

RECENT DECISIONS

When the carer can no longer care...

Raines v Amaca Pty Ltd and Seltsam Pty Limited [2017] NSW DDT 16
(18 December 2017)

[Link to decision](#)

Summary

This case considers the circumstances in which damages may be awarded under section 15B(2) of the *Civil Liability Act 2002* (CLA) which permits, in certain circumstances, the award of damages for the plaintiff's loss of ability to provide gratuitous domestic services to a dependant of the plaintiff.

Background

Mr Raines suffered mesothelioma as a consequence of exposure to asbestos in circumstances in which the defendants were liable to pay damages.

The plaintiff's wife suffered incapacity as the consequence of a motor accident in 1981 and also other disabling medical conditions. One of the plaintiff's sons suffered serious brain and other injuries as the consequence of a motor accident in 1996.

Prior to diagnosis, the plaintiff was providing gratuitous domestic services to both his wife and his son. The son's accident occurred in circumstances which entitled him to benefits under the *Workers Compensation Act 1987*.

Section 15B of the CLA relevantly provides:

(2) Damages may be awarded to a claimant for any loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, but only if the court is satisfied that:

- (a) in the case of any dependants of the claimant of the kind referred to in paragraph (a) of the definition of dependants in subsection (1) – the claimant provided the services to those dependants before the time that the liability in respect of which the claim is made arose, and
 - (b) the claimant's dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity; and
 - (c) there is a reasonable expectation that, but for the injury to which the damages relate, the claimant would have provided the services to the claimant's dependant:
 - (i) for at least six hours per week; and
 - (ii) for a period of at least six consecutive months,and
 - (d) there will be a need for the services to be provided for those hours per week and that consecutive period of time and that need is reasonable in all the circumstances.
- ...
- (6) the claimant (or the legal personal representative of a deceased claimant) may not be awarded damages for any loss of the claimant's capacity to provide gratuitous domestic services to any dependant of the claimant if the dependant has previously recovered damages in respect of that loss of capacity.

The defendant submitted that the plaintiff's provision of domestic services to the son was not 'reasonable' within the meaning of subsection (2)(d) because the son was entitled to have the cost of full time domestic care paid for by the workers' compensation insurer.

Decision

The Tribunal found that the arrangement which had been in place for the plaintiff to provide full time care to his son was not unreasonable in the circumstances. It was an arrangement which had been in place for many years in a loving, caring family relationship in which the plaintiff was doing his best to ensure that his son was well cared for.

It was unreasonable for the defendants to expect the plaintiff to call upon the son's workers' compensation insurer to provide the care which he was not longer able to provide in substitution for a helpful family arrangement that had existed and been beneficial for a long time.

The son's worker's compensation claim had been the subject of litigation in the Court of Appeal which determined in favour of the son, granting him the entitlement to workers' compensation benefits. The defendant argued that as a consequence of the Court of Appeal decision the son had previously recovered damages within the meaning of subsection (6).

The trial judge rejected this argument on the basis that an entitlement to workers' compensation payments did not constitute 'damages' within the meaning of the CLA. In addition, the judge found that the plaintiff's claim was for his loss of capacity to provide the gratuitous care as distinct from his son's entitlement to be paid for such care by the workers' compensation insurer.

His Honour also noted that subsection (9) excludes the award of section 15B damages in motor accident cases. As there is no similar provision for worker's compensation cases, he concluded that section 15B damages are not excluded in cases where there is an entitlement to workers' compensation benefits.

The plaintiff's wife had also received damages in respect of the injuries she suffered in her motor accident. His Honour dealt with this by taking account of the fact that the care being provided to the plaintiff's wife was in respect of a multitude of medical conditions, not attributable to the motor accident. Accordingly, she had not received damages in respect of those other conditions and the

plaintiff was entitled to compensation in respect of the care which he provided to his wife.

In assessing the damages, His Honour took into account the fact that the plaintiff's wife contributed to the care of the son. The judge allowed eight hours per week for the plaintiff's care of his wife and 73 hours per week for his care to his son for a period of nine years into the future, the plaintiff being 78 years of age at the time of judgment. He allowed a discount of 10% for vicissitudes of life.

Implications

The decision provides a useful analysis of the circumstances in which a plaintiff will be entitled to damages for the loss of ability to provide care to members of the plaintiff's family in circumstances where the family member has an independent entitlement to payment for domestic care. It is not unreasonable for a loving family member to choose to provide domestic care to an incapacitated relative, rather than requiring the care to be provided by an unfamiliar third party.

For more information, please contact:



Doug Vorbach

Special Counsel

T: 02 8257 5722

M: 0419 013 617

doug.vorbach@turkslegal.com.au