Before the High Court

Women's Work: Who Cares?

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Introduction

We know very little about what happens to accident victims who receive damages awards.[1] For many years, it has been recognised that the once-and-for-all, lump sum method of assessment may amount to little more than a "forensic lottery".[2] Perhaps its chief failing is that there are too many contingencies and uncertainties about the future of which the courts must take account when assessing damages.[3] As well as a chance that the plaintiff will fall under the metaphorical bus on her way out of the courtroom, there is also the possibility that the plaintiff will live much longer than predicted, or that the value of money will erode further than predicted.[4] The costs of providing the victim with necessary care might escalate, or the quantum of care required might increase. Relationships with partners or other people close to the accident victim might break down.

Occasionally we hear of instances which confirm some of these concerns. Perhaps the best known case is that of Gillian Thurston, rendered a quadriplegic at the age of 15 and awarded what was in 1965 a record amount of $139,000.[5] In 1974, her mother wrote to the Woodhouse Inquiry stating that the total amount of damages had been invested, but the full return was completely taken up with medical and nursing expenses.[6] By 1981, Ms Thurston's mother, at that time a widow aged 62, had been forced to reduce the paid nursing services to six hours per day five days per week, and herself cared for her daughter the remaining 138 hours per week.[7] She had sold some of her capital assets to continue to pay the nurses. In the reports of Gillian Thurston's trial (and the appeal), a number of

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1 For some statistics on accidents and sources of compensation for them, see NSW Law Reform Commission Issues Paper, *Accident Compensation*, 1982. See also Cane, P, *Atiyah's Accident Compensation and the Law* (4th edn, 1987) chs 1 and 8 and Harris, D, et al, *Compensation and Support for Illness and Injury* (1984).

2 Ison, T, *The Forensic Lottery* (1967) and see Atiyah's six count indictment of the common law: Cane, n1 at 415-436.

3 For a discussion of problems in assessing hypothetical events in the future, see *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 642-3 (Deane, Gaudron and McHugh JJ).

4 See *Todorovic v Waller* (1981) 150 CLR 402.

5 *Thurston v Todd* [1965] NSWR 1158 (Asprey J); *Thurston v Todd* [1966] 1 NSWR 321 (CA). The component for future nursing care was $80,000 (£40,000, calculated at £55 per week for 30 years).

6 *Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia* (the Woodhouse Inquiry) (1974) Volume 1, Appendix 6.

7 See Davis, J L R, "Damages for Personal Injury and the Effect of Future Inflation" (1982) 56 *ALJ* 168 at 174.

references are made to the family environment in which this young woman lived. No doubt it was assumed (correctly, as it happens) that her care was secure in that context. But no account was taken of the enormous load borne by her mother who, had the plaintiff not died in 1983,[8] would most likely have been unable to continue to care for her for much longer.

Legal discourses rarely allow us to hear the stories of women like Gillian Thurston's mother.[9] The acontextual way in which judgments are written, combined with the once-and-for-all method of common law assessment, usually leave us in ignorance of the fate of accident victims like Gillian, or like Albertus Kerkemeyer.[10] Of course, only a small number of people who have been injured, or who suffer from some debilitating disease, can recover damages by proving negligence against a third party. Family members often care for relatives or partners without any assistance from any defendant's insurers.[11] As Stephen J has recognised, the vast majority of those carers are women: care at home "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 and who will in any event find the task a demanding one."[12]

The decision of the High Court in *Griffiths v Kerkemeyer* went some way toward recognising the reality of the lives of accident victims whose worlds are irreparably changed by the injuries they sustain and the needs created by the accident. For the first time, the High Court made it clear that damages could be recovered for the costs of care, even where those services were, at the time of the judgment, being provided "gratuitously", usually, though not always, by a (female) member of the plaintiff's family. Yet within months of that decision, State courts (most notably, the NSW Court of Appeal) began imposing limitations on recovery under that head in purported reliance on the High Court's decision, a trend followed by a number of State legislatures.

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8 See Luntz, Hambly and Hayes, *Torts: Cases and Commentary* (2nd edn, 1985) at 25. Note that the main dispute on appeal was her life expectancy: Gillian lived for some 20 years after the accident; the Court had determined that her life expectancy was 30 years.

9 Compare the account by Anne Deveson of her struggle to care for her schizophrenic son, in *Tell Me I'm Here* (1991). Cf the discussion by Christine Littleton of the stories of battered women in "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women" [1989] *U Chicago Legal Forum* 23.

10 See *Griffiths v Kerkemeyer* (1977) 139 CLR 161 where damages were awarded, *inter alia*, on the basis that future care would be provided by the accident victim's fiancée and family. I am told by a colleague that Mr Kerkemeyer's fiancée (who was a very young woman) was unable to sustain her care of him and that he was forced to enter institutional care. The award he had received proved quite inadequate for this.

11 See Harris, et al, above n1. In Australia, a modest carer's pension is available under s198 of the *Social Security Act* (Cth) 1991 to a person who personally provides constant care and attention in her or his own home to a severely handicapped person in receipt of a pension. Child disability allowance is a payment made under Part 2.19 of the *Social Security Act* 1991 to a parent of a child with a physical, intellectual or psychiatric disability who, because of that disability, needs substantially more care and attention than would a child without that disability. The criteria for payment emphasise both the quantum of care and attention provided, and the fact that the care must be provided in (or adjacent to) the home.
Note that carer's pension (but not child disability allowance) is not available where the person for whom the care is provided is precluded from receiving social security payments because of the availability or receipt of some form of accident compensation: s1165(2)(e), and see generally, *Social Security Act* 1991, Part 3.14, for the treatment by the social security system of the receipt of accident compensation (cf *Redding v Lee*; *Evans v Muller* (1983) 151 CLR 117).

12 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 170-1.

In June 1991, the High Court granted special leave to appeal in a case which will require it to reconsider both the appropriateness of the *Griffiths v Kerkemeyer* head of damages and its proper method of assessment. In *Van Gervan v Fenton*,[13] the Tasmanian Full Court affirmed a decision of a trial judge who had assessed the damages under this head by reference to the amount the accident victim's wife had foregone in wages by leaving work to look after him.[14]

Around the time that the High Court was hearing the application for special leave in *Van Gervan v Fenton*, the Office of the Status of Women released a report it had commissioned which looked at the distribution of unpaid work in Australian households.[15] The report demonstrated that, contrary to popular mythology,[16] the increasing participation of women in the paid labour force has not led to a corresponding decrease in their unpaid work in the home nor to any significant increase in their husbands' domestic contribution. Among "retired couples",[17] while men experience an increase in leisure time, women carry a disproportionately heavy load of unpaid work, attributed to their day-to-day care of ageing husbands. While the study did not specifically consider unpaid work done by women in caring for family members who are the victims of accidents, injuries or disease, it seems reasonable to extrapolate from its findings to conclude that women carers would perform particularly large amounts of unpaid household work.[18]

Juggling Time confirms that many women carry what is, in effect, a double burden: they simply have two jobs, one paid and one unpaid.[19] While it is

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13 Tasmanian Full Court, 19 March 1991 (unreported: Serial No 10/1991). The High Court (Mason CJ, Dawson and McHugh JJ) granted special leave to appeal on 7 June 1991.

14 It should be noted that the appeal was allowed on another point not relevant to this discussion — viz, the appropriate treatment of benefits paid under the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth).

15 Bittman, M, *Juggling Time: How Australian Families Use Time*, Office of the Status of Women, Department of the Prime Minister and Cabinet (1991) (hereafter *Juggling Time*). The findings are based on a 1987 Time Use Pilot study conducted by the Australian Bureau of Statistics.

