HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ANDREW GRINCELIS by his next friend
TADAS GRINCELIS APPELLANT

AND

STEPHEN HOUSE RESPONDENT

Grincelis v House [2000] HCA 42
3 August 2000
C20/1999

ORDER

1. *Appeal allowed with costs.*

2. *Vary paragraph 1 of the order of the Full Court of the Federal Court of Australia made on 1 July 1998 by deleting the sum of $4,524,910 and substituting the sum of $4,680,370.*

3. *Application for special leave to cross-appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

L M Morris QC with C E Adamson for the appellant (instructed by Abbott Tout Harper & Blain)

M J Neil QC with R C Tonner for the respondent (instructed by J M Crestani)

CATCHWORDS

Grincelis v House

Damages – Interest – Personal Injuries – Damages awarded for past services provided to the appellant gratuitously – Whether interest should be allowed – Rate of interest – Commercial rate or *Gogic* rate.

Supreme Court Act 1933 (ACT), s 69.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. On 15 February 1989, the appellant, then aged 39 years, sustained severe brain damage, and other serious injuries, when a motor vehicle driven by the respondent collided with the appellant as he was riding his bicycle along Parkes Way in the Australian Capital Territory. The appellant was treated in hospital until 23 December 1989 when he was discharged to his parents' care. Because of the injuries he suffered, he has required care since his discharge from hospital. For all practical purposes, his parents provided all of that care up to the time of the proceedings to which reference will later be made.

2 The question in this appeal is what, if any, interest should be allowed pursuant to s 69 of the *Supreme Court Act* 1933 (ACT) on the amount of damages awarded to the appellant in respect of services rendered to him by his parents, without reward, between the date of his discharge from hospital and the date on which the damages were assessed[1].

The course of earlier proceedings

3 On 19 September 1989, the appellant commenced an action in the Supreme Court of the Australian Capital Territory against the respondent claiming damages for the injuries he had sustained. The action came on for trial before Master Hogan. Liability was not disputed. On 8 December 1995, the Master gave judgment for the appellant for $4,240,646.60. An amount of $250,000 was allowed for the value of past services provided by the appellant's parents. The Master refused to award interest on that sum.

4 The present respondent, the defendant in the action, appealed to the Full Court of the Supreme Court of the Australian Capital Territory and the appellant cross-appealed. By that cross-appeal the appellant alleged that the Master had erred in failing to assess damages for past care on the same basis as damages for future care, and had erred in failing to make an award of interest in respect of the amount of damages allowed in respect of that past care. The other questions which it was sought to agitate in the appeal need not be noticed. The cross-appeal was dismissed[2]. The majority of the Court, Gallop and Ryan JJ,

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1 *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

2 *House v Grincelis* (1997) 128 ACTR 1.

concluded that the Master's "evaluation [of damages for past care] was within the permissible range"[3]. On the question of interest, the majority said[4] that:

> "The question whether interest on past gratuitous services should be awarded was authoritatively resolved in *Hodges v Frost*[5], and there is no reason why this court should follow, in preference to *Hodges v Frost*, the majority decision in *Marsland v Andjelic (No 2)*[6], because it turns upon the statutory provisions of the Motor Traffic Act 1988 (NSW). In our opinion no interest is payable on the $250,000 awarded for past domestic services."

The dissenting judge, Higgins J, was of the opinion that the decision of this Court in *Van Gervan v Fenton*[7] required the conclusion that the amount allowed for past care should be increased to the amount representing the real commercial cost of those services[8]. Further, he concluded that interest on that sum should be allowed at what he described as "commercial rates"[9].

5 The present appellant appealed from the decision of the Full Court of the Supreme Court to the Full Court of the Federal Court of Australia. Again he contended that the amount of damages allowed for past care should be increased and that interest should have been allowed on the damages awarded in respect of that past care. Again, some other issues were raised by the appeal and by a cross-appeal brought by the respondent, but the detail of these matters need not be noticed.

6 The five Judges who constituted the Full Court of the Federal Court of Australia (Foster, Hill, Mathews, Kiefel and Madgwick JJ) agreed that, consistently with the decision in *Van Gervan*, the damages allowed for past care

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3 (1997) 128 ACTR 1 at 11.

4 (1997) 128 ACTR 1 at 12.

5 (1984) 53 ALR 373.

6 (1993) 32 NSWLR 649.

7 (1992) 175 CLR 327.

8 (1997) 128 ACTR 1 at 16.

9 (1997) 128 ACTR 1 at 17.

must be "valued by reference to commercial rates charged for its provision, regardless as to whether they were in fact provided gratuitously, by relatives or partners"[10]. All members of the Court also agreed that interest should have been allowed on the damages awarded in respect of past services rendered by the appellant's parents[11]. The Court divided, however, about the rate at which that interest should be allowed. Put shortly, that disagreement centred upon whether interest should be calculated in the manner described in this Court's decision in *MBP (SA) Pty Ltd v Gogic*[12] by reference to a rate of 4% per annum, or at a rate described as a "commercial" rate of interest. The majority of the Court (Foster, Hill and Kiefel JJ) concluded that the "*Gogic* approach" should be adopted[13]. It is from this part of the judgment and orders of the Full Court of the Federal Court of Australia that the appellant now appeals to this Court by special leave.

The relevant statutory provision

7 The reasons for judgment of all members of the Full Court of the Federal Court, and much of the argument in this Court, proceeded entirely by reference to decided cases. While it is undoubtedly necessary to have regard to the course of authority touching the issues that arise in this matter, it is of the very first importance to bear steadily in mind that the allowance of interest, in a case such as the present, is governed by statute.

8 Section 69 of the *Supreme Court Act* provides:

"(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods) the court shall, upon application, unless good cause is shown to the contrary –

(a) order that there be included in the sum for which judgment is given interest at such rate as the court thinks fit on the whole or any part of the money for the whole or any part of the period

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10 *Grincelis v House* (1998) 84 FCR 190 at 207 per Hill and Kiefel JJ. See also at 192 per Foster J, 213 per Mathews J, 214 per Madgwick J.

11 (1998) 84 FCR 190 at 192 per Foster J, 209-210 per Hill and Kiefel JJ, 213 per Mathews J, 214 per Madgwick J.

12 (1991) 171 CLR 657.

13 (1998) 84 FCR 190 at 200-201 per Foster J, 212-213 per Hill and Kiefel JJ.

between the date when the cause of action arose and the date as of which the judgment is entered; or

(b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) Subsection (1) does not –

(a) authorise the giving of interest upon interest or of a sum in lieu of such interest;

(b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise; or

(c) affect the damages recoverable for the dishonour of a bill of exchange.

