Northern Territory of Australia v O'Connor & Anor [2003] NTSC 56

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v TERESA O'CONNOR and: JOHN RAPAIC
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	58/02 (202015970, 202015971, 20201623)
DELIVERED:	26 May 2003
HEARING DATES:	25 March 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

LIMITATION OF ACTIONS - crimes compensation - extension of time to commence action - appeal against order of magistrate

Crimes Compensation Act 1982 (NT), s 5(1), (3)

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, distinguished.

REPRESENTATION:

Counsel:

Appellant:	G Algie
Respondent:	J Waters

Solicitors:

Appellant:	Morgan Buckley
Respondent:	Caroline Scicluna

Judgment category classification:	C
Judgment ID Number:	tho200321
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

NT of A v O'Connor & Anor [2003] NTSC 56
No. 58/02 (202015970, 202015971, 20201623)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

TERESA O'CONNOR
First Respondent

AND:

JOHN RAPAIC
Second Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 26 May 2003)

[1] This is an appeal from a decision of a stipendiary magistrate sitting in the Local Court at Alice Springs and involves a consideration of the Crimes Compensation Act. The relevant parts of s 5 of the Crimes Compensation Act provides as follows:

> "(1) A victim may, within 12 months after the date of the offence, apply to a Court for a compensation certificate in respect of the injury suffered by him as a result of that offence.
>
> ……

(3) The Court may, as it thinks fit, extent the period within which an application under sub-section (1) or (2) may be made."

[2] On 14 November 2002, the learned stipendiary magistrate delivered a decision in the matter of an application by Teresa O'Connor and Northern Territory of Australia and John Rapaic. His Worship made the following orders:

1. Time extended pursuant to s 5(3) Crimes Compensation Act, to apply for compensation certificates. Such applications to be filed by 4.00pm on 15 November 2002.

2. The first respondent to the application is to be entitled the Northern Territory and not Solicitor for the Northern Territory.

[3] These orders were made with respect to three applications filed 28 October 2002 for time to be extended to the applicant to file an application under s 5(1) of the Act in accordance with a proposed application for assistance which were summarised by the learned stipendiary magistrate in his reasons for decision as "File no. 20201623 a beating at Cedar Grove Caravan Park in Alice Springs on 4 November 1985, 202015970 a sexual assault at Berrimah Hotel in late November/December 1985. 202015971. A sexual assault at Threeways in the Northern Territory in late November/December 1985."

[4] The learned stipendiary magistrate noted "that these applications, if time is extended cannot be commenced pursuant to the Crimes (Victims Assistance) Act. They can only be commenced pursuant to the Crimes Compensation

Act. See s 5(3) of the Crimes Compensation Amendment Act 83 of 1989, which came into force on 1 August 1990.

[5] A Notice of Appeal was filed on 27 November 2002. The grounds of the appeal are set out in that notice:

> "1. The learned Magistrate erred in finding that the Northern Territory's approach was too 'bluff'.
>
> 2. The learned Magistrate erred in finding:
>
> 2.1 That the location of the second respondent was 'neither here not there'.
>
> 2.2 That the death of the Applicant's mother was 'neither here nor there'.
>
> 2.3 That without the Northern Territory stating it did not believe the applicant, he could not identify prejudice.
>
> 3. The learned Magistrate placed too much emphasis on whether the Appellant had considered the First Respondent's evidence and formed an opinion as to whether she was to be believed or not.
>
> 4. The learned Magistrate erred in holding that he could not identify a prejudice to the Appellant if the Applications were granted.
>
> 5. The learned Magistrate erred in considering that the view of the 'informed' was relevant to the issue of prejudice.
>
> 6. The learned Magistrate erred by failing to properly consider the principles enunciated in the High Court decision of *Brisbane South Regional Health Authority v Taylor* 186 CLR 541.
>
> 7. The learned Magistrate failed to give any or any sufficient weight to the potential prejudice to the Northern Territory, namely:
>
> 7.1 The location and memory of the Second Respondent.
>
> 7.2 The death of the Applicant's mother.
>
> 7.3 The location and memory of the FACS and DCW workers.
>
> 8. The exercise of the learned Stipendiary Magistrate's discretion miscarried."

