of hours. The "prescribed amount per hour" is set out in the *Motor Accidents (Compensation) Rates of Benefit Regulations (NT)* as being \$10 per hour and the "prescribed maximum number of hours" is 20 hours per week.<sup>138</sup>

The Scheme provides<sup>139</sup> that there shall be no payment in relation to attendant care services for any period during which the person is an inpatient in a hospital, nursing home or other care or treatment institution or after the person has attained the age of 65 years.

The no-fault Workers' Compensation Scheme makes provision for the payment of compensation for "other rehabilitation".<sup>140</sup> The employer is obliged to pay the costs incurred for household and attendant care services as are reasonable and necessary for a worker who suffers a permanent or long-term incapacity.<sup>141</sup> In relation to attendant care, the matters which are to be taken into account include:

- (i) the nature and extent of the injury and the degree to which that injury impairs the ability to provide for personal care;
- (ii) the extent to which such medical services and nursing care as may be received provide for essential and regular personal care;
- (iii) the extent to which it is reasonable to meet the desire to live outside an institutional environment;

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<sup>136</sup> Ss. 52, 54 and 189.

<sup>137</sup> S. 18A *Motor Accidents (Compensation) Act 1979 (NT)*.

<sup>138</sup> Reg. 4A.

<sup>139</sup> S. 18B *Motor Accidents (Compensation) Act 1979 (NT)*.

<sup>140</sup> S. 78 *Work Health Act 1986 (NT)*.

<sup>141</sup> Subs. 78(1) *Work Health Act 1986 (NT)*.

- (iv) the extent to which the services are necessary to enable the person to undertake or continue employment;
- (v) any assessment made by experts in worker's rehabilitation;
- (vi) any standard developed by the Government in relation to the need of the disabled persons for attendant care; and
- (vii) the extent to which a relative of the worker might reasonably be expected to provide attendant care services.<sup>142</sup>

"Attendant care services" are defined to mean services other than medical and surgical services or nursing care, which are required to provide for essential and regular personal care.<sup>143</sup>

### *New Zealand*

New Zealand has a comprehensive no-fault accident compensation scheme which relates to all injuries and precludes an injured person from bringing a common law action otherwise than under the *Accident Rehabilitation and Compensation Insurance Act 1992 (NZ)*.<sup>144</sup> Therefore, *Griffiths v Kerkemeyer* claims would not be relevant in New Zealand in relation to personal injuries actions.

Part III of the *Accident Rehabilitation and Compensation Insurance Act 1992 (NZ)* relates to rehabilitation, treatment and prevention of personal injury and provides for systems of rehabilitation of injured persons. Section 26 provides that social rehabilitation under the Act includes provision of or payment for attendant care, household help and child care. There is further provision for an independence allowance<sup>145</sup> in section 54 where the injury has resulted in a degree of disability of ten per cent or more. Under subsection 54(4), for example, the amount of the independence allowance shall be \$40 per week for persons who have a degree of disability of 100 per cent.

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<sup>142</sup> Subs. 78(2)(d) *Work Health Act 1986 (NZ)*.

<sup>143</sup> Subs. 78(4) *Work Health Act 1986 (NZ)*.

<sup>144</sup> S. 14 *Accident Rehabilitation and Compensation Insurance Act 1992 (NZ)*.

<sup>145</sup> "Independence allowance" is not defined in the Act.

There is further provision in section 149 for the continuation of payments made under the previous *Accident Compensation Act 1972 (NZ)*<sup>146</sup> and the *Accident Compensation Act 1982 (NZ)*<sup>147</sup> until 31 December, 1992. These payments were in relation to compensation for constant personal attention and care. There is no equivalent provision in the *Accident Rehabilitation and Compensation Insurance Act 1992 (NZ)* for such compensation to be made, except the provisions mentioned above.

## 10. COMMENT ON THE STATUTORY LIMITATIONS

The Australian legislatures' response to *Griffiths v Kerkemeyer* has not been consistent. Tasmania has abolished the head of damage. Victoria has abolished it in relation to motor vehicle accidents. South Australia has limited the categories of gratuitous providers for whose services damages are recoverable. South Australia and New South Wales have capped or limited the damages recoverable under this head of damage.

Queensland and Western Australia have left this area of compensation available to injured persons.

