Changes to gratuitous care

Harrison v Melhem [2008] NSWCA 67

By Jnana Gumbert

For many years it has been settled law in NSW that s15 of the *Civil Liability Act* 2005 (CLA) (and the almost identically worded s128 of the *Motor Accidents Compensation Act* 1999) (MACA) precluded recovery of compensation for gratuitous care services, unless both requirements stipulated in that section were satisfied: that is, that the care had been provided for more than six hours per week *and* for more than six months.

The Court of Appeal's confirmation of this interpretation in *Geaghan v D'Aubert*[1] and *Roads and Traffic Authority v McGregor*[2] has recently been overturned by its decision in *Harrison v Melhem*.[3] This decision significantly changes the interpretation of ss15 and 128 and, consequently, plaintiffs' entitlements under those Acts.

THE FACTS

The plaintiff was injured as a result of the negligence of an employee of Melhem Civil Pty Ltd. He made a claim for damages against the employee and the employer company, including a claim for damages for gratuitous care.

At first instance, Harrison AsJ awarded the plaintiff damages, including an award for gratuitous care. This claim was essentially broken into two periods: a claim for 11.5 hours of care for 130 weeks, and then a claim for four hours per week from 14 September 2001 to the date of judgment and thereafter.

After making this award, her Honour was taken to the decisions in *Geaghan* and *McGregor* and, acknowledging that she was bound by them, limited the award for gratuitous assistance to the first period that exceeded both the six hours per week and six-month thresholds in s15 of the CLA.

The plaintiff appealed on a number of issues, including the correctness of the court's interpretation of s15.

THE LEGISLATION IN DISPUTE

Section 15(3) of the CLA states:

> 'Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided:
> (a) for less than 6 hours per week, and
> (b) for less than 6 months.'

Section 128(3) of MACA states:

> 'No compensation is to be awarded if the services are provided, or are to be provided:
> (a) for less than 6 hours per week, and
> (b) for less than 6 months.'

THE APPEAL

On appeal, the majority of the Court of Appeal (per Spigelman CJ and Mason P, Beazley and Giles JJA agreeing) held that the decisions in *Geaghan* and *McGregor* should be overruled because:

> 'the literal and plain meaning of s15(3) is that the preclusion [against recovering damages for gratuitous care] applies if, and only if, both limbs are satisfied... The subsection does *not* state that a plaintiff has to show the provision of services for more than six hours per week and for more than six months in order to *qualify* for damages.'[4]

Mason P stated:

> 'I construe s15(3) as a preclusion upon the award of *Griffiths v Kerkemeyer* damages unless the plaintiff can overcome one of the two thresholds by showing *either* that the gratuitous services are provided for a long period (that is, more than six months) *or* that the services are provided for a significant period of time (that is, for more than six hours per week).'[5]

Spigelman CJ added some further comments on this issue, saying 'What is involved is a once-and-for-all judgment in the sense that, when either threshold in s15(3) is satisfied, recovery for gratuitous services is open to be awarded.'[6]

Basten JA dissented on this issue, finding that *Geaghan* and *McGregor* should not be overruled.

IMPLICATIONS

As a result of this decision, gratuitous care is now compensable when either of the thresholds in the abovementioned sections are met: namely, when the services are provided for more than six hours per week *or* for more than six months. For example, the threshold can be met by care that is provided for ten hours a week for only two months, or by care that is provided for only two hours a week for eight months.

Additionally, it seems that plaintiffs will be able to claim subsequent periods of care that would not in themselves exceed the threshold.[7] Accordingly, using the examples above, care that was later provided for less than six hours per week and for less than six months would still be compensable, as the thresholds would already have been satisfied.

However, Mason P makes it clear that, in order to pass the initial six-month threshold, the six months must be consecutive.[8] Accordingly, the threshold would not be met by a plaintiff who had received, say, five hours of care per week for five months, and then a subsequent period of five hours of care per week for two months.