CITATION: *Powers v Northern Territory of Australia* [2006] NTMC 051

PARTIES:	RAYMOND JOSEPH POWERS
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance)
FILE NO(s):	20528082
DELIVERED ON:	30th May 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	24th May 2006
JUDGMENT OF:	Judicial Registrar

CATCHWORDS:

Practice and procedure – extension of time – application for assistance certificate – evidence of prejudice

Brisbane South Regional Health Authority v Taylor [1996] HCA 25

Solomon v Webb 224 of 1992 NTSC

REPRESENTATION:

Counsel:

Applicant:	Mr Johnson
Respondent:	Ms Spurr

Solicitors:

Applicant:	Priestleys
Respondent:	Halfpennys

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 051
Number of paragraphs:	29

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

No. 20528082

BETWEEN:

Raymond Joseph Powers
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 30th May 2006)

Judicial Registrar Fong Lim:

1. The Applicant makes application for an extension of time to file and serve his application for an Assistance certificate pursuant to section 5 of the Crimes (Victims Assistance) Act.

2. The Applicant relies on his affidavit of the 6th of January 2006, and the affidavit of Julian Johnson of the 13th January 2006. The Respondent relies on the affidavits of Cathy Spurr of the 23rd of May 2006 and of Rachael Schaeffer of the 23rd of May 2006.

3. The Applicant relied on the authority of Vincent Benjamin Solomon v Christopher Raymond Webb 224 of 1992 NTSC which has long been the authority referred to this court in relation to applications such as the present one before this court. Solomon v Webb related to an extension of time in relation to an application pursuant to the old Crimes Compensation Act of the Northern Territory. The court in Solomon v Webb applied Mildren J's

judgment in The Commonwealth of Australia v DKB Investments Pty Ltd dated 12 September 1991 where his honour said:

> "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. The Applicant was assaulted on the 2nd November 2001 he reported the matter to the police and attended several times to give evidence at the trial of the criminal charges however the offender failed to appear. The Applicant says that he cannot recall being told that he could make a claim for victims compensation however he was aware that he may be able to get compensation for the injuries he suffered.

5. The Applicant further states that even though he had an idea he may get compensation he knew nothing of the time limits set by the Act. He assumed that the offender had to be convicted before he could make a claim for compensation.

6. The Applicant then goes to NT Legal Aid in August of 2005 to investigate the possibility of getting victims compensation and was told that he should fill out a legal aid form and legal aid would ask lawyers in Darwin if they could represent him in an application under the Crimes (Victims Assistance) Act.

7. On 21 October 2005 Priestleys contacted the applicant and advised him that his legal aid had been approved and that they would be acting for him. This is when the Applicant says he was advised of the limitations period and the need to apply for an extension of time. There was a delay between that time

and the filing of the Application for Assistance caused by the clerk who was instructed to prepare the application being on leave. The Application was filed on the 18th November 2005.

8. It is clear that the delay in making application is inordinate being approximately 3 ½ years after the 12 months time limit had expired. Applying Solomon v Webb the question for the court is whether there is a substantial risk of there not being a fair trial or there is substantial prejudice to the respondent should the extension be granted.

9. The Respondent relied on the authority of Brisbane South Regional Health Authority v Taylor [1996] HCA 25 arguing that the law had developed since the Solomon v Webb. The High Court in Brisbane South Regional Health Authority v Taylor was considering the interpretation and application of section 31 (2) of the Limitations of Actions Act (Qld) which is very similar in terms to section 44 (1) of the Limitations Act of the Northern Territory of Australia which sections require the applicant to prove that there was a material fact which was not in the knowledge of the applicant within the 12 months after the expiry of the limitation period.

10. The High Court confirmed that the onus was on the applicant convince the court that in the interest of justice that the discretion be exercised in favour of the Applicant and that while the Respondent should produce evidence of prejudice it is then for the Applicant to prove that prejudice is not material.

11. Their Honours Toohey and Gummow also found that the possibility of the denial of a fair trial is a relevant consideration and that:

> "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 had not begun proceedings until just before the limitation period had expired."

12. Justice McHugh confirms this view and says that to accede to the argument that the prejudice would have existed if the proceedings were commenced

just before the expiry of limitation would be to only use the limitation period as a reference point and that it should be of more significance than that.

13. The principles espoused in Brisbane South Regional Health Authority v Taylor are not totally at odds with the principles espoused in Solomon v Webb in that both courts say that one of the factors to consider in the exercise of the court's discretion is the prejudice to the Respondent of the possibility of an unfair trial. The difference between the authorities is that Solomon v Webb requires the delay to be inordinate or inexcusable or contumelios or deliberate before the discretion will be exercised against the Applicant. The High Court in Brisbane South Regional Health Authority v Taylor sets out no such requirement however it must be recognised that the statutory provisions being considered in these cases are different. In Solomon v Webb the court was considering a limitation provision in the Crimes Compensation Act and the power to extend was contained in section 5(3) which provides:

> "The court may, as it thinks fit, extend the period within which an application under sub section (1) may be made."

