

*Northern Territory v Public Trustee of NT* [2001] NTSC 110

**PARTIES:** THE NORTHERN TERRITORY OF AUSTRALIA

and

PUBLIC TRUSTEE OF THE NORTHERN TERRITORY OF AUSTRALIA on behalf of the estate of MICHAEL JAMBAJIMBA MARSHALL

**TITLE OF COURT:** SUPREME COURT OF THE NORTHERN TERRITORY

**JURISDICTION:** SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY APPELLATE JURISDICTION

**FILE NO:** No 2 of 2001 (9710750)

**DELIVERED:** 7 December 2001

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**JUDGMENT OF:** MILDREN J

**REPRESENTATION:**

*Counsel:*

Appellant: J Stirk  
Respondent: J B Waters QC

*Solicitors:*

Appellant: Povey Stirk  
Respondent: Collier & Deane

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IN SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT ALICE SPRINGS  
(9710750)

*Northern Territory v Public Trustee of NT* [2001] NTSC 110

BETWEEN:

**THE NORTHERN TERRITORY OF  
AUSTRALIA**  
Appellant

AND:

**PUBLIC TRUSTEE OF THE  
NORTHERN TERRITORY OF  
AUSTRALIA** on behalf of the estate of  
**MICHAEL JAMBAJIMBA MARSHALL**  
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 7 December 2001)

- [1] This appeal raises the question of whether an application for assistance under the *Crimes (Victims Assistance) Act* (the CVA Act) survives the death of the victim, in circumstances where the death of the victim was not the result of the injuries the victim sustained as a result of the offence committed by the offender upon the victim and where the victim had brought an application for a certificate which was still pending at the date of his death.

[2] The learned Magistrate held that the application was a cause of action vested in the victim within the meaning of s 5(1) of the *Law Reform (Miscellaneous Provisions) Act* (the LRMP Act) and therefore survived for the benefit of his estate and granted a certificate for the maximum claimable, namely \$25,000.

[3] The appellant has appealed that decision to this Court. Counsel for the appellant, Mr Stirk, submits:

1. the principle that a personal action dies with the claimant has no application to a statutory claim for compensation under the CVA Act;
2. the provisions of s 5 of the LRMP Act do not apply to statutory claims;
3. the question of whether or not the claim survives the death of the complainant depends upon the intention of the legislature to be ascertained by reference to the terms of the CVA Act only.
4. on the true construction of the CVA Act, the claim did not survive for the benefit of the victim's estate.

[4] Counsel for the respondent, Mr Waters QC, submitted:

1. the action fell within the description of a cause of action vested in the victim as at the date of his death, and therefore survived because of s 5 of the LRMP Act;

2. there is a presumption that statutory rights survive unless there is a clear indication to the contrary in the Act and there is no such indication in the CVA Act;
3. in any event, on the true construction of the CVA Act, the claim did survive for the benefit of the victim's estate.

[5] The submissions thus raised, and the authorities referred to by counsel for the parties raise for consideration, the following questions:

1. what is the nature of the right which the deceased had to claim compensation under the CVA Act?
2. Was that right assignable during his lifetime?
3. Did the right lapse with the deceased's death, or did it survive to form part of his estate?
4. If the right did not survive at common law, did it survive under the provisions of the LRMP Act?
5. As a matter of construction of the CVA Act, is the intention of Parliament able to be ascertained one way or the other?

### **The Nature of the Right.**

[6] Section 5(1) of the CVA Act provides, relevantly, that

a victim...may, within 12 months of the date of the offence, apply to a Court for an assistance certificate in respect of the injury suffered by him as a result of that offence.

Section 4(1) defines "injury" to mean:

Bodily harm, mental injury, pregnancy, mental shock or nervous shock but does not include an injury arising from the loss of or damage to property...

Section 4(1) defines "offence" as meaning:

An offence, whether indictable or not, committed by one or more persons which results in injury to another person.

