THE ASSESSMENT OF DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH LITIGATION

GRIFFITHS v KERKEMEYER

SECTION 15C COMMON LAW PRACTICE ACT 1867

REPORT No. 45

Queensland Law Reform Commission
October 1993

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Previous papers on this Reference:
Draft Report on *Exclusion of Benefits from the Assessment of Wrongful Death Damages: Section 15C Common Law Practice Act*, August 1993 (limited circulation).
Draft Report on *Griffiths v Kerkemeyer*, August 1993 (limited circulation).

To: The Hon Mr Dean Wells, M.L.A.
Attorney-General of Queensland

In accordance with the provisions of section 15 of the Law Reform Commission Act 1968, I am pleased to present the Commission's report on The Assessment of Damages in Personal Injury and Wrongful Death Litigation: Griffiths v Kerkemeyer; Section 15C Common Law Practice Act 1867.

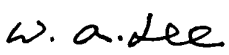
Yours faithfully,

The Honourable Mr Justice G N Williams (Chairman)

Her Honour Judge H O'Sullivan (Deputy Chair)

Ms R G Atkinson

Mr W G Briscoe



Mr W A Lee

Ms L Willmott

8 October 1993

CONTENTS

Part 3 Section 15C *Common Law Practice Act 1867*

PART 1

INTRODUCTION

1. TERMS OF REFERENCE

The Attorney-General has requested the Queensland Law Reform Commission[1] to consider two matters in relation to the assessment of damages:

(a) Whether there should be any limitations imposed on *Griffiths v Kerkemeyer* awards in personal injury litigation and in awards for loss of domestic services in Lord Campbell's actions which are assessed on similar principles to *Griffiths v Kerkemeyer*.

(b) The desirability or otherwise of continuing to exclude the benefits listed in Section 15C *Common Law Practice Act 1867* from the assessment of damages in Lord Campbell's actions.

The Attorney-General requested the Commission to report to him on both matters within three months from July 1993.

Given the deadline for reporting, the Commission circulated draft reports on both matters in August 1993 to a number of individuals and organisations the Commission considered may have an interest or expertise in either or both matters.[2] A cut-off for the receipt of submissions was set at two weeks from distribution of the draft reports. It is regrettable that it was necessary to restrict circulation and to impose such a short time-limit, but the Commission was bound by the Attorney-General's reporting requirements. 11 submissions were received by the Commission and these have been taken into account in this Report.[3]

2. BACKGROUND TO THE REFERENCE

It is apparent to the Commission that the terms of reference arose from a concern in Government with a possible need to increase compulsory workers' compensation insurance premiums and compulsory third party motor vehicle accident insurance premiums to cover the costs of meeting common law damages in personal injury litigation and in litigation resulting from the wrongful death of a person. Any rise in premiums to meet the costs associated with increases in the size and/or number of claims made on compulsory insurers may be passed on to

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1 By letters to the Commission dated 29 June 1993 and 2 August 1993.

2 Approximately 100 copies of each of the draft reports were distributed.

3 A list of respondents appears in Appendix 1.

the community by way of higher transportation costs and labour costs. Although changes to the laws regulating personal injury and wrongful death litigation will affect the uninsured wrongdoer, most serious injuries caused by the wrongdoing of another are associated either with motor vehicles or with the injured person's employment and will be compensated from funds accumulated under compulsory insurance schemes.

The *Griffiths v Kerkemeyer* head of damage in personal injury litigation and the exclusion of certain benefits paid or payable to the dependants of a person who has died as the result of the negligence of another from the assessment of common law damages, are two areas where changes to the law may result in savings to defendants and third party insurers or may at least help control future escalation in the costs of damages. A financial analysis of the current and future costs of *Griffiths v Kerkemeyer* awards and awards for damages for wrongful death may be a useful exercise for insurers and premium payers. Such a project would need to involve actuaries and others with an expertise in insurance. It would also need to take place in the context of common law actions for damages generally and would need to consider the willingness and ability of premium payers and the wider community to bear the cost of particular types and levels of compensation.

3. THE COMMISSION'S APPROACH AND RECOMMENDATIONS

Part 2 of this Report discusses the *Griffiths v Kerkemeyer* head of damage. **Part 3** of the Report discusses section 15C of the *Common Law Practice Act 1867*. **Part 4** sets out the Commission's recommendations.

In summary, the Commission has recommended that there should be minimal legislative interference with *Griffiths v Kerkemeyer* awards in Queensland, and that there should be no amendment to section 15C of the *Common Law Practice Act 1867*.

In its review of these two areas it has become apparent to the Commission that there is a need for a general review of the law and procedures relating to personal injuries litigation and to review the whole of the *Common Law Practice Act 1867*. Whatever savings could have been made by limiting *Griffiths v Kerkemeyer* awards and by restricting the operation of section 15C of the *Common Law Practice Act 1867* are likely to have been insignificant compared to:

(i) the injustices which might have resulted from such a piecemeal approach; and

(ii) the potential savings in time and money which may be achievable by a complete and thorough review of the law and procedure relating to personal injury litigation and wrongful death litigation.

PART 2

GRIFFITHS V KERKEMEYER

1. INTRODUCTION[4]

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.[5] When an injury occurs at a person's place of employment there is a 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)*[6] whether or not the employer was at fault.[7]

Claims for damages may be made under various heads of damage.[8] For example, compensation can be claimed for pain and suffering, loss of amenities, loss of enjoyment of life and 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.[9] The head of damage commonly referred to as *Griffiths v Kerkemeyer*[10] represents a subheading of domestic assistance or nursing services, where those services are provided gratuitously (on an unpaid basis) by friends or relatives of the injured person. The *Griffiths v Kerkemeyer* claim relates to the injured person's need for such services.

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4 The terms of reference are set out on p.1 of this Report.

5 For example, such accidents may occur on another person's property, creating occupier's liability.

6 *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.

7 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*).

8 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.

9 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.

10 (1977) 139 CLR 161.

2. THE LAW PRIOR TO THE DECISION IN *GRIFFITHS v KERKEMEYER*

Prior to the decision of the High Court of Australia in *Griffiths v Kerkemeyer*[11] it was uncertain whether an injured plaintiff who required long term care[12] 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.[13] 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.[14] As a consequence, no compensation was awarded if the services were performed on an unpaid basis by, for example, a "dutiful daughter"[15] or a wife.[16] Luntz notes that the treatment by the courts of unpaid services was in marked contrast to their treatment of charitable gifts given to injured persons and their dependants:[17]

> 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.

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 on an unpaid basis, so that a legal liability was created.[18] The plaintiff may have been able to recover in such circumstances even though the parties to the "contract" had an understanding that the contract would not be enforced if the action for damages failed.[19] However,

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11 (1977) 139 CLR 161.

12 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.

13 *Blundell v Musgrave* (1956) 96 CLR 73 at 79.

14 *Renner v Orchard and Anor* [1967] QWN 3. See also *Blundell v Musgrave* (1956) 96 CLR 73.

15 *Renner v Orchard and Anor* [1967] QWN 3.

16 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1968) 122 CLR 649.

17 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.2.

18 See for example, *Haggar v De Placido* [1972] 2 All ER 1029.

19 But see *Renner v Orchard* [1967] QWN 3 where promise to pay care provider was conditional on recovery of damages held not enough to entitle plaintiff to recover.

as Luntz notes,[20] 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 an unpaid basis. Megaw J in *Wattson v Port of London Authority*[21] 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[22] could lead to a revival of the practice of entering into agreements purporting to create a legal liability.[23]

In England immediately prior to *Griffiths v Kerkemeyer*[24] 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*[25] 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:

> 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

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20 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.3.

21 [1969] 1 Lloyd's Rep 95 at 102.

22 See pp 22-30 below.

23 Luntz H *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.

24 (1977) 139 CLR 161.

25 [1974] QB 454.

needs.[26]

Following *Donnelly v Joyce*[27] the Full Court of the Supreme Court of South Australia applied the concept of "need" in *Beck v Farrelly*[28] and held that the plaintiff was entitled to recover compensation for the need for the assistance which was provided for no pay by his family.

3. HIGH COURT: GRIFFITHS V KERKEMEYER

In 1977, the issue came before the High Court of Australia in the case of *Griffiths v Kerkemeyer.*[29] 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 for no payment by his fiancee 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 for no payment 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 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.[30]

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26 [1974] QB 454 at 461-462.

27 [1974] QB 454.

28 (1975) 13 SASR 17.

29 (1977) 139 CLR 161.

30 (1977) 139 CLR 161 at 163.

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.[31]

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:[32]

> 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.

4. POLICY CONSIDERATIONS

The High Court in *Griffiths v Kerkemeyer*[33] articulated a number of policy reasons which supported its decision. It also based its decision on its belief that the principle was 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[34] agreed with the view of Bray CJ in *Beck v Farrelly*[35] that to compensate the plaintiff in these circumstances is "in accord with popular conceptions of justice". As Lord Reid said in *Parry v Cleaver:*[36]

> 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.

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31 (1977) 139 CLR 161 at 174-175 per Stephen J and at 192 per Mason J.

32 (1977) 39 CLR 161 at 168-169.

33 (1977) 139 CLR 161.

34 (1977) 139 CLR 161 at 168 per Gibbs J, at 175 per Stephen J and at 193 per Mason J.

35 (1975) 13 SASR 17 at 21.

36 [1970] AC 1 at 14.

(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 fiancee. 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.[37]

(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.[38]

In *Griffiths v Kerkemeyer*, Stephen J acknowledged that a friend or relative who provides unpaid services to an injured person is unlikely to have any capacity to distribute the loss. He therefore concluded that:[39]

> 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 unpaid care.

The High Court echoed the abhorrence expressed in *Donnelly v Joyce*[40] at the possibility of the extent of a wrong-doer's liability depending on whether

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37 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 170.

38 Fleming J *The Law of Torts* (8th ed 1992) at 8-11. Two respondents also noted that increased premiums would normally be passed on to the wider community by way of increased transportation costs etc.

39 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 176.

40 [1974] QB 454.

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.[41]

(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 on an unpaid basis. Therefore it does not matter whether the plaintiff has a legal liability, absolute or conditional, to repay the provider.

5. THE AMOUNT OF COMPENSATION

Where no money had actually been paid and no contractual liability existed, the assessment of damages proved to be a difficult calculation. In the United Kingdom Court of Appeal decision in *Donnelly v Joyce*,[42] the court accepted that compensation for the need for unpaid 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:[43]

> 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[44] after discussing *Donnelly v Joyce* referred to a comment in *Winfield and Jolowicz on Tort* suggesting that the cost[45]

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

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41 (1977) 139 CLR 161 at 168 per Gibbs J and at 193 per Mason J.

42 [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.

43 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 193.

44 Id 180-181.

45 *Winfield and Jolowicz on Tort* (10th ed 1975) 577.

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.[46] 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 on an unpaid basis 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.[47]

6. APPLICATION OF THE PRINCIPLE IN *GRIFFITHS v KERKEMEYER.*

Following the decision of the High Court, the State courts confined the *Griffiths v Kerkemeyer*[48] principle in various ways which, in some cases, have been ultimately overruled.[49]

In *Johnson v Kelemic*[50] two members of the New South Wales Court of Appeal expressed reservations about the decision in *Griffiths v 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."[51] 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"[52] 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

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46 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.

47 (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.

48 (1977) 139 CLR 161.

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

50 (1979) FLC 78,487 at 78,493.

51 Ibid.

52 Id 78, 496.

the normal incidents of family life".[53] He stated:[54]

> 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."[55]

These observations were cited with approval in *Kovac v Kovac*[56] 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 under *Griffiths v Kerkemeyer*:[57]

> 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."[58]

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"[59] that led to over-compensation.[60]

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53 Id 78,495.

54 Id 78,496.

55 Ibid.

56 [1982] 1 NSWLR 656 (Reynolds JA dissenting).

57 Id 669.

58 Id 670.

59 Id 676.

60 Id 677.

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"[61] and concluded:[62]

> 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.[63]

The clearest case applying the reasoning of *Kovac v Kovac* and, as Graycar notes,[64] "extending it to include the general principle of mitigation" is the decision of the Queensland Full Court in *Veselinovic v Thorley*.[65]

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:[66]

> 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.

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61 Id 678.

62 Id 680.

63 *Kovac v Kovac* was approved by the Full Court of the Supreme Court of Queensland in *Carrick v Commonwealth* [1983] 2 Qd R 365 and by the SA Full Court in *Bettoncelli v Bettoncelli* (1988) 135 LSJS 211.

64 Graycar R *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 96.

65 [1988] 1 Qd R 191 (decided in 1984, though not reported until 1988).

66 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.

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*[67] noted the important public policies served by the *Griffiths v Kerkemeyer* principle:[68]

* 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."

* "[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*:[69]

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67 (1984) 53 ALR 373. This case involved a claim by an injured woman with respect to unpaid household services provided by her husband. Before the injury the wife did the housework and preferred the husband not to do it.

68 Id 379-380.

69 Id 390.

> 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'.[70]

But, as Graycar observes,[71] 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*[72] 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:[73]

> 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.

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

71 Ibid.

72 (1977) 138 CLR 563.

73 (1977) 138 CLR 563 at 573.

A further limiting factor which the courts have placed on the principle in *Griffiths v Kerkemeyer*[74] 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[75] have denied recovery unless there was an obligation to pay the hospital charges. Luntz[76] 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 being treated at the hospital.[77]

7. THE CURRENT LAW - *VAN GERVAN v FENTON*[78]

The question of the method of assessment of *Griffiths v Kerkemeyer* awards came before the High Court again in *Van Gervan v Fenton.*[79] 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 unpaid 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.

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74 (1977) 139 CLR 161.

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

76 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.2.4.

77 *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.

78 (1992) 175 CLR 327.

79 Ibid.

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:[80]

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

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,[81] *Housecroft v Burnett*[82] and *Veselinovic v Thorley*[83] 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.[84]

The Full Court of the Supreme Court of Tasmania unanimously dismissed the plaintiff's appeal.[85] 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*,[86] *Hodges v Frost*[87] and *Veselinovic v Thorley*[88] 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*.[89] He held:[90]

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80 *Van Gervan v Fenton* Supreme Court of Tasmania, unreported judgment of Cox J 30 April 1990 at 20.

81 [1974] QB 454.

82 [1986] 1 All ER 332.

83 [1988] 1 Qd R 191.

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

85 The Full Court of the Supreme Court of Tasmania, unreported judgment 19 March 1991.

86 [1984] 2 NSWLR 671.

87 (1984) 53 ALR 373.

88 [1988] 1 Qd R 191.

89 [1982] 1 NSWLR 656.

> 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 Supreme Court of Queensland in *Veselinovic v Thorley*,[91] the wages foregone by a care provider are not an appropriate criterion to determine the value of unpaid services provided 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.[92]

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.[93]

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 in the circumstances. In such a case 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.[94]

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.[95]

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90 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.

91 [1988] 1 Qd R 191.

92 (1992) 175 CLR 327 at 331.

93 *Van Gervan v Fenton* (1992) 175 CLR 327 at 333-334; *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 193, per Mason J.

94 (1992) 175 CLR 327 at 334.

95 (1992) 175 CLR 327 at 334 and 349.

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.[96] In doing so she indirectly referred to the gender equity issue raised by Stephen J in *Griffiths v Kerkemeyer*.[97]

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.[98] 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.[99]

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:[100]

> **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

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96 (1992) 175 CLR 327 at 348.

97 (1977) 139 CLR 161 at 170-171.

98 (1992) 175 CLR 327 at 339 and 348.

99 (1992) 175 CLR 327 at 339.

100 (1992) 175 CLR 327 at 335-336.

> family obligation to provide the services free of charge or at less than market rates. Yet post-*Griffiths* awards have been reduced on this on similar theories.[101] 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.[102]

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,

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

[102] *Van Gervan v Fenton* (1992) 175 CLR 327 at 340-341 per Brennan J but cf. at 344 per Deane and Dawson JJ.

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."[103]
>
> (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."[104]

Deane and Dawson JJ said that:[105]

> 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:[106]

> 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.

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[103] *Van Gervan v Fenton* (1992) 175 CLR 327 at 350.

[104] Ibid.

[105] *Van Gervan v Fenton* (1992) 175 CLR 327 at 344.

[106] Ibid.

In the instant case:[107]

> 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:[108]

> 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:[109]

> 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 plaintiff's verdict for serious injuries would be likely to be left unsatisfied.[110]

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[107] Ibid.

[108] Id at 345.

[109] Id at 346.

[110] **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 a portion of it is spread among all taxpayers.

Deane and Dawson JJ also drew attention to the fact that some legislatures[111] have legislated to reverse the decision in *Griffiths v Kerkemeyer*.[112] 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 on an unpaid basis may be seen to conflict with the interests of the community as a whole.[113]

8. 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*.[114] Only the Tasmanian legislation operates in relation to injuries caused by any negligent wrongdoing. The legislation in other jurisdictions operates only in relation to motor vehicle and work accidents.

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

Tasmania

In Tasmania the legislature has abolished claims for compensation for unpaid 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.

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[111] 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).

[112] (1977) 139 CLR 161.

[113] (1992) 175 CLR 327 at 346.

[114] (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.

When the Bill was introduced it was stated that the decision in *Griffiths v Kerkemeyer*:[115]

> 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.[116]

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 on an unpaid basis. 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 on an unpaid basis.

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 on an unpaid basis 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[117] 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

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[115] Second Reading Speech introducing the *Common Law (Miscellaneous Actions) Bill* 1986, Parliamentary Debates 26 November, 1986 at 4510.

[116] Id at 4511.

[117] By the Motor Accidents Insurance Board.

person.[118] "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.[119] 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.[120]

Victoria

Victoria has abolished claims for damages in respect of unpaid 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.[121]

One of the objectives of the legislation was stated to be the reduction of the cost to the Victorian community of transport accidents.[122]

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 unpaid 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).

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[118] **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.

[119] Subs 27A(3) *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas).

[120] Subs 27A(5) *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas).

[121] Graycar R *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 99.

[122] Second Reading Speech introducing the *Transport Accident Bill 1986*, Parliamentary Debates 8 May, 1986 at 2022 and 2025.

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.[123] 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 per week are not compensable.[124] If the services would have been provided even if the person had not been injured, there is no allowance for compensation.[125] 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.[126] 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 of one-fortieth of the amount determined under subsection (5).[127]

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 that 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."[128]

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.

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[123] Subs 72(1) *Motor Accidents Act 1988* (NSW).

[124] Subs 72(2) and 72(4) *Motor Accidents Act 1988* (NSW) respectively.

[125] Subs 72(3) *Motor Accidents Act 1988* (NSW).

[126] Subs 72(5) *Motor Accidents Act 1988* (NSW).

[127] Subs 72(6) *Motor Accidents Act 1988* (NSW).

[128] Second Reading Speech introducing the *Motor Accidents Bill 1988*, Parliamentary Debates 29 November, 1988 at 3833.

In relation to accidents occurring at work, compensation under the *Griffiths v Kerkemeyer*[129] principle is limited in the same way as it is under section 72 of the *Motor Accidents Act 1988 (NSW)*.[130]

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 caring for 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.

South Australia

In South Australia for motor vehicle accidents occurring after 7 February, 1987, damages for unpaid services rendered only by a parent, spouse or child of the injured person may be awarded subject to limits.[131] Thus, the plaintiff in *Griffiths v Kerkemeyer* would not have recovered in respect of unpaid services provided by his fiancee.[132]

The total of damages awarded for the recompense of unpaid 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 are defined as average weekly earnings for ordinary hours of work of full-time male employees.[133] Damages for services rendered by other persons are confined to reimbursement of reasonable out of pocket expenses.[134]

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[129] (1977) 139 CLR 161.

[130] S.151K *Workers Compensation Act 1987* (NSW).

[131] Subs 35a(1)(g), 35a(1)(h) and 35a(2) *Wrongs Act 1936* (SA).

[132] 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.

[133] Subs 35a(6) *Wrongs Act 1936* (SA).

[134] Subs 35a(1)(g)(ii) *Wrongs Act 1936* (SA).

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.[135] 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;

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 (on an unpaid basis 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."[136] The legislature was acting on a recommendation contained in the Report of the Community Law Reform Committee of the Australian Capital Territory.[137] 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".[138] The Committee noted the limitations in other jurisdictions, especially the New South Wales' limitations, and recommended that they be

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[135] S.33.

[136] Second Reading Speech introducing the *Law Reform (Miscellaneous Provisions) (Amendment) Bill 1991*, Parliamentary Debates 17 October, 1991 at 3884.

[137] 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.

[138] Id at para 26.

monitored to determine whether there is any effect on compensation payments and insurance premiums.[139]

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.

The *Work Health Act 1986* (NT)[140] 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[141] 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.[142]

The Scheme provides[143] 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".[144] 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.[145] In

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139 Ibid.

140 Ss.52, 54 and 189.

141 S.18A *Motor Accidents (Compensation) Act 1979* (NT).

142 Reg. 4A.

143 S.18B *Motor Accidents (Compensation) Act 1979* (NT).

144 S.78 *Work Health Act 1986* (NT).

145 Subs 78(1) *Work Health Act 1986* (NT)

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;

(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.[146]

"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.[147]

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).[148] Therefore, *Griffiths v Kerkemeyer* claims would not be relevant in New Zealand in relation to personal injuries actions.

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[146] Subs 78(2)(d) *Work Health Act 1986* (NT).

[147] Subs 78(4) *Work Health Act 1986* (NT).

[148] S.14 *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ).

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[149] 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.

There is further provision in section 149 for the continuation of payments made under the previous *Accident Compensation Act 1972* (NZ)[150] and the *Accident Compensation Act 1982* (NZ)[151] 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.

9. COMMENT ON THE STATUTORY RESTRICTIONS

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 unpaid 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

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[149] "Independence allowance" is not defined in the Act.

[150] S.121.

[151] S.80.

for non-economic losses.[152] Graycar suggests a possible explanation for this:[153]

> 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 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 injured person may have to resort to professional services or to care in an institution at a significant cost to the community and to the possible detriment of the injured person.

10. 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 36 personal injury actions involving a claim for *Griffiths v Kerkemeyer* have been decided by the District Courts and the Supreme Court of Queensland.[154] Approximately 9

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[152] The belief that *Griffiths v Kerkemeyer* awards are for non-economic loss at least in relation to pre-trial unpaid services has recently been expressed by Quinlan S, in *Assessing Voluntary Services: Griffiths v Kerkemeyer Revisited* (1993) The Queensland Lawyer 5 at 6. This view was shared by White J in the Supreme Court decision referred to as *Donnelly 29.9.93* in Appendix 2.

[153] Graycar R *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 101.

[154] Excluding cases heard on appeal by the Court of Appeal.

relevant appeals have been heard by the Court of Appeal.

A summary of those decisions is set out in Appendix 2. Appendix 2 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;

* 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;[155]

* When "extravagant" claims for *Griffiths v Kerkemeyer* are identified by the courts the awards for *Griffiths v Kerkemeyer* are reduced to levels 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 unpaid services as a matter of course. It is not uncommon for the *Griffiths v Kerkemeyer* component to relate solely to past unpaid services;

* Quite often the interest component relating to the damages for past unpaid services approximates the damages awarded for those services which may suggest that any perceived problems with *Griffiths v Kerkemeyer* awards are administrative and procedural rather than substantive.[156]

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[155] See p.3 and footnote 9 above.

[156] See case referred to as *Ingram 21.2.93* (District Courts) in Appendix 2 where interest of $61,115 was awarded in addition to assessment of $111,955. The accident occurred in 1980. The judge determined that the delay was as a result of fault on both sides and, in all the circumstances, he was not persuaded to reduce the period over which interest should be calculated. See detailed discussion on awards of interest at pp 58-65 below.

