SUPREME COURT OF QUEENSLAND

CITATION:	***Huet v Irvine*** **[2003] QSC 387**
PARTIES:	**CARY GARTH HUET by his litigation guardian KIM MAREE TREE** (Applicant) v **ANTHONY PETER IRVINE trading as ANYWHERE ROOFING SERVICES** (Respondent)
FILE NO:	S262 of 2002
DIVISION:	Trial Division
DELIVERED ON:	13 November 2003
DELIVERED AT:	Rockhampton
HEARING DATE:	10 November 2003
JUDGE:	Dutney J
ORDERS:	1. **Application adjourned until Thursday 20th November 2003;** 2. **Any further material in relation to the application is to be filed by 9.30 am on Thursday 20th November 2003.**
CATCHWORDS:	SETTLEMENTS – SANCTION OF SETTLEMENT- where payment sought by former defacto and parents of injured person for gratuitous services provided to the injured person – requirement of proper evidence *Good v Thompson* [2001] QSC 287, cited *Grevett v McIntyre* [2002] QSC 106, discussed *Johnson v Peter McNeal Pty Ltd* (S391 of 2001 – Dutney J – Rockhampton – 11.12.02 – unreported), discussed *Jones v Moylan (No 2)* (2000) 23 WAR 65, cited *Kars v Kars* (1996) 187 CLR 354, followed
COUNSEL:	RJ Douglas SC for the Applicant/Plaintiff DVC McMeekin SC for the Respondent/Defendant

CD Press for Kim Maree Tree, Denyse Ann Huet and Gerald Paul Huet

SOLICITORS: Rees R & Sydney Jones for the Applicant/Plaintiff
Swanwick Murray Roche for the Respondent/Defendant

[1] This is an application to sanction a settlement for a plaintiff who suffered injury in a work related accident. The agreed settlement figure of $1,120,000, clear of the WorkCover refund, represents a little more than 50% of the damages estimated by senior counsel for the plaintiff.

[2] The agreement to reduce in the damages is based upon what appears in my opinion to be a reasonable assessment of the significant risk of failure in the action and of the likelihood that there would be a substantial reduction in the damages on account of contributory negligence even if the plaintiff was successful.

[3] Accepting, as I do, senior counsel's estimate of the quantum of the claim I have no difficulty in accepting that the figure ultimately agreed represents a fair compromise and with one reservation I am prepared to sanction the settlement in the form of the draft order supplied.

[4] My reservation relates to the application by Mr Press on behalf of the next friend of the plaintiff, his former partner, and the plaintiff's parents ("the claimants") to be paid a sum representing the value of the gratuitous services supplied by them to the plaintiff before the claim was compromised.

[5] Since these applications regularly arise and I have voiced my reservations about the orders sought on a number of occasions I consider it desirable to set out in some detail the approach I consider to be appropriate in such matters and the nature of the evidence required to support the application.

[6] The claimed value of the gratuitous services is $22,976 by the plaintiff's father, $137,856 by the plaintiff's mother and $71,762 by the plaintiff's former partner. The plaintiff lived with his former partner from his release

from hospital for about 49 days, until 4th December 1999 when a house was purchased for him and he commenced to live there with his parents. The former partner found it difficult coping with the plaintiff's demand for care while raising two very young children from their relationship and two other children from an earlier relationship. The former partner lives quite close to the plaintiff and still assists both with respite care for the parents and in fostering the continued relationship of the plaintiff with their children.

[7] I am not personally critical of the claimants. They are providing an essential service to the plaintiff for which he would otherwise be required to pay. Neither do I believe that the services that are provided were provided with a view to payment. I am satisfied that they were provided purely out of love and a sense of family obligation.

[8] The quantum of the claims is also not to be attributed to the claimants. Such claims are calculated by the plaintiff's lawyers with a view to maximising the damages that he might recover. Hence, the claims include things that the claimants would not ordinarily expect to be paid for. Examples in this case include the father mowing the grass at the house in which he resides, the mother cooking meals for herself and her husband as well as for the plaintiff and the former partner doing the same, as well as visiting the plaintiff in hospital. The fact that a significant number of hours are included in the claims for doing things that would have been done anyway even had the plaintiff not been injured, may affect the extent of the moral claim and is thus relevant to the issue I have to consider.

