COMPENSATION FOR LOSS OF CAPACITY TO WORK IN THE HOME

*REGINA GRAYCAR**

I. Introduction

Two recent cases highlight a number of the issues raised by women's attempts to obtain common law damages when after an injury, they lose their capacity to work in the home.

In *Maiward* v. *Doyle*,[1] the forty-year-old plaintiff, Mrs. Doyle, had been in paid employment throughout most of her marriage and like many women had a second unpaid job which involved her carrying out virtually all the housekeeping and domestic services for a household comprising her husband, herself and their four children. She suffered serious nervous depression as a result of a motor vehicle crashing through the wall of her house into a bedroom which she was occupying at the time. As a result, her capacity to manage the household was seriously impaired. However, the W.A. Full Court held (Wickham, J. dissenting) that her award, which had totalled $235,313.10 should be reduced by the full amount allocated to the past and future cost of household assistance, and the husband's damages, in a related action for loss of consortium, be increased to $10,000.

In sharp contrast in *Hodges* v. *Frost*[2] the Full Federal Court dismissed an appeal from the A.C.T. Supreme Court against a judgment of Kelly, J. awarding damages to Mrs. Frost for the cost of domestic assistance when the work in question was gratuitously performed by her husband. An award of $15,000 for domestic services rendered to the date of trial and $23,000 for future domestic services was upheld, as was an award of $12,500 to her husband for loss of consortium. Mrs. Frost was 55 at the time she was injured in a motor vehicle accident, as a result of the defendant's negligence. Like Mrs. Doyle, she worked outside and in the home. Before the accident, she did her own housework and preferred her husband not to do it. After the accident, her husband began to do the housework which involved the vacuum-cleaning, some washing, most of the ironing and cooking the evening meal.

The trial judge, Kelly, J., concluded that the husband spent about fifteen hours per week on this work and using figures supplied by the

---

* LL.B.(Hons.) (Adel.) LL.M. (Harv.), Lecturer in Law, University of New South Wales; Barrister of the Supreme Court of New South Wales.

I would like to thank Professor Michael Chesterman of the Australian Law Reform Commission, for his thoughtful comments on earlier drafts, which were invaluable to me. My colleagues Owen Jessep, Mark Aronson and John Brownie Q.C. also provided some very helpful advice and comments on this very lengthy paper, and I thank them for their considerable patience and interest.

[1] [1983] W.A.R. 210.

[2] (1984) 53 A.L.R. 373.

A.C.T. Emergency Housekeeper and Home Help Service Inc., awarded Mrs. Frost compensation for both past and future loss in accordance with the principles of *Griffiths* v. *Kerkemeyer.*[3] This was upheld by the Full Federal Court on appeal.

These two cases (and several others discussed in this article) raise a number of different and often inextricably related issues. Central to their consideration is the following question: if a woman suffers an injury which destroys or impairs her capacity to perform domestic services, particularly those services provided for others, how should the loss be viewed? Is the loss her own, or must it be attributed to the former recipients of the services (or apportioned accordingly)? Is an action for loss of consortium an appropriate way of compensating such a loss? If so, what effect will the statutory abolition in N.S.W. of the action for consortium have?[4] Will it result in courts' reconceptualising the loss of capacity as a loss to the primary accident victim—or will that loss henceforth go uncompensated? If it is accepted that the loss is the woman's loss rather than that of some third party, using the common law heads of damage, is the loss to be classified as an economic loss, or should it be viewed as non-economic—a loss of amenity only? How does the principle of *Griffiths* v. *Kerkemeyer*[5] affect these questions? Does that principle apply to cases where the gratuitous services provided are of a domestic or household, rather than nursing character? If it does, must a distinction be drawn between gratuitous household services provided solely for the benefit of the plaintiff, and those which benefit the family as a whole? Should special considerations, in particular, a principle of "reasonableness" apply in cases where the gratuitous services are performed by family members as part of the "ordinary currency of family life and obligation"?[6] These questions are important not only for the development of common law damages principles but also because they are central to the establishment of any statutory personal injury compensation scheme.[7]

II. If a Woman Suffers an Injury Making Her Less Able or Unable to Perform General Household Functions, How Should That Loss be Characterised?

A number of different approaches have been taken by courts in answering this question. One approach has been to look to the action for loss of consortium for support for the proposition that a loss of this kind is in fact suffered by the husband. A variant is to view the loss as being suffered by members of the family generally. Alternatively, the loss may be viewed as one suffered by the primary accident victim herself. If this view is taken, there is still divergence of opinion as to how the loss is classified, *viz.*, whether it is viewed as economic or non-economic loss.[8]

---

[3] (1977) 139 C.L.R. 161.

[4] Law Reform (Marital Consortium) Act, 1984, (N.S.W.) (Act No. 38, 1984, assented to 13 June 1984). See *infra*, Section III.

[5] *Supra* n. 3.

[6] *Kovac* v. *Kovac* [1982] 1 N.S.W.L.R. 656, 668 *per* Samuels, J.A.

[7] Such as that currently under consideration by the N.S.W. Law Reform Commission. See *A Transport Accidents Scheme for New South Wales*, Working Paper, May 1983. Some of these issues have been discussed recently by J. F. Keeler, "Three Comments on Damages for Personal Injury" (1984) 9 *Adel.L.R.* 385, section 2, "Nursing Care and Domestic Services", at 392 *et. seq.*

[8] See Section IV *infra.*

A recent case demonstrates the difficulties. In *Burnicle* v. *Cutelli*[9] Reynolds, J.A. reformulated the trial judge's award for partial loss of capacity to carry out housework as having three quite distinct components:

> (a) a loss to the family of part of [the plaintiff's] services . . .
> (b) a loss to herself by inability to fully satisfy her personal needs in daily life which would require services . . .
> (c) a personal loss of the capacity to perform services for others voluntarily.[10]

Later in his judgment, he refined this by stating that the plaintiff's injuries gave rise to two losses: "one to the recipient of the services and the other to her personally".[11]

The two-fold characterisation crystallises the central question involved: if the relevant loss is to be compensated at all, how is it to be characterised?

In most cases, a woman's incapacity to do housework in fulfilment of *her own needs* is treated as her own loss and compensated by way of a primary claim, i.e., through a direct action by the accident victim against the tortfeasor. More problematic, and the subject of discussion in this section, is incapacity to do housework for a husband, children, or other household members. This latter incapacity is often distinguished from the former. Sometimes it is treated as a loss to others and thus compensable, if at all, only by way of a secondary claim (i.e. an action by someone who has a relational interest). Some courts have treated this as a primary loss, making no distinction between loss of capacity to do housework for oneself, and housework for others. These approaches will be considered in turn.

(a) *Characterisation as a loss to others:*

One of the clearest formulations of this view is in the 1957 case of *Pegrem* v. *Commissioner of Government Transport*.[12] There the plaintiff had suffered an injury making her less able to carry out heavy household chores. She proved the existence of an agreement to pay her sister-in-law five pounds per week for assisting with that work. The jury had made an award of £4180 in her favour, which included an amount for the possibility that she would in future be obliged to obtain paid assistance in the household.

The Full Court ordered a new trial. After stating that there was no evidence of economic loss, Street, C.J. said:

> . . . the burden rests on a husband to provide his wife with what is necessary for her to carry out her household duties, and if she is unable to do so because of an injury, then presumably the burden rests on him of supplying that deficiency. If the plaintiff's husband is compelled to make payments of that sort because his wife has been injured through the appellant's negligence, then he can obtain com-

---

[9] [1982] 2 N.S.W.L.R. 26 (Court of Appeal, N.S.W.).
[10] *Id.* 27.
[11] *Id.* 28.
[12] (1957) 74 W.N. (N.S.W.) 417.

> pensation for that loss to which he has been put by reason of his wife's injury, and in fact we are told that he has instituted proceedings of that nature.[13]

In other words, *her* physical impairment is to be compensated (other than by an award for non-economic loss), by way of action *of the husband* for loss of consortium.

This approach was followed in *Simmonds* v. *Hillsdon*[14] where Brereton, J. drew a distinction, much used in recent cases, between services to others and services for the injured plaintiff herself:

> . . . as to the housekeeper, what the plaintiff was entitled to was the doing of so much of the housekeeping as related to herself; she could not claim for a sum to provide for her husband and son what she had previously done for them, although her inability now to look after them in this way and her deprivation of the satisfaction she no doubt had in so doing might sound in general damages.[15]

A case which tellingly demonstrates the scope for judicial manipulation in attributing this loss is *Regan* v. *Harper*.[16] There the husband, wife and two children were all injured in a motor vehicle accident—the husband had been driving at the time. Concerned that he would be found to be guilty of contributory negligence, he argued that those parts of what might have been his award for loss of consortium attributable to his *wife's* loss of capacity ought instead to be paid to her directly, with the object of avoiding the reduction of that part of the award by the proportion to which the accident was his fault. He was found to have been 10% responsible. Hoare, J. appears to have been fleetingly persuaded by this approach. However, it was,

> . . . the husband who is entitled by law to make the claim. Accordingly, while it is true that in many ways it is the wife's loss, in so far as the claim for consortium is concerned, it would not be proper to divide it up and to remove from the consortium claim an item of damages relating to the provision of alternative household help and add it to the wife's claim.[17]

But Hoare, J. divided the consortium award to ensure the exclusion of any amount referable to the wife's provision of services to the severely injured infant. However, there is an indication that his attitude to the husband's argument may have been different had the wife been working outside the home at the time of the accident:

> Had the second plaintiff's claim been based at least to some extent on loss of actual earnings then due allowance would have to be made

---

[13] *Id.* 419.

[14] [1965] N.S.W.R. 837.

[15] *Id.* 839. But c.f. *Robinson* v. *Riley* [1971] 1 N.S.W.L.R. 403 (N.S.W.C.A.). There, the plaintiff was a woman of 55 working full-time outside the home at the time of the accident. The court held that she could properly include in *her* claim some allowance for the cost of assistance in the home. Asprey, J.A. noted that whilst normally this was the husband's responsibility, here, the husband was eight years older than the wife, on the point of retirement, and already suffering a disability from an earlier accident. These factors led him to make the award directly to the injured plaintiff herself.

[16] [1971] Qd.R. 191.

[17] *Id.* 194-195.

> for that loss of earnings and likewise allowance would have to be made for the loss of earning capacity. It would not be too long a step to also allow for "replacement labour" in the home.[18]

This very loose conceptualisation of the loss was exemplified in the pre-*Griffiths* v. *Kerkemeyer* decision in *Kealley* v. *Jones.*[19] Prior to the accident, the plaintiff had worked full-time as a clerk and had also performed all of the domestic work. After the accident her injuries prevented her doing both jobs. Moffitt, P. noted that:

> The losses of husband and wife are interrelated, because, if she directed her residual capacity to her outside employment, the loss, or the greater part of it, would fall on the husband by reason of her inability then to attend to her household duties; while, if she directed her residual capacity to her household duties, the loss to her husband would be less and her loss of earnings greater.[20]

The Court of Appeal's most recent attempt to grapple with this issue has already been noted.[21] Reynolds, J.A. considered problematic,

> . . . cases where the diminution of capacity has not been productive of loss of income to the plaintiff in money or money's worth—where it has not been productive of financial loss.[22]

The injured plaintiff in that case was, in his view, entitled to recover the market cost of supplying the services which she had previously performed *for herself.* The difficulty arose from what he saw as a claim for compensation for the "loss of capacity which was formerly exercised *voluntarily* for the benefit of her family . . ."[23] i.e. a loss of capacity to serve others. As it turned out, an unmarried daughter living at home had been able to assist in caring for her mother and had provided general domestic services to the household, of the kind previously provided by the plaintiff. She was, however, seeking full-time employment, though her attempts had to the time of trial been only partially successful.

The three members of the Court of Appeal (Reynolds, Glass and Mahoney, JJ.A.) each found that the damages awarded at trial ought to be reduced, but they applied different reasoning. Reynolds, J.A. was concerned with whether the injury was "productive of financial loss", which is redolent of Gibbs, J.'s test in *Griffiths* v. *Kerkemeyer.*[24] However, he did not consider that this case fell within the principle of *Griffiths* v. *Kerkemeyer*, which in his view, is concerned with "the compensation of an injured person in whom has been created a need, the satisfaction of which calls for the provision of services for which it is reasonable to pay".[25] By contrast, here the issue was how to compensate the plaintiff

---

[18] *Id.* 195.

[19] [1979] 1 N.S.W.L.R. 723. (Decided in 1976.)

[20] *Id.* 728. In the event, Mrs. Kealley had elected to continue her full-time employment (motivated, at least to some degree, by heavy mortgage commitments) so the residual loss was then treated as part of the husband's loss of consortium. See *infra*, Section III.

[21] *Burnicle* v. *Cutelli, supra* n. 9.

[22] *Id.* 27.

[23] *Ibid.* (emphasis added).

[24] *Supra* n. 3. This case is discussed in detail in both Sections V and VI.