* Quite often it is apparent and in every case it is possible, that professional assistance will be required in the future. Thus, the commercial rate charged for such assistance (which includes administrative and other costs) is an appropriate basis for the assessment of *Griffiths v Kerkemeyer* awards.

* It is apparent that institutionalisation of the injured person is often the only alternative to being cared for at home by a family member or friend. Institutionalisation can have serious negative effects on the injured person.[157]

11. THE PROPOSED AMENDMENT IN QUEENSLAND

Legislation has been suggested to limit the award of damages for unpaid services.[158] 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.

(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

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[157] See for example, the case referred to as *Densley 17.6.93* (Supreme Court) in Appendix 2. In that case the plaintiff developed potentially life-threatening bed-sores when in respite care. He had no bed-sores when cared for at home. In the case of *Wallace v Holeszko* (unreported Supreme Court of Queensland 6, 17 August 1990) Master White noted that when the plaintiff was hospitalised her feet were injured, she had hair dryer burns and serious eye and chest infections. Since living at home she was not exposed to such risks and her life expectation was increased significantly. At p.20 Master White observed: "It appears then that the plaintiff's physical well-being and, indeed, longevity is greatly enhanced by living at home in the primary care of her mother."

[158] 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.

(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*[159] 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:[160]

> [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:[161]

> It is also somewhat reminiscent of the earlier NSW Court of Appeal decision, *Burnicle v Cutelli*,[162] 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

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159 (1988) 135 LSJS 211.

160 Id 216 per Legoe J.

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

162 [1982] 2 NSWLR 26.

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* to 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 care-provider.[163]

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 unpaid care-provider 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).[164]

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.[165]

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[163] See p.46 below.

[164] 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.

[165] See pp 30-31 above.

12. 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[166] is different in nature to a *Griffiths v Kerkemeyer* claim. These differences were recently discussed in the High Court decision of *Nguyen v Nguyen.*[167]

The High Court noted that in *Griffiths v Kerkemeyer* the plaintiff's claim was for personal injuries. The loss was caused by his physical disability arising from the accident.[168] 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.[169]

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*[170] 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.

(2) Loss of domestic services

The High Court in *Nguyen v Nguyen*[171] 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.

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[166] Ss.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. See Part 3 below.

[167] (1990) 169 CLR 245.

[168] (1990) 169 CLR 245 at 262.

[169] Id 262 - 263.

[170] Id 263.

[171] (1990) 169 CLR 245.

In assessing the quantum of damages for loss of domestic services in a *Lord Campbell's* action Brennan J in *Nguyen v Nguyen*[172] 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 :[173]

> 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.[174]

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*[175] (the assessment of damages post the High Court decision in *Nguyen v Nguyen*[176]) and Williams J in the unreported Supreme Court decision of *White v MIM Ltd*.[177]

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[172] (1990) 169 CLR 245 at 249 - 250.

[173] Id 264 - 265.

[174] (1990) 169 CLR 245 at 257.

[175] (1992) 1 Qd R 405.

[176] (1990) 169 CLR 245.

[177] Supreme Court of Queensland unreported judgment No 6 of 1991, 17 February 1993.

(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.

13. *GRIFFITHS V KERKEMEYER:* 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.

Submissions

One submission drew attention to the fact that increased transport costs inevitably involve the whole community in expense, and referred to the present assessment of *Griffiths v Kerkemeyer* awards as a "cost penalty" on the whole community.

Commission response

Whether or not a *Griffiths v Kerkemeyer* award is made, the cost of providing domestic care for an injured plaintiff will be borne by the community.

The purpose of a *Griffiths v Kerkemeyer* award is to ensure that, if the need should arise in the future, the plaintiff is in a financial position to obtain professional assistance in performing tasks which, as a result of the accident, the plaintiff no longer has the capacity to carry out for himself or herself and which, at the time of the trial, are being performed on an unpaid basis by a relative or friend. Reliance on unpaid carers is increased by government policies of discharging patients from hospital as soon as possible for convalescence at home and of accommodating people who

need care in the general community rather than in residential institutions. However, the burden placed on an unpaid carer may be extremely onerous.

If an unpaid carer becomes unable or unwilling to continue to provide assistance, alternative arrangements have to be made. These arrangements might consist of professional help in the plaintiff's own home. If the plaintiff has been severely injured, assistance of this kind may be insufficient and it may be necessary for the plaintiff to be re-admitted to an institution such as a hospital or a nursing home. If the damages award does not include an amount which enables the plaintiff to use privately funded facilities, the plaintiff will have to rely on services or institutional care funded and provided by the government to satisfy his or her needs. It will then be the community, through tax payers, who will have to bear the cost.

In relation to most serious accidents occurring as the result of negligence, there is really little difference between the community represented by tax payers, and the community represented by motor vehicle owners and employers; in either event the burden falls largely upon the same group of persons and in this particular case it is motor vehicle owners and employers, through paying premiums, who should bear the burden.

2. Under the present system, the plaintiff may get a double benefit. Some of the services for the provision of which a plaintiff may be compensated are "jobs" which the plaintiff would have had to perform at a personal cost to himself or herself.

Submission

One submission suggested that the award made to the plaintiff because of the need for services to be provided by someone else should, in effect, be discounted to allow for the fact that the plaintiff no longer "has to go through the inconvenience and expense" of carrying out these tasks in person.

Commission response

The purpose of the award is to enable the injured plaintiff, if the need to do so should ever arise, to obtain professional services to replace the tasks which he or she was previously able to perform and now, as a result of the accident, is unable to perform. To discount the award to take account of the personal effort and discomfort which the plaintiff's injuries have "saved" would not allow the plaintiff to be placed in this position.

3. Under the current law in Queensland, a *Griffiths v Kerkemeyer* award to an injured person carries with it no legal obligation on the part of the injured person to pay the caregiver for the services provided.[178] 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.[179]

Submission

One respondent noted:

> Not merely does the existing arrangement not avoid 'gender bias', it positively encourages it. ... under the existing law, there is no obligation to pay [the caregiver]. The person who was injured receives the money. There is no obligation on the injured husband to pay his wife at all, notwithstanding that she now does, and has to do, various things for him.

Commission response

The Commission's response to this argument is set out on pages 51 to 52 of this Report.

4. The present situation leads to over-compensation. A plaintiff will be compensated for loss of earnings prior to the trial and for any loss of future earning capacity. However, the plaintiff's previous level of income may have only been possible because of the home-making contributions of the plaintiff's partner.

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[178] But see in Appendix 2, Supreme Court decision referred to as *Densley 17.6.93* in which the trial judge ordered the Public Trustee (who would be managing the award) to pay the award for pre-trial *Griffiths v Kerkemeyer* to the unpaid care-giver (the plaintiff's mother). In the 1990 case of *Wallace v Holeszko* (unreported Supreme Court of Queensland 6, 17 August 1990) Master White ordered the *Griffiths v Kerkemeyer* component of the award to be paid to the plaintiff's mother and step-father. In both cases the bulk of the plaintiffs' awards were to be managed by the Public Trustee because of the plaintiffs' inability to manage their own affairs (both severely brain damaged).

[179] 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.

Submission

One submission commented:

> It would be much fairer to the parties as a whole if the family situation as a whole were recognised, and account be taken, in valuing the capacity of the husband to earn, of the contribution made by the wife, and notionally treating say 30% or 40% of the husband's high earnings as attributable to the efforts of the wife.
>
> If the matter were approached on this basis, and the wife was paid properly, she would be paid 30% or 40% of the husband's earnings - not 30% or 40% on top of it.

Commission response

This argument assumes that the plaintiff will receive compensation for services which were already being provided prior to the accident. In many cases this is not so. An analysis of recent awards in Queensland indicates that, in fact, the kinds of services for which compensation is being awarded are additional to those already provided as part of a domestic relationship. Services for which compensation has been provided include personal care and hygiene, dressing, feeding, medication, shopping, transport and gardening.[180]

Where compensation is awarded for services which were already being provided prior to the accident, it can be justified if those services have been taken out of the mutual give-and-take of a relationship because the plaintiff's injuries prevent him or her from providing any countervailing services.[181]

Although the question of compensation for loss of earning capacity is beyond the scope of this reference, the proposed apportionment of earnings does not, as the submission claimed, benefit the plaintiff's family as a whole.

To reduce the award of damages to the plaintiff in the situation where the unpaid carer previously chose not to work but to fulfil a home-making role is to create an incentive for the carer to seek full time employment and to engage professional assistance, the cost of which would then have to be included in the damages, to perform the services which the plaintiff now requires. Such a suggestion pays scant regard to the value of family relationships. To assume that the services of a care-provider who was a full-time home-maker and, for example, the wife of the plaintiff, are worth only a proportion of the plaintiff's earnings could in many cases be seen as denigrating the value of those services and the wife. Home-makers are not normally paid for their services. However, if their work were to be given a

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[180] See Appendix 2.

[181] See p.19 above.

monetary value, it is not inconceivable that it would be worth more than the income earned by the partner - not merely a proportion of the partner's earnings. To assert otherwise may be particularly patronising to people who believe they have an independent worth in relationships.

Further, to limit compensation to an injured plaintiff by reference to a notional value placed on contributions by the plaintiff's home-making partner could significantly disadvantage a low-income plaintiff and his or her dependants.

Many care-providers are not full-time home-makers at the time of the accident. After the accident they may or may not give up their employment to care for the plaintiff. In some cases, care is provided on a part-time basis or in a supervisory capacity. The care-provider's contributions to the household prior to the accident may in some cases not have assisted the plaintiff at all in his or her capacity to earn.

If the award of pre-trial *Griffiths v Kerkemeyer* damages was based on the earnings forgone by the care-provider to care for the plaintiff, then the plaintiff would no longer be compensated on the basis of his or her need.

The reasons for this approach were explained by the High Court in *Van Gervan v Fenton*.

5. The care-provider could not, in many cases, earn an amount equivalent to that awarded to the plaintiff as compensation for the need for the care-provider's services.

Submissions

This argument appears to be partly based on the seemingly large awards made to plaintiffs with high support needs. One submission referred to a recent Supreme Court decision[182] where, it was suggested, the plaintiff's mother would in the future be paid $840.00 per week for "living in her own home, and caring for her son, who had no insight, and was simply lying in bed all the time". The onerous nature of the services which were in fact performed by the plaintiff's mother are set out on pages 47 and 48 of this Report.

The argument is also based on the assumption that care-givers who provide services to the plaintiff on an unpaid basis do not have the skills and experience of professional service providers. Consequently, it is argued, the plaintiff should not be compensated for the need for services at a commercial rate which reflects that degree of professional skill and experience.

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[182] See Supreme Court case referred to as *Densley* 17.6.93 in Appendix 2.

Commission response

Again, these arguments ignore the fact that the purpose of a *Griffiths v Kerkemeyer* award is to enable an injured plaintiff to obtain professional services to replace the ability to do things for himself or herself, should the need to do so arise in the future. At the time an award is made, it is impossible to predict with any degree of certainty whether, and for how long, the necessary services will continue to be provided on an unpaid basis. If the unpaid care-provider is unable or unwilling to continue to provide services which the plaintiff needs because of the loss of capacity to do things for himself or herself, the plaintiff must be in a position to be able to obtain those services at a commercial rate commensurate with the degree of skill and experience involved.

6. The commercial rate charged by a professional agency may result in over-compensation to the plaintiff, at least in respect of pre-trial care provided by a person who would not usually incur the overheads which would need to be factored into the agency's rate.

Submission

The arguments raised in submissions on this point are set out on pages 52 to 58 of this Report.

Commission response

The Commission's response is set out on pages 52 to 58 of this Report.

7. Interest should not be awarded on awards for pre-trial *Griffiths v Kerkemeyer* damages because, unlike other past economic losses, there has been no actual expenditure or requirement to pay for services.

Submission

The arguments raised in submissions on this point are set out on page 58 of this Report.

Commission response

The Commission's response is set out on pages 58 to 65 of this Report.

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

Submission

One respondent referred to a recent Queensland District Court case where the plaintiff was awarded damages based on commercial rates, for unpaid services provided by his de facto wife and son in businesses run by the plaintiff.[183]

Commission response

If the result of the accident is that the plaintiff is unable to do things in relation to a business that he or she was previously able to do, it has been suggested that there is no logical reason why compensation should not be awarded so that the plaintiff is, in the future, able to obtain professional assistance should it become necessary to do so.[184] This does not necessarily follow from the High Court's decision in *Van Gervan v Fenton* and must await authoritative judicial determination. In any event, in such cases, the assessment of damages would likely be off-set by a decrease in

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[183] See *Ingram 21.2.93* (District Courts) in Appendix 2. Dodds J stated at p.11: "In my view it does not matter that these persons whose assistance was provided also voluntarily provided some assistance to the plaintiff pre-collision. What does matter is the need for the assistance created by the breach of duty."

[184] See Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 4.6.10 and the case referred to as *Ingram 27.1.93* (District Courts) in Appendix 2. *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 2. It would be difficult to overcome this anomaly whilst the fault-based system of compensation exists in Queensland. But see recent UK Court of Appeal decision in *Hunt v Severs* (1993) 3 WLR 558 (1 October 1993) where it was held that since the plaintiff's need for services represented a loss for which she was entitled to be compensated by the tortfeasor, services voluntarily rendered by the defendant were to be regarded as falling within the same category as those rendered by a third party.

the damages awarded for economic loss such as loss of income or earning capacity.

9. *Griffiths v Kerkemeyer* awards have been abolished or capped in some jurisdictions as part of their revised method of determining compensation for accident victims.

Commission response

The Commission's response to this argument is set out on pages 30, 31 and 33-35 of this Report.

14. *GRIFFITHS V KERKEMEYER:* ARGUMENTS AGAINST CHANGING THE LAW IN QUEENSLAND

1. 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 institution.[185] 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.[186]
>
> The family with which he [or she] lives should receive assistance.[187]

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. Institutionalised care may also be to the

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[185] See for example, *Sailes v The Nominal Defendant (Qld)* Supreme Court 18 August 1993, Unreported, Byrne J.

[186] *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 rights instrument has been ratified by the Commonwealth and is recited in the preamble to the Queensland *Anti-Discrimination Act 1991*.

[187] 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 rights instrument has been ratified by the Commonwealth and is recited in the preamble to the Queensland *Anti-Discrimination Act 1991*.

detriment of the injured person's health and welfare.[188]

2. 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*:[189]

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

O'Connor LJ in *Housecroft v Burnett*[190] stated that he was:[191]

> 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.

Furthermore, as one respondent noted:

> People providing care to injured persons who do not retain sufficient capacity to enter into a contract for services would be discriminated against if the provision for *Griffiths and Kerkemeyer* is limited.

3. 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.

4. 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

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188 See footnote 157 above.

189 [1969] 1 Lloyd's Rep 95.

190 [1986] 1 All ER 332(CA).

191 Id 343.

adequate future care[192] then, as Graycar notes:[193]

> 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.[194]

5. The courts are controlling the *Griffiths v Kerkemeyer* head of damage by applying a 'reasonableness test'.[195] There is nothing to demonstrate that *Griffiths v Kerkemeyer* awards are placing a strain on available compensation funds. This is apparent from the summary of cases set out in Appendix 2. It would be very difficult to justify further reducing the largely moderate or low awards in these cases given the circumstances involved. Large *Griffiths v Kerkemeyer* awards are only made or upheld in cases involving serious injuries and the need for a high degree of care. For example, in the Supreme Court decision referred to as '*Densley 17.6.93*' in Appendix 2 White J described the type of work undertaken by the mother of the seriously brain injured plaintiff:[196]

> She turns the plaintiff two-hourly throughout the day and night, although she usually lets him go from 2 a.m. until 5.30 a.m. when she gets up. She then empties his urine bottle, gives him a drink, gives him a massage and does a load of washing from the night. She prepares his breakfast which is vitamised food and feeds him by mouth with a spoon. This is a slow process and must be done very carefully. He takes his fluids through a squeezer bottle. After breakfast every second day the plaintiff's bowels are evacuated by means of a suppository. The evacuation takes place in the bed. He is then showered by means of a commode chair which is wheeled into the bathroom. The plaintiff is tied into the chair and the

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[192] *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 at 476 per Dickson J.

[193] Graycar R *Before the High Court: Women's Work: Who Cares?* (1992) 14 Sydney Law Review 86 at 105.

[194] See for example, *Sailes v The Nominal Defendant (Qld)* Supreme Court 18 August 1993, Unreported, Byrne J.

[195] See Appendix 2. Note, however, there has been recent academic discussion on possible bias against women in the application of the traditional reasonableness test. See, for example, Mahoney KE *Gender Bias in Judicial Decisions*, a lecture at the Supreme Court of Western Australia, Perth, Australia, August 15 1992 at 15-21 and Graycar R *Before the High Court: Women's Work: Who cares?* (1992) 14 Sydney Law Review 86 at 90.

[196] At pp.23-24 of decision. The *Griffiths v Kerkemeyer* proportion ($601,320) of the total assessment ($1,024,493) was unusually high as a result of the unique circumstances of the case. Because of his unconscious state the plaintiff's pain and suffering was assessed at only $5,000 and his loss of life expectancy was assessed at the low amount of $2,000. At the time of his accident the plaintiff was 15 (9 years before trial). A conservative approach was taken in assessing his past economic loss and his loss of future earning capacity on the basis of such factors as his history of truancy and his reduced life expectancy.

> shower comes directly off the wall. He is returned to bed to be dried. The plaintiff is usually clothed in a T-shirt with socks added for the winter. He is carried by Mrs. Love to the sitting room and lies on a banana lounge. On a suppository day this is usually at about 10.30 a.m. and on a non-suppository day at about 9.00 a.m. Mrs. Love gives the plaintiff a light morning tea and then starts preparing his lunch which is his main meal. By the time the meal is given and clearing up occurs it is about 1.30 p.m. or 2.00 p.m.
>
> In the afternoon Mrs. Love will give the plaintiff a sustagen based drink. Sometimes he is taken outside because it is cooler, particularly in the summer, and in the winter he may stay in the banana lounge or go back to bed. In the summer, Mrs. Love may shower him up to 3 or more times per day because he perspires a lot. In the winter he has a second shower in the evening. On a suppository day he might have an extra shower. He is given a light evening meal between 5.00 p.m. and 6.00 p.m. and the plaintiff is usually asleep by 7.00 p.m. Mrs. Love retires about 9.00 p.m. Throughout the day she massages his back, elbows, ankles and the backs of his legs using skin balm. She gives him physiotherapy to clear his chest of secretions. She gets up two or three times in the night to turn the plaintiff and lightly massages him on each occasion. Throughout the day he is given numerous drinks to keep his kidneys flushed.
>
> Mrs. Love is given an opportunity to shop when a son or a neighbour sits with the plaintiff for an hour or so. She has no other relief from the 24 hour care of the plaintiff except when he goes to respite care.
>
> The plaintiff is prone to fitting and when Mrs. Love thinks that a seizure is likely she gives him dilantin.

What is reasonable in any particular case will obviously depend upon all the circumstances. It may not be considered reasonable to assess damages on the basis of an objective determination of what lifestyle the plaintiff and his or her family are to lead in the future. For example, if the plaintiff would prefer to live at home and if, with appropriate assistance, that is at all possible, then awards should not be assessed on the basis of the future institutionalisation of the plaintiff.

6. Any departure from the *Griffiths v Kerkemeyer* principles or from the use of commercial rates in the assessment of damages would be unfair to unpaid care providers, who are overwhelmingly female.

Appendix 2 includes details of 36 District Courts and Supreme Court cases decided after the High Court decision of *Van Gervan v Fenton*.[197] In 28 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, parents, de facto spouse, the women within whose family he stayed, his mother and his sister, his sister-in-law, his landlady or a group of volunteers.

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[197] (1992) 175 CLR 327. Decision handed down 28 October 1992.

In the 8 cases where the injured person was female, the care providers were the husband, de facto spouse, parents or children of the injured person.[198]

Any significant statutory departure from the *Griffiths v Kerkemeyer* principles would indirectly discriminate against women and "women's work"[199] in contravention of the *Anti-Discrimination Act 1991*.[200]

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 unpaid 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.[201]

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

15. CONCLUSION

The law under the principle in *Griffiths v Kerkemeyer*[202] 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*

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198 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.

199 *Van Gervan v Fenton* (1992) 175 CLR 327 at 348.

200 Ss 7(1)(a), 9, 11.

201 Mahoney KE *Gender Bias in Judicial Decisions*, a lecture at the Supreme Court of Western Australia, Perth, Australia, August 15 1992 at 7.

202 (1977) 139 CLR 161.

Fenton[203] so that plaintiffs are able to obtain this care whether it will be provided indefinitely on an unpaid 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 to 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.[204] This aspect was also raised by the Law Reform Commission of Tasmania[205] 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.

Many concerns about the cost of *Griffiths v Kerkemeyer* awards are dispelled after reviewing the circumstances of the most recent relevant cases.

One respondent noted:

> There are far greater numbers of cases where awards are in small amounts, with a comparatively significant amount represented by gratuitous care, than there are where large amounts are awarded by way of damages and gratuitous care. It is the number of comparatively small claims, not the occasional very high claim, which will cause the costs to rise to an insupportable level.

The vast majority of personal injury cases settle before being tried. Although the Commission is not privy to individual settlement agreements it is common practice for parties to negotiate on a global-figure basis, without differentiating between particular heads of damage. Furthermore, it is unlikely that an unrealistic claim based on *Griffiths v Kerkemeyer* would be agreed to during settlement negotiations. For matters which proceed to trial, the Commission's analysis of recent cases shows that *Griffiths v Kerkemeyer* awards are not made unless the need for services is established to the satisfaction of the court, and "extravagant" claims are reduced to a level which the court considers reasonable.

The justification for *Griffiths v Kerkemeyer* awards is as sound for small claims as it is for larger claims and for reasons set out elsewhere in this Report,[206] there should be no restriction on the minimum level of such damages which can be litigated.

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[203] (1992) 66 ALJR 828.

[204] *Housecroft v Burnett* [1986] 1 All ER 332 at 343 per O'Connor LJ.

[205] *Compensation for Victims of Motor Vehicle Accidents* Report No. 52 1987 at 43.

[206] See p.35 and pp 45-49, above.

Although there may be a need for careful scrutiny of claims for *Griffiths v Kerkemeyer* damages before settling or at trial, there is no basis for substantially limiting or abolishing the *Griffiths v Kerkemeyer* head of damages.

However, the Commission is concerned with a number of matters arising from the earlier discussion and from the submissions received.

(a) Assessment of damages

On a theoretical level, the assessment of common law damages for personal injuries should attempt, by means of monetary compensation, to place the plaintiff in the same position that he or she was in immediately prior to the event which resulted in the plaintiff's injuries. At the same time, the defendant or his or her insurer should not be required to pay to the plaintiff any more than is required to adequately compensate the plaintiff for those injuries and resultant losses.

On a practical level, however, the common law system for compensation for personal injuries cannot always fully, or adequately, compensate an injured person. The plaintiff may have contributed to his or her own losses. Further, it is impossible to predict with any degree of certainty how any person's life will be affected into the future by the injuries sustained as a result of the negligence of another person. All that a court can attempt to do during the assessment of damages is to arrive at a monetary figure which will take into account the factors known to the court at the time of the assessment.

