SUPREME COURT OF QUEENSLAND

CITATION:	*Kriz v King & Anor* [2006] QCA 351
PARTIES:	**DANIELLE ANNE KRIZ** (plaintiff/respondent) **v** **MARY KING** (first defendant) **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (second defendant/appellant)
FILE NO/S:	Appeal No 540 of 2006 DC No 1553 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2006
JUDGES:	McMurdo P, Jerrard JA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	DAMAGES - MEASURE OF DAMAGES - PERSONAL INJURIES - GENERAL PRINCIPLES - where respondent was injured in a motor vehicle accident and was awarded damages at trial - where appellant insurance company contends that primary judge erred in not assessing those damages relating to past and future gratuitous services in accordance with principles recently stated in *CSR Ltd v Eddy* and with the construction of s 59 *Civil Liability Act* 2003 (Qld) - whether judge did so err *Civil Liability Act* 2003 (Qld), s 59 *Bropho v Western Australia* (1990) 171 CLR 1, applied *Carroll v Coomber & Anor* [2006] QDC 146; DC No 2931 of 2005, 31 May 2006, approved *Coco v The Queen* (1994) 179 CLR 427, applied *CSR Ltd v Eddy* [2005] HCA 64; (2005) 80 ALJR 59, applied *Grice v State of Qld* [2005] QCA 272; [2006] 1 Qd R 222, 5 August 2005, considered

Griffiths v Kerkemeyer (1977) 139 CLR 161, applied
Potter v Minahan (1908) 7 CLR 277, applied
Roads and Traffic Authority v McGregor & Anor [2005] NSWCA 388; No 40277 of 2004, 11 November 2005, distinguished
Sturch v Willmott [1997] 2 Qd R 310, disapproved
Sullivan v Gordon (1999) 47 NSWLR 319, disapproved

COUNSEL: K N Wilson SC for the appellant
R J Lynch for the respondent

SOLICITORS: Jensen McConaghy for the appellant
David Colwell & Company for the respondent

[1] **McMURDO P:** The respondent, Ms Kriz, was injured in a motor vehicle accident on 30 May 2003. She brought an action against the first defendant, Ms King, who was insured by the second defendant/appellant. Liability was not in issue at the trial which concerned only the assessment of damages. The primary judge ultimately gave judgment for the respondent in the sum of $76,311.40.[1] The appellant appeals from that part of the damages award relating to past and future gratuitous services contending that the judge erred in not assessing those damages according to the principles recently stated in *CSR Ltd v Eddy*[2] and in the construction of s 59 *Civil Liability Act* 2003 (Qld) ("the Act").

The judge's finding on the gratuitous care award

[2] The judge accepted Ms Kriz's evidence as to her need for past and future assistance occasioned by the accident. His Honour made the following findings of fact. She needed assistance and this had been provided to her as she outlined in her evidence. Her principal help was from her parents, her parents-in-law and her then estranged husband. For the first three months she needed help for about two hours per day. For the next three month period she estimated she received one hour of help per day. Since then until trial she estimated that she needed two to four hours per week and she perceived that need as continuing. The agreed rate of assistance was $15 per hour. His Honour considered that the requirements of s 59 of the Act were met. Taking what he considered reflected a conservative approach to the evidence of this loss, the judge assessed the need for past gratuitous care as follows: for the first three months from the accident 10 hours per week for 13 weeks at $15 ($1,950); for the following three months six[3] hours per week for 13 weeks at $15 ($1,170); from then until judgment two hours per week for 108 weeks at $15 ($3,240), totalling $6,360. The judge allowed interest on the past care component of $430.

[3] His Honour also accepted that the respondent had an ongoing need for care occasioned by the accident and noted that the respondent contended for an amount of $24,000 calculated on the discounted cost of the need of two hours care per week

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1 The judge initially assessed damages at $76,116.40, which included at [89] of his reasons a past gratuitous care award for the second three month period following the accident of five hours per week for 13 weeks at $15 per hour. His Honour later amended that paragraph of his reasons and the subsequent amounts of damages which flowed because "five" was a typographical error which was meant to be "six" so that the assessment for this period was $1,170 instead of $975 and the total damages awarded was $76,311.40 instead of $76,116.40.

