

# SUPREME COURT OF QUEENSLAND

CITATION: *National Injury Insurance Scheme Queensland v Ater* [2020] QSC 198

PARTIES: **NATIONAL INJURY INSURANCE SCHEME, QUEENSLAND**  
(Applicant)  
v  
**ABDEL RAHMAN ATER**  
(Respondent)

FILE NO/S: BS No 5504 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 26 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 3 June 2020

JUDGE: Brown J

ORDER: **1. The Preservation Notice issued by the participant be sanctioned.**

**2. That after the compulsory conference pursuant to s 51A of the *Motor Vehicles Accident Act* and prior to issuing any proceedings to recover damages which includes damages for treatment, care and support, the Respondent's litigation guardian file and serve an affidavit confirming that she:**

**a) has received legal advice as to the prospects of obtaining such an award of damages (without disclosing the nature of that advice) and as to the exposure of the Respondent to legal costs if the Agency is not liable to meet such a claim; and**

**b) is satisfied that it is in the Respondent's best interests to proceed with the claim.**

**3. That the parties have liberty to apply within fourteen days in respect of paragraph 2 of this order.**

#### 4. Costs are reserved.

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – PERSONS UNDER LEGAL INCAPACITY (OTHER THAN CHILDREN): JURISDICTION AND POWERS – where respondent lifetime member of National Injury Insurance Scheme Queensland – where respondent has litigation guardian – where respondent pursues common law damages claim – where applicant seeks sanction of preservation notice – whether sanction of preservation notice in best interests of respondent

*Civil Liability Act 2003 (Qld), s 52A, s 52B, s 52C*

*Guardianship and Administration Act 2000 (Qld), s 11*

*National Injury Insurance Scheme (Queensland) Act 2016 (Qld), s 41, s 42, s 43, s 44*

*Motor Accident Insurance Act 1994 (Qld), s 61A*

*Keryn Mayer as litigation guardian for Ben David McKinlay v Mahoney* [2011] QSC 279, considered

COUNSEL: G Diehm QC for the Applicant  
R Boal for the Respondent

SOLICITORS: MinterEllison for the Applicant  
Littles Lawyers for the Respondent

- [1] In 2016, the Queensland Parliament passed the *National Injury Insurance Scheme (Qld) Act 2016* (the **Act**). In doing so Queensland became part of a National Injury Insurance Scheme which is a companion Scheme to the National Disability Insurance Scheme. One of the purposes of the Act is to ensure that certain people who suffer particular serious personal injuries as a result of a motor vehicle accident in Queensland receive necessary and reasonable treatment, care and support, regardless of fault.<sup>1</sup> According to the Second Reading Speech “In Queensland, the National Injury Insurance Scheme, the NIISQ, incorporates a no-fault model and retains common law rights to recover costs of treatment, care and support for those who are not at fault for their injuries.”
- [2] Participants accepted into the Scheme, who are made lifetime participants, will continue to receive their treatment, care and support services co-ordinated through the National Insurance Agency Queensland (the **Agency**), which is a body established to administer the Scheme, unless they opt out of the Scheme. If a participant wishes to preserve their right to be awarded common law damages for treatment, care and support under a final judgement of a Court or a binding

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<sup>1</sup> *National Injury Insurance Scheme (Qld) Bill 2016*, Explanatory Notes at 1.

settlement, the Act provides for them to give a preservation notice. That notice does not oblige them to take any final assessed damages for treatment, care and support, but gives the person concerned the right to elect to do so or remain in the Scheme. A preservation notice given by a person who has a legal disability is not effective until it has been sanctioned by the Court. The Act provides for that application to be made by the Agency rather than by or on behalf of the person with the legal disability.

- [3] Under the Act, the Agency is obliged to meet any claim for treatment care and support damages (save in certain circumstances) with the compulsory third party meeting payment for all other heads of damage.
- [4] In the present case a preservation notice has been issued on behalf of Mr Ater. The Agency has applied to this Court for a sanction of the notice. The question to be determined is whether such sanction should be given.