Section 4(1) defines "victim" to mean:

A person who is injured or dies as the result of the commission of an offence by another person.

"Court" is defined by s 4(1) to mean the Local Court. Thus, s 5(1) gives a right to a "victim" of an "offence" who has suffered "injury" as a result thereof to apply to the Local Court for an assistance certificate within the time limit therein prescribed.

- [7] Section 6 requires the application to be served on the Solicitor for the Northern Territory and where the identify of the offender is known, on the offender. Section 4(1) defines "offender" to mean "a person who commits an offence which results in an injury to another person". Section 7 says that the parties to the proceedings shall be the Crown and the offender (where the offender is known). Section 15(1) provides that the procedure is, subject to the Act, the Regulations and any rules or practice directions made or given specifically for the conduct of the business of the Local Court under this Act, within the discretion of the Court. Section 17 provides that the

standard of proof is the balance of probabilities and that a transcript of the evidence of proceedings in any other court may be received into evidence. Section 15(3) provides that the Court is not bound by the rules of evidence and may inform itself as it thinks fit. Section 8 provides that "upon hearing an application under s 5, the Court may issue an assistance certificate..." which shall specify the amount that the Territory shall pay by way of assistance to the victim. Section 9 sets out the heads of loss which may be taken into account when assessing the amount to be included in the certificate. In *Woodruffe v Northern Territory of Australia* (2000) 10 NTLR 52 at para 34, the Court of Appeal (Martin CJ, Mildren and Riley JJ) said:

Although it has been held that common law principles have application to the assessment of the statutory assistance provided...that observation cannot override a clear expression of legislative intention to be found in the Act. The common law principles of causation and assessment of damages provide no more than a guide to the operation of the statutory scheme of assistance established by the Act.

- [8] Sections 10, 11, 12 and 13(2) place some limiting factors on either the amount of the assistance payable, or whether assistance is payable at all. Maximum limits are fixed by s 13(1), which in the case of an application under s 5(1) is \$25,000.
- [9] Section 20 requires the Territory to pay to the applicant the amount specified in the certificate, together with the amount of any costs ordered. It appears that the monies so paid are required to be paid out of the Victims' Assistance Fund established by s 25A of the Act. Section 21(1) gives a right

to the Territory to recover the amounts so paid from the offender "as a debt due and payable to the Territory". Section 21(2) enables the Territory to file in the Local Court a notice specifying the amount paid under s 21(1).

Section 22 provides for the subrogation of the victim's rights against the offender once a payment under s 20 has been made. Section 23(1) preserves the victim's common law rights of action and s 23(2) provides that a court shall not take into account "that compensation has been or may be paid under this Act" when assessing his or her damages.

[10] I consider that the provisions of the Act confer a right vested in a "victim" immediately upon his suffering "injury" as the result of an "offence" to apply for an assistance certificate, or, to use the expression in s 23(2), to seek "compensation" under the Act. It is true that s 8(1) of the Act uses the word "may", but that word confers a power. The rest of the Act confers expressly, or by implication, a right to compensation under the Act in the circumstances envisaged by its provisions, a right which, by s 19(1) of the *Local Court Act* is subject to appeal to this Court on any question of law. In these circumstances, the Local Court is compelled to exercise the power whenever an applicant establishes the facts entitling him or her to an assistance certificate: see *Julius v Lord Bishop of Oxford* (1880) 5 A.C. 214. That right became vested in the victim in this case immediately he suffered injuries as a result of the offence; it was not contingent upon his bringing an application under the Act. The time limit in s 5(1) is not, in my opinion, a condition precedent to the existence of his right, but operates only as a

statutory bar to its enforcement, a bar which in any event the Local Court can extend under s 5(3) of the Act. Further, it is a cause of action enforceable through the Local Court: c.f. *Sugden v Sugden* [1957] P 120 at 134-5 per Denning LJ.

