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ASSESSING DAMAGES FOR DOMESTIC ASSISTANCE – WHERE ARE WE NOW?

A brief history

Damages for attendant care, also known as domestic assistance, were formerly known as *Griffiths v Kerkemeyer*[1] damages under common law after the High Court of Australia held that, if a claimant's injuries have created a need for care or for domestic services, they are entitled to recover the cost of such services, whether they are provided on a gratuitous or commercial basis. The High Court held that whether there is a legal or moral liability to repay a person who provides care or domestic services on a gratuitous basis is irrelevant.

Part 2, Division 2 of the *Civil Liability Act 2002* (NSW) now regulates when damages for gratuitous attendant care are to be allowed.

Under section 15(2) no allowance is to be made for gratuitous attendant care unless:

- there is (or was) a reasonable need for the services to be provided;
- the need has arisen (or arose) solely because of the injury to which the damages relate; and
- the services would not be (or would not have been) provided to the claimant but for the injury.

Further, under section 15(3), as it was originally enacted, no damages were to be awarded to a claimant for attendant gratuitous care if the services are provided, or are to be provided:

- for less than 6 hours per week; and
- for less than 6 months.

The Court of Appeal considered the application of what is now known as the intensity (at least 6 hours per week) and duration (for at least 6 months) requirements of section 15(3), as originally enacted (ie as set out above) in *Harrison v Melhem*[2]. The Court of Appeal determined that damages for gratuitous attendant care are available if a plaintiff can show either a need for at least 6 hours per week of care (even if the timeframe over which that 6 hours is required is less than 6 months) or 6 months of care (even if the number of hours needed during that time is less than 6 hours per week).

To remedy the Court of Appeal's generous interpretation of section 15(3) in *Harrison v Melhem*, which was considered to be at odds with the legislative intention, the *Civil Liability Act* was amended shortly thereafter[3]. Section 15(3) now reads:

> *(3) Further, no damages may be awarded to a claimant for gratuitous attendant care services unless the services are provided (or to be provided):*
>
> *(a) for at least 6 hours per week, and*
>
> *(b) for a period of at least 6 consecutive months.*

This amendment was made to make clear the legislative intention that both the 6 hours per week and the 6 month thresholds must be met before a plaintiff has any entitlement to damages for domestic assistance that has been, or will be, provided on a gratuitous basis. Defendants and their insurers can now take comfort in the fact that the intention of section 15

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[1] [1977] HCA 45; (1977) 139 CLR 161

[2] [2008] NSWCA 67; (2008) 72 NSWLR 380

[3] See *Civil Liability Legislation Amendment Act 2008* (NSW)

is to put constraints on the availability of damages for domestic assistance provided on a gratuitous basis.

Since the amendment in 2008 a number of decisions dealing with damages under section 15 have emerged that provide a useful set of principles that should be considered when assessing damages for gratuitous domestic assistance. Recent decisions not only provide further clarity on the parameters around section 15 but also serve as a useful reminder of some often forgotten principles since section 15 hit the spotlight that are not impacted by the legislation and remain applicable.

Recent decisions also provide some much needed guidance on how claims for future domestic assistance to be provided on a commercial basis, which are not subject to the same legislative requirements as gratuitous assistance, are to be dealt with where assistance has otherwise, and previously, been provided on a gratuitous basis.

The intensity requirement in section 15(3)(a)

In *Hill v Forrester*[4] the Court of Appeal considered the construction of section 15(3) in its current form and concluded that the intensity requirement in section 15(3)(a) is ongoing. The Court of Appeal went on to say at [98] that:

> *'It follows that the respondent is not entitled to recover damages in respect of any period during which the gratuitous services were not provided (or are not to be provided) to him for at least six hours per week'.*

It is now a well-established principle that the intensity requirement in section 15(3)(a) is ongoing such that, even if the duration requirement of at least 6 consecutive months has been met, damages cease to be recoverable in respect of any period thereafter (or before) where the assistance provided drops below 6 hours per week. *Hill v Forrester* has since been affirmed in a number of Court of Appeal decisions (see for example *Appleton v Norris*[5] and *Ridolfi v Hammond (No 2)*[6]).

The need must have in fact been satisfied

All too often a plaintiff will rely on evidence (eg from a medical expert) as to the level of assistance they likely would have required in respect of past periods, based on the nature and extent of their injury. However, there must be evidence to establish that this level was, in fact, provided.