(i) *Awards of Griffiths v Kerkemeyer Damages for Past Services*

. *Payment to the Care-Provider*

If the pre-trial *Griffiths v Kerkemeyer* component of the award of damages is not paid to the care-provider, the plaintiff could be seen as being in a better position than he or she was prior to the accident. The plaintiff would have had certain needs met by the provision of unpaid services and would also have received, by way of the award, a sum of money representing the value of those services.

Further, if the pre-trial *Griffiths v Kerkemeyer* component of the award is not passed on to the care-provider, in some cases the care-provider, who in a majority of cases will be female, will be financially exploited by the plaintiff. This will be so even though the services were provided on the basis that there would be no remuneration. The care-provider may have given up employment to assist the plaintiff. In many cases, the care-provider would have worked for long hours under very difficult circumstances to help the plaintiff. It could be seen as only fair for the care-provider to be remunerated for his or her services.

Although in some of the cases reviewed by the Commission orders were made by the court for the pre-trial *Griffiths v Kerkemeyer* component of the award to be

made direct to the care-provider, this has not been the usual practice.

If pre-trial *Griffiths v Kerkemeyer* damages were to be paid direct to the care-provider, it would at least prevent that part of the award constituting a windfall to the plaintiff.

The Commission recommends that there be a statutory requirement for the court to consider whether or not the pre-trial *Griffiths v Kerkemeyer* component of an award of damages be paid direct to the care-provider. The court may need to order that different sums be paid to a number of people, depending on the number of past care-providers and on the relative proportions of care provided by each. Of course, there may be cases where it would be more appropriate for those damages to be paid to the plaintiff - for example, where the provider of past services has died or cannot be contacted, or where it is obvious to the court that it would be offensive to the care-provider to be paid for past services. There may be tax implications to the care-provider as a result of this recommendation which may need to be taken into account by the court when assessing damages.[207] The *Common Law Practice Act 1867* would be an appropriate place to insert the recommended requirement.

. *Commercial Rates - Value v Costs*

Since the High Court decision in *Van Gervan v Fenton*,[208] Queensland courts have been required to assess *Griffiths v Kerkemeyer* damages on the basis of commercial rates, in recognition of the fact that it is the plaintiff's needs which are being compensated - not the care-provider's losses. A spouse, friend or relative of the injured person may expect no payment for the services provided yet, had it not been for the negligence of the defendant, those services would not have been required in the first place. Whether the need is met by professionals or by family or friends of the plaintiff will depend upon the circumstances of each case. The preferred provider of services may vary from time to time depending upon largely unpredictable future contingencies. The use of the commercial rate as the basis for assessing *Griffiths v Kerkemeyer* damages was intended to ensure that the plaintiff's need for care, which may initially be met by the provision of unpaid care, will be able to continue to be met (either on an unpaid basis or professionally).

The High Court in *Van Gervan v Fenton* did not state which, if not all, components of the relevant commercial rate should be applied in particular cases. Queensland courts have generally adopted the full rate charged by a commercial agency to provide relevant services, with some reductions in certain circumstances.

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[207] See Stone C *Taxation of Compensation Payments for Personal Injuries* The CCH Journal of Australian Taxation June/July 1992 66. In the hands of the plaintiff, awards for *Griffiths v Kerkemeyer* damages are unlikely to be taxed. See *Marsland v Andjelic* unreported NSW Court of Appeal No CA 40283/92 decision handed down 30 July 1993 per Kirby P and Meagher JA at p 20.

[208] (1992) 175 CLR 327.

If the plaintiff had been in the position of contracting directly with an appropriately qualified individual for the services required, the cost to the plaintiff of meeting his or her needs would invariably be less than the rate charged by a commercial agency to provide such services.

The rates charged for services provided by commercial agencies include provision for a number of overheads which are not expenses normally incurred by the individual who provides such services. One respondent noted:

> The gratuitous provider of services does not have to pay:
>
> 1. Income tax on the money received;
> 2. The cost of accounting services;
> 3. The cost of rental of commercial premises and telephone, and photocopying and photocopying and facsimile equipment;
> 4. The cost of administrative staff;
> 5. The cost of Workers' Compensation premiums for its employees;
> 6. The cost of providing for the obligation to meet wages, including allowance for long service leave, the 17.5% loading on annual leave, the cost of four week's annual leave, and the cost of sick pay as prescribed by the award, and the cost of superannuation, at the required level, in the case of permanent employees; and the obligation to pay the higher casual rates, in the case of casual employees, and the requirement to actually employ them for the minimum period per week;
> 7. Public liability or professional negligence insurance costs or insurance of business premises, or the cost of insurance extensions for loss of business and business interruption.
>
> What the commercial provider of services charges for the service provided is not the value, but rather the cost to it, plus its profit percentage.
>
> The commercial rate is simply not an equivalent, and the courts are not taking into account the fact that the commercial rate includes all these considerations. The truest "commercial rate" would be the nett after tax receipt, after payment of any transport or uniform or job expenses, of the person who actually performed the work, and that would be far lower.

Unless the rate used as the basis for the assessment of pre-trial *Griffiths v Kerkemeyer* damages for services provided on an unpaid basis up to the date of trial is less than the rate which may be charged by a commercial agency for the provision of those services, the award could be seen to overcompensate the plaintiff for the need or cost of those services.

If, as the Commission has recommended, there were a requirement that the provider of services be paid the award of pre-trial *Griffiths v Kerkemeyer* damages it would invariably be the case that that person would receive a greater payment for the services than he or she would have received had he or she been employed by a commercial agency to provide the services to the injured person. There may also be a number of expenses which an employee of a commercial agency would incur that another carer may not incur - such as travelling expenses, the cost of uniforms, etcetera.

If the services have been provided by an independent care-provider, that is, a person who is not employed by an agency or other third party to provide those services, then something less than the rate that a commercial agency would charge for the provision of such services may be an appropriate rate upon which to base the assessment.

Whether the assessment is based on the full commercial rate or on the rate that a commercial agency would have paid as a salary to the individual care-provider to provide the services, the plaintiff's pre-trial needs created by the defendant's negligence have been met. If the assessment of pre-trial damages is based on the salary that a commercial agency would have paid the care-provider, the individual care-provider's services would, not in most cases, be under-valued. Of course, there may be cases where the care-provider should be paid at a higher rate than a commercial agency would pay him or her. For example, the long hours and arduous conditions some care-providers endure may justify the application of a higher than usual hourly rate.

The Commission recommends that there be a statutory requirement for the court to assess pre-trial *Griffiths v Kerkemeyer* damages on the basis of the rates at which a commercial agency would have paid a person to provide the required services and taking into account the circumstances of each case with particular regard to any factors which may discount or increase the rates a commercial agency would have paid to the care-provider. An appropriate provision could be inserted in the *Common Law Practice Act 1867* to implement this recommendation.

(ii) *Awards of Griffiths v Kerkemeyer Damages for Future Services*

Various permutations of the need for future unpaid or professional care can be discerned from the cases examined by the Commission. For example:

> Professional services either at home and/or in an institution (for example, if no one is able or willing to provide services for no remuneration or if the plaintiff's condition requires services which cannot be provided at home or by untrained carers). This would not be the basis of a *Griffiths v Kerkemeyer* award.
>
> Some professional services at home (for example, nursing care) and some care by spouse/relative/friend - for no remuneration. Only the second component would be based on *Griffiths v Kerkemeyer.*
>
> Care by spouse by spouse/relative/friend at home for certain period (for example, until carer's or plaintiff's health or capacity deteriorates) thereafter professional assistance required. Only the first component would be based on *Griffiths v Kerkemeyer.*
>
> Care by professionals at home under supervision of spouse/relative/friend. The major component would be based on the

need for future care. The smaller component would be based on *Griffiths v Kerkemeyer.*

Care by spouse/relative/friend at home but uncertainty as to degree of permanency of that care. This would be based on *Griffiths v Kerkemeyer.*

. ***Payment to the care-provider***

For so long as the plaintiff is cared for, on an unpaid basis, by, for example, a spouse, it would be consistent with the Commission's recommendations in relation to awards for pre-trial *Griffiths v Kerkemeyer* damages for awards of future *Griffiths v Kerkemeyer* damages also to be paid to that carer.

However, a number of practical and philosophical problems arise when contemplating remuneration for future care to be provided by a spouse, friend or relative. For instance:

* Unlike the provision of care prior to the trial, it is impossible to predict for how long or to what extent unpaid care will be available to meet the plaintiff's future needs. The care-provider may be physically or emotionally unable to provide care on a long-term basis. The care-provider may decide to leave the plaintiff. At that point the only care which the plaintiff may have available is professional care. If the award for future *Griffiths v Kerkemeyer* damages were paid in a lump sum to the person who is likely to provide the services, and that person failed to provide the services then it would be wasted money. The plaintiff may not then be able to engage professional services or other care.

* It is impossible to predict with any degree of certainty for how long the plaintiff will require certain types of care. For example, his or her condition may deteriorate to such an extent that it would be in his or her best interests to move into an institution or into a different living arrangement. At that point there may be no justification for paying the non-professional care-provider.

* Once the care-provider is paid for his or her services he or she is no longer an unpaid carer of the type contemplated by the High Court in *Griffiths v Kerkemeyer.* There would be little to distinguish between loved ones who care for the injured person and professional carers. It would be a similar situation to the plaintiff entering into a contract with his or her spouse to provide future services. The objections to this practice have been canvassed elsewhere in this Report.

* Some care-providers may take offence at the notion of being paid for services provided to a loved one. It may also create friction within family units.

* Where a plaintiff is unable, through age or disability, to manage his or her own financial affairs, the award will usually be paid to the Public Trustee who in turn pays the plaintiff's expenses covered by the award as and when they arise. If the future *Griffiths v Kerkemeyer* component of the award were to be paid direct to the future care-provider, there may be lacking the control and judgment that the Public Trustee would presumably have exercised on behalf of the plaintiff.

. *Lump sum or open-ended awards*

The common law system for compensation for personal injuries in Queensland is based on a lump sum, once and for all, determination. The lump sum is usually paid direct to the plaintiff[209] with no restriction on how it is to be spent. Unless the plaintiff feels morally obliged to pay his or her care-provider for services rendered in the future there is no guarantee that the care-provider will be paid or that any part of the lump sum will be used for the purpose for which it was intended.

It may be possible to develop a common law system of compensation which includes an open-ended award for the plaintiff's future care expenses resulting from the defendant's negligence. Such a system would involve an uncertain and possibly unlimited commitment by defendants and/or their insurers. How widely the costs of maintaining such a system should be spread would be a significant factor to address.

It may be difficult to justify open-ended awards for only one or two components of a damages award, such as the *Griffiths v Kerkemeyer* component and the future care component. To explore this concept in any depth would require a thorough review of the common law system for compensating accident victims in Queensland. Similar reviews have been undertaken in a number of other jurisdictions such as New Zealand. Obviously, such a review would be outside the Commission's current Terms of Reference.

The current common law compensation system does provide defendants and/or their insurers with absolute certainty as to their liability for future care. A system which provides for payment for services as and when provided, for as long as required, and on whatever basis is most desirable at any particular time, would be attractive to those who believe that defendants and their insurers (and thus, the wider community) should provide full compensation for injuries caused by the defendant's negligence. That cannot be achieved, or at least guaranteed, under our current common law system of compensation for personal injuries. It would require a major review of all aspects of personal injury compensation.

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[209] Unless, of course, the plaintiff is unable to look after his or her own affairs, in which case the award would be paid to the Public Trustee, who in turn would provide appropriate sums to care-providers and others in the future.

The following options for reform are apparent to the Commission in the light of the above discussion:

1. Awards for future *Griffiths v Kerkemeyer* damages to be made to the care-provider. This would be fraught with difficulties not least of which would be uncertainty as to who the care-provider will be.

2. The award for future care whether assessed on an unpaid or professional basis, to be paid to the Public Trustee to be held on trust for the provider(s) of future services to the plaintiff. The Public Trustee to pay the provider of the services at the rate specified by the court in its award, on a periodic basis. Given the uncertainties of the future it is unlikely that the court's assessment of the need for future care will be accurate. Numerous problems could result for the Public Trustee and the care-providers. The Public Trustee could not be expected to provide this service for no fee. An additional sum may need to be claimed or deducted from the award to cover administration fees. An alternative would be for the plaintiff to hold future *Griffiths v Kerkemeyer* damages on trust for his or her care-providers. This may impose an unrealistic administrative and financial burden on the plaintiff and may involve trust law problems.

3. The introduction of open-ended awards and periodic payments for all future care costs including remuneration to people who would otherwise provide care on an unpaid basis. This would pose an administrative burden on defendants and/or their insurers and could lead to uncertainty about future liabilities. Unless the cost of such a system were spread throughout the community it is unlikely that it would be a viable alternative. It would also be difficult to justify such a system for future care costs alone.

4. Leave the current system as it is.

Although aware of possible anomalies of the current system, the Commission recommends that there be no statutory restriction on the award of future *Griffiths v Kerkemeyer* damages to the plaintiff. Because of the reciprocal nature of most relationships the plaintiff will usually feel morally obliged to reimburse the care-provider for so long as the care continues.

Commercial Rates

The purpose of compensation is to provide for the future needs of the plaintiff. It is impossible at the date of trial to predict to what extent those needs will continue to be met on an unpaid basis, or to what extent the plaintiff will, in the future, have to pay to obtain those services professionally.

Given the uncertainty of the future in all cases, the Commission recommends that courts continue to assess future *Griffiths v Kerkemeyer* damages on the basis of the commercial rate which a professional agency would charge for the services required.

(b) Interest on awards of pre-trial *Griffiths v Kerkemeyer* damages

In the assessment of damages it is usual for courts to include, as a component of the award, interest on certain damages. The function of an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period.

In Queensland, section 72 of the *Common Law Practice Act 1867* enables a court, in an action for damages, to include in the sum for which judgment is given "interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

Although in Queensland the award of interest is a matter of discretion, it has been accepted that the discretion should be exercised in favour of awarding interest unless there are good reasons for withholding it.[210] Interest has therefore usually been awarded on pre-trial *Griffiths v Kerkemeyer* damages although this is not the case in all other Australian jurisdictions.

The interest component of awards relating to pre-trial *Griffiths v Kerkemeyer* damages can be a substantial amount, as indicated by the summary of cases in Appendix 2. In one case, the interest awarded was $61,000.[211]

One submission expressed concern with the award of interest on pre-trial *Griffiths v Kerkemeyer* damages:

> An important matter which needs to be addressed is the question of payment of interest on *Griffiths v Kerkemeyer* damages. There is no logical reason to allow interest on those awards. The very basis of the award is that the amount has not been paid and it is difficult to understand why a *Griffiths v Kerkemeyer* award should not rank on equal footing to an unpaid item of special damages: see the discussion in *Hodges v Frost* (1984) 53 ALR 381 and 382.

Obviously, if pre-trial *Griffiths v Kerkemeyer* damages are assessed on the basis of the current commercial cost of the care services provided to the plaintiff, there would be no need to also award interest on those damages. If, however, as should be the case, pre-trial *Griffiths v Kerkemeyer* damages are assessed on the

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[210] See Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 11.3.4.

[211] See Supreme Court case referred to as *Densley* 17.6.93 in Appendix 2. In such cases the award of interest on other heads of damage will also invariably be high. In *Densley*, interest awarded on past economic loss (assessed at $85,000) was $43,350.

basis of the commercial cost of services from time to time from the date of the accident, an award of interest may be appropriate.

The rate of interest which has been applied by Queensland courts varies according to the type of damages to which the interest applies.

For pre-trial damages broadly classified as special damages, which refer to economic losses incurred by the plaintiff prior to the trial - such as doctors' fees and loss of earnings - courts have used their discretion to award interest from the date of incurring the loss to the date of judgment at the commercial rate of interest current at the date of trial. Such interest is normally awarded to compensate the plaintiff for being out-of-pocket since the time of incurring the loss. Recently, the rate of interest which has usually been awarded for special damages is 6 per cent per annum.[212]

Pre-trial damages other than special damages are broadly classified as general damages. These damages do not normally represent an economic loss to the plaintiff and are usually incurred gradually over a period of time from the date of the accident to the date of judgment. Heads of general damages include pain and suffering and loss of earning capacity. The High Court in *Van Gervan v Fenton* also classified *Griffiths v Kerkemeyer* damages as general damages.[213]

Courts have adopted a variety of techniques for calculating the appropriate interest to be awarded on pre-trial general damages, to take into account the accruing nature of the damages. A usual practice is to allow the whole period between the date of the accident and the date of the judgment and to apply one half of a current commercial rate of interest to that period. Alternatively, the full commercial rate is applied to a term less than the period from the date of the accident to the date of the judgment. Thus, it is not uncommon to see an award of interest on damages for pain and suffering at the rate of 2 per cent per annum over the whole period prior to judgment.

(i) Compensating the unpaid care-provider

A principal justification given for permitting courts to award interest on pre-trial damages is that it enables the court to fully compensate the plaintiff for the loss sustained, including the distinct loss that arises from being kept out of the money.[214] The need for care, created by the defendant's negligence, is one

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[212] Thomas J in *Camm v Salter* [1992] 2 Qd R 342 at 344 observed:

> "The practice for many years [in Queensland] has been to allow interest at six per cent over the selected period. This is based on a notional rate of 12 per cent interest, but it is reduced to six per cent to give recognition to the fact that the suffering and deprivation is suffered day by day." See p.64 below.

[213] *Van Gervan v Fenton* (1992) 175 CLR 327 at 337.

[214] Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) para 11.3.4.

which would ordinarily be productive of economic loss. As Luntz states:[215]

> If the plaintiff is to be enabled to reimburse in full the provider of services which have an economic value to the plaintiff, then interest must be allowed on the amount awarded (see *Masinovic v MVIT* (1986) 42 SASR 161 (FC), 193.5 per Johnston J).

The Commission has no evidence on the extent to which awards of pre-trial damages are paid to the care-providers.[216]

If the pre-trial care provider had been paid, or was entitled by way of contract with the plaintiff, to be paid for services prior to the trial or upon judgment, courts would be justified in including an interest component in awards to compensate the plaintiff for being out-of-pocket or to compensate the plaintiff's care provider/creditors.[217]

If, as the Commission has recommended above, a care-provider who prior to the trial had no legal entitlement to be paid for his or her services to the plaintiff should be legally entitled to the award of pre-trial *Griffiths v Kerkemeyer* damages, as reimbursement for services provided to the plaintiff, then it would also be appropriate for an award of interest on those damages to be paid to the care-provider. Such an award would be intended to compensate the care-provider for not having been paid for his or her services as and when provided to the plaintiff in satisfaction of certain needs created by the defendant's negligence.

(ii) New South Wales approach

In New South Wales, courts have refused to grant interest on awards of pre-trial *Griffiths v Kerkemeyer* damages.

In *Settree v Roberts*[218] the New South Wales Court of Appeal held that damages for personal injuries should not bear interest unless the injured party has actually expended money or incurred liability, carrying interest, in order to obtain these services. Hope JA stated:[219]

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[215] Id para 11.3.14.

[216] Although some courts have ordered that the care-provider be paid the pre-trial *Griffiths v Kerkemeyer* damages. See, for example, the Supreme Court decision referred to as *Densley 17.6.93* in Appendix 2.

[217] Compensation for the plaintiff's losses in such a case would not have been awarded on the basis of *Griffiths v Kerkemeyer*.

[218] [1982] 1 NSWLR 649.

[219] Id at 654. *Settree v Roberts* has been followed in subsequent New South Wales decisions and in the Australian Capital Territory case of *D'Ambrosio v De Souza Lima* (1985) 60 ACTR 18.

> [the plaintiff's] mother has no interest whatsoever in the sum awarded for the value of past services which have been given to satisfy his need. The position in respect of this item is similar to that which he obtains in respect of liabilities for medical services which he incurs. He is allowed interest upon such medical accounts as he has paid from the time of payment, not on those which he has not paid.

In the Federal Court case of *Hodges v Frost*[220] Kirby J confirmed that the decision in *Settree v Roberts* is the law in New South Wales:

> It now seems clear that interest is not payable on the component of the verdict calculated under this head of damages. Glass JA has explained this rule on the ground that the plaintiff, not being out of pocket, cannot claim interest any more than he could claim such interest on unpaid medical accounts. See Glass JA in *Burnicle v Cutelli* [1982] 2 NSW LR 26 at 30 applying *Settree v Roberts* [1982] 1 NSWLR 649.[221]

(iii) Queensland approach

The courts in Queensland have until very recently not been swayed by the New South Wales decisions.

In *Veselinovic v Thorley*[222] the Full Court of the Supreme Court of Queensland held that the circumstances of each case dictate the basis for measuring damages resulting from the need for services. Where the services have been provided on an unpaid basis the financial loss suffered by the care-provider was considered to be the correct basis for the assessment of *Griffiths v Kerkemeyer* damages.

The majority of the Full Court justified the payment of interest on such damages on a similar basis. Connolly J stated:[223]

> Once it is perceived that the husband [care-provider] has in truth been out of pocket over a substantial period there can no longer be any objection in principle to an award of interest.

Derrington J adverted to the New South Wales decision in *Settree v Roberts*. He distinguished the need for unpaid services from an injured plaintiff's other needs such as the need for medical assistance. In those other cases interest is not normally allowed from the date of payment for the services. However, in relation to

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220 (1984) 53 ALR 373 at 381-382.

221 No interest could be awarded in this case in any event because the Federal Court was at that time without power to award interest.

222 [1988] 1 Qd R 191.

223 Id at 195.

Griffiths v Kerkemeyer awards which relate to services provided for no payment, he stated:[224]

> [i]f the services had been paid for, such payment would surely have attracted interest. It is difficult then to see why interest should not be payable when the need was met by the gratuitous services of another but in respect of which the plaintiff is entitled to damages. One purpose in awarding interest on damages is to ensure that the plaintiff "ought in justice to be placed into position in which he would have been had the amount of the verdict been paid to him at the date of the commencement of action. *Ruby v Marsh* (1975) 132 CLR 642 per Barwick CJ at 652."[225]

Derrington J went on to state:[226]

> Although the basis of the award is no longer confined to the principle that the plaintiff should be reimbursed for an obligation to repay the donor of the gratuitous services, even in that case it might have been expected that the repayments should include interest to reimburse the donor for the period for which he had been unpaid. Fairness requires that the discretion to award interest should be exercised in the plaintiff's favour.

However, the High Court in *Van Gervan v Fenton* rejected the basis of the decision in *Veselinovic v Thorley* and therefore, Connolly and Derrington JJ's basis for awarding interest on pre-trial *Griffiths v Kerkemeyer* damages. The High Court held that the correct basis for assessing *Griffiths v Kerkemeyer* damages is the appropriate commercial rate for the type of services required by the plaintiff rather than any loss suffered by the care-provider.

Thomas J in *Veselinovic v Thorley* did not attempt to define *Griffiths v Kerkemeyer* damages as out-of-pocket expenses or actual loss, for the purposes of allowing interest on such damages. Rather, he classified the plaintiff's need for care as a "detrimental consequence" of the kind which can attract interest before the trial and "[t]he making of payment is irrelevant in such a matter".[227]

The term "detrimental consequence" was used by the High Court in *Cullen v Trappell*[228] to refer to non-economic loss such as loss of economic capacity, pain and suffering and loss of amenities. It is possible to distinguish between detrimental consequences suffered prior to the trial and detrimental consequences

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[224] Id at 208.

[225] Of course, if the services had been paid for there would have been no claim based upon *Griffiths v Kerkemeyer*. Further, the plaintiff is not in a position of being out-of-pocket in respect of the services already provided.