[6] The orders sought are as follows:

> "1. That the Appeal be allowed.
> 2. That the Applications for extension of times filed in Application numbers 20201623, 20215970 and 20215971 be dismissed."

[7] This appeal was lodged within 14 days in accordance with the time limit under s 19(3) of the Local Court Act in respect of an application for leave to appeal.

[8] On 7 February 2003, the appellant lodged an application for leave to appeal. This application stated amongst other matters that the grounds of the application appear in the affidavit of Lorraine Katherine Blakey sworn 7 February 2003 and filed with the application.

[9] The application seeks an order pursuant to Rule 83.23(2) that compliance with rule 83.23(1) be dispensed with.

[10] The applicant also applied for an order that the Notice of Appeal filed on 27 November 2002 be substituted with this notice of application for leave to appeal.

[11] In her affidavit sworn 7 February 2003, Ms Blakey sets out the Grounds of Appeal as set out in the Notice of Appeal filed on 27 November 2002. In her affidavit, Ms Blakey refers to the High Court decision in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 and seeks an order that leave be given to apply for an appeal to the Supreme Court, because the

principles applied by magistrates, in exercising their discretion to extend time to applicants to initiate proceedings, has not been fully considered by the Supreme Court of the Northern Territory since this High Court decision.

[12] Ms Blakey deposes to the fact that when she filed the Notice of Appeal pursuant to s 19(1)(a) of the Local Court Act she was aware that an order refusing an extension of time had previously been held to be of an interlocutory nature (*Patterson v Northern Territory of Australia & Anor* (2001) NTSC 93 delivered 1 November 2001) and accordingly the time in which to file an application for Leave to Appeal was 14 days from the date of the order.

[13] Ms Blakey states it was her intention to file an application for Leave to Appeal and Notice of Appeal within time.

[14] On 4 February 2003, solicitors for the first respondent informed Ms Blakey that the appeal should have been initiated by way of an application for leave pursuant to s 19(3) of the Local Court Act and not s 19(1)(a).

[15] Ms Blakey deposes to the fact that having subsequently considered the relevant sections of the Local Court Act she agrees the appeal proceedings should have been initiated pursuant to s 19(3) of the Act.

[16] Ms Blakey stated it was always her intention to comply with the 14 day time period in which to file an appeal to the Supreme Court from the interlocutory decision of the learned stipendiary magistrate.

[17] Ms Blakey attests to the fact that there was an error made on her part but she does not believe the first respondent has suffered any prejudice by this appeal being initiated by the wrong process.

[18] Rule 83.23(1) and (2) of the Supreme Court Rules provides as follows:

> "**83.23 Time for filing application**
>
> (1) An application under this Part shall be filed –
>
> (a) within 7 days after the material date; or
>
> (b) by such later date as is fixed for that purpose by the tribunal below.
>
> (2) Where an application under this Part is not filed within the time limited by subrule (1), an order shall be sought in the application that compliance with that subrule be dispensed with."

[19] The appellant did file the Notice of Appeal within the 14 day time limit provided under s 19(3) of the Local Court Act for the filing of an application for leave to appeal. The respondent was made aware within fourteen days from the date of the interlocutory order that the appellant intended to appeal the decision. The error made by the appellant was one of form rather than substance. It has not resulted in any prejudice to the respondent.

[20] I consider under Rule 83.23(2) that compliance with Rule 83.23(1) be dispensed with.

[21] I allow the appellant to substitute the Notice of Appeal filed on 27 November 2002 with the Notice of Application for leave to appeal lodged on 7 February 2003.

[22] I now turn to deal with the substantive appeal.

