SUPREME COURT OF QUEENSLAND

CITATION:	*White v Kriukelis & Anor* [2003] QCA 309
PARTIES:	**LEANNE MICHELLE WHITE** (plaintiff/respondent) **v** **ALFONSAS KRIUKELIS** (first defendant) **AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMITED** ACN 004 791 744 (second defendant/appellant)
FILE NO/S:	Appeal No 10912 of 2002 DC No 1825 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Quantum Only
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2003
JUDGES:	Davies and Jerrard JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – NON-PECUNIARY DAMAGE – PAIN AND SUFFERING – where respondent awarded $35,000 in general damages for pain and suffering – where appellant contends that the findings made by the learned trial judge based on medical opinions, cannot be supported by the evidence – where appellant contends that only $25,000 should have been awarded under this head of damages – whether award of damages can be supported by the evidence DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – NON-PECUNIARY DAMAGE – IN GENERAL – where respondent awarded *Griffiths v Kerkemeyer* damages for both

past and future care – where need for these gratuitous services not challenged in cross-examination – where appellant contends that it is not usual practice in Queensland to test a plaintiff by cross-examination on an asserted need for domestic services – where appellant contends that cross-examination was unnecessary as evidence called and proceedings themselves would have given notice to plaintiff and court that her claimed need was challenged – whether appellant's proposition correct having regard to the nature of the adversarial system

Elford v FAI General Insurance Co Limited [1994] 1 Qd R 258, followed
Griffiths v Kerkemeyer (1977) 139 CLR 161, applied

COUNSEL: S C Williams QC, with P D Corkery, for the appellant
R J Lynch for the respondent

SOLICITORS: Dillons Solicitors for the appellant
McInnes Wilson for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Jerrard JA and with the orders he proposes.

[2] **JERRARD JA:** On 13 November 2002 Leanne White was awarded judgment in the sum of $154,579.59 in a claim brought by her in the District Court in Brisbane for damages suffered as a result of her being injured in a motor vehicle accident on 18 September 2000. An order was also made awarding her costs of the action on an indemnity basis. The second defendant, Australian Associated Motor Insurers Limited, has appealed against the amount awarded to Leanne White for general damages for pain and suffering ($35,000.00), and interest thereon ($700.00); and the amount awarded for past *Griffiths v Kerkemeyer* damages ($24,562.50), and future *Griffiths v Kerkemeyer* damages ($40,000.00). The first defendant at the trial, Alfonsas Kriukelis, is not a party to the appeal.

[3] The first defendant's liability for the motor accident in which the plaintiff was injured was not in dispute at the trial. The appellant/second defendant, AAMI contested the quantum of the first defendant's liability in damages. The vehicle the plaintiff was driving on Belmont Road in Belmont had collided on 18 September 2000 with the vehicle driven by Mr Kriukelis, when his vehicle performed an abrupt U Turn and drove into hers.

[4] The learned judge made the following findings which are not challenged, and which are in the judgment at [2], [3], [8], [9], [10], [16] and [17].

[5] Immediately after the accident the plaintiff's left lower back started to hurt, her neck started to hurt a lot within a few days, and she had seven weeks off work. Since then:

- She has experienced problems with her shoulder, and has suffered continuous serious problems and pain. She has endured treatment from a range of medical practitioners and has had many sessions of physiotherapy. She has needed to take

anti-inflammatories and painkillers. She followed advice to swim and did prescribed exercises for a period of time.

- She is not able to play the piano and saxophone for very long. She has difficulty playing with her children. She cannot swim without pain in her shoulder. She can still do craft but only for short periods of time. Her relationship with her partner is affected because she is in pain.

- She does the least possible amount of driving. Her partner drives to social occasions; she is fearful of a similar accident. She considers 30 kilometres is physically about as much driving as she can stand, and she has a mild to moderate phobia related to driving which had resolved by the time she spoke to a Dr Reddan, in May 2002.

