

Reference No. HRRT 002/2016

UNDER THE PRIVACY ACT 1993

BETWEEN MOIRA EDWARDS
FIRST PLAINTIFF
JASON EDWARDS
SECOND PLAINTIFF

AND CAPITAL AND COAST DISTRICT
HEALTH BOARD
DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms LJ Alaeinia, Member
Dr JAG Fountain, Member

REPRESENTATION:

Miss M Edwards in person
Mr J Edwards in person
Mr PN White for defendant

DATE OF INTERVIEW WITH SECOND PLAINTIFF: 18 April 2016

DATE OF DECISION: 22 April 2016

**DECISION OF TRIBUNAL ON APPLICATION BY SECOND PLAINTIFF TO
CONDUCT PROCEEDING WITHOUT LITIGATION GUARDIAN¹**

The application

[1] The second plaintiff reached 16 years of age at the end of March 2016.

¹ [This decision is to be cited as: *Edwards v Capital and Coast DHB (Litigation guardian)* [2016] NZHRRT 16. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true names of the plaintiffs. In substitution the plaintiffs are to be referred to as "Maira Edwards" and "Jason Edwards" (not their true names). See *Edwards v Capital and Coast DHB (Application for Non-Publication Orders)* [2016] NZHRRT 19.]

[2] Consequent on the *Minute* issued by the Chairperson on 7 April 2016 he has by application dated 10 April 2016 sought permission of the Tribunal to conduct these proceedings without a litigation guardian. The grounds of the application are:

- 3.1 I don't want there to be any decisions made on this case that I strongly disagree with. This case is important to me and I want to make sure decisions aren't made without my consent again (like when the DHB made the CYF report without asking me); and
- 3.2 I want to have a part in correcting the mistakes in my sister's information. I feel bad for my sister [name redacted] and accept partial responsibility for what has happened to her.

[3] As directed by the Chairperson, the first plaintiff (his mother) has filed a memorandum in which she explains (inter alia):

[3.1] The second plaintiff himself made the decision to lodge the claim, rather than leaving his older sister to do so.

[3.2] The first plaintiff provided the second plaintiff with assistance and advice that informed his decision to lodge the claim, including explaining the types of relief the Tribunal can provide were the second plaintiff to be successful as well as the risks of pursuing the litigation.

[3.3] If the second plaintiff's application to conduct the proceedings without a litigation guardian is successful, the first plaintiff anticipates she and her son will continue to work together on his claim in a similar way. He will make the decisions and the first plaintiff will help him to understand his options and meet the procedural and other requirements involved.

[3.4] The assistance she can provide includes:

[3.4.1] Appearing on behalf of the second plaintiff at telephone conferences and carrying out any "instructions" he gives to her.

[3.4.2] Continuing to prepare (in consultation with the second plaintiff) and file joint memoranda.

[3.4.3] Sharing with the second plaintiff her own written evidence and submissions for the substantive hearing so the second plaintiff can adopt them if he wishes to do so.

[3.4.4] Assisting the second plaintiff in preparing his own written evidence and submissions for the substantive hearing if he prefers to raise separate or additional matters.

[3.4.5] Answering any questions the second plaintiff has about procedural or other matters during the substantive hearing and providing advice on decisions he has to make if asked.

[3.4.6] Assisting the second plaintiff with any settlement offer.

[3.5] The second plaintiff will be able to seek assistance and advice from other people instead of, or in addition to, the first plaintiff. Those other advisers include:

[3.5.1] His father who practised as a lawyer for about 15 years.

[3.5.2] His grandparents who are aware of the present proceedings and who intend attending the substantive hearing.

[3.5.3] Youth Law which the family has accessed on the second plaintiff's behalf in the past.

[3.6] The first plaintiff fully supports the second plaintiff's application to conduct this litigation without a litigation guardian. She considers him able to weigh advice and to make informed, sensible decisions.

The position of the defendant

[4] By memorandum dated 14 April 2016 Mr White advised the Capital and Coast District Health Board (CCDHB) does not oppose the second plaintiff's application but asks that the Tribunal (or the Chairperson) arrives at a decision only after first meeting with the second plaintiff. The primary concern of the CCDHB is to ensure:

... there is no coercion of similar pressure, either overt or covert (including unintentionally) from the first plaintiff over the second plaintiff in relation to these proceedings. It is obvious in the proceedings that the alleged harm suffered is primarily related to the first plaintiff and her current employer having files that contain information about her. That raises the question whether the second plaintiff actually has the same concerns, and if he does, whether these concerns are actually due to the position of his mother, rather than him in his own right.