Boral Bricks Pty Ltd v Cosmidis; *Boral Bricks Pty Ltd v DM & BP Wiskich Pty Ltd* (***Boral***)[7] dealt with a claim for gratuitous domestic assistance under section 128 of the *Motor Accidents Compensation Act 1999* (NSW). Section 128 has the same requirement as section 15(3) that no compensation is to be awarded unless the services were, or are to be, provided for at least 6 hours per week and for a period of at least 6 consecutive months.

In *Boral*, the evidence of lay witnesses established a need for 4.5 hours of assistance per week, which did not reach the intensity threshold. However, the trial judge overcame this hurdle by endorsing the expert medical opinion of Dr Giblin, an orthopaedic surgeon, that '*domestic assistance is recommended four hours a fortnight for gardening and four hours a week for home care*'. The issue on appeal was whether such assistance was in fact provided at the requisite level.

In dealing with Dr Giblin's evidence the Court of Appeal found at [93] that Dr Giblin's report did not reveal the basis upon which he had assessed the number of hours per week required for domestic assistance and further, that this is '*not the kind of 'expertise' which is normally attributed to orthopaedic surgeons*'. The Court of Appeal determined that Dr Giblin's evidence on the issue of domestic assistance '*was clearly inadmissible... and should be given no weight at all*'.

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[4] [2010] NSWCA 170; (2010) 79 NSWLR 470

[5] [2014] NSWCA 311

[6] [2012] NSWCA 67

[7] [2013] NSWCA 443

In reviewing the evidence of those who had provided the assistance, the Court of Appeal acknowledged at [87] that:

> *'It is not possible to be over-precise about the needs for assistance resulting from the accident, nor with respect to activities which the plaintiff did not undertake because they were not "in his domain"'.*

The Court went on to say, however, that if the evidence of the plaintiff's sister and nephew that they did '*at least two hours*' of housework per week and '*a minimum of two and a half hours'* per fortnight in the garden respectively is accepted, those figures do not reach the intensity threshold of at least 6 hours per week. The Court of Appeal concluded at [87] that:

> *'Although the evidence was replete with phrases such as "at least" and "a minimum of", since the witnesses were giving evidence in the interests of the plaintiff, it is appropriate to accept the actual figures to which they were prepared to depose. On that basis, the work in the garden amounted to some two and a half hours per week (four and a half hours per fortnight) and the housework involved two hours per week. Those figures do not constitute six hours per week over at least six months'.*

The end result in *Boral* was that the Court of Appeal removed the amount allowed by the trial judge for past gratuitous domestic assistance from the assessment of damages.

More recently, in *Wright by his tutor Wright v Optus Administration Pty Limited* (***Wright***)[8] the Supreme Court of NSW confirmed that to be entitled to any damages at all under section 15 the evidence must establish that the need has in fact been satisfied. In *Wright*, there were a number of difficulties in the plaintiff's case in this regard, including that there was no clear evidence at all of the continuous provision of services for any consecutive 6 month period at any time.

The assistance providers were the plaintiff's parents and the evidence was that, although they provided assistance when they could, the plaintiff's condition rendered him volatile and he argued with them frequently. As a result of these relationship difficulties there appeared to be weeks, if not months at a time, when the parents had little contact with the plaintiff. On this basis, although the Court was satisfied the plaintiff's need for assistance was great, it was not satisfied that the evidence made out a case which crosses and satisfies the statutory thresholds, namely that assistance had in fact been provided for at least 6 consecutive months.

No commingling

Another way in which plaintiffs attempt to reach the intensity threshold of at least 6 hours per week is by commingling tasks that are for the benefit of the plaintiff and tasks which benefit other family or household members. Often, domestic tasks which also benefit others who reside in the same household, for example grocery shopping or cleaning the family bathroom, cannot be separated for the purpose of a domestic assistance claim. However, commingling where the elements are severable, is an impermissible approach and cannot be used as a means of satisfying the thresholds.

For example, washing a spouse's car or doing laundry for other family members should be uncoupled from those tasks performed for the benefit of the plaintiff and may result in the claim falling below the intensity threshold.

It may well be that prior to being injured, tasks that benefited others, such as washing a spouse's or children's clothes, or washing a second family car, fell within the domain of the plaintiff. However, any entitlement to damages for the loss of the ability to continue to provide that assistance to others is to be assessed under section 15B of the *Civil Liability Act*, not section 15. Where a section 15 claim and/or a section 15B claim does not reach its respective threshold the two cannot be added together to overcome this. This was recently affirmed by the Court of Appeal in *White v Benjamin*[9].