(3) Where the sum for which judgment is given (in this subsection referred to as the 'relevant sum') includes, or where the court determines that the relevant sum includes, any amount for –

(a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;

(b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or

(c) exemplary or punitive damages;

interest, or a sum in lieu of interest, shall not be given under subsection (1) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the court represents any cash amount."

Neither party contended that sub-section (3) applied to the present case. It is, therefore, unnecessary to consider what is meant by "compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest". The appeal was conducted in this Court on the premise, more often than not unstated, that the statute presented two relevant questions:

(a) whether no interest should be allowed on that part of the damages which represented the allowance for past care, gratuitously provided, because "good cause [had been] shown to the contrary", and

(b) what was the rate of interest that the court should have thought fit to allow.

It is convenient to deal with those questions in turn.

Any allowance for interest?

9 In *Van Gervan v Fenton*[14], it was held that the true basis of a claim for damages with respect to care or services provided gratuitously to a person who has suffered personal injury is the need of the plaintiff for those services, not the actual financial loss suffered as a result of their provision. Accordingly, it was held in that case that a plaintiff's damages on this account are not to be determined by reference to the actual cost to the plaintiff of having the care or services provided, or by reference to the income foregone by the provider of the services, but, generally, by reference to the market cost of providing them. Neither party sought to reopen the decision in *Van Gervan*.

10 The damages awarded to the appellant in this matter in respect of the past care provided by his parents have been calculated accordingly. In particular, the Full Court of the Federal Court reassessed the damages to be allowed on this account. Instead of the sum of $250,000 allowed at trial, the Full Court allowed[15] a sum for the cost of providing those services, assessed, so it seems, by reference to the award entitlements of a person providing the care[16]. The award rates that were used in making that calculation were the rates prevailing from

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14 (1992) 175 CLR 327.

15 (1998) 84 FCR 190 at 192 per Foster J, 207 per Hill and Kiefel JJ, 213 per Mathews J, 214 per Madgwick J.

16 (1997) 128 ACTR 1 at 16 per Higgins J.

time to time in the period between the appellant's discharge from hospital and the assessment of damages at trial.

11 The respondent submitted that no interest should be allowed on the damages awarded for past care and applied for special leave to cross-appeal to vary the judgment in favour of the appellant by excluding from the sum to be awarded any interest on this account.

12 The respondent suggested, in argument, that the market rates used in the calculation of damages for past care may have included amounts that would be applied by the provider of such services to meet obligations such as workers' compensation insurance and superannuation for those providing the care. Given that it seems that the amounts were calculated by reference to award entitlements it may be doubted that this was so. But, whether or not this was the case, it is, of course, clear that, as the respondent submitted, the sum allowed for damages under this head did not represent outlays that the appellant had made to obtain the care which his parents had given him; that care was given to him out of natural love and affection of the parents for their grievously injured son. The sum allowed was awarded in satisfaction of the need for care, not the cost incurred in providing it.

13 But it by no means follows that either of these considerations urged by the respondent constitute "good cause … to the contrary" of the statutory command that, upon application, "the court shall … order that there be included in the sum for which judgment is given interest at such rate as the court thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which the judgment is entered"[17]. Reduced to its essentials, the respondent's contention was that, because the damages allowed were not in recompense for actual outlays, "too much" was allowed by application of the principles established in *Van Gervan* and there should be some countervailing amelioration of the position of a defendant by refusing to allow any award of interest under s 69.

14 That argument must be rejected. Damages have been allowed and their quantum has been assessed at an amount that is not, and cannot be, challenged. To say that "too much" has been allowed can only be understood as saying that the assessment has erred in some way. But once the inquiry has passed to the stage of asking whether interest should be allowed, it must be accepted that the

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17 *Supreme Court Act* 1933 (ACT), s 69(1)(a).

damages, to which interest is to be added, have been properly allowed and their quantum has been properly assessed. And the content of the argument does not change if it is suggested (as the respondent did in argument) that "policy" or "practical" considerations require refusal of the allowance of interest. The only "policy" or "practical" considerations to which reference was made amounted, on examination, to the contention that the allowance of damages for past care, calculated in the manner described in *Van Gervan*, would lead to overcompensation of the plaintiff because the plaintiff had outlaid no sum. That is to say no more than that the amount allowed is "too much" and, as stated earlier, the validity of the allowance and assessment of the award cannot be challenged when questions of interest are being considered.

15 The respondent's application for special leave to cross-appeal should be dismissed with costs.

The statutory purposes of an award of interest

16 As was noted in *Gogic*[18]:

> "The function of an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period: *Batchelor v Burke*[19]."

There is no doubt that this is a very important purpose of statutory provisions providing for the award of interest on the amount of a debt or damages in respect of the period between the cause of action accruing (or, in some statutory provisions, the commencement of the proceedings[20]) and the date of judgment. It may be, however, that statutory provisions for interest serve not only that purpose, but also a purpose of encouraging early resolution of litigation[21]. That statutory awards of pre-judgment interest may have such a purpose may be more readily understood in relation to claims for debts or sums certain than in personal injury cases where it will often be in the interests of the plaintiff to wait until

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18 (1991) 171 CLR 657 at 663.

19 (1981) 148 CLR 448 at 455 per Gibbs CJ.

20 See, for example, *Supreme Court Act* 1986 (Vic), s 60(1).

21 See, for example, *Supreme Court Act* 1986 (Vic), ss 58-60, and *Penalty Interest Rates Act* 1983 (Vic).

injuries have stabilised before bringing the action to trial. For present purposes, however, it is sufficient to have regard to the compensatory purpose of interest.

Gogic

17 The question in *Gogic* was what rate of pre-judgment interest should be awarded under s 30C of the *Supreme Court Act* 1935 (SA) in respect of damages for a plaintiff's non-economic loss incurred before trial. The Court pointed out[22] that, although the determinants of rates of interest had been the subject of much dispute among economists, it was clear that, during periods of significant inflation, commercial rates of interest reflect a component to compensate a lender for the decline, by reason of inflation, in the real value of money. And, because damages for pre-trial non-economic loss are assessed in accordance with the value of money at the time of trial, "[i]n no way is any loss which a plaintiff incurs by reason of being deprived of his or her damages for pre-trial non-economic loss brought about by inflationary factors"[23]. Accordingly, the Court concluded that to award interest by reference to commercial rates on damages for that kind of loss incurred before trial would compensate the plaintiff for a "loss" which had not been sustained. That being so, the Court accepted that using a rate of 4% which had been selected in *Wheeler v Page*[24], although "somewhat arbitrary"[25] was more likely to achieve fair and reasonable compensation for plaintiffs than the use of a real interest rate figure derived, for example, by taking the commercial rate or a 10 year bond rate and deducting some figure for inflation.