### **Background**

- [5] Mr Ater was hit on the head by a truck mirror when he was a pedestrian. He is said to have fallen backwards and hit his head on the pavement. As a result of the accident, he has suffered catastrophic injuries. According to the most recent medical reports, as a result of his brain injury Mr Ater is deaf and blind, is said to be cognitively totally non-responsive and non-communicative and lacking any mental capacity to freely or voluntarily make decisions about any legal claim or to communicate his decisions.
- [6] On 28 March 2017, Mr Ater was accepted as an interim participant in the National Injury Insurance Scheme, Queensland (the **Scheme**).
- [7] In July 2017, Ms Shawar was appointed as administrator for Mr Ater for all financial matters pursuant to an order of QCAT. Ms Shawar has the power to make decisions with respect to relevant legal matters that may have been made by Mr Ater himself.
- [8] Since 27 July 2017, Mr Ater has been funded by the Applicant to reside at the Redlands Residential Care Facility. His current support plan provided by the Applicant records that future plans should include exploring additional care and support with a view to allowing him to leave the residential care facility for short periods. The Act provides for the family to be consulted in relation to a participant's care. Otherwise, his complex needs are said not to have changed markedly since his acceptance into the Scheme.
- [9] On 1 November 2018, Mr Ater was accepted as a lifetime participant in the Scheme.
- [10] On 15 November 2018, the Applicant was served with a preservation notice under s 41 of the Act, stating that Mr Ater wanted to preserve any right to be awarded treatment care and support damages. A claim for damages is being pursued on behalf of Mr Ater with Suncorp Insurance being the respondent insurer under the *Motor Accident Insurance Act 1994 (Qld)* (the **MAIA**).

- [11] According to the Agency, it is anticipated that contributory negligence may be a material issue in the claim.

### **Overview of Statutory Scheme**

- [12] Mr Ater's entitlement to recover "treatment, care and support damages" under his common law claim is regulated by s 52A, s 52B and s 52C of the *Civil Liability Act 2003 (Qld)* (the *CLA*). In particular, s 52B provides that a Court cannot award damages in relation to the person's treatment, care and support needs that arose while the person is or was a participant in the Scheme. That section, however, applies subject to s 52C.

- [13] Section 52C of the *CLA* provides:

- (1) This section applies to a claim for person injury damages against an insurer under the *Motor Accident Insurance Act 1994* if—
  - (a) the personal injury resulted from a motor accident; and
  - (b) the person suffering from the personal injury is a lifetime participant in the insurance scheme in relation to a serious personal injury resulting from the motor accident; and
  - (c) a Court decides—
    - (i) the person is not guilty of contributory negligence in relation to the claim; or
    - (ii) the person is guilty of contributory negligence in relation to the claim and the damages that the person would be entitled to in the absence of contributory negligence, by less than 50%; and
  - (d) the insurance Agency is liable, under the National Injury Act, section 42, to contribute towards the insurer's liability on the claim for treatment, care and support damages.
- (2) The Court may award treatment, care and support damages.
- (3) However, if the Court awards, treatment care and support damages, the Court must not, in assessing the amount of the treatment, care and support damages, take into account any contributory negligence of the person.

- [14] Section 61A of the *MAIA* requires the Agency to be made a participant in the compulsory conference and a defendant to a plaintiff's claim once litigated. The Agency is liable to pay treatment, care and support damages if the plaintiff is successful on liability and contributory negligence is assessed at less than 50

percent. Notwithstanding an admission by the CTP insurer under s 41 of the *MAIA*, absent an admission by the Agency, those issues remain at large.