### **Is the right assignable?**

- [11] I consider that the present state of the authorities probably suggests that the right is not assignable because the amount of compensation to be awarded is not a liquidated sum and is what was referred to in the authorities as a "bare right of action": see Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, 3<sup>rd</sup> Edn., paras 693-696; and this would appear to be so, notwithstanding the broad language of s 182 of the *Law of Property Act*. Whether this still represents the law may be doubtful given that the principal reason for the rule appears to have been grounded on the fact that it savoured or was likely to lead to maintenance: see *Glegg v Bromley* [1912] 3 KB 474 at 489-90; but whether the tort of maintenance still exists in Australia is doubtful: see *Clyne v The N.S.W. Bar Association* (1960) 104 CLR 186 at 203. In view of the ultimate conclusions I have reached, it is not necessary to decide this question.

### **Did the right lapse with the deceased or did it survive to form part of his estate at common law?**

- [12] The answer to this question depends first upon a consideration of the maxim *actio personalis moritur cum persona* and secondly, upon general principles relating to succession.



[13] The common law "rule" is that personal actions die with the person: *actio personalis moritur cum persona*. However, the so called rule admitted of many exceptions and is now confined to common law actions for personal injuries suffered as a result of the tortious conduct of another and anomalously, for actions for general damages (but not special damages) for breach of promise to marry: see *Finlay v Chirney* (1888) 20 QBD 494. The doubtful origin of the rule and of the Latin maxim used to express it, is discussed by many writers: see Holdsworth, *A History of English Law*, Vol 3, pp 576-585; Goudy, *Essays in Legal History* (Vinogradoff Edn 1913) 215-232; Winfield, *Death as Affecting Liability in Tort*, (1929) 29 Col L.R. 239; *Finlay v Chirney*, supra, at 502-504 per Bowen and Fry LLJ. By the nineteenth century, save for the exceptional action for breach of promise to marry which was considered to be tortious in character: see Lord Ellenborough in *Chamberlain v Williamson* (1814) 2 M & S 408 at 415; 105 ER 433 at 436, even though the action was for assumpsit which had not been subject to the rule since *Pinchon's Case* (9 Rep 89b) in 1609), the rule had never extended beyond common law actions in tort: "...*actio personalis* (which is always understood of a tort) *moritur cum persona*..." per Willes CJ in *Sollers v Lawrence* (1743) (Wilkes, 413 at 421); 125 ER 1243 at 1247); *Blackstone's Commentaries*, Vol III, p302 (Legal Classics Library Edn); *Raymond v Fitch* (1835) 2 C M & R 588 at 597-600; 150 ER 251 at 254-5, Winfield, supra, at 248-9 says:

The conclusion seems to be that, under the head which we are now discussing, the maxim was little known as such and never did any harm from its first appearance to the Act of 1833, which deprived it of any power to do mischief in the way of preventing survival of rights and liabilities in torts which did not inflict death. The text-books and decisions limit it to trespasses or torts, and usually to trespasses of a personal character. It was pregnant with mischief to which it never gave birth.

[14] In modern times, what remains of the rule has been not only abrogated by statute (except for actions for libel, seduction, inducing a spouse to separate or for damages for adultery: see LRMP Act s 5(2)) but has been consistently held to not apply to new situations, particularly causes of action granted by statute. In *United Colliers Limited v Simpson* (1909) AC 383, Lord Shaw of Dunfermline said at 396:

The truth is that this maxim, "Actio personalis moritur cum persona" is of doubtful origin, has produced confusion rather than guidance in specific cases, and is used to dress up a conclusion already formed than as a safe guide towards a conclusion. I agree with Lord Kinnear in thinking, so far as this case is concerned, that "it has no bearing on the question of the Workmen's Compensation Act".

