SUPREME COURT OF QUEENSLAND

CITATION:	*Lance Alder (as litigation guardian for Trent Alder) v Khoo & Anor* [2013] QSC 312
PARTIES:	**LANCE ALDER as litigation guardian for TRENT ASHLEY ALDER** (plaintiff) **v** **PAUL KHOO** (first defendant) **and** **STATE OF QUEENSLAND** (second defendant)
FILE NO:	BS13325 of 2008
DIVISION:	Trial Division
PROCEEDING:	Civil trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 November 2013; supplementary reasons delivered on 8 November 2013
DELIVERED AT:	Rockhampton; supplementary reasons delivered at Brisbane
HEARING DATE:	4, 5 and 6 November 2013 and 8 November 2013
JUDGE:	Daubney J
ORDER:	**1. The plaintiff's claim against the first and second defendants is dismissed;** **2. The plaintiff's litigation guardian pay the first and second defendants' costs of and incidental to the proceeding including reserved costs to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAY OF PROCEEDINGS – DISMISSAL – where the plaintiff was born almost 25 years ago – where the plaintiff suffers significant handicaps and disabilities – where the litigation guardian for the plaintiff alleged that the plaintiff's disabilities were caused by the negligence of the first defendant, who was the treating obstetrician – where the plaintiff was not in a position to lead evidence to prove basic factual allegations upon which the plaintiff's claim was

founded – where the plaintiff's claim is barred – whether the proceeding ought be stayed or dismissed.

Limitation of Actions Act 1974 (Qld), s 29
Uniform Civil Procedure Rules 1999 (Qld), r 303, r 304
Personal Injuries Proceeding Act 2002 (Qld), s 42(4)(b)

Re Mempoll [2013] NWSC 301

COUNSEL: The plaintiff's litigation guardian appeared in person (no appearance on 6 or 8 November 2013)
G Diehm QC and S Deaves for the first defendant
R Douglas QC and D de Jersey for the second defendant

SOLICITORS: The plaintiff's litigation guardian appeared in person (no appearance on 6 or 8 November 2013)
K & L Gates for the first defendant
Cooper Grace Ward for the second defendant

[1.] The plaintiff, Trent Alder, was born on the 3rd of January 1989, almost 25 years ago. He suffers from significant handicaps and disabilities. In the present proceeding, in which he has been represented by his father, as litigation guardian, it has been alleged that his disabilities were caused by the negligence of the first defendant, who was the treating obstetrician, and the hospital owned and operated by the second defendant, during the time of the plaintiff's mother's confinement and in the course of his birth. In simple terms, it is alleged that the negligence of the defendants caused the plaintiff to suffer a deprivation of oxygen at around the time of his birth, leading to him suffering cerebral palsy. Each defendant has denied any negligence in connection with the birth, and each says, in any event, that the plaintiff's disabilities result from the plaintiff suffering from a genetic disorder, known as Angelman syndrome.

[2.] On the 26th of November 2002, that is some 12 years ago, the plaintiff's litigation guardian served a notice of claim in accordance with the provisions of the Personal Injuries Proceeding Act. On the 14th of August 2008, Chesterman J (as he then was) ordered: "that pursuant to section 42(4)(b) of the Personal Injuries Proceedings Act 2002 (Qld), Trent Ashley Alder start proceedings against the first applicant and second applicant by his litigation guardian, Lance Alder, or otherwise, on or before 31 December 2008. Otherwise the claim the subject of the notices of claim dated 12 November 2002 is barred." The claim in the present proceeding was then filed on 22 December 2008. Defences were filed and served in January and February 2009, and replies to those defences were filed and served in March and April 2009.

[3.] The history of this proceeding since then is pockmarked by numerous applications and appeals, in which the litigation guardian, on behalf of the

plaintiff, has effectively sought evidence to undermine the validity of the genetic testing which underpinned the diagnosis of Angelman syndrome.

[4.] There is no need to rehearse all of the orders and directions made, including those made when this proceeding was placed on the supervised case list. It is sufficient to note that there has been a not insubstantial history of non-compliance by the litigation guardian with the various orders and directions made in the course of this proceeding. I note, for example, that on the 26th of May 2010 it was ordered that the plaintiff undergo a fresh blood test for Angelman syndrome. That order was not complied with, and the proceeding was stayed as a result of that non-compliance.

[5.] It was only subsequently contended on behalf of the plaintiff that performing a blood test on this plaintiff was contraindicated, and there ought be what is known as a buccal smear test. The first defendant put on evidence calling into question the utility of such a test. Ultimately, however, the defendants accepted there was no utility in staying the claim until a buccal smear test was performed, and the stay was subsequently lifted. I note, parenthetically, that despite the plaintiff's side having advanced the buccal smear test as an appropriate test, there has been no indication that the plaintiff has ever since submitted such a test for analysis. If the plaintiff's litigation guardian was serious about rebutting the allegation in the proceeding that his son suffers from the genetic disorder, one would have thought this to be an obvious piece of evidence to be obtained by the litigation guardian.