18 Essential to the reasoning in *Gogic* was the recognition that, pre-trial non-economic loss being assessed according to monetary values prevailing at the date of judgment, the damages which were awarded were unaffected by whatever may have happened to the purchasing power of money in the period between the accrual of the plaintiff's cause of action and judgment. But that is not the case with the damages awarded in the present matter. They were assessed by reference to costs prevailing from time to time during the period between the cause of action accruing and judgment. That is, the damages were assessed by

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22 (1991) 171 CLR 657 at 663.

23 (1991) 171 CLR 657 at 663-664.

24 (1982) 31 SASR 1.

25 (1991) 171 CLR 657 at 666.

reference to the nominal value of money during that period rather than the purchasing power of money at the date of judgment. Unlike damages of the kind considered in *Gogic*, there is, therefore, no question of double counting for inflationary effects if the interest rate which is allowed is one which takes some account of inflation. That being so, we do not consider that it is open to a judge determining the rate of interest to be allowed under s 69 of the *Supreme Court Act* to reduce the rate which otherwise might be fixed on this account. No other basis for awarding some lesser rate than would otherwise be fixed was advanced. In particular, if a *Gogic* rate of interest were to be applied, some other basis for its application must be found. And for the reasons given earlier, it is not sufficient to assert that the damages which are now in question "are too much" or overcompensate a plaintiff or even to assert that the allowance of interest at commercial rates produces an "unreasonable outcome".

19 The appellant has been kept out of money amounts which were calculated by reference to the purchasing power of money in the past. There is no principle which permits or requires the conclusion that the legislative commands of s 69 have some different application to the sums allowed for past care in this case from the application they have to other sums of damages calculated by reference to historic rather than present values of money. Judicial dissatisfaction with the principle adopted in *Griffiths v Kerkemeyer*[26] provides no basis for doing so. What was decided in *Griffiths v Kerkemeyer* is "too deeply entrenched in this part of the law in Australia for this Court to reopen it"[27].

20 Where, as in the present case, damages are assessed by reference to costs prevailing from time to time, the interest calculation must be made in a way that reflects the fact that damages comprise amounts accruing over time, not a simple lump sum. How, then, is the rate to be fixed in this case?

Fixing a rate

21 On 25 May 1993, the Judges of the Supreme Court of the Australian Capital Territory ordered publication of Practice Direction No 1 of 1993. That Practice

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26 (1977) 139 CLR 161.

27 *Kars v Kars* (1996) 187 CLR 354 at 372.

Direction, entitled "Interest up to Judgment", rescinded an earlier Practice Direction[28] and said that:

> "When computing interest for the purposes of s 69 of the Australian Capital Territory Supreme Court Act 1933, subject to any evidence adduced, it may be taken that the following yearly rates of interest are appropriate to guide the Court …".

There then followed rates in respect of various periods, the first of which commenced on 1 January 1974, and the last of which commenced on 1 July 1993. Neither party suggested that the Practice Direction had any statutory force or effect and, in its terms, it acknowledges, not only that its application is "subject to any evidence adduced", but also that the rates stated in it are rates that are "appropriate to *guide* the Court" (emphasis added). Although the parties, and the Full Court of the Federal Court of Australia, referred to these rates as "commercial" rates of interest, we were taken to no evidence which would reveal the basis upon which they were struck. But there being no evidence about rates of interest, and litigants being on notice from the Practice Direction that the published rates will be taken to be appropriate to guide the Court in fixing interest under s 69, there would ordinarily be no reason to do other than apply those rates to damages of the kind now in question (the *Gogic* approach having been rejected for the reasons given earlier).

22 In the present matter, however, the appellant had submitted, at trial, that interest should be allowed by reference to a rate of 12% per annum. In his written submissions, the appellant accepted that he was bound by that figure and he did not contend for an increase to the applicable combination of rates that were set out in the Practice Direction. Further, both parties have at all times in these proceedings been content to allow for the fact that the damages awarded represent amounts which accrued over time by computing the amount to be allowed for interest by applying one-half of whatever rate is fixed, to the principal sum allowed for damages under this head, and multiplying the result of that calculation by the period (expressed in years) between the date of discharge from hospital and the date of trial and judgment. No doubt this method of calculation contains elements of approximation but it was not suggested that some more precise calculation should be made in this case. The parties agreed that, using this method of calculation, the appellant's award of damages should be increased by the sum of $155,460.

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28 Practice Direction No 3 of 1991 dated 12 December 1991.

23 The appeal should be allowed and the following orders made:

1. Appeal allowed with costs.

2. Vary paragraph 1 of the order of the Full Court of the Federal Court of Australia made on 1 July 1998 by deleting the sum of $4,524,910 and substituting the sum of $4,680,370.

3. Application for special leave to cross-appeal dismissed with costs.

24 KIRBY J. We have it on the authority of Virgil[29] that when an endeavour was made in ancient times to pile Ossa on Pelion and then "to roll leafy Olympus on top of Ossa", the Gods scattered the heaped-up mountains with a thunderbolt. Their divine anger may have been occasioned by irritation with the logic of height being pressed too far. This appeal explores the limits of logical deduction in the legal context of compensation for the unpaid care provided by a family member to a person injured as a result of a legal wrong.

Approach to the novel doctrine of *Griffiths v Kerkemeyer*

25 Having, in *Griffiths v Kerkemeyer*[30], embraced the principle[31] that an injured plaintiff is entitled to recover damages for his or her needs met by the provision of gratuitous services by family or friends, this Court was set upon a path that has repeatedly demonstrated the "anomalies"[32], "artificiality"[33] and even "absurdities"[34] of the "novel legal doctrine"[35] which it adopted in substitution for its own earlier stated opinion[36].

26 Perhaps, in these more critical times, the Court might have been less inclined than it was nearly a quarter of a century ago to follow the English authority leading to that decision. Alternatively, in recognising an entitlement, it might have attempted to explain it in a different way and by reference to different considerations. However, the principle in *Griffiths v Kerkemeyer* is now "too deeply entrenched in this part of the law in Australia for this Court to reopen it"[37]. Belatedly, the English courts have perceived for themselves certain fallacies in the authority which, in that country, occasioned the change of

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29 Virgil, *Georgics*, bk I, line 281.

30 (1977) 139 CLR 161.

31 Derived from *Donnelly v Joyce* [1974] QB 454 at 462.

32 *Kars v Kars* (1996) 187 CLR 354 at 382.

33 *Kars v Kars* (1996) 187 CLR 354 at 381.

34 *Kars v Kars* (1996) 187 CLR 354 at 382.

