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## Insurance Law E-alert

### Change to Gratuitous Care Assessment

#### Case

In *Harrison –v– Melhem* [2008] NSWCA67 (29 May 2008), the NSW Court of Appeal changed the law in respect of assessing damages of attendant care services/gratuitous services in personal injury claims. The decision has affected the interpretation of section 128(3) of the *Motor Accidents Compensation Act* and section 15(3) of the *Civil Liability Act*. Plaintiff's are now only required to satisfy either of the two threshold tests to be entitled to gratuitous services. Mason P, in the majority, at paragraph 181 decided:

*“ On this basis, I construe section 15(3) (which is the equivalent to section 128(3) of the Motor Accidents Compensation Act) as a preclusion from the award of Griffiths –v– Kerkemeyer damages unless the plaintiff can overcome one of the two thresholds by showing **either** that the gratuitous services are provided for a long period (ie more than 6 months) or that the services are provided for a significant period of time (ie more than 6 hours per week)...if either threshold is met, then the plaintiff can recover for the whole of the gratuitous services provided, or to be provided, subject to compliance with other sub-sections of section 15.”*

The Court of Appeal has now interpreted section 128(3)(a) and (b) and section 15(3) disjunctively.

#### The Change and Opinion

We do not know whether the Court of Appeal decision will be appealed to the High Court. With this in mind, plaintiffs are now entitled to gratuitous services as long as they satisfy one of the two abovementioned thresholds. For example, if a plaintiff was to show a need for gratuitous services for say 10 hours per week for a period of less than 6 months, then that plaintiff would be entitled to those gratuitous services, and any services claimed thereafter. In the alternative, if a plaintiff was able to show that he or she required gratuitous services for say 4 hours per week over a continuous 6 months period, then that plaintiff would be entitled to gratuitous services and any services claimed thereafter.

Prior to this decision, plaintiffs had to overcome both thresholds to be entitled to claim gratuitous care and assistance. This now means that plaintiffs are now required to overcome a drastically lesser threshold. Defendant legal practitioners and insurers will now have to increase their estimates, at least until an appeal is heard that overturns the decision, or until there is parliamentary intervention.

For further information please contact

Michael Inger, Lawyer +61 2 9391 3184 [minger@hunthunt.com.au](mailto:minger@hunthunt.com.au)

Renee Bianchi, Lawyer +61 2 9391 3228 [rbianchi@hunthunt.com.au](mailto:rbianchi@hunthunt.com.au)

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