16 The mythology to which I refer is amply reflected in comments by courts in a number of damages cases to the effect that housework is increasingly shared: see for example, Hutley JA in *Kealley v Jones* [1979] 1 NSWLR 723 at 741; Deane J in *Nguyen v Nguyen* (1990) 169 CLR 245 at 256, and for an extra-curial discussion of this by one of the judges who has played a key role in the development of limitations on *Griffiths* recovery, by reference to "the ordinary currency of family life and obligation" (*Kovac v Kovac* [1982] 1 NSWLR 656 at 668), see Samuels JA: "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". Samuels JA, *Assessment of Damages*, Committee for Postgraduate Studies in Law, University of Sydney, 1982, at 311.

17 Indeed, the report suggests that caution must be exercised in referring to women as having "retirement": "For a woman, living with a retired husband means foregoing leisure in order to provide care and service for her spouse": *Juggling Time*, above n15 at 55. And, the unpaid labour performed by women for their retired husbands "substitutes for the kind of care provided by medical institutions and formal retirement care. The dollar value of this transfer may well be the equal of state health and welfare expenditure on the aged": id at 53.

18 For some discussions of women's work as carers, see, for example, Jane Lewis, "'It all Really Starts in the Family ...' Community Care in the 1980s" (1989) 16 *J Law and Soc* 8; Finch, J and Grove, D (eds), *A Labour of Love: Women, Work and Caring* (1983). For a more general discussion of the worldwide failure to acknowledge the value of women's contribution of unpaid work to the economy, see Waring, M, *Counting for Nothing: What Men Value and What Women are Worth* (1988).

acknowledged that women are primarily responsible for the care of children,[20] what is less frequently recognised is the overwhelming responsibility of women for the care of others: their partners, the elderly, people with disabilities, or others unable to care for themselves independently.[21]

It is in this context of the failure to recognise the value of women's work that this note will look at the principle behind *Griffiths v Kerkemeyer* damages and consider the limitations placed on recovery by both courts and legislatures since the decision in 1977. In particular, it will become apparent that the judgments in these cases rest on a series of assumptions which import "common understandings" of the world: understandings which may not accord with reality, and certainly not with the reality of the lives of accident victims and their carers. Some of the assumptions embedded in many of the post-*Griffiths* judgments, and in the statutory limits which have been imposed on recovery are: that the relationships people are in at the time of their accidents, or at trial, will continue unchanged;[22] that people in households share domestic work;[23] that where care is being provided gratuitously by a partner, parent or child, that situation will continue;[24] that the amount of care accident victims require will remain constant; that caring work in the home which is not provided for cost has no economic value, since it has no market reference;[25] and that the "ordinary currency of family life and obligation" makes it "reasonable" that family members undertake caring work gratuitously.[26] Courts have used these assumptions when assessing damages on the basis of factual scenarios presumed to exist, as if somehow these are matters of which "judicial notice" may be taken. This has led a number of courts to conclude that there is no justification for awarding the full costs of the requisite care to accident victims who have been assisted by some other person prior to the trial since, apparently, it is "reasonable" to deny the economic nature of the work of carers.

Griffiths v Kerkemeyer gave accident victims able to claim damages for their loss (and the carers of those people) a real choice about how to secure the necessary care. Yet the limitations which have developed from these assumptions have effectively removed that choice. The purpose of analysing and uncovering the assumptions upon which these limitations have been based is to demonstrate

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19 See the comment by Wickham J in *Hermann v Johnson* [1972] WAR 121 at 128.

20 Compare, however, the recent trend toward "equality" discourses in child custody law, based in part on a (false) assumption that women and men share child care equally: see Graycar, "Equal Rights versus Fathers' Rights: The Child Custody Debate in Australia" in Smart, C and Sevenhuijsen, S (eds), *Child Custody and the Politics of Gender* (1989). Cf *Gronow v Gronow* (1979) 144 CLR 513 at 528, per Mason and Wilson JJ.

21 "Mothers are ten times more likely than fathers to be carers of a child with severe disabilities; daughters are three times more likely than sons to look after parents with severe disabilities; and most unpaid carers are poorer than the rest of the population and are women. More than 50% depend on social security compared to 27% of the total population": *For Love Alone? Women's Unpaid Work*, NSW Women's Advisory Council (1991) at 8.

22 Cf *Burnicle v Cutelli* [1982] 2 NSWLR 26

23 See n16 above.

24 See, for example, *Griffiths v Kerkemeyer*, above n10; *Kovac v Kovac* [1982] 1 NSWLR 656. But compare the suggestion by Dawson, Toohey and McHugh JJ, in *Nguyen v Nguyen* (a Lord Campbell's Act case) that "voluntary unsolicited assistance cannot be permanently relied upon": (1990) 161 CLR 245 at 267.

25 For a discussion of the relevance of a "market reference" to tort assessment, see Finley, L M, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 *Notre Dame LR* 886 at 898.

26 *Kovac v Kovac* [1982] 1 NSWLR 656 at 658. See also *Johnson v Kelemic* (1979) FLC 90-657.

that, if we know little of the lives of accident victims, it may be both dangerous and wrong in principle to make decisions about the appropriate measure of damages for their future care subject to notions of what we "know" is "ordinary" or "reasonable" in households.

Feminist scholars have challenged a number of the concepts central to legal discourse and have exposed the highly gendered basis of core notions such as objectivity, neutrality, and perhaps most significantly, reasonableness.[27] Each of these has come under increasing scrutiny by lawyers concerned to question the epistemological basis of law, the ways in which we "know" things that inform our understandings, and the partiality of the gendered standpoint from which law operates.[28] It is therefore essential that we consider the standards by reference to which reasonableness is assessed with these critiques in mind when we re-read the cases that have applied and modified *Griffiths v Kerkemeyer*, and the statutes that have followed their lead.

Courts and legislatures in some areas of law have shown themselves responsive to feminist critiques of reasonableness standards.[29] Accident compensation, and in particular, the assessment of damages for the care of accident victims, is an issue central to women's lives since it involves the heartland of women's work — their homes and their relationships with others — and is therefore precisely the kind of doctrinal context where feminist challenges to "objective" and purportedly gender-neutral standards have most force.[30]

In addition to locating any re-evaluation of *Griffiths v Kerkemeyer* within the framework of feminist challenges to gendered standards and epistemological assumptions in law, a further contextual backdrop is the developing recognition in other doctrinal contexts of the economic value of women's work in the home. Admittedly, such recognition has been partial, and slow to develop. Questions about the value of women's work as the carers of accident victims should be seen as part of the broader issue of the law's response to women's work in the home, work that can come before the courts in a number of different contexts.[31] For

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27 For a general account of developments in feminist jurisprudence, see Graycar, R and Morgan, J, *The Hidden Gender of Law* (1990).

28 Catharine MacKinnon has graphically described this in her discussion of the "point-of-viewlessness" of law: see "Feminism, Marxism Method and the Law: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635 at 639. Or, as Christine Boyle has suggested, when reviewing two books on remedies, "'Men and the law' may be masquerading as 'People and the law'": "Book Review" (1985) 63 *Can Bar Rev* 427 at 430-431. See also, for example, MacKinnon, C, *Feminism Unmodified* (1987); *Toward a Feminist Theory of the State* (1989); and Mossman, M J, "Feminism and Legal Method: The Difference it Makes" (1986) 3 *AJLS* 30. For a general account of feminist epistemological challenges to law, see *The Hidden Gender of Law*, above n27, ch 3.

29 See, for a discussion of some of these trends in the area of criminal law, *The Hidden Gender of Law*, above n27 at 404-409. See also the decision of the Supreme Court of Canada in *R v Lavallee* (1990) 55 CCC (3d) 97.

30 This is starting to be recognised in tort law: see Graycar, R, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 *Syd LR* 528; *The Hidden Gender of Law*, n27 at 75-83; Finley, L M, "A Break in the Silence: Including Women's Issues in a Torts Course" (1989) 1 *Yale J Law and Feminism* 41; Bender, L, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 *J Legal Ed* 3. A former member of the Canadian Supreme Court, Madame Justice Bertha Wilson, has acknowledged that tort law is an area where gender difference has been a significant factor in judicial decision-making: "Will Women Judges Really Make a Difference?" (1990) 28 *Osgoode Hall LJ* 507 at 512.