In *White v Benjamin* the plaintiff appealed, among other things, the trial judge's rejection of her claim for gratuitous care and commercial services. At trial, these claims were rejected on the basis that after disentangling services needed by the plaintiff from services that also

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[8] [2015] NSWSC 160

[9] [2015] NSWCA 75

benefited other family members, such as cleaning the second bathroom used by other family members, washing and ironing for her husband and children and mowing the lawn, the plaintiff's claim did not reach the intensity requirement of at least 6 hours per week.

On appeal, the plaintiff argued that the trial judge's dissection of needs and services was erroneous and that, at least to the extent that the needs were commingled, that approach should not have been adopted. The Court of Appeal agreed that there will be many circumstances where no clear line can be drawn between services required by the injured plaintiff and those which benefit family members and said at [70] that:

> *'It is not necessary to inquire whether a plaintiff who lives in a house with two bathrooms uses both, or could reasonably confine herself to one. Where a service is reasonably required by the plaintiff, which is likely to cover the cleaning of the house in which she lives, the benefits to other members of the household may be disregarded. But the statutory schemes require that a plaintiff identify and establish the basis on which a particular element of an award is sought'.*

The Court of Appeal referred to *Allianz Australia Insurance Ltd v Roger Ward & Ors* (***Ward***)[10] which involved a claim for gratuitous domestic services for the plaintiff and also for his loss of capacity to care for his children. These are two distinct claims, however, to be assessed under separate provisions. Under the *Civil Liability Act*, the domestic services claim falls for consideration under section 15 and the loss of a capacity to care for others falls under section 15B. *Ward* dealt with equivalent provisions under the *Motor Accidents Compensation Act* and Hidden J said at [17]:

> *'Claims under them must be separately assessed, with an eye to the limitations upon an award imposed by each provision. That includes the 6 hour/6 month threshold, which must be applied to each claim. The statutory requirements are not met by the application of that test in some global way to the two claims, viewed in combination'.*

The Court of Appeal held in *White v Benjamin* at [75] and [76] that:

> *'It follows that commingling, where the elements are severable, is an impermissible approach with respect to claims for gratuitous assistance ... Once the tasks were divided between services to the plaintiff and assistance with care of her dependent children, it is apparent that neither claim would rise above six hours per week'.*

No damages during periods of hospitalisation

Plaintiffs frequently include in their claims for past gratuitous domestic assistance, periods of hospitalisation, particularly if a period of hospitalisation would otherwise interfere with the duration threshold of at least 6 consecutive months.

A typical pleading by a plaintiff will include time spent by the primary domestic assistance provider (eg a spouse, parent or adult child) to visit the injured plaintiff in hospital to provide emotional support or bring clothes, other personal effects or luxury items for the plaintiff, and to maintain the plaintiff's home while they are absent (eg mail collection, putting out bins, gardening, dusting and general tidying).

The recent Supreme Court decision of *Wormleaton v Thomas & Coffey Limited* (No 4) (***Wormleaton***)[11], however, serves as a useful reminder to exclude periods of hospitalisation from an assessment of damages for past domestic assistance based on the principle established, prior to the *Civil Liability Act*, in *Nicholson v Nicholson*[12]. On the basis that *Nicholson* still applies, the Supreme Court rejected the entirety of the domestic assistance claim in *Wormleaton* during the period of the plaintiff's hospitalisation.

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[10] [2010] NSWSC 720; (2010) 79 NSWLR 657

[11] [2015] NSWSC 260

[12] (1994) 35 NSWLR 308

In *Wormleaton*, the Supreme Court also rejected a claim of 7 hours per week for 'emotional support', provided by the plaintiff's wife, directed to maintenance of the plaintiff's psychological state as a result of serious injury. The Supreme Court had regard to *CSR Limited v Eddy*[13] (which concerned common law damages, rather than the statutory modification of such damages under section 15) in which it was said at [21]:

> *'Griffiths v Kerkemeyer damages are awarded to plaintiffs to compensate them for the cost (whether actually incurred or not) of services rendered to them because of their incapacity to render them to themselves, not to compensate them for the cost of services which because of their incapacity they cannot render to others'.*

On this basis, in *Wormleaton*, it was concluded that '*emotional support is not a service that one is capable of rendering to oneself*'. The Supreme Court noted at [134]:

> *'People are social beings and most of us appreciate the company of family, friends and colleagues. But the benefits we derive from that society is not a service provided by those others to us. Nor can we, as I have said, provide that support to ourselves'.*

Future commercial assistance: only if gratuitous assistance will cease?

