CITATION:	*Hunnam v Northern Territory of Australia* [2005] NTMC 068
PARTIES:	CRAIG LAWRENCE HUNNAM
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance)
FILE NO(s):	20516681
DELIVERED ON:	27th October 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	24th October 2005
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Crimes (Victims Assistance) – Practice and Procedure - Extension of time – prejudice – likelihood of success – risk of unfair hearing

Solomon v Webb 224 of 1992 NTSC
The Commonwealth of Australia v DKB Investments [1991] NTSC
Eldridge v Northern Territory of Australia and Riley [2001] NTMC 76

REPRESENTATION:

Counsel:

Applicant:	Mr Bradley
Respondent:	Ms Tregear

Solicitors:

Applicant:	Withnalls
Respondent:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2005] NTMC 068
Number of paragraphs:	28

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20516681

BETWEEN:

Craig Lawrence Hunnam
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 27th October 2005)

Judicial Registrar Fong Lim:

1. The Applicant has applied for the issue of an Assistance certificate pursuant to section 5 of the Crimes (Victims Assistance) Act. The offence that the Applicant claims he was a victim of allegedly occurred on the 24th of December 2002.

2. The Applicant filed his application for assistance on the 14th of July 2005 some 2 ½ years after the offence and therefore 18 months out of time.

3. The application before this court is for an extension of time in which the Applicant can file his application for assistance. The leading authority applied in the Northern Territory is that of Solomon v Webb 224 of 1992 Supreme Court of Northern Territory of Australia a decision of Justice Thomas in which she referred to the decision of Justice Mildren in The Commonwealth of Australia v DKB Investments [1991]NTSC her honour states:

The magistrate in making his decision referred to the decision of Mildren J in The Commonwealth of Australia v DKB Investments Pty Ltd dated 12 September 1991and the principles set out therein. In particular (at page 5 of the reasons):

"4. The discretion should only be exercised adversely to the plaintiff where the plaintiff's default has been intentional and contumelious or where there has been inordinate or inexcusable delay on the part of the plaintiff or its solicitors giving rise to a substantial risk that a fair trial is not possible or to a substantial risk of serious prejudice to the defendant: Birkett v. James (1978) AC 297;Van Leer Australia Pty Ltd v. Palace Shopping K.K. and Another (1981) 34 ALR 3; Mahon v. Frankipile (Australia) Pty Ltd (1990) 157 LSJS 52."

4. Her honour accepts the statement of principles to consider by his honour Justice Mildren in The Commonwealth v DKB Investments Pty Ltd as follows:

page 4, Mildren J stated:

"... The relevant legal principles which apply to the exercise of the court's discretion in these matters are as follows:

1. The court will not grant the extension unless good reason is shown for the extension: Irving v. Carbines (1982) VR 861; Soper v. Matsukawa (1982) V.R. 948; Kleinwort Benson Ltd v. Barbrak Ltd (1987) 1 AC 597; (1987) 2 WLR 1053.

2. Whether there is good reason depends on all the circumstances of the case. The question whether an extension should be allowed was one for the discretion of the judge who is entitled to have regard to the balance of hardship between the parties and the possible prejudice to the defendant if an extension is allowed: Kleinwort Benson Ltd v. Barbrak Ltd, supra; Zappelli v. Falkiner and Others (Supreme Court of Victoria, O'Bryan J, unreported, 21/9/87).

3. The fact that the action is statute barred if the extension is not granted may be a good reason for extending the Writ. As O'Bryan J observed in Zappelli, supra: 'In my view, should the extension not be granted the plaintiff's claim against the defendants may be time-barred and they would have to look to their solicitors for a remedy. Such a result would be inconvenient, time-consuming, wasteful of costs and tend to bring the law into disrepute. Further delay in the prosecution of this proceeding is contrary to the interests of justice.'

> This is all the more so where the solicitors are the clients' own employees, as is the case here. Be that as it may, the fact that the action is statute barred if the extension is not granted does not increase the burden of proof upon the plaintiff: Soper v. Matsukawa, supra; Williams v. F.S. Evans and Sons and District Council of Stirling (1988) 52 SASR 237; Kleinwort Benson Ltd v. Barbrak Ltd, supra.
>
> The discretion should only be exercised adversely to the plaintiff where the plaintiff's default has been intentional and contumelious or where there has been inordinate or inexcusable delay on the part of the plaintiff or its solicitors giving rise to a substantial risk that a fair trial is not possible or to a substantial risk of serious prejudice to the defendant: Birkett v. James (1978) AC 297;Van Leer Australia Pty Ltd v. Palace Shopping K.K. and Another (1981) 34 ALR 3; Mahon v. Frankipile (Australia)Pty Ltd (1990) 157 LSJS 52."

5. Her honour accepted this as a statement of the principles to apply when deciding an application for extension of time.