[23] The factual background to this matter has been set out in the appellant's outline of submissions. There is no contest with this and I have set out the factual background as follows:

> "3.1 Ms O'Connor (the first respondent) made application for a compensation certificate under the Crimes Compensation Act with respect to three alleged offences said to have been perpetrated upon her by Mr Rapaic (the second respondent) in the months of November/December of 1985.
>
> 3.2 Ms O'Connor first reported these alleged offences to Northern Territory Police on 4 May 2000.
>
> 3.3 Ms O'Connor first filed applications for the issue of a compensation certificate on 28 October 2002 and further sought for time to be extended pursuant to section 5(3) of the Crimes Compensation Act.
>
> 3.4 On 14 November 2002 his Worship Mr Gillies SM (the learned Magistrate) ordered that time be extended to apply for compensation certificates until 4.00 pm on 15 November 2002.
>
> 3.5 On 27 November 2002 the appellant filed a Notice of Appeal pursuant to section 19(1) of the Local Court Act.
>
> 3.6 On 7 February 2003 the appellant filed an Application for Leave to Appeal pursuant to section 19(3) and an affidavit of Lorraine Katherine Blakey sworn 7 February 2003."

[24] In his reasons for decision on 14 November 2002, the learned stipendiary magistrate described the three applications filed on 28 October 2002 as follows:

> "The proposed applications for assistance are as follows; file 20201623 a beating at Cedar Caravan Park in Alice Springs on 4 November 1985. 20215970, a sexual assault at Berrimah Hotel in late November/December 1985. 20215971, a sexual assault at Threeways in the Northern Territory in late November/December 1985."

[25] The principles to be applied with respect to applications for an extension of time are set out in *Brisbane South Regional Health Authority v Taylor* (1996) (supra). Dawson J at 544 said:

> "…. The onus of satisfying the court that the discretion should be exercised in favour of an applicant lies on the applicant. To discharge that onus the applicant must establish that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant. I agree with McHugh J that once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation. …."

Toohey and Gummow JJ at p 548 - 549:

> "… A material consideration (the most important consideration in many cases) is whether, by reason of the time that has elapsed, a fair trial is possible. Whether prejudice to the prospective defendant is likely to thwart a fair trial is to be answered by reference to the situation at the time of the application. It is no sufficient answer to a claim of prejudice to say that, in any event, the defendant might have suffered some prejudice if the applicant has not begun proceedings until just before the limitation period had expired."

McHugh at 551:

> "… An applicant for an extension of time who satisfies those conditions is entitled to ask the court to exercise its discretion in his or her favour. But the applicant still bears the onus of showing that the justice of the case requires the exercise of the discretion in his or her favour.
>
> The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law as been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitation has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates' [*R v Lawrence* [1982] AC 510 at 517, per Lord Hailsham of St Marylebone Local Court]. Sometimes the

> deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. .... So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now 'knowing' that it ever existed. .... The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose."

McHugh at 553 - 554

> "... The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. ..."

McHugh at 555

> "... But the justice of a plaintiff's claim is seldom likely to be strong enough to warrant a court reinstating a right of action against a defendant who, by reason of delay in commencing the action, is unable to fairly defend itself or is otherwise prejudiced in fact and who is not guilty of fraud, deception or concealment in respect of the existence of the action.
>
> ... When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice. ..."

[26] It is also important to take into account the facts in this case. In *Brisbane South Regional Health Authority v Taylor,* Toohey and Gummow JJ at 545:

> "On 29 May 1979 (that is, just over seventeen years ago) the respondent attended the appellant's hospital for review following a laparoscopy which, it is said, revealed pelvic inflammatory disease. She alleges that Dr Chang recommended a hysterectomy, telling her that without such an operation 'she was at risk of death'. On 5 June

> 1979 she underwent a hysterectomy and has experienced pain ever since. ….. The hysterectomy, she says, was neither necessary nor appropriate to deal with her condition. ….”

and further at 545:

> “…. An employee of the appellant’s solicitors has deposed: ‘My attempts to contact Dr Chang have been unsuccessful.’”

and p 546:

> “It is apparent that if the proposed action proceeds to trial the crucial issue will be the conversation between the respondent and Dr Chang which is the subject of Dr Chang’s notes. ….”

[27] In the application that is the subject of appeal to this Court, there are a number of factors which distinguish it from the factual basis for the decision in *Brisbane South Regional Health Authority v Taylor* (supra).

1) The basis of the claim involves allegations of physical and sexual assault by a stepfather upon his stepdaughter at a time when the applicant was still a child and not in a position to pursue any claim for compensation.

2) This is an application for compensation under the Crimes Compensation Act which is beneficial legislation as distinct from an action under the common law.

