

SUPREME COURT OF QUEENSLAND

CITATION: *Till v Nominal Defendant* [2010] QSC 121

PARTIES: **PETER TILL**
Plaintiff
And
NOMINAL DEFENDANT
Defendant

FILE NO/S: S73 of 1997

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Mackay

DELIVERED ON: 22 April 2010

DELIVERED AT: Supreme Court Mackay

HEARING DATE: 12 April 2010

JUDGE: McMeekin J

ORDER: **1. Order the question of the plaintiff's capacity to bring the proceedings pending in the Supreme Court numbered S73 of 1997 be referred to the Queensland Consumer and Administration Tribunal for determination.**

2. Direct that the Registrar of the Court serve on the Registrar of the Queensland Consumer and Administration Tribunal:

- (a) A copy of these reasons;
- (b) a transcript of the proceedings of 2 September 2009;
- (c) copies of Exhibits 24, 25 and 26 in the proceedings; and
- (d) a copy of the affidavit of Stephen Patrick Byrne filed 26 March 2010.

CATCHWORDS: MENTAL HEALTH – LEGAL PROCEEDINGS BY AND AGAINST MENTALLY ILL AND OTHER PROTECTED PERSONS – where a party to a proceeding may be a person with impaired capacity – where trial adjourned to determine the plaintiff's capacity to give instructions – where plaintiff refused to be psychiatrically examined – whether the plaintiff should be referred to the Queensland Civil and Administrative Tribunal for the purpose of determining his

capacity.

Guardianship and Administration Act 2000 (Qld), s 12, s 81(1)(a), s 82, s 146, s 240, s 241(1)

Public Trustee Act 1978 (Qld), s 59

Queensland Civil and Administrative Tribunal Act 2009, s 10

Uniform Civil Procedure Rules 1999 (Qld), r 72(1)

H v Nominal Defendant [1997] QSC 233

McDermott v Suncorp & Ors – 4670/06 – 11 February 2008

Till v QPS [2008] QCA 304

VJC v NSC [2005] QSC 068

COUNSEL: SP Byrne (solicitor) for the plaintiff

J Power (solicitor) for the defendant

SOLICITORS: McKays for the plaintiff

Walsh Halligan Douglas for the defendant

- [2] **McMeekin J:** Peter Till is the plaintiff in proceedings that are part heard. On 2nd September 2009 I adjourned the trial, then into its third day, on the application of Mr Till’s counsel, Mr Mullins. Mr Mullins had become concerned through the trial that his client lacked the necessary capacity to provide him with instructions. I stayed the proceedings pending an enquiry into Mr Till’s capacity pursuant to r 72(1) of the *Uniform Civil Procedure Rules 1999* (Qld).
- [3] If Mr Till’s capacity is impaired then a litigation guardian must be appointed to enable rational decisions to be made in the conduct of the litigation.
- [4] Mr Till has since refused to cooperate with any psychiatric examination.
- [5] Matters have not progressed. The Public Trustee has been approached by Mr Till’s solicitors but has declined to become involved without a specific order.
- [6] Mr Till’s solicitors have now applied, orally, to have Mr Till transferred to the Queensland Consumer and Administration Tribunal (QCAT) for the purpose of that body investigating whether Mr Till has capacity to provide instructions to enable the proceedings before me to proceed. The application is made pursuant to s 241(1) of the *Guardianship and Administration Act 2000* (Qld) (“the Act”). That section provides: “The court may, if it considers it appropriate, transfer a proceeding within the tribunal’s jurisdiction to the tribunal”. Mr Byrne, who represents the plaintiff, was able to tender a copy of an order made by White J pursuant to that section in which her Honour referred a person to the Guardianship Tribunal for determination of their capacity.¹

¹ *McDermott v Suncorp & Ors* – 4670/06 – 11 February 2008.