Frequently, plaintiffs attempt to prevent the thresholds for gratuitous assistance impacting on their claim for future assistance by converting the claim for the future into one for paid, commercial assistance. Although the enactment of the *Civil Liability Act* set clear parameters for gratuitous assistance claims, there has been little guidance on the interplay between a gratuitous assistance claim and a commercial assistance claim since the inception of section 15.

Although recent Court of Appeal decisions have brought some much needed clarity to claims for damages under section 15, there is some tension among a series of decisions emanating from the NSW Court of Appeal in the last three years in relation to what is needed in order for a plaintiff to prove a claim for future assistance based on commercial care in circumstances where they currently receive gratuitous assistance.

In 2009 the Court of Appeal delivered judgment in *Miller v Galderisi*[14] holding that the trial judge's findings that the plaintiff required commercial domestic assistance immediately, and would continue to do so for the rest of his life, could not be justified because that finding was not supported by the evidence and there was no reason to assume the plaintiff's wife, or son, would not continue to be able and willing to assist the plaintiff for many years to come. As assistance was being provided gratuitously, and it had not been established that this arrangement would come to an end so as to produce a need for commercial assistance, it was held that '*the expense was neither immediate nor inevitable*'. As such, no allowance for future, commercial assistance was made. In reaching this conclusion the Court of Appeal stated at [24]:

> *'There is no conventional allowance for the provision of domestic assistance on a commercial basis at some future point in time, against the possibility that the gratuitous carer may no longer be able or willing to provide such care. If any such convention were to be adopted, it would, as with vicissitudes, require the plaintiff's particular circumstances to be taken into account. The respondent's circumstances in this case militate against any such allowance. Accordingly, it is not appropriate in this case to simply pluck a figure out of the air because there is remote, though not entirely fanciful, chance of a need for commercial domestic assistance in the future'.*

In 2013, this position was strengthened when, in *Berkeley Challenge Pty Ltd v Howarth* (***Howarth***)[15], the Court of Appeal held that the acceptance of such a claim must rest on a finding that such services would, at some point, be availed of in place of the gratuitous services. In other words, it was not good enough for a plaintiff to give evidence to the effect that if they had the money they would pay for it. There must be a consideration of if, and when, the current level of gratuitous assistance will no longer be available to the plaintiff.

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[13] [2005] HCA 64; (2005) 226 CLR 1

[14] [2009] NSWCA 353

[15] [2013] NSWCA 370

Later, in the same year, a similar approach was taken in *Boral* when the Court of Appeal said at [96]:

> *'...if the plaintiff sought to recover an amount on account of domestic assistance to be calculated at commercial rates, rather than the rate for gratuitous assistance, the burden lay on him to establish that those presently providing gratuitous assistance would not continue to do so'.*

In 2014, in *ECS Group (Australia) Pty Ltd v Hobby* (***ECS***)[16] the Court of Appeal affirmed its decision in *Howarth*. The respondent in *ECS* gave evidence that she did not like the fact that her mother was doing all the housework for her and that she would prefer to pay someone to do it. The Court of Appeal held, however, at [63] that:

> *'In order for the respondent to be entitled to damages in respect of commercial care services, she had to show not only a need for paid commercial care but also that gratuitous assistance to satisfy the need was unavailable'.*

The evidence in *ECS* suggested that the assistance currently provided by the respondent's mother would continue to be available for the next 5 years, being the future period in which the Court had determined that assistance would reasonably be required. The claim for future commercial assistance was therefore rejected.

Allard v Jones Lang Lasalle (Vic) Pty Ltd[17] came next, in which a claim for future commercial care was also rejected at [73] on the basis that:

> *'...the evidence goes no further than establishing that there was a remote, though not entirely fanciful, chance of the need for commercial domestic assistance in the future. The remoteness of that chance is based upon the impossibility of determining with any degree of confidence whether or when the appellant's children ... would no longer be able or available to provide gratuitous assistance. To pick a future point in time when such assistance might cease and commercial assistance may be required would be nothing short of speculative. As the onus lies on the appellant to properly establish when the need for commercial services would arise, in my view that onus has not been discharged'.*

More recently, on 6 March 2015, in *Wright*, the plaintiff gave unchallenged evidence that he would not 'choose to live in filth' and that if he had someone available to him and he could afford it, he would pay someone to assist him with housework. The Court held at [92]:

> *'...the difficulty with his relationship with his parents, notwithstanding their willingness to look after him, is his volatility. I expect that would be different with a paid provider. The amount claimed is 10 hours per week and the rate is agreed at $35 per hour. I am satisfied that the largest problem is his psychiatric injury which makes him unmotivated and disorganised. For this reason he requires help with housework, cleaning, washing and perhaps some shopping to assist to make sure there is food in the house. Ten hours per week is a modest amount for this'.*

This decision is reconcilable with *Howarth*, as there was an assessment of the availability of gratuitous assistance and it was determined that such assistance was essentially not available, despite a willingness on the part of the plaintiff's parents to assist if they could, because the relationship prevented this from being possible.

On 20 March 2015 the Supreme Court held in *Wormleaton* (where the plaintiff advanced a claim for future domestic assistance on a commercial basis in lieu of the gratuitous assistance currently provided) at [142] that there was '*no persuasive evidence to support this change in tack*' and that:

> '*Most likely, in the future [the plaintiff's wife] will provide the necessary assistance ... just as she has done in the past. As age overtakes her, it is likely, in the way of modern life that their daughter will take over*'.

As a result, the claim for future commercial care was rejected and the claim was assessed on a gratuitous basis. This decision is also consistent with *Howarth*.

However, a change of tack by the Court of Appeal seems to be emerging. The Court of Appeal's judgment in *White v Benjamin* was handed down on 30 March 2015. The trial judge had rejected the plaintiff's express evidence that she would pay for such services in the future because her husband was a busy man and the current arrangement was unfair on him. In

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[16] [2014] NSWCA 193

[17] [2014] NSWCA 325

overturning this decision, the Court of Appeal did not cite *Howarth* but referred at [18] to the following passage in *Miller v Galderisi*:

> *'There is no reason in principle why, if the evidence justifies it, damages may not be awarded in respect of a need for commercial domestic assistance likely to arise in the future after the availability of gratuitous assistance ceases'.*

Although prima facie this passage is not inconsistent with *Howarth*, the Court of Appeal went on to say the following at [88] in *White v Benjamin*:

> *'What was required was consideration of the family circumstances, including the fact that Mr White was self-employed and apparently busy; that his wife was unable to do heavy cleaning and hanging out clothes; and that cleaning services are not the kind of personal domestic assistance which one spouse may prefer to obtain from another. Rather they are services which are readily available and availed of by those who can afford them and who are otherwise engaged in remunerative employment or have a disability'.*

On the basis of the plaintiff's evidence that if funds were available, she would pay for domestic assistance rather than burden her husband with additional tasks, the claim for future commercial care in *White v Benjamin* was allowed on appeal. This, however, is not quite the same test, or burden of proof required, in *Howarth* (and the cases that followed), namely that it must be established, on balance, that the assistance currently provided by the plaintiff's husband would become unavailable at some point in the future (through either a change in circumstances or an unwillingness by the plaintiff's husband to continue the current arrangement).

The Court of Appeal, in *White v Benjamin*, considered that *Miller v Galderisi* continues to provide guidance as to the '*proper approach to a claim for damages for commercial domestic assistance*'. However, it qualified its earlier statement in *Miller v Galderisi* that it was '*not appropriate ... to simply pluck a figure out of the air because there is a remote, though not entirely fanciful chance of the need for assistance*'. The Court of Appeal in *White v Benjamin* said at [88] that this statement was made in a context where the Court accepted that there was '*no evidence that as a result of the injury suffered..., or indeed for any reason, [the plaintiff] required, or would require, commercial domestic assistance*', as there was '*no evidence that this gratuitous assistance would cease at some time in the future*'. It observed that in *Miller v Galderisi* the Court stated:

> *'There is no reason in principle why, if the evidence justifies it, damages may not be awarded in respect of a need for commercial domestic assistance likely to arise in the future after the availability of gratuitous assistance ceases'.*

Although there seems to be some attempt here to reconcile the decision in *White v Benjamin* with the Court's earlier decision in *Miller v Galderisi*, there nonetheless seems to be an inconsistency in the approach taken in *White v Benjamin* to that taken in other Court of Appeal decisions such as *Howarth* and *ESC* (which were not cited in *White v Benjamin*), which expressed a clear statement of principle that to obtain damages for future commercial assistance a plaintiff had to show not only a need for paid commercial care but also that gratuitous assistance to satisfy the need was unavailable (or would become unavailable).

