

# Cerebral palsy claim – advance payment

***Dylan Wallace (by his Litigation Guardian Helen Wallace)  
v State of Queensland (2011) unreported***

By Vicki Holmes

In *Wallace v State of Queensland*, the Supreme Court of Queensland sanctioned an order for the payment of an advance sum by way of partial compromise of the proceeding, pursuant to s59(1) of the *Public Trustee Act 1978* (QLD).

## FACTS

The plaintiff, Dylan Wallace, brought a claim against the state of Queensland via his mother and litigation guardian, Helen Wallace, arising out of events that took place at the time of his birth at Stanthorpe Hospital on 16 September 2004. The plaintiff suffers from spastic quadriplegic cerebral palsy.

The parties were not able to negotiate settlement in the pre-court phase under the *Personal Injuries Proceedings Act 2002* (QLD), and a claim and statement of claim were filed at the Supreme Court of Queensland on 8 August 2011.

Briefly, the allegations of negligence relate to a failure to provide Helen Wallace with appropriate care during her labour with Dylan, resulting in Dylan suffering cerebral palsy. While admitting liability, the defence raised other issues in relation to quantum and, most importantly, life expectancy.

It should be noted that there is no provision within the *Uniform Civil Procedure Rules 1999* (QLD)<sup>1</sup> for advance payments. As a result, it was necessary to reach agreement between the parties for payment of this voluntary advance sum, and thereafter seek sanction of the court under s59 of the *Public Trustee Act 1978*.

Fortunately, the defendant in this case was willing to voluntarily offer an advance payment, pending final determination of the claim and payment of any final settlement sum.

The plaintiff, being a child suffering from severe cerebral palsy, obviously required the funds to be placed in trust, and for the advance payment to be sanctioned by the Supreme Court.

On behalf of the plaintiff, an application was filed at the Supreme Court of Queensland on 10 October 2011, along with supportive affidavit evidence from the solicitor

conducting the case, the plaintiff's litigation guardian, Helen Wallace, and the representative of the proposed trustees, in accordance with the usual provisions for seeking sanction under s59 of the *Public Trustee Act 1978*.

The application sought sanction of a partial compromise of the proceeding. The plaintiff was represented by Mr Gerard Mullins of Counsel.

On 4 November 2011, his Honour Justice P McMurdo made the following order:

- '1. The partial compromise of this proceeding on the following terms be sanctioned pursuant to s59(1) of the *Public Trustee Act 1978*:
  - (a) That the defendant pay the plaintiff towards his damages the sum of \$X ("the partial compromise sum");
  - (b) That the plaintiff agrees to set off the partial compromise sum against any award of damages or subsequent settlement of the plaintiff's claim for damages;
  - (c) That the defendant pay the plaintiff his costs of this application to be assessed on the standard basis ("the standard costs").
2. X Limited ("the trustee") be appointed to receive, hold and manage the partial compromise sum on trust for the plaintiff until any appointment pursuant to the *Guardianship and Administration Act 2000* [QLD] of an administrator for the plaintiff to receive and manage the partial compromise sum and any accretions takes effect.
3. The trustee be empowered to invest the partial compromise sum and any accretions in such investments as trustees are empowered to invest under the *Trusts Act 1973* [QLD].
4. The trustee apply such monies for the maintenance, benefit and support of the plaintiff.
5. Within seven (7) days of this order, the plaintiff's solicitors serve a copy of it on the trustee.
6. Within twenty-one (21) days of this order, the defendant pay the partial compromise sum to the trustee whose receipt shall be a sufficient discharge for the defendant.
7. The defendant pay the standard costs referred to in >>

paragraph 1(c) above to the trustee within twenty-one (21) days of their assessment or prior agreement between the defendant and the trustee as to their amount.

8. The plaintiff's costs of and incidental to this application be assessed on the indemnity basis ("the indemnity costs").
9. The trustee pay the indemnity costs to the plaintiff's solicitors from the monies received under paragraph 6 of this order within twenty-one (21) days of their assessment or prior agreement between the plaintiff's solicitors and the trustee as to their amount.
10. The registrar of the court provide a copy of this order and copies of the affidavits read on this application to the principal registrar of the Queensland Civil and Administrative Tribunal forthwith.
11. The registrar of the court place the opinion of counsel read on this application in a sealed envelope marked "Not to be opened within an order of the court".
12. Each of the parties, the trustee and the plaintiff's solicitors, have liberty to apply in respect of these orders.'

### CONCLUSION

In other jurisdictions, provision is made for payment of interim/advance payments. In the writer's opinion, interim

payments are undoubtedly of enormous benefit to a plaintiff, particularly when remaining issues of quantum or life expectancy will delay final resolution of any claim.

In the writer's experience, interim payment can be of significant assistance to a plaintiff and their family, providing funds to assist with the provision of care, equipment and/or other therapy needs.

Although there is no direct provision within the *Uniform Civil Procedure Rules 1999*, the order made by Justice McMurdo in this case indicates that the court will be prepared to sanction a 'partial compromise of a proceeding' should it be possible for the parties to negotiate and agree on the payment of an advance sum. In this case the plaintiff was fortunate that the defendant was agreeable to making this voluntary advance payment. Defendants should be asked to agree to advance payments in appropriate cases, given the overwhelming benefits of such payments to plaintiffs. ■

**Note:** 1 *Supreme Court of Queensland Act 1991 - Uniform Civil Procedural Rules 1999.*

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# Failure to mark hazards costs \$1.4 million

***Williams v Twynam Agricultural Group Pty Ltd & Anor [2011]***  
**NSWSC 1098 (16 September 2011)**

By Paul Byrne

**T**he plaintiff, Mr Rodney Williams, was seriously injured in a motor vehicle accident that occurred while he was working on a property owned and operated by Twynam Agricultural Group (TAG). At the time of the accident, Mr Williams was employed by Inland Watering (IW), the company contracted by TAG to provide irrigation services on its property. The accident occurred when Mr Williams was driving along one of the property's internal roads. The topography of the road meant that the approach to the junction where the accident occurred was obscured, as the junction was lower than the approaching section of

road on which Mr Williams was travelling. An additional hazard was a deviation in the road immediately before the junction, where there was a concrete drop box. Mr Williams collided with the drop box, and sustained serious neck injuries when his vehicle overturned.

It was accepted in evidence that the junction was a hazard but was not marked as such by any warning signs or other hazard-markers. It was also accepted that speed limits on the property were regularly exceeded and that the requirement to wear seat belts was routinely ignored, as the nature of the work involved getting in and out of vehicles frequently.