[9] The claimants have no legal entitlement to any payment out of the settlement sum for gratuitous services. Rather, they have a moral claim which, if it is made to the Court in a case where the plaintiff lacks capacity, must be weighed against other relevant considerations. The nature of the claimants' entitlement was finally settled by the judgement of the High Court in *Kars v*

Kars[1] where at 372 in the joint judgement of Toohey, McHugh, Gummow and Kirby JJ the following passage appears:

> "It is an accepted principle in Australia that the damages for past and future gratuitous services constitute a sum designed to provide for the injured plaintiff's established needs. That sum may be calculated by reference to what the provider does and even what the commercial costs of doing it would entail. But the focus is upon the plaintiff's needs. The plaintiff might, or might not, reimburse the provider. According to the repeated authority of this Court, contractual or other legal liability apart, whether the plaintiff actually reimburses the provider is entirely a matter between the injured party and the provider."

[10] There is ample authority for this Court to perform what in principle ought to be the role of the plaintiff's personal representative and make a gratuitous reimbursement out of the damages to the provider of the relevant services.[2] In *Grevett* however, Byrne J made it clear that the awarding of such a payment was no mere formality. It was a payment that should be ordered only on proper evidence. Examples of the type of evidence that might be required were given in paragraph [6] of His Honour's judgement and included details of the nature and extent of the services, evidence of the fair value of those services and an assessment of the risk, if any, that the proposed payments may unacceptably diminish the capital sum required to meet the plaintiff's future needs.

[11] The evidence of any of those matters in this case is sadly deficient. The details provided in the affidavits are of the most general nature. The description does not enable any clear picture to be gained of what in fact is done by the claimants and how often. There is no sworn evidence on which the value of the services provided can be assessed. No attempt has been made to explain what effect the payments to the claimants might have on the capacity of the capital sum to fund future care.

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[1] (1996) 187 CLR 354

[2] *Jones v Moylan (No 2)* (2000) 23 WAR 65 (Full Court); *Good v Thompson* [2001] QSC 287 (per Ambrose J) and *Grevett v McIntyre* [2002] QSC 106 (per Byrne J)

[12] No evidence was placed before me as to the future care needs of the plaintiff or the cost of providing for such needs. From reading counsel's opinion I can conclude that he is of the view that the cost of future care alone will exceed the net amount awarded by way of damages. While Mr Douglas SC is an expert in his field and highly regarded, his opinion is not evidence.

[13] There are many factors which might bear upon whether a payment should be made in this case and the quantum of it. The fact that the claimants are continuing to provide care for an indefinite time into the future, if applicable, is plainly relevant. If future care is to be gratuitously provided it will reduce the demands on the capital of the fund and make it more likely that the plaintiff's needs can be met even if payment is made to the claimants. How the plaintiff's needs will be met in a case where the capital sum is inadequate is of great importance. The period of time before which the plaintiff again becomes eligible for welfare benefits might be a relevant consideration. As well, in this case there would seem to me to be a stronger than usual moral obligation to the former partner if she now has the responsibility of caring for their children without support from the plaintiff. The effect on the plaintiff's parents of caring for the plaintiff might be such that without some benefit such as a holiday which they can only afford with a lump sum payment they will be unable to continue to provide gratuitous care. Such a factor could, in an appropriate case, provide a sufficient benefit to the plaintiff to outweigh the disadvantage of thereby reducing the capital of the fund. These are examples of things which, singly or in combination, might justify the payment of the value of the past care to a claimant even if the fund is *prima facie* inadequate. They can be relied upon, however, only if they are supported by sworn evidence.

[14] There are any number of other considerations that might be relevant in an appropriate case even if, *prima facie*, the fund available is less than the amount apparently needed for the future.[3] If such matters are not put before me I cannot consider them.

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[3] see for example *Johnson v Peter McNeal Pty Ltd* (S391 of 2001 – Dutney J – Rockhampton – 11.12.02 – unreported) where the critical facts were that the plaintiff was not expected to survive his

[15] Because I do not want to exclude the claimants from making a claim to which they are morally, even if not legally, entitled and which the plaintiff's counsel has not opposed, I will adjourn the matter until Thursday 20th November 2003. If the claimants want to place further material before me in relation to their claims they should do so by 9:30 am on that day. At that time I will consider any further material or submissions. If it is not intended to present any further evidence or make any further submissions I will not require an appearance provided that my associate is notified by 9:00 am on that morning. I do not require an appearance by the defendant. If there is no appearance by any party, I will make an order in terms of the draft supplied by the plaintiff save that paragraphs 3.5, 3.6 and 3.7 will be deleted.

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parents who were seeking the payment, were financially sound and who would bear the burden of his support when the fund was exhausted in any event.