2 [2005] HCA 64; (2005) 80 ALJR 59.

3 See fn 1.

for 35 years. The judge considered that in the future she would find work more suited to her physical problems so that her need for gratuitous care will reduce. It was "impossible to pretend to arithmetic accuracy" in assessing these damages and "a broad brush approach" was called for. His Honour assessed damages for future care at $12,000.

Should the respondent's gratuitous care award be reduced because of *CSR v Eddy*?

[4] It is common ground that since the High Court's decision in *CSR v Eddy*, overturning *Sturch v Willmott*[4] and *Sullivan v Gordon*,[5] a claimant who is prevented through personal injury from providing gratuitous services to another person cannot recover damages for the commercial value of those services;[6] the loss of the amenity to provide those services is compensable by way of an award of general damages;[7] if the services are paid for they are compensable as a financial loss by way of special damages.[8]

[5] The appellant contends that the evidence was that many of the gratuitous services supplied to the respondent were not for her own needs but to help her care for her young daughter and baby son; consistent with *CSR v Eddy*, these services were not compensable by an award of damages. The answer to that contention requires a full review of the brief relevant evidence at trial which came solely from the respondent.

[6] The respondent's evidence was as follows. By the time of trial she was the mother of two young dependent children. Her parents lived about five minutes away and her parents-in-law about 20 minutes away. Immediately following the accident she had one child, a two year old daughter. Her parents and parents-in-law would cook dinner and look after her daughter for her. Her estranged husband visited after work every day, took care of their daughter and did a lot of things for the respondent. Her counsel asked her during the first three month period after the accident to "estimate how much assistance [she was] receiving from [her] husband, [her] parents-in-law and [her] parents in that three-month period after the accident". She responded "... at least a couple of hours a day". She explained that during that period she was having physiotherapy; she had her husband drive her as much as possible because turning her neck was difficult. She was asked whether after the initial three month period she required assistance. She responded affirmatively. She was asked "to estimate how much assistance [she] required". She estimated about one hour each day. She was then asked whether since that first six month period she continued to require assistance around the house. She again responded affirmatively. She was asked what were the main things with which she needed assistance and which aggravated her symptoms. She responded: "Definitely cleaning the floors ... Shopping. Washing, carrying the washing out". She was asked to estimate the average number of hours per week that she "required assistance with respect to those things". She estimated these at probably two to four hours a week. She explained that some weeks were better than others depending on whether her back had been aggravated at work. She and her husband resumed their relationship and she became pregnant with a little boy born in April 2004.

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4 [1997] 2 Qd R 310.

5 (1999) 47 NSWLR 319.

6 See fn 2, Gleeson CJ, Gummow and Heydon JJ, [35] - [54], [68]; McHugh J, [113]; Callinan J, [122].

7 Above, Gleeson CJ, Gummow and Heydon JJ, [71]; McHugh J, [114] - [116]; Callinan J, [122].

8 Above, [31], [122].

[7] Her mother assisted her in caring for her child (mainly at night) before the accident, occasionally helped her with cooking but did not help her with washing or housework like cleaning the floors or the bath. When she returned to work after the accident she needed help with housework and around the house because her back was sore and she could not do anything.

[8] The High Court's decision in *CSR v Eddy* was delivered on 21 October 2005, about 10 days before this trial. The respondent was not asked to differentiate between the assistance that she personally required around the house and the assistance she required in taking care of her daughter and later her son. The trial does not seem to have been conducted on the basis of the law as stated in *CSR v Eddy* but on the basis of what was wrongly previously presumed to be the law in Queensland as stated in *Sturch v Willmott*,[9] which would have provided the respondent with an entitlement to damages for gratuitous care to assist her in caring for her daughter and later her son if her accident-related injuries prevented her from doing this. In questioning the respondent, her counsel at trial did not differentiate between the assistance given to her personally and any assistance given to her daughter, and later her son, which she would have provided before the accident and which she could no longer provide because of her accident-related injuries. Her counsel did not pursue whether any inability to provide that motherly care to her two year old daughter, and later her baby son, caused her emotional pain and suffering relevant to her general damages award. Nor were those matters canvassed in any detail in cross-examination.