The common law has been replaced or complemented in some jurisdictions by no-fault compensation schemes.

The New South Wales and Victorian reforms should be viewed in the light of the fact that in these states damages could be assessed by juries - that is not the case in Queensland. Each of the statutes, except the Australian Capital Territory provision, aims to limit recovery of damages for non-economic losses.

*Griffiths v Kerkemeyer* damages have traditionally been characterised as economic. But Graycar notes that the legislatures have treated these damages as if they were for non-economic losses. Graycar suggests a possible explanation for this:<sup>148</sup>

since money has not changed hands, the damages suffered are not perceived as economic. But to characterise such damages as non-economic moves even further away from the conceptual basis adopted by the High Court in *Griffiths*.

The High Court in *Griffiths v Kerkemeyer* and in *Van Gervan v Fenton* was of the strong opinion that the damage suffered by the plaintiff is the need for such

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<sup>146</sup> s. 121.

<sup>147</sup> s. 80.

<sup>148</sup> Graycar R. *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 101.

services. Compensation is to be awarded in response to that need so that should the plaintiff require professional services he or she will be in the position to pay for them.

The statutory responses to *Griffiths v Kerkemeyer* generally seem to ignore the 'need' basis of the head of damages, and place great stock in the selflessness, generosity and tireless nature of the injured person's family and friends who are, in the vast majority of cases, female. They do not recognise the possibility that the selflessness and generosity may not continue indefinitely and that the plaintiff may have to resort to professional services.

#### 11. QUEENSLAND AWARDS OF GRIFFITHS V KERKEMEYER POST VAN GERVAN V FENTON

It is apparent that many if not the vast majority of claims for personal injury are settled between the parties and there is no need for a court determination. This is particularly so when there is no dispute as to liability. Where the claim includes a *Griffiths v Kerkemeyer* component, and the claim settles, it would be difficult to maintain that the *Griffiths v Kerkemeyer* component of the damages paid to the injured party was unreasonable or extravagant. Presumably, if the parties could not agree on the appropriate amount to be paid under this head of damage and that was a significant point of contention between them, the dispute would proceed to trial.

Since the High Court's decision in *Van Gervan v Fenton* approximately 27 personal injury actions have been decided by the District Courts and the Supreme Court of Queensland.<sup>149</sup> Approximately 7 appeals have been heard by the Court of Appeal.

A summary of those decisions is set out in the Appendix. The Appendix also includes a number of decisions made shortly prior to *Van Gervan v Fenton*, for comparative purposes. The decisions made post *Van Gervan v Fenton* did not necessarily refer to that case.

From the Commission's review of the cases proceeding to trial, the following has become apparent:

- \* Many *Griffiths v Kerkemeyer* claims are modest. Awards for *Griffiths v Kerkemeyer* compensation are normally a minor item in the total award;

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<sup>149</sup> Excluding cases heard on appeal by the Court of Appeal.

- \* The larger *Griffiths v Kerkemeyer* awards relate to the care needed for seriously injured people - primarily quadriplegics, tetraplegics and severely brain-damaged people. Often the major claim relating to domestic assistance or nursing services for severely injured people is for commercial assistance and services. That is not a *Griffiths v Kerkemeyer* claim;<sup>150</sup>
- \* When "extravagant" claims for *Griffiths v Kerkemeyer* are identified by the Courts the awards for *Griffiths v Kerkemeyer* are reduced to a level which the Courts believe are reasonable in all the circumstances;
- \* The need for the services has to be established;
- \* Plaintiffs do not claim compensation for the need for future gratuitous services as a matter of course. It is not uncommon for the *Griffiths v Kerkemeyer* component to relate solely to past gratuitous services;
- \* Quite often the interest component relating to the damages for past gratuitous services approximates the damages awarded for those services.

## 12. THE PROPOSED AMENDMENT IN QUEENSLAND

Legislation has been suggested to limit the award of damages for gratuitous services.<sup>151</sup> It provides as follows:

- (1) If an award of damages for personal injury is to include compensation for the value of services of a domestic nature, or services relating to nursing or attendance, provided gratuitously or on a non-commercial basis, the compensation is subject to limitations prescribed by this section.
- (2) No compensation is to be awarded if the services would have been provided even if the injury to which the award of damages relates had not happened.
- (3) No compensation is to be awarded unless the services provided or to be provided are for at least six hours per week, and compensation may only be awarded for services provided or to be provided after the first six hours in each week.