[6.] There is no need for me to recount the detailed history of further directions. In April 2013 the parties were advised that the proceeding, which, by a previous order, was limited to a trial of the separate questions of liability and causation, had been set down for a trial for two weeks commencing on the 4th of November 2013. On the 13th of September 2013 I made a raft of directions which were expressly designed to promote the orderly presentation of evidence at trial. The plaintiff's litigation guardian comprehensively failed to comply with those directions, and on 22 October 2013 I ordered that those directions be vacated.

[7.] The trial commenced on the 4th of November 2013. The plaintiff's litigation guardian, despite having the assistance of a McKenzie friend, was clearly under prepared for the purposes of opening the plaintiff's case. He was also clearly not in a position to lead evidence to prove even some of the most basic factual allegations on which the plaintiff's claim was founded. I stood the trial down for lengthy periods to enable the plaintiff's litigation guardian to get his house in order.

[8.] Starting at 2.30 pm on the second day of the trial, the litigation guardian opened the case on behalf of the plaintiff. It transpired that the entirety of the evidence to be led on behalf of the plaintiff was one report by a midwife. The admissibility of that report was at least doubtful, because of a failure on the evidence (or lack of evidence) opened by the plaintiff's

litigation guardian to establish factual assumptions underpinning that midwife's report.

[9.] At that point, late on the second day of the hearing, I caused the senior member of the Rockhampton Bar to be prevailed upon to meet with the litigation guardian in an attempt to provide the litigation guardian with some independent advice as to the seriousness of the situation in which he found himself and in which, as a consequence, his son's case found itself. As it transpired, the litigation guardian did not take advantage of the opportunity to meet with that senior barrister.

[10.] What happened, rather, was that, shortly after 9 o'clock this morning, the litigation guardian sent by facsimile to the solicitors for the defendants and to the court registry a letter enclosing a document purporting to be a notice of discontinuance on behalf of the plaintiff against the first and second defendants.

[11.] It's unnecessary for present purposes to traverse the terms of the covering letter. I note, however, that to the extent that it might, by anyone, be considered that the notice of discontinuance had thereby been filed in the court, the purported notice of discontinuance is clearly a nullity and of no effect. The plaintiff, by his litigation guardian, required leave to file a notice of discontinuance. See UCPR, rules 303 and 304. No such leave had been applied for or granted. As I say, the purported notice of discontinuance faxed to the court's registry shortly after 9 o'clock this morning, even if regarded as filed, is a nullity.

[12.] The litigation guardian has not appeared further at this hearing. Inquiries have been made in an attempt to have him come back to court. Information has been received from the McKenzie friend to the effect that the litigation guardian is in hospital himself for observation.

[13.] It is necessary to note a couple of further matters.

[14.] The first is the effect of the order of Chesterman J in 2008. By virtue of the operation of section 29 of the Limitation of Actions Act, this plaintiff being under a permanent disability might otherwise be thought to have effectively not been subject to a time limitation for the purposes of the commencement of proceedings. That, however, needs to be read subject to the limitations imposed by the Personal Injuries Proceeding Act and by the intent and clear effect of the order of Chesterman J made on the 14th of August 2008. The clear position is that, other than as pursued in the present proceeding, the plaintiff's claim is barred.

[15.] The second matter to note is that notwithstanding a number of protests by the litigation guardian during the course of the hearing over the last two days that he is unable to obtain legal representation, the fact of the matter is that the litigation guardian has had the assistance and representation of numerous well known law firms over a period of time. Why those law firms have not continued in their representation of the plaintiff via the

litigation guardian is a matter only of speculation and I do not propose to comment any further on that. I note again, however, that the court sought, even at the 11th hour, to offer some independent assistance to the plaintiff's litigation guardian by arranging for pro bono assistance to be provided by the Queen's Counsel resident in Rockhampton.

[16.] Each of the defendants now asks for orders that the proceedings be dismissed. The only realistic alternative to making such an order would be to order that the proceeding be stayed with any such stay only to be lifted on fulfilment of stated conditions, including for example, a condition that the defendant's costs be paid before the stay is lifted. Ordering a stay would have cognisance of the fact that the plaintiff's claim is otherwise now barred.

[17.] The very real difficulty however is that is it not just the plaintiff and his family who are affected by the pendency of this proceeding. I note, as has been set out in some detail of the affidavits filed before me today, that there has been full disclosure in the present proceeding, that experts' reports have long been exchanged in respect of the matters central to the dispute on liability and causation, and that witnesses for this trial have been conferred with and prevailed upon to be available for this trial which, in factual terms, concerns events which occurred nearly 25 years ago.

[18.] In the context of an application for leave to discontinue, Brereton J in *Re Mempoll [2013] NSWSC 301* at paragraph 10 noted by reference to long established English authority that: "It is a general principle that, although there may be exceptions, rarely will it be appropriate to grant leave to discontinue once the proceedings have proceeded to a contested hearing... This is because once the parties have defined their positions, prepared their cases and proceeded to a hearing, it is ordinarily as unfair to deprive a party who has obtained a forensic advantage of that advantage. For example, even where leave to discontinue is granted, where a defendant has gained some advantage, leave to discontinue is usually granted on terms that preserve the advantage..."