[9] In those circumstances it is difficult and undesirable for this Court to now attempt to carry out an exercise which would involve findings of fact not sought at trial based on evidence where those issues were not specifically explored. What can be said is that the respondent's evidence was sufficient to support the judge's findings, consistent with the legal principles stated in *CSR v Eddy*. The judge found that the respondent (not the daughter or the son) needed the gratuitously provided assistance. Even though his Honour accepted the respondent's evidence, which included that she received some assistance in caring for her daughter after the accident, he made no specific finding that she needed more help in caring for her daughter, and later her son, than before the accident. It can be inferred that the husband and grandparents would wish to spend time with the respondent's little girl and later her baby boy regardless of the respondent's accident-related injuries and their effect on her; the respondent's evidence was that at least her mother assisted with caring for her little girl before the accident. The respondent's evidence did not emphasize the assistance provided by her husband and the grandparents in caring for the little girl after the accident but did emphasize the assistance they gave her with housework, shopping and driving her to physiotherapy. Her evidence and the judge's express findings do not suggest that his Honour necessarily considered that assisting the respondent to care for her daughter and later her son was a significant, or indeed any, part of the award he reached for damages for gratuitous services, an award which was in any case more modest than her evidence justified if fully accepted. By moderating the award as he did, his Honour's assessment of damages for past and future gratuitous care was well open on the complainant's evidence of her own needs, consistent with the principles in *CSR v Eddy*. The appellant's first contention is not made out.

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9 See fn 4.

Section 59 of the Act

(a) The respondent's alternative contention: the effect of s 59(3)

[10] That conclusion makes it strictly unnecessary to decide the respondent's alternative submission that *CSR v Eddy* has no application because of s 59(3) of the Act, although I will express my own views on that submission before dealing with the appellant's next contention.

[11] Section 59 is contained in the Act's **Chapter 3 Assessment of damages for personal injury**, **Part 3 Assessment of damages**. It has not previously been construed at appellate level. It relevantly provides:

> "**59 Damages for gratuitous services**
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> (1) Damages for gratuitous services are not to be awarded unless -
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> (a) the services are necessary; and
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> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
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> (c) the services are provided, or are to be provided -
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> (i) for at least 6 hours per week; and
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> (ii) for at least 6 months.
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> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
>
> (3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.
>
> ... "

[12] The term "gratuitous services" is not defined in the Act; it can be taken to have its meaning at common law: see *Griffiths v Kerkemeyer*.[10] Section 59(3) was introduced prior to the High Court's decision in *CSR v Eddy*. Insofar as that subsection refers to "[d]amages ... for gratuitous services replacing services provided by an injured person ... for others outside the injured person's household", it merely reflects what the legislature at the time of enacting the subsection must have (wrongly) understood to be the common law in Queensland as to a claimant's entitlement to damages for gratuitous services: cf *Sturch v Willmott*. As Gleeson CJ, Gummow and Heydon JJ noted in *CSR v Eddy*, s 59(3) does not preclude courts from deciding that the common law was in fact something different to that stated or assumed in s 59(3). Section 59(3) purported to limit what at the time of its enactment the legislature wrongly understood the common law in Queensland to be; it does not give claimants an entitlement that they did not have at common law. A claimant's common law entitlement is not what was thought to be the case prior to the enactment of s 59(3) as stated in *Sturch v Willmott* and *Sullivan v Gordon*; it is and has always been as now stated by the High Court in *CSR v Eddy*. Section 59 does not provide a statutory entitlement to damages for gratuitous services separate to the common law but rather modifies and restricts the common law entitlement to them. The respondent's contention, that s 59(3) provides, independently of the common law, an entitlement to damages for gratuitous services replacing services provided by the claimant to those in the claimant's household, is wrong.

