SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Millard v Australian Capital Territory**
Citation:	**[2020] ACTSC 138**
Hearing Dates:	21–22, 25, 27 May 2020
Decision Date:	28 May 2020
Before:	Murrell CJ
Decision:	Each party is to pay its own costs of proceedings SC 185A of 2020.
Catchwords:	**PROCEDURE** – COSTS – Urgent injunction
Legislation Cited:	*Transplantation and Anatomy Act 1978* (ACT) ss 27, 45
Cases Cited:	*Australian Capital Territory v JT* [2009] ACTSC 105; 4 ACTLR 68 *Gray v Richards (No 2)* [2014] HCA 47; 89 ALJR 113 *Northbridge v Central Sydney Area Health Service* [2000] NSWSC 1241; 50 NSWLR 549
Parties:	Jamie Damian Millard (Plaintiff) Australian Capital Territory (Defendant)
Representation:	**Counsel** D Campbell SC (Plaintiff) N Hancock (Defendant) **Solicitors** Ken Cush & Associates (Plaintiff) ACT Government Solicitor (Defendant)
File Number(s):	SC 185 of 2020

MURRELL CJ:

1. This is a costs application in relation to proceedings that have largely resolved.

2. On Saturday, 16 May 2020, following an argument with the plaintiff (her partner), Khayla Reno left the residence where both were residing. She drove her two children to Tumut, NSW. At the time, Ms Reno was pregnant with the plaintiff's child. The foetus was approximately 19 weeks old. Generally, a foetus is considered to be viable from about 23 weeks old.

3. On the afternoon of 16 May 2020, at Tumut, Ms Reno's vehicle was involved in a very serious motor vehicle accident. She sustained severe head injuries. She was airlifted to The Canberra Hospital and admitted to the intensive care unit, where she came under the care of Dr Robertson. The children were airlifted to Westmead Hospital,

NSW. Subsequently, one of the children passed away. The other remains in critical care.

4. On 7 May 2020, Ms Reno had executed an enduring power of attorney in favour of the plaintiff, inter alia, authorising him to act in relation to healthcare matters.

5. When Ms Reno arrived at the Canberra Hospital (the Hospital) on the evening of Saturday, 16 May 2020, she was met by the plaintiff, who remained by her side over the weekend.

6. On the morning of Monday, 18 May 2020, the plaintiff spoke to medical staff and other family members of Ms Reno. He went home to search for the enduring power of attorney. At that stage, the plaintiff could not find the document.

7. There was a background of some tension between the plaintiff and some (but not all) members of Ms Reno's family concerning the plaintiff's alleged treatment of Ms Reno.

8. During Monday, 18 May, members of Ms Reno's family told Dr Robertson that, at the time of the motor vehicle accident, Ms Reno may have been in the process of leaving the relationship. No doubt, that was their genuine belief. We will never know whether that was in fact the case or whether, even if it was the case, Ms Reno may have later changed her mind.

9. At about 11 AM on Monday, 18 May, when the plaintiff returned to the Hospital, he was told to wait outside. He was then told that he could see Ms Reno for an hour.

10. During the afternoon, the plaintiff spoke to Dr Robertson at Ms Reno's bedside. According to the plaintiff, Dr Robertson told him that the one-hour visit accorded with the family's wishes, that the plaintiff should "make the most of it" as there would be no further visits, and that no attempts would be made to salvage the foetus. Medical records state that Dr Robertson told the plaintiff that Ms Reno may be progressing to brain death and that the foetus was not viable.

11. On Tuesday, 19 May, the plaintiff located the enduring power of attorney form and delivered it to the Hospital.

12. At 3 PM on Tuesday afternoon, Ms Reno's father, who was said to be the "senior available next of kin for removal of tissue after death", stated that he had no reason to believe that Ms Reno had expressed an objection to the removal of tissue and authorised organ donation. The document was signed by Paul McLauchlan as "DSNC".

13. On Tuesday, a Hospital social worker spoke to other members of Ms Reno's family and they agreed that the plaintiff should be permitted to have restricted access to the Hospital.

14. On Wednesday, 20 May, a Hospital social worker telephoned the plaintiff to arrange for him to visit Ms Reno on that day.

15. At 11:35 AM on 20 May, Dr Robertson examined Ms Reno and pronounced life extinct. Later that day, coronial consent was given for the removal of tissue after death.

16. At about 10:30 AM on Thursday, 21 May, the social worker at the Hospital telephoned the plaintiff and told him that he could visit for an hour to "say his last goodbyes" as life support would be terminated following his visit.

17. At 1:50 PM on 21 May, the plaintiff attended the Hospital. According to a social worker, he was argumentative.

18. While the plaintiff was visiting Ms Reno, Dr Robertson spoke to the plaintiff at 2:28 PM and provided him with a further update on the progress of Ms Reno's condition. Dr Robertson again spoke to the plaintiff at 2:38 PM and told him that Ms Reno had progressed to brain death and the foetus could not survive.

19. After Dr Robertson left, the plaintiff inquired of nursing staff as to whether an obstetric opinion could be obtained but was told that no obstetrician would be attending.