31 I have explored some of these matters in a preliminary way in "Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence" forthcoming in Tilbury, M,

example, the *Family Law Act* 1975 (Cth) recognises in s79(4) that a contribution as homemaker or parent is judicially cognisable as work of economic value when it comes to altering property interests on divorce; the same is true under the *De Facto Relationships Act* 1984 (NSW).[32] Occasionally, claims under family provision legislation are grounded in the work women have done as carers.[33] In trusts cases, the High Court has recently held that it will in certain circumstances be unconscionable not to take account of unpaid work by women when determining equitable interests in property in which the woman has no legal interest.[34] It may be valuable to consider some of these other contexts when re-evaluating *Griffiths v Kerkemeyer*, since, though the issues have been presented within a disparate array of subject areas, what the fact situations have in common is a central concern with women's work, and the question of whether it is to be recognised as having economic value.

One final methodological comment is necessary before moving to examine the cases. It was earlier suggested that legal discourses are characterised by their abstraction of legal principles outside the context of the real lives of the people affected by them. Since a central tenet of feminist methodologies in law has been to try to overcome this acontextual approach to legal problems,[35] the facts of some of the cases considered will be explored in some detail. This is because we need to know something of the lives of accident victims to aid our understanding of how legal principles may operate when they are not abstracted and removed from the context of their application.

Griffiths v Kerkemeyer: *the principle*

The case which gave its name to a distinct head of damages in Australian jurisprudence involved a young man who, at the age of 22, suffered an accident which left him "completely unemployable and wholly unable to look after himself".[36] Like many victims of catastrophic injuries, he had lost virtually all physical function. Mason J attributed the fact that Mr Kerkemeyer had not lost his mental powers and had remained cheerful, to "the selfless devotion of his fiancée and his family who have lavished care and attention on him".[37] At the time of the hearing, he was living with his fiancée who, though she was in full-time employment, cared for him with the assistance of members of his family. "For her it is an extremely arduous life".[38]

Damages of $15,000 had been awarded for the provision of services to the time of trial and the cost of future care was assessed at $80,000 of which $40,000 was expressly stated to be for voluntary services rendered by the fiancée and the respondent's family.[39] The appellant objected to the award of damages for

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and Winterton, G (eds), *The Distinctiveness of Australian Law* (1992) where I have argued that the use of doctrinal categories constructed by reference to men's experience has obscured the issues common to contexts such as family provision and social security.

32 See s20(1)(b). Compare *Property Law Act* 1958 (Vict), s285.

33 See, for example, *Goodman v Windeyer* (1980) 144 CLR 490 where the claim was by a woman who had nursed her ex-husband on a twenty four hour basis, over a significant period of time.

34 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

35 For discussion of feminist methodologies, see *The Hidden Gender of Law*, above n27, esp ch 3.

36 This description of the facts is taken from the judgment of Mason J, (1977) 139 CLR 161 at 182.

37 Ibid.

38 Ibid.

39 The trial judge found that the fiancée could not continue to care for him without paid assistance and that he would need to spend more and more time in a nursing home. From the time he

services that had been and were being provided gratuitously. The High Court (Gibbs, Stephen and Mason JJ) decided that the damages were recoverable, even though they had been and would be provided gratuitously. The Court adopted the approach taken by the SA Full Court in *Beck v Farrelly*[40] and the English Court of Appeal in *Donnelly v Joyce*,[41] and further held that any award of damages should not be subjected to a limitation such as that the plaintiff be under a legal liability to pay the damages awarded to some third party,[42] or that a trust be imposed for the benefit of the care provider.[43]

The decision did not, however, create an open-ended liability for defendants. In his well known statement of principle, Gibbs J suggested a two stage test:

> 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.[44]

While Stephen and Mason JJ agreed with the result, and generally with the reasoning, what is often overlooked is that neither judge attempted to lay down an equivalent "test" of liability, as Gibbs J's two stage formulation has come to be treated. However, all members of the Court adopted the same conceptual basis for the award of damages, relying on the reasoning of the English Court of Appeal in *Donnelly v Joyce*. The Court there pointed out that the child accident victim's claim for damages for the cost of care was not a third party claim:

> The loss *is* the plaintiff's loss ... 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 — for the purpose of the ascertainment of the amount of his loss — is the proper and reasonable cost of supplying those needs. ... [T]he loss is not someone else's loss. It is the plaintiff's loss.[45]

Stephen J elaborated on this "conceptual" approach and suggested that an award for the provision of services, gratuitously provided or otherwise, "is concerned not with what outlays of money the plaintiff will in fact incur as a consequence of his injuries but with the objective monetary 'value' of his loss".[46]

Griffiths v Kerkemeyer: *the method of assessment*

One obvious attraction of the earlier approach, requiring some legal liability to pay the damages to a third party, is that the liability in question (for example, a contractual obligation) would often assist in calculating the relevant damages. Where no money has actually been paid and no contractual liability exists,

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reached about 45, he would need to enter full time care in such an institution.

40 (1975) 13 SASR 17

41 [1974] 1 QB 454.

42 Compare, for example, *Blundell v Musgrave* (1956) 96 CLR 73, expressly distinguished by the High Court in *Griffiths*, since it involved hospital services, not the gratuitous provision of caring services by family and loved ones (see, for example, Gibbs J, above n10 at 169).

43 See Stephen J, n10 at 177. Compare *Cunningham v Harrison* [1973] QB 942 (CA); *Thornton v Board of School Trustees of School District No 57* (1978) 83 DLR (3d) 480 (SCC).

44 *Griffiths*, n10 at 168-9.

45 *Donnelly v Joyce* [1974] 1 QB 454 at 462 (per Megaw LJ for the Court: emphasis in original).

46 *Griffiths v Kerkemeyer*, above n10 at 178. See also Mason J: "It is now recognised that the true loss is the loss of capacity which occasions the need for the service": id at 193.

assessment becomes more difficult.[47] In *Donnelly v Joyce*,[48] the Court of Appeal had calculated the value of the nursing services needed by the young plaintiff by reference to the wages his mother had foregone by giving up her employment to care for him. However, two of the three members of the High Court rejected this approach to the issue of assessment. Mason J stated: "But [*Donnelly v Joyce*] does not decide that this is the true measure of the relevant head of damage. ... In general, the value or cost of providing voluntary services will be the standard or market cost of the services".[49] Similarly, Stephen J after discussing *Donnelly*, referred to a comment in *Winfield and Jolowicz on Tort* suggesting that the cost "will not, of course, necessarily be the same as the earnings given up by the friend [or relative] who renders the assistance".[50] Gibbs J did not address the issue. The High Court will be squarely confronted with this question when it considers the appeal in *Van Gervan v Fenton.*

Van Gervan v Fenton

The plaintiff was injured in a motor vehicle accident in 1984, when he was aged 59, and as a result, became totally unemployable.[51] As a result of his severe depression, held to have been substantially caused by the accident, he requires constant care and attention. Medical evidence given at trial indicated that he had become totally dependent on his wife and "would be devastated by being removed from her care". The doctor considered the plaintiff's condition incurable and indicated that he will need annual hospitalisation for reassessment and monitoring of medication as well as respite for his wife.[52]

The main issue in dispute is the assessment of the relevant *Griffiths v Kerkemeyer* damages, which the trial judge calculated by reference to the income foregone by Mrs Van Gervan when she reduced her paid work outside the home, and ultimately ceased altogether, so as to care for her husband on a full time basis.