- She has suffered anxiety from time to time, sometimes severe, and she feels frustrated and irritable. These feelings result from her change of jobs and continuing pain.

[6] The learned judge also gave the following description of the evidence, in paragraph [7], about which description no complaint is made.

- The plaintiff has suffered considerable pain after the accident. She took Mersyndol and Endep. She continues to suffer pain in her shoulder every day; some days are worse than others. She has two different types of pain in her neck. She suffers headaches on average once per week. She takes one pack of Panadol per week and her partner gives her massages.

[7] The contents of that last paragraph were not expressed by the learned trial judge as findings, but it is likely that they were. They are a summary of evidence the plaintiff gave and on which the plaintiff was not challenged in cross-examination. They are therefore findings it was open to the learned judge to make, even if she did not expressly so declare.

General Damages

[8] The specific findings made by the learned judge and the evidence the judge described are capable of supporting the award of $35,000.00 of general damages for pain and suffering, although it is at the higher end of the scale on those findings. It is not one with which this court should interfere, on the principles expressed in *Elford v FAI General Insurance Co Limited* [1994] 1 Qd R 258 at 265. The appellant, who submits the award should have been no more than $25,000.00, did not argue that that award is all that would be justified by the findings described. Instead the appellant complains about the description the learned judge gave of the medical evidence given in the hearing, and contends that the judge made "findings" in respect of the opinions of two doctors, Dr Boys and Dr White, which are not supported by the evidence. It appears that the appellant's real argument is that the findings it says the medical evidence supports would justify an award of $25,000.00 as general damages, rather than $35,000.00.

[9] Apart from anything else, this approach by the appellant ignores the findings actually made. The learned judge made no findings about the medical evidence as such. The judgment recites that a Dr White diagnosed a muscular/ligamentous strain of rotator cusp, and a disability of 5-10% of the whole person; and the

appellant complains that by that description of the evidence the learned judge made a finding not supported by the evidence. In fact Dr White had provided a report dated 9 August 2001 in which (relevantly) he had written that: (at AR 258)

> "Of those with symptoms present two years post injury virtually all have permanent pain and loss of function (*I interpolate that I understand this to describe the plaintiff*).
>
> The latter prognosis is considered more likely in those displaying radiological abnormalities, as in Ms White's case. (Italics my observation).
>
> It is therefore too early in the course of her injury/convalescence to state the long-term prognosis with certainty and further reviews at up to two years post-injury, or upon stabilisation of symptoms, may be required.
>
> It should be noted, however, that those with significant symptoms six months post injury are, on the balance of probabilities, more likely than not to suffer a degree of permanent impairment as a consequence of this type of accident.
>
> This may be of the order of five to ten percent (5% - 10%) whole person."

[10] The cross-examination of Dr White did not change that opinion and there seems little merit in the complaint that the learned judge made a finding in respect of Dr White's opinion. No finding was made, although the description of his evidence is a little favourable to the plaintiff.

[11] The appellant also complains that the learned judge wrote that a Dr Boys, who had reported an assessment of 0-2% impairment of the upper extremity, had been prepared to agree in cross-examination that it might be an impairment of 5-8%. The appellant says Dr Boys was **not** prepared to make that concession, and that he specifically rejected the proposition. There is some more substance in that complaint, but Dr Boys did say in cross-examination (at AR 118) that on the subjective complaints of the plaintiff she was in the category assessed as a 5-8% impairment of the whole person.

[12] What makes these complaints about the description by the judge of the evidence of Dr White and Dr Boys seem both narrowly focussed and irrelevant is that not only were those descriptions not expressed as findings, but also there was medical evidence from a Dr Todman describing the plaintiff as having a 10% permanent disability of the whole person related to a cervical spine injury, and a 7.5% permanent disability of the whole person related to post traumatic headaches (at AR 288). The recitation of Dr Todman's evidence by the learned judge also did not describe that as a "finding" by the judge. Instead the judge, having described the medical evidence given in the trial (which included evidence, the description of which is not complained about, from both a Dr Reddan and a clinical psychologist Mr Johnston), then made the important and specific findings referred to earlier at [4] and [5] herein. There is simply no real point made by the complaints about how the judge described the evidence of Doctors Boys and White, or by the attack on general damages.