- [15] Section 41(1) of the Act provides for a participant to give a notice to the Agency, stating whether or not the participant wishes to preserve any right the participant may have to be awarded treatment, care and support damages. A notice given under s 41(1) of the Act, which seeks to preserve such a right, is a preservation notice.
- [16] According to the learned authors of the annotated *CLA*, the plain intent of s 41 of the Act is to afford maximal opportunity to a Scheme participant who can prove substantial fault in a motor vehicle claim, to recover, in full measure, lump sum damages in lieu of periodic (that is, long tail) benefits under the Scheme.<sup>2</sup>
- [17] If the Agency considers the participant is a person under a legal disability section 41(5) of the Act obliges the Agency to apply to the Court for an order sanctioning a preservation notice, if it considers a person is under a legal disability. Section 41(7) provides that the Court must decide whether or not to sanction the notice; may order that the participant or person acting for the participant give a new notice under s 41(1); and may make any other order it considers appropriate. Section 41(8) provides that if a participant is an adult, the Court may exercise all the powers of QCAT under the *Guardianship and Administration Act 2000* (Qld), Chapter 3 (the *GAA*).
- [18] Section 42 of the Act provides that if a participant gives a preservation notice, the Agency is liable to contribute towards the insurer's liability, if any, on the claim for treatment, care and support damages, unless:<sup>3</sup>
- (a) a Court decides, or the parties to the claim agree by way of settlement, that—
    - (i) that the participant is guilty of contributory negligence in relation to the claim; and
    - (ii) the damages that the participant would otherwise be entitled to in the absence of contributory negligence are to be reduced, because of the contributory negligence, by 50% or more; or
  - (b) a Court decides, under section 41(7), not to sanction the preservation notice; or
  - (c) a Court makes an order, under section 43, preventing the participant from being awarded treatment, care and support damages; or
  - (d) for a participant other than a participant whose preservation notice has been sanctioned by a Court—the participant, by

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<sup>2</sup> *Annotated Civil Liability Legislation Queensland* (LexisNexis, 4 ed, 2016) at 52C.7.

<sup>3</sup> *National Injury Insurance Scheme (Qld) Act* (the **Act**) at s 42(2).

notice to the Agency and the insurer, withdraws the preservation notice.

- [19] Under s 43 of the Act, the Agency may apply to the Court for an order preventing the participant from being awarded treatment, care and support damages under a final judgment of a Court or a binding settlement. While s 43 permits the Agency to make an application in relation to any participant, Section 43(4) provides that in deciding whether to make the order, the Court:
- (a) Must consider the participant’s ability to manage an award of treatment, care and support damages in a way that will not compromise the participants:
    - (i) Prospects of improvement and rehabilitation; or
    - (ii) Future health and wellbeing.
  - (b) Must consider whether the participant is a person under a legal disability; and
  - (c) May consider any other matter the Court considers relevant.
- [20] Pursuant to s 43(5) of the Act, if the Court makes the order sought by the Agency, the participant may not give a preservation notice, or if the preservation notice has been given, it is taken not to have been given.

- [21] The Agency in the present case does not apply to the Court for an order under s 43 of the Act.

### **Consideration**

- [22] A sanction only needs to be sought by the Agency of a preservation notice where a person is under a legal disability. The requirement of sanction of a preservation notice appears to be unique to Queensland.
- [23] The term “person under a legal disability” used in s 41 and s 43 of the Act is defined to mean a person with impaired capacity for a matter within the meaning of the *GAA*.<sup>4</sup> The Agency contends that in the context of the Act, a participant suffering a legal disability must mean a person who does not have the ability to make the relevant decision required in issuing the notice, namely whether to pursue damages or preserve their right to pursue common law damages that include “treatment, care and support damages” or to continue to have those needs met by the statutory scheme.
- [24] Impaired capacity for a person under the *GAA* is defined to mean “the person does not have capacity for the matter”.<sup>5</sup> Relevant to s 41(5) of the Act, the relevant matter is a financial matter, namely the ability to make a decision as to whether to

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<sup>4</sup> The Act, sch 1.

<sup>5</sup> *Guardianship and Administration Act 2000* (Qld), sch 4.

issue and act upon a preservation notice. I consider that the submission of the Agency is correct and that the participant who is a person under a legal disability refers to the person who does not have the capacity to make the decision required to issue the preservation notice, namely to stay within the scheme or preserve the right to pursue common law damages particularly damages for treatment, care and support.