From 1976, Mrs Van Gervan had been working as a nurse's aide at a hospital. She earned $12000 in the year ended June 1983; $14000 in the year ended 1984 and $15000 in the following year. Thereafter her earnings reduced as she took more and more time off work to care for her husband, culminating in an income of $966 in the year ended 1989. She had not worked outside the home since that time.[53]

The trial judge, Cox J, found that the plaintiff is in need of constant care and decided that the plaintiff's particulars were substantially made out. These included that he has poor short term memory and is unable to manage his own affairs on a day to day or hour to hour basis; that he becomes severely depressed and cries often; he becomes agitated when left alone for long periods and believes he cannot cope with everyday tasks; he is unable to prepare meals for himself; he is likely to turn on electrical appliances and then leave them

47 Cf the comments by Deane J in *Nguyen v Nguyen*, n24 at 255.
48 [1974] 1 QB 454.
49 *Griffiths v Kerkemeyer*, above n10 at 193.
50 Id at 180-1.
51 This account is taken from the reasons for judgment of the trial judge, Cox J, 30 April 1990.
52 *Van Gervan v Fenton*, Reasons for judgment, at 7. The doctor, informed that to the time of trial, those annual admissions had averaged six weeks' duration, expressed surprise as "the plaintiff tended to become labile in his mood and more irritable, and that in his interests and those of the other patients it is usually better to try to get him home quickly": id at 17.
53 Id at 18.

unattended; he feels uncomfortable in the company of people other than his wife and is untrusting of them; he has to be supervised with tools; he is likely to cause damage to his house if left alone; he needs assistance to dress and to bathe and he requires constant companionship.[54]

Having found that it "is no longer practicable for [the plaintiff's] wife to undertake outside employment, other than on a very spasmodic basis", Cox J determined that the cost to her of undertaking the care of her husband "would be less than the cost of providing help from [an] Agency".[55] He cited *Donnelly v Joyce*,[56] *Housecroft v Burnett*[57] and *Veselinovic v Thorley*[58] as authority for the view that the appropriate award in respect of *Griffiths v Kerkemeyer* damages was a sum approximating the net wages lost by the plaintiff's wife.[59]

The Full Court unanimously dismissed the plaintiff's appeal.[60] Green CJ held that none of the judgments in *Griffiths v Kerkemeyer* required the damages to be assessed by reference to the market cost and referred to observations in *GIO v Planas*,[61] *Hodges v Frost*[62] and *Veselinovic v Thorley*[63] as authority for the view that the commercial rate is not necessarily the appropriate measure of the damages. Wright J agreed and also referred to *Kovac v Kovac*.[64] Echoing the judgment of Thomas J in *Veselinovic*, he held: "The limits are to be found in the area of reasonableness and the principles of mitigation".[65] Crawford J did not accept this approach. However, he agreed with the result, noting that some of the services provided by Mrs Van Gervan since the accident were provided by her prior to it and she would have continued to provide them if the accident had not occurred. It followed, therefore, in his view, that the accident had not created a need for services that it would be reasonably necessary to provide at a cost.[66]

When the High Court considers whether the damages should have been assessed by reference to the earnings foregone by Mrs Van Gervan (the opportunity cost) or the cost of obtaining those services commercially (the replacement or market cost),[67] it will be required to examine the assumptions which have led a

54 Id at 19-20.
55 Id at 20.
56 [1974] 1 QB 454.
57 [1986] 1 All ER 332.
58 [1988] 1 Qd R 191.
59 *Van Gervan v Fenton*, Reasons for judgment, at 20.
60 Tasmanian Supreme Court, Full Court, 19 March 1991.
61 [1984] 2 NSWLR 671 at 676 (NSWCA).
62 (1984) 53 ALR 373 (Fed Ct).
63 [1988] 1 Qd R 191.
64 [1982] 1 NSWLR 656.
65 Typescript, at 39.
66 Typescript, at 44.
67 For some discussions of these methods of valuing the damages (most of which are concerned with valuing an injured woman's loss of capacity to work in the home, rather than the caring services provided), see Pottick, F, "Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?" (1978) 50 *Colorado LR* 59; Clarke, K and Ogus, A, "What is a Wife Worth?" (1978) *Brit J of Law and Soc* 1; Cooper-Stephenson, K, "Damages for Loss of Working Capacity for Women" (1979) 43 *Sask LR* 7; O'Donovan, K, "Legal Recognition of the Value of Housework" (1978) 8 *Fam L* 215; Chesterman, M, "Proposals to Modify the Common Law" Research Paper prepared for the NSW Law Reform Commission, (1983) ch 3, pars 3.3.6-3.3.10; Keeler, J, "Three Comments on Damages for Personal Injury" (1984) 9 *Adel LR* 385. For an express application of the replacement cost method in a damages case, at least for future losses, see *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696. Christopher Bruce suggests there are three, rather than two, methods of assessment: opportunity cost, market

number of Courts in post-*Griffiths* cases to impose limitations on the recovery of *Griffiths v Kerkemeyer* damages.

The aftermath of Griffiths v Kerkemeyer

(i) Judicial "glosses"

The NSW Court of Appeal soon made clear its concern with the principle established by the High Court.[68] Shortly after *Griffiths*, in a case where the accident victim was quadriplegic and needed, *inter alia*, to be turned several times during the night, two members of the Court of Appeal expressed reservations about it.[69] Samuels JA, after pointing out that no claim had been made under *Griffiths v Kerkemeyer*, was "not persuaded that the husband's services satisfy the test propounded by Gibbs J..."[70] In his view, "not every item of assistance and support rendered by one member of a family to another ought reasonably to be regarded as sounding in damages".[71] Similarly, Mahoney JA did not consider this "a case in which *Griffiths v Kerkemeyer* has operation"[72] since the nature of the services were "not such as may normally be obtained for reward, and are such that they are or partake of the normal incidents of family life".[73] He continued:

> Some at least of the services in fact provided comprise ... substantially the kinds 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.[74]

While he conceded that turning the plaintiff at night was more akin to the work of a nursing aide, he was not persuaded that if services of that kind were not supplied by her family, the plaintiff would "engage some person simply to provide them for reward".[75]

These observations were cited with approval in *Kovac v Kovac*,[76] a case which has come to be associated with the so-called "reasonableness" principle.[77]

The plaintiff in that case was also a woman: her husband was available to care for her because he was receiving workers' compensation payments for a partial incapacity for work. While Reynolds JA considered it irrelevant that the husband was at home and available to render the services, both Samuels and Mahoney JJA reduced the *Griffiths v Kerkemeyer* damages, again by reference to notions

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cost and housekeeper approach, though he acknowledges that the third is a variant of the second: see Bruce, *Assessment of Personal Injury Damages* (1985) at 255-268.

68 I have considered a number of these cases in some detail in "Compensation for Loss of Capacity to Work in the Home", above n30 at Part VI; they will therefore only be summarised here.

69 *Johnson v Kelemic* (1979) FLC 90-657 (decided in December 1977, just a few months after *Griffiths*). There were two claims: hers was a primary action, while her husband's was an action for loss of consortium. That action has since been abolished in New South Wales: see *Law Reform (Marital Consortium) Act* 1984 (NSW).

70 *Johnson v Kelemic* (1979) FLC 90-657 at 78,493.

71 Ibid.

72 Id at 78,496.

73 Id at 78,495.

74 Id at 78,496.

75 Ibid.

76 [1982] 1 NSWLR 656 (Reynolds JA dissenting).