35 *Kars v Kars* (1996) 187 CLR 354 at 365.

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

37 *Kars v Kars* (1996) 187 CLR 354 at 372.

direction copied by this Court[38]. But in Australia, it would now require legislation to secure a second change of direction. Legislative modifications have indeed occurred, but usually these have been limited to abolition or capping of the entitlement to recovery[39]. Because, so far as this Court is concerned, it is "too late to go back"[40], all that can now be done is to try to avoid the most inconvenient results of the "novel legal doctrine". The means of doing so is to apply any applicable legislation and to adhere to "the basic legal principles"[41] expressed in *Griffiths v Kerkemeyer*, following through the consequences "in the most consistent and least unsatisfactory way"[42]. The parties to the present proceedings recognised this. No one argued that the principle accepted in *Griffiths v Kerkemeyer* should be reopened.

27 This approach was the one adopted by this Court in the task of calculation in *Van Gervan v Fenton*[43]. It was also followed in *Kars v Kars*[44] when the question arose as to recovery by a plaintiff for gratuitous services actually provided by the tortfeasor who, in that case, was a motorist whose compulsory insurer would otherwise have gained an unmerited windfall if recovery had been denied.

28 In the present case, one would be immediately inclined to follow the logic of basic legal principles if the only criterion were the common law. Having embarked upon a path of anomalies, the logic of the common law would carry the decision-maker forward, however apparently extreme the resulting outcome. Ossa would again be piled on Pelion. Any remedy would be left to a legislative thunderbolt if the consequence were regarded as too artificial to be tolerated. Artificiality abounds, as Callinan J has demonstrated[45]. But now we have a new

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38 *Hunt v Severs* [1994] 2 AC 350 at 361-363 referring to *Donnelly v Joyce* [1974] QB 454 at 462.

39 See eg *Motor Accidents Act* 1988 (NSW), s 72; *Transport Accident Act* 1986 (Vic), ss 174-175; *Common Law (Miscellaneous Actions) Act* 1986 (Tas), s 5; *Wrongs Act* 1936 (SA), s 35A; *WorkCover Queensland Act* 1996 (Qld), s 315.

40 *Kars v Kars* (1996) 187 CLR 354 at 369.

41 *Kars v Kars* (1996) 187 CLR 354 at 377.

42 *Kars v Kars* (1996) 187 CLR 354 at 379.

43 (1992) 175 CLR 327.

44 (1996) 187 CLR 354.

45 Reasons of Callinan J at [60].

problem. Subject to any specific statutory provision, is interest payable upon the *Griffiths v Kerkemeyer* component of a plaintiff's damages and, if so, what is the correct rate that a court should apply?

29 The basic purpose of interest – ordinarily a creature of statute – is to compensate a person for being kept out of moneys that, in law, belong to that person[46]. The object of interest is to restore the plaintiff – so far as money is able – to the situation in which he or she would have been but for the defendant's legal wrong[47]. It is possible to mount a logical case for interest based on the foundation of the entitlement of the plaintiff to compensation for gratuitous services, namely the sum necessary to reflect the needs of the plaintiff. But, clearly, this is a somewhat artificial basis, given that the very essence of the entitlement is that the services in question have been provided gratuitously; that the services are not usually donated for reasons of profit-making; that the amount recovered by the plaintiff is not legally repayable to those who provided the services; and that nobody has actually been out of pocket in money terms at all.

30 The artificiality of adding interest to the sum calculated under this head of damage is shown in stark relief when the method of calculation, approved by this Court, is considered. Assessment, typically by reference to commercial rates for organised domestic help[48], usually involves a further measure of unreasonableness, given that few (if any) injured plaintiffs in a real life situation could contemplate engaging such commercial services, with their extremely high charges for their time-consuming and labour-intensive services. To add interest upon a sum of money so derived takes logic almost to snapping point. It requires an extension of presuppositions that oblige a court, asked to adopt this course, to pause and ask where logic, in the form of "basic legal principles", has taken the law.

31 In Australia, there is no enforceable trust or other legal obligation for the successful plaintiff to compensate the care-givers from the fund so recovered[49]. The voluntary services, by definition, involve no out of pocket expenses. The calculation is ordinarily made by reference to evidence as to rates and costs

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46 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657; *Haines v Bendall* (1991) 172 CLR 60 at 66.

47 Yoshida, "Comparison of Awarding Interest on Damages in Scotland, England, Japan and Russia", (2000) 17 *Journal of International Arbitration* 41 at 52.

48 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 187. This was stated to be a guide to maximum recovery.

49 *Kars v Kars* (1996) 187 CLR 354 at 375; cf *Cunningham v Harrison* [1973] QB 942 and *Hunt v Severs* [1994] 2 AC 350 at 363.

which (as Callinan J has pointed out[50]) necessarily includes pro rata commercial elements such as insurance, superannuation entitlements, advertising, set up and other basic expenses. Now, on top of this substantial payment, it is suggested that interest at commercial rates must be paid on the resulting sum. It is at this stage on the path of logic that I come to an abrupt halt.

32 Were I obliged to give effect to nothing more than the application of logic derived from analogous reasoning applied to what has gone before in the common law, I would still hesitate, because the common law usually abhors unreasonable outcomes. Even in the logic of *Griffiths v Kerkemeyer* damages, a point of intolerable unreasonableness would ultimately be reached. But fortunately, in this case, there is a statutory means of escape. It has been afforded to guard against the excesses to which logic can sometimes lead the legal mind. I refer to the legislation which in this case provides an exemption from the statutory obligation to pay interest where "good cause is shown to the contrary"[51] and which limits the provision of interest to be "at such rate as the court thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which the judgment is entered"[52]. These provisions must be interpreted and applied in a principled manner[53]. The power to exempt an award of compensation from interest or to determine the rate of interest should it be payable must be exercised by a court in a way consistent with the grant of the power and the purposes which lay behind that grant.

Exemption from interest would be unprincipled

33 It is critical first to address the meaning of the statutory exemption in a case such as the present. Initially, it occurred to me that the mention of the need for an "application"[54] might suggest that the exemption applies not to a class of damages but only to the peculiar circumstances shown by the evidence in a particular case. On reflection, however, I do not find this argument to be compelling. The provisions of the statute affording an entitlement to interest are perfectly general. They require an application for interest in every case in which interest is claimed. The exemption is equally general. It may, therefore,

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50 Reasons of Callinan J at [60].

51 *Supreme Court Act* 1933 (ACT), s 69.

52 *Supreme Court Act* 1933 (ACT), s 69.

53 *Cullen v Trappell* (1980) 146 CLR 1 at 17.

54 *Supreme Court Act* 1933 (ACT), s 69. See reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [8].

potentially apply to the nearly infinite variety of claims for which interest may be ordered.