20. During Thursday, 21 May, there were discussions between the plaintiff's legal representatives and the Hospital. Initially, the proposed "deadline" for terminating life support to Ms Reno was 4 PM on 21 May. Ultimately, the Hospital agreed that it would not terminate life support until 6 AM on the morning of Friday, 22 May 2020.

21. Consequently, on the afternoon of 21 May, the plaintiff sought an urgent injunction to restrain the Hospital from terminating life support to Ms Reno. His purpose was to obtain information about the viability of the foetus and understand whether there were any prospects of Ms Reno's condition improving. The plaintiff's legal representative indicated that the plaintiff was seeking access to Ms Reno's clinical records. However, as legal proceedings had not been commenced, no subpoena had been issued.

22. I made an order restraining the termination of life support until further order of the Court.

23. On Friday, 22 May, the plaintiff lodged originating application SC 185A of 2020. In that application, the plaintiff sought an order restraining the termination of life support to Ms Reno and an order that she be independently medically examined for the purpose of providing the Court with a report as to her condition and prognosis and the condition and viability of the foetus. Having commenced proceedings, the plaintiff was also able to subpoena Ms Reno's medical records. The Hospital produced the records to the plaintiff.

24. I extended the restraining order. No order was made regarding medical examination. The plaintiff arranged for Professor Brew, an eminent Sydney neurologist, to urgently examine the records and provide a report. The Hospital agreed to cooperate with that process. The Hospital resisted a proposal that it participate in a court-based mediation on the morning of Monday, 25 May. The plaintiff was willing to participate.

25. In proceedings SC 185A of 2020, the plaintiff sought to invoke the parens patriae jurisdiction of the Court and argue that continuing life support to the plaintiff was not futile. The existence of the parens patriae jurisdiction depends upon the subject remaining a living being; it would not be available if Ms Reno was deceased, including if she was brain dead within the meaning of s 45 of the *Transplantation and Anatomy Act 1978* (ACT) (*TAA Act*). Pursuant to ACT law, the foetus is considered to be part of the mother.

26. On Friday evening, the plaintiff received a preliminary report from Professor Brew stating that the data with which he had been provided pointed strongly towards brain death but that he required further information before reaching a concluded view.

27. The plaintiff's lawyers requested further information from the Hospital and sought permission for the plaintiff to visit Ms Reno for an hour on Saturday afternoon and Sunday afternoon.

28. On the morning of Saturday, 23 May, the Hospital's legal representative emailed the plaintiff's legal representative saying that the request for a visit was refused and no further visits would be permitted as "the plaintiff was provided with the opportunity to visit and say goodbye to Ms Reno on the afternoon of 21 May 2020".

29. Later on Saturday morning, the Hospital provided further information, which was conveyed by the plaintiff's legal representatives to Professor Brew.

30. On Saturday evening, the plaintiff's legal representatives wrote to the Hospital's legal representatives, noting a further conversation in which the Hospital had said that it would permit the plaintiff to visit Ms Reno on condition that he withdraw his application to the Court. The plaintiff's legal representatives sought confirmation of this offer.

31. At 7:42 PM on Saturday night, the Hospital's legal representatives wrote to the plaintiff's legal representatives in the following terms:

> We are instructed to make the following offer:
>
> 1. The plaintiff provide written consent (via his solicitors) by 9 PM on 23 May 2020 to the lifting of the order made by Chief Justice Murrell on 21 May 2020, and amended on 22 May 2020, such that the Canberra Hospital (TCH) is no longer restrained from terminating life support of Ms Khayla Reno;
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> 2. The plaintiff provide a written undertaking (via his solicitors) by 9 PM on 23 May 2020 that he will not object to and/or seek to interfere in any way with the planned donation of Ms Reno's organs pursuant to the *Transplantation and Anatomy Act 1978*; and
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> *3.* The plaintiff confirm in writing (via his solicitors) by 9 PM on 23 May 2020 that his solicitors have obtained an oral or written opinion from Professor Brew, Neurologist, that Ms Reno is brain dead pursuant to the definition in section 45 of the *Transplantation and Anatomy Act 1978.*
>
> If the above offer is accepted in full, we are instructed that the defendant will permit the plaintiff final one hour visit to Ms Reno at TCH by no later than 11:30 PM on 23 May 2020 …

32. On the evening of Sunday, 24 May, the plaintiff's legal representatives wrote to the Hospital's legal representatives reiterating their desire to participate in mediation and stating that, if the matter was not to be mediated, they would seek to amend the application before the Court to prevent organ donation. Ms Reno was Aboriginal. According to the plaintiff, Ms Reno had told him that, because of Aboriginal custom, she did not want to donate her organs and wished to be cremated as a whole person.

33. Later on Sunday evening, the plaintiff's legal representatives received a further opinion from Professor Brew, based on the supplementary material that he had received on Saturday. He considered that Ms Reno satisfied the criteria for brain death and provided his reasons for that opinion.

34. On the morning of Monday, 25 May, Professor Brew's further report was provided to the Hospital's legal representatives.