[25] *Supra* n. 9 at 28.

in respect of a loss which he classified as a loss to others. Mahoney, J.A. also considered *Griffiths* v. *Kerkemeyer* inapplicable, holding that the public policy on which it is based does not extend to "requiring that a plaintiff be compensated because others have lost the benefit of the services she would have provided to them."[26] But he also (unlike Reynolds, J.A.) squarely addressed the question of whether, under this approach, the lost services would ever be the subject of a compensation award. "Under the existing law, the members of the family to whom the services were rendered (other than, perhaps, the husband), cannot claim against the defendant for the loss of them."[27]

Glass, J.A. took a different route but arrived at the same conclusion. After surveying the *Griffiths* v. *Kerkemeyer* principle at some length, he addressed the defendant's submission to the effect that no matter how necessary it may be for the services to others to be provided at a cost, they arise from the needs of others and thus do not fall within the *Griffiths* principle. Glass, J.A. preferred the English Court of Appeal's approach in *Daly's Case.*[28] He concluded that he was unable to see why the *Griffiths* doctrine should allow recovery for a "need for nursing services due to an impaired capacity to do for oneself but should exclude the need for domestic services due to an impaired capacity to do for one's family".[29] Having come to that conclusion, he nonetheless joined with his brethren in upholding the appeal, accepting the defendant's submission that it was not reasonably necessary to procure the daughter's housekeeping services at a cost.[30]

Of the three judgments, only that of Mahoney, J.A. comes close to dealing with the otherwise ignored issue of who will bear the financial loss which, in effect, *this household* has suffered as a result of the plaintiff's injury? Reynolds, J.A., in determining that the plaintiff's injury has not been productive of financial loss[31] leaves that loss to lie where it falls. However, his somewhat literal view is not applied in respect of her inability to provide for herself—there, though she had not lost income as such, he encountered no difficulty in quantifying the loss in money's worth, as the principle in *Griffiths* v. *Kerkemeyer* permits.

The importance of *Burnicle* v. *Cutelli*[32] is that it illustrates the existence of a large gap in compensation—there is a loss for which no (or inadequate) compensation is paid. Moreover, it is a loss that sounds financially. The twenty-one-year-old daughter could hardly be expected to remain at home as unpaid housekeeper to her family and nurse to her mother indefinitely. When she went, someone would have to purchase those services at a real cost—a cost for which the court failed to provide.

The Western Australian Full Court in *Maiward* v. *Doyle*[33] followed *Burnicle*, but not without a vigorous dissenting judgment from Wickham,

---

[26] *Id.* 37.

[27] *Id.* 36. The judgment provides no indication of whether the husband had brought an action for loss of consortium.

[28] *Daly* v. *General Steam Navigation Co. Ltd.* [1980] 3 All E.R. 696. (See *infra*, text at n. 46.)

[29] *Supra* n. 9 at 34. (This issue is discussed *infra*, Section V.)

[30] *Id.* 35.

[31] "The diminution of capacity has not been productive of loss of income to the plaintiff in money or money's worth". *Id.* 27.

[32] *Supra* n. 9.

[33] *Supra* n. 1.

J. He had no difficulty in answering in the affirmative the question he posed of whether a loss of working capacity as a housekeeper was a loss of earning capacity. "[S]he could have earned money in that way had she chose or, if and when relieved of her housekeeping duties, could have earned money in some other way."[34] Given a loss of earning capacity, was it or might it be productive of financial loss? No actual money had been paid out, because members of the household had done the housework but that did not conclude the matter. Like Glass, J.A. in *Burnicle*, Wickham, J. directly applied the test of Gibbs, J., as he then was, in *Griffiths* v. *Kerkemeyer* to the case, *viz.*,

> . . . First, is it reasonably necessary to provide the services, and would it be reasonably necessary to do so at a cost? If so, the fulfilment of the need is likely to be productive of financial loss. Next, is the character of the benefit which the plaintiff receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer? If not, the damages are recoverable.[35]

The cited passage speaks of benefit received *by the plaintiff* and one *could*, he conceded, were one so inclined, divide up the claim between services rendered for the wife herself, and those rendered for the husband and the children, and reallocate some (but not all) to a claim by the husband.[36] Wickham, J. preferred a different approach.

> On the other hand, given the conclusion that the wife has lost an earning capacity which may be productive of financial loss, and the conclusion that it would have been reasonably necessary to replace that loss at cost, and that the gratuitous provision of the replacement ought not to be brought into account in relief of the wrongdoer, then I know of no rule of law which prevents the whole assessment being covered in the one claim by the plaintiff who in fact lost the capacity. This was accepted as being satisfactory without argument in the case of *Bresatz* v. *Przibilla* (1962) 108 C.L.R. 541, 550.[37]

On that basis, Wickham, J. upheld the trial judge's award which had taken into account the cost of providing housekeeping services for the family. He also affirmed the modest award of $6,500 to the husband for loss of consortium.

Olney and Kennedy, J.J. did not agree. Kennedy, J. held that the trial judge's award had involved confusion between meeting the plaintiff's own needs and those of others. By way of illustration, he explained that whilst she was in hospital, no award need be made for outside help as any assistance during that period could only be for the children and the husband, and, in relation to the latter, "any claim with respect to his wife's inability to provide services for him . . . should fall within his own claim for loss of consortium".[38]

---

[34] *Id.* 212.
[35] *Supra* n. 3 at 168-169 (cited at *supra* n. 1 at 210, 212.)
[36] Nonetheless, he expressly disapproved of this approach, calling it hairsplitting.
[37] *Supra* n. 1 at 213.
[38] *Id.* 217.

He did not, however, suggest how the children's needs were to be met in future. In the event, he made an extraordinary factual finding in relation to the plaintiff's capacity for housework:

> She may no longer be capable of cooking, washing and cleaning for the whole of the family, but there is no suggestion that she is incapable of doing so for herself. There is no suggestion of any household needs [of her own] having been created or altered as a result of the accident.[39]

Kennedy, J. held that there is a fundamental distinction between impairment of a capacity to attend to one's own needs, and similar impairment in relation to the needs of others, where the latter is not productive of any financial loss to the injured party. He noted "the general rule" that a third party has no right of action for loss or expense incurred as a result of injury to another person.[40] In common with most general rules, there are exceptions of which perhaps the oldest and most well known is the *actio per quod consortium*, the husband's[41] action for loss of his wife's services and companionship.[42]

In the passage just noted, Kennedy, J. seems to have suggested that recovery under *Griffiths* v. *Kerkemeyer* is also an exception. This can hardly be the case; notwithstanding that the services of third parties figure largely in the quantification of damages under that head, the damages are paid directly *to the primary accident victim* and, moreover, are calculated as referable to the *plaintiff's incapacity*—the third party's services serve an evidential purpose only.

Finally, Kennedy, J. turned to the trial judge's award of $6,500 for the husband's loss of consortium and decided that it was too low—inadequate provision was made for the loss of the wife's domestic services *to the husband* and, he suggested, perhaps also "to the youngest child for whom he [the husband] was under a duty to provide".[43] He increased the award to the husband to $10,000. Whilst this way of dealing with the "child's loss" was convenient here, it cannot meet the situation where the recipients of the services are, for example, elderly parents, de facto spouses, siblings, or other members of a household who previously relied on the plaintiff in that way. It would also be an inappropriate way of dealing with the services to the children if the husband were dead or divorced from the injured wife. None of these persons has a secondary action nor could their "losses" be included in a husband's consortium claim.

Olney, J. also relied on *Griffiths* v. *Kerkemeyer* as the basis for reducing the plaintiff's damages in relation to future housekeeping services.

> Making provision for the cost of necessary full-time personal attention is one thing, but it is a misconception of the principles applied in *Griffiths* v. *Kerkemeyer* to add to that by way of damages the cost of employing household help for looking after Mrs. Doyle's husband and family.[44]

---

[39] *Ibid.*
[40] *Id.* 224.
[41] See *Best* v. *Samuel Fox* [1952] A.C. 716.
[42] See *infra*, Section III.
[43] *Supra* n. 1 at 229.
[44] *Id.* 238.

He agreed with Kennedy, J. in allowing the appeal on consortium.

After dismissing the claims for future household assistance, both Kennedy and Olney, JJ. upheld an award for $60,000 for loss of amenity, noting that Mrs. Doyle had "obviously derived much satisfaction from attending to all of the domestic needs of her family".[45]

(b) *Characterisation as a loss to the victim:*

The alternative approach recognises that it is the victim herself who has suffered the loss.

Perhaps the clearest illustration of this approach is the English Court of Appeal's decision in *Daly* v. *General Steam Navigation Co. Ltd.*[46] There the plaintiff suffered a partial loss of her capacity, *inter alia*, to do housework. While she was in hospital her sister-in-law, who had become part of the household, had undertaken housekeeping work and an amount of £633 in special damages was awarded to cover the cost of her services. Subsequently, the husband had given up part-time employment in order to assist his wife in running their home.[47]

The issue on appeal was not whether the loss was properly classified as the plaintiff's loss or her husband's loss. It was taken for granted that it was her loss, but the dispute concerned the method by which damages should be assessed. Bridge, L.J. had no difficulty in making an award for partial loss of housekeeping capacity as a separate head of damage (though it was assessed differently for the pre-trial and for the post-trial periods).[48]

Templeman, L.J. referred to *Donnelly* v. *Joyce*[49] as authority for attributing the husband's loss of earnings to the wife's award. He agreed with Bridge, L.J. that the award should specifically include an amount for the future cost of providing housekeeping services which Mrs. Daly would not be able to perform in future. The third judge, Ormrod, L.J., expressly agreed with both of the other judges.[50]

In Australia, surprisingly few cases have treated the loss in this way. The Federal Court, however, has twice departed from orthodoxy.[51]

The facts of *Hodges* v. *Frost*, the most recent case to deal with these issues, have already been noted.[52] Kirby, J. (with whom Gallop and Morling, JJ. agreed) saw the central issue to be whether Kelly, J., in the A.C.T. Supreme Court, "correctly applied to the facts of the case the principles enunciated by the High Court in *Griffiths* v. *Kerkemeyer*".[53]

---

[45] *Id.* 239.

[46] *Supra* n. 28.

[47] *Id.* 699.

[48] This is discussed *infra*, Section IV.

[49] [1974] Q.B. 454.

[50] His judgment, however, contains some interesting references to "what the husband has lost", but there is no suggestion that the claim is his, rather than the plaintiff's. *Supra* n. 28 at 703. For a discussion of this case see M. Brazier, "The Cost of Women's Work" (1981) 44 *M.L.R.* 725.

[51] The first of these cases, *Cummings* v. *Canberra Theatre Trust*, Federal Court, Full Court, (unreported), June 18, 1980, is dealt with *infra*, at n. 129.

[52] *Supra*, text at n. 2.

[53] *Supra* n. 2 at 378.

He made it clear that the *Griffiths* principle conceives the issue in terms of primary, not secondary claims.

> [W]hat is being compensated for is the loss of the injured victim's own capacity, not the benevolent activities of relatives and friends. True it is, to put the money value on that loss of capacity, regard is had to the nature, intensity and duration of the gratuitous services. However, the compensation, though calculated with those services in mind, is not for the services but for the loss of capacity which the services may help to evidence.[54]

Using Gibbs, J.'s two-part test set out above, Kirby, J. asked whether, given the reasonable necessity of providing some services, it was reasonably necessary to do so "at a cost".[55] The earlier Federal Court decision in *Cummings* v. *Canberra Theatre Trust*[56] involved a case where monies *were* actually expended on domestic assistance.[57] This was not such a case. Instead of purchasing replacement services, the husband re-arranged his time and did the housework himself. Kirby, J. found that it was open to the trial judge to have decided that "but for the gratuitous intervention of the husband, it would have been reasonably necessary to secure domestic assistance at a cost".[58] In his view, it was inconsistent with principle that damages should only be recoverable in cases where the family members did none of the work, but hired others to perform it.

Kirby, J. squarely addressed the point so frequently taken in recent cases—*viz.*, that a distinction should be made, when awarding damages for the lost capacity, between the capacity to serve oneself, and the capacity to serve others.

> Although it is true, as the defendant contends, that the services of a domestic nature rendered by the husband were partly for his own benefit and only partly for the benefit of the injured wife, it is difficult to disentangle the domestic duties he performed. Somebody had to clean the house and cook the meals. Whilst allowance may be made for the fact that some ironing, washing and other duties were not specifically for the wife's needs, these must be considered marginal. The basic need to perform the domestic duties which the wife . . . so enjoyed before the injury, arose as a result of the disabilities that followed it.[59]

The decision affirms that the loss for which compensation in a case of this kind is sought and provided is a loss of capacity *suffered by the injured person.* Using the gratuitous services provided by others as a

---

[54] *Id.* 380.
[55] *Id.* 386.
[56] *Supra* n. 51.
[57] Even in that case, the minority judge, McGregor, J. held that of the money so expended, only amounts referable to the provision of services *for the wife alone* were recoverable from the defendant. (*Id.* 7 *per* McGregor, J.)
[58] *Supra* n. 2 at 386.
[59] *Id.* 387.

quantifying yardstick by which to measure the loss has, in his Honour's view, caused confusion in which the whole conceptual basis of the award has been submerged and that confusion has led some courts, especially the N.S.W. Court of Appeal, to apply some narrow restrictions onto recovery under *Griffiths.* These purported limitations on recovery were also directly addressed and rejected by Kirby, J. in *Hodges* v. *Frost.*[60]

Kirby, J. reaffirmed his view that the relevant loss is that of the wife when he was considering the related action, the husband's claim for loss of consortium, a claim he approached with evident reserve. The two appeals were brought together—the husband's "defensively"[61] but Kirby, J. made it clear that insofar as the defendant was concerned, a successful appeal might have been at best, a pyrrhic victory.