[15] The maxim has been held not to apply to:

1. actions brought by a personal representative of a deceased workman for compensation due under the Workman's Compensation Acts (see *United Collieries Ltd v Simpson*, supra; *Schlenert v HG Watson Contracting Co Pty Ltd* (1979) 1 NSWLR 140);
2. actions brought on a statute to recover rent paid in excess of the rent fixed by statute: see *Dean v Wiesengrund* [1955] 2 QB 120;

3. complaints brought under the *Sex Discrimination Act 1984* (Cth);  
*Stephenson v Human Rights and Equal Opportunity Commission and Another* (1996) 139 ALR 678;
4. a claim for mandamus to construct a sewer as required by statute: see  
*Peebles v Oswaldtwistle Urban District Council* (1896) 2 QB 159;
5. a claim to enforce a right conferred by statute to give or withhold consent to use dramatic performances: see *Rickless v United Artists Corp* [1988] QB 40.

Since *Finlay v Churney* in 1888, there is not a single instance to which I have been referred or which I myself have been able to find, of the so called rule being successfully called in aid to defeat an executor's action, except where the action was in tort and fell within the statutory exceptions to the LRMP Act.

[16] It was suggested by Mr Waters QC for the respondent, that the right of action given to the deceased by the CVA Act to apply for a certificate was an action in tort. I do not consider that such rights as the deceased had could be so described: see *Pinecot Pty Ltd v Anti-Discrimination Commissioner* (2001) NTSC 107.

[17] It is nevertheless the case that not all rights of a testator survive his death for the benefit of his estate. An obvious example is certain contracts for personal services because it was the intention of the parties that the contract

could only be performed by the deceased personally: see *Mayne v Jaques* (1959-60) 101 CLR 169 at 172 per Fullagar J; and the discussion in *Williams and Mortimer, Executors, Administrators and Probate*, (1970 Edn.) p503-4. One approach has been to see if the right is assignable either in law or equity (see for example *Dean v Wiesengrund*, supra, at 131, 136; *Mayne v Jaques*, supra at 172, 182), however this is not in itself a complete test as a right may still devolve for the benefit of a testator's estate even though it is not assignable: see *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540 at 557-8 per Dixon CJ; at 568 per Fullager J; at 583 per Kitto J.

[18] The present position, so far as the general law is concerned, is thus expressed by *Williams and Mortimer*, supra, at pp488-489:

The general rule has been established from the earliest times, that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor or administrator. The rule was recognised by statutes, and now by the Law Reform (Miscellaneous Provision) Act 1934...it is enacted that on the death of any person...all causes of action vested in him shall survive for the benefit of his estate. This includes, but is not confined to, rights that can be enforced by action so long as they are rights and not mere hopes or contingencies.

[19] The words used in s 5 of the LRMP Act have not been confined to actions in tort. *Williams and Mortimer*, supra, at 490, suggest that "even where the contract which was broken during the lifetime of the deceased was a mere personal contract, it is clear that the cause of action thereby vested in the

deceased will survive for the benefit of the estate", citing the *Law Reform (Miscellaneous Provisions) Act 1934*, s1 (UK). The authors go on:

This reverses the common law rule as stated in earlier editions of this work, that, as a result of the decision in *Raymond v Fitch*, a personal representative could probably sue for any breach of contract in the life-time of the deceased unless it was a mere personal contract, where the rule *actio personalis moritur cum persona* applied.

However, *Raymond v Fitch*, supra, is not authority for that proposition. As Lord Abinger CB said, at 597 (ER, at 254):

The maxim, that "*actio personalis moritur cum persona*" is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by statute law.

[20] I decline to add another category of case to a doctrine which, for so long, has been limited to actions in tort and actions for breach of promise and which in any event has been abrogated by statute. I therefore accept the first of Mr Stirk's propositions, that under the general law the right to bring an action for a certificate under the CVA Act was not subject to any rule precluding the right from devolving upon the deceased's death to his personal representative. However, it by no means follows that s 5(1) of the LRMP Act is therefore irrelevant.

