Judgment No. 117
C.J. 26/3/58

IN THE SUPREME COURT)
OF THE TERRITORY OF )
PAPUA AND NEW GUINEA)

McDONALD AND OTHERS v. THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA.

This is an application to stay proceedings in an action for damages in consequence of a settlement arrived at between the parties. Since the Plaintiff is an infant the order sought involved the sanction by the Court or a Judge of the terms of compromise.

The material before me was inadequate for the purposes of the application and this being the first application of its kind in the Territory for many years, I was invited by Counsel to indicate what practice ought to be followed in these cases.

The requirements of the law are readily ascertainable. It must be borne in mind that the infant has a legal right to a cause of action and to have that cause of action determined in due course. He has neither a legal right to a compromise nor the legal capacity to make one, and his lack of capacity involves the consequence that no settlement can displace the cause of action without the sanction of the Court. The Court must have before it proper material to enable it to arrive at an affirmative conclusion of fact that the proposed compromise is for the benefit of the infant. If this conclusion is reached and the compromise sanctioned it becomes binding upon all parties. There is no presumption that a settlement, even for a substantial figure, is for the infant's benefit.

In order to reach a conclusion that the compromise is in fact for the benefit of the infant, the Court or Judge will consider all circumstances which in the particular case appear to be material. Usually these will include the probable chances of success or failure in the action and the financial consequences; the amount which may reasonably be expected to be awarded and recovered if the action is successful; and any circumstances which may be likely to prevent the action from being properly or adequately presented at trial (not being due to the resources or inclination of the next friend unless all other possible resources open to the infant are exhausted).

The Court may rely on the opinion of Counsel of standing and experience in arriving at a conlusion that a compromise is for the benefit of an infant, but in many cases in the Territory a Judge will have to be in a position to form his own independent judgment on the settlement.

The Court, even if of opinion that the settlement is for the infant's benefit, will not sanction it without the express consent of the next friend or guardian and the approval of the infant's legal advisers. (See In Re Burchall (1880) XVI Ch.D. 41). If there is any disagreement on the question, the next friend or guardian may be removed and replaced if upon investigation the refusal to consent appears improper, but the Court will insist that all parties responsible at the time of the application approve of the compromise before sanction will be given.

The age of the infant is another important consideration and if able to understand the matters involved, the infant should make a separate affidavit giving his own views and reasons. In some cases in England the infant is required to be separately represented by Counsel and in cases where the infant is not considered of sufficient age to hold a firm independent opinion, the assistance which can be rendered by independent Counsel representing the infant's point of view becomes increasingly important.

The conditions prevailing in the Territory may give rise to special considerations but too much stress should not be laid upon geographical considerations, since this Court is prepared to consider applications for evidence to be heard in any of the large number of centres visited by the Court, and since there are no civil juries there is little if any disadvantage in having evidence taken at different times and places, or in having the evidence of witnesses in Australia or elsewhere taken on commission. There is no reason why litigation in the Territory should be conducted less expeditiously or less efficiently than elsewhere, and questions of expense alone afford poor reason for compromise. Where this may amount to a motive, special scrutiny is called for to ensure that the infant's own interest is not being sacrificed, and separate and independent advice from Counsel under no obligation to the persons providing the money for litigation is called for.

I have consulted my brother Judges who agree that the practice which ought to be followed, subject to any special direction which may be given in particular cases, is as follows:-

(1) If the action is ready for trial or already before the Court the fact of settlement should be announced in open Court, and the terms of it, set out on paper, handed to the Judge. No oral reference to the sums of money involved or other conditions of settlement should be made without the Judge's permission until the settlement is sanctioned. All necessary consents may be given in Court if the persons concerned are present, and affidavits may be used in relation to those who cannot be conveniently called. Counsel may express their opinions in Court. The Judge may call for any oral or other evidence, or direct that any independent opinion should be obtained and either deal with the matter or leave it for subsequent application as may appear appropriate.

(2) In any case a separate application may be made in Court or in Chambers. The Solicitors representing the infant's interest in the action have the carriage of the matter and a Notice of Motion or Chamber Summons should be served on the other parties to the action.

(3) The application must be supported by affidavits by the Solicitor representing the infant's interest in the action, and by the next friend or guardian. A separate affidavit by the infant if of appropriate age and understanding should also be filed. These affidavits should not follow a single pattern but must give facts and conclusions from the several points of view of the deponents. The Solicitor should disclose the extent to which he has investigated

3/

the case, the main facts and issues as he sees them, and show that he has fully considered the extent to which the case is supportable by independent or reliable evidence, and formed his own opinion as to the likely outcome both as to liability and damages. Where any difficulty is involved the Solicitor should refer to any advice he has received or sought. Any opinion of Counsel on material questions, together with the case upon which the opinion was given, should be exhibited but not served on any other party.

(4) The Affidavit of the next friend or guardian should set out the facts known to him, the age and circumstances of the infant, the advice he has received and his own conclusions showing what beneficial results for the infant would follow from the settlement of the action and what might result if the settlement were not carried out. The affidavit (if any) of the infant should deal with similar matters, and both should contain sufficient material to indicate whether the deponent sufficiently understands the issues involved to form a reasonable impression of what is involved in the action.

(5) Medical evidence must be given by oral evidence or affidavit where it is desired to establish a fact relevant to the application, but where it is desired only to indicate what medical evidence (including opinions) is available to support the action in the event of trial, this may be treated as any other material evidence available in the action and either exhibited or referred to in the appropriate affidavit as may be appropriate. Medical evidence is of the utmost importance in cases of severe or permanent physical injury. No fair estimate of damage can be arrived at without full details of future earning power, capacity for normal activities and general prospects for the future, and a clear picture of all this must be available to the Judge should he require it, and it must appear that all these matters have been fully taken into account by the practitioner who advises the settlement.

(6) In all cases any material which might prejudice or embarass the trial of the action should not be set out on the fact of any affidavit but if it is necessary to refer to any such material, all reference to it should be set out in a separate memorandum signed and exhibited to the appropriate affidavit and not be served on any other party but handed to the judge hearing the application. Disclosure of material of this kind can best be avoided by exhibiting the opinion of independent Counsel of suitable standing and experience in the class of action in question. It may not be practicable to obtain a suitable opinion in the Territory in all cases, and it may often be found more suitable to obtain the opinion of Counsel practising in Australia based on experience gained here. If it is not practicable to obtain a suitable opinion at all the Judge may find it necessary either to appoint an officer (such as the Registrar) to investigate the case or conduct a full investigation himself. This last course may result in

4/

a Judge directing that the action, if it proceeds to trial, be adjourned and heard before another Judge.

(7) Reference to verdicts given in other cases here or elsewhere ought not to be used as an indication of a probable verdict, but may be used as a test of the reasonableness or otherwise of a compromise, depending on the chance of success.

(8) Where the compromise includes sums to be paid to the next friend or guardian and sums to be paid of costs, special care is called for to ensure that the apportionment is fair to the infant and based on proper considerations and independent advice. The basis adopted should be fully disclosed and justified and the material should be adequate to enable the Court to form its own view of a proper apportionment.

The facts of the present case so far placed before me are not sufficient for me to form any idea of the adequacy of the proposed compromise.

C.J. 26/3/58