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<sup>150</sup> See footnote 5 P.1 above.

<sup>151</sup> The current draft of the *Motor Vehicles Insurance Bill 1993* is in the consultation phase. It has not been introduced in Parliament. The Bill has been provided to the Commission for the purposes of this reference.

- (4) If the services provided or to be provided are for forty hours or more per week, the amount of the compensation is not to exceed -
- (a) the amount per week estimated by the Australian Statistician as the average weekly earnings of employees in Queensland for:
    - (i) the quarter in which the services were provided; or
    - (ii) if the services were provided in a quarter for which the Australian Statistician's estimate is not yet available or the services are to be provided in the future - the most recent quarter for which the Australian Statistician's estimate is available; or
  - (b) if the Australian Statistician ceases to publish estimates of average weekly earnings for employees in Queensland - an amount per week determined in accordance with the principles laid down by regulation.
- (5) If the services are, or are to be, provided for less than forty hours per week, the compensation is to be calculated at an hourly rate equivalent to 1/40 of the weekly rate under subsection (5) [sic].

Subsection 2 will require Courts to make detailed assessments of what goes on in households and to determine what housework and other domestic arrangements had been undertaken. This may lead to unexpected and perhaps undesirable results. For example, in the South Australian case of *Bettoncelli v Bettoncelli*<sup>152</sup> the accident victim was a woman with five children. Her injuries prevented her from undertaking housework. Her needs for assistance of a personal and domestic nature after the accident had been met by members of her family. The eldest daughter was 16. Legoe J commented:<sup>153</sup>

[I]t is an obvious fact that a girl of that age and a member of a family basically Italian or European in background and upbringing, would be doing her bit for the family, both her parents and her siblings.

Graycar suggests that there is something "deeply disturbing" about assessments based on such assumptions:<sup>154</sup>

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<sup>152</sup> (1988) 135 LSJS 211.

<sup>153</sup> *Id* 216 per Legoe J.

<sup>154</sup> Graycar R. *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 100.

It is also somewhat reminiscent of the earlier NSW Court of Appeal decision, *Burnicle v Cutelli*,<sup>155</sup> where the accident victim, also of Italian origin, had been rendered unable to undertake housework and her daughter, aged 21 at the time of trial, had taken on this work. While the judges differed on whether housework services fell within the *Griffiths v Kerkemeyer* principle, none of them would have allowed damages for the housework the daughter did. They appear to have assumed that she would remain available to do that work for the household (which is how they characterised it) indefinitely. But, if one were inclined to make assumptions about people's behaviour, why did the court not consider that an adult daughter of 21 might leave, whether to marry, or to establish an independent household of her own? I know nothing of this woman's life and would feel uncomfortable speculating on her future. But such speculation does not appear to concern some judges in cases of this nature.

If the services are provided by a wife, it equates her, as Gaudron J said in *Van Gervan v Fenton* as an "indentured domestic servant". Issues of proof will also add to the length and cost of litigation. It should also be noted that the proposed amendment could be defeated by a commercial agreement being entered into by the injured person and the caregiver.<sup>156</sup>

Subsection 3 The Commission believes that some seriously injured people require less than six hours assistance per week - and without that assistance, may be unfairly disadvantaged. For example, paraplegics may only require about five hours assistance per week, in respect of cleaning activities, vacuuming, gardening and so forth. If the need for such services arises from the injury, then it is difficult to justify not compensating the victim for the need. A need to lift this restriction has also been recognised in New South Wales.

Subsection 4 The award of compensation should reflect the appropriate rate for the particular services to be provided as well as the number of hours per week such services are to be provided. It may be that the gratuitous care-giver has qualifications to fulfil specialised needs of the injured person. It may be also that the services are required for greater than forty hours a week - in which case a payment based on a forty-hour week would be inadequate compensation (particularly if, in the future, the injured person were obliged to pay for professional services).<sup>157</sup>

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<sup>155</sup> [1982] 2 NSWLR 26.

<sup>156</sup> See pp 2-3 and 7 above.