[226] *Veselinovic v Thorley* [1988] 1 Qd R 191 at 208.

[227] Id at 202.

[228] (1979) 146 CLR 1.

to be suffered in the future. Gibbs J stated:[229]

> In general, the distinction between detrimental consequences already suffered and those to be suffered in the future should be regarded by a judge exercising his discretion to allow interest not only on damages awarded in respect of economic loss, but also in respect of damages awarded for non-economic loss.

However, it could be argued that unlike other "detrimental consequences" suffered by the injured person, the need for care has actually been ameliorated or satisfied by the care-provider's services - usually from when the need arose or existed. The need for services is more often than not evidenced by the provision of services.

Further, Thomas J's basis for awarding interest on pre-trial *Griffiths v Kerkemeyer* damages would be difficult to justify if, as the Commission has recommended above, the care-provider, rather than the plaintiff, were to be paid the award for pre-trial *Griffiths v Kerkemeyer* damages. The "detrimental consequence" is the plaintiff's need for past services, not any detrimental consequence which the care-provider may suffer as a result of providing the care to the plaintiff.[230] Of course, an award of interest made to the care-provider could be regarded as compensating the care-provider for the detrimental consequence of not having been paid for his or her services as and when provided to the plaintiff.

Since *Veselenovic v Thorley* it has been the usual practice of Queensland courts to award interest on pre-trial *Griffiths v Kerkemeyer* damages at a commercial interest rate. However, it is not obvious that the commercial rate has been calculated on a consistent basis.

In some cases the rate may have been a then current commercial rate applied to the whole period from the date of the accident to the date of judgment, thereby treating pre-trial *Griffiths v Kerkemeyer* damages more as special damages than as general damages. In other cases a commercial rate of, say, 12 per cent per annum, which would have been appropriate in the 1980's in Australia, may have been halved to reflect the accruing nature of pre-trial *Griffiths v Kerkemeyer* damages. In many cases, however, it is apparent that parties have simply agreed on the appropriate rate of interest.

In most cases, the relatively high awards of interest normally awarded on pre-trial *Griffiths v Kerkemeyer* damages when compared to awards of interest on other heads of general damages, such as pain and suffering, appear to result from a continued acceptance by Queensland courts of the now discredited reasoning in *Veselenovic v Thorley*.

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[229] Id at 20-21.

[230] See p.9 above.

White J in the Supreme Court case of *Donnelly v Patrick Operations Pty Limited*[231] rejected the approach adopted by the Full Court in *Veselinovic v Thorley* and indicated a possible new approach to the award of interest on pre-trial *Griffiths v Kerkemeyer* damages in Queensland. Her Honour observed:[232]

> Since the plaintiff has actually received the services the subject of Griffiths v. Kerkemeyer award, and, since there is no obligation to make any payment to the provider of those services, it is difficult to see how a plaintiff can be said to have suffered a detriment such as to attract an award of interest. It seems to me then that interest ought not to be awarded in relation to past Griffiths v. Kerkemeyer claims.[233]

(iv) The Commission's view

1. **There should be no award of interest on pre-trial *Griffiths v Kerkemeyer* damages if those damages are assessed on the basis of the current commercial cost of providing appropriate care.**

2. **If the court exercises the discretion earlier recommended, in favour of directing that the award of pre-trial *Griffiths v Kerkemeyer* damages be paid to the care-provider(s), then the court should continue to have a discretion to award interest on those damages at the same rate and in the same manner as for other items of general damages, such as pain and suffering.**

   At the current time, a commercial interest rate of 4 per cent per annum may be appropriate. Applying half that rate to the whole period between the date of the accident and the date of judgment would reflect the accruing nature of the need suffered by the plaintiff.

   The High Court in *M.B.P. (S.A.) Pty Ltd v Gogic*[234] in 1991 accepted that for South Australia a rate of 4 per cent per annum as general damages was "fair and reasonable" compensation for a "plaintiff in that State". In 1992 the Queensland Supreme Court decision of *Camm v Salter*,[235] Thomas J accepted the interest rate referred to in *M.B.P. (S.A.) Pty Ltd v Gogic* as the appropriate rate to be applied in Queensland for general damages.

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231 Supreme Court of Queensland unreported judgment No 3011 of 1989, delivered 29.9.93.

232 Id at 25.

233 However, the point was not argued before Her Honour, and the defendant by its submissions, accepted the plaintiff's right to interest and at 6 per cent per annum. Interest was allowed at 6 per cent per annum.

234 (1991) 171 CLR 657.

235 [1992] 2 Qd R 342.

However, the 4 per cent per annum rate is merely a guide. In the 1992 Queensland decision of *Pickard v Haeberle-Turner*,[236] the Full Court held that the trial judge was within his discretion to adopt an interest rate of 6 per cent per annum for general damages.

3. **There should be a statutory requirement for the court to consider whether or not the interest awarded on pre-trial *Griffiths v Kerkemeyer* damages should be paid direct to the care-provider.**

[236] [1992] 2 Qd R 425.

PART 3

SECTION 15C COMMON LAW PRACTICE ACT 1867

1. INTRODUCTION[237]

(a) Common law and legislative intervention

At common law "[i]n a civil court, the death of a human being could not be complained of as an injury".[238] The result is that until a statute says otherwise, anyone who suffers loss as a result of the death of another cannot sue the wrongdoer who caused the death.

Before the enactment of wrongful death statutes, dependants could not sue the wrongdoer when they lost the support of a breadwinner. The origin of this rule appears to be in the felony-merger doctrine.[239] The policy behind that doctrine was that misconduct resulting in the death of another involved the commission of a public wrong, which extinguished all private remedies arising as a result of the death. The public interest was given more importance than that of the individuals. It could also be seen that the King's desire to obtain the felon's goods and lands (which in those days went to the Crown when the felon was convicted) was more important than the right of any individual to recover damages.[240]

The Alberta Law Reform Institute has described the history of the felony-merger doctrine as follows:[241]

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[237] The terms of reference are set out on p.1 above.

[238] *Baker v Bolton* (1808) 1 Camp 493, 179 E.R. 1033 (Nisi Prius) per Lord Ellenborough; *Woolworths Ltd v Crotty* (1942) 66 CLR 663. See for general discussion H Luntz *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 Ch.9.

[239] See Holdsworth WS "*The Origin of the Rule in Baker v Bolton*" (1916) 32 Law Q. Rev. 431. The doctrine was first described by Tanfield J in *Higgins v Butcher* (1607), Yelv. 89:

> If a man beats the servant of J.S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost."

[240] A mechanism did develop however, to provide the deceased's family with some funds. Any property involved in a person's death (referred to as a "deodand") was forfeited to the King's Almoner for charity. The funds generated from the sale of deodands were often used to assist the deceased's family. As the practice developed, the owner, rather than let the goods be sold, would ordinarily pay an amount assessed by the coroner's jury that investigated the death. The money so raised would be given to the deceased's family. For a brief history of deodands, see Law Reform Commission of British Columbia, Working Paper on *Pecuniary Loss and the Family Compensation Act*, 1992.

[241] *Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act*, Report for Discussion No 12, June 1992.

> At first, the felony-merger doctrine established in *Higgins v Butcher* met with strong approval. However, beginning in 1625 there were cases that held that a conviction of felony did not extinguish a cause of action in trespass. By 1873 it was clear that the fact that the conduct complained of amounted to a felony did not stop civil proceedings for damages. At most, the felony was only a defence if the action was brought against the supposed criminal before prosecution. The felony only suspended the right to sue for the wrong to the person, it did not take away the right.
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> Logic would dictate that if the conduct complained of did not amount to a felony, the felony-merger doctrine would not apply. Also, if the felony-merger doctrine was never the law of the country or if the doctrine was discarded, it would seem that *Baker v Bolton* should not be followed. Yet, logic did not prevail in this area of the law. The result is that the rule in *Baker v Bolton* applies even though the felony-merger doctrine was never the law in a particular country or was discarded.

In the United Kingdom, the right to claim compensation for the death of another was introduced by *An Act for Compensating the Families of Persons killed by Accidents 1846*[242] (commonly referred to as *Lord Campbell's Act*[243]) in a time when fatal accidents were becoming frequent in England with the development of factories and railways. Prior to that time wrongful death usually referred to death by violence. The wrongdoer was most often the thief or highwayman. Even if found and arrested, the murderer was more often than not impecunious and not worth suing. With the industrial revolution and deaths resulting from machines, the wrongdoer was often a wealthy corporation.

All Australian jurisdictions re-enacted the United Kingdom provisions[244] although they have been subsequently varied in a number of respects, including in relation to the deduction from the assessment of damages of benefits received by dependants as a result of the breadwinner's death. The action based on the legislation is often referred to as a *Lord Campbell's* action or a *Fatal Accidents Act* action, irrespective of the title of the legislation.

In some jurisdictions and in respect of deaths resulting from some types of accident claims for damages have been abolished entirely[245] or against particular

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242 Cap. XC111. The preamble to the Act read:

> "Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in Damages for the Injury so caused by him."

243 One of a number of important reforming Acts promoted or supported by Lord Campbell after he had become a member of the House of Lords. See Sir W. Holdsworthy, *A History of English Law* Vol. xv pp.220, 421.

244 Ss.12-15C *Common Law Practice Act 1867* (Qld); *Compensation to Relatives Act 1897* (NSW); Part II, *Wrongs Act 1936* (SA); *Fatal Accidents Act 1934* (Tas); Part III, *Wrongs Act 1958* (Vic); *Fatal Accidents Act 1959* (WA); *Compensation (Fatal Injuries) Ordinance 1968* (ACT); *Compensation (Fatal Injuries) Act 1974* (NT). The UK provision is now in the *Fatal Accidents Act 1976*. Deaths in commercial airline accidents are covered by different provisions in ss.12 and 35 of the *Civil Aviation (Carrier's Liability) Act 1959* (Cth).

245 For example, *Motor Accidents (Compensation) Act 1979* (NT) s.5.

defendants.[246]

In Queensland the *Lord Campbell's Act* provisions are found in sections 12-15C of the *Common Law Practice Act 1867*.

(b) The *Lord Campbell's* action

The *Lord Campbell's* action brought by family members of a deceased person has been described in the following way by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd*:[247]

> [The Fatal Accidents Acts] provided a new cause of action and did not merely regulate or enlarge an "old one," as Lord Sumner observed in *Admiralty Commissioners v S.S. Amerika* [1917] A.C. 38 at 52. The claim is, in the words of Bowen L.J., in *The Vera Cruz (No. 2)* (1884) 9 P.D. 96 at 101, for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but by his family after his death. The Act of 1846, s. 2, provides that the action is to be for the benefit of the wife or other member of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death.

The legislation restricts the action to family members of the deceased. The jury (or judge) could give such damages as may be thought proportioned to the injury resulting to such family members from the death.

The nature of the damages suffered by the family of the deceased which can be claimed under this action was not set out in the legislation although the courts have subsequently adopted the view that damages recoverable are restricted to pecuniary loss[248] and may not include anything by way of consolation for the dependants for grief or sorrow.[249]

Balkin and Davis describe the calculation of the loss suffered by family members as a result of the death of a breadwinner as follows:[250]

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246 For example, *Workers' Compensation Act 1987* (NSW) s. 149(2).

247 [1942] AC 601 at 611-612.

248 *Blake v Midland Railway* (1852) 18 QBD 93.

249 **Note**, in South Australia in 1940, ss 23a-23c were introduced to the *Wrongs Act 1936* providing for the payment of a sum of money "as the court thinks just by way of solatium for the suffering caused" to the parents of an infant and to the spouse of an adult who has been killed. The provisions prescribed upper limits for awards. The Northern Territory *Compensation (Fatal Injuries) Act 1974* provides in s.10(3)(f) that the "damages in an action may include ... solatium." It may be awarded to any of the persons for whose benefit the action is brought and is not subject to an upper limit.

250 Balkin RP and Davis JLR *Law of Torts* 1991 at 391-392.

> If the deceased was the breadwinner for the family, the loss suffered by the surviving members is calculated by reference to the lost earning capacity [after taking account of possible beneficial or adverse contingencies] of the deceased, after deducting income tax and the proportion of the product of that capacity which he would have spent on his own maintenance. The amount to be awarded to each member of the family also depends upon the length of time for which each had a reasonable expectation of receiving a benefit, so that each child's share will be assessed on the basis that he or she will in due course achieve financial independence. In assessing the widow's share, no account is taken of the fact that she has taken up employment after her husband's death, since that fact does not diminish her expectation of financial support from her husband; if she had been earning prior to his death, the amount of her income is of relevance only in determining what proportion of the deceased's earning capacity might have been spent solely for his own benefit .... If the deceased had devoted the whole (or a large part) of her time to caring for the family, it has been recognised that the loss of the remainder of the family is the value of the services of which they have been deprived of by death. That value may be assessed by reference to the cost of providing substitute services, but such a cost is no more than a guide.

The value of the dependency can include not only that part of the deceased's earnings which he or she would have expended annually in maintaining his or her dependants but also that part of his or her earnings which he or she would have saved and which would have come to the dependants by inheritance on his or her death. There may also be included a sum in respect of loss attributable to the cessation of contributions which the deceased, and his or her employers, had made to a superannuation or other fund of which the dependants were the nominated beneficiaries.

2. THE QUEENSLAND PROVISIONS

(a) Liability for death caused wrongfully

The *Lord Campbell's* action for damages resulting from wrongful death was introduced in Queensland by section 12 of the *Common Law Practice Act 1867* which states:

> Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

(b) Who to benefit from such an action?

Only the husband, wife, parent or child of the deceased person are entitled to benefit from such an action.[251] Section 13 of the *Common Law Practice Act 1867* states:

> Every such action shall be for the benefit of the wife husband parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.

(c) How many actions can be brought?

Consistent with similar provisions in other jurisdictions, section 14 of the *Common Law Practice Act 1867* states:

> Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint.

(d) What is deducted from the assessment of damages?

The amount to be awarded to a particular claimant pursuant to an action under the *Common Law Practice Act 1867* can be reduced by a number of factors. For example:

1. If one of the claimants was partly at fault in causing the death, and he or she is the only person who can be sued for that death - that person is unable to claim under the Act. However, where one of the claimants was partly to blame and there are others outside the family who are also liable for the death - the share which would otherwise have gone to that claimant is to be reduced in proportion to the degree to which he or she was responsible for

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[251] Note, in all jurisdictions other than Queensland and Tasmania, members of the family who can bring such an action include de facto spouses. In all jurisdictions other than Queensland, members of the family include the deceased's siblings (whether of half-blood or full-blood). In Western Australia, the Northern Territory and the Australian Capital Territory, the family includes the divorced wife or husband of the deceased and, in Victoria, simply anyone who depends on the deceased can bring an action. In Queensland, the surviving spouse (if any) and the deceased's children (if any) would typically be named as plaintiffs in the action.

the death.[252] Where the deceased had been guilty of contributory negligence damages will be reduced to a degree which is just and equitable having regard to his or her share in the responsibility for his or her own death.[253]

2. Against the losses flowing from the death must be offset some of the pecuniary advantages which accrue to the dependants by reason of the death.[254] The most common pecuniary advantage which must be brought into account, in all jurisdictions except Tasmania and the Northern Territory,[255] is the acceleration of a testamentary benefaction resulting from the early death.

The acceleration of the benefit to a surviving spouse of owning the matrimonial home is disregarded on the basis that (in relation to a claim by a widow) she "merely continues to enjoy as owner what she previously enjoyed as wife".[256]

In all Australian jurisdictions other than the Northern Territory the prospect that a claimant will replace the pecuniary advantage provided by his or her deceased spouse with the same benefit from another person must also be taken into account.[257] That is, regard must be had to the possibility of a dependency being replaced.[258]

The legislation in all Australian jurisdictions now also precludes account being taken in the assessment of damages of the proceeds of a life insurance policy,

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252 Even if a Lord Campbell's action settles prior to trial, it appears from the Commission's review of files held at the Workers' Compensation Board of Queensland that, in general, any contributory negligence of the employee is taken into account in the settlement negotiations.

253 *Law Reform (Tortfeasors' Contribution, Contributory Negligence, and Division of Chattels) Act 1951*. Where the damages are to be reduced for the deceased's contributory negligence, the reduction must be effected after there have been deducted from the prima facie loss any benefits accruing to the dependants, otherwise the dependants would be excessively penalised. See Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 para 9.8.4.

254 For discussion see Balkin RP and Davis JLR *Law of Torts* 1991 at 393.

255 *Fatal Accidents Act 1934* (Tas) s.10(1)(b) precludes consideration of up to $10,000 of the value of the deceased's estate which passes to the family. *Compensation (Fatal Injuries) Act 1974* (NT) s.10(4)(g) prohibits the consideration of any gains or benefits consequent upon the death.

256 *Zordan v Metropolitan (Perth) Passenger Transport Trust* [1963] ALR 513 at 516 (HCA); *Tripodi v Leonello* 14 (1982) 31 SASR 9 at 12-13 (FC); *McCullagh v Lawrence* [1989] 1 Qd R 163 at 165-6 (FC); Balkin and Davis at note 177 page 393 note also: "The same principle applies in relation to chattels such as a motor car: *Worden v Yeats* [1964] SASR 381 at 390 per Hogarth J; *Lamb v Southern Tablelands County Council* (1988) *Aust Torts Reports* 80-220 at 68, 198-9 per Campbell J (NSW SC)." The ACT (s.10(4)(e)) and NT (s.10(4)) have given this approach legislative sanction.

257 In *Carroll v Purcell* (1961) 107 CLR 73 at 79 the rule was regarded as so well established as no longer to require justification.

258 In the Northern Territory the legislation prevents the court from taking account of "The remarriage or prospects of remarriage of the surviving spouse" (NT s.10(4)(h)). This is also now the position in the United Kingdom.

superannuation payments or pensions or benefits payable under social security or similar legislation.[259] In all jurisdictions either by reason of legislation or judicial decisions charitable gifts are also excluded.[260] Section 15C of the *Common Law Practice Act 1867* in Queensland lists each of these exclusions.

3. SECTION 15C

Section 15C of the *Common Law Practice Act 1867* states:

> In assessing damages in respect of a person's death in any such action, whether commenced before or after the commencement of the *Common Law Practice Act Amendment Act* 1972, there shall not be taken into account -
>
> (a) a sum paid or payable on the death under any contract of assurance or insurance;
>
> (b) a sum paid or payable on the death under a contract made with a friendly or other benefit society, or association or trade union that is not a contract of insurance or assurance;
>
> (c) a sum paid or payable on the death out of any superannuation, provident or like fund;
>
> (d) a sum paid or payable on the death by way of pension, benefit or allowance under any law of the Commonwealth or of any State or Territory of the Commonwealth or of any other country; or
>
> (e) a gratuity in whatever form received or receivable on the death,
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> whether any such sum or gratuity is paid or payable to or is received or receivable by the estate of the deceased person or by any person for whose benefit the action is brought.

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[259] The names of the statutes appear in footnote 244 above. The specific provisions are: Qld. s.15C; NSW s.3(3); SA s.20(2aa); Tas s.10(1); Vic s.19; WA s.5(2); ACT s.10(4); NT s.10(4). Note, in the United Kingdom s.4 of the *Fatal Accidents Act 1976* has been substituted by the following provision (introduced by the *Administration of Justice Act 1982*):

> In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

[260] The names of the statutes appear in footnote 244 above. The specific provisions are: Qld s.15C(e); SA s.20(2aa)(ii); Vic s.19(d); ACT s.10(4)(d); NT s.10(4)(d). *Papowski v Commonwealth* [1958] SASR 293; *Mockridge v Watson* [1960] VR 405. Both cases were decided prior to the enactment of the relevant provision and are therefore relevant to those jurisdictions without such statutory provision (WA, NSW, Tas).

4. THE HISTORY OF SECTION 15C - *COMMON LAW PRACTICE ACT 1867*

The original section 15C was inserted into the *Common Law Practice Act 1867* in 1915[261] and read:

> In assessing damages in any such action, whether commenced before or after the first day of October, one thousand nine hundred and fifteen, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after that date.

This provision was repealed and a new, expanded provision was enacted in 1972.[262]

The original provision was based on English legislation of 1908. The history of the 1908 English provision has been described as follows:[263]

> The story starts in 1864 when the Railway Passengers Assurance Company asked for powers under a private Bill and the House of Commons in a fit of pious resolution imposed on it a clause whereby insurance money payable by the company was not to be deducted from damages recovered under the Fatal Accidents Act, 1846. This seems to have been good for trade because two private companies then obtained Acts "contracting out of the Fatal Accidents Act." When forty more clamoured for exemption the government thought that the time had come to equalise competition by introducing the 1908 Bill making moneys payable under a contract of insurance not deductible from damages recovered under the Fatal Accidents Act.[264] But this left the anomaly that moneys payable under a pension scheme which was not a contract of insurance were deducted whereas a personal accident group policy taken out by an employer in respect of his employees ranked as a contract of insurance. The Fatal Accidents Act, 1959, was passed to deal with the situation.

The current Queensland provision (section 15C) was based upon a recommendation of the Queensland Law Reform Commission in 1971.[265] The Commission recommended that the then existing section 15C (which simply provided that no account was to be taken of any sum paid or payable on the death of the deceased person under any contract of assurance or insurance) be expanded to its current form.

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261 By 6 Geo. 5 No. 22, s.2.

262 By Act No. 34, s.2.

263 Gantz G *Mitigation of Damages by Benefits Received* (1962) 25 MLR 559, 559-60.

264 *H.C. Debates*, 4th series, Vol. 192, Col. 261.

265 *The Provisions of the "Fatal Accidents Acts" with a View to the Elimination of Anomalies*, Report No. 9 1971.

The Commission noted in relation to the narrower Queensland provision in force in 1971 and the analogous United Kingdom provision:[266]

> Conflicting decisions --- have failed to elucidate which "contracts of assurance or insurance" are not to be taken into account in the assessment of damages. courts in Queensland give the phrase its generally accepted meaning and ignore the fact that any such payments have been made. In 1966, consequent upon the decision in *Parker v Commonwealth of Australia*[267] the Victorian Parliament passed an amendment to s. 19 of the *Wrongs Act 1958* (q.v) [which was in similar terms to the current, expanded section 15C]. An article on page 295 of 40 ALJ suggests that it would be appropriate for the other States to consider adopting this enactment with a view to uniformity. The Commission is prepared to recommend its adoption but, as the concept of the word "sum" has been made too narrow, paragraph (d) and the final paragraph which the recommended s.15C contain differ from the Victorian section.

In relation to "ex gratia" payments - that is, voluntary payments made by insurance companies or funds raised by voluntary subscription, the Commission in 1971 took note of Fullagar J in *Attorney-General for New South Wales v Perpetual Trustees*.[268]

> It would surely be out of the question to reduce damages by a sum which some benevolent persons had collected for the benefit of a man crippled in an accident.

The Commission also noted that in other States, such as New South Wales and Tasmania, for many years legislation had provided that in assessing damages in a case of this nature account should not be taken (inter alia) of any sum paid or payable under any State or Commonwealth legislation by way of Widow's, Invalid or Old Age Pensions.[269] The Commission noted:[270] "Despite criticism, the Commission feels these exemptions which are in s.15C in another form should be retained."

The Victorian Statute Law Revision Committee,[271] when reviewing the Victorian equivalent of the narrower section 15C, noted that, if any exceptions were to be retained, then at least the illogical distinctions between different forms of savings set up by the Victorian provision should be eliminated. That is, why should the

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[266] Id at 5.