Intentional and contumelious <u>or</u> inordinate <u>or</u> inexcusable delay.

6. Before this court can find against the Applicant on his application for extension of time the court must find that the delay was either intentional and contumelious or inordinate or inexcusable. The Applicant's affidavit of the 17th October 2005 provides a timeline describing events before he made his application.

7. The offence relied upon occurred on the 24th December 2002 when the Applicant was pistol whipped with a loaded .357 Magnum. There was a further assault by the same offender in June of 2003 when the offender assaulted the Applicant. The Applicant was charged with offences in relation to that assault and does not rely on that assault in support of his application for assistance. On the 19th June 2003 the Applicant consulted with Ian Rowbottom of counsel at the time who advised that he may have a claim under the Crime (Victims Assistance) Act. On the 23rd of June 2003 the Applicant received some advice from Ms Farmer of Withnalls regarding his possible claim and it was then he learnt of the time limits of the Act. For the

rest of 2003 and until August of 2004 the Applicant did nothing to further his application. At the end of August 2004 the Applicant obtained written advice from his solicitor regarding the costs of his application and the relevant time limit for making the application for assistance.

8. The Applicant consulted with Mr Bradley from Withnalls on the 30th November 2004 and then on the 1st of December 2004 deposited some funds with instructions to Withnalls to commence proceedings. The Applicant then left the Territory and failed to contact his lawyers between January 2005 and May 2005. An application was filed on his behalf on the 14th of July 2005.

9. The evidence does not support the argument that the delay caused by the Applicant was "intentional and contumelious". The Applicant did intentionally decide not to make an Application because he wanted to "let things cool off a bit"(see paragraph 5.3 of his affidavit of the 8th of July 2005). However the Applicant does say is that he was the victim of a sustained campaign of threats from the offender and his friends and that campaign meant that he was in fear for his life for most of 2003 and 2004. The Applicant feared that if he went ahead with his application for assistance he may be the subject of further assaults.

10. If the Court accepts the Applicant's evidence then it is clear the reason he did not commence his application before he did was because he was dealing with the sustained campaign of threats from the alleged offender not because he had no respect for the time limits. There is no reason to doubt the Applicant's evidence as there is no evidence to the contrary. I find that the delay while it may have been intentional it was not contumelious.

11. The next question is whether the delay was inordinate or inexcusable. In my view the delay of 18 months was inordinate particularly as the Applicant was well aware of the time limits which applied.

12. The submissions made by the Applicant's solicitor concentrated on providing the court with reasons as to why the Applicant delayed so long to convince the court that the delay was not inexcusable. To a certain extent that is not relevant if the court finds the delay was inordinate because the delay only has to be either inordinate or inexcusable before the Court can consider refusing an application for extension of time.

13. Even if I had not found the delay to be inordinate then considering the evidence before me it is my view only part of the delay was excusable. That part of the delay in which the Applicant was in fear of his life and didn't wish to antagonise the alleged offender by making an application for assistance was excusable. However the Applicant failed to make himself available to his solicitors for over 6 months and there is no reasonable excuse given for that failure especially when he was well aware of the requirement to make an application for extension of time.

14. Given the above it is this court's view that the delay was inordinate and for the last 6 months inexcusable and therefore the Applicant's application for extension of time it is open to the Court to dismiss the application. To refuse the extension of time the court must be convinced that there is a real risk of there not being a fair trial or that there would be real prejudice to the Respondent should the extension be granted.

15. The counsel for the Respondent argued that given the delay the "trail is cold" and the Respondent has been denied the opportunity to properly investigate the allegations made by the Applicant. The Respondent has been advised by the Police that:

> "This case was finalised as "no further action required" as the applicant declined to make a complaint, or a statement, to the Police on various occasions."

16. The Respondent argues that because the Applicant failed to make statements or complaint to the police it has suffered real prejudice in the investigation

of the offence. It is true that the Applicant has even to this day failed to make a statement to the police and it is highly likely that any police investigation into the alleged offence would be severely compromised however in Eldridge v Northern Territory of Australia and Riley [2001] NTMC 76 his honour Mr Loadman SM found that it is not enough for the respondent to claim that it would likely to suffer prejudice it must put evidence before the court that in fact there is real prejudice. His honour undertook an extensive analysis of the authorities and came to the conclusion that it is an evidentiary burden for the Respondent to prove prejudice if the court is to accept that an extension of time should not be granted on that basis. At page 21 his honour states:

> "There is, as must be apparent from traversing earlier decisions in this Court's view, a positive obligation on the second respondent to adduce evidence to establish what it is that he says is prejudicial to him."