34 In some cases, where the services to an injured plaintiff, although provided gratuitously, involve legal or other effective obligations of at least some reimbursement to the care-giver, it might be appropriate to allow interest even at commercial rates "on the whole or any part of the money". But in the ordinary case, of which this was one, it was submitted that no reason existed to treat the payment for gratuitous services as something in the nature of a debt or the outstanding "money" of a damages claim. Upon this footing, it was argued, the exception was applicable. "Good cause" had been shown to the contrary. To add interest on the sum would (it was suggested), in most cases of such damages, as in this, be to heap windfall upon windfall in respect of this component of the verdict and to produce an artificial outcome unjust to the defendant.

35 I am conscious of the fact that in earlier times I have reached opposing conclusions on issues similar to that presented in this appeal. In *Hodges v Frost*[55], in the Full Court of the Federal Court of Australia, I accepted that interest was not payable on the *Griffiths v Kerkemeyer* component of a verdict entered in the Supreme Court of the Australian Capital Territory. In this regard, I adopted the reasoning of Glass JA in *Burnicle v Cutelli*[56]. I based my conclusion on the then state of judicial authority and the statutory provisions for the award of interest in the Supreme Court of the Australian Capital Territory[57].

36 Ten years later, in the Court of Appeal of New South Wales in *Marsland v Andjelic [No 2]*[58], I joined Meagher JA in awarding interest to an injured plaintiff in respect of this component of her damages. However, *Marsland* was substantially concerned with a specific statutory regime governing the award of interest to persons injured in motor accidents in New South Wales[59]. That statutory regime was different from the one invoked in this case. The task in courts below this Court necessarily involves interpreting the particular statutory warrant for interest and deriving inferences from the logic of what this Court has decided, for example, in *Griffiths v Kerkemeyer* and *Van Gervan*. In this appeal,

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55 (1984) 53 ALR 373 at 381-382.

56 [1982] 2 NSWLR 26 at 30 applying *Settree v Roberts* [1982] 1 NSWLR 649.

57 *Australian Capital Territory Supreme Court Act* 1933 (Cth), s 53A(1) as amended by the *Statute Law (Miscellaneous Amendments) Act* 1981 (Cth).

58 (1993) 32 NSWLR 649.

59 *Motor Accidents Act* 1988 (NSW), s 73(1). See *Marsland v Andjelic [No 2]* (1993) 32 NSWLR 649 at 651.

it is the duty of this Court to deal with the matter as one of principle. There is no authority in the Court on the point. The entitlement in this case is governed by the specific legislation of the Australian Capital Territory.

37 For a time, I was inclined to accept the respondent's argument that this was a case for total exemption so that no interest at all would be paid. This, after all, had been the law in several Australian jurisdictions with legislative provisions expressed in general terms. Such provisions were construed in ways that avoided what were felt to be excessive and unwarranted outcomes. However, it is difficult to reconcile such an approach with the acceptance of a legal entitlement of a person, in the position of the appellant, to recover damages for this head of loss expressed in terms of his or her "needs". At least in some cases, the payment of interest may provide a fund from which a measure of compensation will be afforded to the care-givers. The present may be such a case where the parents of the present appellant are caring for him at their home.

38 Furthermore, the payment of interest prevents a defendant from benefiting from a "windfall" because family and friends have fulfilled a plaintiff's needs at no actual cost to the defendant. If regard is had to one of the purposes of tort law, namely the just distribution of the economic consequences of the tort, it is far from obvious that a defendant, having caused the burden that has an economic value, should be released from a duty to discharge or ameliorate that burden. At least to some extent, an obligation to pay a measure of interest may encourage early settlement. It may discourage undue delay. Artificial though this reasoning may in part appear, it follows from the Court's decisions on the point.

39 To refuse interest altogether might snap logic in another way – basically denying the legitimacy of the entitlement which the Court has now repeatedly upheld. For these reasons, a principled application of the statute, and specifically of the provisions authorising a court to deny interest altogether where "good cause is shown", requires that the submission for complete exemption be rejected.

Provision of commercial rates would be excessive

40 The foregoing does not, however, mean that full interest at commercial rates must be paid on this component of a plaintiff's past damages. It would be erroneous, in my view, for a Court to "think fit" that full commercial rates of interest should be applied. Whilst such rates may be appropriate, if proved and where they would be apt to restore the plaintiff for needs in terms of commercially borrowed moneys or their equivalent, it is not "fit" to so provide where the component of the damages in question has not been paid for but has been given gratuitously and without any legal duty to repay the provider.

41 I therefore agree with Callinan J that the rate of interest fixed by the Court in *Gogic*[60] should apply. That is the rate ordinarily applicable to an entitlement to general damages for non-economic loss sustained before trial. The claim for a commercial rate of interest should be rejected. It should be rejected as a matter of legal policy[61]. In the end, legal policy marks out the limits and boundaries to which the momentum of logic takes the mind in relation to this head of damage. The applicable legislation permits, and invites, this to be done. But it equally rejects the provision of commercial rates of interest.

42 Such a proposed rate may be somewhat arbitrary, as the majority suggest. But so much was acknowledged by a unanimous Court in *Gogic*[62]. The reasons that lay behind it, and the character of the head of loss in question there and here, make it entirely appropriate, just and lawful to adopt the rate which the Court adopted in *Gogic*. It is not appropriate or just to adopt commercial rates of interest. In my view, they are not the rates which the law requires. To adopt those rates is to fall into the Olympian error of which, long ago, Virgil warned. We should heed his warning.

Order

43 I agree in the orders proposed by Callinan J.

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60 (1991) 171 CLR 657 at 666.

61 *Kars v Kars* (1996) 187 CLR 354 at 365.

62 (1991) 171 CLR 657 at 666.

44 CALLINAN J. The facts, the course of previous proceedings, and the statutory provisions relevant to this case are set out in the reasons for judgment of the majority[63] and need no repetition here.

45 A High Court constituted by three Justices (Gibbs, Stephen and Mason JJ) held in this jurisdiction for the first time in *Griffiths v Kerkemeyer*[64] that a person who had been injured as a result of the negligent acts of a tortfeasor should be entitled to recover from the tortfeasor damages representing the value of services provided and to be provided for him gratuitously by his family.

46 Before *Griffiths v Kerkemeyer* was decided this Court (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Taylor JJ) in *Blundell v Musgrave*[65] had unanimously set its face against awards of damages of this kind unless the plaintiff was under a legal liability to pay or refund the costs or value of the services. In that case Dixon CJ and Fullagar J dissented but their dissent related to the question whether a legal liability in fact and law arose in the circumstances.

