

CITATION: *Scheepens v Northern Territory of Australia & Smith* [2002] NTMC 016

PARTIES: LAURA JANETTE SCHEEPENS
Applicant

v

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

and

TANYA SMITH
Second Respondent

TITLE OF COURT: LOCAL COURT

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20113594

DELIVERED ON: 31 May 2002

DELIVERED AT: Darwin by video conference link to Alice Springs

HEARING DATE(s): 13 March 2002

DECISION OF: Mr V M LUPPINO

CATCHWORDS:

Crimes Victims Assistance – Extension of time to file application – Discretion to allow extension of time – Factors relevant to exercise of discretion.

Crimes (Victims Assistance) Act ss 5(1), 5(3).

Solomon v Webbe & Anor (1993) 112 FLR 64; *Commonwealth v DKB Investments* (unreported, Supreme Court, NT, Mildren J, 12 September, 1991); *Braedon v Hynes* (1986) 4 MVR 521; *Napolitano v Coyle* (1977) 15 SASR 559; *Forbes v Davies & Anor* (1994) Aust Torts Reports 81-279; *Ulowski v Miller* [1968] SASR 277; *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1; *Woodruffe v Northern Territory of Australia* (2000) 10 NTLR 52.

REPRESENTATION:

Counsel:

Applicant:	Ms Blakey
First Respondent:	Ms Phillis
Second Respondent	Mr Preston

Solicitors:

Applicant:	Morgan Buckley
First Respondent:	Povey Stirk
Second Respondent	Murray Preston

Judgement category classification:	B
Judgment ID number:	[2002] NTMC 016
Number of paragraphs:	15

IN THE LOCAL COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20013594

BETWEEN:

LAURA JANETTE SCHEEPENS
Applicant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
First Respondent

and

TANYA SMITH
Second Respondent

REASONS FOR DECISION

(Delivered 31 May 2002)

Mr VM LUPPINO SM:

1. This is an application pursuant to section 5(3) of the *Crimes (Victims Assistance) Act* (“the Act”) for an extension of the time fixed by section 5(1) of the Act to commence proceedings under the Act. I heard argument in Alice Springs on 13 March 2002. At that time I gave directions as to filing of further affidavit material and written submissions both by the applicant and the respondents. The applicant has filed further affidavit material and written submissions. I have not received any affidavit material filed on behalf of the respondents nor any written submissions in accordance with those directions.
2. The offence the subject of the proposed application is an assault allegedly committed on the applicant by the second respondent on 21 February 1999.

The application for an extension of time was filed on 7 September 2001 i.e. over eighteen months after the expiration of the time period set by section 5(1) of the Act.

3. The evidence before me in support of the application comprises a number of affidavits. There are three affidavits of Peter Mark Twiggs sworn 11 June 2001, 4 March 2002 and 26 March 2002. There are three affidavits of the applicant sworn 31 May 2001, 11 March 2002, and 26 March 2002. In addition there is an affidavit of Lorraine Blakey sworn 26 March 2002. Mr Twiggs is the Adelaide solicitor of the applicant. Lorraine Blakey is a member of the firm of Morgan Buckley, the town agents of Mr Twiggs.
4. The findings that I am prepared to make on the available evidence are set out hereunder. At the argument before me on 13 March 2002 Mr Preston for the second respondent challenged the applicant's entitlement to an extension based on factual discrepancies in the affidavit material then available. I thought these were properly raised at the time. In the absence of any contradictory affidavit material or written submissions I am of the view that any apparent factual discrepancies have now been satisfactorily resolved. The absence of any contradictory evidence from the respondents means that the evidence led on behalf of the applicant is unchallenged. The findings I am prepared to make, both directly on the available evidence and by inferences I am prepared to draw from that evidence, are as follows:-
 - 4.1 After the alleged assault on 21 February 1999 the applicant moved to Adelaide; the move was at least partly due to her fear of the second respondent;
 - 4.2 After moving to Adelaide the applicant consulted Mr Twiggs and was given some initial advice regarding a possible common law claim as well as a claim for statutory compensation;

- 4.3 Mr Twiggs was not familiar with the Act at the time he was consulted. He gave advice based apparently on his knowledge of South Australian law, which I thought was a foolish and imprudent in the circumstances. On that basis the essential differences in relation to a common law claim are immaterial. However the South Australian scheme for compensation for injuries resulting from the commission of criminal offences has two material differences. Apparently under the South Australian scheme expenses incurred by the applicant consequent upon her relocation would not be recoverable and the limitation period for the commencement of an action is three years.
- 4.4 In early April 2001 following discussions with Mr Algie, an Adelaide barrister with some familiarity with the Act, informed Mr Twiggs of the correct position under the Act in relation both to the limitation period and the recovery of expenses.
- 4.5 Shortly thereafter Mr Twiggs sought advice from Morgan Buckley in relation to the Act.
- 4.6 In consequence, on or about 23 April 2001 Morgan Buckley gave advice to Mr Twiggs and also forwarded certain documentation to him, including documents for the purposes of the application for an extension of time.
- 4.7 By on or about 8 June 2001 Mr Twiggs had obtained instructions from the applicant to proceed with the application for an extension of time, had subsequently prepared the necessary documents, had arranged for affidavits to be sworn and had then forwarded that documentation to Morgan Buckley for filing in the Alice Springs Registry.