> If, as the defendant contended, the loss and inconvenience suffered by the husband should form compensation in his action for loss of consortium by way of general damages, again the transfer of part of the compensation to the husband's verdict would not avail the defendant in the aggregate amount payable . . . The only relevance, in practical terms, of a *reassignment* of part of the verdict would be a possible relevance as to costs.[62]

Kirby, J. rejected the contention put by the defendant that compensation in respect of gratuitous services is payable only in the husband's action. He noted that there may be,

> . . . reasons of policy for resisting the suggestion that gratuitous services in a domestic situation should be pursued, if at all, in the action for loss of consortium. First, it ignores the new authority clearly laid down in *Griffiths* v. *Kerkemeyer.* Secondly, it ignores the principle of compensating the injured victim for a loss of capacity for which reference to gratuitous services is simply used as evidence. Thirdly, the action for loss of consortium is in many respects anomalous. . . . It seems too late now to breathe life into this legal antiquity as a vehicle for compensating the wide range of persons who offer gratuitous assistance to modern accident victims and who are now within the protection of the rule in *Griffiths* v. *Kerkemeyer.*[63]

In the event, Kirby, J. found that there was no appealable error. Returning to his emphasis on reallocation, he concluded,

> . . . whether the husband's efforts merely provide the means to measure the wife's need amounting to her loss of capacity compensable in her case or a separate head of loss compensable in his case for loss of consortium, is not a matter that is necessary to

[60] *Id.* 385 (discussed *infra*, Sections V and VI.
[61] *Id.* 389.
[62] *Ibid* (emphasis added). This point is discussed *infra*, at text preceding n. 77 *et. seq.*
[63] *Id.* 389-390.

determine in this appeal. There is no overlap or double accounting between the two verdicts.[64]

(c) *Discussion:*

It is clear from consideration of the foregoing cases that the problems caused by loss or impairment of housekeeping capacity challenge the conventional basis of awarding common law damages in several respects. While it is well established that at common law, the major component of damages for economic loss is that part attributed to loss or impairment of earning capacity, it is also well established that these assessments are most commonly made by reference to demonstrable wage loss.[65] For women, this raises two quite discrete problems. The first goes to the question of how courts should assess damages under this head for people unable to demonstrate wage loss, either because they are temporarily out of the paid workforce, or those who for various reasons (e.g. childbearing, being financially supported by others, etc.) have not or not as yet entered that workforce or have become too old to participate in it.[66] That is a very important issue but one beyond the scope of this article. For present purposes, the central problem, whilst related to the first is nonetheless a different one—*viz.*, how, in terms of traditional common law heads of damage, can a loss of housekeeping capacity as such be conceptualised (rather than quantified)?

There are a number of possible approaches. First, one can see housekeeping as a function performed solely or largely for the benefit of others, in which case a loss or impairment sounds in damage to *others*. But there are several objections to this view. For damages purposes, perhaps the most central is that of those "others", until 1984 only the husband (and the wife in S.A.) had a right of action in respect of that loss. Now in N.S.W. even the husband no longer has such an action.[67] Accordingly, on that view, such a loss goes largely uncompensated.

Alternatively, the loss can be seen as one suffered by the primary accident victim, the approach taken in *Daly* and *Hodges*. But even using

---

[64] *Id.* 390.

[65] See *Graham* v. *Baker* (1961) 106 C.L.R. 340, 347. See also H. Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed., (Butterworths, Sydney, 1983), Chapter 5; P. S. Atiyah, "Loss of Earnings or Earning Capacity" (1971) 45 *A.L.J.* 228. This focus upon demonstrable wage loss shows that the common law damages system gives considerable preference to wage-earners, in particular for the earners of large salaries. This issue is discussed critically by M. R. Chesterman "Proposals to Modify the Common Law", Research Paper for N.S.W. Law Reform Commission, Accident Compensation reference, November, 1983, Chapter 2. The N.S.W. Law Reform Commission, in its final report on transport accident compensation, has drawn a distinction, for its purposes, between "earners" and "non-earners": see *A Transports Accidents Scheme for N.S.W.*, October 1984, Chapter 7 (thereafter Final Report 1).

[66] Problems that arise out of this question are canvassed by Chesterman, *supra* n. 65, Chapter 3. Without expressing a preference for any of them, Chesterman outlines the three basic options available as:

(i) imputing an opportunity cost (what the person would have earned on the open market),

(ii) evaluating the loss by imputing deemed earnings from the husband to the wife, by way of a notional internal transfer, and

(iii) using a replacement cost, or substitute services approach: *Id.*, paras. 3.3.6-3.3.10.

See also K. Clarke and A. Ogus, "What is a Wife Worth?" (1978) 5 *Brit. Jo. Law and Soc.* 1; K. O'Donovan, "Legal Recognition of the Value of Housework" (1978) 8 *Family Law* 215; K. Cooper-Stephenson, "Damages for Loss of Working Capacity for Women" (1979) 43 *Sask.L.Rev.* 7; F. Pottick, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978) 50 *Colorado L. Rev.* 59.

[67] Law Reform (Marital Consortium) Act, 1984 (N.S.W.), discussed *infra*, Section III.

that approach, courts have still managed to distinguish this kind of loss from the clearly economic earning capacity-type loss by classifying it as a loss of amenity (see Section IV). The difficult question is how to define a loss of capacity to do domestic labour in a way which makes it comparable to the loss of capacity to work outside the home, so that it can be compensated in the same way. What that question necessarily involves is an acceptance that for damages purposes, the relevant focus should be upon the capacity to work, for it is impairment of that capacity which causes need and consequent financial loss. What most of the cases have failed to recognise is the economic nature of housework and the inter-relationship of outside productive work and domestic productive work.

It will be argued in this article that the nature of that relationship is essentially economic. That is the premise upon which this analysis of the relevant case law is based, a premise supported by the following statement of principle by Murphy, J. in *Sharman v. Evans*:

> The expression "loss of earning capacity" does not precisely describe this element of loss in its modern application. *What is measured is the impairment or destruction of the capacity to engage in work that is economically valuable, whether it would be paid for in money or not. It is a loss of working capacity sometimes referred to as loss of economic capacity.* There is a discernible factor of economic loss in loss of ability to do non-earning work of economic value. . . . A woman who loses her capacity to make the usual contributions of a wife and mother in a household suffers great economic deprivation. Actions for loss of services correctly treat this as economic injury, but as a loss to the husband on the archaic view of the husband as master or owner of his wife. The economic loss is one of the wife or mother. It is her capacity to work, either in the household or outside, which is affected . . .[68]

III. The Action for Loss of Consortium

Given the clear preference expressed until recently by Australian courts for the view that a woman's loss of capacity to do housework for others in the household gives rise to a secondary, rather than primary claim, it is necessary to devote at least some attention to what Kirby, J. described as "this legal antiquity". The action for loss of consortium is the paradigm case of a secondary claim, one of the very small number of exceptions to the accepted tort principle that a third party cannot sue to recover any loss or detriment caused by injury to someone else.

The consortium action is a husband's action for compensation against a person whose breach of legal duty has caused damage or injury to his wife, resulting in a loss or impairment[69] of his consortium. The language in the last sentence is deliberately gender-specific—in a historic decision of the House of Lords in 1952[70] it was held that the cause of action is

---

[68] (1977) 138 C.L.R. 563, 598 (emphasis added).

[69] Impairment, rather than total destruction, is sufficient: *Toohey* v. *Hollier* (1955) 92 C.L.R. 618.

[70] *Best* v. *Samuel Fox Pty. Ltd.* [1952] A.C. 716.

not available to a woman who has suffered similar losses flowing from an injury to her husband.[71]

What is recoverable?

"The material consequences of the loss or impairment of his wife's society, companionship and service in the home and the expense of her care and treatment incurred as the result of the injury . . . form proper subjects of compensation to the husband".[72] Treatment expenses paid by the husband for the wife are uncontroversial.[73] More problematic is compensation for loss of conjugal comfort and society—specifically sexual relations, about which there has been some considerable judicial discussion.[74] Disquiet has also been expressed about the problems of quantifying such losses.[75]

However, the concern of this paper is with the third element of consortium, specifically the *servitium* aspect, or damages for loss of services, which in most cases, forms the major part of any award for this head of damage.[76] It is in this aspect of the award where the wife's loss of ability to perform domestic chores is reflected, albeit from the perspective of viewing that loss as a loss to the husband.

Some recent decisions in N.S.W. challenge the assumption implicit in Kirby, J.'s discussion of the relationship between the wife's primary action and the husband's secondary action in *Hodges* v. *Frost.* It will be recalled that there, the suggestion was made that an ascertainable sum was to be allocated to compensate for the loss of capacity and the outcome of the related appeals would only affect the allocation, rather than the quantification of that amount. In other words, the amount paid by the defendant is a constant—the variable factor is whether the damages go to husband or wife. That this is not occurring in practice is demonstrated by several cases.

Bagias v. *Smith*[77] provides a clear illustration. There, the injured woman was 26-years-old at the time of the accident and was working full-time outside the home in addition to managing a household comprising her husband, herself and two small children. On appeal, the amount awarded for loss of her future earning capacity was increased because the Court of Appeal, after making certain observations about the working lives of migrant women, accepted that but for the accident, she was likely to have continued working full-time outside her home. However, no consideration was made in her case of her lost capacity for work in the home—that was viewed as part of her husband's claim.

---

[71] Both South Australia and the Canadian province of Alberta have by legislation extended the action to a wife: see, Wrongs Act (S.A.), s. 33; and for Alberta, Domestic Relations Act, R.S.A. 1970, c. 113.

[72] *Toohey* v. *Hollier*, *supra* n. 69 at 627.

[73] See Luntz, *supra*, n. 65, para. 10.1.64 and cases cited therein.

[74] See *Birch* v. *Taubmans* [1957] S.R. (N.S.W.) 93 (F.Ct.).

[75] "Estimation of the monetary value of sexual relations is not merely a distasteful exercise, it really is an impossible exercise". *Bagias* v. *Smith* (1979) F.L.C. 90-658, 78, 510, *per* Hutley, J.A. (N.S.W.C.A.).

[76] It is beyond the scope of this paper to discuss in any detail elements of the action for loss of consortium. Recent comprehensive and critical accounts of the history and operation of the cause of action are provided by A. C. Riseley, "Sex, Housework and the Law" (1981) 7 *Adel.L.R.* 421, M. Thornton, "Loss of Consortium: Inequality Before the Law" (1984) 10 *Syd.L.R.* 259, and M. D. Popescul, "Action *per Quod Consortium Amisit*" (1979) 43 *Sask.L.Rev.* 27.

[77] *Supra* n. 75.

Hutley, J.A. accepted that "the husband has lost a wife who, while they remain together, will be unable to render to him many of the services previously given."[78] However, in considering the question of quantification, he noted that no paid domestic assistance had been procured—instead, the wife's mother had been brought to Australia from Greece. As for the husband, he,

> . . . will have to do more in the domestic field than he would otherwise have had to do. Most Australian males are expected to give domestic assistance to their wives. . . . Marriage is for better and for worse, and a husband must be expected to take on burdens in the domestic scene whenever his wife is unable to perform them. Though some sum must be allowed for the changes in the services which he receives from his wife, where those services are domestic in my opinion the damages allowed should be modest.[79]

Moffitt, P. rejected the argument put by counsel that, since the action is archaic and anomalous, only a small conventional sum ought be awarded. He did, however, stress the difficulties of quantification, especially in a case such as the present where no evidence was tendered as to the replacement cost of providing those services (whether or not they were actually provided at cost).[80] He held ultimately that the plaintiff's loss of ability to perform services had caused a serious detriment to the husband, and increased the trial judge's award from $4,000 to $11,500.[81] Reynolds, J.A. concurred in this view.

Hutley, J.A.'s discussion of the husband's role as working member of the domestic unit echoes his analysis in the earlier case of *Kealley v. Jones*[82] decided in 1976, before *Griffiths* v. *Kerkemeyer*. This is the case where the wife's reduced post-accident capacity left her with the choice of either returning to full-time employment *OR* performing domestic chores—she could not do both. She chose the former, so the loss was viewed as that of the husband. Had she chosen the latter, her loss of earning capacity would have been compensated by way of an award *to her* of economic loss. The husband claimed that because of the accident, he had left his job and taken another at a lesser salary, so as to be at home more often. He also paid for some domestic assistance and an aunt stayed for some time—her board was provided in return for domestic assistance, but no wages. The trial judge had found that the husband had suffered a very substantial financial loss to the time of trial, but an appeal by the defendant against the magnitude of the consortium verdict was allowed. Hutley, J.A. rejected the trial judge's finding of substantial financial loss. His judgment suggests that the wife's choice of returning to paid employment was a factor to be considered in reducing the amount available[83] as was the (then recently enacted) Family Law Act 1975 (Cth.) of which he noted:

---

[78] *Id.* 78,511.
[79] *Ibid.*
[80] *Id.* 78,503.
[81] *Id.* 78,504.
[82] *Supra* n. 19.
[83] *Id.* 739-740.

> The "fragility of marriage" resulting therefrom must be borne in mind in allowing a husband damages for loss of consortium in the future. The contingency that he may lose his wife's future services for reasons other than the accident is very real and should be reflected in any award.[84]

He went on to consider the quantum of damages to be awarded for the servitium aspect of the award.

