SUPREME COURT OF QUEENSLAND

CITATION:	*Stewart v Woods* [2002] QSC 164
PARTIES:	**EDNA EILEEN STEWART** (applicant) **v** **ALWYN ALFRED WOODS** (respondent)
FILE NO/S:	SC No 1106 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2002
JUDGE:	Fryberg J
ORDER:	**Further hearing of the application adjourned to a date to be fixed**
CATCHWORDS:	CRIMINAL LAW – Jurisdiction, practice and procedure – Judgment and punishment – Orders for compensation, reparation, restitution, forfeiture and other matters relating to disposal of property – Compensation – Queensland – Offender dead – Proper respondent *Criminal Code*, s 663B(1) *Criminal Offence Victims Act 1995*, s 46(2) *Public Trustee Act 1979* (NT), s 9, s 35 *Supreme Court of Queensland Act 1991*, s 93N *Uniform Civil Procedure Rules*, r 71 *Re Leber* [1999] QSC 177, considered *R v Callaghan and Fleming; ex parte Power* [1986] 1 Qd R 457, considered
COUNSEL:	A J Kimmins for the applicant No appearance for the respondent
SOLICITORS:	Tony Bailey Solicitor for the applicant No appearance for the respondent

[1] **FRYBERG J:** On 12 February 1973 Alwyn Woods shot Edna Stewart in the eye with a .22 magnum rifle. She was nearly 26 years old, he was 33. They were living together at Camooweal Street, Mt Isa. He had left the wife whom he had married 11 years earlier, and who had borne his child, and had been living with Ms Stewart since 1969. On the day of the shooting, Ms Stewart went to visit her mother at the Mt Isa Hospital. Woods was supposed to pick her up at the hospital at about 3.00pm. He failed to do so. Ms Stewart went looking for him and found him in a hotel, drinking. She was upset and told him off. She hit him on the nose with a beer can; she thought his nose might have been split. She then got a taxi home. Woods also returned home – how much later does not appear. He obtained the rifle and found her in the laundry. She said, "Don't do that", but he shot her in front of her six year old nephew (who lived with them) from a distance of about 5 metres.

[2] After the shooting, he did not call for help, though there was blood pouring down her face. She walked to a nearby ice works, where a staff member called an ambulance. She was taken to hospital. She remained in hospital for two weeks. As a result of the shooting, she lost her right eye and the bony orbit around the eye was scarred and deformed. She was given a glass eye. She also suffered an acute stress disorder and a depressive dysthymia, both of which lasted and settled over a period of one to three months, leaving only an ongoing mild chronic depression of mood. She was, as Dr Ian Curtis subsequently observed, "a strong, robust person".[1]

[3] The incident was reported to police and Woods was charged with unlawful wounding. On 11 May 1973, he pleaded guilty to that charge in the Supreme Court at Mt Isa. The sentencing judge, Hoare J said:

> "In this case I am satisfied from what has been Court that it is unlikely that this prisoner will commit a further offence. I think it is very probable that he has had a lesson in this. I take into account the circumstances that he has previously been a law-abiding citizen with one comparatively minor infraction 15 years ago, and that the person on whom the wounding occurred appears to have, on a number of occasions, used violence to him."

He imposed a fine of $250.

[4] After she was discharged from hospital, Ms Stewart resumed cohabitation with Woods. She told Dr Curtis, "I lived with him afterwards and he never hurt me again … but I sort of split later and I left him and I went back to Mornington Island." Precisely when she left Woods does not appear, but Dr Curtis said it was "some relatively short time after he shot her". She received no further medical assistance for the effects of the shooting and apparently did not need any. She took no steps to apply for compensation under ch LXVA (as it was then confusingly called) of the *Criminal Code*.

[5] In February 1999, her present solicitor, Mr Tony Bailey, commenced acting for her. He arranged for Dr Curtis to see her. That consultation took place at Mornington Island on 27 February 1999. From 1996 to 1999, Dr Curtis conducted psychiatric

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[1] The foregoing facts have been gathered from a brief affidavit by Ms Stewart and a medical report prepared by Dr Curtis in 1999, where Ms Stewart's version was partly recorded. However, it should be noted that she did not verify this version in her affidavit. Moreover, she said that her solicitor would make an affidavit with her statement to investigating police annexed to it. This did not occur and the omission was not explained in the evidence.

examinations of nearly 300 indigenous people in North Queensland. Ms Stewart is evidently an indigenous person. She told Dr Curtis that she was worried because vision in her left eye was blurring. However, she had not consulted a medical practitioner at the Mornington Island Hospital because they "only visit a couple of days at a time". He advised her to have regular check ups of her good eye. She told him that after the shooting "I used to cry, I could hardly speak … restless", and her upset lasted about two or three months. She was very proud of the fact that she had raised her young nephew successfully to adulthood. At times the glass eye became irritable, inflamed and scratchy. She worked in the community development employment program and also did part-time casual cleaning work for the Council.