3) The success of the application will depend upon the credibility of the applicant supported to an extent by the reports from the Community Welfare Department in South Australia and the Northern Territory.

It is not a situation where a conversation between a plaintiff and her doctor who cannot be located is "crucial" to the outcome of the claim.

[28] The essential prejudice claimed by the appellant in this matter is as follows:

1. The delay of nearly 17 years between the commission of the alleged offences and the filing of an application for extension of time under s 5(3) of the Crimes Compensation Act.

2. The second respondent, John Rapaic, cannot be located.

3. The mother of the first respondent died in 1992. Any relevant evidence she may be able to give is lost.

[29] In her affidavit sworn 4 May 2000, Teresa Maria O'Connor deposes to the fact that in 1985 she was 15 years of age. She details acts of sexual abuse by the second respondent upon her from the age of five years to the age of 15 years including acts of sexual intercourse from the time she was 10 years of age. In her affidavit sworn 11 November 2002, Ms O'Connor states that the last time she saw the second respondent was in December 1994 when she asked him to leave her home. She further deposes to the fact that the last time she had any contact with the second respondent was when he telephoned her early in January 1995.

[30] Ms O'Connor details the attempts she has made to locate the whereabouts of the second respondent without success. Police checks with Centrelink

revealed the second respondent was last in receipt of Centrelink benefits in May 1996. I note there is a letter from the Police Department in Western Australia indicating John Rapaic arrived at Perth Airport on a return flight from Thailand on 16 May 2000. Further inquiries have failed to locate his present whereabouts.

[31] The affidavit material prepared by Ms O'Connor sets out her reasons for not reporting the incidents to police until the statement she made dated 5 October 1996 when she was 26 years of age.

[32] Counsel for the applicant, Teresa O'Connor, in the proceedings before the learned stipendiary magistrate, sought to distinguish this matter from that of *Brisbane South Regional Health Authority v Taylor* (supra). Where "the crucial issue would be the conversation between the respondent and Dr Chang which is the subject of Dr Chang's notes".

[33] In the application before this Court the crucial issue is not the recollection of a conversation. The applicant for compensation in this matter is alleging acts of physical and sexual abuse stretching over a period of some 11 years. There are notes from the Department of Community Welfare in Alice Springs and Port Augusta which give support to the allegations made by Teresa O'Connor. The allegation is the physical and sexual assaults took place in South Australia, the Northern Territory and Western Australia. It is only the physical and sexual assaults that took place in the Northern Territory in November/December 1985 that are the subject of an application.

[34] In her affidavit sworn 30 January 2002, Ms O'Connor deposes to the fact that as she was a minor at the time of the various assaults she did not have the legal capacity to commence proceedings within the limitation period. Ms O'Connor reported the offences on 5 October 1996 at the age of 26 and made a statement to the South Australian Police. On 4 May 2000 she reported the matters to the Northern Territory Police being the offences that had occurred in Alice Springs. These two statements are annexed to the affidavit of Ms O'Connor sworn 30 January 2002.

[35] I accept that a delay of 17 years from the time of the alleged offence till the date of the application for an extension of time is prima facie a prejudice faced by the appellant as is the fact that the second respondent cannot be located. I am not persuaded there is a prejudice to the appellant as a consequence of the death of the applicant/respondent's mother in 1992.

[36] I now turn to deal with each of the grounds of appeal.

Ground 1: The learned magistrate erred in finding that the Northern Territory's approach was too 'bluff'.

[37] This may not have been an appropriate way in which to describe the approach of the Northern Territory but I am not persuaded it resulted in an error in the exercise of the discretion to grant an extension of time.

Ground 2: The learned magistrate erred in finding:

2.1 That the location of the second respondent was 'neither here not there'.

2.2 That the death of the applicant's mother was 'neither here nor there'.

2.3 That without the Northern Territory stating it did not believe the applicant, he could not identify prejudice.

[38] These findings were open to the learned stipendiary magistrate on the evidence before him. The allegations were such that only the applicant and her stepfather, John Rapaic, could know what occurred. The appellant has not shown that the evidence of Ms O'Connor's mother would have been of assistance to the appellant.