<sup>157</sup> It should also be noted that average weekly earnings rarely represent 40 hours per week work in Queensland. For example, public servants in Queensland are required to work 37¼ hours per week.



Subsection 5 The comments relating to subsection (4) also apply to subsection (5). Subsection (4) also raises a number of industrial issues.

The general comments made earlier on the statutory limitations in other jurisdictions apply to the same extent to the proposed Queensland provision.<sup>158</sup>

### 13. USE OF THE "COMMERCIAL RATE" IN LORD CAMPBELL'S ACTIONS

#### (1) Differences between Lord Campbell and Griffith v Kerkemeyer claims

A claim for loss of domestic services in a *Lord Campbell's* action<sup>159</sup> is different in nature to a *Griffith v Kerkemeyer* claim. These differences were recently discussed in the High Court decision of *Nguyen v Nguyen*.<sup>160</sup>

The High Court noted that in *Griffith v Kerkemeyer* the plaintiff's claim was for personal injuries. The loss was caused by his physical disability arising from the accident.<sup>161</sup> In assessing the loss, the plaintiff was awarded the cost of services required to satisfy the need caused by the disability, even though the plaintiff had not paid and would not pay for the services.<sup>162</sup>

On the other hand a claim for the loss of domestic services in a *Lord Campbell's* action is a claim for the loss of a material benefit. Dawson, Toohey and McHugh JJ in the High Court decision of *Nguyen v Nguyen*<sup>163</sup> described this claim as:

a claim for recompense for some tangible advantage which has been lost by reason of the death of the deceased... In this type of claim the loss can be identified directly and it is unnecessary to point to some need by which it is represented.... the deceased may have made a contribution in services rather than money in which case damages are recoverable for their loss, whether or not they are, or are to be, replaced, provided that a pecuniary value can be placed upon them.

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<sup>158</sup> See p30 above.

<sup>159</sup> Sections 12-15C of the *Common Law Practice Act 1862* enable dependants of a person who died as a result of another person's negligence to bring an action against the wrongdoer for damages. This action is commonly referred to as a *Lord Campbell's* action.

<sup>160</sup> (1990) 169 CLR 245.

<sup>161</sup> (1990) 169 CLR 245 at 262.

<sup>162</sup> *Id* 262 - 263.

<sup>163</sup> *Id* 263.

## (2) Loss of domestic services

The High Court in *Nguyen v Nguyen*<sup>164</sup> held that compensation may be recovered in a *Lord Campbell's* action for loss of domestic services which were not replaced at a pecuniary cost. The widower was successful in obtaining compensation for the loss of domestic services which his wife had performed before her death, even though he did not engage anyone to perform those services.

In assessing the quantum of damages for loss of domestic services in a *Lord Campbell's* action Brennan J in *Nguyen v Nguyen*<sup>165</sup> was of the opinion that the same principles applied when assessing the provision of substitutionary services in a *Lord Campbell's* action as those in respect of needed services in a *Griffiths v Kerkemeyer* claim. In this decision the High Court recognised that the method of calculating the damages in these types of claims will depend on the circumstances of each case.

Dawson, Toohey and McHugh JJ described circumstances which will put a halt on unreasonable assessments of damages as follows :<sup>166</sup>

The evidence may justify only a small amount by way of damages or it may justify a large amount. The result will depend upon the facts established before the court. ...the damages to be assessed are those suffered by the plaintiff and cannot always be equated with the cost of such help. The services formerly rendered by a deceased wife may not be capable of being reproduced faithfully by services which are commercially available and the scope and cost of the only services commercially available may be disproportionate in comparison with the scope and value of the services which were actually provided by the deceased wife. In circumstances such as that it will not be reasonable to regard the cost of substitute services as any more than a starting point in assessing a plaintiff's loss. Indeed, in cases where the disproportion is severe, the cost of commercially available services may offer no real guide at all. It must always be borne in mind that the damages to be assessed are those suffered by the plaintiff by reason of the death alone.

Deane J also said damages must be reasonable in the circumstances of the case, taking into account current local standards and values.<sup>167</sup>

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<sup>164</sup> (1990) 169 CLR 245.

<sup>165</sup> (1990) 169 CLR 245 at 249 - 250.

<sup>166</sup> *Id* 264 - 265.

