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Supreme Court of New South Wales

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LISA KAYE O'DONOGHUE v JET FIGHTER FLIGHTS PTY LTD (IN LIQ) [2013] NSWSC 781 (7 June 2013)

Last Updated: 20 June 2013

Supreme Court

New South Wales

Case Title: LISA KAYE O'DONOGHUE v JET FIGHTER FLIGHTS PTY LTD (IN LIQ)

Medium Neutral Citation: [\[2013\] NSWSC 781](#)

Hearing Date(s): 7 June 2013

Decision Date: 07 June 2013

Jurisdiction: Common Law

Before: Slattery J

Decision: Settlement of the proceedings and the proposed apportionment of the settlement sum approved.

Catchwords: PROCEDURE - deceased killed in a recreational flight accident - wife commenced action under [Compensation to Relatives Act 1897 s 6B](#) on behalf of herself and her children - proceedings settled - Court asked to apportion the settlement sum - proposed apportionment below the amounts allocated to each child by expert actuaries - whether the reduction appropriate - the wife already paid substantial costs of the inquest into the accident - the wife already paid expenses for the children's

education and advancement in life - the children and the wife agree to the proposed apportionment - the children informed that they can receive independent legal advice and declined to do so - wife's position as a fiduciary for the children discussed - HELD: settlement sum apportioned in accordance with the proposal.

PROCEDURE - action commenced on behalf of a person under legal incapacity - person ceased to be under legal incapacity - proceedings settled - Court approval of the settlement required under [Civil Procedure Act 2005 s 76](#) - HELD: settlement approved.

Legislation Cited:

[Civil Procedure Act 2005 s 76](#)
[Compensation to Relatives Act 1897 s 6B](#)

Cases Cited:

Elliott v The Public Trustee, Supreme Court of NSW, Court of Appeal (Unreported), 9 November 1981
Erwin v Shannon's Brick, Tile and Pottery Co. Limited [1938] NSWStRp 42; (1938) 38 SR (NSW) 555
Haigh v State Government Insurance Office (Queensland) [1962] Qd R 534
Pobezin v Insurance Commissioner of the State Motor Car Insurance Office [1969] VicRp 87; (1969) VR 682

Category:

Separate question

Parties:

Lisa Kaye O'Donoghue Plaintiff
Jet Fighter Flights Pty Ltd (in liq) (First Defendant)
Aerospace Services Group Pty Ltd (Second Defendant)
← **Civil Aviation Safety** → Authority (Third Defendant)

Representation

- Counsel:

Counsel:
D. Kelly (Plaintiff)
I. Harvey (Defendant)

- Solicitors:

Solicitors:

File Number(s):

2008/00289574; 2008/00289589

EX TEMPORE JUDGMENT

1. The late Shane O'Donoghue was tragically killed in an accident on 5 October 2006 whilst he was flying as a passenger in a Strike Master Fighter Jet VHAKY on a recreational flight in the Bathurst region. I have before me an application for approval of a settlement of proceedings brought under the [Compensation to Relatives Act 1897](#) ("*Compensation to Relatives*") s 6B by his widow Lisa Kaye O'Donoghue on behalf of herself and her children, Hayley Judith O'Donoghue and Trent Shane O'Donoghue.
2. As a result of a mediation before the Honourable Kevin Lindgren QC on 20 March 2013 the proceedings were settled upon terms satisfactory to the defendants and to Mrs O'Donoghue.
3. The defendants to the proceedings are: Jet Fighter Flights Pty Ltd ("Jet Fighter"), a company which is now in liquidation; Aerospace Services Pty Limited ("Aerospace Services"), and the  **Civil Aviation Safety**  Authority ("CASA").
4. Mr O'Donoghue's death resulted in an extensive inquest over 17 days, inquiring into the circumstances not only of his death but that of the pilot of the jet aircraft.
5. The pursuit of these proceedings has been difficult in a number of respects. Jet Fighter has gone into liquidation. Freezing orders have been obtained against Aerospace Services but its assets appear insufficient to meet a substantial judgment against it. I do not have any evidence that either of those entities is insured in respect of any liability to Mrs O'Donoghue and her children arising out of this accident Counsel's advice, tendered on this approval application, is to the effect that success in the proceedings would be unlikely against the only potential solvent defendant, CASA. It may be difficult to establish any duty of care against CASA.
6. The settlement reached and recorded in the terms of settlement of the *Compensation to Relatives* proceedings (Exhibit B) is for the payment to Mrs O'Donoghue, on behalf of herself and her children, of a sum of \$504,000.
7. Mrs O'Donoghue has brought separate nervous shock proceedings. But I am not currently concerned with them. The approvals are only needed in the *Compensation to Relatives* proceedings.
8. The Court's approval is required for two reasons. Firstly, at the time of the death of the deceased in October 2006, the deceased's and Mrs O'Donoghue's son Trent, born on 8 April 1990, was 16. Their daughter Hayley Judith O'Donoghue born on 6 May 1992, was 14. Trent is now 23 and Hayley is now 21. Although they are both of age, [Civil Procedure Act 2005](#) ("*CPA*") s 76 has the effect that the compromise of proceedings commenced "on behalf of" a person under legal incapacity, requires the approval of the Court. CPA s 76 does not provide an exception where at the time of their commencing proceedings the plaintiff (or beneficiary) in the proceedings is under a legal incapacity but then ceases to be under such incapacity.
9. The two children, Trent and Hayley, fall within CPA s 76. The proceedings were commenced "on behalf of" them by Mrs O'Donoghue. Her action is provided for by the mechanism of [Compensation to Relatives Act s 6B](#). Mrs O'Donoghue brings the *Compensation to Relatives* action as their fiduciary.
10. The Court's jurisdiction is also attracted because the Court must apportion the respective benefits obtained by Mrs O'Donoghue and that of her two children. The reason for this is that she acts as Trent and Hayley's fiduciary in the action in respect of their rights. She is in a position of conflict of interest and duty when it comes to apportioning the funds received. The more she receives the less that her beneficiaries will receive. The intervention of the Court is necessary so an objective judgment can be brought to bear between Mrs O'Donoghue as fiduciary and her children as