[19.] Similar considerations apply in the present case where the option to dismissal of the proceeding is to order a stay subject to conditions relating to reactivation of the proceeding.

[20.] Ultimately, the present case is to be determined, in my respectful view, by reference to the long standing maxim interest reipublicae ut sit finis litium the interests of justice and the people are served by finality in litigation. The plaintiff, by his litigation guardian, has had every opportunity and more to present his case. He has had his day in court and not taken advantage of that opportunity. It is not in the interests of the court, the community or the other parties for this litigation for the proceeding simply to be put in aspic. Today is the day for finality in respect of this claim and it ought be dismissed.

[21.] The second defendant sought its costs on an indemnity basis. Despite the fact that the plaintiff's litigation guardian received some legal assistance on the way through, the plaintiff's litigation guardian has largely been self-represented in the course of the proceeding. I do not think this is an appropriate case for the award of costs on an indemnity basis. It is however clearly appropriate for both of the defendants to have their costs on a standard basis.

[22.] There will be the following orders. One, the plaintiff's claim against the first and second defendants is dismissed. Two, the plaintiff pay the first and second defendant's costs of and incidental to the proceeding including reserved costs to be assessed on the standard basis. There will be an order in terms of the draft that I now initial and place with the papers.

SUPPLEMENTARY REASONS

8 NOVEMBER 2013

[23.] On 6 November 2013, I pronounced, amongst other things, an order that "the plaintiff pay the first and second defendant's costs of and incidental to the proceeding including reserved costs to be assessed on the standard basis". This was based on a form of draft order which had been provided to me by counsel for the first defendant, with counsel for the second defendant concurring as to its terms.

[24.] That order has not yet been taken out.

[25.] Each of the defendants has now applied for the form of order to be amended or varied so as provide that "the plaintiff's litigation guardian pay the first and second defendants' costs of and incidental to the proceeding including reserved costs to be assessed on the standard basis".

[26.] Each of the solicitors for the first defendant and the second defendant has provided an affidavit in support of the present applications.

[27.] The solicitor for the first defendant, who prepared the draft order, has frankly stated that he "mistakenly drafted the alternate forms of order to be submitted to provide for the plaintiff, a 25 year old boy under a disability, as being ordered to pay the costs of the first and second defendants, instead of the plaintiff's litigation guardian".

[28.] The affidavits of the solicitors for the first and second defendants make it clear that none of the solicitors or counsel in the matter picked up this error in the draft order before it was provided to me.

[29.] The affidavit material also deposes that the litigation guardian has acted as such on behalf of the plaintiff for the entirety of the proceeding, and that at

no time has the plaintiff conducted his own proceeding nor could he, on the evidence as to his disability, have done so.

[30.] In the circumstances of this case, which are set out in my reasons for judgment delivered on 6 November, it is clear that the litigation guardian has had real and effective carriage of this matter. It is equally clear that, the litigation pursued by the litigation guardian having been dismissed, it is the litigation guardian who ought be responsible to meet the defendants' costs. There is abundant authority for the proposition that when a litigation guardian conducts proceedings, it is the litigation guardian who must pay the costs if unsuccessful in those proceedings – see, for example, *Yakmor v Hamdoush (No 2)* [2009] NSWCA 284.

[31.] It is, or ought be, obvious from my reasons for judgment on 6 November that I attributed the way in which the proceedings had been conducted on behalf of the plaintiff to the litigation guardian. I confirm that it was my intention to sheet home the consequences of the way in which the litigation had been conducted to the litigation guardian and not to the plaintiff personally. The form of draft order on which I based the orders I pronounced did not reflect that intention.

[32.] Rule 388 of the *Uniform Civil Procedure Rules* permits the court to correct a mistake in an order if, *inter alia*, the mistake or error resulted from an accidental slip or omission.

[33.] I am satisfied that each of the defendants was mistaken when providing me with the form of draft order on which I based the costs order which I pronounced, and that I have power under Rule 388 to correct the consequent mistake in the order.

[34.] In any event, Rule 667(1) relevantly provides that the Court may vary an order before the earlier of the filing of the order or the end of seven days after the making of the order. Neither of those time limits has been reached. And, under Rule 667(2)(d) the court has power to set aside an order at any time if it does not reflect the court's intention at the time the order was made. Accordingly I have power under Rule 667 to vary the costs order which I pronounced on 6 November, or set it aside and make a new costs order. For the reasons I have already stated, it would be appropriate to vary the order pronounced so as to provide for the costs to be paid by the litigation guardian.

[35.] In any event, it seems to me that the Court has an inherent jurisdiction in circumstances such as the present to make such amendments or variations to an order formally pronounced as may be required to have the order properly reflect the intention of the Court.

[36.] Accordingly, the orders in this proceeding will be as follows:

1. the plaintiff's claim against the first and second defendants is dismissed;

2. the plaintiff's litigation guardian pay the first and second defendants' costs of and incidental to the proceeding including reserved costs to be assessed on the standard basis.