77 Feminist challenges to concepts such as "reasonableness" are discussed above at nn28 and 29. Tort law's reliance on the highly gendered "reasonable man" (sometimes presented as the purportedly gender-neutral "reasonable person"), has also come under scrutiny: see Bender and Finley, both at n30 above.

about what kinds of support family members routinely provide for one another. Samuels JA did not believe that any "head of policy (or theory of loss distribution)[78] requires the *ordinary currency of family life and obligation* to be wholly ignored".[79] Samuels JA set out what he saw as the policy arguments for limiting *Griffiths* recovery:

> ... I emphasize 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 has been carrying out.[80]

Samuels JA also noted that he thought it would be "incongruous to contemplate the plaintiff reimbursing her husband for the services he has provided for her".[81] He did, however, take account of the possibility that the husband might predecease the plaintiff and awarded an amount to take account of that contingency and the consequent need for institutional care. Similarly, Mahoney JA began his judgment by noting that *Griffiths v Kerkemeyer* awards had become increasingly large,[82] that the "principle results in the creation of an anomaly"[83] and that it led to overcompensation.[84] He also questioned the application of *Griffiths v Kerkemeyer* in cases where the services "are such as would reasonably be seen as provided, according to the incidents of ordinary or family life".[85] He concluded that:

> there would be no relevant sense of outrage in the defendant not having to bear that cost: indeed, it would, I think, be felt by the ordinary man to be unreasonable if the plaintiff sought to have the services other than as before.[86]

In his view, even if it were appropriate to award *Griffiths v Kerkemeyer* damages, a principle of reasonableness was required in its application. Accordingly, the damages for future assistance were considerably reduced.

Kovac v Kovac has been approved by the WA Full Court in *Maiward v Doyle*,[87] by the Queensland Full Court in *Carrick v Commonwealth*,[88] and by the SA Full Court in *Bettoncelli v Bettoncelli*.[89] Perhaps the clearest of the cases applying the reasoning from *Kovac* and extending it to include the general principle of mitigation is a decision of the Queensland Full Court in *Veselinovic v Thorley*,[90] which, with *Kovac*, was relied on most directly by the Tasmanian Full Court in *Van Gervan*.

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78 Presumably, he was referring to the discussion by Stephen J in *Griffiths*, where he examined the outcome of that case by reference to such theories: see *Griffiths*, n10, at 176.

79 [1982] 1 NSWLR 656 at 668 (emphasis added).

80 Id at 669. For discussion of whether *Griffiths v Kerkemeyer* damages are available where one of the plaintiff's needs is to have someone take over her responsibilities for work in the home, see "Compensation for Loss of Capacity to Work in the Home", above n30, Part V.

81 [1982] 1 NSWLR 656 at 670.

82 Id at 674. This is a common theme in discussion of *Griffiths v Kerkemeyer* damages: see, for example, Clarke QC, M J, (as he then was), "Injuries to the Person", *Assessment of Damages*, Committee for Postgraduate Studies in Law, University of Sydney, 1982, at 69; NSW Law Reform Commission, Issues Paper, *Accident Compensation*, 1982, pars 3.11-3.12 and *A Transports Accidents Scheme For NSW*, Final Report, 1984 Volume 1, at 10.24.

83 *Kovac*, at 676.

84 Id at 677. "He does not suffer the difficulties and has, nett, a financial benefit".

85 Id at 678.

86 Id at 680.

87 [1983] WAR 210 (Wickham J dissenting).

88 [1983] 2 Qd R 365.

89 (1988) 135 LSJS 211.

90 [1988] 1 Qd R 191 (decided in 1984, though not reported until 1988).

Veselinovic v Thorley, like *Kovac*, involved a woman accident victim born in Yugoslavia whose husband had been in receipt of workers' compensation payments and unemployment benefit and was therefore at home and seen as available to care for her.[91] Thomas J asked whether the assessment of damages for the care of the plaintiff "should allow the notional cost of hiring of outside labour, or whether it should reflect the loss to the husband who actually supplied the services".[92] In his view, where the services were provided by someone who by doing so would suffer a smaller loss than the cost of engaging outside assistance, then the provider's loss should prima facie be the measure of the plaintiff's loss.

> Where a family is a discrete unit and its members combine in a reasonable way to overcome the effects of an injury to one of them there is much to be said for treating the family as a unit when attempting to perceive a plaintiff's loss when one spouse surrenders his earning capacity to meet his spouse's needs. The limits are to be found in the area of reasonableness and the principles of mitigation.[93]

On this basis, the award for past care was reduced from $94,700 to $30,000 while the award for future care, originally assessed at $164,400, was halved.[94]

While a number of courts have endorsed the approach in *Kovac* and *Veselinovic*, it has also been subjected to considerable criticism. Most notable amongst the judicial critics is Kirby J in *Hodges v Frost*.[95] After examining the rationale for the *Griffiths v Kerkemeyer* principle, he explained the important public policies served by it. It encourages the provision of non-institutional care by acknowledging the work of the care providers. And, since such care "may prove to be more efficacious and certainly more congenial than paid services" and may be available during longer hours, encouraging it might actually minimise the liability of the defendant.[96] While Kirby J did acknowledge that "the calculation of compensation with reference to charges made for the supply of services on a commercial basis may not always be appropriate",[97] since the plaintiff is under a duty to mitigate, this remark was taken somewhat out of context by both Green CJ and Wright J in *Van Gervan*.[98] Both judges relied on *Hodges v Frost* as authority for the proposition that it is not necessarily appropriate to award the full commercial cost of the services needed by the plaintiff, yet neither mentioned the outcome of the case, nor Kirby J's trenchant criticism of the NSW Court of Appeal's "attempted gloss" on *Griffiths*.

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91 That this is the case is not so clear, since a statutory condition for the award of unemployment benefit (prior to its abolition in 1991, and replacement with Job Search Allowance and New Start Allowance), was that a person meet the "work test" which involves being unemployed, actively seeking work and being available for suitable paid work: see *Social Security Act* 1947 (Cth), s116(1)(c) (and see now, *Social Security Act* 1991 (Cth), Parts 2.11 and 2.12).

92 [1988] 1 Qd R 191 at 198.

93 Id at 200. This approach, of treating a family as an economic unit, was also alluded to by Deane J in *Nguyen*, n24 at 252. However, empirical research both in Australia and in Britain has demonstrated that households do not necessarily operate as economic units and in particular, the sharing of income in households cannot be assumed: see Edwards, M, *The Income Unit in the Australian Tax and Social Security Systems* (1984); and Pahl, J, *Money and Marriage* (1989).

94 Id at 203. Connolly J agreed with Thomas J, while Derrington J, though he agreed with the reduction for future services, would have awarded $60,000 for past services.

95 (1984) 53 ALR 373.

96 Id at 379-80.

97 Id at 381 (the fourth of eight "rules" he drew from *Griffiths*).

98 See *Van Gervan*, Green CJ at 28; Wright J at 36.

Green CJ and Wright J also referred to *GIO v Planas*[99] as authority for the view that damages should be reduced by reference to "reasonableness" and that the market cost of providing the services is not the appropriate determinant in cases where they are provided gratuitously. In *Planas*, the plaintiff's wife, some years older than him, was the care provider. It had been argued that the *Griffiths v Kerkemeyer* damages should be calculated at the nett, rather than gross, market cost since, as the plaintiff had no need to pay a third party for the services, the gross amount would overcompensate him. But though the Court of Appeal commented that the market cost will not always be the appropriate measure of the damages where services are provided by a family member, the appellant's argument was rejected. As there was always the contingency that the services would at some later stage have to be purchased, the plaintiff would in that event be disadvantaged by having to find the additional taxation component.[100]

But perhaps the more fundamental problem in these cases is their purported reliance on *Griffiths* itself. In each of the cases where limitations on recovery have been imposed, the judges have referred to Gibbs J's two stage test as if it were the definitive statement of the *Griffiths* principle and as if his second stage required a reduction where services are being supplied as part of the "ordinary currency of family life and obligation". Yet the judgments simply do not support such an approach.[101] First, neither Stephen nor Mason JJ laid down any such broad proposition, so Gibbs J's "test" does not necessarily represent the views of all members of the Court. Secondly, had Gibbs J intended that recovery would be limited in situations where family or close friends provided the necessary care, he may well have applied that approach in *Griffiths* itself.