<sup>167</sup> (1990) 169 CLR 245 at 257.

The High Court's concern with containing the assessment of damages within reasonable limits has found judicial support in the judgments of Macrossan CJ and Derrington J in the Full Court decision of *Nguyen v Nguyen*<sup>168</sup> (the assessment of damages post the High Court decision in *Nguyen v Nguyen*<sup>169</sup>) and Williams J in the unreported Supreme Court decision of *White v MIM Ltd.*<sup>170</sup>

### (3) Reform

Claims for loss of domestic services in *Lord Campbell's* actions are clearly distinguishable from *Griffiths v Kerkemeyer* claims although the assessment of damages in relation to both types of claims is made on the basis of appropriate commercial rates. Also, the courts are able, in both cases, to control the claims by imposing a reasonableness test.

The Commission believes that any review of the basis for a claim for loss of domestic services in a *Lord Campbell's* action would be better done in the context of a wider review of Queensland's *Lord Campbell's* actions. To examine this small aspect of a *Lord Campbell's* action in isolation may be misleading. In the meantime, however, there is no apparent need for reform of the basis of assessment of damages for loss of domestic services.

## 14. ARGUMENTS IN FAVOUR OF CHANGING THE LAW IN QUEENSLAND

1. Compensating people injured at work or in motor vehicle accidents, imposes a significant cost on compulsory insurers. That cost has been increased by the requirement that compensation for the need for care be based on commercial rates. This cost will, in turn, be passed on to employers and motor vehicle owners.
2. *Griffiths v Kerkemeyer* awards have been abolished or capped in some jurisdictions as part of their revised method of determining compensation for accident victims.
3. Under the current law in Queensland, a *Griffiths v Kerkemeyer* award to an injured person carries with it no obligation on the part of the

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<sup>168</sup> (1992) 1 Qd R 405.

<sup>169</sup> (1990) 169 CLR 245.

<sup>170</sup> Supreme Court of Queensland, 17 February 1993, Unreported No 6 of 1991.

injured person to pay the caregiver for the services provided. There will be cases where the caregiver is, in effect, treated as slave labour by the injured person. The caregiver may be economically dependent on the injured person and with no legal entitlement to payment for services provided, despite the fact that the injured person has been paid an amount to cover the need for such services.<sup>171</sup>

4. There is no reason why recovery under *Griffiths v Kerkemeyer* should not be had for voluntary assistance other than for nursing and domestic assistance. It might also extend, for example, to voluntary assistance rendered in the plaintiff's business.<sup>172</sup> There is a potential for this head of damage to become excessive.

## 15. ARGUMENTS AGAINST CHANGING THE LAW IN QUEENSLAND

1. Any departure from the *Griffiths v Kerkemeyer* principles or from the use of commercial rates in the assessment of damages would be unfair to gratuitous care providers, who are overwhelmingly female, if their work is not valued at the commercial cost of those services.

The appendix includes details of 22 cases decided after the High Court decision of *Van Gervan v Fenton*.<sup>173</sup> In all but one of these cases the injured person was male and where the care provider is identified, it appears that the care was provided by his wife, girlfriend and parents, de facto spouse, the women with whose family he stayed, his mother and his sister, his sister-in-law, or a group of volunteers.

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<sup>171</sup> In Ontario a third party claim by a carer is available under s.61 of the *Family Law Act 1986*. The Ontario Law Reform Commission has recommended the abolition of the third party action and has recommended that an award be made to the victim with the Court being empowered to impose a trust for the carer's benefit. *Report on Compensation for Personal Injuries and Death*, 1987. But, see Stephens J in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 177.

<sup>172</sup> See Luntz H. *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.10. *Griffiths v Kerkemeyer* awards may also take into account the cost of attendance by relatives at hospital to visit the injured person, travel and accommodation expenses of the carer, etc. In the assessment of *Griffiths v Kerkemeyer* award it is irrelevant that the party providing the assistance also receives Commonwealth or other benefits for providing the assistance (assuming such benefits are available - normally spouses would be precluded because of size of the award). See for example, *Wann v Fire and All Risks Insurance Company Limited* [1990] 2 Qd R 596. Note also the anomaly referred to by Luntz at para 4.6.11 where the voluntary assistance is provided by the defendant to the action. In such cases, Courts insist on treating the person named as defendant as the person liable to pay the damages and treat the provision of the services as partial satisfaction of the liability. It is likely in these circumstances that plaintiffs will be advised to seek outside help when assistance within the family is more congenial and convenient. See cases referred to as Peek 18.5.92 (District Courts) and Maan 24.7.92 (Supreme Court) in Appendix to this Draft Report. It would be difficult to overcome this anomaly whilst the fault-based system of compensation exists in Queensland.

