

Harrison v Melhem [2008] NSWCA 67

For many years it has been settled law in NSW that Section 15 of the Civil Liability 2005 (and the almost identically worded Section 128 of the Motor Accidents Compensation Act 1999) precluded recovery to compensation for gratuitous care services unless both requirements stipulated in that section were satisfied: ie that the care had been provided for more than 6 hours per week **and** for more than 6 months. This interpretation was confirmed by the Court of Appeal in *Geaghan v D'Aubert*ⁱ (“*Geaghan*”) and *Roads and Traffic Authority v McGregor*ⁱⁱ (“*McGregor*”).

The Court of Appeal has now overturned its own decisions in the cases of *Geaghan* and *McGregor*, in the recent decision of *Harrison v Melhem*ⁱⁱⁱ (“*Harrison*”). This significantly changes the interpretation of the abovementioned sections and consequently the entitlements of plaintiffs who bring claims under those Acts.

THE FACTS

The plaintiff/appellant was injured as a result of the negligence of an employee (first respondent) of Melhem Civil Pty Ltd (second respondent). He made a claim for damages including damages for gratuitous care.

At first instance Associate Justice Harrison awarded the plaintiff damages including an award for gratuitous care. This claim was essentially broken down into two periods: a claim for 11.5 hours of care for 130 weeks, and then a claim for 4 hours per week from 14 September 2001 to the date of Judgment and into the future.

After purporting to make this award the Judge was taken to the decisions of *Geaghan and McGregor* and, recognising that she was bound by those decisions, Her Honour limited the award for gratuitous assistance to the first period that exceeded both the 6 hours per week and 6 month thresholds in s15 of the Civil Liability Act.

The plaintiff appealed on a number of issues including the correctness of the interpretation of s15 of the Civil Liability Act.

THE LEGISLATION IN DISPUTE

Section 15(3) of the Civil Liability Act states as follows:

“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 the Motor Accidents Compensation Act states as follows:

“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.”

INTERPRETATION OF S15 OF THE CLA AND S128 OF MACA

On appeal, the majority (per Spigelman CJ and Mason P, Beazley and Giles JJA agreeing) held that the decisions in *Geaghan* and *McGregor* should be overruled for the reason that “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.”^{iv}

Mason J stated (at 181): “... 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 (ie more than six months) **or** that the services are provided for a significant period of time (ie for more than six hours per week).”

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.”^v

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

There was also considerable discussion in this case about statutory interpretation, parliamentary intention, and the use of extrinsic materials, but that is beyond the scope of this case note.

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 6 hours per week **or** for more than 6 months. For example, the threshold can be met by care that is provided for 10 hours a week for only 2 months, or by care that is provided for only 2 hours a week for 8 months.

Passing this threshold essentially opens a gateway to enable plaintiffs to also claim subsequent periods of care that would not in themselves exceed the threshold.^{vi} Accordingly, using the examples above, if care was later provided

that was for less than 6 hours per week and for less than 6 months this care would still be compensable as the thresholds would have already been satisfied.

However, Mason P makes it clear that in order to pass the initial 6 month threshold it is necessary for the 6 months to run together.^{vii} Accordingly, the threshold would not be met by a plaintiff who had received say 5 hours of care per week for 5 months, and then a subsequent period of 5 hours of care per week for 2 months.

It is important to note that the decision of *Harrison* has not changed the existing interpretation of s15B of the Civil Liability Act regarding damages for loss of capacity to provide domestic services (ie, *Sullivan v Gordon* claims). The wording of this section is different to the wording in the sections that were the subject of *Harrison*, and are not affected by this decision. Accordingly, for claims under s15B of the Civil Liability Act **both** thresholds will have to be met in order to qualify for damages.

ⁱ [2002] NSWCA 260. This case involved an interpretation of s72 of the Motor Accidents Act 1988 which was in essentially the same terms as s128 of the Motor Accidents Compensation Act 1999.

ⁱⁱ [2005] NSWCA 388. This case involved an interpretation of s15 of the Civil Liability Act.

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^{iv} Ibid at 157 per Mason J

^v Ibid at 20 per Spigelman CJ

^{vi} This is implicit from the findings of Spigelman CJ at 20.

^{vii} *Harrison v Melhem*, above n3, at 181