4.8 On 7 September 2001, i.e. a further delay of nearly three months, Morgan Buckley filed the application for an extension. That further delay was as a result serious personal factors on the part of the solicitor at Morgan Buckley then handling the matter.

5. I do not find anything untoward in relation to the delay between early April 2001, when Mr Twiggs learnt of the correct position in relation to the Act, and 8 June 2001 when completed documents were forwarded to Morgan Buckley. I am satisfied with the explanation offered for the delay referred to in paragraph 4.8 hereof and do not consider that relevant to the issue before me for the reasons which follow.
6. In consequence, I am of the view that the reasons for the failure to make application for an assistance certificate before the expiration of the period set out in section 5(1) of the Act is a combination of three factors. Firstly, it results from the applicant's own ignorance of the law. Secondly, it results from the ignorance of the Act by Mr Twiggs and the consequent incorrect legal advice he gave the applicant. Thirdly, it results from the delay of three months discussed in paragraphs 4.8 and five above.
8. The absence of affidavit material on behalf of the respondents means that I have no evidence before me of any actual prejudice suffered or likely to be suffered by the respondents.
9. Relevant cases dealing with the question of applications for extension of time, both generally and specifically under the Act include *Solomon v Webbe & Anor* (1993) 112 FLR 64, *Commonwealth v DKB Investments* (unreported, Supreme Court, NT, Mildren J, 12 September, 1991), *Braedon v Hynes* (1986) 4 MVR 521, *Napolitano v Coyle* (1977) 15 SASR 559, *Forbes v Davies & Anor* (1994) Aust Torts Reports 81-279, *Ulowski v Miller* [1968] SASR 277 and *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1.

10. Additionally some general comments in relation to interpretation of the provisions of the Act were made by the Court of Appeal in *Woodruffe v Northern Territory of Australia* (2000) 10 NTLR 52 (“Woodruffe”). In that decision, the Court of Appeal said:

“The purpose or object underlying the Act is to provide compensation to victims of crime. The preamble to the Act is that it is "An Act to provide assistance to certain persons injured or who suffer grief as a result of criminal acts". The Act is remedial and therefore should be construed beneficially, although excepting provisions in a remedial Act do not necessarily have to be given a liberal interpretation.”

11. In summary form, the principles derived from the foregoing and applicable to a determination of the issue in these applications are as follows:

- 11.1 Whether an extension should be granted involves the exercise of a discretion which, although unfettered, must nevertheless be properly exercised;
- 11.2 The applicant has the onus to make out a case for an extension of time;
- 11.3 Good reason must be shown before a court will grant an extension. Whether or not good reason exists is a question to be determined on the circumstances of each case;
- 11.4 The length of the delay on its own is not a material consideration;
- 11.5 The length of the delay and the explanation for the delay are relevant factors;
- 11.6 Prejudice must be taken into account;
- 11.7 The respondent has some burden in relation to prejudice i.e., where the basis of the prejudice is peculiarly within the knowledge of the respondent, the respondent has the onus to

establish prejudice by positive evidence and the court is entitled to assume that there is no prejudice in the absence of such evidence;

11.8 An application for extension should be declined in the event of “intentional and contumelious default” or “inordinate or inexcusable delay” resulting in a substantial risk that either a fair trial is not possible or that there will be serious prejudice;

11.9 Prejudice should not be assumed by mere lapse of time;

11.10 The hardship which will be caused to the applicant is relevant and is to be balanced against the prejudice which will be caused to the defendant and the extent to which the delay means evidence will become less cogent;

11.11 The application should be refused where actual prejudice of a significant kind is shown;

11.12 No regard should be had of the prospect or validity of an action for negligence against a legal adviser;

11.13 Courts generally tend to apply time limits less rigidly where there is no injustice, prejudice or hardship.

12. Applying these principles to the subject case leads inescapably to the conclusion that the application should be granted. It cannot be said that the delay is inordinate or inexcusable nor intentional. Moreover a delay of slightly more than 18 months beyond the applicable limitation period does not lead to any necessary inference, absent any positive evidence of prejudice, that there is a substantial risk that a fair trial is not possible.

13. Further, no part of the relevant delay can be attributed directly to the applicant as opposed to her advisers. The hardship the applicant will suffer if the application is not granted is obvious namely, she will not be able to pursue her claim for compensation. If, as the authorities indicate that I

should, I disregard any possible action that she may have against her advisers, clearly an extension is appropriate in accordance with the principles espoused above.

14. Accordingly the order of this court is that pursuant to section 5(3) of the Act, the time limited by section 5(1) of the Act within which to make application for an assistance certificate is extended to 7 September 2001.
15. The question of the applicant's costs of this application are reserved to the Court hearing the substantive application.

Dated this 31st day of May 2002.

V M LUPPINO
STIPENDIARY MAGISTRATE