<sup>173</sup> (1992) 175 CLR 327. Decision handed down 28 October 1992.

In the one case where the injured person was female, the care providers were her parents.<sup>174</sup>

The proposed amendment to the law would indirectly discriminate against women and "women's work"<sup>175</sup> in contravention of the *Anti-Discrimination Act 1991*.<sup>176</sup>

Gender bias in the law has recently been a subject of much debate in Australia. The prospect of gender bias clearly arises with the issue of reducing the quantum of awards paid for gratuitous care providers. Professor Kathleen Mahoney has defined gender bias as follows:

Gender bias takes many forms. One form is behaviour or decision making by participants in the justice system which is based on, or reveals a reliance on, stereotypical attitudes about the nature and roles of men and women or their relative worth, rather than being based upon an independent valuation of individual ability, life experience and aspirations. Gender bias can also arise out of myths and misconceptions about the social and economic realities encountered by both sexes. It exists when issues are viewed only from the male perspective, when problems of women are trivialised or over-simplified, when women are not taken seriously or give the same credibility as men. Gender bias is reflected not only in actions of individuals, but also in cultural traditions and in institutional practices.<sup>177</sup>

It is inconsistent with principle for such gender bias to be reflected by statutory amendment.

2. It would be unfair to the injured plaintiff. The current law encourages an injured person to be cared for in the home rather than in an

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<sup>174</sup> Figures were sought from the Workers' Compensation Board indicating the percentage of female carers in *Griffiths v Kerkemeyer* claims. The figures provided show a comparison of female plaintiffs and male plaintiffs and the percentage of damages awarded for *Griffiths v Kerkemeyer* claims for each. These show a high percentage of claims awarded under the *Griffiths v Kerkemeyer* head for female plaintiffs in matters that went to trial. However it does not identify whether the care providers in those cases were male or female. On the basis of the examples given in the text, the care-providers are at least as likely to have been female as male.

<sup>175</sup> *Van Gervan v Fenton* (1992) 175 CLR 327 at 348.

<sup>176</sup> Ss 7(1)(a), 9, 11.

<sup>177</sup> Mahoney, K.E. "Gender Bias in Judicial Decisions", A lecture at the Supreme Court of Western Australia, Perth, Australia, August 15 1992, p.7.

institution.<sup>178</sup> This serves the dual objectives of lessening costs and achieving the social policy of keeping people out of institutions. This policy is the manifestation of the rights of physically and mentally disabled people:

to live with their families ... and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom.<sup>179</sup>

The family with which he [or she] lives should receive assistance.<sup>180</sup>

Institutionalisation of injured persons is likely to have the social costs of despondency and lack of independence and the economic costs of an increase in awards for pain and suffering and of the state having to build and provide suitable facilities.

3. The making of contracts between relatives and friends and the injured person would be encouraged. Indeed it might be considered negligent of a legal adviser not to advise an injured person to enter into such an agreement with a friend or relative. This may not be desirable. It is likely that the Courts would view such agreements unfavourably. As Megaw J stated in *Wattson v Port of London Authority*:<sup>181</sup>

That is not how human beings work and [such a requirement] would, in my judgment ... be a blot on the law ...

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<sup>178</sup> See for example, *Sailes v The Nominal Defendant (Qld)* Supreme Court 18 August 1993, Unreported.

<sup>179</sup> *The Declaration on the Rights of Disabled Persons* proclaimed by the General Assembly of the United Nations on 9 December 1975, Article 9. This international human right instrument has been ratified by the Commonwealth and is recited in the preamble to the *Queensland Anti-Discrimination Act 1991*.