[5] A further concern held by the CCDHB relates to the assistance which the first plaintiff will give to the second plaintiff in the course of proceedings:

7. It is counsel's submission that in this context a mother/son relationship, and particularly where the events at the heart of the proceeding involve a notification and supply of information to a statutory agency that deals with potential care and protection concerns of young people, that this situation raises the issue of coercion, potentially even innocently so without any intention by either plaintiff.
8. As the first plaintiff sets out, there is nothing unusual or problematic about coordination between parties in a proceeding. However, that is in the context of parties on a relatively equal status in terms of power and knowledge. If that were to occur here, the Tribunal should be satisfied that the balance of power and knowledge is appropriate or can otherwise be adequately maintained to ensure that the second plaintiff's direct interests are adequately represented.

[6] To the foregoing the first plaintiff has responded:

[6.1] The second plaintiff's claim relates to a disclosure he made about his older sister. It does not relate to the allegations the CCDHB made about the first plaintiff.

[6.2] The alleged harm is clearly set out in the amended statement of claim. It is harm to the second plaintiff and his sister, not to the first plaintiff.

[6.3] If the second plaintiff's claim is successful, the first plaintiff will not benefit in any way.

THE LAW

The appointment of a litigation guardian

[7] Two factors have brought into issue the appointment of a litigation guardian. First, the second plaintiff is 16 years of age.

[8] Second, according to the amended statement of claim the second plaintiff has been diagnosed with autistic spectrum disorders and learning disabilities. He suffers from related psychological conditions, including anxiety and depression, requiring ongoing medication. He has also been treated for obsessive compulsive disorder.

[9] Had these proceedings been brought in the High Court, High Court Rules Part 4, Subpart 7 would apply and inquiry made as to whether the second plaintiff is an “incapacitated person” or a “minor” as defined in High Court Rules, r 4.29:

4.29 Incapacitated person, litigation guardian, and minor defined

For the purposes of these rules,—

incapacitated person means a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—

- (a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or
- (b) unable to give sufficient instructions to issue, defend, or compromise proceedings

litigation guardian

(a) means—

- (i) a person who is authorised by or under an enactment to conduct proceedings in the name of, or on behalf of, an incapacitated person or a minor (but only in a proceeding to which the authority extends); or
- (ii) a person who is appointed under rule 4.35 to conduct a proceeding; and
- (b) has the same meaning as the expression “guardian *ad litem*”

minor means a person who has not attained the age of 18 years; and a person is of **full age** if he or she has attained the age of 18 years.

[10] An incapacitated person **must** have a litigation guardian as his or her representative in any proceeding, unless the court otherwise orders. See High Court Rules, r 4.30:

4.30 Incapacitated person must be represented by litigation guardian

- (1) An incapacitated person must have a litigation guardian as his or her representative in any proceeding, unless the court otherwise orders.
- (2) If a person becomes an incapacitated person during a proceeding, a party must not take any step in the proceeding without the permission of the court until the incapacitated person has a litigation guardian.

[11] Similarly, a minor (a person who has not attained the age of 18 years) **must** also have a litigation guardian unless the court otherwise orders. See High Court Rules, r 4.31:

4.31 Minor must be represented by litigation guardian

- (1) A minor must have a litigation guardian as his or her representative in any proceeding, unless the court otherwise orders.
- (2) Subclause (1) does not apply to a minor who—
 - (a) is required by an enactment to conduct a proceeding without a litigation guardian; or
 - (b) is permitted by an enactment to conduct a proceeding without a litigation guardian and elects to do so; or
 - (c) is authorised under rule 4.32 to conduct a proceeding without a litigation guardian.

[12] A minor may apply to conduct a proceeding without a litigation guardian. See High Court Rules, r 4.32:

4.32 Minor may apply to conduct proceeding without litigation guardian

- (1) This rule applies to a minor who—
 - (a) is not required or permitted by an enactment to conduct a proceeding without a litigation guardian; and
 - (b) is not prohibited by an enactment from conducting a proceeding without a litigation guardian.
- (2) A minor who wishes to conduct a proceeding in his or her own name may apply to the court for authorisation to conduct the proceeding without a litigation guardian.
- (3) On an application under subclause (2), the court may make an order allowing the minor to conduct the proceeding without a litigation guardian if it is satisfied that—
 - (a) the minor is capable of making the decisions required or likely to be required in the proceeding; and

- (b) no reason exists that would make it in the interests of the minor to be represented by a litigation guardian.

[13] On such application the court must be satisfied the minor is capable of making the decisions required or likely to be required in the proceeding and that no reason exists that would make it in the interests of the minor to be represented by a litigation guardian.

[14] The High Court Rules do not, of course, have application in proceedings before the Tribunal but the Tribunal does have power to regulate its own procedure. See s 104(5) of the Human Rights Act 1993 which is incorporated into the Privacy Act 1993 by s 89 of the latter Act. In addition the Human Rights Review Tribunal Regulations 2002, reg 16 empowers the Tribunal and Chairperson to give such directions as are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice.

[15] The Tribunal often draws on the High Court Rules for guidance in matters of civil procedure and it is therefore proposed to apply Part 4, Subpart 7 of the High Court Rules, appropriately adapted to the Tribunal's unique jurisdiction.