[267] (1965) 112 CLR 295. That case arose out of the *Voyager* disaster. Windeyer J decided that he should not regard the pension being received by the plaintiff as a sum "payable under a contract of assurance or insurance" and the damages were reduced accordingly.

[268] (1952) 85 CLR 237 at 292.

[269] S.3 *Compensation to Relatives Act 1897-1953* (NSW); s.10 *Fatal Accidents Act 1934* (Tas) as amended in 1955.

[270] *The Provisions of the "Fatal Accidents Acts" with a View to the Elimination of Anomalies*, Report No. 9 1971 at p.6.

[271] *Report upon the Proposals Contained in the Wrongs (Assessment of Damages) Bill*, 1966.

benefit of the provision extend to those pensions which have their origin in a scheme of insurance or assurance, but exclude pensions which emanate from some statutory or other scheme, leaving these to be taken into account to reduce awards of damages?

Although it proved difficult to find a clear rationale on which to base the exceptions, the Victorian Committee preferred the approach of specifying the exceptions, to the approach of adopting a broad provision such as existed in New Zealand.[272] The New Zealand provision directed the court to ignore all gains to the deceased's estate or dependants as a result of the death. The provision was the subject of a great deal of criticism by the Judiciary and the legal profession in New Zealand. It had been stated that the provision contemplated conferring more of a benefit on a surviving spouse than could be justified, and that, furthermore, it penalised the person who was responsible for the death of the deceased. It had been held that an inheritance came within the New Zealand provision - and therefore was not taken into account when assessing damages.[273]

The Victorian Committee had been asked to comment on a proposed amendment to Victorian law along the lines of the New Zealand provision. The Committee made the following comments:[274]

> It is reasonable to assume that similar criticisms would be valid in Victoria if the suggested amendment was passed. It follows the New Zealand section in providing that there shall not be taken into account two species of gain - (i) any gain to the estate of the deceased that is consequent on his death; and (ii) any gain to any person for whose benefit the action is brought, that is consequent on the death of the deceased. The first species could only refer to insurance moneys or sums such as friendly society benefits payable to the estate of the deceased upon his death, but the second must surely be interpreted as any gain whatsoever, and include any gain to the dependant from the estate of the deceased.
>
> In these circumstances, it would appear that much of the basis for the assessment of damages is lost, as it would normally follow that all evidence regarding such gains as inheritances would be irrelevant to the inquiry, and therefore inadmissible. It is recognised, however, that the action in theory would still be founded upon

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272 S.7(2) *Deaths by Accident Compensation Act 1952* -

> In awarding damages in any such action the Court shall not take into account any gain, whether to the estate of the deceased person or to any dependant, that is consequent on the death of the deceased person.

A similar provision has been introduced in the UK, see footnote 259 above. New Zealand has since abolished the common law action for damages for personal injuries resulting from accidents.

273 *Alley v Alfred Buckland and Sons, Ltd* [1941] NZLR 575 per Ostler J. The judge described the cause of action as a "purely punitive action" and stated that it had nothing to do with compensation, but was punishing a man for negligently killing another. It virtually gave rise to a new fictional loss in place of the compensation for actual losses originally intended by the statute, in that even if the dependant by virtue of moneys received on death was financially better off than before the death, there was still an action for damages available which in some cases would enable the dependant to make a profit out of the loss of a breadwinner. Also see *Maskill v Attorney-General* [1959] NZLR 156 where a fairly large estate was under consideration and the Court decided that it could not take into account the benefit of this inheritance to the widow to reduce damages.

274 Victorian Statute Law Revision Committee *Report upon the Proposals Contained in the Wrongs (Assessment of Damages) Bill* 1966 at p.5.

compensation for loss, and that amounts would vary by considerations such as the age, occupation and earning power of the deceased, and the age, earning power and degree of dependence of the claimant.

The Committee can foresee further difficulties surrounding questions of causation in the interpretation of the words "any gain consequent on the death". For instance, the situation could arise where at the time of the action being determined, a widow has remarried, and her husband is earning far more than was the deceased. The question would have to be decided as to whether this gain was one consequent on the death which must not be taken into account under the proposed amendment. If this was so, it would alter materially the type of considerations taken into account under the present method of calculating damages, and may extend beyond the intention of what was originally in the mind of the Bill's sponsor.

In sum, the Committee believes that there is much to be said for specifying what exceptions are desired, rather than to enact a blanket provision which may have unexpected and far-reaching consequences. It prefers the policy of removing, so far as is possible, the illogical distinctions produced by the operation of the present section 19, without providing for something which would be so completely out of step with the general principle of compensation which is inherent in the whole of the civil law.

5. STATUTORY EXCLUSIONS FROM THE ASSESSMENT OF DAMAGES LISTED IN SECTION 15C

Prior to the enactment of the original, narrower, section 15C of the *Common Law Practice Act 1867* the pecuniary loss suffered by dependants as a result of the death of a breadwinner through some wrongful act or neglect was determined by balancing on the one hand the loss of any future pecuniary benefit and, on the other hand, any pecuniary advantage from whatever source that emerges by reason of death.

In relation to the almost identical situation in Victoria, the Victorian State Law Revision Committee in 1966 observed:[275]

> Guided by the underlying principle of compensation, the courts evolved a procedure whereby a series of deductions have been taken into account at common law in assessing the extent of damages. The first group of deductions concerns general contingencies, such as the likelihood that the deceased may not have advanced very far in his trade or profession. The possibility that he may have suffered sickness or died, or sustained injury is taken into account, and although the effect would be insignificant in the greater number of cases, the damages are scaled down by reference to these factors. The likelihood of the widow's re-marriage is considered, and the compensation could be further reduced. If it can be shown that a widow has assets and means that suggest she was not dependent economically upon the deceased, this factor has a substantial bearing also in decreasing compensation. The second group of deductions taken into account prior to the enactment of [... the Victorian equivalent of section 15C] embraces gains usually concerned with the death, such as the proceeds of

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[275] *Report upon the Proposals Contained in the Wrongs (Assessment of Damages Bill) 1966* at p.3.

> insurance or assurance policies, together with pensions payable under some statutory or employer's scheme, social service payments and the like. Apart from [... the Victorian equivalent of section 15C] these gains would be assessed and the damages scaled down accordingly. Finally, the matter of inheritance is examined, and the accelerated benefit to a claimant of receiving property or money is calculated, being the benefit which comes from obtaining such assets sooner than might have been expected having regard to the life tables. **[Emphasis added]**

The effect of the current section 15C is to **exclude** from the assessment of damages certain specific payments referred to under the second group of deductions.

Each of the exclusions under section 15C is briefly discussed below.

(a) "a sum paid or payable on the death under any contract of assurance or insurance"[276]

It is unlikely that courts would find a distinction between the words "assurance" and "insurance".[277]

Before the enactment of the original section 15C and its equivalents in other jurisdictions, insurance benefits were deducted from damages awards. The full amount had to be deducted if it came from an accident policy[278] but only the accelerated benefit if it came from a life policy.[279] Richards J in *Butler v McLachlan* [1956] SASR 152 at 159 stated that the distinction is:[280]

> based on the fact that, although a man must die, there is no certainty, or even a reasonable probability that he will suffer an accident.

Difficulties may arise when an insurance policy is payable upon the death of the insured person to someone other than a dependant of the deceased. In the

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[276] S.15C(a) *Common Law Practice Act 1867*.

[277] See *Gillett v Gallagher* [1963] ALR 392, and *Public Trustee (WA) v Nickisson* (1964) 111 CLR 500 - both appeals to the High Court from Western Australia where only "insurance" payments are to be excluded. The High Court excluded moneys which in both cases were most likely if not obviously the proceeds of life "assurance".

[278] *Hicks v The Newport, Abergavenny and Hereford Railway Company* (1857) 4 B & S 403 at footnote (a). 122 ER 510.

[279] *Grand Trunk Railway Co of Canada v Jennings* (1888) 13 App Cas 800 (PC).

[280] Quoted with approval by Dixon J in *Public Trustee v Zoanetti* (1945) 70 CLR 266, 281. See discussion in Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.3.

Victorian Full Court case of *McPhee v Carlesen*[281] the company which employed the deceased took out an endowment policy in its own name on the life of the deceased, pursuant to a staff superannuation scheme. When the employee died the company paid over the money which it had received from the insurer, to the dependants.

It was argued that the deceased employee's widow received the proceeds of the policy under the deceased's contract of employment and not under the contract of insurance and that they should therefore be taken into account in reduction of the damages.

Herring CJ held that the Victorian equivalent to the original section 15C (current 15C(a)) was irrelevant since evidence of the widow's receipt of proceeds would have been properly excluded in any event because the benefit had been taken into account by deducting the premiums from the deceased's future earnings. Macfarlan and Gavan Duffy JJ held that the statutory provision excluded consideration of the money received in this case. When the employers received the proceeds of the policy of insurance, the moneys came "stamped or impressed with the obligation imposed by the scheme and therefore with the obligation to account for and apply them in accordance with the provisions of the scheme. They are, therefore, moneys paid or payable on the death of the deceased under a contract of insurance."[282]

There must be evidence before the court that a benefit was derived from a contract of insurance before the benefit will be ignored. Thus, in *Bahr v ETSA*[283] a widow's evidence that a mortgage and a credit union loan were discharged on the death of her husband was insufficient to establish that they were discharged in consequence of a sum paid under a contract of assurance or insurance. Consequently, the accelerated benefit of the discharge was taken into account in reduction of the damages.

The question whether schemes under which the deceased and the dependants had no legal or equitable right to the proceeds of the insurance policy, though they had a reasonable expectation of benefiting from it, are covered by the insurance exclusion in section 15C, was answered in *Green v Russell*.[284] In that case it was held that the proceeds of the insurance were not to be taken into account. Subsequent cases have also adopted a wide interpretation of the provision - that is, bringing proceeds of insurance within the equivalent section to 15C(a) even if

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[281] [1946] VLR 316.

[282] *McPhee v Carlsen* [1946] VLR 316 at 320 per Macfarlan J. A similar conclusion was reached in *Bowskill v Dawson (No 2)* [1955] 1QB 13 (CA) 24.

[283] (1985) 39 SASR 254.

[284] [1959] 2 QB 226 (CA).

the proceeds reach the dependants by a circuitous route.[285]

Luntz notes:[286]

> In view of the history of the statute, it is doubtful whether the legislation was in fact intended to be remedial ... but in view of its subsequent extension in most jurisdictions, it is probably correctly interpreted in as wide a manner as possible.

Strange results could occur from a wide interpretation of 15C(a) if pension and superannuation schemes[287] not dependent on insurance were not within the scope of the legislation. This happened prior to the introduction of the expanded section 15C in Queensland. In *Colebrook v Wide-Bay Burnett Regional Electricity Board*[288] as a result of her husband's death, the plaintiff had received a payment of $10,033 from a superannuation fund of which her husband had been a member. The fund was operated by trustees who took out insurance policies on members in the amount of the excess of the benefit payable on death or disablement over the sum accumulated in the fund towards the normal retirement benefit. A sum of $8,440 was provided by the insurance policy and $1,593 was the sum accumulated in the fund in the deceased's name. Since insurance policies were used only to cover the possible excess liability of the fund over the value of the contributions received, the longer an employee was in the service of the employer the greater would be the deduction, although the benefit was always 3.4 times the employee's annual wage at the time of death.

Even the broader view of the original section 15C (current section 15C(a)) could not assist in the Queensland case of *Gronow v SGIO,*[289] where a husband and wife were killed in the same accident and it was held that there had to be deducted from the children's claim for loss of the mother's services the accelerated benefit of the proceeds of a policy, on the life of the father, which passed to the mother's estate and then to the children. The policy in this instance was not "payable on the death of the deceased person" i.e. the mother, but on the death of the father, in respect of whose death the children had no claim because the accident was due to his negligence.

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285 In *Green v Russell*, two views were expressed. Pearce LJ was of the opinion that no matter how many hands the proceeds passes through or by what route it reaches the dependant if it can still be described as paid or payable on the death of the deceased, then it should not be deducted from the assessment of damages. Hodson and Romer LJJ simply held that (at p 244 per Romer J):

> if sums are received by an employer under a scheme which was designed for the benefit of the employees, but without conferring any enforceable right on them, and he pays the sum over to the estate or dependants of the men when the risk matures, then the provisions of the Act apply.

The broader view of Pearce LJ was preferred by Lucas J in *Colebrook v Wide-Bay Burnett Regional Electricity Board* [1971] QWN 8.

286 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.7.

287 See ss15C(c), 15C(d) *Common Law Practice Act 1867.*

288 [1971] QWN 8.

289 [1980] Qd R 425.

A significant problem which is not specifically dealt with by the Queensland provision relates to the premiums paid on the insurance policy. In the Territories' legislation[290] and under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth)[291] it is provided that there shall not be taken into account by way of reduction of damages a premium that would have become payable under a contract of insurance in respect of the life of the deceased person if he/she had lived beyond the time at which he/she died. Luntz suggests that:[292]

> [p]resumably, this requires the court to take such premiums into account in considering the expenditure which the deceased would have made for the benefit of the dependants, so increasing the damages.[293]

In *Glen v Philpott*[294] Norris J said that in considering the proportion of the deceased's income that would have been expended for the benefit of the family:

> allowance has to be made for life insurance premiums which cannot ... really be regarded in the circumstances of this case as expenditure by the deceased upon himself.

However, in *Nominal Defendant v Littlewood*[295] it was held that what deceased persons spent on their own life insurance should not come into the calculation of the benefits of which the dependants had a reasonable expectation if the deceased had not been killed.

Luntz suggests:[296]

> Once there is a legislative prohibition on taking into account sums paid or payable under contracts of insurance, there is no need to try to arrive indirectly at the value of the accelerated receipt of the benefit, since such receipt is to be ignored, and there is no longer any justification for deducting the premiums from the

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290 S.10(4)(f) in each case.

291 Ss 15(e) and 38(e).

292 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.8.

293 Luntz at f/n 7 states that before the enactment of legislation prohibiting the taking into account of sums paid or payable under contracts of insurance, it had been held that in the case of a life policy only the accelerated receipt had to be allowed for and this could be sufficiently done by deducting future premiums from the estimated future earnings of the deceased (*Grand Trunk Railway Co of Canada v Jennings* (1888) 13 App Cas 800 (PC)). The legislative prohibition on taking account in reduction of damages premiums that would have been payable on life insurance policies must have been intended to make any such deduction improper.

294 [1974] VR 257 at 265.

295 NSW CA, 21 Aug, 1980, unreported.

296 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.8.

expenditure which would ultimately have benefited the family unless the proceeds of the policy would probably not have been received by them if the deceased had not been killed when he or she was. ... [A] dependant might have had an expectation of benefit from the policy if the deceased had not been killed whether the policy itself gave the dependant a legal right to the proceeds, or the estate into which the proceeds would have fallen would have devolved on the dependant ... The onus apparently rests on the plaintiff to show that the dependants would probably have benefited from the proceeds of the policy before any portion of the premiums paid by the deceased will be included in the calculation of the loss. In *Bahr v ETSA,*[297] therefore, the premiums paid by the deceased for a whole of life policy of which the widow was the owner were taken into account as being for her benefit, as were the premiums payable on a health insurance policy, which was for the benefit of the whole family; whereas premiums on another life policy, as to which there was no evidence, and a sickness and accident policy were regarded as expended entirely for the benefit of the deceased. The judge would have been prepared to take the second policy into account if it had been shown to be a whole of life one, even though owned by the deceased, since the family members would have probably inherited the proceeds on death, despite the owner's right of surrender, borrowing and conversion. On the other hand, in his view, an endowment policy was like any other asset, such as shares, purchased by the deceased. This does not necessarily mean that the survivors did not have a reasonable expectation of benefiting from the accumulation of assets by the deceased and allowance should be made for that ...

(b) "a sum paid or payable on the death under a contract made with a friendly or other benefit society, a trade union or association that is not a contract of insurance or assurance."

The Queensland Law Reform Commission in its Report No. 9[298] recommended a new section 15C in the following terms:

> In assessing damages in any such action, whether commenced before or after the commencement of the Common Law Practice Act Amendment Act 1971, there shall not be taken into account -
>
> **(a) a sum paid or payable on the death of the deceased person under any contract of assurance or insurance (including a contract made with a friendly or other benefit society or association or trade union);**
>
> (b) a sum paid or payable out of any superannuation provident or like fund;
>
> (c) a sum paid or payable by way of pension benefit or allowance under any law of the Commonwealth or the State or under the law of any other State territory or country; or

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297 (1985) 39 SASR 254.

298 *An Examination of the Provisions of The Fatal Accidents Acts with a View to the Elimination of Anomalies*, 1971.

(d) any gratuity in cash or otherwise received or receivable - whether any such sum is paid or payable by the estate of the deceased person or is paid or payable to or received or receivable by any person for whose benefit the action is brought. **[Emphasis added]**

When section 15C was amended in 1972, the Commission's recommended 15C(a) was broken down into two subsections (15C(a) and 15C(b)). This would imply that there may be benefits accruing to dependants from contracts made with a friendly or other benefit society or association or trade union which are distinguishable from benefits payable by way of assurance or insurance (15C(a)) and which are also distinguishable from benefits payable by way of any superannuation, provident or like fund (15C(b)).

The Commission's 1971 Report based its recommendations on similar amendments to section 19 of the Victorian *Wrongs Act 1958* and on the basis of uniformity between the various States. It is unclear why the Queensland Parliament departed from the recommendation of the Law Reform Commission by splitting the proposed section 15C(a) into two subsections. It is also unclear what the nature of the benefits referred to in section 15C(b) are.[299]

(c) "a sum paid or payable on the death out of any superannuation, provident or like fund."[300]

All Australian jurisdictions have provisions similar to section 15C(c) prohibiting the taking into account of actual benefits received from such a fund as a result of the death.[301]

The phrase "any superannuation, provident or like fund" has been held not to be confined to cases where the deceased contributed on a contractual or wholly voluntary basis.[302] It also includes a statutory scheme.

Were it not for section 15C(c) a superannuation benefit payable in consequence of the death may have to be taken into account, whether it is payable as of right or at someone's discretion.[303]

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[299] *Hansard* does not shed light on the reason for the split.

[300] S.15C(c) *Common Law Practice Act 1867*.

[301] The names of the statutes appear in footnote 244 above. The specific provisions are: Qld s15C(c); SA s20(2aa)(iii); Tas s10(1)(c); Vic s19(b); WA s5(2)(b); ACT s10(4)(b); NT s10(4)(b); *Civil Aviation (Carrier's Liability) Act 1959* (Cth) ss15(b) and 38(b).

[302] *Peipman v Turner* [1961] NSWR 252 (FC).

[303] *Baker v Dalgleish Steam Shipping Co* [1922] 1 KB 361 (CA); *Lincoln v Gravil* (1954) 94 CLR 430; *Pannell v Fischer* [1959] SASR 77 (FC); *Ylitalo v Mount Isa Mines Ltd* [1969] Qd R 406 (FC); *Colebrook v Wide-Bay Burnett Regional Electricity Board* [1971] QWN 8; *Sinclair v Bonnefin* (1968) 13 FLR 164 (NT).

Before the introduction of section 15C(c) and its equivalents in other jurisdictions, attempts were sometimes made to bring the benefits received and to be received from such funds, where the deceased made contributions to them, within the concept of insurance payments so as to exclude them under the equivalents to the original, narrower section 15C (the current section 15C(a) which simply excludes from consideration benefits paid or payable from insurance or assurance). However, notes Luntz:[304]

> The cases recognised that, as with insurance, to deduct both the benefits received on the premature death and the deceased's contributions was to make a double deduction if the beneficiaries could reasonably have expected to derive some benefit ultimately from the contributions to the fund. Thus, although the acceleration of the benefits had to be allowed for by way of deduction, portion of the deceased's contributions to the fund could be taken into account as expenditure for the benefit of the dependants, so augmenting their damages.

Legislation such as the *Common Law Practice Act 1867* now prohibits the taking into account of sums paid or payable out of any superannuation, provident or like fund. It remains unclear, however, whether the dependants should continue to be regarded as having had a reasonable expectation of deriving a benefit from a portion of the contributions. To do so would be consistent with the view relating to the consideration of insurance premiums referred to earlier.[305] Thus a portion of the contributions should be regarded as expended for the benefit of the dependant, so increasing the damages.[306]

However, in *Nominal Defendant v Littlewood*,[307] it was held that the superannuation contributions had to be deducted. Luntz suggests that:[308]

> The explanation for this may be that the court took into account directly the expectation of benefit that the dependants had from the superannuation scheme, referring to the fact that the deceased would have received 52.5 per cent of his final salary on retirement and could have been expected to continue to support his wife thereafter (cf *McIntosh v Williams* [1979] 2 NSW LR 543 (CA), 555-7, where specific sums were allowed for superannuation that would have been received during the period after the retirement of the deceased.

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304 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.13.

305 See pp 77-81 above.

306 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.13 footnote 16 notes that in most cases the portion would be a major one. Even if the superannuation benefits would ultimately have been paid to the deceased personally on retirement, had the premature death not occurred, the support for the dependants would usually have come out of the money so paid. (See *Singapore Bus Service (1978) Ltd v Lim Soon Yong* [1985] 3 All ER 437 (PC).)

307 NSW CA, 21 August 1980, unreported.

308 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.13.

Luntz suggests that it would be wrong, in assessing the value of the expected benefit, to allow both for the deceased's contributions to the fund and for the proceeds of the fund:[309] "But one or the other should be allowed for, while actual benefits received from the fund as a result of the death must be ignored, as required by the statutes."[310]

Section 15C(c) is, to the Commission's knowledge, the only statutory 'exclusion' from the assessment of damages in *Lord Campbell's* actions which is causing concern to segments of the community. In particular, the Workers' Compensation Board has expressed concern, on behalf of the Workers' Compensation Fund and on behalf of employers, that the practical effect of section 15C(c) is that negligent employers are in effect forced to pay twice for the same damages resulting from the death of an employee. Set out below is an analysis of the argument.

(i) Superannuation

. Superannuation funds and death benefits

There are a variety of superannuation schemes operating in Australia and the benefits paid or payable to the dependants of a deceased superannuant will depend on the type of scheme or schemes to which he or she belonged.

The primary purpose of superannuation is to ensure that the permanent departure of an employee from the workforce does not result in financial hardship for the employee and/or his or her family. However, the level and sufficiency of benefits payable to the deceased's dependants will depend on a large number of factors.

If each case could be considered separately, a reasonable objective of any superannuation plan might be to ensure that the dependants were no worse off financially than before the employee died. In practice, however, a broader approach is adopted by the plans due to the wide variation in the circumstances of employees. Dependants of some employees may be as well off financially as a result of receiving the superannuation benefits as they were before the employee died. Dependants of other employees may be better off - whilst another employee's dependants may be significantly worse off. Each case will be different

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[309] Ibid.

[310] Id. at para 9.5.13, footnote 18, Luntz notes:

> See, however, *Auty v National Coal Board* [1985] 1 All ER 930 (CA), which holds that only the net loss of superannuation benefits may be recovered, a decision which in terms of a policy of not over-compensating plaintiffs is understandable, but is perhaps difficult to reconcile with the policy of the legislation in prohibiting the deduction of benefits received. A less justifiable decision is *Bahr v ETSA* (1985) SASR 254, where the judge refused to take account of the contributions of the deceased as being for the benefit of the survivors and in the calculation of their expectation of benefit adopted for guidance an actuary's certificate which gave the value of $1 per week terminating when the deceased would have reached 65 or prior death. Almost certainly in such a case the survivors would have had a reasonable expectation of benefiting from the superannuation payments to the deceased after retirement in the normal course, yet this was not mentioned even among the contingencies considered.