> Though I appreciate that it is theoretically correct that a husband is entitled to monetary compensation for having to perform more services in the home than he did prior to the accident, where such services are not so onerous as to preclude him from working, with a consequent loss of actual money, I can see little justification for making anything more than a nominal award. In assessing damages in this situation, regard must be had to the public mores in Australia and where a husband wife [*sic.*] are both working, unless they are in extremely well paid positions permitting the employment of full-time domestic assistance, the sharing of domestic burdens with the wife is expected of the husband, even where the wife is perfectly healthy. To give monetary compensation to a husband just because there is some small variation of the amount of work in the home which he is required to perform in his leisure time would seem to me to disregard the realities of the Australian domestic scene.[85]

The process in these cases may be summarised as follows: the loss which has occurred, a loss of capacity which directly affects an injured woman, has been conceptualised as a loss to the husband, rather than being viewed as a loss to the injured party herself. In that sense, she is deprived of compensation. Nonetheless, it might have been assumed that an amount of money representing the magnitude of that loss would be available to the *husband*, under the established consortium doctrine. However, the Court of Appeal, by exhorting changes in public mores has, in effect, suggested that such changes have ingeniously done away with the actual loss. In the absence of evidence, the Court of Appeal appears to have decided that if both members of a marriage are working outside the home, then both must equally be working in the home. In fact, all empirical research shows that this assumption is false.[86] What happens for the most part is that in families where both parties to the marriage work outside the home, the woman works an extra job in the home as primary childcarer and housekeeper.[87] Much could be written of the iniquities in the distribution of work in the home but that is not in issue here. What is

---

[84] *Id.* 740. Equally, Hutley, J.A. did not refer to the windfall which a husband might receive if after obtaining a large lump sum he then divorces and marries a wife who is fit and willing to provide services for him.

[85] *Id.* 741.

[86] See, for example, P. Harper, *Mothers and Working Mothers* (1979), cited by Riseley, *supra*, n. 76, at 454; H. I. Hartmann, "The Family as the Locus of Gender, Class and Political Struggle: The Example of Housework" (1981) 6 *Signs: Journal of Women in Culture and Society* 366; A. Game and R. Pringle, "Production and consumption: Public versus private" in D. H. Broom (ed.), *Unfinished Business: Social Justice for Women in Australia* (1984, Sydney, George Allen and Unwin), esp. at 77 (and authorities cited therein).

[87] For a rare judicial recognition of this fact, see the judgment of Wickham, J. in the fatal accidents case of *Hermann* v. *Johnson* [1972] W.A.R. 121 (cited *infra*, at n. 155).

of concern is that a material loss has occurred which is going uncompensated. The wife has lost a twofold capacity to work. Whilst she may receive compensation in respect of her lost job her husband will receive little if any compensation for her lost housekeeping capacity. Nor is there any suggestion by Hutley, J.A. that *she* should receive damages in respect of that lost capacity. It appears that defendants who negligently impair the capacity of women to make a contribution to the economic well being of their families are treated better by the common law courts than those who injure what are quaintly called breadwinners.

A particular problem with this approach is that there is no indication in the judgments that evidence was taken as to the actual distribution of work in the home prior to the accident: rather, the decisions appear to be based on assertion and assumption. This is contrary to the more usual judicial reticence towards acting on other than adduced evidence.[88]

More fundamentally, by looking at the matter from this point of view, the courts are ignoring altogether the fact that what is in issue is a lost capacity, in this case, a lost capacity to do housework, rather than a lost capacity to work outside the home. The issue is not how much work the husband previously did or did not do in the home, but rather what needs has the accident created? What economic effect will inability to work in the home have on the accident victim specifically, and the family more generally? It is no answer to object that if the true picture were looked at in assessing the relevant loss, the courts, by awarding significant damages in respect of a woman's loss of capacity, (thereby recognising her predominant role in doing the housework) would be endorsing and affirming an unsatisfactory social phenomenon.[89] Once again, this involves deflecting attention from the central concern which is the loss of the woman's working capacity, whether that capacity be exercised in the home or in the paid workforce (or in both).

How far does consortium extend? Does "material loss" include wage loss?

In an *obiter dictum* in *Bagias* v. *Smith*,[90] Hutley, J.A. suggested an extraordinary extension of the principles governing damages available under the consortium head—awarding the husband an amount to cover the wife's lost wages, or earning capacity. The trial judge had found the plaintiff guilty of contributory negligence—accordingly, if that finding were not overturned, her damages for loss of earning capacity would necessarily have been reduced. But it is well established that the husband's

---

[88] An interesting example of judicial attitudes on this matter was provided by Samuels, J.A. In a comment on a paper delivered in 1982, he said:

> Those, incidentally, who care to dabble in jurimetrics might care to consider what is to be made of this: of the seven wives of the seven judges of the Court of Appeal, three are in full-time professions or occupations, two are in part-time professions or occupations, one was in full-time employment before marriage, and the remaining one in part-time employment before marriage. I would think therefore that all of us have experience of what might be regarded as a more modern way of life, in which household tasks are shared.

Assessment of Damages, Committee for Post-Graduate Studies in the Department of Law, University of Sydney, November, 1982, at 311 (hereafter, "Assessment of Damages").

[89] This appears to trouble Thornton, *supra*, n. 76, at 268: "As a question of social policy, one must ask whether it is appropriate for the judiciary to underscore the fact that it is women who are expected to carry out the preponderance of socially necessary housework, regardless of whether they are in the paid workforce or not".

[90] *Supra* n. 75.

consortium action is independent of that of the wife, though grounded on the same act of the defendant[91]—accordingly, his damages are not to be reduced for contributory negligence on the part of the accident victim. On appeal, the Court of Appeal rejected the finding of contributory negligence.[92] But Moffitt, P. and Hutley, J.A. both addressed the argument that the plaintiff's lost earning capacity could form part of the *husband's* award for loss of consortium. Evidently, this was put by counsel for the plaintiff in an attempt to maximise the *household's* total award in the event that the finding of contributory negligence was upheld.

Moffitt, P. rejected the argument out of hand. But Hutley, J.A. took a different approach.

> If . . . his Honour's finding that the wife was guilty of contributory negligence had been correct, the husband's damages for loss of consortium should have included the compensation for the material disadvantages which he suffered by reason of her injuries. She was working to speed the paying off of liabilities secured on the home which, on the evidence, was his home alone. Nowhere is it suggested that she had any proprietary interest in the home. He was therefore receiving substantial material benefits from his wife's labour. As she will recover by way of damages what she would have earned both in the past and in the future, he is as well off as though she had continued to work, and she is in a position to give him the same assistance as she had done before. If, however, she only recovered a proportion of what she would have earned because of her contributory negligence she is not able to give him the same assistance. His right of action is entirely independent of hers, and is unaffected by her contributory negligence (*Curran* v. *Young* 112 C.L.R. 99).[93]

Thornton[94] has criticised this approach as retrograde and possibly in conflict with the Married Women's Property Acts. Rather than a sinister attempt to deprive women of their property rights, it appears instead to be a (fundamentally misconceived) attempt to ensure maximum benefit to the household economic unit, just as the attempt in *Regan* v. *Harper*[95] was also (unsuccessfully) aimed at this end.

Interestingly, Hutley, J.A.'s suggestion in *Bagias* v. *Smith* recalls the different ways in which the economic life of the family has historically been perceived. At the time when the action for loss of consortium first developed, the family was recognised as an economic unit—accordingly, a loss of services caused that unit to suffer financially.[96] With the development of capitalism, a disjunction appeared between economists' accounts of the family and the workplace. Work outside the household was given the privileged status of productive work, whilst "women's work"

---

[91] *Curran* v. *Young* (1965) 112 C.L.R. 99.

[92] See Moffitt, P.'s judgment, *supra* n. 75 at 78, 499.

[93] *Id.* 78, 508.

[94] *Supra* n. 76, 268.

[95] *Supra* n. 16.

[96] This is also the origin of the father's action for loss of services of an injured child, which is used today to compensate the father for medical expenses incurred in respect of an injury to a child—see Luntz, *supra*, n. 65, Chapter 10.2.

came to be seen as domestic and privatised. The household was perceived as a locus of consumption rather than production. But in the latter part of the twentieth century, these distinctions between production and consumption, public and private are no longer so widely accepted.[97] Nor are households so clearly constructed from that dichotomous model, that is, of one (usually male) breadwinner working to support a number of (non-working) dependants. More households are headed by women and as more adult members of all households work outside the home, the household is once again more readily perceived as a site of economic activity.

Accordingly, one could read Hutley, J.A.'s suggestion simply as a remedial device to ensure maximum benefit to the family, recognising it as the economic unit which has been injured. However, that analysis falls down when it is recalled that if the husband rather than the wife is injured (and is guilty of contributory negligence), the wife has *no* secondary claim, neither for loss of her notional share of the husband's earnings, nor for the loss of his contribution to the housework which increasingly, we are told, is a substantial contribution. The law makes no attempt in that situation to shore up the overall family economic situation. Moreover, this account of the rationale behind Hutley, J.A.'s dictum is inconsistent with his judgment in *Kealley* v. *Jones*[98] where his Honour considered the ready availability of divorce under the Family Law Act as a relevant factor in reducing damages for loss of consortium. The Family Law Act is significant—indeed, it is arguable that it has undermined the whole premise upon which the law of consortium is based. Certainly, the husband no longer has a *right* to the services of his wife, just as neither party has an absolute *right* to be maintained by the other.[99]

Reform of the law of consortium

There is little support in academic or law reform circles for the retention of the action.[100] The approach of South Australia[101] and Alberta in extending the action (unchanged in substance) to wives as well as husbands has not been followed in other Canadian or Australian jurisdictions, although many states in the United States have so extended the action, but by common law development, rather than statute.[102] The preferred view is in favour of abolition of the cause of action.[103] The Royal Commission on Civil Liability and Compensation for Personal Injury, chaired by Lord Pearson,[104] recommended abolition of the

---

[97] One important challenge to these notions was the domestic labour debate of the 1970s, canvassed in E. Malos (ed.), *The Politics of Housework* (1980, London, Allison and Busby). See also Hartmann, *supra* n. 86 and, for a more contemporary critique of these distinctions, see Game and Pringle, *supra* n. 86.

[98] *Supra* n. 19.

[99] See Family Law Act, s. 72. See also Chesterman *supra*, n. 65, Chapter 3.1.

[100] See Chesterman, *supra*, n. 65, Chapter 3.2 and 3.3 and see particularly, sources cited therein, at notes 21,23. See also Women Lawyers Association, "Loss of Consortium: Time for Change" (1983) *Law Society Journal* 555, and Thornton, *supra*, n. 76. *Cf.* P. Handford, "Relatives' Rights and *Best* v. *Samuel Fox*" (1979) 14 *U.W.A.L.R.* 79. The Australian Law Reform Commission, as part of its community law reform programme in the A.C.T., is inquiring into the action. See "Loss of Consortium in the A.C.T.", Consultative Paper, A.C.T.L.R. 3, 1984.

[101] For a compelling critique of this extension of "equality" see Riseley, *supra*, n. 76.

[102] See Thornton, *supra*, n. 76 at 269-270.

[103] See, e.g. Chesterman, *supra*, n. 65, para. 3.2.4.

[104] CMND 7054, 1978, H.M.S.O. London (hereafter *Pearson Report*).

actions for loss of services and loss of consortium.

> It is right to regard the loss of the capacity to render services gratuitously as primarily the plaintiff's loss, rather than the loss of those who used to benefit from the services. We consider therefore that damages should be recoverable by the plaintiff in his [*sic.*] own right.[105]

Section 2(2) of the Administration of Justice Act 1982 (U.K.) abolished the servitium and consortium actions, without taking the opportunity to provide a statutory foundation for the recommendations concerning recognition that a woman's loss of capacity should be compensated through her own primary claim. However, in England, the common law has moved more closely in this direction than in Australia.

The N.S.W. Government has also abolished the action for loss of consortium[106] in the Law Reform (Marital Consortium) Act, 1984. Citing support from the N.S.W. Law Reform Commission, the Women Lawyers' Association of N.S.W., the Women's Electoral Lobby and the Anti-Discrimination Board, Mr. Walker, who introduced the bill into the Legislative Assembly said:

> The original concept of a husband being head of a household with direct proprietary interest in members of the family has little or no application to the modern domestic situation and is abhorrent to the community's current understanding of the position of women in society.[107]

It is submitted that abolition is preferable to extending the scope of third party recovery.[108] However, unless the courts are prepared to reconsider the question of "whose is the loss", and, if it *is* the wife's, to recognise it as an economic loss, the effect of abolition might well be to reduce even further the overall amount of damages available in respect of an accident, an approach which does little to further either the victim's or the family's post-accident economic well being.

IV. Economic or Non-Economic Loss?

If one follows the approach taken by the English Law Commission,[109] the Pearson Commission,[110] and adopted in *Hodges* v.

---

[105] *Id.*, para. 354. The Law Commission also recommended abolition—Law Commission (England and Wales), Report on *Personal Injury Litigation, Assessment of Damages* (No. 56) (H.M.S.O., London, 1973), paras. 121, 161. Weir is critical of this view: "Doubtless it is more blessed to give than to receive, but surely, when services are terminated, their loss is felt by the person who received them rather than by the person now unable to give them." J. A. Weir, *Compensation for Personal Injuries and Death: Recent Proposals for Reform*, (1978, Cambridge-Tilbury Law Lectures, Cambridge) at 18.

[106] The related *actio per quod servitium* remains available—for a recent decision see *Panizutti* v. *Marinovski*, (N.S.W.S.Ct., *per* Hodgson, J., 15 March, 1984, (unreported).

[107] Legislative Assembly (N.S.W.), 29 February, 1984, p.4872.

