

# Queensland sanctions for personal injuries claims on behalf of a person under a legal disability

Catherine Phillips, Shine Roche McGowan, Toowoomba

Before any compromise or settlement of a personal injuries action involving someone under a legal disability can be valid, the approval or sanction by a Court or the Public Trustee must be obtained.

The phrase “under a legal disability” is defined under the Public Trustee Act as:

- 1) Not of full age;
- 2) Not of full mental capacity;
- 3) A patient of whose estate the public is a committee or manager pursuant to the provisions of the Mental Health Act;
- 4) A protected person;
- 5) A person whose estate the Public Trustee is authorised to manage pursuant to Division 4 of the *Public Trustee's Act* or pursuant to the *Intellectually Disabled Citizens' Act* of 1985.

In personal injuries litigation, most people encountered by lawyers fall into the first two categories although, in some instances, a Protection Order may also be made at the time the matter is sanctioned, or, indeed, prior to the matter being sanctioned.

Whether someone is “not of full age” is a fairly easy objective test. The question of not having full mental capacity on the other hand, is a question for the Court to determine on the evidence put before it, including independent medical evidence and the evidence of the plaintiff and/or his or her relatives.

## Section 59, Public Trustee Act

This section concerns itself wholly and solely with the proceeds of a personal injuries action and no other part of any estate in which a plaintiff may have interest.

## Sanction of a settlement where an action has been commenced

Where an action has been commenced, the sanction may be made by either the Court in which the action has been brought, or by the Public Trustee. One should note however that pursuant to the Act, no money can be paid to anybody other than the

Public Trustee without the direction of the Court.

The matter to be sanctioned can be brought before a Court at any stage in the action. This can be done by an Application to a Judge in Chambers or at the actual trial date of the action.

The means of bringing an Application when an action has been commenced is fairly straightforward and is done by way of Summons with supporting Affidavit material.

## Sanction prior to action being commenced

In these circumstances, the Public Trustee may sanction the settlement, however, again, no money can be paid to any person but the Public Trustee without the direction of the Court made upon application, presumably by the plaintiff, his next friend, or the plaintiff's solicitor.

It is vital to remember that such payments other than to the Public Trustee must be specifically directed and it may be necessary to bring the matter before a Judge in order to achieve this. It is important to pay careful attention to the wording of the draft Order and supporting Affidavit material. It appears from the wording of the Act that moneys for damages such as special damages, *Griffiths v Kerkemeyer* damages, and payment of solicitors fees cannot be made without the Judge's express directive.

Section 59(4)(A) does give the Public Trustee specific power to reimburse any expenses reasonably incurred by or on behalf of the person under the disability. This authority works in addition to the Court's ability to direct money and damages to be paid to someone other than the Public Trustee.

There are no specific mechanisms to bring a matter before a Judge prior to commencing proceedings set out in Section 59 of the *Public Trustee Act*. In this regard, it may be useful to refer to Section 74 of the *Public Trustee Act* which deals with an Application for a Protection Order. Sec-

tion 74(1) says that an Application for a Protection Order may be made by Originating Summons. This can be done in the Supreme Court.

## Material to be put before the Court

The rationale behind requiring protection for a person under a legal disability is that such a person does not have full legal capacity and they are unable legally to waive their rights and thereby compromise their legal action. Master Lee QC as he then was in *Fowler v Gray* [1982] QR334 at 349 discusses the Court's protective responsibilities. He notes that,

*“The Court is, in reality, a persona designata, vested with responsibility of protecting the interests of a person under a legal disability. If the compromise is sanctioned, agreement entered into between the parties has legal effect insofar as that person is concerned, and binds him. The Court is not determining a las inter partes. It does not try the issues in dispute nor does it arrive at a decision as at a trial. It is only concerned whether, in all the circumstances of a particular case as presented, the settlement is reasonable and for the benefit of the person under the disability. If that opinion is formed, the compromise takes effect as in any other case between persons of full legal capacity.”*

The material to be put before the Court was discussed in some detail by W B Campbell J in the matter of *Madden v Hough* [1969] QWN7.

The most important document to be prepared is the Affidavit of the plaintiff's solicitor because this document sets out the information upon which a sanction can be given or refused. The plaintiff's legal representative who prepares this document must be in a position to give a considered opinion that the settlement is beneficial to their client. In order for the Court to take this opinion into account, the person preparing the Affidavit must be someone who has experience in the kind of matter which is the subject of litigation and, according to

Blackburn J in *Karvelas v Chikirou* [1976] 26FLR 381, the person must be fully aware of their professional responsibilities.

In the matter of *Fowler v Gray*, Master Lee as he then was considered that Affidavit material prepared by a law clerk was insufficient.

