Restoration of *Sullivan v Gordon*

By Andrew Stone

In *Precedent* No. 71 (November/December 2005), I summarised the High Court decision in *CSR Ltd v Eddy* [2005] HCA 64, noting both the High Court's comments that it was for individual state parliaments to legislate to create a right of compensation for the loss of the capacity to care for others,[1] and the efforts of the Australian Lawyers Alliance to lobby the NSW government on this issue.

Those lobbying efforts have borne some fruit, albeit not as sweet as might have been hoped for.

The *Civil Liability Amendment Act* 2006 provided a limited statutory right to *Sullivan v Gordon* damages, set out in the new s15B.

Damages can be awarded for the loss of capacity to care for a dependant. A 'dependant' is fairly broadly defined to include a husband or wife, a de facto partner, a child, grandchild, sibling, uncle, aunt, niece, nephew, parent or grandparent of the claimant, along with any other person who is a member of the claimant's household. The definition also includes any child of the plaintiff who is in utero at the time of the accident and born afterwards. This somewhat bizarre provision is explained below.

There are effectively four restrictive provisions in s15B on the recovery of damages for gratuitous services provided to others.

First, the plaintiff must have provided the services to the dependants before the injury occurred. A person becoming dependent on the plaintiff subsequent to the accident cannot form a basis for the recovery of damages under s15B.

The provision has a strangely capricious effect. Imagine that a plaintiff's partner has had a stroke, creating a need for the plaintiff to care for them. If that stroke occurred two days before the plaintiff was injured in a motor vehicle accident, rendering them incapable of providing that care, then *Sullivan v Gordon* damages are recoverable. However, if the partner has the stroke two days after the motor vehicle accident, no damages under s15B are recoverable.

The Alliance lobbied the NSW government regarding this unfair provision. One of the examples used was a child born on the day preceding an accident compared with a child born the day after. The parent of the first child recovers *Sullivan v Gordon* damages for an inability to care for their child, while the parent of the later child misses out. The Alliance submission was perhaps taken too literally, as the government proceeded to extend the definition of dependant to the child who was existent in vitro pre-accident and was subsequently born.

It is interesting to look at the debate over this amendment in the NSW Legislative Council. Perhaps missing the point, the anti-abortion groups were excited that the NSW Government was at last recognising the rights of the unborn!

From any perspective the outcome is still capricious. Why should any distinction be drawn between the care needs of a child born within nine months of an accident and a child born 12 months post-accident?

The second restrictive provision is that care is recoverable only where the dependant was not, or will not be, capable of performing the services for themselves because of their age or physical or mental incapacity. The effect of this provision is that there can be no claim for an inability to do the washing or cook meals for grown children who still live at home. There will be no damages for an inability to iron a spouse's shirts or wash their car. These are all services that a normal adult ought to be able to perform for themselves, albeit not very well if they lack experience or practice.

The third restrictive provision has already been adopted in NSW in relation to the direct personal care needs of a plaintiff. The *Sullivan v Gordon* care must extend for at least six hours per week and for a period of at least six consecutive months.

It is important to note that the *Sullivan v Gordon* threshold cannot be combined with the current *Griffiths v Kerkemeyer* threshold. Accordingly, a claimant who requires five hours of personal assistance per week and five hours of assistance to replace care previously provided to dependants will miss out under both thresholds. Conversely, the claimant who requires seven hours per week assistance for both will recover the full fourteen hours.

Finally, the need for the services to be provided must be reasonable in all the circumstances.

The foregoing is a brief overview of the provisions of the new s15B. It is certainly better to have some restricted *Sullivan v Gordon* rights than none at all. It is extremely pleasing that the provision is not retrospective and is not restricted to accidents occurring after proclamation of the amendment. Rather, the amendment applies to any case that has not been settled or determined as at 20 June 2006.

No doubt, the Australian Lawyers Alliance will continue to raise with the NSW government the potential unfairness of the more restrictive provisions of the new s15B of the *Civil Liability Act* 2002. ■

Note: **1** *Sullivan v Gordon* (1999) 47 NSWLR 319.

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