(ii) Statutory modifications

A number of Australian jurisdictions have followed the lead of the courts in modifying the principle in *Griffiths v Kerkemeyer* and have either abolished or limited recovery under that head.[102] Outside Tasmania and New South Wales,[103] these limitations operate only in the context of motor vehicle and work accidents (though of course, these constitute the vast majority of accident compensation cases heard by courts). While the form of these limitations vary, one aspect common to each of them is that they all apply both to nursing and attendance services, and to household or domestic services, a matter that has been the subject of some dispute when *Griffiths v Kerkemeyer* has been applied by courts in common law actions.[104]

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99 [1984] 1 NSWLR 671.

100 It was held that "a faithful application of the principle in *Griffiths v Kerkemeyer* required a computation of the amount payable for future attendant services by reference to gross wages and not wages nett of tax": id at 676.

101 Keeler describes Mahoney JA's approach in *Kovac* as "simply incompatible" with *Griffiths* and Samuels JA's approach in the same case as "ultimately inconsistent with the letter, spirit and result of" the case: (1984) 9 *Adel LR* 385 at 396. As he also points out, "Where *Sharman v Evans* [(1977) 138 CLR 563] would commit an injured person to institutional care if it is cheaper than domestic care, *Kovac v Kovac* appears to deny most of the cost of the domestic care if it can be provided gratuitously in the cases where it is no more expensive than institutional care": id at 397.

102 See generally, Tilbury, M, *Civil Remedies, Volume 2*, [forthcoming 1992], ch 9, and Luntz, H, *Assessment of Damages for Personal Injury and Death* (3rd edn, 1990) at 4.6.9.

103 Assuming the Personal Injury Damages Bill 1990 is enacted.

104 See "Compensation for Loss of Capacity to Work in the Home", above n30, Part V.

Tasmania has abolished damages for services of a domestic nature or services relating to nursing and attendance for which the plaintiff has not paid or is not liable to pay, in common law actions arising after 18 December 1986.[105] Section 93(10)(c) of the *Transport Accident Act* 1986 (Vic) is to similar effect, though it applies only to transport accidents after January 1987, rather than to all common law actions. The Tasmanian and Victorian Acts reintroduce the *Blundell v Musgrave*[106] approach — the requirement of a legal liability to pay for the services. To that extent, they abolish *Griffiths* recovery entirely. This raises the question whether a well advised accident victim would contemplate making an agreement, most usually with a spouse or another family member, for the payment of those services.[107] It seems likely that courts would view such agreements with some distaste. In a pre-*Donnelly v Joyce* case,[108] Megaw LJ allowed recovery to a man for services provided by his wife, even though there was no contract to repay her. Responding to an argument that the plaintiff should receive that sum only if they had a legally binding contract that his wife would give up work and forego her income in order to look after him, he stated: "That is not how human beings work and [such a requirement] would, in my judgment ... be a blot on the law ..."[109]

In *Housecroft v Burnett*,[110] O'Connor LJ was...

> very anxious that there should be no resurrection of the practice of plaintiffs making contractual agreements with relatives to pay for what are in fact gratuitous services rendered out of love. Now that it is established that an award can be made in the absence of such an agreement, I would regard an agreement made for the purposes of trying to increase the award as a sham.[111]

More generally, the courts have been reluctant to give binding effect to contractual agreements between spouses.[112] It is unlikely that a court in Tasmania or Victoria, faced with an agreement between spouses or household members to provide services at a cost, would uphold the agreement and allow the damages.[113]

The second group of statutes makes no reference to agreements or a liability to pay. In South Australia, the categories of gratuitous provider for whose services damages are recoverable are limited to the parent, spouse or child of the accident victim.[114] This means that in *Griffiths v Kerkemeyer*, the plaintiff would not have recovered in respect of the services provided by his fiancée. Nor would recovery have been allowed in *Beck v Farrelly*,[115] the case still referred to by

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105 *Common Law (Miscellaneous Actions) Act* 1986, s5. Compare, for transport accidents, *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas), s27A (inserted 1991).

106 *Blundell v Musgrave* (1956) 96 CLR 73.

107 See the comment by Gibbs J in *Griffiths*: he suggested there that a "rule having that effect placed a premium on astuteness": (1977) 139 CLR 161 at 168. See also Luntz, above n102 at pars 4.6.3 and 4.6.9.

108 *Wattson v Port of London Authority* [1969] 1 Lloyd's Rep 95.

109 Id at 102.

110 [1986] 1 All ER 332 (CA).

111 Id at 343.

112 Cf *Balfour v Balfour* [1919] 2 KB 571.

113 For an older case where the Court refused to find an agreement to pay for the services provided, see *Renner v Orchard* [1967] Qld Law Rep 6.

114 *Wrongs Act* 1936, s35a(1)(g). Others who provide gratuitous services may recover only reasonable out-of-pocket expenses: s35a(1)(g)(ii). There are also limits on the amounts recoverable: see s35a(1)(h) and s35a(2).

115 (1975) 13 SASR 17.

South Australian courts in such cases, since the services for which damages were there awarded were provided by the siblings of the accident victim.

New South Wales legislation currently limits *Griffiths v Kerkemeyer* damages in both work and transport accidents and will, when the Personal Injury Damages Bill 1990 is enacted, extend these restrictions to all common law accidents. The form, which is unique to that State, is to provide a series of thresholds to recovery of "compensation for the value of services of a domestic nature or services relating to nursing and attendance which have been or are to be provided to the person in whose favour the award is made by a member of the same household or family as the person". First, no damages are to be awarded for any services provided in the first six months. Secondly, only services over and above those provided for six hours per day may be the subject of an award. Thirdly, "No compensation is to be awarded if the services would have been provided to the person even if the person had not been injured". And, even where the services supplied meet these onerous thresholds, there are limits on the amount, up to a maximum of average weekly earnings.[116]

It will be apparent that the legislation has tried to incorporate some of the limitations developed by courts by reference to the "ordinary currency of family life and obligation": the courts will now be required to determine whether the services would have been provided to the person even if s/he had not been injured. Since the need for nursing and attendance will have arisen only as a result of the accident, this requirement can only relate to household services. But this invitation to the courts to continue to make invidious assessments of what goes on in households and to make findings about arrangements for housework and other domestic services in accident victims' homes is hardly reassuring. Consider this comment in a 1988 South Australian case. The accident victim was a married woman with five children whose injuries rendered her unable to undertake housework. The evidence showed that her needs for assistance "both of a personal nature and a domestic nature" had been met by members of her family. The oldest child was a daughter of 16:

> ...[I]t is an obvious fact that a girl of that age and a member of a family basically Italian or European in background and upbringing, would be doing her bit for the family, both her parents and her siblings.[117]

There is something deeply disturbing about assessments based on such assumptions. It is also somewhat reminiscent of the earlier NSW Court of Appeal decision, *Burnicle v Cutelli*,[118] where the accident victim, also of Italian origin, had been rendered unable to undertake housework and her daughter, aged 21 at the time of trial, had taken on this work.[119] While the judges differed on whether housework services fell within the *Griffiths v Kerkemeyer* principle,[120] none of them would have allowed damages for the housework the daughter did. They

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116 See *Motor Accidents Act* 1988, s72; *Workers Compensation Act* 1987, s151K; Personal Injury Damages Bill 1990, cl12-15.

117 *Bettoncelli v Bettoncelli* (1988) 135 LSJS 211 at 216 per Legoe J.

118 [1982] 2 NSWLR 26.

119 In a discussion of this case, Chesterman notes that the "courts often display remarkable blindness to the likelihood that a child who is looking after an injured parent will subsequently want to move out from the parent's home and set up a separate household": above n67 at 3.6.11.