[6] Woods had been born in Queensland. At some unknown time after his separation from Ms Stewart, he went to the Northern Territory. On 17 March 2000, he died intestate. At the time of his death, his usual residence was at Winnellie, which is, I think, an outer suburb of Darwin. The value of his estate is not in evidence. However, it was administered by the Public Trustee of the Northern Territory under s 35 of the *Public Trustee Act* (NT), so it cannot have exceeded $20,000.[2] On 19 April 2000, by advertisement in the *Northern Territory News*, the Public Trustee required all persons having claims against the estate to submit them in writing within one month from publication of the notice. The advertisement advised that after that date the Public Trustee could distribute the assets of the estate having regard to the claims of which at the time of distribution he had notice. Administration of the estate was finalised on 18 April 2001.

[7] On 4 February 2002, Mr Bailey, on behalf of Ms Stewart, filed an originating application in this Court seeking compensation under s 663B(1) of the *Criminal Code*. There is no explanation for the delay from February 1999 in the evidence before me. Ms Stewart's affidavit was sworn on 27 February 1999 but not filed until 4 February 2002, the same day as the application. Dr Curtis reported on 5 August 1999. Section 663B was repealed in 1995; however, had it not been repealed, it would have applied to Ms Stewart's injury. Consequently, it must be applied as if it had not been repealed.[3] The section was enacted in 1968 and commenced on 1 January 1969. No amendments were made to it before the date of the shooting. At that time, it provided:

> " **663B. Court may order payment for compensation.** (1) Where a person is convicted on indictment of any indictable offence relating to the person of any person, the Court, on the application by or on behalf of the person aggrieved by the offence, may, in addition to any other sentence or order it may make, order him to pay to the person aggrieved a sum not exceeding two thousand dollars by way of compensation for injury suffered by him by reason of the offence of which the offender is convicted."

It was subsequently amended on several occasions, but the words quoted remained the core provision.[4]

[8] That provision conferred on Ms Stewart a cause of action exercisable against Woods from the time of his conviction.[5] Unfortunately, Ms Stewart did not

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2 *Public Trustee Regulations* (NT), reg 7 and sch 3.
3 *Criminal Offence Victims Act 1995*, s 46(2).
4 *R v Chong; ex parte Chong* [2001] 2 Qd R 301 at p 307.
5 *Ibid.*

immediately exercise it. She only became aware of her rights shortly before 27 February 1999. A little over a year later Woods died. Her claim cannot now succeed unless her right of action survived against his estate.[6] It could not have done so at common law. Under the common law of Australia, as inherited from England, a personal right of action died with the death of the person against whom it might have been brought.[7] The common law was changed by statute in all Australian jurisdictions many years ago. In Queensland, it is now governed by s 66(1) of the *Succession Act 1981*. But does Queensland law necessarily govern this case? There are a number of facts which connect it to the Northern Territory. Under Australian choice of law rules (to use the expression which the High Court has said is preferable to "conflict of laws rules"[8]), this might mean that the question is governed by the law of the Northern Territory.[9] There, the relevant law is found in ss 5 to 8 of the *Law Reform (Miscellaneous Provisions) Act*. At the present time, it is unnecessary to decide which Act applies. Both provide that on the death of a person, actions subsisting against him or her survive against his or her estate. At this stage, in the absence of argument on the point and in the absence of a contradictor, it may be assumed that, as counsel for Ms Stewart has submitted, the cause of action survived Woods' death and may be continued against his estate. On these assumptions, I accept counsel's submission that there is nothing to stop the application proceeding. Eventually, however, it will be necessary for this assumption to be made good.

[9] For this reason (and because there are a number of differences between the two acts), I shall flag some of the difficult questions which may need to be considered:

1. Is the question of survival of causes of action to be resolved by the choice of law rules relating to succession or to tort?
2. Is the statutory cause of action created by s 663B to be characterised for these purposes as a tort? Is it actionable in any other Court than the Supreme Court of Queensland?
3. Is the cause of action properly located in the Northern Territory? Is it a liability which a personal representative in the Territory would be bound, or alternatively entitled, to recognise?
4. Where was Woods domiciled at the time of his death?
5. Has the cause of action been extinguished by the effluxion of time, the finalisation of the administration of the estate or any other event? Is s 66(5) of the Queensland *Succession Act 1981* relevant?
6. May compensation include amounts for pain and suffering or for any bodily or mental harm? (Compare s 66(2)(a) of the Queensland *Succession Act 1981*.)
7. May proceedings be brought against any beneficiary to whom any part of Woods estate has been distributed? Is s 66(6) of the Queensland *Succession Act 1981* relevant? Are there any such beneficiaries?

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6 *Ibid* at p 303.

7 The rule was embodied in the Latin expression *actio personalis moritur cum persona*. Its origin is obscure: *Fleming on Torts*, 9th edition, p 741.

8 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at p 527. These rules are part of the single common law of Australia.