35. At 2:15 PM on 25 May, the matter came before me. I refused the plaintiff's application to amend the existing originating application but granted the plaintiff leave to file a fresh originating application returnable instanter (SC 185B of 2020), seeking orders (inter alia) that:

    (a) the defendant be restrained until further order of the Court from withdrawing the organ support presently being provided to Khayla Ann Reno;

(b) pending further order of the court, all servants or agents of the defendant be prevented from proceeding with organ and/or all tissue donation from Khayla Ann Reno;

(c) the authorisation from senior available next of kin executed by David Reno and Paul McLauchlan on 19 May 2020 be set aside; and

(d) the consent by purported delegates of the coroner for removal of tissue after death completed on 21 May 2020 be set aside.

36. In essence, the new application sought review of a decision made by a "designated officer" under s 27 of the *TAA Act.* Pursuant to that provision, a designated officer may authorise organ donation if, during their lifetime, a person had expressed the wish for, or consented to, the removal after her death of tissue from her body for the purpose of transplantation and had not withdrawn the wish or revoked the consent. If they had not done so, their "senior available next of kin" may indicate that they do not object to the removal of tissue from the body of the deceased. The plaintiff contended that Ms Reno had objected to organ donation and that he was the "senior available next of kin". Although this was not clear from the application itself, it emerged in discussion that the basis of the application was that, in relation to the designated officer's decision, the plaintiff had been denied procedural fairness.

37. The Hospital was restrained until further order from withdrawing organ support from Ms Reno. Despite the Hospital's reluctance to participate in mediation, I ordered the parties to attend court-based mediation at 9 AM on Tuesday, 26 May 2020 and requested assistance with legal representation to facilitate the participation in the mediation of Ms Reno's other family members.

38. The mediation occupied the whole of Tuesday, 26 May and largely resolved the matter.

39. On Tuesday, a different "designated officer" made a fresh decision about whether to authorise removal of tissue from Ms Reno pursuant to s 27 of the *TAA Act*. The designated officer was unable to form a concluded view about whether Ms Reno did or did not express an objection to the removal of tissue from her body. Further, the designated officer was unable to form a concluded view that, immediately before her death, Ms Reno was in a domestic partnership with the plaintiff (and whether he was the "senior available next of kin"). Consequently, the designated officer was unable to authorise the removal of tissue for the purpose of organ donation.

40. On Wednesday, 27 May 2020, the following orders were made by consent:

(a) The originating applications numbered SC 185A of 2020 and SC 185B of 2020 are dismissed; and

(b) The defendant is to pay the plaintiff's costs of application SC 185B of 2020.

41. The only outstanding issue was payment of costs in relation to SC 185A of 2020. The plaintiff submitted that the Hospital should pay his costs. The Hospital submitted that each party should pay its own costs.

42. In relation to costs, the Court has a broad discretion but usually costs follow the event. In *Gray v Richards (No 2)* [2014] HCA 47; 89 ALJR 113 at [2], the Court said:

> The disposition of costs is within the general discretion of the Court. Ordinarily, that discretion will be exercised so that costs are awarded to the successful party, but other factors may have a significant claim on the discretion of the Court. The disposition which is ultimately to

be made in any case where there are competing considerations will reflect a broad evaluative judgment of what justice requires.

(footnotes omitted)

43. In application SC 185A of 2020, there were two issues. The first issue was whether Ms Reno was alive at law; if she was not alive, then the parens patriae jurisdiction of the Court could not be invoked and the Court lacked jurisdiction to intervene. If she was alive, then there was an issue as to whether it was futile to maintain life support: *Northbridge v Central Sydney Area Health Service* [2000] NSWSC 1241; 50 NSWLR 549, *Australian Capital Territory v JT* [2009] ACTSC 105; 4 ACTLR 68.

44. In order for those issues to be examined and in the absence of an appropriate undertaking by the Hospital, it was plainly necessary for the plaintiff to obtain a restraining order and for that order to be maintained until Tuesday, 26 May 2020.

45. Ultimately, the plaintiff failed to establish that the Court had jurisdiction; Ms Reno's life was extinct on 20 May 2020, prior to the commencement of proceedings.

46. It is unfortunate that the plaintiff felt compelled to commence the proceedings. From 19 May 2020, he felt alienated from the decision-making process as the Hospital chose to communicate primarily with other members of Ms Reno's family, particularly in relation to the issues of foetal viability and organ donation. As noted above, on 19 May, the plaintiff provided the Hospital with an enduring power of attorney form which, during Ms Reno's life, gave him authority in relation to healthcare matters.

47. With the benefit of hindsight, it can be seen that the Hospital's attitude to the plaintiff and associated communication deficiencies fuelled this unfortunate litigation, which has been traumatic for all concerned. The series of "deadlines" imposed by the Hospital (including that contained in the letter sent on Saturday night) suggest that the Hospital was anxious to proceed with an organ donation and gave some priority to that desire. Nevertheless, there is no suggestion of mala fides on the part of anyone and the Hospital succeeded in establishing that the Court lacked jurisdiction.

48. I have concluded that the appropriate order is that each party pay its own costs of proceedings SC 185A of 2020.

I certify that the preceding forty-eight [48] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Chief Justice Murrell.

Associate:

Date: 28 May 2020