There can be a discount for vicissitudes

Often, whether a discount should be applied to damages for future domestic assistance (both gratuitous and commercial) is overlooked. A number of recent decisions on future domestic assistance are also welcoming to defendants and their insurers, as they demonstrate that there can be a reduction to damages for future domestic assistance for vicissitudes.

In the past, trial judges have often declined to make any such reduction on the basis that the life expectancy tables already have their own inbuilt discounting mechanism. What is often overlooked, however, is that this does not prevent a discount from being applied because of a range of factors.

Factors that can lead to a discount may include the chance the care will not be needed or the likelihood that age will create a similar need for domestic assistance in later years. The possibility that intervening medical issues (unrelated to the accident), a diminished life expectancy (based on a medical history), or deterioration of pre-existing conditions will overwhelm any needs created by the accident, may also justify a discount.

Of late, the Court of Appeal has seen fit to discount damages for future domestic assistance on a number of occasions, for the probability of such future variables.

In *Miller v Galderisi*, for example, although ultimately no damages were allowed, the Court of Appeal found that the trial judge's assessment of damages for future domestic assistance failed to take into account:

- the plaintiff's medical history, which demonstrated a significant possibility that he would not survive for his projected life expectancy;
- the fact that a large proportion of the plaintiff's disabilities resulted from a pre existing condition rather than the subject accident and that there was a significant possibility that further ill health would overwhelm the needs created by the accident; and
- that age alone (in light of the plaintiff's health) is likely to create a similar need for domestic assistance, in later years, to that created by the accident.

The Court of Appeal stated that the amount awarded must be discounted on account of the above factors, although the appropriate reduction was not specified.

In *Boral*, the Court of Appeal was of the view that the 15% reduction for vicissitudes made by the trial judge was insufficient. The Court of Appeal said at [96]:

> *'...the suggestion that, absent the accident, the plaintiff would have expected, subject only to the normal reduction for vicissitudes, to continue to carry out the domestic activities referred to until the age of 85 was implausible. A greater reduction for the vicissitudes, particularly of age, was required'.*

More recently, in *Metaxoulis v McDonald's Australia Ltd* (***Metaxoulis***)[18] the Court of Appeal also considered at [81] that:

> '...*there must be a significant reduction for vicissitudes, both to take account of normal ageing processes and to take account of the significant likelihood that the appellant would have required domestic assistance at an earlier stage because of his existing injury*'.

The Court of Appeal adjusted damages in *Metaxoulis* by way of a proportionate reduction in accordance with the principles in *Malec v JC Hutton Pty Ltd*[19]. The ultimate discount applied was 40%.

Checklist

Often, when internally assessing claims for domestic assistance, there is only a brief assessment of whether, for gratuitous claims, the intensity and duration thresholds are met, and nothing more. Claims for commercial care are often only looked at in a cursory way, on the basis they are not regulated by statute (the general impression being that there is not much a defendant can do to rebut such claims).

Recent decisions, however, demonstrate that careful attention should in fact be given to a number of factors in an assessment of damages for domestic assistance. Among other things, the following ought to be considered:

For gratuitous claims:

- Are both the intensity and duration thresholds met?
- Before or after both thresholds have been met, are there any periods (past or future) in which the intensity threshold is not met (ie the assistance has dropped, or will drop, below 6 hours per week)?
- Have any periods of hospitalisation been included? If so, once excluded, are the thresholds still met (in particular, the 6 consecutive months threshold)?
- Is there any other intervening event breaking up the duration (ie 6 consecutive months) threshold (eg the assistance provider may have gone away for period or fallen ill themselves, or there may be a period of incarceration)?

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[18] [2015] NSWCA 95

[19] [1990] HCA 20; (1990) 169 CLR 638

- Is there evidence that the assistance was in fact provided sufficient to reach the thresholds? Is any of the evidence (eg expert evidence) objectionable?
- Can any of the tasks making up the claim be severed on the basis they are for the benefit of other members of the household and are more appropriately categorised as assistance to others? If so, does this impact whether the section 15 claim meets the thresholds?
- Can a discount be applied to the future claim to account for age, pre-existing conditions, reduced life expectancy or other such factors?

For commercial assistance claims:

- Is there evidence to support a contention that the present level of gratuitous assistance will no longer be available at some point in the future?
- Can a discount be applied to future domestic assistance to account for age, pre-existing conditions, reduced life expectancy or other such factors?
- Commingling of tasks should also be considered.

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