### The Affidavit

The Affidavit by the plaintiff's solicitor must disclose the following information:

- 1) That informed consent by the next friend or guardian has been obtained;
- 2) A detailed history of the injuries suffered and the effects of the injury, including past and future effects;
- 3) The question of liability must be discussed. This is to enable the Judge to ascertain whether or not the settlement sum offered is appropriate, given the risks associated with running the action to completion;
- 4) Full details of the proposed settlement must appear on the Affidavit. It is important to show that all relevant heads of damage have been considered;
- 5) Details should be obtained from the Public Trustee as to their costs of administering the estate and a copy of the letter detailing same must be exhibited to the Affidavit. This can be difficult to calculate where the Public Trustee's administration period is for an indeterminate period of time;
- 6) The Affidavit must also exhibit a copy of Counsel's opinion, particularly where the claim is for a large sum of money. Where the sum involved is not particularly large, the opinion of the plaintiff's solicitor will probably suffice. In order that the plaintiff not be prejudiced by having this privileged document exhibited to an Affidavit which is placed on the Court file, it is appropriate to obtain an Order from the Judge that either the entire Affidavit or the portion containing Counsel's opinion be placed in a sealed envelope and marked "*Not to be opened without Order of a Judge*";
- 7) Relevant medical reports must be exhibited to the Affidavit;
- 8) It may also be of assistance to the Court to exhibit photographs of the plaintiff showing injuries, or showing the plaintiff during treatment. Judges may require the plaintiff to

be present in Court during the sanction so that they are able to observe the plaintiff and, in appropriate cases, speak to the plaintiff;

- 9) The Affidavit should contain specific details of all special damages. Documentation verifying these amounts should be exhibited to the Affidavit. Where documents are not available, a paragraph detailing the source of the information on "information and belief of the solicitor" should be inserted;
- 10) The Court has the power to award that *Griffiths v Kerkemeyer* damages be paid directly to the next friend or guardian or the individual providing the services. This money is not held on trust for the plaintiff. It is vital that it is shown in the Affidavit material that the amount of the *Griffiths v Kerkemeyer* claim is allowed for and recovered in the action as part of the plaintiff's damages. As a precaution, the Affidavit should also state that on the information provided to the solicitor, they believe that all the gratuitous services provided were in fact rendered;
- 11) After specifically detailing the amounts of sums to be paid to any person or entity other than the Public Trustee, the Affidavit should ask the Court to order that the total amount of special damages, *Griffiths v Kerkemeyer* damages, etc. together with the taxed solicitor and own client costs including the costs of the sanction fees payable to the Public Trustee be deducted from the settlement moneys. If there are any areas of particular expenditure in the future which are known, such information should be provided in the Affidavit. For example, a specially designed house for the plaintiff may need to be built.

### Orders

The second important document to be prepared by the solicitors before attending at the sanction hearing is a draft Order. Examples of the Orders required are as follows:

- 1) It must be ordered that the settlement of the claim be sanctioned in a specific amount including a specific amount for the administration fees payable to the Public Trustee together with the costs of the sanction;
- 2) Further, it must be ordered that the defendant pay the plaintiff's costs of and incidental to the action to be taxed on

the appropriate scale and that the amount of the costs be paid directly to the solicitors for the plaintiff. The receipt of such funds will be sufficient discharge to the defendant;

- 3) It must be ordered that the plaintiff's costs be taxed as between party and party and as between solicitor and own client on the appropriate scale;
- 4) A further Order is required that the settlement moneys relating to the plaintiff together with the Public Trustee administration fee be paid by the defendant in the appropriate specified manner;
- 5) Although the Act gives the Public Trustee the authority to reimburse people who pay out money on the plaintiff's behalf, an Order should be made that the plaintiff's next friend or guardian be reimbursed from the settlement moneys for any expenses they incur on the plaintiff's behalf in the future on presentation to the Public Trustee of a receipt for the expenses;
- 6) There should be an Order that the Public Trustee be appointed manager of and take possession of and manage the residue of the plaintiff's settlement moneys pursuant to the *Public Trustee Act*. If the plaintiff is an infant the trust money remaining will go to the plaintiff on reaching the age of 18 and the date of the plaintiff's 18th birthday should be mentioned in the Order;
- 7) The plaintiff and the Public Trustee should have liberty to apply to the Court on matters dealing with the administration of the trust fund;
- 8) There should be an Order that the solicitor's Affidavit be placed in a sealed envelope and marked "*Not to be opened without Order of a Judge*".

The omission of any of the Orders outlined above, may lead to complications for the plaintiff in obtaining their settlement moneys.

If the Court refuses to sanction your client's action, there is no need for concern that the information contained in the Affidavit which may be prejudicial to your client at hearing will be disclosed to the defendant. There is no need to serve a copy of the Affidavit on the defendant and the Court's copy is sealed.

*APLA member Catherine Phillips is an associate with Shine Roche McGowan in Toowoomba, Queensland.*