9 "The rules of the conflict of laws are, traditionally, expressed in terms of juridical concepts or categories and localising elements or connecting factors": Dicey and Morris, *The Conflict of Laws*, 12th edition, p.30. The authors observe in a footnote, "This expression ['connecting factors'] (first suggested by Falconbridge) seems the best English equivalent of the French and German technical terms 'point de rattachement' and 'Anknüpfungspunkt'."

[10] Despite the fact that Mr Bailey knew when the application was filed that Woods was dead, and when and where he died, he has been named as the respondent, and the only respondent. That is plainly wrong. The case appears to be covered by r 71 of the *Uniform Civil Procedure Rules*. That rule provides:

> "**71 Defendant or respondent dead at start of proceeding**
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> **(1)** This rule applies if—
>
> (a) when an originating process is issued—
>
> (i) a person who would otherwise be defendant or respondent is dead; and
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> (ii) a grant of representation has not been made; and
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> (b) the cause of action survives the person's death.
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> **(2)** If the party filing the originating process knows the person who would otherwise be defendant or respondent is dead, the originating process must name as defendant or respondent the 'Estate of [person's name] deceased'.
>
> **(3)** If, after the start of a proceeding against a person, the proceeding is taken, under an Act, to be against the person's personal representative, all subsequent documents filed in the proceeding must name the personal representative as defendant or respondent."

[11] That rule applies by reason of the curious fact that when the Public Trustee of the Northern Territory administers an estate under s 35 of the *Public Trustee Act*, he is not required to obtain a grant of representation. That section provides:

> "**35 Public Trustee may administer small estates**
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> **(1)** Where the Public Trustee is satisfied that -
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> (a) the net value of the estate of a deceased person does not exceed the prescribed amount; and
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> (b) application has not been made for a grant of probate of the will or of letters of administration of the estate of the deceased person,
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> the Public Trustee may administer the estate of the deceased person and for that purpose may call in the estate of the deceased person, sell and convert into money such part of that estate as does not consist of money, pay any debts and liabilities of or relating to the deceased person, being debts and liabilities of which he has notice, and deal with the balance, if any, of that estate as if a grant of administration of the estate of the deceased person had been made to the Public Trustee by the Court."

[12] Rule 71(3) reflects the operation of s 93N(1) of the *Supreme Court of Queensland Act 1991*. The latter section provides:

> "**Proceeding if no grant of representation when originating process issues**
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> **93N (1)** If—
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> (a) an originating process names as a defendant or respondent a person who is dead when the originating process issues; and
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> (b) the cause of action survives the person's death; and
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> (c) a grant of representation has not been made when the originating process issues;

> the proceeding is taken to have been brought against the person's estate.
>
> **(2)** However, if a grant of representation is made after the originating process issues, then, unless the court orders otherwise, the proceeding is afterwards taken to be against the person's personal representative in the personal representative's capacity as personal representative of the person's estate.
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> **(3)** Even if a grant of representation has not been made when an order is made in the proceeding, the order binds the estate to the same extent as if a grant had been made and a personal representative of the deceased had been a party to the proceeding."

[13] In the present case, there is no likelihood that a grant of representation will ever be made; so s 93N(2) is unlikely ever to have any application. On the other hand, s 93N(3) does in terms cover the present case. Plainly, the Public Trustee is a person who potentially has a very distinct interest in whether an order should be made which binds Woods' estate. He (or she) is effectively Woods' personal representative and, therefore, a person "whose presence as a party is necessary to enable the court to adjudicate effectually and completely on all issues raised in the proceeding."[10] The Trustee is a corporation able to be sued under the name "Public Trustee for the Northern Territory".[11] In these circumstances, it would be inappropriate to apply r 71(2). *Prima facie*, the Public Trustee should be included as a respondent and the proceedings should be amended accordingly.

[14] Unfortunately, the question whether the Public Trustee should be included in the proceedings was not directly addressed by counsel for the applicant. I do not think it would be right for me to make any order in that regard without hearing counsel, particularly since there is power under r 62(4) to dispense with a requirement under that rule. The applicant may wish to argue that that rule has no application or seek an order that a requirement under it should be dispensed with. There is also the question of what provision should be made regarding service of the application if the Public Trustee is included. To enable these issues to be addressed, I shall adjourn the further hearing of the application to a date to be fixed.

[15] Before doing so, I would make one observation about the submissions made on Ms Stewart's behalf. Counsel submitted that the maximum award payable under the scheme as at the date of the shooting was $2,000 and that this was the amount of compensation which should be ordered. I am not persuaded that this is correct. As presently advised, it seems to me that the relevant limit is $5,000, not $2,000. That was the conclusion reached in *Re Leber*[12] and (*pace* Atkinson J) in *R v Callaghan and Fleming; ex parte Power*[13]. I ask that counsel address this issue in due course.

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10 *Uniform Civil Procedure Rules*, r 62(2).
11 *Public Trustee Act* (NT), s 9.
12 [1999] QSC 177.
13 [1986] 1 Qd R 457 (Connolly J).