47 Dixon CJ stated the general proposition of law on the topic as being[66]:

> " … that, before a plaintiff can recover in an action of negligence for personal injuries an item of damages consisting of expenses which he has not yet paid, it must appear that it is an expenditure which *he* must meet so that at the time the action is brought, though he has not paid it, he is in truth worse off by that amount". (emphasis added)

48 Fullagar J[67] (dissenting) was content to adopt what had been said by Harvey CJ (speaking for the Appellate Division of the Supreme Court of Alberta) in *Greenaway v Canadian Pacific Railway Co*[68]:

> "unless the expense is one which she … actually makes as a result of the accident, the defendant should not be called on to pay for it for the benefit of someone other than the injured person".

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63 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

64 (1977) 139 CLR 161.

65 (1956) 96 CLR 73.

66 (1956) 96 CLR 73 at 79.

67 (1956) 96 CLR 73 at 94.

68 (1925) 1 DLR 992 at 995.

49 Sitting as a Justice of the Supreme Court of Queensland in *Renner v Orchard*[69] Gibbs J regarded himself as bound by *Blundell v Musgrave* to reject a claim for the value of gratuitous care. But his Honour did go on to say that if it is shown that the plaintiff is under a compelling moral obligation to pay for the services, and is likely to do so notwithstanding the absence of any legal obligation, it followed in his opinion that the plaintiff had a loss which ought to sound in damages. The plaintiff there had promised to pay her daughter for her services in looking after her, but because the promise was conditional on the recovery of damages his Honour considered himself bound to reject this head of claim[70].

50 Between the decision in *Blundell v Musgrave* and *Griffiths v Kerkemeyer* the English Court of Appeal (Davies and Megaw LJJ and Walton J) decided *Donnelly v Joyce*[71]. In the course of their reasons the Court of Appeal[72] expressed criticism of what had been said by Dixon CJ in his dissenting judgment in *Blundell v Musgrave*[73]:

> "It is certainly not cynical to say that the law knows no criterion for deciding what is and what is not a moral obligation; or that the views of sensible, right-thinking people may differ widely on such a question; or that the law would be gravely uncertain and defective if the answer to the question whether or not a moral obligation existed in a particular case were to be determinant of a person's right to sue. But it goes further than this. It would produce a very odd result. Suppose the provider, being a charitable person, the Good Samaritan of St Luke's Gospel, for example, has advanced money to provide nursing treatment for an injured neighbour who had suffered injuries by the crime or negligence of another. It might well be thought, by the Good Samaritan and other right-minded people, that there was no moral obligation on the injured man to repay unless and until he recovered compensation from the wrongdoer. But it might well be thought, also, by right-minded people that, if and when he recovered compensation, there *would* be such a moral obligation at least to offer repayment. Would it not be absurd that the question whether or not the injured man could successfully sue the wrongdoer for damages in respect of the loss

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69 [1967] QWN 6.

70 [1967] QWN 6 at 8.

71 [1974] QB 454.

72 Megaw LJ read the judgment of the Court.

73 [1974] QB 454 at 463.

> ameliorated by the Good Samaritan's expenditure should depend on the existence of a moral obligation to repay, when in its turn the very existence or non-existence of that moral obligation itself would depend on whether or not he could successfully sue the wrongdoer?"

51 With respect to their Lordships there is implicit in their reasoning an optimism about human nature unhappily rather infrequently encountered in practice. Experience recalls to mind the incredulous expressions of delight of plaintiffs, and of disbelieving dismay of defendants, on being told that damages for gratuitous care and services at common law are available, and that there is no legal obligation in this country for them to be paid to the gratuitous carer and provider of services.

52 The question could validly be asked, what had changed since *Blundell v Musgrave*[74], a unanimous decision on the point (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Taylor JJ), by the time *Griffiths v Kerkemeyer* came to be decided? The considerations that moved the Court of Appeal to reach a different conclusion in *Donnelly v Joyce* had, it may safely be assumed been fully ventilated in *Blundell v Musgrave*. Reference was made by Gibbs J in *Griffiths v Kerkemeyer* to a decision of the South Australian Supreme Court[75] that had followed and applied *Donnelly v Joyce* and to statements in other cases, which his Honour thought justified a new approach. He said[76]:

> "It would seem unjust to an ordinary person that damages under this head could only be recovered if the injured plaintiff had retained sufficient capacity, and shown sufficient foresight, to enter into a binding contract to pay for the services with which he was provided. And although, under the principle formerly accepted, the plaintiff might have lost his special damages if he was not liable to pay for the services provided to him, it would have been easy for him to correct the position for the future once he realized that his damages depended upon whether or not he bound himself to pay for the services. A rule having that effect placed a premium on astuteness. For all these reasons, we should, I think, accept that the conclusion reached in *Donnelly v Joyce*[77] was correct.
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> However in my opinion this Court should not abandon the principle that a plaintiff whose injuries have created a need for hospital or nursing

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74 (1956) 96 CLR 73.

75 *Beck v Farrelly* (1975) 13 SASR 17.

76 (1977) 139 CLR 161 at 168-169.

77 [1974] QB 454.

services cannot recover damages in respect of that need (except of course for loss of amenities or pain and suffering) unless the satisfaction of the need is or may be productive of financial loss. However it should no longer be held that the fact that the services have been and will be provided gratuitously is conclusive of this question. 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?"

53 *Ferguson v E A Watts Pty Ltd*[78] was a case in which this Court (Menzies, Mason and Jacobs JJ) was called upon to decide whether an assessment of damages for personal injuries was manifestly wrong. The assessment contained no component for gratuitous care and the Court did not add any such component. There is no suggestion in the judgment that *Blundell v Musgrave* had ceased to state the relevant law.

54 It may also be noticed that in *Griffiths v Kerkemeyer* Gibbs J was prepared to omit from his formulation the conditions he thought essential in *Renner v Orchard*, that there existed a compelling moral obligation to pay for the services, and it was likely that the plaintiff would do so[79].

55 Stephen J[80] in *Griffiths v Kerkemeyer* was impressed by the reasoning in *Donnelly v Joyce* but was also apparently heavily influenced by policy considerations, including the desirability of placing the injured person in a position of being able to reimburse the provider for the provider's services. His Honour also thought it relevant that because the wrongdoer might be "likely to carry liability insurance [he or she would] prove a much better loss distributor", a proposition both, with respect, open to question, and having a capacity to distort legal principle[81].

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78 Unreported, 22 October 1974. See also (1974) 48 ALJR 402n.

79 [1967] QWN 6 at 8.

80 (1977) 139 CLR 161 at 173-174.

81 (1977) 139 CLR 161 at 176.