- [25] Given that a person under a legal disability is an adult with impaired capacity, the principles in schedule 1 of the *GAA*<sup>6</sup> are relevant in considering what is in Mr Ater's interests. None of those matters have specific application to the present case but I have had appropriate regard to those matters. In the present case, it is plain that Mr Ater is under a legal disability and does not have capacity for a financial matter. He is cognitively non-responsive and unable to make or communicate any decisions in relation to a legal matter including whether to preserve his common law right of damages for treatment, care and support and is under a disability. As stated above, Ms Shawar, has been appointed under the *GAA* as guardian for Mr Ater in respect of all financial matters.
- [26] Section 41(8) of the Act empowers the court to appoint a guardian under Chapter 3, which is supported by the reference to the court exercising the power as if acting under s 245(2) of the *GAA* such that s 245(3)-(6) of the *GAA* apply to the exercise of the power.
- [27] In the present case, given QCAT has made an appointment of a guardian, namely Ms Shawar, it is unnecessary for the Court to consider whether to exercise the powers in Chapter 3 of the *GAA*.
- [28] No particular matters are identified in s 41(7) of the Act as guiding the exercise of the Court's discretion in determining whether to sanction the preservation notice. I note that a review of the explanatory memorandum for the *National Injury Insurance Scheme (Qld) Bill 2016* gives no guidance as to what is intended by s 41 of the Act. Nor does the second reading speech address the particular provision.
- [29] Provisions providing for a sanction regarding a person with a legal disability such as s 41(5) of the Act and s 59 of the *Public Trustee Act 1978* (Qld) must be considered against a background of the Court's *parens patriae* jurisdiction which evolved from the direct responsibility of the Crown for those who cannot look after themselves.<sup>7</sup>
- [30] In determining whether the Court approves a compromise under s 59 of the *Public Trustee Act* the Court considers whether, in all of the circumstances, acceptance of the offer is for the benefit of the person under a disability.<sup>8</sup> Similarly, I consider that in determining whether or not to sanction a preservation notice under s 41(7) of the Act, the Court must determine whether it is in the best interest of the participant under a legal disability to preserve the participant's right to be awarded treatment

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<sup>6</sup> *Guardianship and Administration Act 2000* (Qld), s 11.

<sup>7</sup> *Keryn Mayer as litigation guardian for Ben David McKinlay v Mahoney* [2011] QSC 279

<sup>8</sup> *Keryn Mayer as litigation guardian for Ben David McKinlay v Mahoney* [2011] QSC 279.

care and support damages in circumstances where they would otherwise receive treatment, care and support as provided for under the Act. Given the Court is also provided with the powers under Chapter 3 of the *GAA*, the Court must consider whether the participant needs the benefit of a guardian or administrator in the making of decisions to pursue such actions.

- [31] Somewhat curiously, the Act provides for the Agency to seek the sanction of the Court in relation to the preservation notice, not the participant who gave the notice. I say curiously because the Agency is not in a position to provide the Court with any advice of the prospects of the success of any action for common law damages and particularly treatment, care and support damages. The Agency is potentially the relevant party which will be liable to meet any claim for common law damages for treatment, care and support. That suggests that it is not necessarily envisaged that as part of this application, any evidence would be put before the Court as to its prospects, unless the participant or the participant's representative considers it necessary to address any matter raised by the Agency in relation to the strength of the action for common law damages for treatment, care and support. In this respect the section differs from the situation where a sanction of a settlement is applied for under s 59 of the *Public Trustee Act* or where a trustee seeks judicial advice under s 96 of the *Trusts Act*, as to what is in the best interests of the trust, albeit for the protection of the trustee.<sup>9</sup> In that respect, however, the sanction is to preserve a right to damages only and is not a case where proceedings necessarily will be issued to claim such damages.
- [32] The fact that the Act provides for the Agency not the participant to make the application would appear to be due to, at least in part, the fact that the Court may have to also give consideration to whether the participant is able to prosecute such a claim because of his legal disability. That is supported by the fact that the Court is provided with the powers under Chapter 3 of the *GAA* to appoint a guardian or administrator under s 41(8) of the Act.
- [33] Given the assessment procedure carried out by an Agency under the Act,<sup>10</sup> the Agency will have assessed the person's treatment, care and support needs and will be in a position to place before the Court evidence of the participant's medical condition and the extent of those needs and the matters which impair the participant's capacity. The Agency will be in a position to make submissions as to whether the participant needs a guardian or administrator appointed in respect of the conduct of the proceedings such that the Court should be making an appointment under Chapter 3 of the *GAA*.
- [34] While the Agency quite properly has raised the fact that contributory negligence is a potential issue, which if it exceeds 50 percent may expose Mr Ater to costs. Mr Ater rejects the suggestion that contributory negligence is a significant issue. There is no suggestion that a claim for common law damages by Mr Ater is misconceived or without proper basis.

