

SUPREME COURT OF QUEENSLAND

CITATION: *Grevett v McIntyre & Anor* [2002] QSC 106

PARTIES: **LANCE GREVETT**
(plaintiff)
SCOTT JAMES McINTYRE
(first defendant)
SUNCORP METWAY INSURANCE LIMITED
(formerly SUNCORP GENERAL INSURANCE) (ACN
075 695 966)
(second defendant)

FILE NO: S2830 of 1999

DIVISION: Trial Division

ORIGINATING COURT: Supreme Court

DELIVERED ON: 22 April 2002

DELIVERED AT: Brisbane

HEARING DATE: 3 December 2001

JUDGE: Byrne J

ORDER:

CATCHWORDS: NEGLIGENCE – PERSONAL INJURIES – MOTOR VEHICLE ACCIDENT - plaintiff student suffered a severe head injury resulting in organic brain damage, bone fractures, abdominal injuries, and multiple abrasions, bruising, lacerations and contusions - orders sought to approve and to facilitate a compromise of the litigation

PRACTICE - *Griffiths v Kerkemeyer* – where father acting as litigation guardian - whether moneys proposed should be paid for past gratuitous care to the parents of the plaintiff - Public Advocate and Public Trustee invited to make submissions with respect to the diversion of part of the compensation to the litigation guardian and his wife.

INCOME TAX – ASSESSABLE INCOME – whether compensation for past services in hands of parents be subject to income tax.

Guardianship and Administration Act 2000 (Qld) s12, s210, s245.
Income Tax Assessment Act 1936 (Cth) s26(e).
Public Trustee Act 1978 (Qld) s59.
Uniform Civil Procedure Rules (Qld) r94(1)(b), r98(2)(b).

Brown v Commissioner of Taxation [2002] FCA 318 considered
Commissioner of Taxation v Holmes (1995) 58 FCR 151 considered
Goode v Thompson [2001] QSC 287 considered
Jones v Moylan (No 2) (2000) 23 WAR 65 considered
Public Trustee v Thompson (2000) 155 FLR 18 considered
Russo v Zucco, Cairns, 18 of 1985, 7 March 1991 considered
Smith v FCT (1987) 164 CLR 513 considered
Stephenson v Geiss [1998] 1 Qd R 542 considered
Re B [2000] NSWSC 44 considered
Re DJR and the Mental Health Act, 1958 [1983] 1 NSWLR 557 considered
Re Public Trustee of Queensland [2000] 1 Qd R 409 considered

COUNSEL: M H Grant-Taylor, with him P D de Plater for the plaintiff
 J P Kimmins for the first and second defendants

SOLICITORS: Butler, McDermott & Egan for the plaintiff
 Eardley Motteram for the first and second defendants

- [1] In March 1996, the plaintiff, then aged 16, was seriously injured in a motor vehicle accident, suffering a severe head injury resulting in organic brain damage, bone fractures, abdominal injuries, and multiple abrasions, bruising, lacerations and contusions. In 1999, he instituted proceedings claiming damages in respect of his injuries. In June 2000, his father consented to act as litigation guardian, executing the form required by the Rules,¹ thereby declaring that he had “no interest in the proceeding adverse to that of” the plaintiff.
- [2] Orders are now sought to approve and to facilitate a compromise of the litigation for \$3,750,000 plus costs to be assessed on the standard basis.
- [3] Acceptance of that sum appears to be in the plaintiff’s interests. And, with one exception, the ancillary orders and directions proposed – such as that the Public Trustee be appointed as the administrator for the plaintiff’s financial matters² and to manage what remains of the settlement sum after payments are made to creditors in satisfaction of statutory charges for hospital care and other benefits – involve uncontroversial, suitable arrangements for distribution of the settlement sum. However, questions arise with respect to moneys proposed to be paid to the plaintiff’s mother and father: as described in the proposed order, \$566,250 “representing the value of past gratuitous services rendered to the plaintiff, and interest thereon ...”; and \$25,000 representing “out of pocket expenses and special damages met on the plaintiff’s behalf to date and interest thereon ...”.

¹ UCPR 94(1)(b) and Form 13.

² See s 12, 245 *Guardianship and Administration Act* 2000.