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10 (1977) 139 CLR 161.

(b) The effect of s 59(1)(c)

[13] The appellant's second contention is that the judge was not entitled under s 59 of the Act to award damages for those gratuitous services which were not provided or were not to be provided for at least six hours per week; s 59(1)(c) of the Act requires that such damages can only be awarded if the services are required at all times for both six hours per week and for at least six months. As the future gratuitous services were assessed on the basis that less than six hours per week of assistance would be required, the respondent was not entitled to a damages award for future gratuitous care.

[14] The respondent's answer to that contention is that s 59(1)(c) is a mere threshold provision requiring that damages for gratuitous services will not be awarded unless the services have been provided or are to be provided both for a minimum of six hours per week and for at least six months; once that threshold is met, damages for gratuitous services can be awarded for subsequent services provided for lesser periods, as here.

[15] There is some support for the respondent's position. The experienced senior counsel who appeared for the appellant at trial submitted to the primary judge that that was the effect of s 59(1)(c), an interpretation accepted by defence counsel and the trial judge but now eschewed by the appellant. It was also the view subsequently reached by his Honour Judge McGill in *Carroll v Coomber & Anor*.[11]

[16] This Court's consideration of s 54(2) *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA") in *Grice v State of Queensland*[12] is of no assistance in construing the differently worded s 59(1)(c) of the Act, which on any view is more restrictive than s 54(2): see *Grice*.[13] New South Wales cases such as *Roads and Traffic Authority v McGregor & Anor*[14] to which the appellant has referred us are also of no assistance in interpreting s 59 of the Act, which is also in quite different terms to the New South Wales legislation considered in that case: see *Grice*.[15]

[17] The ordinary meaning of the words in s 59(1)(c) lends itself to either of the interpretations urged upon this Court. There are sound arguments for both competing contentions. It is common ground that the Second Reading Speech of the Act and the Explanatory Notes to s 59 provide no assistance in resolving the ambiguity. It seems clear enough that the legislature intended in enacting Ch 3 of the Act which contains s 59 to place statutory limits on the common law entitlement to damages, including in s 59 damages for gratuitous services, so that these are not awarded in the less significant cases. That legislative intent is however equally consistent with the appellant's and the respondent's competing interpretations of s 59(1)(c).

[18] Because s 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously: *Potter v Minahan*;[16]

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11 [2006] QDC 146; DC No 2931 of 2005, 31 May 2006, [63] - [67].
12 [2005] QCA 272; [2006] 1 Qd R 222.
13 Above, [24] and [43].
14 [2005] NSWCA 388, No 40277 of 2004, 11 November 2005; (2005) 44 MVR 261.
15 See fn 12, [23] and [42].
16 (1908) 7 CLR 277, O'Connor J, 304.

Bropho v Western Australia;[17] *Coco v The Queen*[18] and *Grice*.[19] For that reason s 59(1)(c) should be interpreted in the way which least diminishes a claimant's common law rights to damages for gratuitous services. Giving the words their ordinary meaning and applying that important principle of construction, it is my view that s 59(1)(c) of the Act has the effect that damages for gratuitous services are not to be awarded unless the services have been provided or are to be provided for both six hours per week and for at least six months; once that threshold is met then damages for gratuitous services can be awarded even if the services thereafter are provided or are to be provided for less than six hours per week. This approach is consistent with that taken by McGill DCJ in *Carroll v Coomber & Anor* and with the submissions of senior counsel for the appellant at trial. The judge was required under the common law and consistent with s 59 of the Act to make the assessment of damages for future gratuitous services on the evidence accepted by him.

[19] It follows that the appellant's second contention also fails. The appeal should be dismissed with costs.

[20] **JERRARD JA:** I respectfully agree with the reasons for judgment of the President, and the order proposed by Her Honour.

[21] **HELMAN J:** I agree with the order proposed by the President and with her reasons.

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17 (1990) 171 CLR 1, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 18.

18 (1994) 179 CLR 427, Mason CJ, Brennan, Gaudron and McHugh JJ, 437.

19 See fn 12, [25].