[16] Neither the first plaintiff nor Mr White disputed this was a proper course for the Tribunal to take in the present case.

[17] There are additional matters to which the Tribunal must have regard on an application such as the present.

The right to be heard

[18] As the applicant under r 4.32, the second plaintiff has a right to be heard, a right reinforced by s 27(1) of the New Zealand Bill of Rights Act 1990 and by the Convention on the Rights of the Child 1989, Article 12 which provides:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[19] The Tribunal accordingly met with the second plaintiff on Monday 18 April 2016 at the Tribunals Unit, Level 1, 86 Customhouse Quay, Wellington. By mutual agreement the first plaintiff and Mr White were not present during the interview.

Barriers to access

[20] Litigants in person, particularly young persons (who for present purposes may be conveniently defined as persons over the age of 14 as in the Children, Young Persons, and Their Families Act 1989, s 2) should not face unjustifiable barriers to accessing the Tribunal and in communicating their case directly to the Tribunal. The inappropriate insistence on the appointment of a litigation guardian can become such barrier. There must be real, justifiable grounds for appointing a guardian in the face of the young person's explicit request that he or she conduct the proceedings unassisted. The appointment of a guardian "just in case" over the objections of a young person clearly capable of making his or her own decisions may well frustrate the Article 12 right to express views both freely and directly and to have those views taken into account. In the context of the Tribunal's human rights-focused (and relatively informal) jurisdiction care must be taken to avoid the imposition of layers of cost and complexity not justified by the circumstances.

Substantial merits

[21] A further factor to be considered is that form must not be confused with substance. Section 105(1) of the Human Rights Act requires the Tribunal to focus on the substantial merits of the case, not technicalities:

105 Substantial merits

- (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
- (2) In exercising its powers and functions, the Tribunal must act—
 - (a) in accordance with the principles of natural justice; and
 - (b) in a manner that is fair and reasonable; and
 - (c) according to equity and good conscience.

ASSESSMENT

The meeting with the second plaintiff on Monday 18 April 2016

[22] It is not intended to provide a detailed account of the Tribunal's meeting with the second plaintiff on the morning of Monday 18 April 2016. It is sufficient to note the focus of the interview was on the second plaintiff's capacity to understand the issues on which his decision would be required as a litigant conducting his own proceedings and on his capacity to make those decisions. Inquiry was also made as to whether there is any reason that would make it in his interests to be represented by a litigation guardian. Specific regard was had to the concerns articulated on behalf of the CCDHB.

Conclusions

[23] As to High Court Rules, r 4.30 we are of the clear view the second plaintiff is not an incapacitated person as defined in r 4.29.

[24] As to the first limb of High Court Rules, r 4.32 we have been satisfied by the second plaintiff that he understands the nature of this proceeding in which he is the second plaintiff. He has further satisfied us he is capable of making the decisions required or likely to be required in the course of the proceeding. Indeed, he is clear-minded as to the objective he wishes to achieve, being that set out earlier at para [2]. He sees the hearing as his opportunity to personally and directly explain why he believes the CCDHB did not properly apply the Privacy Act. He also wants to place before the Tribunal evidence of the consequences which thereafter affected both him and his older sister.

There can be little doubt his views are strongly held and that he will be articulate in expressing those views.

[25] It is true he will receive advice and guidance from his mother but we see this in a positive light as it will enable the second plaintiff to better focus on the relevant issues. He did not strike us as someone who could be easily “coached”. In addition he is fully aware he can seek advice also from his father, his grandparents and Youth Law.

[26] It follows that having spoken directly to the second plaintiff we do not share the concern of the CCDHB that if he is given permission to conduct the proceedings without a litigation guardian he might be subject by his mother to coercion or similar pressure, whether overt or covert (including unintentionally). Focused as they are on the harm said to have been caused to him and his sister, the second plaintiff’s concerns are separate and distinct from those of his mother although arising out of the same factual circumstances. The assistance he will receive from his mother as detailed earlier will not create an appreciable risk his independent voice will not be heard or that all significant litigation decisions will be made by his mother, not by him.

[27] Our assessment of the circumstances as explained by the second plaintiff and his mother is that while their respective cases will be coordinated, the second plaintiff’s interests and his views will not be subordinated to those of his mother.

[28] As to the potential stress of the proceedings the second plaintiff acknowledged he does experience stress in various other contexts but would not see involvement in these proceedings as stressful. Asked about the public nature of the hearing and the publicity the case might potentially attract he responded he had given the matter thought and concluded publicity will not trouble him.

[29] On the second limb of High Court Rules, r 4.32 we accordingly conclude no reason exists that would make it in the interests of the second plaintiff that he be represented by a litigation guardian. His Article 12 rights are accordingly preserved without modification.

DECISION

[30] The application by the second plaintiff to conduct this proceeding without a litigation guardian is granted.

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Mr RPG Haines QC
Chairperson

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Ms LJ Alaeinia
Member

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Dr JAG Fountain
Member