[108] For an example of the latter approach, see Family Law Reform Act 1978 (Ontario) s. 60, which creates a right of action for certain relatives of an accident victim to claim directly against the tortfeasor for pecuniary loss. This is defined to include, *inter alia*, "an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the injured person if the injury had not occurred". (s. 60(2)(d)). The same legislation abolishes the action for loss of consortium (s. 29(3)).

[109] Law Commission No. 56 (1973), *supra*, n. 105, paras. 121, 161.

[110] Pearson Report, *supra*, n. 104, para. 354.

Frost[111] and *Daly's Case*,[112] of characterising loss of a woman's capacity to work in the home as a loss for which *she* should receive compensation, that still leaves open the question of under what compensatory principle those damages are to be awarded.

Traditionally, damages for personal injury are awarded under particular heads, but because they are for the most part awarded by way of a once and for all lump sum,[113] it used to be accepted practice, deriving from the time when juries were responsible for determining the damages, to award a lump sum without necessarily specifying the individual components of the award.[114] However, the trend is now in the other direction: the N.S.W. Court of Appeal and the High Court have both shown a preference for the itemisation of awards, with individual consideration to the separate heads of damages.[115]

An analysis of the case law in this area shows that there is no clearly established conceptual basis for the award of damages for lost house-keeping capacity. Even where courts concede the existence of an injury to the primary accident victim rather than to her husband, they fluctuate between treating the loss as economic loss, or as non-economic loss (a loss of amenity). That choice has very important ramifications. Not only will it affect the size of the actual award, it might also affect recovery under any proposed statutory compensation plan.

A number of cases referred to in earlier parts of this paper have involved the question of how to classify loss in these cases. In *Pegrem*,[116] the then Chief Justice held that though the plaintiff had contracted to pay for the cost of domestic assistance, she had nonetheless suffered no economic loss.[117]

This approach was followed in *Simmonds* v. *Hillsdon*[118] where Brereton, J. held that the plaintiff "could not claim for a sum to provide for her husband and son what she had previously done for them, although her inability now to look after them in this way and her deprivation of the satisfaction she no doubt had in so doing might sound in general damages".[119]

In *Burnicle* v. *Cutelli*[120] Reynolds, J.A. held that that part of the loss which he classified as being a loss to the plaintiff's family, was to be compensated by an award of general damages, consistently with the approach to other losses which do "not produce financial loss":

> The injured plaintiff has in such a case as this lost part of a capacity, the exercise of which can give to her pride and satisfaction and the receipt of gratitude and the loss of which can lead to frustration and feelings of inadequacy.[121]

---

[111] *Supra* n. 2.

[112] *Supra* n. 28.

[113] One exception is the Motor Vehicle (Third Party Insurance) Act 1943-76 (W.A.) which empowers courts hearing personal injury cases to award periodic payments.

[114] See *Luntz, supra*, n. 65, at 41-44.

[115] *Id.* 43.

[116] *Supra* n. 12.

[117] *Id.* 418. But c.f. *Freudhofer* v. *Poledano* [1972] V.R. 287.

[118] *Supra* n. 14.

[119] *Id.* 839. Brereton, J.'s use of the depiction "general damages" is perhaps ambiguous, given that damages for future economic loss are also classified as general damages, but it seems clear that he meant non-economic loss when discussing her deprivation of the satisfaction she received from serving others.

[120] *Supra* n. 9.

[121] *Id.* 28.

He described her lost capacity as one which had formerly been "exercised *voluntarily* [*sic.*] for the benefit of her family"[122] and went on to reject explicitly the notion that the value of "voluntary" work of this nature should be measured by the cost of employing a third party to do the work. He noted and rejected the Pearson Report's recommendation[123] that a replacement cost approach be adopted and expressed his disagreement with the judgment of Brandon, J. at first instance in *Daly* v. *General Steam Navigation Co. Ltd.*[124]

It is submitted that the use of the adjective "voluntary" to describe the work involved is quite inappropriate. There is a fundamental difference between unpaid (in the wages sense) work in the home and voluntary work of, for example, the Meals on Wheels kind. The former makes a significant economic contribution to the family, or domestic unit, while the latter does not. It is this difference which is obscured by the language of "voluntary" services giving rise to "personal satisfaction".

Mahoney, J.A. also addressed the question. He held that it was not necessary to decide whether the "basic theory" under which the plaintiff was to be compensated was for the "loss of a capacity as such or for the loss of the satisfaction apt to be derived from doing what formerly she did".[125] However, he noted that he had taken into account in his assessment both the loss of capacity and the satisfaction which she would have derived from the exercise of that capacity. Like Reynolds, J.A., he expressly rejected a submission that her damages be calculated by reference to the market cost of replacement services, supporting this decision by holding that the loss in this case fell outside the *Griffiths* v. *Kerkemeyer* principle.[126]

Glass, J.A. disagreed on the latter point.[127] He expressed the view that the impairment of the capacity to keep house for one's family is compensable "by setting an objective value upon the depreciation of an economic asset",[128] but held the loss here non-compensable, on the facts.

A case which expressly rejected the loss of amenity approach is *Cummings* v. *Canberra Theatre Company*.[129] The woman plaintiff was injured and substitute domestic services consequently procured. The majority judges in the Federal Court (Brennan and Fisher, JJ.) rejected the argument that the services in question should notionally be distributed, for assessment purposes, between husband and wife. The husband had paid the housekeeper's wages—but unlike the approach taken in *Pegrem*,[130] Brennan and Fisher, JJ. had little hesitation in deciding that the loss of capacity was the central issue and that that loss was the plaintiff's.

> Where, according to the practice of a family of which the plaintiff is a member, the plaintiff performs particular domestic chores and

---

[122] *Id.* 27 (emphasis added).
[123] *Supra* n. 104.
[124] *Supra* n. 9 at 29.
[125] *Id.* 36.
[126] *Id.* 37. Damages awarded under *Griffiths* clearly fall within the economic loss rubric. See *infra*, Sections V and VI.
[127] *Id.* 34.
[128] *Id.* 35.
[129] *Supra* n. 51.
[130] *Supra* n. 12.

> is disabled from continuing them by the conduct of a tortfeasor, that incapacity is a loss suffered by the plaintiff . . . and the cost of providing the services which are needed because of the incapacity should be borne by the tortfeasor.[131]

The court commented on the fact that the actual payments for the substitute services were made by the husband, but that was not considered sufficient reason for the court to attribute the loss to the husband as a loss of consortium.

> There was no suggestion made that the payment of the cost by the appellant's husband goes in relief of the tortfeasor. Indeed, the inference is open to be drawn that if the husband had not paid for them, the appellant would herself have paid for them out of her earnings.[132]

Though the majority judges did not in terms address the question of whether the loss ought be considered economic or non-economic, it is submitted that the tenor of their joint judgment indicates that they favoured the former view.[133]

Wickham, J., the dissenting judge in *Maiward* v. *Doyle*[134] saw the issue as whether a loss of working capacity as a housekeeper was a loss of earning capacity (and therefore economic loss). He held that it was, noting that the plaintiff could have earned money as a housekeeper had she chose or alternatively, if relieved of her housekeeping responsibilities, she could have earned additional income in some other way.[135]

But Kennedy, J. followed the approach taken in the N.S.W. cases of *Pegrem, Simmonds* and more recently *Burnicle* v. *Cutelli* explicitly holding that the compensable loss which the plaintiff had suffered was for her loss of amenity—she had previously "derived significant satisfaction from her labours on [her family's] behalf".[136] That being so, no damages should have been awarded for past and future household assistance.[137] Similarly, Olney, J. was prepared to uphold the trial judge's award of $60,000 for loss of enjoyment of life, *inter alia*, on the basis that "Mrs. Doyle obviously derived much satisfaction from attending to all the domestic needs of her family . . ."[138]

The English Court of Appeal took an equivocal approach to this question in *Daly* v. *General Steam Navigation Co. Ltd.*[139] Although there was no disagreement in the Court of Appeal that the plaintiff should be compensated for the financial detriment caused by the loss, the damages were determined differently in respect of the periods before and after trial.

The Court firmly rejected the argument put by counsel for the defendants that the plaintiff was required to satisfy the court that she had

---

131 *Supra* n. 51 at 14.

132 *Ibid.* Certainly, it can be said that the money came out of household funds.

133 McGregor, J., whose approach differed from that of the majority, did not specifically deal with the question of whether or not the loss was an economic loss.

134 *Supra* n. 1.

135 *Id.* 212.

136 *Id.* 226.

137 *Ibid.*

138 *Id.* 239. One can only speculate on the type of evidence which both plaintiff and defendant would be expected to adduce in an action founded upon this view of the loss.

139 *Supra* n. 28.

a firm intention of employing substitute services, as a prerequisite to being awarded damages for the future loss of capacity.[140] Bridge, L.J. considered it entirely appropriate to estimate the amount of assistance she would require in the household and calculate the cost of employing the relevant labour.

> It is really quite immaterial . . . whether having received those damages the plaintiff chooses to alleviate her own housekeeping burden . . . by employing the labour . . . or whether she chooses to continue to struggle with the housekeeping on her own and to spend the damages . . . on other luxuries . . .[141]

However, he took an entirely different approach in respect of the period between the accident and the trial. For that period, he held that the plaintiff was unable to say that she had incurred any cost – she'd simply managed as best she could. It was argued that an award estimating a weekly amount for the value of the past services of her husband and daughter should be made but Bridge, L.J. rejected that approach as being an incorrect method of "evaluating what is essentially an element in the plaintiff's pain and suffering and loss of amenity caused by the additional difficulties she had in doing her housekeeping work".[142] In effect, Bridge, L.J. was refusing to make an award of *special* damages for a loss which can at best, be estimated. He did however agree that some special damages might appropriately be awarded – *viz.*, the amount of part-time earnings which the husband had foregone by virtue of his need to spend more time at home assisting his wife.[143]

Most of the cases discussed in this section demonstrate a preference for the view that work in the home is more in the nature of a hobby than it is comparable to employment outside the home. Accordingly, in the same way that loss of a leg to an avid skier, or loss of an arm to a keen recreational golfer causes distress, it is compensable by an award of damages for non-economic loss, i.e. for loss of amenity. Certainly, the primary focus of awards for loss of amenity is on just such leisure activities.[144] But that is not necessarily the correct approach.

In a Canadian case,[145] decided under Ontario's fatal accidents legislation, expert evidence was provided at the trial by an economist, Professor Oli Hawrylyshyn, Assistant Professor of Economics at Queen's University, on the financial contribution of a wife to the economy. Haines, J., the trial judge in the Ontario High Court, accepted that evidence, finding that a realistic definition of the gross national product,

> . . . is simply the sum total of all acts and services that provide certain benefits to the individuals in the economy. In that must be included

[140] *Id.* 701, *per* Bridge, L.J.

[141] *Ibid.*

[142] *Ibid.*

[143] *Id.* 702. On this point, Templeman, L.J. specifically noted that the husband's loss of part-time earnings could properly be awarded to *Mrs.* Daly under the principle established by *Donnelly* v. *Joyce*, *supra* n. 49 (cited by Templeman, L.J., *supra* n. 28 at 702).

[144] See Luntz, *supra*, n. 65, paras 3.3.08-3.3.09. *Hodges* v. *Frost, supra* n. 2, is somewhat contradictory on this point. Though it was held that the damages for lost housekeeping capacity were correctly awarded under *Griffiths* v. *Kerkemeyer* (and therefore, *semble*, economic), nonetheless Kirby, J. talked of "the domestic duties which the wife . . . so enjoyed before the injury". *Id.* 387.

[145] *Franco* v. *Woolfe* (1974) 52 D.L.R. (3d.) 355.

> the homemaker in the services she renders to her husband, to each child, so that they in turn may enter the community and contribute to the economy. Merely because she is not paid wages by her husband and family does not mean that she does not contribute and should be ignored.[146]

On appeal, the Ontario Court of Appeal[147] held that the evidence as to the contribution made to the gross national product by the average Canadian housewife should not have been admitted: instead, the court "must determine the value of the services rendered by a particular wife to a particular husband".[148]

Moreover, Houlden, J.A. (delivering the judgment of the Court) held that the evidence was also unnecessary since it was well established that a husband is entitled to compensation for the loss of household services performed by his wife and it is available to the court to consider the cost of hiring substitute services as an appropriate determining basis.[149]

So there was in the event, no dispute as to quantification of the value of the deceased's services on an economic basis, which is hardly surprising, given that (in the absence of statutory exceptions) only pecuniary loss is compensable under fatal accidents legislation.[150]

Similarly, in Australia in a case involving death of a housewife, damages are available to compensate for the loss of services.[151] And, the fact that relatives have voluntarily provided the services is to be ignored in assessing the damages.[152] As Luntz notes, this is perfectly consistent with the principle of *Griffiths* v. *Kerkemeyer*.[153] Indeed, there is no bar against an award of damages to the survivors of a deceased woman who worked both inside and outside the home which takes into account both her earnings and her contribution to the household. In *Hermann* v. *Johnson*,[154] a fatal accident case, Wickham, J. noted:

> As a fact, I think there to be a strong inference of probability that she was really holding down two jobs and that after her return at 3 p.m. on weekdays most of her time until bedtime was spent on domestic matters, and that most of her time in the weekends was likewise spent, leading to the conclusion that she was for practical purposes a full-time housekeeper, mother and general factotum as well as being a full-time wage earner.[155]

The economic evidence presented in *Franco* v. *Woolfe*[156] is

---

[146] *Id.* 361.

[147] (1976) 12 O.R. (2d.) 549.

[148] *Id.* 551.

[149] *Id.* 552. As it turned out, the replacement cost basis resulted in an almost identical damages award.