- [4] As the amount to be paid to the plaintiff's parents is considerable, and because one of those who would benefit in that way had provided the statement *UCPR 98(2)(b)* requires that, as litigation guardian, he had given instructions to compromise the litigation on the terms proposed, the Public Advocate and the Public Trustee were invited to make submissions with respect to the diversion of that sizable part of the compensation to the litigation guardian and his wife.³ Those submissions, and the submissions for the plaintiff, have been of assistance.⁴
- [5] A body of authority supports the notion that orders may be made authorizing the payment of money from agreed or awarded compensation for personal injury rewarding those who have gratuitously provided care to a plaintiff under a legal disability. In Queensland, some such directions have been founded on s 59 of the *Public Trustee Act 1978*.⁵ Others, elsewhere,⁶ have involved the exercise of a Supreme Court's powers under the general law to make orders for the benefit of someone lacking legal capacity.
- [6] An exercise of the jurisdiction to divert money to the plaintiff's parents is, however, not appropriate, for two reasons. First, there is the conflict of duty and interest inherent in the litigation guardian's propounding a compromise that would accord him substantial rewards.⁷ More importantly,⁸ the kind of information needed to establish an adequate foundation for the payments is lacking. The statement of loss and damage is relied upon. Yet it is unsworn. Besides that, there is only counsel's opinion commending the compromise. It does contain information and expressions of opinion on the amount which, had the case proceeded to trial, might have been awarded for past gratuitous care; it also indicates that a compromise for the proposed settlement sum is in the plaintiff's interests. But it cannot sustain payments to the care-givers, for not only is the information it contains unsworn but also the opinion does not, for example, (i) detail the nature and extent of the

³ The questions raised were:

- a. whether it is correct in principle for the compromise of a personal injuries damages claim to be sanctioned on terms which divert part of the compensation to a person who has no legal entitlement to it;
- b. if so, whether it is correct in principle, where the care-giver is not a professional, to calculate the sum so to be paid by reference to the commercial cost that would have been incurred had the services not been provided by the care-giver gratuitously;
- c. whether it is appropriate that a care-giver who, as with Mr Grevett's father, stands to benefit financially by such an order become (or remain) a litigation guardian;
- d. if the answer to c. is in the negative, whether in this case the Adult Guardian, the Public Trustee, or some other person ought now to be appointed as the litigation guardian;
- e. whether if some amount may, in principle, be paid away to the plaintiff's parents, there is in this case evidence sufficient to support the orders sought in para 4 of the draft order.

⁴ There being no opposition, leave is granted to the Public Advocate pursuant to s 210 of the *Guardianship and Administration Act 2000* to intervene in the proceedings.

⁵ *Russo v Zucco*, Cairns, 18 of 1985, 7 March 1991, Dowsett J; *Stephenson v Geiss* [1998] 1 Qd R 542, 560; *Re Public Trustee of Queensland* [2000] 1 Qd R 409, 434-435; *Goode v Thompson* [2001] QSC 287, [152].

⁶ *Re DJR and the Mental Health Act, 1958* [1983] 1 NSWLR 557, 564-565; *Jones v Moylan (No 2)* (2000) 23 WAR 65, 69, 79; *Re B* [2000] NSWSC 44, [11]; *Public Trustee v Thompson* (2000) 155 FLR 18.

⁷ Cf *Jones v Moylan (No 2)* at 75.

⁸ As a different litigation guardian could now be appointed.

services actually provided; (ii) establish the fair value of those services;⁹ (iii) attempt to assess the risk, if any, that the proposed payments may diminish unacceptably the capital sum required to be invested to meet the plaintiff's future needs;¹⁰ or (iv) prove the out-of-pocket expenses. Nor was attention given to the prospect that, in the hands of the parents, their compensation for past services might be assessable to income tax¹¹ or whether such an eventuality should matter.

- [7] In these circumstances, the settlement sum should be paid to the Public Trustee. In his capacity as administrator, he can then decide, on reliable and sufficient information and on a consideration of relevant factors, what ought to be paid for past services and out-of-pocket expenses.

⁹ Among other things, the cost that would have been incurred had the services been provided commercially is not proved; and there is no evidence of the extent to which, if at all, remunerative opportunities were foregone by the parents.

¹⁰ Cf *Jones v Moylan* (No 2) at 90.

¹¹ See s26(e) *Income Tax Assessment Act 1936*; cf *Smith v FCT* (1987) 164 CLR 513, 519, 523, 533; *Commissioner of Taxation v Holmes* (1995) 58 FCR 151, 154-5; *Brown v Commissioner of Taxation* [2002] FCA 318, [27], [47].