***Griffiths v Kerkemeyer* Damages**

[13] When assessing past *Griffiths v Kerkemeyer* damages the learned judge did not repeat her earlier findings, but obviously relied on those. The judge contented herself with a description of how the plaintiff had claimed $24,562.50 for past gratuitous care and the observation that the details of the date, names of the service providers, and the services provided were contained in exhibit 2. The judge then added:

> "The need for the services was not challenged in cross-examination".

[14] That statement by the learned judge was quite accurate. The schedule to which the judge referred is reproduced at AR 180-181, and it describes services being provided by a Mr Andre Farmer, (the respondent's de facto husband), and by other named persons. The services provided were described to include housework, cleaning, bathing children, driving children to school and activities, washing clothes, folding clothes, general weekly housework, shopping, vacuuming, sweeping, and washing up.

[15] These were described in the schedule as being performed for 55.5 hours in September 2000, 106 hours in October 2000, 95 hours in November 2000, 100 hours in December 2000, 81 hours in January 2001, 72 hours in February 2001, 73 hours in March 2001, 96 hours in April 2001 and May 2001, 108 hours in June 2001, 74 hours in July 2001, 75 hours in August 2001, 58 hours in September 2001, 52 hours in October 2001, 48 hours in November 2001 and each month thereafter until and including May 2002, and 40 hours per month from June 2002 until trial in October 2002.

[16] At AR 28 the plaintiff swore in her evidence in chief that that schedule outlined the assistance that had been given to her, principally by her de facto husband, and by others. Those others were her de facto husband's ex wife, her de facto husband's son, and her own daughter. At AR 29 she described those "things that are listed there" as things she was able to do before the accident, and in fact did (before the accident); and said her need for assistance had reduced over time and that as at "the current state of play":

> "Andre would probably provide about five hours a week".

[17] She also swore that "if I do them I'm in pain" in respect of the "extra around the house that Andre did," being apparently what he did in those five hours per week. She said, still apparently about that extra assistance, that:

> "I couldn't do both, I couldn't work and – and do the housework"

At the time of trial she was a Project Officer with the Brisbane City Council in a temporary 12 month position.

[18] There was no challenge made in cross-examination of the plaintiff to any of that evidence. She was not challenged on her description that exhibit 2 outlined assistance provided to her since the accident, nor on the nature of the assistance given, nor her description of being in pain if she attempted what Andre now did for her, nor that it took him about five hours per week. The only cross-examination of her concerned her evidence that an astonishingly large amount of money ($3,000.00) had been spent on buying a particularly expensive vacuum cleaner that could be operated with one hand. Her evidence in cross-examination was that she

had attempted to vacuum, perhaps three or four months after the accident, but it was just "too hard" and it hurt too much.

[19] Mr Farmer was called by the plaintiff and he described the services he performed. These included chopping up the pumpkins or potatoes needed for meals, lifting of heavier bags out of a shopping trolley and into the car, and (whenever she appeared in pain) the ironing. He also did the laundry and most of washing the dishes and "things". He does all the driving, most of the washing, and he hangs it outside. He does the bulk of both vacuuming and the mopping, and sweeps the floor.

[20] The only point made in his cross-examination was that prior to his living with the plaintiff he had lived with his ex wife, and during the course of that marriage had seen fit to carry out the heavier or slightly heavier tasks associated with shopping, gardening, and the like. He agreed it was in keeping with his character to assist to lift heavy objects on behalf of someone with whom he was in love, and that that was what he did for the plaintiff. Had she not been injured he would have done it anyway. There was no challenge made to his description of the actual assistance he did provide.

