JAMES GOUDKAMP, NSW

Damages for the cost of providing the defendant with psychiatric counselling?

Henderson v Campbell [2002] NSWSC 1202

In *Henderson v Campbell*, ('Henderson') Burchett AJ of the New South Wales Supreme Court was called upon to quantify several heads of damage and to determine the life expectancy of a catastrophically injured infant plaintiff. This decision is generally unremarkable save for the fact that the plaintiff was awarded $13,511 for psychiatric counselling to assist his mother, the defendant, '. . . to cope with the great and unremitting pressures of his care.'[1]

THE FACTS

On 14 March 1995, the plaintiff, then aged approximately five months, was travelling in a motor vehicle driven by the defendant on the Pacific Highway near Taree. The defendant, who was momentarily distracted by the plaintiff's pacifier, lost control of the vehicle. As a result of the accident that ensued, the plaintiff sustained severe brain damage and significant orthopaedic injuries, requiring virtually continuous care, much of which was provided by the defendant. Liability was admitted.

JUSTIFICATION FOR THE AWARD

The justification given by Burchett AJ for awarding damages for psychiatric counselling involved two steps of reasoning.[2] Firstly, the defendant's need for counselling arose as a result of the mental pressure associated with caring for the plaintiff. (Presumably, it also arose, at least in part, as a product of the fact that the defendant was undoubtedly painfully aware of the fact that she was responsible for the plaintiff's loss). Secondly, the meeting of this need was essential to enable the plaintiff to receive the care and attention his condition requires. Burchett AJ calculated that, if fit to do so, the defendant would provide the plaintiff with 25 hours of voluntary care per week for the next 30 years.[3] Damages awarded for future care were calculated with reference to this anticipated provision of voluntary care, and accordingly included a *Griffiths v Kerkemeyer*[4] component.[5]

It is important to note that Burchett AJ did not award the sum in mention to compensate the defendant personally for her psychiatric problems. Obviously, this would have been absurd, as the defendant was ultimately responsible for causing her condition. Rather, the sum was awarded to ensure that the defendant was able to continue to care for the plaintiff in the future.

It cannot be doubted that individuals who provide care on a voluntary basis to the catastrophically injured are placed under unimaginable pressures and suffer their own peculiar grief and sorrow as well as a variety of other difficulties. This is likely to be particularly true when the carer is the defendant and related to the plaintiff, as was the case in *Henderson*. However, it is respectfully submitted that it is contrary to established principle to award a plaintiff damages to ensure that a particular carer is fit to continue providing him or her with care, whether on a voluntary or commercial basis.

The fundamental axiom governing the assessment of damages in tort is that the damages should be equivalent to the plaintiff's loss: no more and no less.[6] The plaintiff should be awarded sufficient damages to erase the effects of the defendant's tort, and to restore him or her to the position which he or she would have occupied. As Windeyer J declared in *Skelton v Collins*[7], '[t]he one principle which is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory.'[8]

It seems apparent that the sum awarded in *Henderson* for the defendant's counselling is inconsistent with this principle, as the plaintiff would not suffer any loss (which sounds in damages) if the defendant were unable to care for him. It is well established that, in assessing future *Griffiths v Kerkemeyer*[9] damages, whether or not care is in fact provided to the plaintiff is irrelevant. This position is consistent with the fundamental principle that the courts are not to take any concern with the manner in which the plaintiff uses his or her damages.[10] The relevant issue is the plaintiff's need for care.[11] Damages for care are awarded on the basis of the

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plaintiff's need for care and that need alone.[12] No cognisance should have been taken as to whether or how the plaintiff would receive care.

CONCLUSION

The decision in *Henderson* is instructive because it demonstrates how, in large and complex cases involving numerous heads of damage, sight may easily be lost of the overarching principle of the assessment of damages. On one hand, it is clear that the heads of available damages is not closed. Indeed, new heads of damage are continuously being identified and which are necessary to consider in order to provide fair compensation. For example, *Griffiths v Kerkemeyer*[13] damages emerged in Australia as a separate head in 1956.[14] On the other hand, care must be taken to ensure that new heads of damage are not discovered which, whilst perhaps morally justifiable and even logically sensible, fail to conform to the compensation principle.

ENDNOTES:

1 At [30].

2 At [31].

3 At [64].

4 [1977] 139 CLR 161.

5 At [62].

6 *Todorovic v Waller* [1981] 150 CLR 402 at 412 per Gibbs CJ and Wilson J, at 427 per Stephen J, at 442 per Mason J and at 463 per Brennan J; Luntz, H., (2002), *Assessment of Damages for Personal Injury and Death* (4th ed.), Butterworths, Sydney, p. 4.

7 [1966] 115 CLR 94.

8 At 128.

9 [1977] 139 CLR 161.

10 *Todorovic v Waller* [1981] 150 CLR 420 at 412 per Gibbs CJ and Wilson J.

11 Luntz, H., (2002), above n7, p.248.

12 *Van Gervan v Fenton* (1992) 175 CLR 327 at 338 per Mason CJ, Toohey and McHugh JJ.

13 [1977] 139 CLR 161.

14 See *Blundell v Musgrave* [1956] 96 CLR 73.

BRETT CHARRINGTON, QLD

Wife fails in dependency action arising out of husband's surf drowning:

Enright v Coolum Resort Pty Ltd [2002] QSC 394

On 29 November 2002, Moynihan J of the Supreme Court of Queensland delivered the much anticipated judgment in a dependency action brought by the wife of an American executive who drowned at Yaroomba Beach near Coolum on 3 March 1993.

Robert Steven Enright arrived in Australia on 3 March 1993 from the Philippines to attend a conference at the Hyatt Coolum Regency Resort. This conference related to his employment with PepsiCo Inc. at which he held the position of Vice President of World Tax.

Mr Enright arrived at Brisbane Airport at 5:00am, having left the Philippines at 11:00pm local time the previous night. He was picked up by a chauffeured hire car that left Brisbane Airport at 9:20am, arriving at the resort between 11:00am and 11:30am. On the way, he expressed an interest in body-surfing to the driver, Mr Fleming. Mr Fleming gave Mr Enright a brief tour of the local beaches, and crucially warned him of the dangers associated with swimming at Yaroomba Beach. Mr Fleming recommended swimming at Coolum Beach instead.

Mr Enright attended the conference immediately upon his arrival at the resort, until 4:30pm. At this time, he and a colleague decided to go body-surfing. The evidence at trial showed that a significant amount of literature and information was available about the local beaches, and particularly about a beach club facility conducted by the resort. Mr Enright and his colleague, however, did not consult this material, but rather embarked upon their own journey without enquiry of resort staff.

They found themselves on the main road passing the resort, and there were ▶

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