14. The court in Brisbane South Regional Health Authority v Taylor was of course considering the Limitation of Actions Act (Qld) section 31 which requires the applicant to prove material fact before an extension of time can be granted. Their Honours agreed that once the applicant proves material fact that does not give the applicant a right to the extension of time it is a prerequisite and once proven then the court should look at the possible prejudice to the respondent before exercising its discretion in the applicant's favour.

15. It is clear that in both instances, an application pursuant to section 5(3) of the Crimes (Victims Assistance) Act and an application for an extension of time pursuant to a Limitations Act that prejudice to the respondent is

important and the possibility of the denial of a fair trial is a significant prejudice which more than likely would persuade the Court not to exercise its discretion.

16. It is my view that both Solomon v Webb and Brisbane South Regional Health Authority v Taylor are both apply to this application.

17. It is for the Applicant to convince the court that justice requires the exercise of the discretion in the applicant's favour. The court has to be satisfied that the delay is contumelios or inordinate or inexcusable delay. Then the court has to consider the justice of granting an extension and part of that consideration must be any prejudice to the Respondent of a fair trial. The general principle that once the Respondent shows to the court that there is prejudice then it is up to the Applicant to show that the prejudice is not material also applies.

18. I have already found that the delay is inordinate and therefore the court must consider if there is material prejudice to the Respondent should the extension be granted.

19. In the present matter the Respondent has provided evidence of prejudice as follows:

    (a) the electronic record of interview taken of the offender is missing

    (b) the offender cannot be found

    (c) one of the investigating officers has left the force to travel overseas to work with the Federal Police

20. It is clear that the offender had gone missing prior to the expiry of the 12 month limitation period as a Warrant for his arrest was issued for his failure to turn up to the criminal hearing and that warrant is still outstanding. However according to the principles laid out in Brisbane South Regional Health Authority v Taylor the fact that the prejudice existed before the expiry of the limitation period doesn't make the prejudice any less real.

21. The police records show that the offender participated an interview with the police and the substance of that interview was reported in a case note. There was a suggestion in that note that the offender admitted to throwing mangos at the victim but that the victim had been chasing him with a stick. The Respondent argues that as the full record of interview is not available to them and the offender cannot be found then there is a real risk of there not being a fair hearing as the respondent has lost the opportunity to fully investigate the alleged contributory behaviour of the victim.

22. The Respondent also points to the inability to contact the investigating officer as a prejudice to their investigations however as the investigating officer, O'Donnell, did not participate in the interview of the offender it is hard to see what assistance he could be in relation to any contribution argument. The police case report does not show any further attendances upon the applicant subsequent to the interview of the offender and doesn't indicate that the Applicant was questioned about the offender's allegation that the Applicant was chasing him with a stick. It is also clear from the statutory declaration by O'Donnell of the 21st of Jun 2005 that he did not have any thing further to do with the matter after to took a "complaint statement" from the Application on or about the 2nd of December 2001. O'Donnell states:

> "Later that morning I took a complaint statement from Powers about the matter. After taking the statement I completed my shift and Dempsy was spoken to by day shift members S/C Ken Flood and S/C Michael Deutrom.
>
> I had no further dealings with the matter apart from compiling the file."

23. It is my view that the fact that O'Donnell cannot be found by the Respondent is not a significant prejudice to the Respondent. O'Donnell clearly would not be able to add anything to the issue of the Applicant's alleged contributory behaviour. O'Donnell's absence is not likely to be the cause of an unfair trial for the respondent.

24. The disappearance of the Electronic record of interview is in itself not significant because the Respondent could always call evidence from the officers present at the interview as to the offender's allegations of the Applicant's contributory behaviour. However the claim that the Offender cannot be found is of some significance for a fair trial. The Offender cannot be made available for cross examination (assuming leave would be granted) nor can he be asked to do an affidavit as to what he recollects happened on the day especially his claim that the Applicant was chasing him with a stick.

25. The Respondent has not just relied on the fact that a warrant has issued for the offender to prove that his cannot be found. The Respondent's solicitors have done electoral roll and telephone searches and called the numbers which could possibly be the offender's phone number but have been unsuccessful in contacting him.

26. The Applicant could argue that the Respondent could put forward the alternative explanation of what had happened by tendering the case report summary to show what the offender says had happened however evidence in that form will clearly be given less weight than an affidavit by the offender.

27. Given the above it is my view that the Respondent has established prejudice substantial enough to deny them a fair trial and the Applicant has not done enough to dispel the idea that the Respondent is materially prejudiced

28. Accordingly the Applicant's application for extension of time is refused.

29. Costs reserved.

Dated this 30th day of May 2006

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Tanya Fong Lim
JUDICIAL REGISTRAR