Kars v Kars

Queensland CA196, 197 of 1994, 8/9/95.

Recovery of the cost of gratuitous domestic services provided by the tortfeasor

Robert Whiteford, Barrister, Queensland

This is a summary of a presentation to a Litigation at Sunrise Seminar in Brisbane on 7 Februrary 1996.

In this case, the plaintiff was injured in a motor vehicle accident which occurred on 2nd September 1991. She was a passenger in a motor vehicle being driven by her husband. She was injured due to her husband's negligence. Her injuries left her with a 35% disability of her back. She received gratuitous services from her husband and from neighbours, and the evidence showed those services were likely to be required for the rest of her life.

The judge assessing damages awarded about $1,500 for services provided to the plaintiff in the past by persons other than her husband. Relying on the decisions in *Gutkin v Gutkin* (1983) 2QdR 764 and *Maan v Westbrook* (1993) 2QdR 267, His Honour did not award any *Griffiths v Kerkemeyer* damages for services rendered to the plaintiff in the past by her husband, who was the defendant. There was no appeal against that decision.

For the future, the judge awarded some $84,000 for services which would be provided in the future by persons other than the plaintiff's husband. He assessed the future value of the services being rendered by Mr Kars to Mrs Kars at the date of the trial at $123,000. He held that, on the authorities, Mrs Kars was not entitled to recover for future care provided by her husband. He found that, because of the strain being placed on their marriage by her injuries, there was a prospect her husband would, at some time in the future, cease to be available to provide these services. His Honour assessed this risk at 50% and, therefore, for this component, awarded $61,500.

Among other matters, the Court of Appeal had to consider whether Mrs Kars was entitled to the full $123,000 or only the $61,500. That is, is the plaintiff entitled to recover under the *Griffiths v Kerkemeyer* head, damages for care to be provided in the future, when that care is provided by the defendant on the record?

The Court of Appeal was divided on this. The majority judgments were given by Davies JA and McPherson JA Shepherdson J dissented.

Davies JA said at pp.5-6:

> "Two policy considerations underlie the principles now governing awards of damages for voluntary care provided to a plaintiff. The first is a desire to compensate the voluntary care giver. The second is a desire to ensure that such an award should not, by a requirement that the need for such care is or may be productive of financial loss, diminish the damages to the advantage of the defendant. The result is a principle based on need alone thereby providing a fund for expenditure at the plaintiff's discretion, on behalf of the care giver.
>
> Once need alone is seen as a basis for relief, the basis on which, if at all, damages should be reduced in respect of care provided either in the past or in the future by the defendant is also reasonably clear. The provision of care by the defendant cannot eliminate the need which arises on causation of the injury."

Therefore, Davis JA said that in relation to past services, the fact the defendant provides those services cannot "eliminate the loss". What it does do though, is discharge the defendant's liability to pay damages to satisfy that need. So, no damages are recoverable for the past services provided by the defendant.

However, His Honour achieved a different result when applying this reasoning to the future position. Davies JA said at pp.7-8:

> "The position with respect to future care is quite different. No payment having been made or services rendered in reduction of damages in respect of the need, there is no basis, either in principle or policy for reducing the plaintiff's damages. The possibility or probability that a care giver will continue to render care cannot affect the value of the need for it (although it may affect the extent to which that need is or may be productive of economic loss) and will not have discharged, wholly or in part, the defendant's liability for damages payable for satisfaction of that need by the time they come to be assessed. There is therefore no basis for taking that possibility or probability into account."

You may find this difficult to follow. I would have thought the correct solution is that adopted by the trial judge. If the defendant on the record provides the services in the future, he is, in effect, being

punished twice. He is ordered to pay damages for satisfying a need for services which he will satisfy himself by supplying these services. The plaintiff can pocket the damages representing the value of those services. I would have thought this is double compensation to the plaintiff also. It is clearly the case in Australia that the *Griffiths v Kerkemeyer* damages are not held on trust for the care provider.

Surely, the plaintiff would have been adequately compensated if her damages under this head were assessed upon the likelihood that the defendant will not be available or willing to provide the care in the future. This is the view which Shepherdson J took in his dissenting judgment.

The fact that the defendant is covered by compulsory third party insurance was held by the Court of Appeal not to affect the position. I think this is correct. As Thomas J said in *Maan v Westbrook* (at pp.267-8):

> "I consider that whilst the conventional structure of an action for damages remains the vehicle through which compensation for personal injuries is awarded, it is inappropriate to disregard it"

His Honour said he did not think the fundamental structure of civil proceedings and the fundamental rule of the assessment of damages ought to be compromised by considerations of third party insurance.

A minor matter which arose for consideration in *Kars v Kars* was whether the administration fee built into a commercial case provider's charge ought to be included in the rate per hour at which *Griffiths v Kerkemeyer* damages are calculated for domestic, ie unskilled assistance. As you know, when calculating damages for past care provided by family members, it is not allowed (e.g. *Biggenden Shire Council v Buckland* (unreported) Appeal No 11 of 1993, Queensland Court of Appeal, 4/5/93).

In *Kars*, the Court of Appeal held that the administration component was not recoverable for future care either. Davies JA said at p.8:

> "Notwithstanding the absence of other evidence, it is most unlikely that, in a labour market such as the present one in which there is a high level of unemployment, particularly in unskilled labour, unskilled services such as this could not be obtained at the price charged by the commercial care giver before adding its administration charge."

This is of interest. On the one hand, the Court of Appeal shows considerable generosity to a plaintiff in awarding her damages for a loss which the tort feasor probably will satisfy, to a large extent. However, imagine the plaintiff's husband did leave her and she had to find someone else to come into her home and perform the services which her husband had been doing.

By not allowing the administration component, the Court of Appeal was effectively saying it is not appropriate for her to go to an established agency to find someone to come into her home to perform these necessary services.

Presumably, she is expected to ask around amongst her family or to advertise for someone in the Trading Post to come and do the jobs. Isn't this a little hard on plaintiffs?

Aren't plaintiffs entitled to the security of knowing that their home-help is vetted by an established agency such as Domicare? Perhaps its not so bad for Mrs Kars, but what about a quadriplegic? Is such a plaintiff to have his or her damages assessed on the basis that the court expects them to go elsewhere than an established, reputable agency to find people who will come into their homes, in whom they must repose a lot of trust?

What the Court of Appeal gives, the Court of Appeal takes away.