17. In that matter his honour found that the second respondent had not adduced such evidence. That principle applies equally to the Respondent in this matter as is it did to the second respondent in Eldridge's case. The Respondent in the present case has produced some evidence that is a letter from the police saying that the investigation did not continue as the applicant failed to make a complaint or statement however that is not evidence of prejudice. The Respondent argues that the "trail has gone cold" and the Respondent has been stopped from properly investigation therefore there is a real risk of there not being a fair trial. If the Respondent had produced evidence to show that it had attempted to investigate this alleged offence and was hindered in doing so because of the Applicant's failure to make a complaint then that argument could be accepted. I accept that the power of the Respondent to investigate what is basically a crime is limited without the involvement of the police force, however they have not even provided the court with evidence that they have tried to find the alleged offender to ascertain his availability to give evidence. If the offender could

not be found then that would be evidence of real prejudice. The Respondent has not even seen fit to obtain the full police file to establish what investigations the police did carry out. The Respondent as a model litigant has a responsibility to put before the court all of the relevant material possible to assist the court in its deliberations. Without any such evidence the Respondent is asking the court to assume prejudice which it cannot do.

18. Without evidence of actual prejudice the Court must then look at whether there is a real danger of an unfair trial. Evidence in Crimes (Victims Assistance) applications received by way of affidavits except for medical evidence. The court can only adjudicate on the evidence before it. The Respondent might argue that in this case the Applicant has failed to co – operate with the police and the Applicant should not be allowed to rely on his failure to give a statement to bolster his case and argue that his evidence is uncontroverted.

19. The Respondent has only had the details of the offence, scant as they are, since the receipt of the application in July of this year and argues without a statement from the Applicant it will be very difficult for the Respondent or the police to investigate and gather evidence regarding this application.

20. The Applicant argues that these issues are for the hearing of the substantive application and have no place in an application for extension of time. To the contrary it is perfectly proper for the Respondent to submit that it would be facing an unfair trial should the applicant's evidence go before the court untested because of his alleged failure to assist the police. Interestingly the Applicant has not answered the allegation that he failed to give statements to the police on several occasions. He has chosen to ignore that allegation.

21. Even the Applicant's affidavit does not give enough detail for the Respondent to do its own investigation of the alleged offence it only gives the bare facts of the date, the alleged offender and the alleged assault. There are no details as to what occurred before and after the offence or whether

there were any witnesses to the offence or the circumstances leading up to the alleged offence.

22. In other civil matters a defendant has the opportunity to investigate the plaintiff's claims because the plaintiff must provide those basic facts and circumstances upon which it relies to establish a cause of action in its statement of claim. After service of the statement of claim a defendant in a civil action usually has some knowledge of facts and circumstances giving rise to the cause of action and can answer the claim of its own knowledge. Applications under the Crimes (Victims Assistance) Act are different. The Respondent, the Northern Territory, knows nothing about the offence and alleged injury until it receives the applicant's claim. The Respondent has no control or knowledge of the offence. In these matters that Respondent relies entirely on the investigations undertaken by the police force or statements given to the police by the applicant, any witnesses and any alleged offender without those things the Respondent could be at risk of an unfair trial.

23. The Respondent further argues that the Court should be convinced that there is enough evidence of the Applicant's failure to assist the Police and therefore and extension of time should not be given as the Applicant has no chance of success in his application because of the operation of section 12(c) of the Act.

24. Certainly when an applicant requests the court exercise its discretion in favour of the Applicant on an extension of time application then the court must be convinced that the Applicant has a meritorious claim. The Respondent is arguing that there is no merit to the Applicant's claim because he clearly failed to assist the police and therefore cannot be successful in his claim for assistance. The evidence of the Applicant's failure to assist is in the form of a letter from the Business Information and Recording branch stating their interpretation of what the police file reveals. It cannot be taken as to the truth of that statement. If the Respondent had

produced the police file showing the attempts to get the Applicant's assistance and the Applicant's refusal then that would be evidence that the Applicant failed to assist the police.

25. I find that there is enough evidence before the court to suggest a meritorious claim even though there is some evidence to support that the Applicant's application may be refused on the basis of section 12(c). The evidence of the Applicant's alleged failure to assist is not strong enough to refuse the application for extension of time on that basis.

26. I have found that the Applicant's delay is inordinate and in part inexcusable. I have further found that given the Applicant's failure to make a complaint to the police coupled with the fact that the application is 18 months out of time there is a real risk of an unfair trial but there is no evidence of actual prejudice. The Applicant has not shown any present willingness to give a statement to the police and help them with their enquiries into the assault. The Applicant is clearly not concerned with the offence being investigated rather more interested in making an application for Assistance.

27. Given the Applicant's choice not to make a formal statement to the police, or show any intention to make a statement and the consequential risk of an unfair hearing it is this Court's ruling that the scales tip in favour of the Respondent in this case and the Applicant's application for extension of time is refused.

28. The question of costs is reserved.

Dated this 27th day of October 2005

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Tanya Fong Lim
JUDICIAL REGISTRAR