- [7] Mr Dickson of counsel, for the defendant, has provided a submission pointing out the difficulties with the application. Whilst not explicit, it suggests opposition to the referral proposed.
- [8] There are three questions – (1) Do I have the power to make the order sought? (2) If so, should I exercise that power? and (3) If so, what order should I make?
- [9] As to the first question, if Mr Till does lack capacity then it is plain that this court exercising its *parens patriae* jurisdiction has a duty to protect and assist him. As Lee J observed in *H v Nominal Defendant* [1997] QSC 233: “... the Court, when such matters are drawn to its notice, has an independent and responsible role under its *parens patriae* jurisdiction, to act in the best interests of the person concerned”. The “matters” to which he referred was the question of whether the plaintiff in an action was under a legal disability within the meaning of s 59 of the *Public Trustee Act* 1978 (Qld).
- [10] There is somewhat of a “Catch 22”. It seems axiomatic that that jurisdiction can only be invoked if and when there is sufficient evidence to justify that invocation. But it is the possible limitation on Mr Till’s capacity that needs to be established or refuted.
- [11] Here, in my view, there is sufficient basis to invoke the inherent jurisdiction.
- [12] First, Mr Till has made statements in the course of giving evidence that are suggestive of a disturbed mind. He at all times rejected that he was in fact Peter Till and would not answer any question prefaced by a reference to his name. His views are reflected in this introduction to a document tendered at his insistence in which he states: “i the living man the sovereign being the living agent/scribe who represent the energy part of the artificial person/persona the birth certificate/corporation Peter : Till living in body....”.²
- [13] In another document Mr Till records his definition of “Person/Natural Person/Individual” as being “1. Under the law of man, this means an artificial entity which is subject to the government and not a real soul, or body claimed by a soul” or “2. A real live soul and body”.³ He then goes on: “Only I can choose which definition applies at any time I feel. This word I generally use as definition number 2, but when dealing with souls who do not understand the difference, I will use definition number 1 and possible (*sic*) switch back to definition 2 at will”.
- [14] In another document Mr Till signs as “agent for the artificial person”.⁴
- [15] It is this dichotomy between the two possible entities that are potentially Mr Till and between which he might switch at will that caused Mr Mullins to become concerned. It became increasingly unclear to him whether Mr Till accepted that he was responsible for evidence that he might give or responsible for accurate disclosure of facts or documents.
- [16] Second, an experienced psychiatrist has advised counsel that if Mr Till does believe what he is saying then he has a psychotic illness. At the time of the stay application

² See p10 of Ex SPB1 To the affidavit of Mr Byrne of 25 March 2010.

³ See p34 of Ex SPB1 To the affidavit of Mr Byrne of 25 March 2010.

⁴ See p11 of Ex SPB1 To the affidavit of Mr Byrne of 25 March 2010.

Mr Mullins related the events that had occurred during the trial to a psychiatrist who had examined Mr Till some years before and received the opinion that I have referred to. While the time of judgment is yet to come in the trial proceedings before me, all the indications that I have so far satisfy me Mr Till is genuine in his beliefs. Mr Till certainly gave every appearance of believing the statements that were of concern.

- [17] Third, any rational person would submit to psychiatric testing if that permitted their claim for damages to proceed, no matter how much they might object to the suggestion that they were psychiatrically ill.
- [18] Fourth, Mr Till has a history of litigation, the details of which seriously raise the issue of his mental capacity. On 8 January 2007, Mr Till was apprehended on his entry into the Magistrates' Court at Brisbane with two cannabis plants in his possession. They were seized by the security staff when placed on the conveyor for screening. As a result he was charged and found guilty of possessing a dangerous drug. He appealed to the District Court and McGill DCJ, in what was described on appeal as a scholarly judgment,⁵ declined to uphold an apparent attempt to claim sovereign immunity - "apparent" as his Honour gleaned the ground from material filed that he described as "unintelligible". As a result of the documentary material placed before the Court of Appeal, Daubney J observed that either Mr Till was "significantly disconnected from reality" or "treating the judicial system as a joke": *Till v QPS* [2008] QCA 304.
- [19] Wilson J explained the history of the *parens patriae* jurisdiction in *VJC v NSC* [2005] QSC 068:

"[7] ... Control of the property and persons of those of unsound mind was the prerogative right of the Sovereign acting as *parens patriae*. In time it was delegated to the Lord Chancellor under warrant of the royal sign manual: *Re D (A Lunatic Patient) (No 2)* [1926] VLR 467 at 477- 478 per Dixon AJ; *Re Magavalis* [1983] 1 Qd R 59 at 61 per McPherson J. The Lord Chancellor would direct a commission *de lunatico inquirendo* asking a jury to determine whether someone was of unsound mind and unable to manage his affairs. If the jury found that he was, then the Lord Chancellor could appoint a committee or direct inquiries and make orders for the care and protection of his person and property: *Ex parte Cranmer* (1806) 12 Ves Jun 445; 33 ER 168; *Re D (A Lunatic Patient) (No 2)* at 478; *Re Magavalis* at 61.

[8] This responsibility of the Lord Chancellor was given to the Supreme Court of Queensland by s 22 of the Supreme Court Act 1867 (now s 201 of the Supreme Court Act 1995). The commission *de lunatico inquirendo* was abolished by cl 4(1) of the 5th Schedule to the Mental Health Act 1974, which provided that where the Court was satisfied that a person was mentally ill and incapable of managing his affairs it might appoint a committee of his estate or his person."

⁵ [2008] QDC 74.

- [20] It is apparent from that history that there might well need to be an enquiry into the mental state of the person in question before any decision is made as to the person's capacities. The matters that I have detailed show the need for such an enquiry.
- [21] The next issue to resolve is whether it is appropriate that some order be made. The proceedings are at a standstill because Mr Till refuses to permit any psychiatric examination of himself to be conducted. He seeks damages. His proceeding is stayed until his capacity to provide instructions and make decisions about his legal rights is established. The ball is very much in his court. Why should the court interfere? Neither party wants that intervention and the plaintiff's solicitor feels ethically bound not to take a step that Mr Till would oppose.
- [22] Satisfied as I am that there is sufficient ground to take some action to determine Mr Till's capacity, in my view it is in the interest of both parties that I do act. Here the proceedings are very old – the motor vehicle accident out of which the claim arises occurred on 10 May 1996. It is highly unsatisfactory that further delay occurs, if it can be avoided. Erosion of memory (and both liability and quantum are in issue) is a real risk.
- [23] I propose to exercise whatever power I have to intervene and bring matters to a head if possible. I turn then to the appropriate form of the order.
- [24] Whilst the *parens patriae* jurisdiction of this court is preserved,⁶ the responsibility for appointing guardians and the function of holding enquiries passed to the Guardianship Tribunal constituted under the Act and now to QCAT: *Guardianship and Administration Act 2000*, s 12; *Queensland Civil and Administrative Tribunal Act 2009*, s 10.
- [25] Section 146 of the Act provides, in part:
- “146 Declaration about capacity
- (1) The tribunal may make a declaration about the capacity of an adult, guardian, administrator or attorney for a matter.
- (2) The tribunal may do this on its own initiative or on the application of the individual or another interested person. ...”
- [26] QCAT has “exclusive jurisdiction for the appointment of guardians... for adults with impaired capacity for matters”: s 82 of the Act; and has as one of its functions the function of “making declarations about the capacity of an adult... for a matter”: s 81(1)(a) of the Act. The relevant matter is within paragraph 18(d) of Schedule 2 to the Act – “bringing or defending a proceeding... whether before or after the start of a proceeding”. In short QCAT has the responsibility to investigate matters relating to capacity and the exclusive jurisdiction to appoint a guardian if needed.
- [27] I order that the question of the plaintiff's capacity to bring the proceedings pending in the Supreme Court in S73 of 1997 be referred to the Queensland Consumer and Administration Tribunal for determination.

⁶ *Guardianship and Administration Act 2000* (Qld), s 240.

- [28] I direct that the Registrar of the Court serve on the Registrar of the Queensland Consumer and Administration Tribunal:
- (a) A copy of these reasons;
 - (b) a transcript of the proceedings of 2 September 2009;
 - (c) copies of Exhibits 24, 25 and 26 in the proceedings; and
 - (d) a copy of the affidavit of Stephen Patrick Byrne filed 26 March 2010.
- [29] In the meantime the proceedings before me are stayed pending the determination of the Queensland Consumer and Administration Tribunal.