[150] See, e.g., *Public Trustee* v. *Zoanetti* (1945) 70 C.L.R. 266 and, generally, Luntz, *supra*, n. 65, 9.2.05 and cases cited therein.

[151] Luntz, *supra*, n. 65, 9.3.09, and cases cited therein.

[152] *Ibid.*

[153] *Id.* n. 10.

[154] *Supra* n. 87.

[155] *Id.* 128. Strictly speaking, one could object to awards under fatal accidents legislation on the basis that, like the action for consortium, they are also secondary claims. However, the analogy ends there – the objection, in the consortium situation is in preferring to compensate a secondary victim when the primary accident victim is available to be compensated, but is passed over in favour of the second.

[156] *Supra* n. 145.

representative of most contemporary economic accounts of the contribution made by homemakers to the domestic (in the most narrow sense) economy.[157] It is difficult to categorise loss of housekeeping capacity as anything other than economic loss—the work a woman does in the home facilitates the participation of her family (and often herself) in the public labour market. If she cannot do the work, someone else must do so. She may be fortunate enough to be part of a family in which, after an accident, other members come to her aid and assist in performing household tasks, partially or completely. There may be no need to expend money to provide those services, so long as one or more family members forgoes time previously spent working or at leisure. It is clear that in general terms, what is in issue is a loss of capacity *to work*. If the marriage breaks down (and accidents often precipitate such events) then the woman will be both incapacitated from entering the workforce *as well as* being no longer in receipt of the same financial support that she might previously have received from her husband's wages. This goes well beyond any conception of personal satisfaction.

There has been considerable debate in legal and economic circles as to how the value of the contribution made by women to the domestic economic unit is to be quantified for damages purposes. Various methods have been proposed, spanning replacement cost, opportunity cost, market cost and an approach involving a notional allocation of breadwinner's wages.[158] Those arguments are well canvassed in the literature and need not be repeated here. They warrant attention, however, because despite the differences in approach, they are all predicated on a clear assumption that the loss has economic value and must be compensated accordingly. Nowhere in the academic literature has the argument seriously been put that the relevant loss is a loss of amenity, sounding in damages for non-economic loss only.

There is clear precedent in the Family Law Act for recognising domestic work as having economic value. When making orders with respect to matrimonial property, s. 79(4)(b) directs the Family Court to take into account "the contribution (other than a financial contribution) made directly or indirectly by . . . a party to the marriage . . . to the acquisition, conservation or improvement of any of the property of the parties to the marriage". Likewise, s. 79(4)(c) directs the Family Court to consider "the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage . . . including any contribution made in the capacity of homemaker or parent". It has been held that the purpose of such provisions is "to give recognition to the position of the housewife who, by her attention to the home and the children, frees her husband to earn income and acquire assets".[159]

---

[157] See, for example, Riseley, *supra*, n. 76, at 446 *et seq*; Donovan, *supra*, n. 66, at 216-7 (and references cited therein); Clarke and Ogus, *supra*, n. 66, at 16 *et. seq.*; Cooper-Stephenson, *supra*. n. 66, at 15-23; Thornton, *supra*, n. 76, at 267.

[158] See, e.g. Chesterman *supra*, n. 66, and Pottick, O'Donovan and Cooper-Stephenson, all cited *supra*, n. 66. See also Women's Advisory Unit (N.S.W.), *Occupation: Housewife*, (1980), and M. Edwards, *The Income Unit in the Australian Tax and Social Security Systems*, (1984, Melbourne, Institute of Family Studies), Ch. 5, "The economic value of home activities". See also J. Yale, "The Valuation of Household Services in Wrongful Death Actions" (1984) 34 *U. of Toronto L.J.* 283 and Keeler, *supra* n. 7, sections 2 and 3.

[159] *In the Marriage of Mallet* (1984) 52 A.L.R. 193, 207 *per* Mason, J. (and see the extensive list of authorities cited therein).

The N.S.W. Law Reform Commission[160] has presented three arguments in favour of compensating "non-earners" for loss of economic capacity. Central is the argument that,

> . . . many non-earners perform indispensable functions that have substantial economic value, despite the fact that they may receive no monetary payment for those services. If a homemaker, for example, is incapacitated through accidental injury, the family unit suffers economic loss. The services previously provided by the homemaker have to be either purchased, or provided by other family members, thus reducing their capacity to do other things, including earning an income".[161]

It is therefore said to be unjust, both to the injured person and to the family, to deny compensation for that loss.

This argument is perfectly consistent with the prevailing economic view, and with the position under the Family Law Act. Accordingly, the Commission has tentatively proposed that under its scheme "compensation for loss of economic capacity" would be available to injured persons, including those who work in the home (though the bases for assessment remain extremely tentative).[162]

By contrast, the Commission has expressed a general disinclination to provide compensation for *non-economic* losses, at least in precisely the form in which they are currently available at common law. To the extent to which it will form part of any statutory scheme, it is proposed that non-economic loss "should be measured by reference to the degree of impairment as it affects the person in all his or her normal activities".[163]

This section has demonstrated that the work of the N.S.W. Law Reform Commission, the Family Law Act, and the often heated debates about replacement cost or opportunity cost as the basis of quantification all presuppose a view that loss of capacity to work at home is an economic loss, a view quite different to that taken by the common law courts, especially in N.S.W. This disjunction could become extremely significant if any statutory compensation scheme were established. In particular, it will be necessary to define in the legislation precisely what is economic and what is non-economic loss. There is no point allowing recovery for "loss of economic capacity" if common law courts have defined the relevant loss as a loss of amenity, rather than a loss of economic capacity.

---

[160] In its 1983 Working Paper, "A Transport Accidents Scheme for N.S.W.", Accident Compensation Reference 1983. (Hereafter cited as "Working Paper").

[161] *Working Paper*, para. 7.9. Since this article was prepared, the Commission has issued its final report (*supra* n. 65). The Working Paper position has been varied somewhat: see *Final Report 1, supra* n. 65 particularly at paras. 7.80-7.98 and 10.2-10.10.

[162] *Working Paper*, para. 4.26 and see generally, Chapter 7. Chapter 7.III sets out four alternative methods of quantifying the relevant loss: the flat rate principle; the social security principle; the substitute services principle and the lost opportunity principle. Omitted is the notional internal transfer, described by Chesterman, *supra*, n. 66. Note that the Commission draws a distinction between household services previously provided by a "non-earner" and those done as part of a second job by an earner. Whilst accepting the double burden which this imposes, most usually on women, the Commission has not included in its proposed scheme the cost of substitute household or domestic services previously provided by an injured *earner*. See paras. 6.35-6.37. *Cf. Final Report 1, supra* n. 65 at para. 7.84.

[163] *Working Paper*, paras. 9.10-9.14. It is significant that in this section, the Commission "recognises that identical physical disabilities or impairments may affect the capacity of individuals to undertake *non-work-related* activities in different ways". (Emphasis added).

V. Does the Principle of *Griffiths* v. *Kerkemeyer* Extend to Household, as Well as Nursing Services?

The earlier sections of this paper have focussed upon the problem caused by a loss of capacity to perform services for others. However, the issues raised in this and the subsequent section are somewhat different. Here, the problem is not so much who previously benefitted from the services, but rather, whether an accident victim will be debarred from recovering in respect of a lost capacity to provide services both to others and for herself because her husband, or children, or other family members or friends did the work for her. This requires a detailed examination of *Griffiths* v. *Kerkemeyer.*[164] There are two ways in which, under that principle, recovery has come to be limited. First, (the matter dealt with in this section), if domestic services are held to be outside the *Griffiths* principle, the injured woman will not recover. Secondly, the "reasonableness" principle, examined in Section VI, might be invoked against her.

Griffiths v. *Kerkemeyer* was a "turning point in the law of damages in Australia".[165] There the High Court held that where gratuitous services were provided to an accident victim by friends or relatives, the plaintiff could recover in damages the market value of the services, notwithstanding that the plaintiff was under no legal liability to pay the gratuitous service provider for them. In so deciding, the High Court followed the approach taken by the English Court of Appeal in *Donnelly* v. *Joyce.*[166]

In *Donnelly,* the Court of Appeal forcefully rejected the defendant's argument that even if there was a connection between the mother's wage loss and his negligence, it could not be recovered *by the plaintiff.*

> The loss *is* the plaintiff's loss. . . . [His loss] is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages . . . is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.[167]

Megaw, L.J. noted that a corollary to the proposition extracted above is that, unless it is possible to claim for loss of consortium or servitium, the provider of services has no direct recourse against the wrongdoer.[168]

In *Griffiths* v. *Kerkemeyer,*[169] the plaintiff was rendered a quadriplegic after a car accident. Included in his damages award was a sum representing the value of services provided by his fiancee and other members of his family up to the time of trial. There was also provision representing the cost of future care by the fiancee and family. The Full High Court upheld the award.

Gibbs, J. (as he then was) quoted the passage from *Donnelly* v. *Joyce*

---

[164] *Supra* n. 3.

[165] M. J. Clarke Q.C., (now the Honourable Mr. Justice M. J. Clarke of the N.S.W. Supreme Court), "Injuries to the Person", in *Assessment of Damages, supra,* n. 88, at 69.

[166] *Supra* n. 49.

[167] *Id.* 461-2, *per* Megaw, L.J.

[168] *Id.* 462.

[169] *Supra* n. 3.

extracted above, and noted that as a statement of principle, it required a little qualification.[170]

His qualification has become the basis of a frequently applied two-part test:

> The matter should, as it were, be viewed in two stages. First, is it reasonably necessary to provide the services and would it be reasonably necessary to do so at a cost? If so, the fulfilment of the need is likely to be productive of financial loss. Next, is the character of the benefit which the plaintiff receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer? If not, the damages are recoverable.[171]

His conclusion was that where "necessary services have been provided gratuitously by a relative or friend, it should now, as a general rule, be held that the value of the services so provided should not reduce the damages payable to the plaintiff."[172]

Stephen, J. felt no need to qualify the principle in *Donnelly* v. *Joyce* in the way Gibbs, J. had done. He hailed Megaw, L.J.'s analysis as disclosing "for the first time a loss suffered by the injured plaintiff whereas previously the loss appeared to be one suffered by the charitable provider yet nevertheless sought to be recovered by the plaintiff".[173]

This was reinforced by resort to "theories of loss distribution", i.e., by a consideration of the relevant policy questions involved.[174] Similarly, Mason, J., the third member of the Court, approved the then recent S.A. Full Court decision in *Beck* v. *Farrelly*[175] which was based on *Donnelly* v. *Joyce.* He also cited the passage from Megaw, L.J.'s judgment set out (*supra*) and held that it accurately expresses the law on the question.[176] He continued:

> The respondent's relevant loss is his incapacity to look after himself as demonstrated by the need for nursing services and this loss is to be quantified by reference to the value or cost of providing those services. The fact that a relative or stranger to the proceedings is or may be prepared to provide the services gratuitously is not a circumstance which accrues to the advantage of the appellant.[177]

The view that in such a case, recovery is permitted only on proving the existence of a legal liability to pay for the services was rejected as proceeding "upon the footing that the relevant loss was the legal liability to pay for the service. It is now recognised that the true loss is the loss of capacity which occasions the need for the services."[178]

It seems from the report of the decision that the services being provided to the injured victim, Albertus Kerkemeyer, were of the nature of nursing services, so it was not necessary for the members of the court

---

[170] *Id.* 164.
[171] *Id.* 168-169.
[172] *Id.* 169.
[173] *Id.* 175.
[174] *Id.* 176.
[175] (1975) 13 S.A.S.R. 17.
[176] *Supra* n. 3 at 192.
[177] *Ibid.*
[178] *Id.* 193.

to consider domestic services, or to catalogue those services which did, and those which did not, fall within the newly stated recovery principle.[179] Even so, Gibbs, J. who, it will be recalled, took the most restrictive approach to recovery by qualifying *Donnelly* v. *Joyce*, appears expressly to have included ordinary household services previously provided by the plaintiff as falling within the principle under consideration. After noting the frequency with which relatives or friends assist injured accident victims, he continued:

> Sometimes the service provides care of a kind that would otherwise have to be provided in a hospital or nursing home, or by a paid nurse or team of nurses working in the plaintiff's home. Sometimes the service provided is of a domestic nature—for example, the relative or friend does housework that the injured plaintiff is unable to do.[180]

Clearly, he contemplated that the principles expounded in the case would apply to both situations he outlined. And, there is no suggestion that the "housework" must be solely for the plaintiff's benefit, as opposed to being for the benefit of other family members.

Stephen, J. did not address this issue, but he noted that the kind of gratuitous care in issue "necessarily entails devoted care on someone else's part, often a wife or woman relative who may have to abandon her ordinary employment to nurse the plaintiff."[181] Having expressly stated the assumption that the injured will be men and the carers women (as was the situation in the case before the court), he did not go on to consider the possibility that the woman herself might be disabled; that she might be unable to look after herself *and* unable to perform her previous functions within the household.[182]

It is often claimed that since the decision in *Griffiths* v. *Kerkemeyer*, damages awards have risen quite significantly.[183] This may perhaps explain why some courts, in particular the N.S.W. Court of Appeal, have been prompted to impose restrictions on recovery under the *Griffiths* v. *Kerkemeyer* principle. Two such limitations are particularly evident: confining the principle to recovery only in respect of medical/nursing services which provide for the personal care of the victim, and imposing a "reasonableness" requirement which reduces damages awarded when the services are provided as part of the "ordinary incidents of family life and obligation".[184]

In *Cummings* v. *Canberra Theatre Trust*[185] on appeal from a decision of Blackburn, J. in the A.C.T. Supreme Court,[186] the Full Federal Court (McGregor, J. dissenting on this issue) held that the principle of *Griffiths* v. *Kerkemeyer* applied to the performance of domestic services.