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<sup>9</sup> *Macedonian Church v Eminence Petar* (2008) 237 CLR 66.

<sup>10</sup> The Act, s 25.

- [35] The Agency contends that in Mr Ater's circumstances, including because of his lack of insight, potentially limiting general damages, his treatment, care and support damages may be close to the entirety of the damages to which he is entitled. Therefore, he may put his interests at risk due to his exposure to costs by pursuing a common law claim, and where the damages may prove to be of little benefit.<sup>11</sup> Mr Ater's potential damages for economic loss would also appear to be limited because he had retired on medical grounds before the accident.
- [36] People with capacity who serve a preservation notice without having to seek the sanction of the Court, have the right to await the assessment of any damages and make an election under s 44 of the Act whether or not they accept those damages. The Agency contends that while there is something to be said for the view that Mr Ater's decision maker should have the same opportunity, that consideration cannot be decisive alone because otherwise the requirement of the application would be redundant. The Agency contends that the most relevant consideration is whether there is a real potential benefit in Mr Ater leaving the Scheme as to make it worthwhile for the claim to be pursued on his behalf, bearing in mind the cost implications of doing so. It contends that Mr Ater should provide to the Court evidence as to how it is proposed that Mr Ater's treatment, care and support needs would be met if he leaves the scheme with an award of damages and why that would advance his interests.
- [37] There is merit in the Agency's contention. However the preservation notice is only to preserve the right to be awarded damages for treatment, care and support. Proceedings are yet to be issued, albeit Mr Ater's legal advisors anticipate they will soon be in a position to engage in a compulsory conference.
- [38] No evidence has been provided by the litigation guardian supporting the fact that it is in the interests of the participant to preserve his right to common law damages for treatment, care and support, notwithstanding that he is a lifetime participant under the Scheme and his needs have been assessed as being met and are the subject of ongoing review. In causing the preservation notice to issue, one would however also expect that Ms Shawar, consistent with her obligations as Mr Ater's financial administrator under the *GAA*, would have considered whether it is in Mr Ater's best interests to seek to preserve his common law right to damages for treatment, care and support. She has legal advisors in that regard.
- [39] Given the nature of the Act and the fact that it does not impose upon the participant the obligation to obtain the sanction of the Court, the contention of the Agency that Mr Ater should provide a proposal as to how his treatment, care and support would be managed in the event that he was to accept damages for the same and opt out of the Scheme prior to the Court sanctioning the notice, would not necessarily be required. However, what is required must be judged on the particular circumstances of the participant for whom the notice is to be sanctioned. In the present case where there is no suggestion that pursuing damages is without a proper basis I do not consider Mr Ater needs to provide evidence of such a proposal. However, one

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<sup>11</sup> Through the litigation guardian's entitlement to seek an indemnity from the estate in respect of such costs.

would anticipate going forward the guardian will be advised of and give proper consideration to whether any anticipated damages that may be awarded for his treatment care and support will meet Mr Ater's needs in the way and with the certainty presently offered under the scheme.