- due to such factors as: the type of superannuation plan; the age of the deceased at time of death; the length of time he or she had been contributing to the plan; the level of contributions (if any) the employee had made; the level of contributions the employer had made; whether or not a life insurance benefit is included in the superannuation benefit; the circumstances of the dependants (for example, number of dependants; whether there is a mortgage on the family home; whether they own or rent the family home; whether there are outstanding debts, etcetera).

Most Australian superannuation plans are either Accumulation plans or Defined Benefit plans (lump sum or pension).

* Accumulation plans

Superannuation plans which provide retirement benefits equivalent to the accumulation, with interest, of member and employer contributions generally provide for the payment of total accumulation on exit for any reason (other than resignation) or death. The Queensland Government superannuation plan *Go Super* is such a plan. The benefits payable to dependants on the death, particularly of younger members, would in many cases be insufficient to support the dependants. There is no provision for loss of future contributions or future benefit. It may be difficult to justify the deduction of any portion of such benefits from any subsequent assessment of damages under a *Lord Campbell's* action.

It is common for accumulation plans to provide additional lump sum benefits on death.[311] The additional benefits are usually provided by way of an insurance cover (the premiums of which are usually deducted from the employer's contributions).[312] The additional lump sum may take a number of forms, for example:

* An additional lump sum calculated as a multiple of salary at the date of death. This multiple may reduce at higher ages.

* A minimum death benefit. For example, the death benefit could be the greater of the current accumulation balance and three times salary at the date of death.

* A fixed dollar amount, based on the member's age at the date of death.[313]

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[311] It is unusual for an accumulation plan to provide a pension benefit on death although an annuity could be purchased from a life insurance company.

[312] For example, *Sun Super* and *Go Super*.

[313] For example, *Sun Super's* insurance cover pays $36,000 if the employee was under 41 at date of death, and $6,000 if the employee was 60 at date of death. *Go Super* pays $37,500 if the employee was 35 or younger at date of death (for $1 per week contribution) and nil if the employee was 60 at date of death (for $1 per week contribution).

* An additional lump sum calculated as: *total contribution rate x salary x period to normal retirement age*.

It is likely that the additional benefit provided to the dependants pursuant to a life insurance policy attached to the accumulation plan would fall within section 15C(a) of the *Common Law Practice Act 1867* and thus be excluded from consideration in the assessment of damages in a *Lord Campbell's* action.

* **Defined benefit plans**

Defined benefit superannuation plans generally provide lump sum retirement benefits defined by a formula such as: *benefit rate x period of membership x final average salary*.

Death benefits are usually calculated in a similar manner although in the death benefit formula "potential membership period" (the period from joining the plan to normal retirement age) is usually used in place of accrued membership period. The death benefit is then the same multiple of salary as the member's expected benefit on retirement at the normal retirement age (some schemes use the most common early retirement age).

Some defined benefit plans fix the death benefit multiple at a level that the employer considers reasonable - for example, four times salary, irrespective of the age or needs of the member. The benefit would usually be gradually reduced from age 55 or so, if necessary, to ensure that it does not exceed the normal retirement benefit.

A defined benefit pension plan would normally provide pensions for both the surviving spouse and any dependant children of a member who dies before retirement.

The Queensland Government Superannuation Plan *Q Super* is a defined benefits plan. Employees normally contribute 5% of their wages[314] into the plan and the Government holds 14.55% in consolidated revenue[315] for employees (total contributions 19.55%). The benefit rate has been actuarially calculated at 21% of final contribution salary (which is the annual salary at the previous review) multiplied by the number of years from joining Q Super until age 55 (both past and prospective membership periods). Where the deceased leaves children under 16 or under 25 and in full-time education, an indexed pension for each child is also payable.

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[314] There is also provision in *Q Super* for employees to place additional, voluntary contributions into the scheme. These contributions plus interest would be payable to the employee's estate on death.

[315] This level can vary from time to time.

The benefit is payable to the deceased's estate although in some circumstances it can be paid directly to the spouse. Additional death insurance can be taken out by employees. The premiums are deducted from any voluntary contributions made by the employee.

It may be difficult to determine what portion of death benefits payable under a scheme such as *Q Super* could be attributable to the compulsory contributions the employer (Government) has made or would have made in the future had the employee survived to retirement. It would be that component which would be affected by the repeal or amendment of section 15C(c) of the *Common Law Practice Act 1867.*

Additional insurance benefits would be covered by section 15C(a) *Common Law Practice Act 1867* and, in any event, premiums would normally have been paid by the employee.

The benefits which would be affected by the repeal or amendment to section 15C(c) would be the difference between the sum of the accumulated compulsory contributions plus interest to date of death and the defined death benefits. That difference could be seen to be paid for by the employer's contributions above the compulsory level of contributions (currently 5%). But administrative and management costs of the fund are also covered by the contributions (employers and employees) and may have to be considered by the courts during the assessment of damages.

* **The role of trustees**

Some superannuation plans provide for the nomination by members during their lifetime of a dependant or other person to benefit from the superannuation. The nominated person may or may not be the appropriate person to whom to pay the benefit. The deceased may have recently divorced his wife, leaving her with a number of children, to live in a de facto relationship. The trustees of the plan will need to determine who should be paid the death benefits. They will take the member's wishes into account, but are not bound to distribute the benefit as the member has requested.

The administrator of such a plan will have to deduct tax from the death benefit. Lump sums paid to dependants on the death of a member are tax-free whilst lump sums paid to non-dependants (including the estate) are taxed as eligible termination payments and pensions are taxed as earned income.

Q Super and Go Super and many other schemes pay benefits to the employee's estate upon death. Benefits paid to dependants through the estate are tax-free.

. Compulsory contributions

In 1986 the Australian Conciliation and Arbitration Commission introduced the concept of award-based superannuation.[316] Although the Commission was at that time opposed to granting a 3% wage equivalent to approved superannuation schemes in favour of employees it was prepared to certify agreements or make consent awards providing for employer contributions to approved superannuation schemes for employees covered by such agreements or consent awards provided those agreements or consent awards:[317]

> (i) operate from a date determined or approved by the Commission in accordance with the Commission's phasing in procedure but not before 1 January 1987 except in special and isolated circumstances approved by the Commission;
>
> (ii) do not involve retrospective payments of contributions;
>
> (iii) do not involve the equivalent of a wage increase in excess of 3% of ordinary time earnings of employees;
>
> (iv) are consistent with the Commission's Principles and determinations by the Full Bench referred to in our decision;
>
> (v) are in accordance with the Commonwealth's Operational Standards for Occupational Superannuation Funds; and provided that
>
> (vi) the consent of the employers is genuine; and
>
> (vii) there is ambit.

In 1987 the Commission modified its approach to superannuation in light of the level of industrial action occurring in support of superannuation claims.[318] The Commission decided to continue to certify agreements or make consent awards. It was also prepared, as a last resort, to arbitrate on superannuation in instances where regulations and conciliation are exhausted.

> In any such arbitration the Commission will award new or improved benefits not exceeding the equivalent of 1.5 per cent of ordinary time earnings, to operate no earlier than 1 January 1988 and no more than a further 1.5 per cent to operate no earlier than 1 January 1989. Ordinary time earnings for an employee in this context means the classification rate, including supplementary payment where relevant, overaward payment and shift loading. Consistent with this change, superannuation matters may be dealt with by individual members of the Commission. The principle will therefore be amended to remove mention of the

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316 *The National Wage Case June 1986*, Commonwealth Arbitration Reports 1986 p.611.

317 Id at 665.

318 *The National Wage Case March 1987*, Commonwealth Arbitration Reports 1987 p.65.

> superannuation Full Bench established in accordance with the 26 June 1986 *National Wage* case decision.[319]

The Commission chose this course for two reasons:

> [The reasons] lie in the nature and intent of the package we have decided to introduce. That package is designed to assist in providing a workable industrial relations and wage fixation environment in order to assist in the achievement of an improved economic situation. The superannuation issue has the potential to destroy those efforts, both industrially and economically. We are not confident that individual parties will not continue to act in the manner that some have already acted, thus causing frustration, poor industrial relations and inevitable disputation. Under the modified approach there can be no excuses for industrial action.[320]

In 1991 it was shown to the Conciliation and Arbitration Commission[321] that there was a considerable diversity of superannuation provisions in 490 federal awards. Those awards were estimated to cover between 80 and 90 per cent of federal award employees. A significant number of awards prescribed a qualifying period of employment and a significant number excluded casuals who fail to meet qualifying requirements. There was also a high level of non-compliance with awards in some areas. The ACTU was pressing for a claim for increased superannuation contributions of a further 3 per cent. The Commonwealth Government supported the claim:[322]

> ... occupational superannuation is a key element in the Government's retirement income policy of encouraging retirement provision by employees during their working lives to achieve adequate living standards. ... The key to providing better income for the growing number of old people in the future is to increase savings now. Improved access to superannuation is the best way of achieving this.

The Commonwealth said that the Commission's 1986 decision to introduce award-based superannuation had been the main impetus to the growth of superannuation coverage and improvements. However, contributions of only 3 per cent as provided by awards did not provide an adequate retirement benefit.[323]

The Commission considered it essential that a national conference be convened to review and clarify a number of vital issues about superannuation and award-based superannuation. The claim for increased contributions was adjourned until that

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[319] Id at 87.

[320] Id at 87.

[321] *National Wage Case, April 1991*, Commonwealth Arbitration Reports 1991 p.205.

[322] Id at 263.

[323] The Commission agreed with this at p.264.

happened.[324]

In 1992 the Commonwealth Government enacted the *Superannuation Guarantee (Administration) Act*[325] to encourage employers to provide a minimum level of superannuation support for employees. Where employers provide less than the minimum level of support they will be liable for a superannuation guarantee charge. The charge will be used to meet the superannuation contribution entitlement of the relevant employee and will be used to fund administrative costs.

The level of superannuation support an employer is expected to provide will depend on the employer's annual payroll. For 1992-93, employers with an annual payroll of over $1 million, will be expected to contribute 5% of an employee's earings base to a superannuation fund. This percentage will increase over the next nine years to 9%. Employers with an annual payroll of $500,000 or less will be required to contribute 3%, increasing on a slower transition schedule to 9%. Existing employer contributions are included in these rates. The Commonwealth Government has decided to support the inclusion in existing superannuation award provisions of the rates of contribution required by the scheme, as they become operative.[326]

> The Government believes these measures represent a major step forward in the development of retirement income policy and will lay the foundation for income security and higher standards of living in retirement for virtually all workers.

The Commonwealth Government's apparent aim is to significantly reduce the cost to taxpayers of Commonwealth dependant and age pensions by encouraging superannuation savings. Commonwealth pensions payable to dependants are currently excluded from the assessment of damages in *Lord Campbell's* actions.[327] To the extent that superannuation benefits replace Commonwealth pensions as retirement or dependant's income, both could be regarded as income worthy of special protection.

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[324] The conference has not proceeded. The need for the conference may have been displaced by subsequent Commonwealth legislation.

[325] No. 111 of 1992. Also see Commonwealth House of Representatives *Hansard*, Second Reading Speech by the Federal Treasurer, Mr Dawkins, 2 April 1992 from p.1763 and 5 May 1992 from p.2432. **Note:** *Superannuation Guarantee Charge Act 1992* (No 93 of 1992) by s.3 stated:

> "The Superannuation Guarantee (Administration) Act 1992 is incorporated and is to be read as one with this Act."

[326] Certain exemptions apply. For example, no superannuation support is required in relation to part-time employees under 18 years of age nor for employees earning less than $250 per month nor for employees 65 years of age or older. The scheme only applies to the first $80,640 (indexed annually) of salary. There is also an income tax exemption for certain payments made by the Commissioner of Taxation in the event of an employee's death or early retirement due to illness. Where the Commissioner pays the 'shortfall component' of the superannuation guarantee charge to an employee under 55 years of age who has retired from the workforce due to illness, or to the local personal representative of an employee who has died, the payment is exempt from income tax.

[327] Section 15C(d) *Common Law Practice Act 1867.*

. The treatment of superannuation benefits in common law actions by injured plaintiffs

Where a person is injured to an extent that his or her employment terminates and he or she thereby becomes entitled to payment of superannuation benefits from the employer or a private or statutory fund, in general the courts will ignore such payments when assessing damages for loss of earning capacity.

The courts disregard any distinction between contributory and non-contributory schemes. Brereton J in *Watson v Ramsay* [1960] NSWR 642 said:[328]

> The existence of a superannuation scheme to which both parties contribute is one of the incidents of the employment offered by the employer which has the effect of making terms of employment more attractive and of encouraging continuity of employment. The same result could perhaps be achieved by the payment initially of a larger salary with no superannuation fund, thus enabling the employee to make his own arrangements to provide for the event of his retirement, or with a fund to which the employee only contributes, but in that event the removal of the contingency upon which the employer's share is payable removes the inducement to continue in the employer's service. Looked at in this way the entitlement to a pension is an entitlement to money earned or saved day by day during the employee's active service, earned day by day but not to be paid until he retires.

Luntz observes that:[329]

> The encouragement by the Government in recent years of occupational superannuation which is 'portable' so as to relieve the pressure on aged pensions under the Social Security Act 1947 (Cth) as the population includes a larger and larger proportion of elderly people, makes the reasons given by Brereton J less cogent. However, taxation advantages make it attractive for employers to contribute to such schemes rather than to pay higher wages and the Arbitration Commission has required employers to contribute to the schemes in lieu of increases in wages.

Lord Pearce, one of the majority in the UK House of Lords case of *Parry v Cleaver*[330] introduced a possible qualification to the decision that a pension-superannuation benefit is not deductible from the assessment of damages:

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[328] Affirmed [1962] SR (NSW) 359 (FC); and sub nom *Ramsay v Watson* (1961) 108 CLR 642, and approved by Windeyer J in *National Insurance Co of NZ Ltd v Espagne* (1961) 105 CLR 569, 598. Luntz, at para 8.4.3, suggests that Brereton J's arguments are true and justify the treatment of contributory and non-contributory pensions in the same way. See also Balkin RP and Davis JLR *Law of Torts* 1991 at p.379.

[329] Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) para 8.4.3 footnote 3.

[330] [1970] 1 AC 1 at 37.

> It seems to me possible that ... there might be some difference of approach where it is the employer himself who is the defendant tortfeasor, and the pension rights in question come from an insurance arrangement which he himself has made with the plaintiff as his employee.

Luntz[331] notes that most relevant Australian authorities have been concerned with actions against the Crown, where the pensions were payable out of general public superannuation funds or those applicable to defence personnel. In those cases the pensions received were not deducted.[332]

In the one case involving a private employer-defendant, *Grego v Mount Isa Mines Ltd*,[333] Lucas J also disregarded a superannuation payment; though the scheme was established and contributed to by the defendant, Lucas J stated:

> It does not seem to me that the superannuation payment was intended to operate, or should be regarded as operating, in diminution of the defendant's liability as tortfeasor.

Rather, the scheme was described as being offered to the plaintiff employee as an incident of his employment.

Cases under *Lord Campbell's Act* prior to the introduction of the equivalent of section 15C(c) had taken a different turn and, unlike the cases under the common law, had brought pensions into account. Lord Pearce, in *Parry v Cleaver* commenting on the introduction of the United Kingdom equivalent to section 15C(c) states:[334]

> The Fatal Accidents Act, 1959, directed that pensions should *not* be taken into account. It may have done this, regardless of what should be the fair and just principle, simply in order to bring cases under that Act into line with common law cases. If so, it would be unfortunate that the common law cases should now change direction and get out of line once more. It is, however, far more likely that Parliament excluded the taking into account of pensions because it thought that the principle of exclusion laid down in common law cases was fairer and more in accordance with public policy and that, therefore, cases under *Lord Campbell's Act* should be brought into line with it.

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331 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 8.4.13.

332 *Ramsay v Watson* (1961) 108 CLR 642; *State of South Australia v Heaven* (1978) 77 LSJS 18 (FC); *Gee v Commonwealth of Australia* [1982] ACLD 786 (ACT SC).

333 [1972] QWN 33 79.

334 [1970] 1 AC 1 at 38.

The principal reason for the courts refusing to reduce awards of damages to an injured plaintiff by benefits received from other sources appears to be the feeling that a tortfeasor ought not to benefit from the fact that a plaintiff has received a charitable subvention, or has had the prudence to make his or her own provision for his or her possible future injury.[335]

As Balkin and Davis have summarised:

> While it is difficult to extract any clear principle from the decisions, it can be said that, in practice, very few monetary benefits received by a plaintiff from other services will be taken into account in reduction of his damages.[336]

(ii) Workers' Compensation

All Australian jurisdictions have established legislative schemes to provide compensation for industrial injuries and diseases. In Queensland, the scheme is found in the *Workers' Compensation Act 1990*.[337] For an injury or death to be compensable it must have arisen "out of or in the course of the worker's employment" (section 5.1) - that is, there must be either a causal or temporal link between the injury and the employment. The employer does not have to have been negligent towards the employee for compensation to be payable.

Every employer in Queensland is legally liable to pay the compensation which the Act prescribes that the worker employed by it shall be entitled to receive (out of the Workers' Compensation Fund).[338]

The Act directs every employer to insure itself and keep itself insured with the Workers' Compensation Board of Queensland against all sums for which, in respect of injury to or death of any employee employed by it, it may become legally liable by way of compensation under the Act and against damages arising out of circumstances creating a legal liability in the employer, independently of the Act (such as negligence by the employer resulting in the worker's injury or death),

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335 Balkin RP and Davis JLR *Law of Torts* 1991 at 379.

336 Note however, under Pt XVII of the *Social Security Act 1947* (Cth) the amount of any pension or benefit under the Act will be recouped out of damages paid or payable to the plaintiff. The only type of payment from another source which, at common law, is to be brought into account in reduction of the plaintiff's damages is sick pay which his/her employer was contractually bound to pay him. In New South Wales damages payable to a motor vehicle accident victim must be reduced to the extent to which a retirement or similar benefit is increased or accelerated because of the accident [*Motor Accidents Act 1988* (NSW) s.78]. In Queensland and a number of other States, Workers Compensation legislation provides for a reduction in the damages payable in an action by an employee against his/her employer for pecuniary loss arising out of an industrial injury, to the extent of the benefits paid or payable under the legislation.

337 In 1978 the administration of the Workers' Compensation Fund was placed with the newly constituted Workers' Compensation Board.

338 S.4.9 of the Act.

to pay damages in respect of that injury or death.[339] The Board is a monopoly insurer for the purposes of workers' compensation in Queensland.

The amount of premium payable by an employer is assessed by the Board and is calculated on payments estimated by the employer to be made to all employees in respect of wages, salaries and other earnings during the period of insurance. Currently, Queensland employers pay to the Board a premium of 1.6% of such earnings.[340] For an employee's average earnings of $450 per week, an employer might expect to pay an extra $7 to the Board by way of workers' compensation premium.

Death benefits are payable to an employee's (total and partial) dependants under the Queensland legislation.[341] The maximum amount which can be awarded is $89,000 and a weekly amount (10% of a prescribed base rate) for young dependants and an additional amount of up to $5,000 for each dependant as well as reasonable expenses of medical treatment or attendance on the employee, and reasonable expenses for the funeral of the employee[342]. There are provisions for the reduction in the amounts paid to dependants in certain circumstance.[343]

Although the deceased employee's dependants may be entitled to benefits under the *Workers' Compensation Act 1990*, they are not prevented from pursuing a *Lord Campbell's* action against the employer for the wrongful death. However, the workers compensation paid or payable to the dependants will have to be either deducted at the time of judgment or paid over to the employer.[344] Even in the absence of a statutory direction the court will allow the workers' compensation payments to be taken into account in the assessment of damages unless it is clear that the beneficiary will have to repay the employer or insurer when successful in recovering damages.

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339 S.4.9(2) of the Act.

340 Until 1 July 1993 premiums were set at 1.4%. The net premiums received by the Board for the 1991/92 assessment was $299,711,623.00.

341 Ss7.9 and 7.10.

342 S.8.13.

343 S.8.14 and 8.15.

344 S.10.1 of the *Workers' Compensation Act 1990* states:

> (1) If an injury in respect of which compensation under this Act is payable is suffered by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer who is -
> (a) indemnified by the Board under a policy in respect of the injury; or
> (b) required by this Act to be so indemnified;
> to pay damages in respect of the injury, then -
> (c) the amount of such damages that the employer is legally liable to pay is reduced by the total amount paid or payable from the Fund, by way of compensation under this Act in respect of the injury; and
> (d) subject to this Part, the worker is, or the worker's dependants are, to receive from the Fund such reduced amount....

(iii) The *Lord Campbell's* Action, Workers' Compensation and Superannuation

If a worker dies as a result of the negligence of his or her employer his or her dependants may be entitled to the following payments and compensation:

1. Death benefits pursuant to the *Workers' Compensation Act 1990*. This compensation is paid by the Workers' Compensation Board from the Workers Compensation Fund. The deceased's employer would normally have made premium payments into the Fund over the time the deceased was employed by the employer.

2. A benefit from a superannuation policy held in the name of the deceased or his or her nominated beneficiaries. Contributions to the superannuation fund may have been made by the deceased during the period of his or her employment. Contributions would also have been made by the employer - including compulsory contributions.

3. Other benefits, such as payments from any life insurance policy taken out on the life of the deceased which falls to the benefit of his or her dependants.

4. The dependants would also be entitled to bring a *Lord Campbell's* action against the employer for damages resulting from the death of the deceased pursuant to the *Common Law Practice Act 1867*.

If the dependants are successful in their *Lord Campbell's* action against the employer, at least the following deductions would have to be made from the assessment of damages - thus reducing the amount of the damages recoverable from the negligent employer's insurer, the Workers' Compensation Board:

1. The workers' compensation benefits (deduction made pursuant to section 10.1 of the *Workers' Compensation Act 1990* which would probably have been deducted under the common law in any event);[345]

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[345] In *Mataic v Milinga* ([1970] VR 862) it was argued that a certain workers' compensation benefit came within the Victorian equivalent to section 15C(d) of the *Common Law Practice Act 1864* (the Victorian phrase was "a sum paid or payable by way of pension, benefit or allowance under any law of the Commonwealth or the State."). The argument was rejected. Luntz (at para 9.5.15) notes, however, that:

> The reasons that led to that conclusion may have been weakened by subsequent legislation in a number of States which establishes a public fund out of which workers' compensation is paid, which does not place liability on the employer to make the payments, except in limited circumstances, or which provides for periodical payment of benefits. Nevertheless, the view would probably still be taken that it would be startling to find workers' compensation among

2. Any other benefits paid or payable to the dependants as a result of the death of the deceased not referred to in section 15C of the *Common Law Practice Act 1867*. Other benefits which may be excluded, such as the matrimonial home and the family car, are referred to above.[346]

The benefits referred to in section 15C of the *Common Law Practice Act 1867*, including life insurance and superannuation benefits paid or payable to the dependants upon the death of the deceased, must be ignored by the court in the assessment of damages.

(iv) Effect of a repeal or amendment of section 15C(c) on the Workers' Compensation Board of Queensland

. Frequency of *Lord Campbell's* claims

For the period from 1 July 1989 to 30 June 1993 there were 35[347] *Lord Campbell's* claims for damages resulting from the death of an employee. The claims were made on the Workers' Compensation Board of Queensland in its role as the compulsory insurer of employers. Seven of these 35 claims have been finalised (either by settlement or judgment). Three of those seven cases were finalised for nil payment to the dependants. During the same period, 470 claims other than *Lord Campbell's* claims were made on the Board for fatal injuries occurring on or after 1 July 1989.