120 Glass JA held that they did, while Reynolds and Mahoney JJA disagreed: see "Compensation for Loss of Capacity to Work in the Home", above n30, Part V, and see also Keeler, n67 and Chesterman, n67.

appear to have assumed that she would remain available to do that work for the household (which is how they characterised it) indefinitely. But, if one *were* inclined to make assumptions about people's behaviour, why did the court not consider that an adult daughter of 21 might leave, whether to marry, or to establish an independent household of her own? I know nothing of this woman's life and would feel uncomfortable speculating on her future. But such speculation does not appear to concern some judges in cases of this nature.[121]

One final point remains about these statutory limitations. The context in which they have been made is the increasing concern about the ability of the insurance system to support large damages awards. As a consequence, there has been a trend toward reducing damages for non-economic losses which are seen as serving little compensatory purpose.[122] However, each of the statutory limitations to *Griffiths v Kerkemeyer* recovery described above is located in a statute aimed at limiting non-economic losses. While it is not the purpose of this comment to address the function or utility of non-economic losses,[123] what is apparent is that *Griffiths v Kerkemeyer* damages, which have always been characterised as economic, have been treated as if they were damages for non-economic losses in these Acts. Perhaps the explanation is that, since money has not changed hands, the damages suffered are not perceived as economic. But to characterise such damages as non-economic moves even further away from the conceptual basis adopted by the High Court in *Griffiths.*

How reasonable is "reasonable"?

The cases examined (and the New South Wales legislation) are notable for their reliance on one or more of the assumptions referred to earlier. Before exploring some of these in more detail, consider some other possible scenarios. Suppose the plaintiff has no family or friends: does that person automatically receive the full cost of care because there is no evidence at trial that care has been or will be provided gratuitously? What of the accident victim who has no money prior to the trial to afford to pay for the necessary care and is forced to rely on relatives for that reason? Should the Court assume that this will continue in the future? Treating these issues as matters of evidence is fraught with difficulty. How likely is it that a wife, mother, or other relative will tell the Court, in the presence of the accident victim, that she does not wish to continue to carry that responsibility in the future? Alternatively, what if our hypothetical hermit receives a large award

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121 This is another instance of what appears to be judicial notice of a "notorious fact" with respect to household behaviour. Cf an American wrongful death action, where the Court rejected the need for evidence about the economic valuation of household services because it was "a matter within the common ken": *Zaninovich v American Airlines Inc* 26 AD 2d 155; 271 NYS 2d 866 (1966), discussed by Finley, above n30 at 52. *Franco v Woolfe* (1976) 12 OR (2d) 549 (Ont CA).

122 The only reason for limiting *Griffiths* recovery offered by the Attorney General's Department (NSW), Discussion Paper, *Tort Liability in NSW*, April 1990, was "In the current climate it is difficult to justify the continued availability of this type of claim": par 4.7.3. This is not argument but assumption.

123 However, it should be recalled that many courts still consider a woman's loss of capacity to work in the home as a loss of amenity, rather than as a loss of working capacity: see "Compensation for Loss of Capacity to Work in the Home", above n30, Part IV. For this reason, abolition of those damages may be a matter of some concern, if no corresponding economic loss recovery is available. For a discussion of this in the context of the New Zealand *Accident Compensation Act* see John Hughes, "Case and Comment: The National Women's Case in the Court of Appeal" [1990] *NZLJ* 114 at 117.

for future care but later forms a relationship and is provided with gratuitous services? Should that contingency be taken into account?

A feature common to the cases is their assumptions about the stability of family relationships. It is presumed in each of the cases discussed that the relationship between accident victim and carer will continue, yet family relationships are often significantly disrupted by accidents and injuries.[124] A spouse may end the relationship as the extra strains (both physical and emotional) created by the accident may prove too much;[125] an adult child might leave the home, whether to marry or simply to live independently.

This last point returns us to the cases already mentioned, of the stereotypical daughters in families "Italian or European in background". An even more inappropriate set of assumptions is sometimes evident in the cases.[126] Consider these comments about a Greek accident victim:[127]

> Like many migrant women, she had been constantly in work .... [I]n these days of changed practices of women working, but particularly so in the case of migrant settlers ...[128]

> The appellant and her husband both worked despite the fact that she had two quite young children.[129]

And, on the issue of the plaintiff's inability to do domestic work caused by the accident:

> The husband had never employed domestic assistance by reason of his wife's accident. He brought her mother from Greece for a short period. ...[I]t is not reasonably foreseeable that he will have to get any paid assistance in the future. 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.[130]

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124 See Chesterman, n67 above. Compare the facts of some family law property cases: see, for example, *O'Brien v O'Brien* (1983) FLC 91-316 (esp at 78,148 on the wife's post-accident care of the husband). One policy argument against reducing *Griffiths v Kerkemeyer* damages is to support the relationship and ensure that the stress caused by the accident is not exacerbated by expectations of intra-familial care that simply cannot be sustained.

125 For a graphic illustration of this problem, see *Bruno v Davies* (1988) 133 LSJS 226. There the accident victim had suffered brain damage which, *inter alia*, made him violent. Although by the time of trial, incidents of this were rare, the Court noted that, despite the wife's evidence that "she had taken him for better or for worse", she may yet leave him: "the one thing she will not now tolerate is violence from the man whom she has cared for and nursed so devotedly": id at 236.

126 One cannot avoid noting the apparent disapproval of both of the husband carers in *Kovac v Kovac* and *Veselinovic v Thorley*. Both were of Yugoslav origin, both out of the workforce and in receipt of workers' compensation. Moreover, in *Veselinovic*, it was noted that the family intended returning to Yugoslavia. Thomas J suggested, referring to the plaintiff's costs in that country, particularly in relation to supplementing her domestic needs, that "it would be unrealistic to pretend that she may not have real advantages" [1988] 1 Qd R 191 at 201. Similarly, on this point, Derrington J suggested that "the rate of domestic wages may be considerably less [in Yugoslavia] than in Australia ... There is no evidence upon the point which would justify a conclusion in any direction, but the result must be a conservative approach": id at 208. Most striking, however, is Connolly J's reference to "a grown man who deliberately takes himself out of the work force to provide this type of service": id at 195.

127 *Bagias v Smith* (1979) FLC 90-658. Like *Johnson v Kelemic*, this case involved two claims: one by the accident victim, the other by her husband for loss of consortium.

128 *Bagias*, at 78,500 per Moffitt P.

129 Id at 78,506 per Hutley JA. In fact, they were also the husband's children.

130 Id at 78,511.

When such propositions appear in the cases, it is assumed that no evidence is needed for them, as if somehow they are "notorious facts". In the context of the law of evidence, there is little if any authority for taking account of "domestic matters" as part of judicial notice.[131] Since the assumptions that have been relied upon do not have any factual basis and the alternative of relying on the evidence of the carers as to their future intentions is also fraught with difficulty,[132] this must bolster the case for not reducing damages by reference to the presumed availability of gratuitous care. There can be no principled alternative to awarding the full market cost of the services as the only reliable way to ensure that the needs are met.

Consider some further possibilities. Should a plaintiff who has a rich spouse have his damages reduced for loss of earning capacity on the basis that he didn't "need" to work anyway?[133] What of the plaintiff who has a relative who is a doctor: would the damages be reduced because it is considered reasonable that medical services will be available free of charge? Such reductions have never been seriously suggested (at least, within the context of the current lump sum system),[134] and *Griffiths v Kerkemeyer* damages are equally damages for economic loss. But of all the economic heads of loss, only *Griffiths v Kerkemeyer* damages have been singled out for this treatment, both by courts and by legislatures. The only basis for not awarding the full market cost is the assumption that caring services, because they are seen as lacking a market reference, are not work: they are what people, mostly women, just do.