56 Mason J[82] in his judgment referred to *Wilson v McLeay*[83] as had Stephen J[84]. In *Wilson*, Taylor J[85] expressed the view that an injured plaintiff might recover an allowance to permit the reasonable attendance upon a plaintiff by her parents[86]. What was contemplated in that case was an actual cost incurred by the parents on the basis that the attendance would assist in the recovery of the plaintiff, or alleviate her pain and suffering. The cost of the attendance in these circumstances could properly be regarded as having been reasonably incurred (albeit although not directly by the plaintiff) in mitigation of her loss.

57 In my opinion the decision in *Griffiths v Kerkemeyer* cannot be satisfactorily reconciled with what was held by all members of the Court (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Taylor JJ) including the dissenting Justices, Dixon CJ and Fullagar J, in *Blundell v Musgrave*. Furthermore, the later case was a decision of but three Justices of this Court (Gibbs, Stephen and Mason JJ) and it was heavily based upon policy considerations. However, whatever view one might take of the foundations for, and the conclusive effect of, *Griffiths v Kerkemeyer*, it is too late now, in the absence of any express overruling of it, to do other than act upon it. Its binding force has effectively been recognised by legislation in various places to modify it in whole or in part[87]. Furthermore, *Van Gervan v Fenton*[88] is a decision of this Court in which all seven of the Justices (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), although not unanimous on the question of the quantum of damages for gratuitous care, and the indicia for their calculation, accepted without question the continued binding force of *Griffiths v Kerkemeyer*.

58 There was no attempt made in this case to reopen *Griffiths v Kerkemeyer* but the nature of the foundations upon which the decision rests, and policy considerations to which it gives rise, are not necessarily irrelevant to the issues in this case: whether any interest should be allowed on damages for pre-trial

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82 (1977) 139 CLR 161 at 191.

83 (1961) 106 CLR 523.

84 (1977) 139 CLR 161 at 180.

85 (1961) 106 CLR 523 at 524.

86 (1961) 106 CLR 523 at 527.

87 See *WorkCover Queensland Act* 1996 (Q), s 315; *Transport Accident Act* 1986 (Vic); *Common Law (Miscellaneous Actions) Act* 1986 (Tas); W*rongs Act* 1936 (SA).

88 (1992) 175 CLR 327.

gratuitous care and services, and if it should be, at what rate should it be allowed?

59 As the majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) have pointed out attention must first be focused upon s 69 of the *Supreme Court Act* 1933 (ACT)[89], which provides that unless good cause to the contrary be

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89 "**69 Interest up to judgment**

(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods) the court shall, upon application, unless good cause is shown to the contrary –

(a) order that there be included in the sum for which judgment is given interest at such rate as the court thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which the judgment is entered; or

(b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) Subsection (1) does not –

(a) authorise the giving of interest upon interest or of a sum in lieu of such interest;

(b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise; or

(c) affect the damages recoverable for the dishonour of a bill of exchange.

(3) Where the sum for which judgment is given (in this subsection referred to as the 'relevant sum') includes, or where the court determines that the relevant sum includes, any amount for –

(a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;

(b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or

(c) exemplary or punitive damages;

interest, or a sum in lieu of interest, shall not be given under subsection (1) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the court represents any cash amount."

shown an award of interest at such rate as the Court thinks fit should be allowed[90].

60 In this case the substance of the respondent's argument was that because the assessment here was made upon the basis of the market cost of the provision of the services (in conformity with what was held in *Van Gervan v Fenton*[91]), the appellant had in effect received a windfall, because the market cost included components for superannuation and workers' compensation insurance, being components of loss which would never be incurred in respect of, and were totally inappropriate for inclusion as damages for, gratuitous care. To those items others might well be added. The market cost of such services may include a loading to cover a commission or service charge payable to an agency by the person performing the services for reward. No attempt was made in this case to explore income tax advantages or ramifications (if any) that might be involved if the injured plaintiff were actually required to outlay money for the services. There is a further matter which is sometimes overlooked, and that is that the market cost will almost always be based upon the period of the attendance of the provider of the services at the residence of the injured plaintiff, even though during the period of attendance the provider will rarely be occupied throughout in providing services. By contrast, a gratuitous carer will often be in attendance by choice or obligation, moral or otherwise, at the injured person’s premises, whether services are being provided or not. The whole area is fraught with imponderables. And in some jurisdictions in Australia there is not the opportunity to award damages on a provisional basis or to structure settlements in such a way as to do greater justice with respect to care and services and their actual or notional cost[92].

61 Samuels JA in *Kovac v Kovac*[93], following what he had said in *Johnson v Kelemic*[94], stated that he did not think:

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90 Reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [7]-[8].

91 (1992) 175 CLR 327.

92 See *Halsburys Laws of England*, 4th ed, vol 12(1), paras 930-931 for a discussion of the position in the United Kingdom. See also, for example *Motor Vehicle (Third Party Insurance) Act* 1943 (WA), s 16(4); *Supreme Court Act* 1935 (SA), s 30b (discretion to depart from lump sum awards); *Supreme Court Act* 1970 (NSW), Pt 5 Div 2 (provisions for interim payments); *Motor Accidents Act* 1988 (NSW), s 81; and *Transport Accident Act* 1986 (Vic), s 72.

93 [1982] 1 NSWLR 656 at 668.

94 [1979] FLC ¶90-657 at 78,493.

"that any head of policy (or theory of loss distribution) requires the ordinary currency of family life and obligation to be wholly ignored; or the inclusion in the area of compensation of the support commonly expected and received amongst the members of a family group, even though the actual occasion for its provision may be the tort-caused disability of the recipient".

62 There are other matters which perhaps have not always attracted the attention that they deserve in the assessment of damages for gratuitous care, either past or prospective. Some relationships are more fragile and less enduring than others. Care provided gratuitously, for a time, may cease to be available or may simply cease because of fatigue or exhaustion. It may also be easy to make wrong assumptions in modern times about who, and in what circumstances, domestic services will ordinarily be provided, absent any disability. It has not always been easy to distinguish between care, and services provided out of natural love and affection, and the additional burden imposed by the fact of injury. It is to this aspect that, for example, s 211 of the *WorkCover Queensland Act* 1996 (Q) directs attention with respect to workers' compensation for care and services provided to an injured worker[95].

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95 "**Additional lump sum compensation for gratuitous care**

211 (1) This section applies if a worker sustains an injury that results in –

(a) a WRI of 50% or more; and

(b) a moderate to total level of dependency on day to day care for the fundamental activities of daily living.