[179] Had they done so, such an expression of opinion would have been merely *obiter dictum*.

[180] *Supra* n. 3 at 163.

[181] *Id.* 170-171.

[182] Mason, J. gave no indication that he considered the classification of the gratuitously provided service of significance.

[183] See, for example, Clarke, *supra*, n. 88, at 69; N.S.W. Law Reform Commission, Issues Paper, *Accident Compensation*, 1982, paras. 3.11-3.12, and *Final Report 1, supra* n. 65 at para. 10.24.

[184] *Kovac* v. *Kovac, supra* n. 6 at 668 *per* Samuels, J.A. (See Section VI.)

[185] *Supra* n. 51.

[186] (1979) 25 A.C.T.R. 33.

Brennan and Fisher, JJ. explicitly relied on Stephen, J. and Gibbs, J.'s judgments in *Griffiths* and in accordance with their approach, characterised the loss which produced the need for domestic assistance as a "loss by the appellant of her capacity to do the housework".[187] They rejected the defendant's argument that a distinction should be drawn between the need for replacement housekeeper services here and the needs which attract compensation under the principles expressed in *Griffiths* v. *Kerkemeyer.*

But that submission found favour with McGregor, J. He distinguished *Griffiths* and cases decided under that principle from the present case, holding that in *Griffiths* (and other cases he cited) it was "essential that the services, clothes or wages" were for the plaintiff personally—not as here—for the household.[188]

> There is a distinction in the cases of *Donnelly, Beck* v. *Farrelly* and *Griffiths* v. *Kerkemeyer* from the present in that the plaintiffs in those cases by virtue of a gratuitous provision actually received something they needed personally; whereas here the appellant received nothing other than being relieved of the necessity to have carried out more secretarial and domestic services for her husband and in their household respectively. It is argued that (in the *Donnelly* sense) her loss is the existence of the need for those services. . . . Yet those services were not provided to or for her personally.[189]

In *Daly's Case,*[190] the Court of Appeal relied in part upon *Donnelly* v. *Joyce* in awarding the plaintiff damages for her lost capacity. Both Ormrod, L.J. and Templeman, L.J. referred to that case, but only as a basis of authority for that part of the pre-trial loss which was quantifiable—i.e. the wages lost by Mr. Daly's having to give up his part-time employment.[191] Both had no hesitation in including that sum as part of the (female) plaintiff's damages. The result of this is that it is unclear whether the English Court of Appeal considers loss of housekeeping capacity as a "need" of the plaintiff falling within the *Donnelly* v. *Joyce* principle. In *Daly*, that loss, though clearly considered as compensable, appears to have been treated as *sui generis.*

This question caused sharp division in the N.S.W. Court of Appeal in *Burnicle* v. *Cutelli.*[192] Reynolds, J.A. declared himself unable to find assistance in the decision in *Griffiths* v. *Kerkemeyer.* That case, in his view, dealt with a different question, *viz.*, "the compensation of an injured person in whom has been created a need, the satisfaction of which calls for the provision of services for which it is reasonable to pay".[193]

In other words, he would confine the principle to post-accident needs created by the occurrence of the accident, rather than extend it to pre-existing needs which would otherwise go unmet as a result of the accident. Turning a person over at night to prevent bed sores falls into the former—a

[187] *Supra* n. 51 at 11.
[188] *Id.* 5.
[189] *Id.* 7.
[190] *Supra* n. 28.
[191] *Id.* 702, 703.
[192] *Supra* n. 9.
[193] *Id.* 28.

man taking over the vacuuming because his wife who previously did it no longer can, falls into the latter.

Though he declared himself to be in agreement with the Pearson Commission's recommendation that such a loss should be compensated by way of award to the primary accident victim, he reaffirmed his view that this was non-economic loss – to be compensated by way of "an award of general damages, just as must be done in respect of any other deprivation which does not produce financial loss".[194]

After disagreeing with the way in which the Court of Appeal had dealt with future loss in *Daly*, he continued:

> To quantify the injured housewife's loss of capacity to perform the work voluntarily for the benefit of others by the measure of the value of those services if performed by a third party may be a convenient and simple way to do so, but it does not seem to accord with established principle or to be a satisfactory way of assessing what is reasonable.[195]

The narrowness of Reynolds, J.A.'s approach has been the subject of some critical comment. Clarke, J. (writing extra-judicially) has expressed his disagreement with this reading of *Griffiths* in two respects. First,

> It disregards Stephen, J.'s reference to "needs created or capacity lost" [p. 180] and Mason, J.'s "the true loss is the loss of capacity which occasions the need". [p. 193]. Secondly, it means that if the plaintiff employs housekeeping assistance at a cost to himself [*sic.*] that cost is allowable, yet if a member of a family gives up work (and thus suffers a real financial loss) the loss of capacity is treated simply as part of the general damages and the provider's loss or "sacrifice" is ignored.[196]

It is submitted that both these criticisms are well-founded and that Reynolds, J.A.'s approach is misconceived.

Mahoney, J.A. also treated this loss as falling outside the *Griffiths* principle and as being "for services now supplied not to her but to others".[197] In his view, policy did not extend to compensating a plaintiff because others had lost the benefit of her services. To compensate the plaintiff here would, he claimed, be to extend *Griffiths.*[198]

Of the three judges of appeal, only Glass, J.A. endorsed both Stephen and Mason, JJ.'s conceptual approach to the losses in question.[199] He then expressed his view that the Court of Appeal in *Daly* considered such a claim as falling within *Donnelly* v. *Joyce.*[200]

---

[194] *Ibid.*

[195] *Ibid.*

[196] *Supra* n. 88, at 84.

[197] *Supra* n. 9 at 37.

[198] *Ibid.* Interestingly, he expressed the view that there was no difference on this point between his approach and that of the majority of the Federal Court in *Cummings* v. *Canberra Theatre Trust* presumably because there money was actually expended on replacement services.

[199] *Supra* n. 3 at 180 *per* Stephen, J.: "the needs created or capacity lost"; *Id.* 193 per Mason, J.: "the true loss is the loss of capacity".

[200] Though he commented that it may possibly have been resurrecting the notion of indemnity for financial loss when it rejected the allowance for past domestic assistance. If so, *Griffiths* (and, indeed, *Donnelly*) had rejected such a requirement.

In his view, it would be futile to examine *Griffiths* closely with a view to determining whether the High Court had expressed the principle in such a way as to cover domestic services. True as it is that that question was "not present to the minds of the justices" on the facts presented to them, it has already been noted that Gibbs, J. did in fact advert precisely to the situation which arose in *Burnicle.*[201]

After outlining several propositions which he extracted from the High Court's decision, Glass, J.A. declared himself,

> . . . unable to see any reason in point of doctrine why the conceptual approach (Ogus, *The Law of Damages* (1973), at p. 172, adopted in *Donnelly* v. *Joyce* and *Griffiths* v. *Kerkemeyer* (1977) 139 C.L.R. 161, at p. 178), should include a need for nursing services due to an impaired capacity to do for oneself but should exclude the need for domestic services due to an impaired capacity to do for one's family.[202]

It is submitted that Glass, J.A.'s approach is to be preferred to that of the majority members of the Court of Appeal. It was their approach, however, which found favour with Kennedy, J. in *Maiward* v. *Doyle,*[203] who ruled that *Griffiths* v. *Kerkemeyer* "says nothing directly as to services rendered or to be rendered to persons other than the injured party. Nor does it deal with ordinary domestic services, the need for which was not created by the wrongful act".[204]

Olney, J. was not so categorical. He considered it,

> . . . conceivable that the principles that [Gibbs, J.] enunciated would be equally applicable to the provision of other services, especially services that may be necessary for the general well being of the plaintiff, such as feeding, dressing, bathing and attention to matters of basic hygiene. These services would not ordinarily be characterised as hospital and nursing services but in some respects are similar to them.[205]

Nonetheless, he held that,

> . . . there is nothing about the services gratuitously provided by Mrs. Doyle's husband and children that can be said to be reasonably necessary for her own welfare, nor is there any suggestion that it would be reasonably necessary to provide any such services at cost if the husband and children had not performed them.[206]

In *Hodges* v. *Frost*[207] Kirby, J., like Stephen, J. in *Griffiths,* considered the policies underlying the principle and reiterated the fundamental basis of the decision in *Griffiths—viz.*, that compensation

---

[201] *Supra* n. 3 at 163, (quoted *supra*, n. 180).
[202] *Supra* n. 9 at 34.
[203] *Supra* n. 1.
[204] *Id.* 218.
[205] *Id.* 236.
[206] *Id.* 237. Wickham, J.'s dissent, wherein he expressly endorsed Glass, J.A.'s approach, has already been noted (see text at n. 35, and n. 135).
[207] *Supra* n. 2.

is "not for the services but for the loss of capacity which the services may help to evidence".[208]

Throughout the judgment Kirby, J. appears to have assumed that there is no logical basis for distinguishing between "nursing" and "domestic" services in applying the *Griffiths* principle of recovery; certainly, he did not advert to any such distinction. This case differed from the earlier Federal Court decision in *Cummings* in that here, monies were not actually expended as the husband took over the domestic chores, instead of paying for replacement labour.

> Having regard to the extent of the injuries, the painful nature of them and their persistence, the fact that they incapacitated the wife from work and the inference that they incapacitated her from performing heavy domestic duties, it was clearly open to Kelly, J. to conclude that but for the gratuitous intervention of the husband, it would have been reasonably necessary to secure domestic assistance at a cost. The husband continues to work. Somebody must perform the domestic duties. To the date of the trial they were performed by the husband. This is the case in which *Griffiths* v. *Kerkemeyer* suggested that the sense of justice of the ordinary person would be shocked if no compensation were recovered in respect of the proved need. Had the wife secured paid domestic assistance, there is little doubt that the defendant, on the accepted medical and lay evidence, would have conceded the obligation to pay for it. This is the very inconsistency which *Griffiths* v. *Kerkemeyer* aimed to remove from the law.[209]

Kirby, J. also confronted the defendant's argument, successful in both *Burnicle* and *Maiward* that the award should reflect the fact that the relevant services were partly for the husband's benefit and only partly for the benefit of the injured wife, but, after noting the difficulty of disentangling the work, concluded that "the basic need to perform the domestic duties . . . arose as a result of the disabilities that followed" the injury.[210]

The weight of academic and judicial (albeit extra-curial) opinion appears to favour the Federal Court's approach.[211] Only Samuels, J.A. has expressed support for Reynolds, J.A.'s approach. In a paper delivered at a 1982 seminar, he considered it unfortunate that the word "capacity" was used by the High Court in *Griffiths*, preferring instead the use of the "need" concept.[212] He then asked, somewhat rhetorically, "what is the nature of the need when an unpaid housekeeper is unable to look after her family?" If it's frustration, then the compensation should be provided under the general non-economic loss head. He doubted that the plaintiff in such a case "vicariously felt" a need on behalf of her family.[213]

---

[208] *Id.* 380.

[209] *Id.* 386.

[210] *Id.* 387.

[211] See, for example, Chesterman, *supra*, n. 65; Clarke, *supra*, n. 88.

[212] *Assessment of Damages, supra*, n. 88, at 309.

[213] "It is really the family's need to be looked after and it is very hard, I think, in any rational way to think of it as the plaintiff's own needs. *She* doesn't *need* her son's shirts to be ironed. *He needs* them ironed, she misses the fact that she can no longer do it, and I don't think that it is a *Griffiths* v. *Kerkemeyer* case, and I don't think that the loss is to be valued by working out how much an employed person might charge to do the ironing." (*Id.* 310)

However, of the others who addressed this issue in the same forum, Kirby, J.'s view as to the scope of *Griffiths* v. *Kerkemeyer* (as it subsequently came to be expounded in *Hodges* v. *Frost*) was preferred.[214]

VI. Gratuitous Services and the "Ordinary Currency of Family Life and Obligation"

As noted (*supra*) the decision in *Griffiths* v. *Kerkemeyer* is often said to have led to an increase in damages awards. Soon after the High Court's decision, the N.S.W. Court of Appeal began to impose a significant qualification upon the new recovery principle which requires the Court, in assessing an award where gratuitous services are involved, to take into account the "ordinary currency of family life and obligation".

In *Johnson* v. *Kelemic*[215] both husband and wife claimed damages when the wife, already a quadriplegic from a previous accident, was injured as a result of the defendant's negligence. The case was decided shortly after the High Court handed down its verdict and the decision in *Griffiths* was the subject of some discussion by the judges of appeal (Reynolds, Samuels and Mahoney, JJ.A.), though the wife did not claim under *Griffiths*. Mahoney, J.A. considered it necessary to draw a distinction between those cases in which the plaintiff, had the services not been provided gratuitously, would have arranged to have them supplied for reward and those where the plaintiff would not have done so. Of the latter, he expanded:

> It may be that the nature of the services is such that they are not such as may normally be obtained for reward, and are such that they are or partake of the normal incidents of family life.[216]

Griffiths could have no operation in a case such as this since there had been no evidence to suggest that the husband, or any other person, had suffered financial loss.