- [40] Mr Ater's solicitors contend that the Court should sanction the notice given:
- (a) Ms Shawar has been appointed to act as litigation guardian for Mr Ater in the proceeding;
  - (b) The issue of contributory negligence has little relevance to the question of whether the Court should sanction the notice;
  - (c) Mr Ater will lose the right to accept treatment, care and support damages under a final judgement of a Court or binding settlement and would be obliged to remain a lifetime participant in the Scheme.<sup>12</sup> That will remove his opportunity, through his litigation guardian, to make a choice;
  - (d) It is premature to require Mr Ater to provide the Court with a detailed proposal in relation to how his treatment, care and support would be managed given the compulsory conference under Part 4, Division 5A of the *MAIA* has not yet been convened and Mr Ater's potential award of damages has not yet been realised;
  - (e) The Agency's assessment of the "necessary and reasonable" treatment, care and support needs provided under the Scheme may differ from Mr Ater's assessment through his representatives which may result in lengthy reviews having to be undertaken by Mr Ater's representative to change the Agency's assessment. Whereas Mr Ater can be afforded certainty and control if he has the option of accepting damages under s 44 of the Act; and
  - (f) The Agency may still apply under s 43 of the Act if it considers a Court would find that it was not in the participant's best interests to accept treatment, care and support damages.
- [41] There is some basis for concern about Mr Ater's potential exposure to costs in pursuing common law damages for treatment, care and support. However, at this stage prior to any issuing of proceedings that is the subject of speculation. While Mr Ater's physical and mental state also raises whether pursuing common law damages may ultimately prove to be of little benefit to him given any treatment care and support to be provided will not be significantly different from that being provided under the scheme given his level of brain injury, a lump sum damages award may offer the possibility of treatment, care and support beyond what is provided under the scheme. Realistically that cannot be assessed at the stage a preservation notice is issued.
- [42] In determining whether or not to sanction the notice, the Court must be conscious of the fact that it would deprive Mr Ater of the opportunity provided by s 44 of the Act, to determine whether or not to accept any assessment of the award of damages

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<sup>12</sup> However, the binding settlement would have to be sanctioned by the Court.

which is a right of all participants. The Court is also conscious that there is an additional safeguard if it becomes apparent to the Agency that it is not in the interests of the participant to pursue the damages for treatment, care and support, if proceedings are in fact issued on behalf of Mr Ater seeking such damages. In that respect, an application may be made by the Agency to the Court under s 43 of the Act at any time prior to the election being made by the participant to accept damages under s 44 of the Act.

- [43] On balance I consider it is in his best interests to sanction the preservation notice because:
- (a) He has the benefit of a litigation guardian who is obliged to make decisions in his best interests;
  - (b) There is no suggestion that he does not have a right to pursue common law damages and will not have a genuine choice between remaining a permanent participant in the Scheme or accepting damages for treatment, care and support;
  - (c) His potential exposure to costs is a matter of speculation; and
  - (d) Like all participants, he should have the opportunity to preserve his right to common law damages, which may give him greater options for his treatment, care and support not presently offered by the Scheme.
- [44] Given the concerns I have addressed above, I will order that Mr Ater, through his litigation guardian, file an affidavit prior to issuing any proceedings for damages which includes a claim for treatment, care and support confirming that she has received legal advice as to the prospects of obtaining such an award of damages and as to the exposure of Mr Ater to legal costs if the Agency is not liable to meet such a claim. It should also verify that she is satisfied that it is in Mr Ater's best interests to proceed with the claim.
- [45] I will provide liberty to apply within seven days of the Court's order in respect of the above order.

### **Orders**

- [46] The Court orders that:
1. The Preservation Notice issued by the participant be sanctioned.
  2. That after the compulsory conference pursuant to s 51A of the *Motor Vehicles Accident Act* and prior to issuing any proceedings to recover damages for treatment, care and support the Respondent's litigation guardian file and serve an affidavit on the Agency, prior to issuing any proceedings for damages which includes a claim for treatment, care and support confirming that she:
    - a. has received legal advice as to the prospects of obtaining such an award of damages (without disclosing the nature of that advice) and as to the exposure of the Respondent to legal costs if the Agency is not liable to meet such a claim; and

- b. is satisfied that it is in the Respondent's best interests to proceed with the claim.
3. That the parties have liberty to apply within fourteen days in respect of paragraph 2 of this order.
4. Costs are reserved.