

Overruling *Sullivan v Gordon* special damages

CSR LTD v EDDY [2005 HCA 64]

By Andrew Stone

BACKGROUND

Some victims of compensable injury will, as a consequence of their disabilities, require assistance to carry out the functions of daily life, including personal hygiene, nursing assistance, help with domestic tasks and household maintenance chores. Such services are frequently provided on a voluntary basis by family members. Since the High Court decision in *Griffiths v Kerkemeyer*,¹ such damages have been recoverable at common law.

Serious injury can not only create a need for the provision of services to an injured person but also the need to replace services that the injured person was providing to others. Common examples include parenting for a young child, parenting for an older child with a disability, caring for a sick or disabled spouse, and caring for a sick or disabled parent.

In general, Australian law does not recognise any right on the part of the recipients of such care and assistance to sue for the loss of their care provider.²

In *Burnicle v Cutelli*³ the NSW Court of Appeal held that there was no right to recover the commercial value of lost services to be provided to others. However, general damages could be increased to reflect the mental anguish to an injured party who was no longer able to provide assistance to a loved one.

Subsequently, in *Sullivan v Gordon*,⁴ the NSW Court of Appeal unanimously overturned *Burnicle v Cutelli* and held that special damages could be recovered for the loss of capacity to care for others.⁵

THE HIGH COURT DECISION

On 21 October 2005 the High Court handed down its decision in *CSR Ltd v Eddy*.⁶ In a unanimous decision, five judges held that there was no right at common law for a plaintiff to recover *Sullivan v Gordon*-style damages to compensate for their lost ability to provide care to others.

The plaintiff contracted mesothelioma from exposure to asbestos and was consequently unable to provide domestic assistance to his wife, who suffered from osteoarthritis. The trial judge had allowed \$165,480 for the cost of replacement care for his wife.

The High Court's reasoning in rejecting *Sullivan v Gordon* was straightforward. A claimant's entitlement to compensation arises from his or her own needs created by an injury, and does not extend to the needs of another who is dependent on the injured person.

The High Court went on to consider various policy arguments for and against *Sullivan v Gordon*-style damages, ultimately concluding that such policy considerations were properly a matter for legislation rather than judicial determination.⁷

CONSEQUENCES OF THE HIGH COURT DECISION

Where catastrophic injuries such as quadriplegia, paraplegia or traumatic brain injury prevent a young mother caring for her children, there is now no provision for paid care to replace lost parenting services or to compensate for the burden placed on other family members.

It is ironic that under compensation to relatives legislation, the children of a paraplegic or quadriplegic would be financially better off had their parents died. In a death claim – applying the High Court's reasoning in another case – the replacement costs of parenting services are fully recoverable.⁸

POLICY JUSTIFICATIONS FOR REINSTITUTING SULLIVAN V GORDON

In *Sullivan v Gordon* Justice Mason, President of the Court of Appeal, articulated three policy grounds for supporting *Sullivan v Gordon* damages:

- (a) For many women and some men their own needs extend to caring for other members of their family as naturally as they extend to the capacity to attend to their own personal functions. Any distinction only discriminates against those who devote themselves to the care of others within the family unit.
- (b) It is difficult and unreal to disentangle the domestic duties performed by a household member in fulfilment of their own needs and compelling moral duties owed to others.
- (c) A mother's interrupted capacity to make her usual contribution to a household deserves the law's belated recognition of the economic value of such work.

LEGISLATIVE REFORM

At present three Australian jurisdictions provide some limited statutory acknowledgement of the existence of *Sullivan v Gordon* damages.⁹ It is beyond the scope of this case note to apply the High Court decision to each of these provisions.

The Australian Lawyers Alliance has already submitted to the NSW Government that legislation should be introduced to