***The Law Reform (Miscellaneous Provisions) Act***

[21] Section 5 of the LRMP Act provides:

- (1) Subject to this Part, on the death of a person after the commencement of this Ordinance all causes of action subsisting against or vested in him survive against his estate or, as the case may be, for the benefit of his estate.
- (2) This section does not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

[22] I consider that the right to seek a compensation certificate is a "cause of action". In *Letang v Cooper* [1964] 2 All ER 929 at 934, Diplock LJ (as he was then) said:

A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

[23] In *Chong v Chong*, [1999] QCA 314 (unreported), the Queensland Court of Appeal held that a statutory right to obtain compensation for injury suffered as the result of a crime was such a cause of action. A statutory right of action was also held to be within the terms of the English provision in *Dean v Wiesengrund*, supra, at 129, 132, 138-9. Therefore, the fact that the right is conferred by statute rather than being a cause of action at common law is insufficient to take it out of the words of the section. The situation in *Chong v Chong* was that it was the perpetrator of the offence who had died, rather than the victim as in this case, but s 5(1) of the LRMP Act applies whether the deceased is the plaintiff or the deceased is the defendant. The only other question is whether the deceased in this case had a cause of action subsisting in him or vested in him at the time of his death. I have

already answered that question in the affirmative: see also *Sugden v Sugden*, supra. Therefore, unless the provisions of the CVA Act suggest a different answer, I reject the second of Mr Stirk's propositions.

### **What was the intention of Parliament?**

[24] I return now to the CVA Act to see if the intention of Parliament is able to be ascertained one way or the other, bearing in mind that both under the general law and under the LRMP Act the right of action would have survived for the benefit of the estate. Before doing so, I should refer to the observations of Wilcox J, with whom Jenkinson and Einfeld JJ agreed, in *Stephenson v Human Rights and Equal Opportunity Commission and Another*, supra, at 684:

I accept the submission of counsel for the Attorney-General that the present issue must be resolved by reference to the terms of the Sex Discrimination Act. With respect to the contrary view of Sir Ronald Wilson and Beazley J, I do not think that common law rules are relevant to this case. Those rules were evolved by judges as necessary ancillaries to substantive common law principles, also evolved by the judges. They are meaningful only in relation to the common law actions to which they relate. Where a right of action is created by statute, guidance must be sought in the statute itself; a parliament that creates a cause of action may ordain as it pleases in relation to the cause of action's survival on death of a party. And the same principle, applies in relation to a statutory entitlement that falls short of constituting a "cause of action", as lawyers use that term or a statutory proceeding.

If the common law rules are irrelevant, it follows that s 2(1) of the Law Reform (Miscellaneous Provisions) Act is also irrelevant.

[25] That decision was made in a context where, by reason of the fact that the Court was dealing with a proceeding in a Commission established by an Act

of the Commonwealth, s 80 of the *Judiciary Act* did not apply so as to make s 2(1) of the *Law Reform (Miscellaneous Provisions) Act*, (NSW), and the general law of New South Wales applicable to the situation there being considered, namely, whether a complaint lodged with the Commission survived after the complainant's death. There was therefore no general law or statutory law to consider as a background to the Act in question, whereas there is in this case. In England, where the situation is the same as in this Territory, the background of the general law has been taken into account. In *Rickless v United Artists Corp* [1988] QB 40, Browne-Wilkinson VC said, following *Dean v Wisenrund*, supra, that prima facie a statutory right which would have survived under the general law would survive unless there were clear words to the contrary to be found in the statute creating the right. Approaching the question on that basis, there are no such clear words and, if that is the correct approach, the right survives. I therefore reject the third of Mr Stirk's propositions.