For the period 1 July 1989 to 30 April 1993, *Lord Campbell's* claims only make up 6.9% of the claims for compensation at the Workers' Compensation Board which arose when an employee died as a result of injuries sustained "out of or in the course of the worker's employment".[348] In most *Lord Campbell's* claims there would be a substantial delay between the date of injury causing death and the date the claim is settled or goes to trial. Factors which may contribute to the time delay include:

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the types of State benefit envisaged by that particular exclusion. In most instances the question will be comprehensively dealt with in the relevant workers' compensation legislation.

346 See p.71 and footnote 256 above.

347 These statistics have been provided by the Workers' Compensation Board of Queensland. Existing claims comprise claims where the injury causing death was on or after 1 July 1989, up to and including 30 June 1993. The total number of common law claims (injuries and death) made on the Board, including Lord Campbell's claims between 1 July 1989 and 30 June 1990 was 5,595 (at a steadily increasing rate each year). The number of statutory claims for workers' compensation benefits over the same period totals 323,586. The percentage of statutory claims which proceed to common law has risen steadily over that period:

1989-1990	...	1.36%
1990-1991	...	1.63%
1991-1992	...	1.94%
1992-1993	...	1.97%

348 S.5.1 of the *Workers' Compensation Act 1990*.

* awaiting the findings of the Coroner's inquiry;

* the injury causing death may have taken place in an isolated part of Queensland (for example, a mining site) thus causing delays in taking statements from witnesses, etc;

* the procedural delays involved in litigation.

The Commission understands that very few *Lord Campbell's* claims are decided judicially.[349] Most claims settle. Some are not pursued by the dependants.

. Future loss of a superannuation benefit

In *Lord Campbell's* claims made to the Board to date it is very rare for the claim to include a component relating to future loss of a superannuation benefit. For example, part of the claim could include the benefit to the dependants of the employer's compulsory contribution to the employee's superannuation fund from the date of death of the deceased to his or her projected retirement age or the estimated benefit to the dependants of the future superannuation payout which the employee would have received had he or she lived to retirement age. The Commission understands that there has been a trend developing over the last 12 to 18 months for personal injury damages claims for negligence (excluding *Lord Campbell's* claims) to include a superannuation component. This trend may be linked to the relatively recent introduction of compulsory employer contributions to superannuation funds to provide a minimum level of retirement support for employees.[350] The trend of including a future loss of a superannuation benefit may well develop in *Lord Campbell's* claims.

If an employee were a member of an accumulation plan for superannuation, it would be difficult to justify the deduction of any portion of such benefit payable to dependants on the death of the employee from any subsequent assessment of damages under a *Lord Campbell's* action. On the other hand, if the employee were a member of a defined benefit plan for superannuation, then a portion of the death benefit payable could be attributed to the compulsory contribution the employer has made and would have made in the future had the employee lived to retirement age. As noted on page 87 of this Report, this portion may be difficult to quantify.

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[349] In recent years, there have only been two cases where the Workers' Compensation Board has been the insurer where judgments have been handed down in relation to Lord Campbell's claims. This information was provided by the Workers' Compensation Board of Queensland.

[350] See pp 88-90 above.

If section 15C(c) of the *Common Law Practice Act 1867* did not apply to a *Lord Campbell's* action against the employer for damages resulting from the death of an employee, then it would appear from information available to the Commission that there would be negligible savings to the Workers' Compensation Board as the compulsory insurer of the employer in the foreseeable future.

(v) The concern with section 15C(c) in light of the above analysis

The concern that negligent employers and the Workers' Compensation Board of Queensland would most likely have with the continued existence of section 15C(c) of the *Common Law Practice Act 1867* in its present form is that, as a result of the operation of that provision, employers are in effect required to pay dependants of a deceased employee compensation for a portion of the same loss, twice. An employer who wrongfully causes the death of an employee is the only type of tortfeasor who would have:

1. contributed to the deceased person's superannuation fund, and

2. indirectly paid for (by way of compulsory Workers Compensation premiums) the damages assessed by the court in a *Lord Campbell's* action brought by the deceased person's dependants for the wrongful death.

The overlap in compensation occurs if any part of the superannuation benefits paid or payable to the dependants upon the death of the employee is also included in the assessment of damages. An assessment of damages may include consideration of the benefit to the dependants that would have been derived from contributions which the employer would have made in the future had the deceased lived and worked to retirement age. Alternatively, the assessment may include consideration of the benefit to the dependants that would have been derived from the superannuation payout the deceased would have received had he or she lived and worked to retirement age. In either event, by reason of section 15C(c) the court must ignore any superannuation benefit paid or payable to the dependants on the death of the employee.

One submission to the Commission suggested that there needs to be recognition given to:

> the anomalies which could occur in certain circumstances, which would depend upon the superannuation entitlements of a particular employee. It seems reasonable that discretion be provided for a court to take into account sums payable where the employer has made compulsory payments for death benefits under superannuation arrangements. Notwithstanding the difficulties ... it is felt that a court could in most circumstances make a judgment on this matter just as judgments are made on a range of other heads of damages in common law.

(d) "a sum paid or payable on the death by way of pension, benefit or allowance under any law of the Commonwealth or of any State or Territory of the Commonwealth or of any other country."

A similar provision exists in all other Australian jurisdictions.[351] It has been held that Supporting Parent's Benefit under the Commonwealth *Social Security Act 1947* (Cth) falls within this provision[352] and that such benefit should not be taken into account in assessing the damages recoverable by the deceased's ex-nuptial children even though the benefit was payable to their mother, rather than to them. The mother's loss of support was indirectly taken into account in the children's damages.

Luntz has noted:[353]

> [T]he statutes will generally be construed as directing that a particular pension or allowance should not be taken into account only when consideration is given to the benefits accruing to the dependants in consequence of his death. When the dependants claim to have lost the benefit of a pension owing to the premature death of the deceased, evidence will be admissible of such a pension or allowance which would have been payable if the deceased had not been killed.[354] According to *Auty v National Coal Board* [1985] 1 All ER 930 (CA), where the plaintiff claims the loss of a benefit by way of pension, credit must be given for any part of the pension which the plaintiff will still receive; the legislation does not require such part to be ignored. In other words, the plaintiff is entitled only to the net loss - or the amount by which the pension has been reduced in consequence of the death - not the full amount that would have been payable if the deceased had not been killed, without regard to the amount payable as the result of the death at this time.

Although the receipt of damages from a *Lord Campbell's* action does not at present preclude payment to dependants of relevant Commonwealth benefits (widow's pension, supporting parent's benefits and orphan's benefits) - the ordinary means tests will apply in the future if the proceeds of the *Lord Campbell's* action are retained or invested.[355]

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351 The names of the statutes appear in footnote 244 above. The specific provisions are: s.3(3)(c) NSW; s.10(1)(d) Tas; s.5(c) WA; s.20(2aa)(v) SA; s.19(c) Vic and s.10(4)(c) Territories.

352 *Radanovic v MVIT* [1986] WAR 105 (FC).

353 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.11.

354 *Mangan v Cornish* [1962] NSWR 1296 (FC); *Watson v Dennis* [1968] 3 NSWR 60 (CA); *Wright v Dwyer* [1977] Tas SR (NC) 2; and the cases cited in [9.3.7]. The same applies to a superannuation benefit which would have been received if the deceased had not been killed (*McIntosh v Williams* [1979] 2 NSWLR 543, 547 (CA)).

355 Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.12.

(e) "a gratuity in whatever form received or receivable on the death."

In assessing the amount to be awarded, courts are prevented from considering any amount paid or payable to the deceased's dependants on a gratuitous basis - for example, a sum paid by a charity or as a result of a public appeal to assist the deceased's family. The gratuity may be paid to or received by the estate of deceased or any person for whose benefit the *Lord Campbell's* action is brought.

However, voluntary payments made by a defendant such as the negligent employer, may be taken into account in assessing damages.[356]

6. ARGUMENTS FOR REPEAL OF ANY OR ALL STATUTORY EXCLUSIONS LISTED IN SECTION 15C

1. There is no logical basis for the exclusions, as shown by the history behind the introduction of the original section 15C. A court should not be expected to ignore benefits accruing to dependants as a result of the wrongful death of a breadwinner when assessing damages against the wrongdoer. Any benefit ignored in the assessment could be seen as a penalty imposed upon the wrongdoer. The wrongdoer should be required to pay compensation by way of damages actually suffered by the dependants. He or she should not, in addition, be penalised simply on the basis that certain benefits accruing to the dependants as a result of their breadwinner's death fall within one of the statutory exclusions listed in section 15C. As one respondent noted:

> There is no proper basis to continue the exclusions set out in s15C ... 'over compensation' is as offensive to the principle of just restitution as is 'under compensation'.

and, further:

> [T]he exclusion of the benefits ... does not allow a full and just comparison to be made between the pre accident and post accident situations ... The effect of repealing s15C would be to allow a true analysis of the full extent of accelerated testamentary benefits which would allow accurate restitution.

2. Section 15C(c) forbids the court from taking into account during the assessment of damages, the benefit to dependants of the accelerated payment of superannuation entitlements upon the early death of the

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[356] *Jenner v Allen West & Co Ltd* (1959) 2 All ER 115.

breadwinner. As a result, dependants may be financially better off as a result of the breadwinner's death than had he or she lived to normal retirement age.

The dependants may include in their claim the benefit to them of compulsory contributions to the superannuation fund that the deceased's employer would have made had the deceased lived and worked to normal retirement age. Alternatively, the dependants may claim the projected benefit to them of the superannuation payout that would have been made to the deceased had he or she lived and worked to normal retirement age. Whatever the dependants' claim, the court must, by reason of section 15C(c) ignore the accelerated benefit to the dependants of the superannuation payment made upon the death of the deceased.

Where the tortfeasor is also the employer, the tortfeasor will be required to pay the assessed damages (either directly or indirectly by the payment of premiums to the Workers' Compensation Board). Where the employer was a compulsory contributor to the deceased's superannuation fund, there could be an overlap between the employer's contributions to the superannuation benefits payable to the dependants on the death of the deceased, and the damages the employer (or his/her indemnifier) is required to pay as a result of the *Lord Campbell's* action. It is unfair that an employer should in effect be required to pay more to the dependants of the deceased than the pecuniary damages resulting to them from the employer's negligence.

As the employer's compulsory contributions to employee superannuation increase, the cost to employers and their indemnifiers of the overlap between superannuation death benefits and damages assessed pursuant to *Lord Campbell's* actions will become more significant.

One respondent suggested that:

> [i]t seems reasonable that discretion be provided for a court to take into account sums payable where the employer has made compulsory payments for death benefits under superannuation arrangements ... A court could in most circumstances make a judgement on this matter just as judgements are made on a range of other heads of damages in common law.

3. Section 15C(c) virtually elevates one form of saving (superannuation) to a preferred position over all others. Why should the family of a person who invests in a superannuation scheme be in a preferred position to the family of a person who invests in property? The court will have to ignore the payment to the first family of any superannuation payment in the assessment of damages. The court will deduct the benefit to the second family which result from the death of the deceased of property investments made by the deceased. The same argument could apply to insurance and assurance which are referred to in section 15C(a).

Luntz suggests:[357]

> These statutory exclusions have probably been due to a legislative reaction to the court's parsimony in refusing to award damages for non-pecuniary loss. On the whole, they have been ill-thought out and can result in practice in a further regressive redistribution of wealth. Thus the surviving spouse and children of a wealthy person, who not only provided for them generously while alive but also made provision for them by means of insurance and superannuation, are doubly rewarded when their damages come to be assessed; whereas the survivors of a poor person who could make little such provision receive neither solatium nor excluded benefits - except perhaps a social security pension - in addition to the damages for loss of support.

4. An appropriate amendment to section 15C(c) could result in a saving to the Workers' Compensation Board and, in turn, result in stemming increases to employers' premiums to the Board. The repeal of section 15C would also result in savings to other wrongdoers which may have a beneficial flow-on effect to the community. For example, if motor vehicle accident insurers were not required to pay compensation for damages to dependants resulting from the wrongful death on the roads of a breadwinner - to the extent of any section 15C-type accelerated benefits received by the dependants (for example, gratuitous payments; life insurance benefits; superannuation benefits; Commonwealth pensions, etc payable on the death of the breadwinner) - then there may be a cost saving to all motorists by way of reduced premiums. One respondent suggested:

> [t]he burden of ignoring the matters referred to in s15C falls upon motorists.
>
> The continued existence of s15C will not enhance the prospects of containing premiums or avoiding thresholds in relation to smaller claims as has occurred in other States.

For uninsured wrongdoers, the repeal of section 15C might prevent severe, unnecessary financial hardship to the wrongdoer and his or her family.

5. If courts were able to take into account the 3% compulsory employer contributions to employee superannuation in the assessment of damages resulting from the death of an employee due to the employer's negligence, it is unlikely that dependants would be adversely affected. Commonwealth social security benefits would invariably have to be relied upon in any event by dependants whose only "provision for retirement" was the 3% compulsory contribution made by the employer to the deceased's superannuation fund.

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[357] Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 at para 9.5.1.

7. ARGUMENTS AGAINST REPEAL OF ANY OR ALL STATUTORY EXCLUSIONS LISTED IN SECTION 15C

1. It would continue uniformity with other Australian jurisdictions, all of which provide that each of the benefits referred to in the equivalents to section 15C are not to be deducted from awards in actions for damages for wrongful death brought by dependants of the deceased.[358]

2. It would be anomalous to permit superannuation payments (section 15C(c)) to be deducted and to continue to prevent insurance, pensions etc from being deducted from *Lord Campbell's* damages awards. As with private life insurance, people who contribute to non-compulsory superannuation, or who contribute more to a compulsory superannuation scheme than required to, could be seen as careful financial planners whose dependants should not be deprived of higher damages than dependants of people who did not so plan.

   If section 15C(c) were repealed, dependants of people who invest in life insurance policies would be in a more advantageous position than dependants of people who voluntarily, or compulsorily, invested in superannuation schemes.

3. It would be anomalous to permit superannuation payments to be deducted in actions brought on behalf of the deceased's dependants when, for cases brought by injured people who are entitled to a superannuation payment - those payments are ignored by courts when assessing damages at common law. A similar argument exists in relation to each of the other statutory exclusions under section 15C.

4. Superannuation entitlements could be considered an incident of a person's past employment. Superannuation investments are intended to provide for a worker's and his or her family's retirement and are not intended to be compensation for damages resulting from the wrongful death of the superannuant. The employer's contribution to superannuation pursuant to award obligations could be seen as being made in lieu of wages to the worker. If the contribution had been paid to the worker as wages during his or her life time the worker could have spent it or invested in a way that would have avoided it being deducted from any subsequent *Lord Campbell's* award to his or her dependants. In a submission to the Commission this argument was expressed as follows:

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[358] One respondent suggested that other States and Territories might actually follow any amendments made by Queensland to s15C.

> Where the deceased was a member of a scheme receiving the statutory minimum benefit (ie. the Superannuation Guarantee Charge (SGC)), some of which, if not all, has been provided in lieu of pay increases, it can reasonably be argued that the benefit payable from such scheme should not be deducted from damages awards. This argument pertains even if the minimum level of contribution has funded an insurance death benefit within the scheme, as the employee has, effectively, paid for the insurance component of the benefit through a reduced accumulation balance in the fund.
>
> Employers who are paying in excess of the SGC to a superannuation scheme on behalf of their employees are often funding a higher level of death cover including an insurance component. There could be some overlap here because the employer is also paying a certain level of Worker's Compensation premium. However, in the current era of fairly wide spread salary packaging an equity question emerges where an employee with a relatively high superannuation death benefit coverage is compared to an employee who opted to receive benefits other than superannuation in his/her salary package.

5. It would be difficult to justify an amendment of section 15C(c) so as to permit superannuation payments to be taken into account only in those cases where an employer was the defendant and to continue to ignore superannuation payments in all cases where the employer was not the defendant (for example, the driver of a motor vehicle responsible for the death of a breadwinner).

6. Some people invest excess money in investments other than superannuation. Should they die due to the wrongful actions of another, their investment may or may not be taken into account in the assessment of the dependants' damages. For example, money put into the matrimonial home would not be deducted from an award of damages to the surviving spouse. The New South Wales Law Reform Commission in its Report No 43 on *Accident Compensation: A Transport Accidents Scheme for New South Wales* was of the opinion:[359]

> The prudent claimant should be allowed to enjoy the fruits of his or her own contributions to financial security.[360] In addition, the practical difficulty, if not impossibility, of devising a satisfactory set-off rule to apply to the wide variety of superannuation schemes which exist, is sufficient reason in itself to refrain from any attempt at setting off superannuation payments.

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[359] 1984 at para 14.103.

[360] Although one respondent noted:

> [i]f the justification [for the exclusion of certain benefits] is that a private individual should not be penalised for obtaining private coverage, then a true application of the restitution principles would allow the benefit to be treated as a set-off less the costs of obtaining the benefit, that is, the premiums.

7. If 15C(c) were to be repealed, what parts of the various types of superannuation payouts should be taken into account? A superannuation payout may consist of an insurance payout which, presumably, could continue to be ignored by the courts pursuant to section 15C(a). There might also be an amount voluntarily contributed to the fund by the deceased. It may be extremely difficult for a court to identify the appropriate, deductible accelerated benefit without expert actuarial advice.

8. Some part of a superannuation payment could be considered to relate to non-pecuniary damages such as pain and suffering suffered by dependants of the deceased. Such damages would not otherwise be available to dependants in a *Lord Campbell's* action. Similarly, the exclusion of all matters listed in section 15C would be seen as an indirect method of compensating dependants for the non-pecuniary damages suffered by reason of the death of their breadwinner. Of course, this indirect compensation is only available to dependants who would be entitled to one or more of the benefits referred to in section 15C.

9. Even though the deceased's dependants may receive by way of damages an amount equivalent to the future superannuation contributions the employer would have made had the employee lived and worked until normal retirement, it is unlikely that the dependants would have the same investment power as the Superannuation Fund. Therefore the retirement benefits the family would have received had the deceased lived and worked until retirement age is likely to be more than the investment return on any superannuation benefit and future superannuation component of a court award received by the family subsequent to the death of the breadwinner.

10. If a deduction from damages could be justified in respect of the compulsory contributions an employer would have made to a deceased employee's superannuation fund had he or she lived and worked to retirement age, account may need to be made of administration, management, taxation and other fees deducted from the superannuation investment. This would add complexity to the actuarial assessment to be made by the court.[361]

11. Section 15C costs wrongdoers and their indemnifiers relatively little when compared to other more substantial costs in the adversarial system - such as legal fees, experts' reports.

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[361] One respondent suggested that:

> [t]he calculation would be no more difficult than an injured Plaintiff's claim for loss of superannuation entitlements which are often the subject of claims in Queensland ... the cost savings in damages would greatly outweigh any legal fees or experts' reports in presenting such a claim to the court. There are invariably legal fees and experts' reports in presenting '*Lord Campbell's*' claims to date and it is doubtful whether the repeal of a (sic) s15C would make any difference whatsoever.

12. The dependants may very well have to rely on superannuation death benefits, life insurance benefits, gratuitous payments, etc to fund a *Lord Campbell's* action. If these benefits could be taken into account during the assessment of damages some dependants may be deterred from pursuing their rights under the *Common Law Practice Act 1867.*[362]

13. 15C has had a long and widespread acceptance.[363]

8. CONCLUSION

The Commission does not believe that an amendment to section 15C is justified at this stage. However, it has become apparent during the course of this Reference that there may be a need for a general review of *Lord Campbell's* actions in Queensland.

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[362] One respondent notes that this argument:

> overlooks the fact that the benefits would still be payable to the Plaintiffs, but would simply be taken into account when assessing damages. Furthermore, of course, parties have Legal Aid and there is a widespread system of legal profession funding *Lord Campbell's* actions with accepting such claims on a 'spec' basis.

[363] Victorian Statute Law Revision Committee *Report upon the Proposals Contained in the Wrongs (Assessment of Damages) Bill, 1966* at p.4. One respondent notes that:

> the fact that s15C has been long accepted is no defence to the fact that it produces illogical and arbitrary results contrary to the basic tenet of providing fair and just compensation.

PART 4

THE COMMISSION'S RECOMMENDATIONS

(a) In relation to awards of *Griffiths v Kerkemeyer* damages for pre-trial services:

1. There should be a statutory requirement in the *Common Law Practice Act 1867* for the court to consider whether or not the pre-trial *Griffiths v Kerkemeyer* component of an award of damages be paid direct to the care-provider(s).

2. There should be a statutory requirement in the *Common Law Practice Act 1867* for the court to assess pre-trial *Griffiths v Kerkemeyer* damages on the basis of the rates at which a commercial agency would have paid a person to provide the required services and taking into account the circumstances of each case with particular regard to any factors which may discount or increase the rate a commercial agency would have paid a care-provider.

3. There should be no award of interest on pre-trial *Griffiths v Kerkemeyer* damages if those damages are assessed on the basis of the current rates at which a commercial agency would pay a person to provide the required services.

4. Where pre-trial *Griffiths v Kerkemeyer* damages are assessed on the basis of the rates at which a commercial agency would have paid a person to provide the required services from time to time from the date of the accident, interest on such damages should be calculated on the same basis as interest is calculated on other heads of general damages such as pain and suffering.

5. There should a statutory requirement in the *Common Law Practice Act 1867* for the court to consider whether or not the interest awarded on pre-trial *Griffiths v Kerkemeyer* damages be paid direct to the care-provider(s).

(b) In relation to awards of *Griffiths v Kerkemeyer* damages for future care:

6. There should be no statutory restriction on the award of future *Griffiths v Kerkemeyer* damages to the plaintiff.

7. Courts should continue to assess future *Griffiths v Kerkemeyer* damages on the basis of the commercial rate which a commercial agency would charge for the services required.

(c) In relation to awards of damages for loss of domestic services in *Lord Campbell's* actions

8. There should be no statutory interference with the basis of the assessment of damages for loss of domestic services in *Lord Campbell's Act* actions.

(d) In relation to S.15C *Common Law Practice Act 1867*:

9. There should be no amendment to Section 15C of the *Common Law Practice Act 1867*.

APPENDIX 1

RESPONDENTS TO DRAFT REPORTS ON

GRIFFITHS V KERKEMEYER
and
SECTION 15C *COMMON LAW PRACTICE ACT 1867*

GRIFFITHS V KERKEMEYER

- ACTU (Queensland)
- FAI Insurance Group
- Queensland Law Society Inc
- State Public Services Federation
- Suncorp
- Women's Legal Service
- The General Manager
  The Workers' Compensation Board of Queensland

SECTION 15C *COMMON LAW PRACTICE ACT 1867*

- ACTU (Queensland)
- FAI Insurance Group
- Government Superannuation Office
- The General Manager
  The Workers' Compensation Board of Queensland

APPENDIX 2

GRIFFITHS & KERKEMEYER AWARDS IN QUEENSLAND

1992 / 1993[364]

[364] The High Court's decision in *Van Gervan v Fenton* was handed down on 28 October 1992. The cases reviewed by the Commission include a number of cases decided shortly prior to *Van Gervan v Fenton* and cases decided post *Van Gervan v Fenton*.