<sup>180</sup> *The United Nations Declaration on the Rights of Mentally Retarded Persons* proclaimed by the General Assembly of the United Nations on 20 December 1971, Article 4. This international human right instrument has been ratified by the Commonwealth and is recited in the preamble to the *Queensland Anti-Discrimination Act 1991*.

<sup>181</sup> [1969] 1 Lloyd's Rep 95.

O'Connor LJ in *Housecroft v Burnett*<sup>182</sup> stated that he was:<sup>183</sup>

very anxious that there should be no resurrection of the practice of plaintiffs making contractual agreements with relatives to pay for what are in fact gratuitous services rendered out of love. Now that it is established that an award can be made in the absence of such an agreement, I would regard an agreement made for the purposes of trying to increase the award as a sham.

4. It is the wrongdoer and his or her insurer who should bear the loss rather than the injured person. This is not only because it is fairer and more just but also because the insurer is a better loss distributor than the injured plaintiff.
5. It gives the injured person the security that he or she will be able to choose whether to continue to be cared for by a relative or friend or whether to be independent of that care. If the primary concern of the Courts when awarding damages for personal injury should be to assure that there will be adequate future care<sup>184</sup> then, as Graycar notes:<sup>185</sup>

There is no justification for compounding the uncertainties about the plaintiff's future by awarding less than the market cost of cover by reference to assumptions about the ways in which people in relationships order their lives.

It should be noted that there is a significant risk that a spouse or other family member who cares for the injured person will not be able to cope with the demanding position they are placed in.<sup>186</sup>

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<sup>182</sup> [1986] 1 All ER 332(CA).

<sup>183</sup> *Id* 343.

<sup>184</sup> *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 at 476 per Dickson J.

<sup>185</sup> Graycar R. *Before the High Court: Women's Work: Who Cares?\** (1992) 14 Sydney Law Review 86 at 105.

<sup>186</sup> See for example, *Sailes v The Nominal Defendant (Qld)* Supreme Court 18 August 1993, Unreported, Byrne J.

6. The Courts are controlling the *Griffiths v Kerkemeyer* head of damage by applying a 'reasonableness test'.<sup>187</sup> There is nothing to demonstrate that *Griffith v Kerkemeyer* awards are placing a strain on available compensation funds. This is apparent from the summary of cases set out in the Appendix. It would be very difficult to justify further reducing the largely moderate or low awards in these cases given the circumstances involved.

## 16. CONCLUSION

The law under the principle in *Griffiths v Kerkemeyer*<sup>188</sup> allows injured plaintiffs to obtain compensation in relation to the need for domestic services, nursing services and attendant care. The High Court reiterated this principle in *Van Gervan v Fenton*<sup>189</sup> so that plaintiffs are able to obtain this care whether it will be provided indefinitely on a gratuitous basis, or whether, at some later date, such care will be provided by a professional carer.

In some States and Territories the principle has been limited or abolished entirely by legislatures concerned with keeping the cost to insurers and to the community at a minimum. This may lead, in the long term, to plaintiffs entering into contractual arrangements with relatives so that the effect of the legislation can be avoided, a practice that the English Court of Appeal has said should not be resurrected.<sup>190</sup> This aspect was also raised by the Law Reform Commission of Tasmania<sup>191</sup> which was concerned that the effect of the Tasmanian legislation could be circumvented by a plaintiff entering into contractual arrangements with relatives for the provision of services which would otherwise have been provided on a gratuitous basis. Such a situation should also be avoided in Queensland.

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<sup>187</sup> See Appendix. Note, however, there has been recent academic discussion on possible bias against women in the application of the traditional reasonableness test. See pp 38-39 above.

<sup>188</sup> (1977) 139 CLR 161.

<sup>189</sup> (1992) 66 ALJR 828.

<sup>190</sup> *Housecroft v Burnett* [1986] 1 All ER 332 at 343 per O'Connor L.J.

<sup>191</sup> Report No. 52 *Compensation for Victims of Motor Vehicle Accidents* Law Reform Commission of Tasmania, October 1987 at 43.



**17. THE COMMISSION'S TENTATIVE PROPOSAL**

- \* There should be no legislative interference with *Griffiths v Kerkemeyer* awards in Queensland.
- \* Methods of ensuring that the providers of services are actually paid for those services from the compensation award should be explored. The effect of the defendant providing services to the injured person may also be matter for further consideration.