

DAMAGES FOR GRATUITOUS SERVICES - S 59 OF CLA REVISITED :- CLEMENT V BACKO & SUNCORP METWAY INSURANCE LTD

On 16 March 2007 the Queensland Court of Appeal delivered judgement in the matter of **Clement v Backo & Suncorp Metway Insurance Ltd** [2007] QCA 81. The matter considered the question of whether damages could be awarded for gratuitous services provided for commercial benefit. In so doing it also had to consider whether s 59 of the Civil Liability Act 2003 applied to fetter any common law right.

Facts

Mr Clement was a passenger in a motor vehicle which overturned after being driven through water on a roadway in 2004. As a consequence of injuries sustained in the accident his capacity to earn an income was affected and he was awarded \$549,944.08 at trial in the Supreme Court of Queensland.

At the time of the accident Mr Clement had 600 mahogany trees on his 6 hectare property which he had planted over the previous 4 year period. This plantation was operated as a commercial venture and the Plaintiff's tax returns reflected this. This operation was conducted in addition to the plaintiff's usual employment. Due to injuries suffered in the accident Mr Clement could no longer attend to the planting of mahogany trees but could attend to other duties associated with maintaining the plantation. He paid a third party to undertake some of the planting works. The Plaintiff's wife also undertook planting work but performed that service on a gratuitous basis at no cost to the business.

The Supreme Court of Queensland awarded to the Plaintiff damages for gratuitous care and assistance for domestic and personal services in the amount of \$2112.00. It awarded a further \$40,000.00 damages for gratuitous services supplied by the Plaintiff's wife in furtherance of the Plaintiff's commercial operation. The court found that the gratuitous tree planting was a necessary need otherwise the operation was at risk of becoming less productive and less profitable for the Plaintiff than it would otherwise have been had he not been injured.

Argument In the Court of Appeal

The insurer defendant appealed the primary judge's decision to award damages for gratuitous services supplied for commercial benefit. It argued firstly that the services were not gratuitous services and secondly if they were common law gratuitous services that s 59 of the Civil liability Act applied to the claim requiring the services to be "necessary". It argued these services were not necessary as they did not solely arise out of the injury and therefore recoverability of these damages was excluded by virtue of s 59.

On appeal Mr Clement's argued that the damages should more properly be categorised as services arising out of impaired earning capacity and as such s 59 of the Civil Liability Act 2003 did not apply to the need for which the \$40,000.00 award of damages had been made.

Decision

The Court dismissed the Appeal. Whilst separate judgements were delivered, two of the judges found that at common law, damages were recoverable for gratuitous services rendered for commercial profit in circumstances where the need for those services was created by the tort. Section 59 of the Civil liability Act 2003 applied to

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the claim but as the services were necessary, section 59 did not preclude recoverability in this instance.

The third judge upheld the Plaintiff's right to recover the \$40,000 damages but considered that services supplied gratuitously for commercial purposes should be categorised as damages for lost earning capacity and not as a gratuitous service.

In reaching its decision, the court had to consider

- (a) whether the principles in Griffiths v Kerkemeyer concerning the awarding of damages on account of gratuitously performed services would extend to the provision of services beyond those of a domestic or personal nature.
- (b) the decision of CSR v Eddy (2005) ALJR 59 where the High Court revisited the entitlement to claim for gratuitous care in respect to domestic/personal care supplied by a Plaintiff to third parties, which the plaintiff was incapable of providing after the tort. (Sullivan v Gordon damages)
- (c) the decision of Kriz v King [2006] QCA 351 where Court of Appeal had previously examined the effect of s 59 of the Civil Liability Act on claims for gratuitous services
- (d) a series of cases where courts in Australia had previously awarded Griffiths v Kerkemeyer type damages for gratuitous services supplied in sustaining business enterprises on behalf of an injured plaintiff who was unable to undertake certain works in respect to their livelihood after the accident. (O'Keefe v Schuller; Cockshell v Australian National Railway Commission; Randall v Dul; Thomas v Eyles)

In **Clement v Backo & Anor** the Court of Appeal concluded that nothing in the decision of the High Court in CSR v Eddy would preclude the recoverability at common law for gratuitous services rendered to a plaintiff in respect to the carrying on aspects of a plaintiff's commercial enterprise on the Plaintiff's behalf. The majority concluded that such gratuitous assistance was recoverable by way of Griffiths v Kerkemeyer damages .

The court applied the view it adopted in Kriz v King on the reference to "gratuitous services" in s 59 of CLA . That is "gratuitous services" means services of the type contemplated by the Griffiths v Kerkemeyer principles as interpreted in CSR v Eddy. The majority in **Clement v Backo & Anor** decided that the gratuitous services provided by Ms Clement in respect to the plantation were necessary services required by the Plaintiff after the accident of a type he ordinarily performed prior to the motor vehicle accident. The necessity for the service was said to be demonstrated by the fact that the plaintiff was likely to suffer some sort of financial detriment if the service had not been supplied.

COMMENT

- A claim for gratuitous care and assistance for domestic assistance or personal care **received** by a plaintiff is sustainable at common law based on the principles laid down in Griffiths v Kerkemeyer and as confirmed in CSR v Eddy. Such damages should properly be described as Griffiths v Kerkemeyer damages

- A claim for gratuitous care and assistance for domestic and/or personal services **provided** by a Plaintiff to a third party for which the Plaintiff can no longer perform post tort (Sullivan v Gordon damages) is at most a lost amenity compensable as a component of the plaintiff's general damages - CSR v Eddy
- A claim for gratuitous services received by a plaintiff for the plaintiff's commercial benefit to prevent loss is according to the decision of **Clement v Backo & Anor** an allowable extension to the Griffiths v Kerkemeyer principles and as such is recoverable as a component of Griffiths v Kerkemeyer damages

Where a Plaintiff establishes that a need for receipt of gratuitous services has been created as a consequence of a tort, such services if supplied are recoverable at common law regardless of whether they are personal, domestic or commercial in nature, providing that those services were of a type or kind the Plaintiff would ordinarily have undertaken for themselves prior to the tort.

A common law claim for gratuitous services may however be abolished by statute .Where the *Workers Compensation & Rehabilitation Act 2003* applies, there is no entitlement to recover damages for gratuitous services. Where the *Civil Liability Act 2003* applies, damages for all gratuitous services are recoverable if services have been provided for at least 6 hours per week for 6 months, or will be provided for 6 hours per week for 6 months in the future.

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