(2) The worker is entitled to additional lump sum compensation only if –

(a) day to day care for the fundamental activities of daily living is to be provided at the worker's home on a voluntary basis by another person; and

(b) the worker resides at home on a permanent basis; and

(c) the level of care required was not provided to the worker before the worker sustained the impairment; and

(d) the worker physically demonstrates the level of dependency mentioned in subsection (1)(b).

(3) However, a worker is not entitled to additional lump sum compensation if the WRI arises from –

(Footnote continues on next page)

63 I would not regard the appellant in a relevant sense of having been kept out of a sum of money to which he was entitled. What has happened is that he has had damages assessed, by reference to a real, market cost that he has not in fact incurred, and which have not been and may never be applied towards the entirely notional if not to say, fictitious purpose that they were intended to fulfil.

64 In my opinion, when all of the relevant factors are weighed up, and, in particular, when regard is had to the fact that the moral obligation is just as likely to be honoured in the breach as in the observance, they do provide reason, or to use the language of the statute, constitute good cause shown, not for no

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(a) a psychiatric or psychological injury; or

(b) combining a psychiatric or psychological injury and another injury.

(4) WorkCover must ask that a registered occupational therapist assess the worker's level of dependency resulting from the impairment in the way prescribed under a regulation.

(5) The occupational therapist must give WorkCover an assessment report stating –

(a) the matters the therapist took into account, and the weight the therapist gave to the matters, in deciding the worker's level of dependency; and

(b) any other information prescribed under a regulation.

(6) WorkCover must decide the amount of the worker's entitlement to additional compensation of up to $150 000, payable according to a graduated scale prescribed under a regulation, having regard to –

(a) the worker's WRI; and

(b) the worker's level of dependency; and

(c) any other information prescribed under a regulation.

(7) If the worker does not agree with the level of dependency assessed under subsection (4), WorkCover must refer the matter of the worker's level of dependency to the General Medical Assessment Tribunal for decision.

(8) In this section –

'**home**', of a worker, means a private dwelling where the worker usually resides."

allowance of interest, but for an allowance at a moderate rate rather than at a commercial rate, on damages for pre-trial gratuitous care. I consider this approach, although if not compelled by, to be consistent with the unanimous decision of this Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) in *MBP (SA) Pty Ltd v Gogic*[96]. There the Court held that interest on damages for non-economic loss sustained before trial, should not be calculated at current interest rates or at the real rate of interest which would have been available to the plaintiff in the relevant period, but on a rate which represents the difference between a rate for secure investments and the rate of inflation. Their Honours thought that the rate at the time of that decision should be fixed at four percent, acknowledging, in doing so, that their approach was necessarily an arbitrary one. Their Honours said that a plaintiff is awarded interest because he or she has been "deprived of the use of his or her money, not because he or she has forgone investment opportunities"[97]. I do not overlook that there was one significant difference in *MBP (SA) Pty Ltd v Gogic*. The damages in question there were for pre-trial pain and suffering, which fell to be assessed in the currency of the time of trial, whereas here, the damages for pre-trial gratuitous care were calculated by reference to the actual market charges, from time to time of the gratuitous care. But I do not think that is a reason for adopting a commercial rate of interest in this case. The Full Court of the Federal Court, in this case, was alive to this difference, but did not think that it provided reason for an award of interest at commercial rates[98]. Foster J made these points[99]:

> "In the first place, although *Griffiths v Kerkemeyer* awards are not, generally speaking, subsumed under the heading of general damages, they are, in my opinion, far more akin to such damages than they are to special damages. They are computed on the basis of notional amounts paid in the past for services notionally provided at commercial rates of pay. Of their very nature they do not involve actual out-of-pocket expenditure productive of an unpaid debt in respect of which interest would be payable at commercial rates in order that the capital sum not be eroded by inflation.
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> Although *Gogic* makes it clear that the question can no longer be approached, as in *Settree*, on the basis that no interest should be awarded, it provides, in my opinion, sound reasons for not applying commercial rates. The purpose of awarding interest on a *Griffiths v Kerkemeyer* sum is not 'to

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96 (1991) 171 CLR 657.

97 (1991) 171 CLR 657 at 666.

98 See *Grincelis v House* (1998) 84 FCR 190 at 200 per Foster J.

99 (1998) 84 FCR 190 at 200-201.

> compensate a plaintiff for being deprived of the opportunity to invest his or her money' the notional moneys involved in the *Griffiths v Kerkemeyer* damages having been notionally paid away at the time when the notional services were provided. The plaintiff has not 'foregone investment opportunities'. Consequently, the award of interest should be made on the basis that 'he or she has been deprived of the use of his or her money'[100].
>
> If exactitude were sought in an area where, having regard to the numerous imponderables involved, it could not reasonably be an object of attainment, then efforts might be made to arrive at the 'real' rate of interest for each appropriate period. I consider, however, that the broad approach enjoined by *Gogic* in respect of general damages is also appropriate in the present situation. I consider that the four per cent interest rate taken as appropriate in *Gogic* for general damages may also reasonably be applied in respect of *Griffiths v Kerkemeyer* damages for past notional care."

I agree with his Honour's approach and conclusion.

65 There are some further observations that I would make. Except in the very specific cases in which exemplary damages are available, damages should not include a penalty element. If that is desired, it is for the legislature to say so in clear terms. There are abundant means available today to plaintiffs under the rules of court, and in particular when case management is widely practised, for plaintiffs' legal advisers to bring their matters expeditiously to finality with ordinary diligence. It may be doubted therefore whether a penalty component would serve any purpose, and would be other than an unfair imposition on defendants. This point may also be made. The amount of time and effort involved in the provision of gratuitous care will usually be a matter peculiarly within the knowledge of the plaintiff and his or her camp. Until details upon which a defendant might sensibly act are provided on behalf of the plaintiff it will be difficult for a defendant to essay any realistic assessment of damages under this head.

66 I would not regard the Practice Direction[101], which is referred to in the reasons of the majority[102], as necessarily providing an appropriate guide as to the interest that should be allowed on damages for pre-trial gratuitous care. It is a

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100 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 666.

101 The Supreme Court of the Australian Capital Territory, Practice Direction No 1 of 1993 dated 25 May 1993 rescinded Practice Direction No 3 of 1991 dated 12 December 1991.

102 Reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [21].

Practice Direction only, and adherence to it in a case of this kind may deflect the Court from a consideration of those matters which bear upon the appropriate rate of pre-trial interest, particularly on damages for gratuitous care, which depend upon so many different imponderables from case to case, and in which therefore there has to be the most careful of explorations of the actual circumstances of each plaintiff so claiming.

67 It would follow that I would dismiss the respondent's application for special leave to cross-appeal with costs, dismiss the appellant's appeal with costs, and affirm the judgment of the Full Court of the Federal Court.