It has been suggested earlier that caring work, and compensation for the need for such services, should be considered within the broader context of "work of economic value". It might assist to think about the work that is required in caring for accident victims who have lost the capacity to care for themselves. In some of the cases, the plaintiffs required turning several times per night: constant, physically demanding work for the carers. Many accident victims lose control of their excretory functions: this must be attended to by carers. Quadriplegics are more susceptible to common diseases (for example, they cannot cough to clear congestion). Should this work be perceived as "... substantially the kinds 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 ..."[135] and therefore not compensable? There is much more at stake here than bringing someone cups of tea from time to time: in many cases sheer unpleasant hard work. While it may be a labour of love, it certainly is labour, and hard labour at that.

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131 Cf *Holland v Jones* (1917) 29 CLR 149. It was unsuccessfully argued in *Theaker v Richardson* [1962] 1 All ER 229 (CA) (a libel case where the only publication was to the plaintiff's husband) that the Court should take judicial notice of the fact that husbands open their wives' mail. Compare the recent discussion by the Full Federal Court of the appropriateness of a tribunal of fact relying on "beliefs about 'normal' or common human psychological mechanisms and 'normal' or common human behavioural responses": see *Repatriation Commission v Strickland* (1990) 22 ALD 10 at 18 (per Jenkinson J). The issue of fact there was whether a man could be assumed to have retired at age 65. In the damages context, by contrast, the value of household services has been treated as "a matter within the common ken": see above n121.

132 Another evidentiary possibility here is reliance on expert (or empirical) evidence: cf above n121.

133 Cf s72 of the *Family Law Act* 1975 (Cth). I have suggested a male plaintiff here: for women, the scenario does not seem so far fetched as it does for men.

134 Cf Graycar, "Non-Earners and Accident Compensation: Women Sold Out Again?" (1985) 10 *LSB* 86.

135 *Johnson v Kelemic* (1979) FLC 90-657 at 78,496.

Whose loss?

This brings us back to *Van Gervan v Fenton* where the damages were calculated by reference to what Mrs Van Gervan had lost in earnings by giving up her job as a nurse's aide to care for her husband. Presumably the choice of an opportunity cost approach here flowed from the fact that she was in a low paid job. But such an approach could hardly be applied consistently. If, for example, the accident victim's spouse gave up her job as a brain surgeon or High Court judge to care for her partner, the defendant would, no doubt, argue that damages assessed by reference to her lost wages would overcompensate the plaintiff for his need for caring services arising from the accident.

But of course not many women are brain surgeons or High Court judges. Most women who work outside the home earn considerably less than men.[136] The vast majority of them work in a small number of sex-segregated areas of employment, doing "women's work".[137] Indeed, some of them work in other people's homes caring for accident victims or as nurse's aides in nursing homes, as Mrs Van Gervan did.[138] Mr Van Gervan will not need the kinds of services required for, say, a quadriplegic but he does need constant care (even though he can be left alone for periods of "the order of an hour or more").[139] When Mrs Van Gervan worked outside the home, presumably she did so only for periods of approximately eight hours per day. Now, she is on call virtually 24 hours per day, seven days per week, save only that provision was made for two weeks per year institutional care for her husband, inter alia, to provide her with respite. Even though the Court considered that the work she is now doing is less constant and less skilled than her paid work,[140] what seems completely overlooked is that her whole life must be devoted to this activity (though provision was made for the future contingency that she would no longer be able to care for him and he would need institutional care). She, no less than her husband, has suffered a serious loss of amenity, yet it has never been suggested that such a loss should be taken into account.[141] Mrs Van Gervan has foregone more than her wages: she has foregone the social aspects of working outside the home and the prospect of any independent leisure activities. Compensating her husband for the full market cost of providing the services he requires will give her, as well as him, a real choice about continuing to provide those services. If she chooses to continue to do the work unassisted, she does so in the context of a real and informed choice, where alternatives are available. But providing an amount that will be insufficient to pay an outside person will leave her only with a continuing obligation, in addition to her loss of wages and her loss of amenity. She should not be left in a

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136 Women who work full time earn just over 80% of what men earn: when account is taken of all women workers (many of whom work part time), women's earnings are less than two thirds of men's: see Women's Bureau (DEET), *Women and Work*, Volume 13(2), June 1991.

137 The marked sex segregation of the Australian workforce is well recognised: for details of occupational and industrial segregation, see id at 13.

138 Nursing is one of the areas targetted in pay equity or "comparable worth" campaigns: for a discussion of the *Nurses'* test case, see *The Hidden Gender of Law*, n27 at 92-94.

139 Reasons for judgment, at 30.

140 Ibid.

141 Note that if courts were to award *Griffiths v Kerkemeyer* damages by reference to the true loss to the care provider, the amounts would be significantly higher than the commercial cost of care. In addition to the matters mentioned by Kirby J in *Hodges v Frost* (above n62), it could also be argued that the true cost should include a component for the carer's loss of amenity.

position where her husband does not have the resources to pay another person to look after him.

Of course, discussion about the loss to the carer raises squarely the question of whether it would be more appropriate to award the damages to the carer, rather than to the accident victim, since we cannot assume that the carer will benefit from a *Griffiths* award.[142] This is the approach taken in Ontario where a third party claim by a carer is available under s61 of the *Family Law Act* 1986 (Ont).[143] However, since the underlying rationale for *Griffiths v Kerkemeyer* damages is the conceptual approach to the accident victim's loss, and satisfaction of the needs created thereby, it is submitted that it is appropriate to pay the person in need of the services, rather than the carer.

Conclusion

The outcome of this appeal can hardly have a significant impact on the assessment of *Griffiths v Kerkemeyer* damages in Tasmania, since, in accidents occurring after December 1986, this head of damages is no longer available. No decision of the High Court can restore these damages in jurisdictions where they have been abolished by statute. But what the High Court can do is to address the various "glosses" placed on recovery by some of the State courts and assist in exposing the inappropriate factual assumptions upon which they operate. A clear restatement of the underlying rationale of *Griffiths v Kerkemeyer* will assist in refocussing attention on the conceptual basis for which such damages are paid, that is, the plaintiff's loss of a capacity which creates a need for services that is, or may be, productive of financial loss. A clear restatement may make it more difficult for legislatures limiting these damages to rely on the trend of common law decisions, as New South Wales appears to have done with its requirement that the services would have been provided anyway, a requirement resonant of "the ordinary currency of family life and obligation".

If, as the Canadian Supreme Court stated, "the paramount concern of the Courts when awarding damages for personal injury should be to assure that there will be adequate future care",[144] there is no justification for compounding the uncertainties about the plaintiff's future by awarding less than the market cost of care, by reference to assumptions about the ways in which people in relationships order their lives.

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142 A doctrinal analogy for such a "third party claim" could be found in the action under Lord Campbell's Act (see *Nguyen v Nguyen*, above n24, though note the discussion by Dawson, Toohey and McHugh JJ of the conceptual distinction between that action and the *Griffiths v Kerkemeyer* head of recovery: id at 262-264). The old actions for loss of consortium and servitium are the clearest analogies. Alternatively, the doctrine of recovery for nervous shock, which allows recovery to persons in a sufficiently proximate relationship who suffer injury as a result of the defendant's negligence to someone else, could be drawn upon. Traditionally, however, "nervous shock" has been limited to psychiatric injury: see *Jaensch v Coffey* (1984) 155 CLR 549.

143 The Ontario Law Reform Commission has recommended the abolition of the third party action: instead, it proposes that damages should be awarded to the accident victim for the costs of care, with the court being empowered to impose a trust for the benefit of the carer: see *Report on Compensation for Personal Injuries and Death*, 1987. For the reasons discussed by Stephen J in *Griffiths*, the trust approach ought not to be followed in Australia: see n10 at 177.

144 *Andrews et al v Grand & Toy Alberta Ltd et al* (1978) 83 DLR (3d) 452 at 476 (per Dickson J, as he then was). See also Spence J in *Arnold v Teno* (1978) 83 DLR (3d) 609 at 639: "[I]n these cases of very serious personal injuries, the prime purpose in fixing an award of damages is the provision of adequate reasonable care for the plaintiff for the rest of the plaintiff's life".