beneficiaries. And there are many examples in the cases of this being done: cf. *Elliott v The Public Trustee*, Supreme Court of NSW, Court of Appeal (Unreported), 9 November 1981 ("*Elliott*"), where an apportionment was made with a reduced amount to the children on account of their mother having supported them for some years before the trial.

11. The fiduciary character of Mrs Donoghue's role is clear. [Compensation to Relatives Act s 6B](#) is a machinery provision which allows a member of a class to sue to enforce rights to compensation vested in himself or herself and others, not a provision which vests the substantive rights of the whole class in whoever happens to be the plaintiff: *Erwin v Shannon's Brick, Tile and Pottery Co. Limited* [1938] NSWStRp 42; (1938) 38 SR (NSW) 555, at 563 ("*Erwin*") per Jordan CJ. A member of a class, such as Mrs O'Donoghue, commencing action on behalf of class members, stands in a fiduciary position to these class members, and may be liable for improper performance of his or her fiduciary duty: *Erwin* at 561 per Jordan CJ. And once judgment is entered each dependent relative has a personal right to the amount apportioned (by the Court) to that dependant: *Haigh v State Government Insurance Office (Queensland)* [1962] Qd. R. 534 and *Pobezin v Insurance Commissioner of the State Motor Car Insurance Office* [1969] VicRp 87; (1969) VR 682, at 691, per Menhennit J.
12. In this matter the settlement proposed of \$504,000 is close to the out-of-pocket expenses which Mrs O'Donoghue has already incurred in the inquest without leaving much more over. Her children Hayley and Trent have both reached their majority. As Mr Kelly has rightly pointed in support of the approval, the *Compensation to Relatives* dependency claim would normally be to provide for Trent and Hayley's education and advancement in life until the age of 18, which would be the usual end of their dependence. But Mrs O'Donoghue has already paid these expenses for them both. In these circumstances apportioning a lower figure to them is appropriate, as was done in *Elliott*.
13. I am much assisted by the thorough affidavit evidence which has been provided on behalf of Mrs O'Donoghue, Hayley and Trent. Their affidavits depose in substance to the following. Of the \$504,000 which is to be paid on the settlement, some \$80,000 is on account of the costs which would be payable by the defendants to the plaintiff. That means in effect \$424,000 is the verdict to be paid. But the actual solicitor/client costs are more than the costs that are to be paid inter partes. I am told a further \$74,000 approximately would represent those costs. Given that there are a number of proceedings, that is the figure that can be apportioned to this proceeding/ This leaves a balance of \$350,000 to be paid to Mrs O'Donoghue and her children. What money Mrs O'Donoghue receives will go towards reimbursing her expenses on the inquest.
14. The expert actuarial evidence filed in the proceedings on both sides would indicate that Hayley and Trent could potentially receive the following figures as a portion of this settlement. Trent would receive between \$39,000 and \$44,000 if his share was assessed in accordance with the expert evidence at 11 percent of the total settlement. Hayley would receive between \$59,000 and \$68,000 if her share was apportionment at 17 percent of the total settlement.
15. The assumption behind this expert assessment is that these amounts are unpaid and still have to be provided for. But the evidence is, as I have indicated, that Mrs O'Donoghue has already paid all these expenses. And additionally, she has funded all the legal representation at the inquest. Moreover, both Mrs O'Donoghue and each of her two children have stated on affidavit that they are aware of the figures that have been outlined in this judgment and each of them wish by family consensus for an apportionment to take place, so each of Hayley and Trent receives \$25,000, and the balance received will go to Mrs O'Donoghue.
16. In all the circumstances, this seems to me to be an appropriate agreement within the family. It has been reached with the parties' full understanding of their legal positions. Hayley and Trent have indicated that they know they can receive independent legal advice if they wish but they have declined to do so. That is not unreasonable in the circumstances. It is not a reason not to approve the settlement.
17. I approve the settlement of these proceedings as set out in exhibit B.

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