APPENDIX 2

GRIFFITHS V KERKEMEYER AWARDS IN QUEENSLAND

COURT OF APPEAL

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**First Instance Assessment Past G v K/Future G v K Interest on G v K (Total Assessment)**	**court of Appeal decision/comment**
Tully 21.5.92	* Spinal	* House and garden work.	* No claim / $75,000 ($462,615)	* Future *Griffiths v Kerkemeyer* reduced to $25,000. * Unclear how trial judge arrived at $75,000 - $30 per week for 25 years for additional services required. * Whether de facto partner likely to continue and provide service considered relevant. * Minority judgment would have allowed only $5,000 for future *Griffiths v Kerkemeyer*.
Lawson 13.11.92	* Back, neck, arm pain	* Personal care, companionship, home help.	* $70,000 / $250,000 * $14,700 ($771,945)	* Past *Griffiths v Kerkemeyer* reduced to $20,000. Future *Griffiths v Kerkemeyer* reduced to $85,000. Interest on past *Griffiths v Kerkemeyer* reduced to $3,600. * Neither the hours claimed nor the rates applied to those hours related to the respondent's needs. Needs require less skilled attendance than claimed.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**First Instance Assessment Past G v K/Future G v K Interest on G v K (Total Assessment)**	**court of Appeal decision/comment**
Lane 13.11.92	* Tetraplegia	* Totally dependent on others. Requires hands-on care as well as constant attendance.	* $137,000 / $995,00 * $43,155 ($1,977,375)	* *Griffiths v Kerkemeyer* award unchanged. No error in the computation of interest. * Re: Past care - dispute as to hours required for hands-on care. Appellant claimed some of that time only required "companion care". court of Appeal saw nothing of any consequence to justify interference with this award. * Re: Future Care - claim was made on basis of commercial rate for hands-on care and one half of commercial rate for companion care. The latter component was conservative.
Staines 2.12.92	* Acceleration of back degeneration		* $16,000 / $14,000 * $1,000 ($167,501)	* *Griffiths v Kerkemeyer* Award unchanged. * Insufficient detail in trial judge's judgment to ascertain how he arrived at *Griffiths v Kerkemeyer* figure. * Scope for significant dispute each way in relating to past and future care but insufficient to justify allowing appeal.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**First Instance Assessment Past G v K/Future G v K Interest on G v K (Total Assessment)**	**court of Appeal decision/comment**
Groves 11.12.92	* Spinal		* No claim / $25,000 ($474,717)	* *Griffiths v Kerkemeyer* award unchanged. * $25,000 based on carer spending 30 minutes per day showering and washing respondent's legs, drying, massaging etc. Commercial rate of $10 per hour. This rate justified by *Van Gervan v Fenton*. Award was high but trial judge justified in the circumstances.
Michael 18.12.92	* Spinal pain		* $900 * No interest ($191,010)	* *Griffiths v Kerkemeyer* not subject to appeal.
Fidler 12.3.93	* Neck, shoulder		* $2,000 / $8,000 * No interest ($110,000)	* *Griffiths v Kerkemeyer* award unchanged. * 12% contributory negligence. * *Griffiths v Kerkemeyer* small component in the award. * No excess shown.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**First Instance Assessment Past G v K/Future G v K Interest on G v K (Total Assessment)**	**court of Appeal decision/comment**
Jenkin 23.4.93	* Spinal	* 8 hours per day assistance of general nursing character and 1 hour per day home help.	* $170,000 / $400,000 * $61,200 ($996,688) * Assessed but not awarded. Note plaintiff sought $250,000 past *Griffiths v Kerkemeyer* and $617,235 future *Griffiths v Kerkemeyer*. Trial judge disagreed with rates claimed. Plaintiff referred to casual rates rather than shift rates for past care, and nursing care shift rates rather than lower shift rates for future care. Judge assessed on commercial rates.	* Appeal Dismissed. * Trial judge made no award.
Holzheimer 30.4.93	* Leg injury	* "Assistance" in "various tasks".	* $20,000 / $14,000 * $6,000 ($396,694) * $8 per hour past *Griffiths v Kerkemeyer*, $9 per hour future *Griffiths v Kerkemeyer*, 3 hours per week	* *Griffiths v Kerkemeyer* award not subject to appeal.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**First Instance Assessment Past G v K/Future G v K Interest on G v K (Total Assessment)**	**court of Appeal decision/comment**
Buckland 4.5.93	* Major head (blinded one eye, etc)	* General assistance.	* $77,515 / $123,125 * $18,603 ($875,798)	* *Griffiths v Kerkemeyer* award unchanged. * The applicability of administrative fee in application of "commercial rate" not considered in *Van Gervan v Fenton*. Conceivable that relatives may not be available in the future and respondent may need to use agency (whose charge will include administrative fee) in future. May be argument for allowing reduced fee for past services in relation to administrative fee - such a reduction in this case would be too small to warrant interference with this substantial award.

GRIFFITHS V KERKEMEYER AWARDS IN QUEENSLAND

SUPREME COURT

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Berryman 7.5.92	* Head, neck injuries * Loss of hearing in one ear	* General assistance by mother and husband.	* $29,500 / $5,800 * $8,850 ($217,178)	* Need for assistance will diminish. One year's assistance at $60 per week followed by two years' assistance at $30 per week.
Cain 8.5.92	* Permanent hole in throat	* Lawn mowing. * Domestic services. * Changing/cleaning throat tube. * Services provided by wife.	* $2,500 / $1,000 * $900 ($264,653) * $1,000 refund to Blue Nurses	* Claim grossly exaggerated. * Mowing is for benefit of whole family. All children capable of contributing. * Plaintiff could do some aspects of cleaning, changing tube. * Not appropriate to award registered nurses' rate. * Services performed in carer's own home at her own time and in course of her ordinary work.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Jenson 11.5.92	* Head injuries * Intellectual deficit * Pain * Spine problems * Headaches * Major injury to knee		* $822 / $1,734 ($131,828)	* *Griffiths v Kerkemeyer* component agreed.
Howe 21.5.92	* Spinal	* Assistance by wife and children.	* No claim / $20,000 ($349,315)	* Claim must be drastically discounted from $100,000 claimed. * There is the contingency that he might lose the assistance of his family in the future. * 15% reduction for contributory negligence.
Malic 5.6.92	* Brucellosis	* Massage, purchasing and giving medication, preparing special meals and assistance with bathing and dressing. * Wife.	* $12,000 / $8,000 * $4,320 ($140,803)	

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Groves 19.6.92	* Spinal	* Personal care by wife.	* $9,000 / $25,000 * $3,024 ($474,717)	* Commercial rates used: recognise that there are limitations on award where family members render gratuitous services to plaintiff.
Hogan 25.6.93	* Head injury from gun shot	* Home help by foster parents.	* $5,200 / $22,000 * $624 ($393,374)	* Commercial scales used. * Recognise there are limits to the *Griffiths v Kerkemeyer* principle.
Morgan 30.6.92	* Multiple fractures and lacerations	* Wife.	* $12,500 / No claim * $3,978 (approximately) ($334,951)	
Jovanovski 14.7.92	* Fractured ankles * Mental condition	* Exceptional support and assistance by wife.	* $5,000 / No claim * $1,800 (approximately) ($325,467)	* Award substantially attributable to the first 12 months. * 10% contributory negligence. * No allowance for future care.
Maan 24.7.92	* Significant head injury causing residual problems * Severe internal injuries requiring colostomy	* Assistance by wife (defendant), brother-in-law, other family members.	* $25,000 / No claim * $8,500 ($394,111.30)	* Award discounted because some services provided gratuitously by defendant. Judge criticised *Griffiths v Kerkemeyer* as an artificial creation and raised issue of statutory alteration of principle that defendant cannot be ordered to pay for a need which has already been met when true defendant is compulsory insurer.[365] * Plaintiff and wife divorced subsequent to accident.

[365] See similar circumstances in District Court case of *Heffernan 18.5.93.*

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Monaghan 4.8.92	* Severe head injuries and brain damage * Multiple fractures	* Wife.	* $6,000 / No claim * Amount agreed as a total, including interest ($336,125)	* Award agreed by parties.
Howsan 3.9.92	* Back injury * Nervous overlay	* Personal care and attention. * Wife.	* $5,000 / No claim * No interest allowed ($239,719)	* Award agreed by parties.
Armstrong 11.9.92	* Multiple fractures * Renal failure * 60% loss of function to entire body	* Wife (later died), friends **and** de facto wife.	* $10,000 / $20,000 * $3,600 ($1,061,254)	* No award for what de facto wife currently does as they fit within ordinary interaction within a household.
Fullford 11.9.92	* Ankle almost severed, later amputation of leg below knee * Multiple fractures * 85% of use of left leg lost	* Parents.	* $4,547 / No claim * Amount included interest, no calculation possible ($383,091)	* Award agreed by parties.
Ruttiman 16.9.92	* Back injury	* De facto wife.	* $3,000 / No claim * $870 ($198,520)	* Claim (unspecified) described as over-generous. * Compensation allowed for 400 hours at $7.50 per hour.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Harp 22.9.92	* Amputation of hand * Residual disability of 50-60% after microsurgery	* Wife.	* $5,940 / No claim * $1,060 ($254,525)	* Claim considered reasonable. * 792 hours x $7.50 per hour.
Locke 23.9.92	* Back injury	* Wife.	* $300 / No claim * No interest ($259,516)	* Plaintiff's evidence unreliable.
Nichols 30.9.92	* Back injury	* Male flatmate.	* $500 / No claim * No interest ($226,819)	* 30% reduction for contributory negligence.
Herbert 2.10.92	* Back injury	* Wife and wife's male cousin.	* $15,960 / $16,200 * $5,940 ($284,419)	* Award discounted because (a) period of 9 months separation (b) wife now performs tasks which plaintiff previously undertook. Some things fall within currency of ordinary domestic life. Readjustment not compensable in its entirety. * Past care valued at $7 per hour.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Coughlin 3.11.92	* Paraplegia	* Parents. * Future care based on need for assistance with gardening, shopping, cleaning and with children, if any.	* $20,129 / $75,000 * $7,608.95 ($1,015,593)	* Plaintiff 16 year old schoolgirl at time of accident.
Nutley 11.11.92	* Back injury	* Claim for things plaintiff would otherwise have been able to do. * Wife.	* $3,000 / $8,000 * $1,000 ($226,054)	* Argument that claim should be dismissed because wife knew about disability when she married plaintiff rejected as irrelevant to question of need for services.
McLaren 17.11.92	* Head injuries causing frontal lobe damage	* Assistance by wife.	* $1,000 / No claim * $200 ($305,850)	* Considerable assistance which goes well beyond the ordinary currency of domestic life.
Saez 17.11.92	* Leg and foot injury * Reactive depression	* Domestic assistance and transport. * Parents.	* $5,768 / No claim * $4,845 ($280,870)	* Past care valued at $7 per hour.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Robertson 18.11.92	* Injury to arm and shoulder	* Mother **and** wife.	* $8,079 / $13,520 * Amount included interest, no calculation possible ($482,377)	* Claim for past care described as modest. * Claim for future needs reasonable.
Nichols 10.12.92	* Back injury	* Domestic chores and massages performed by girlfriend, mother and father.	* $4,320 / No claim * No interest ($243,611)	* Claim for "administrative cost" (unspecified) rejected.
Hodgon 11.12.92	* Leg fracture	* Future services by wife around house to include mowing and working in yard.	* $1,948 / $3,500 * $555 ($384,733)	* 20% contributory negligence.
Chertes 16.12.92	* Back injury	* Domestic assistance. * Female family friends.	* $11,403 / No claim * $3,000 ($251,038)	* Commercial rates applied, but difficult to make precise calculation when assistance given in family situation and attempts must be made to assess how much helper's ordinary tasks have been extended.
Stewart 5.2.93	* Fractured vertebra * Incomplete tetraplegia		* $5,000 / No claim * $1,500 ($366,725)	* Past care agreed.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Davey 16.2.93	* Blow to head causing pain in neck, shoulder and arm	* Wife and father mow lawn and work in yard. * Wife provides domestic assistance.	* $5,000 / $20,000 * $1,125 ($440,846)	* Past care agreed at rate of $8.50 per hour. * Plaintiff now provides some help to wife with some domestic tasks.
Monk 24.2.93	* Intra-discal tear at the L5/S1 level in the back	* Care provided by wife.	* $26,558 / No claim * No interest ($194,243)	* Different commercial rates applied to various periods. * Plaintiff and his wife shared household tasks equally before the accident.
Walda 24.2.93	* Post-traumatic stress and phobia about electricity burns to hand		* $1,995 / No claim * $335 ($285,607)	* *Griffiths v Kerkemeyer* component not challenged.
Burgers 1.3.93	* Back injury	* Heat rub.	* $ 3,500 / $7,500 * $1,050 ($268,050)	* Commercial rates used.
Obern 8.3.93	* Multiple fractures		* $5,000 / No claim * Agreed sum, including interest ($284,475)	* Past care agreed.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Harris 12.3.93	* Dislocated right hip * Multiple fractures * Injury to sciatic nerve	* Care by de facto wife.	* $5,040 / No claim * No interest ($346,856)	* $8 per hour.
Francis 22.3.93	* Injury to leg and foot	* Day to day activities. * Assisted with mobility. * Assistance by wife (third party) and volunteers.	* $19,876 / No claim * No interest ($567,751)	* Commercial rates used (agency fee not included in assessing past *Griffiths v Kerkemeyer*). * Plaintiff's damages against the defendant fall to be assessed on the basis that the needs which the defendant's negligence caused remain unfulfilled. * There seems no justification for the defendant having the benefit of those needs being satisfied by someone else.
Davis 22.3.93	* Multiple fractures	* Household services and transport. * Sister-in-law.	* $13,225 / No claim * No interest ($253,161)	* Claim reasonable but allowance for transport reduced because need arose from factors other than disability.
Day 23.3.93	* Multiple fractures * Closed head injury * Hemiparesis		* $1,876 / No claim * $1,500 (included interest on special damages, no basis of calculation set out) ($332,403)	* *Griffiths v Kerkemeyer* component agreed.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Velvers 24.3.93	* Multiple fractures		* $25,000 / $20,000 * $8,250 ($565,125)	* *Griffiths v Kerkemeyer* component agreed.
Jackson 25.3.93	* Soft tissue injury to foot		* $630 / No claim * $18.90 ($207,860)	
Vassie 29.3.93	* Injury to lower back and neck	* Care by wife for one hour a week for rest of life.	* No claim / $9,000 ($230,078)	* Damages for future care assessed at commercial rate. * No claim for past care. * No claim for tasks which plaintiff no longer able to perform. * Claim described as "reasonable".
Hardy 7.4.93	* Damage to lower back * Pain in lower back, hip, right leg	* Substantial claim for care and assistance, past and future by husband.	* $4,000 / No claim * No interest ($281,670)	* Evidence does not support substantial claim. * 2 hours per week re past periods. * Nothing allowed for future.
Woods 15.4.93	* Injury to back * Depressive condition	* Personal hygiene. * Home help. * Wife.	* $9,300 / $4,000 * $2,466 ($286,484)	* Damages assessed at commercial rate (Domicare). It is only in respect of care which is needed as a result of the accident which is compensable i.e. care in doing the things which, because of the accident, the plaintiff was not able to do for himself and which was reasonable in the circumstances.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Becin 13.5.93	* Occupational asthma	* Domestic chores by husband.	* $6,000 / $21,200 * $600 ($497,616)	* Submissions of counsel on *Griffiths v Kerkemeyer* damages were so close that during addresses sums agreed.
Pye 19.5.93	* Lumbar spine injury * Pre-existing degenerative condition in lower lumbar spine	* Domestic chores by landlady whom plaintiff married subsequent to accident.	* $4,230 / No claim * No interest ($228,514)	
Draper 21.5.93	* Exacerbation of pre-existing degenerative disease in back	* Assistance of wife to change dressings, showering, dressing, massage. * Accompanying plaintiff to treatment. * Mowing.	* $6,000 / No claim * $1,800 ($82,103)	* 20% contributory negligence. * Claimed $13,300, allowed $6,000.
Oliver 7.6.93	* Fractured ribs * Tension pneumothorax * Fractured right humerus * Painful left shoulder	* Assistance by fiance.	* $5,040 / No claim * $650 ($203,213) * Assessed but <u>not</u> awarded	* No features of defendant's driving which can be identified as negligent. * Action dismissed. * *Griffiths v Kerkemeyer* component agreed.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Densley 17.6.93	* Serious brain injury * Never regained consciousness	* Nursing and general assistance on 24 hour basis for estimated 10 year lifespan.	* $166,500 / $345,000 * $89,820 ($1,024,403)	* Judge ordered past *Griffiths v Kerkemeyer* award to be paid to plaintiff's mother. * Damages reduced by 20% for contributory negligence (failure to wear seat belt).
Rider 20.7.93	* Fractured right femur * Fractured left femur * Lacerations to face and elsewhere	* Parents.	* $10,225 / No claim * $6,135 ($228,775) * Assessed but <u>not</u> awarded	* There was no fault in the first defendant as he did all he could to avoid the collision. * Judgment for the defendants against the plaintiff. * Satisfied that there was no exaggeration in *Griffiths v Kerkemeyer* claim.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Donnelly 29.9.93	* Fractured right frontal bone * Frontal lobe dysfunction * Reduced memory * Aggressive and anxious behaviour * Short attention span * Poor concentration * Epilepsy * Headaches * Depression	* Care and supervision. * Wife.	* $84,608/Claim rejected * $30,882 ($948,697)	* Past *Griffiths v Kerkemeyer* based on Domicare rate actually paid to the carer (i.e. excluding administration costs). * Judge preferred value of plaintiff's needs for future care to be based on his placement in an independent unit in a retirement village. * Interest ought not to be awarded in relation to past *Griffiths v Kerkemeyer* claims since the plaintiff has actually received the services and there is no obligation to make any payment to the provider of the services. The plaintiff has not suffered a detriment such as to attract an award of interest. Because point not argued before the judge not appropriate in this case to depart from accepted practice in this State. Interest allowed on past *Griffiths v Kerkemeyer* damages at 6% per annum.

GRIFFITHS V KERKEMEYER AWARDS IN QUEENSLAND

DISTRICT COURTS

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Forster 22.6.92	* Fractures	* Personal hygiene, feeding, mobility. * Parents.	* $352 / No claim * No interest ($27,923.52)	* Modest *Griffiths v Kerkemeyer* claim in the circumstances. * 20% contributory negligence.
Corcoran 10.7.92	* Fractured foot * Injuries to wrist and thigh	* Home help by mother-in-law, daughter.	* $5,040 / No claim * $201.60 ($44,007)	* $200 per week for first 6 weeks. * $80 per week for 48 weeks.
Kendall 30.9.92	* Spinal	* Home help by husband.	* $1,000 * No interest ($60,101)	* Husband lost his employment and would rather do housework than nothing.
Ashen 2.10.92	* Spinal * Knee	* Home help.	* $5,000 * $1,500 ($40,751)	

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Banks 5.10.92	* Spinal * Whiplash	* Heavy household (mopping, vacuuming etc) by husband.	* $1,500 / $10,000 * No interest ($39,088)	* *Past Griffiths v Kerkemeyer*. Husband performed extra duties. Defendant argued these were result of rearrangement of normal domestic affairs of the household. Calls made on husband in circumstances of this family are above and beyond mere rearrangement of household activities of the type that might ordinarily flow from this type of accident. $10 per hour appropriate for professional help - but not for the husband. "The claim made in this case is not one which should be arrived at on the basis of an hourly rate over a set number of hours per week, over a set number of months or years ... [global figure more appropriate based on justice]." * *Future Griffiths v Kerkemeyer.* Taking into account possible need in the future for paid home help - broad brush approach appropriate - $10,000 (for 15 to 20 years).
Pederson 9.10.92	* Shot in arm by nail gun * Compound fracture	* Assistance by wife. One hour per day.	* $756 / No claim * $540 ($181,983)	* One hour per day at domestic rate of $6 per hour for 4½ months.
Grant 20.10.92	* Spinal		* $725 * As agreed, including interest ($68,552)	* *Griffiths v Kerkemeyer* component agreed.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Lees 22.10.92	* Multiple musculo-skeleton injuries (fracture and lacerations)	* Disabled from looking after herself. Assistance provided by a friend, father, mother, husband.	* $3,000 / No claim * $900 ($185,619)	
McKee 12.11.92	* Bruising to arm, between breasts, lower abdomen * Fractured sternum * Injured great toe		* $1,400 * $336 ($16,988)	
Scarbor-ough 7.12.92	* Whiplash * Exacerbation of pre-existing spinal injury (by 10 years)	* Husband assists with washing, sweeping, bed-making. Claims for 20 hours per week for first 12 to 14 weeks.	* $1,200 / No claim * No interest ($18,112)	* Allowed 10 hours per week at $7 per hour. Rate agreed between parties.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Ingram 27.1.93	* Injury to soft tissues including ligaments and discs in cervical spine and tearing in rotator cuffs of shoulder capsules * Collision stirred up pre-existing degenerative changes (until then, largely asymptomatic)	* Assistance in taxi and secondhand shop business. * Domestic assistance. * Assistance by de facto wife and by son.	* $52,420 / $6,775 * $13,300 ($111,955) * + interest of $61,115	* Plaintiff's loss included need for assistance in taxi business and in shop. Assistance provided by de facto spouse and son on unpaid basis. * Accident occurred in 1980. Delay was result of fault on both sides. In all the circumstances judge not persuaded to reduce the period over which interest should be calculated. Hence the large interest component.
McPherson 10.2.93	* Exacerbation (by 10 years) of degeneration of spine. 10% loss of spinal function	* Ex de facto husband's services of ½ hour per day for some of time he remained with plaintiff. Daughter provided services during that time and since. * Claim made for $3,000 using agreed rate of $7 per hour.	* Nil ($72,256)	* "A rather shadowy *Griffiths v Kerkemeyer* claim". Insufficient evidence that services were actually supplied. While plaintiff might have been given assistance with tasks such as vacuuming, ironing or sweeping. "... Which I would think any considerate member of the household would offer in any event.." *Griffiths v Kerkemeyer* claim rejected.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
Squires 30.4.93	* Shoulder and neck strain * Headaches	* Care by wife.	* $3,822 / $178 * $535 * Final award yet to be made	* 6 hours per day spent by wife on tasks which used to be shared. The extra demand on her was 3 hours for 6 months. Commercial rate of $6 per hour used - must include the agency fee of $3 for each daily visit. Small amount awarded to cover care during Plaintiff's headaches.
Heffernan 18.5.93	* Whiplash * Broken rib * 7½% loss of capacity of spine	* Claimed $17,884 for care by husband and mother and paid help.	* $2,500 / No claim * $900 * ($46,397)	* Circumstances of *Van Gervan v Fenton* completely different to this case. That case involved helpless plaintiff who had required and would require almost constant care. Bulk of claim not *Griffiths v Kerkemeyer* type care - but rather the taking over by husband and mother of functions which plaintiff would otherwise have performed for the household in general. Intention of *Griffiths v Kerkemeyer* is to cover commercial cost of obtaining care for plaintiff. Not intended to entitle plaintiff to commercial value of contributions to running of a household which family members may make at a time of the plaintiff's inability to perform or difficulty in performing the plaintiff's accustomed functions.

Case Name Judgment Date	**Injury**	**Gratuitous services claimed**	**Past G v K/Future G v K Interest (Total Assessment)**	**Comments by Judge**
				* Brennan J's view in *Nguyen v Nguyen* justifies (the judge) placing more reliance on more modest rates than commercial rates. * Discounting also appropriate for the "social" aspects of the mother's assistance. * Husband is also a defendant. Defendant ought to gain the advantage of having provided such services in reduction of damages, rather than having to pay to the plaintiff some rational commercial value of the services, over and above having provided them.