[39] The comment concerning the location of the second respondent was made in the context of unchallenged evidence presented by the applicant. The credibility of the applicant, Ms O'Connor, is an important issue which can be raised on the hearing of the application.

Ground 3: The learned magistrate placed too much emphasis on whether the appellant had considered the first respondent's evidence and formed an opinion as to whether she was to be believed or not.

[40] There was agreement from the solicitor for the Northern Territory that they had not analysed the substance of the applicant's allegations and were not challenging her credibility but rather were concerned that the delay in making the application had deprived them of the ability to properly test the assertions.

[41] The learned stipendiary magistrate was entitled to take into account the fact that there was no direct challenge to the applicant's evidence and that if there was no challenge there was no issue to try.

Ground 4: The learned magistrate erred in holding that he could not identify a prejudice to the appellant if the applications were granted.

[42] This finding was made on the basis that the representatives for the Northern Territory had not given any consideration to the merits of the application and as there was no challenge to the allegations there could not be a question of prejudice.

Ground 5: The learned magistrate erred in considering that the view of the "informed" was relevant to the issue of prejudice.

[43] This has been adequately dealt with under the other grounds of appeal.

Ground 6: The learned magistrate erred by failing to properly consider the principles enunciated in the High Court decision of *Brisbane South Regional Health Authority v Taylor* 186 CLR 541.

[44] The authority of *Brisbane Regional Health Authority v Taylor* (supra) was referred to the learned stipendiary magistrate. I consider this case is distinguishable from *Brisbane South Regional Health Authority v Taylor* (supra) in that the learned stipendiary magistrate was not able to find actual prejudice. I refer to the following statement of principle expressed by McHugh J at 555:

> "… When a defendant is able to prove that he or she will not now be able to fairly defend him or herself or that there is a significant

> chance that this is so, the case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by baring the plaintiff's action. When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice. In such a situation, actual injustice to one party must occur. It seems more in accord with the legislative policy underlying limitation periods that the plaintiff's lost right should not be revived than that the defendant should have spent liability reimposed upon it. This is so irrespective of whether the limitation period extinguishes or merely bars the cause of action."

It was within the discretion of the learned stipendiary magistrate to find the appellant had failed to prove actual prejudice. It was on this basis he allowed the application for an extension of time.

Ground 7: The learned magistrate failed to give any or any sufficient weight to the potential prejudice to the Northern Territory, namely:

7.1 The location and memory of the second respondent.

7.2 The death of the applicant's mother.

7.3 The location and memory of the FACS and DCW workers.

[45] The allegations in this matter are such that only the applicant and John Rapaic are in a position to give evidence as to what occurred. The appellant has not shown that the death of the applicant's mother has caused actual prejudice to the appellant.

[46] I accept that the fact the second respondent cannot be located is prima facie prejudicial to the appellant as is the length of time that has elapsed since the alleged offences occurred. The applicant has completed a very detailed

statement and supporting affidavit, this includes reasons for the delay in making the application. There is also included in the material presented in support of the application, observations of physical injury to the applicant made by officers of the Department of Community Welfare and extensive documentation as to action taken by the officers and their concerns for the welfare of the applicant at the relevant time.

[47] Whilst the appellant has shown a prima facie prejudice they have not taken the matter further than a prima facie level.

Ground 8: The exercise of the learned stipendiary magistrate's discretion miscarried.

[48] The learned stipendiary magistrate was well aware of the delay that occurred before the applications were filed. He did not consider there was any evidence of contumelious behaviour by the applicant. In his reasons for decision, his Worship recognised that these types of allegations are often not forthcoming until the alleged victim has reached a certain level of maturity. He also noted that the appellant had not examined the detail of the allegations and had not indicated they disputed the truth of the assertions.

[49] The lengthy period of the delay and the inability to locate the second respondent are prima facie matters prejudicial to the appellant. The learned stipendiary magistrate exercised a discretion to extend the time limit for making the application as he considered this case to be a justifiable

exception to the rule that the welfare of the State is best served by the limitation period in question.

[50] In these circumstances I am not persuaded the learned stipendiary magistrate's discretion miscarried. I would dismiss the appeal.

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