[26] However, even if the correct approach is that adopted by Wilcox J in *Stephenson's* case, supra, (and I note that a similar approach has been adopted in many other cases, eg. *United Collieries Ltd v Simpson*, supra; *Mayne v Jaques*, supra; *Managing Director, NSW Technical and Further Education Commission v Fines* (1993) 32 NSWLR 383, I consider that the same result must be arrived at. It is true that the CVA Act makes specific provision in s 5(1) for circumstances where the victim is, by reason of injury, disease or infirmity, not capable of managing his affairs and that in



those circumstances the application may be brought on his behalf by some person who, in the opinion of the court, is a suitable person to represent the interests of the victim. It is also the case that the Act provides a specific remedy where the victim dies as a result of the injury suffered to him: see s 5(2). But that does not lead to the conclusion that the *expressio unius* principle applies: see *Dean v Wiesengrund*, supra at 130-131, per Jenkins LJ and at 137-138 per Morris LJ (as he then was). On the other hand, the right of the Territory to proceed to judgment against the offender given by s 21 appears, plainly on its face, a right which would survive the offender's death.

[27] Even if this be wrong, the clear intent to be ascertained from s 22 is that if the offender has died, the Territory has a right of recovery through subrogation of the victim's common law rights which would clearly survive as against the offender's estate because of s 5(1) of the LRMP Act. It is plain that the rights of a victim do not, and cannot, come to end on the offender's death because, notwithstanding that the offender is a party (if he is known) the person liable to pay the compensation is the Territory. The fact that the application does not come to an end upon the offender's death suggests that it is unlikely that the legislature intended that the right would come to an end on the victim's death. The original reason for the *actio personalis* rule, as *Winfield*, supra, suggests at 242, so far as suing the estate of a deceased tortfeasor was concerned, was that actions for trespass were closely allied to appeals for felony and if one looks at trespass as a crime, it

was natural to suppose that no one should be liable for it but the person who committed it. Further, as a felon originally forfeited all he had to the Crown, this "...makes the rule as to intransmissibility not only understandable, but even rational. True, the argument is not so strong for denying survival of the action to the *plaintiff's* successors against a still living defendant. But perhaps the rule that an appeal ended, whether it was the appellor or the appellee who died, infected the law about trespass also." (I note that historically the rule had nothing to do with the fact that damages were at large and in any event, applied even to claims for property loss and for special damages.) If the action against the offender or the Crown is still maintainable should the offender die, there is no reason based on historical considerations to infer that a different approach should be now taken to the victim's action should the victim have died.

[28] Further, there is nothing in s 5(1) of the CVA Act which confers the right, which unequivocally shows that the intention was that the right would not survive the victim's death. As this is beneficial legislation, s 5(1) must be construed to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open: see *Woodruffe v The Northern Territory of Australia*, supra, at [28]. The purpose of the Act is to provide compensation to victims of crime. Victims of crime are likely as not to have dependants who could well be expected to benefit from an award of compensation for pecuniary loss suffered by the victim, or who may have indirectly suffered from the victim having incurred

expenses as a result of the injury. It was submitted that in some cases, the ultimate beneficiary might in fact be the offender, a result which might well be described as absurd if it were true. I accept that it is not uncommon for offenders to be the victim's next of kin or the person most likely to benefit from an award to his estate. To the extent that that is so, the amount paid would be recoverable via the processes envisaged by s 21 and s 22 of the Act; and it may also be that the offender would be prohibited from recovering on the basis that it is contrary to public policy, but it is not necessary to decide that question. It is true that in some circumstances persons who would not otherwise have any moral claim to the money might gain a windfall, but that line of reasoning, which *Winfield* accepted was a valid policy reason for keeping that aspect of the rule which provided that actions in tort should die with the victim (*supra*, at 249-50), has been discarded by the legislature (and not only in this jurisdiction) by enactments such as the *Law Reform (Miscellaneous Provisions) Act*, s 5(1) and I see no reason why the legislature would wish now to resurrect it from the dead. Mr Stirk suggested another reason, namely that because of s 23(1), such claims were open to double-dipping, but this submission overlooks the Territory's rights of subrogation under s 22 of the Act.

### **Conclusion**

[29] In my opinion, the learned Magistrate was right for the reasons which I have endeavoured to express, in concluding that the victim's right to claim

compensation under the Act survived his death and may be pursued by his personal representative. Accordingly, the appeal is dismissed with costs.

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