> Some at least of the services in fact provided comprise, on the evidence, substantially the kind of things which members of a family might be seen as doing for disabled persons in the family group, in the course of their ordinary day to day living.[217]

In a self-styled adaptation of the words of Gibbs, J., Mahoney, J.A. described the services here as "going to the satisfaction of a need which could not be productive of financial loss, in the sense here relevant, either to the wife or the husband".[218]

In *Bloomfield* v. *Brambrick*,[219] Glass, J.A. invoked *Johnson* v. *Kelemic* as authority for the proposition that "domestic services rendered within the family do not satisfy the requirements of the *Griffiths* v.

---

[214] See Nygh, J., *Assessment of Damages, supra*, n. 88, at 284-285. Clarke J. (*id.*, 85), however, considered that the law in N.S.W. was settled: this kind of lost capacity was in his view compensable only by the inclusion of an allowance in the general damages. See also the recent N.S.W. legislation on these damages, *infra*, at nn. 246-249.

[215] (1979) F.L.C. 90-657 (N.S.W. Court of Appeal).

[216] *Id.* 78,495.

[217] *Id.* 78,496.

[218] *Ibid.*

[219] N.S.W. Court of Appeal, No. 10 of 1979, 17 August, 1979, (unreported).

Kerkemeyer principle unless it be shown to be reasonably necessary that such services should be performed at the expense of the defendant".[220] Mahoney, J.A. reiterated the views he had earlier expressed in *Johnson* and invoked what he described as the "test of reasonableness"[221] though he considered it undesirable to attempt to lay down any guidelines for imposing such a limitation, preferring the matter to be left for determination on a case by case basis.[222] But in *Kovac* v. *Kovac*[223] he reiterated these views and set out certain propositions which he saw as central to the principle in *Griffiths* v. *Kerkemeyer.*

a. To say that a plaintiff has a "need" does not determine the matter; it merely poses the problem.[224]
b. The origin of the *Griffiths* v. *Kerkemeyer* principle lies in policy.[225]
c. The principle results in the creation of an anomaly leading to over-compensation.[226]
d. Though it was unnecessary to express a concluded view, doubt was expressed as to whether recovery should be allowed in cases where it was not intended to pay for the services.[227]
e. A principle of reasonableness must be applied in cases where the services are such that they would ordinarily be provided as part of the incidents of ordinary or family life.[228]

Kovac v. *Kovac*, like *Johnson* and *Bloomfield* before it, involved a woman accident victim whose husband/family provided gratuitous services to her after the accident. The husband in *Kovac* was not employed, and had been receiving workers compensation for some years. The evidence accepted by the court was to the effect that though unable to engage in outside employment, he was able to assist his wife, as required, and perform the household tasks which she had carried out before the accident.[229]

It was argued for the defendant that the full market cost of the services provided should *not* form the basis of a *Griffiths* award because, in rendering services to her, he had suffered no financial loss since he was available to help her by reason of being at home unemployed. Samuels, J.A. discussed the factors upon which a defendant could rely in pressing a case for reduction of the damages on "reasonableness" grounds. These included,

---

[220] *Id.* 1588.
[221] *Id.* 1594.
[222] *Id.* 1597. Hutley, J.A. also focussed upon the question of financial loss and decided that the plaintiff would not have paid someone to do the work even if she had money at her disposal and did not have her family to assist. (*Id.* 1585). Another case in which limitations were placed on the *Griffiths* v. *Kerkemeyer* damages is *Frankcom* v. *Woods*, N.S.W. Court of Appeal, October 1 1980, (unreported).
[223] *Supra* n. 6.
[224] *Id.* 675.
[225] *Id.* 676.
[226] *Id.* 677.
[227] *Id.* 678.
[228] *Ibid.*
[229] Samuels, J.A., in an extra-curial discussion of the case gave this factor some significance: " . . . although the reasons for his incapacity and the likely prognosis were somewhat obscure . . . it was a reasonable inference, we thought, that he was likely to remain in that not unhappy situation for a great many years to come. Being unemployed and at home, he found it, I would think, neither difficult nor distasteful to keep an eye on his wife." *Supra* n. 88 at 308.

> . . . the domestic nature of the services, the husband's availability to perform them and the absence of any financial loss on his part; and the lack of "sacrifice" or of substantial emotional or physical pressure caused by the routine which the husband had been carrying out.[230]

Both Samuels, J.A. and Mahoney, J.A. agreed in concluding that four sevenths of the amount assessed for future assistance should be credited to the defendant. They felt that some amount must go to the plaintiff to take account of the possibility that the husband might predecease the plaintiff, or return to work, or become totally incapacitated and unable to assist his wife.[231]

Reynolds, J.A. dissented. He disagreed with the proposition that,

> . . . considerations of reasonableness or general notions of fairness enable a tribunal of fact to moderate the award which should otherwise be made. . . . [He was] unable to see the relevance of the circumstance that it is a husband performing . . . [the services] and that he is able to do so or that of the circumstance that it causes no financial loss to the provider of the services or that they are of a domestic nature.[232]

Although he noted that if a housekeeper were to be employed, s/he would "provide for two", he claimed that the evidence did not suggest that it cost more money to have the house kept for two than for one.[233]

The decision in *Kovac* v. *Kovac* has been approved by the W.A. Full Court in *Maiward* v. *Doyle* and by the Queensland Full Court in *Carrick* v. *Commonwealth of Australia*[234] and the "reasonableness" principle which the N.S.W. Court of Appeal read into *Griffiths* v. *Kerkemeyer* has been applauded by Mr. Justice Clarke[235] on the basis that it reflects the fact that the principle of reasonableness underlies the whole system of awarding damages.

However, it does not have universal support. In a comment upon Clarke, J.'s paper, Professor Ronald Sackville, Chairman of the N.S.W. Law Reform Commission, noted that to argue against "reasonableness" as a principle is not easy[236] but that it is important to note the effect of the argument *viz.*, that accident victims receive less than they might otherwise, taking into account the basic compensatory principle that damages are designed to restore the plaintiff to the same position as if s/he had not sustained the injury.[237] He pointed out that neither *Kovac* nor the other decisions provided any guidance as to how the court is to determine what

---

[230] *Supra* n. 6 at 669.

[231] See, *per* Samuels, J.A., *id.* 670.

[232] *Id.* 660.

[233] *Ibid.* This is a direct reference to the type of argument raised in cases like *Burnicle* v. *Cutelli* and *Maiward* v. *Doyle, viz.*, that household services (and, accordingly, damages for the loss of ability to perform those services) should be apportioned among the family members. Mahoney, J.A. also referred to that argument but he suggested that the parties had perhaps decided that the sensible course was to ignore that issue.

[234] [1983] 2 Qd.R. 365.

[235] Clarke, *supra*, n. 88, at 79.

[236] Arguing against "reasonableness" is similar to arguing against "motherhood".

[237] *Assessment of Damages, supra*, n. 88, at 94.

assistance can reasonably be expected from family or friends, nor a means of estimating the future availability of the gratuitous service provider.[238]

Chesterman has also raised a number of objections to the *Kovac* "reasonableness" principle. First, family life is disrupted because of an accident. Many of the tasks involved are new tasks, referable to needs newly created by the accident (e.g. turning someone over in bed at night).[239] Accordingly, "the ordinary currency of family life" no longer has the same meaning as before the accident. Secondly, as was explicitly noted in *Kovac*, the gratuitous service provider may cease to be available. The child may leave home; the husband in *Kovac* may return to paid employment, or might predecease the plaintiff. Husband and wife may separate and/or divorce.[240]

Chesterman argues that "the first priority of compensation should be to ensure that the burden of catering for needs newly created by the accident is relieved as fully as money can do".[241] Accordingly, "any element of undue sacrifice or strain imposed on the family" should, in his view, be reflected in damages awards.[242]

From the bench, the most trenchant criticism has come from Kirby, J.:

> There is nothing in the reported decisions in states other than N.S.W. that lends support to the notion that the principle in *Griffiths* v. *Kerkemeyer* is to be read down to exclude, as if in a special category, gratuitous domestic assistance provided by family or friends to the victim of an injury . . . It is the duty of this Court to apply the principle stated in *Griffiths* v. *Kerkemeyer.* In so far as there is any suggested modification of that principle evidenced in judgments of the Court of Appeal of the Supreme Court of N.S.W., it does not appear to be a unanimous view in that Court as the judgment of Glass, J.A. [in *Burnicle* v. *Cutelli*] illustrates.[243]

Kirby, J. reiterated his view that the Federal Court should follow its own earlier decision in *Cummings* rather than follow the Court of Appeal's "attempted retreat"[244] evident in *Kovac* v. *Kovac.* The *Griffiths* principle, while perhaps anomalous, is supported by important public policies. Moreover, as a question of precedent, the Federal Court was bound to follow and apply the decision until modified by legislation or qualified by the High Court.[245]

However, in N.S.W., the strong views of the Court of Appeal on this issue have been greeted with a legislative response, albeit a somewhat different response to that in the cases. The Motor Vehicles (Third Party Insurance) Amendment Act[246] sets out statutory criteria to be followed in compensating accident victims where services have been provided gratuitously.

If the services are performed in less than 40 hours per week, their

---

[238] *Id.* 94-95.
[239] Chesterman, *supra,* n. 65, para. 3.6.10.
[240] *Id.* para. 3.6.11.
[241] *Id.* para. 3.6.10.
[242] *Ibid.*
[243] *Hodges* v. *Frost, supra* n. 2 at 385.
[244] *Id.* 390.
[245] *Ibid.*
[246] Number 86 of 1984, assented to June 28, 1984.

cost is not to exceed the cost of average weekly earnings in N.S.W., and where more than 40 hours a week is spent on those services, an hourly rate, based on those average weekly earnings, is to be applied.[247]

The effect of this provision will be to ensure that the services of unskilled and untrained family members are not compensated to the plaintiff on the rates applicable to professional nursing care. But it does not appear to leave room for the broad discretionary judgments about the "ordinary obligations of family life" and it is arguable that it will no longer be possible for courts to discount the awards on that basis.

It is significant that the statutory description of the services includes *both* domestic services *and* nursing services.[248]

The legislation, which also imposes a statutory discount rate of 5%,[249] applies only to N.S.W. The Federal Court has in *Hodges* v. *Frost* expressed its disapproval of the use of a "reasonableness" principle to reduce damages awards, but there is no indication of whether the other state or territory legislatures will intervene with a view to clarifying the application of the principles in *Griffiths* v. *Kerkemeyer.*

VII. Conclusion

In the course of this article I have tried to isolate the various legal issues involved in the determination of cases concerning women accident victims whose capacity to do housework has been destroyed or impaired by injury. It has been argued that, in particular, the loss of that capacity is a loss for which compensation should be paid to the primary accident victim herself. However, the trend, at least in relation to the capacity to do housework for others, has been in favour of viewing that loss as a secondary loss, specifically to the victim's husband. Accordingly, unless a fundamental reappraisal is made, damages for that lost capacity may not be recoverable *at all* following the abolition in N.S.W. of the action for loss of consortium, thereby providing defendants (though of course, in practice, insurers) with a windfall.

Alternatively, courts may concede that the loss in question is compensable by way of a primary claim brought by the injured woman herself. Even so, they may persist in propagating the view that housework is a pleasurable activity from which women derive satisfaction, and accordingly loss of capacity to do that work is compensable by way of damages for non-pecuniary loss. Whilst this article has *not* been concerned with the different methods of quantifying the value of the loss,[250] it has been argued that loss of capacity to work in the home is an economic loss, which "is or may be productive of financial loss".[251] Damages for non-pecuniary loss (e.g. loss of amenity) are likely to be substantially reduced in relation to accidents covered by the proposed transport accidents scheme in N.S.W. It is therefore essential that the truly economic nature of that

---

[247] Schedule 3, Section 35C.

[248] Section 35C(1) refers to an award which includes "compensation for the value of services of a domestic nature or services relating to nursing and attendance".

[249] Section 35B.

[250] These are set out *supra*, at n. 66. See also n. 162, and the works cited *supra*, n. 66 and n. 158.

[251] *Graham* v. *Baker* (1961) 106 C.L.R. 340, 347 and see also *Griffiths* v. *Kerkemeyer, supra* n. 3 at 168 *per* Gibbs, J. (as he then was). Certainly until that economic foundation is established, economists' arguments as to the relative merits of the different quantification methods seems premature.

loss, so clearly described by Murphy, J. in *Sharman* v. *Evans*[252] be acknowledged, both in the common law and in the context of no fault schemes.

Finally, the restrictions placed on recovery under the principle of *Griffiths* v. *Kerkemeyer* have been examined. It has been argued that housekeeping services fall squarely within the scope of that principle (as Gibbs, J. expressly recognised in his judgment).[253] Moreover, the recent trend toward reducing amounts awarded for the cost of future care, culminating, in N.S.W., with legislation on the matter, has been examined and it has been suggested that this approach may cause hardship to injured accident victims and their families.

The Hon. Ann Symonds in the midst of a heated debate in the N.S.W. Legislative Council upon the introduction of the Law Reform (Marital Consortium) Bill (as it then was)[254] exhorted her colleagues to consider the legislation "in the context of the total losses". Yet this paper demonstrates that the total losses suffered by women accident victims have not been taken account of by courts who have failed, in personal injury claims, to recognise the economic contribution of women as domestic workers.

Law reform efforts must take place in that "context of the total losses" or attempts to improve the position of women will fall victim to the insidious structural sexism that underpins the principles governing common law damages awards.

---

[252] *Supra* n. 68 at 598.
[253] *Supra* n. 3 at 163.
[254] N.S.W. Legislative Council, May 10, 1984, p. 552.