[21] The appellant said that the medical evidence called did not support the existence of any need for voluntary domestic services. It relies on opinions expressed by Doctors White, Boys, and a Dr John Cameron. Dr White had seen no need for voluntary assistance at the time of his examination, but acknowledged that "she did obviously complain that she had discomfort carrying out" housework, sweeping, mopping, and heavier aspects of her day to day existence (at AR 83). The doctor said of the plaintiff that "…she obviously was doing those things but experiencing discomfort when she was doing them". Dr Boys had written in his report that there was no physical condition evident which would preclude normal household duties or activities of daily living; and the appellant makes the point that Dr Boys was asked nothing about that in cross-examination. However, his report does describe the plaintiff saying that she did virtually no house work at home, because she has tried it on occasions and she finds it "too sore". The thrust of his statement was the opinion that no evident physical condition explained that.

[22] Dr Cameron had found no explanation as to why the plaintiff should have any ongoing complaints, by the stage of his examination in September 2001, and no clinical explanation for the discomfort of which she complained. He agreed in cross-examination that the discomfort to her neck and shoulder, and the episodic headaches of which she complained, did interfere significantly with her lifestyle and work (at AR 134).

[23] All of that evidence no doubt gave the appellant some encouragement during the trial. However, there was other medical evidence. Dr Todman expressed the opinion (in February 2001) that the plaintiff would require domestic assistance for the next three to six months, at a rate of 14 hours per week. He repeated that same opinion in July 2001. A further opinion expressed by that doctor in October 2002, while suffering from the deficiency of relying upon the assertion in a letter from the plaintiff's solicitors that the plaintiff continued to experience neck and shoulder pain, expressed the opinion that her symptoms remained substantial, and affected her in all aspects of her life. He thought the effects were likely to be ongoing and permanent.

[24] Dr Todman was called as a witness. He was not cross examined at all by the appellant about his earlier opinions on the plaintiff's need for assistance, nor his final report immediately pre trial, describing adverse affects upon her daily living and day to day activities. It follows that there was conflicting medical evidence on the plaintiff's need for assistance, and the appellant choose not to challenge in cross-examination either the plaintiff's own account, her de facto husband's account, or that of the doctor who supported her description of a need for assistance. There was accordingly evidence to support the finding made by the learned trial judge that the plaintiff had a past and future need for assistance in domestic matters.

[25] The appellant submits to this court that it is not usual practice in Queensland to test a plaintiff by cross-examination on an asserted need for domestic services. Instead, the appellant says:

> "The task rests with the Trial Judge to weigh all competing evidence (especially expert opinion) and determine a reasonable level of need for voluntary assistance".

The appellant suggests that to require detailed cross-examination of a plaintiff would considerably lengthen the trial process, and that the evidence it called and the proceedings themselves gave notice to the plaintiff and the court that her claimed need for assistance was challenged. Accordingly, cross-examination was unnecessary.

[26] There is no merit in that proposition. The task of a trial judge in an adversarial system is not simply that of weighing competing evidence about which there has been no cross-examination. Cross-examination is the essence of an adversarial system, identifying what is challenged and exposing the weakness or strength of that evidence. A judge cannot be expected to guess which unchallenged evidence from one party and her witnesses is actually accepted by the other party, and which is not. Trials should not be conducted with opposing cases presented in the abstract and without any interaction between them; and the appellant cannot now ask this court to disbelieve or reject the evidence accepted by the trial judge from the plaintiff, Mr Farmer, and Dr Todman. The challenge the appellant now wants to make by the medical evidence it relied on simply comes too late. The learned judge allowed future gratuitous care at the rate of four hours per week and the evidence the plaintiff led supported that figure.

[27] I would order that the appeal be dismissed, and that the appellant should pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.

[28] **MACKENZIE J:** I agree with Jerrard JA's reasons and with the orders proposed by him.