SUPREME COURT OF QUEENSLAND

CITATION:	*Tyler v Krause & Ors* [2002] QCA 295
PARTIES:	**PHILLIP ALEXANDER TYLER** (plaintiff/appellant) **v** **PETER LAWRENCE KRAUSE & NOMINAL DEFENDANT** (first defendants/first respondents) **NOMINAL DEFENDANT** (second defendant/second respondent)
FILE NO/S:	Appeal No 2423 of 2002 DC 57 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	16 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2002
JUDGES:	McPherson JA, White and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CRIMINAL LAW - GENERAL MATTERS - OTHER GENERAL MATTERS - DISABILITIES AND DISQUALIFICATIONS OF CONVICTED PERSONS - OTHER CASES - prisoner instituted proceedings without permission of Public Trustee - whether permission can be granted *nunc pro tunc* *Convicts Forfeitures Act* 1871 of New Zealand *Forfeiture Act* 1870; 33 & 34 Vic c 23, s 8 *The Escheat (Procedure and Amendment) Act of* 1891 (Qld) *The Public Curator Act of* 1915, s 85(2), s 86(2) *Public Trustee Act* 1978 (Qld) s 90(a), s 91, s 94(2), s 95, s 95(b) *Fitzpatrick v Jackson* [1989] 2 Qd R 542, applied *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, applied

Jol v State of New South Wales (1998) 45 NSWLR 283, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, mentioned
Prus-Grzybowski v Everingham (1983) ALR 468, 478, mentioned

COUNSEL: G R Mullins for the appellant
K N Wilson for the respondents

SOLICITORS: Shine Roche McGowan for the appellant
McInnes Wilson for the first respondents
Gadens Lawyers for the second respondents

[1] **McPHERSON JA:** This is an appeal by the plaintiff against a decision in the District Court striking out his action for damages for personal injuries sustained in a motor vehicle accident which occurred on 27 June 1998. The action was instituted by claim filed in the District Court on 10 May 2001. At that date the plaintiff was already serving a sentence imposed on 25 May 2000 of imprisonment for four years, with a recommendation for parole after 18 months, consequent on his conviction on indictment for drug offences. Section 91 of the *Public Trustee Act* 1978 provides that the Public Trustee is the manager of the estate of every prisoner to whom Part 7 of that Act applies. By s 90(a) of the Act, that Part applies to any prisoner undergoing sentence for a term of three years or more following conviction on indictment for an offence.

[2] The plaintiff was therefore within the ambit of Part 7 of the Act. Section 95 in that Part is as follows:

> "**95**. During the time when the Public Trustee is manager of the prisoner's estate under this part, a prisoner shall be incapable, except with the consent in writing of the Public Trustee -
> (a) of alienating or charging any property or of making any contract; and
> (b) of bringing or defending any action of a property nature or for the recovery of any debt or damage."

On the face of it, therefore, s 95(b) applied to the plaintiff's action unless it was brought with the Public Trustee's written consent, which had not been obtained here. After this requirement had been drawn to the attention of the plaintiff's solicitors on 19 December 2001, they wrote to the Public Trustee seeking retrospective consent to the bringing of the plaintiff's action. The Trustee's response was that there was no point in giving consideration to the question of retrospective consent in view of the decision in *Fitzpatrick v Jackson* [1989] 2 Qd R 542.

[3] *Fitzpatrick v Jackson* is a decision of the Full Court given in 1988, in which it was held a writ claiming damages for personal injuries issued by someone who was serving a six year sentence, also with a recommendation for parole, was a nullity. In that instance, like this, the consent of the Public Trustee had not been obtained or even sought before the action was brought, and indeed, the objection was in fact not raised until counsel was engaged in opening the plaintiff's case at trial. The three members of the Full Court who heard the appeal (Kelly SPJ, Macrossan, Derrington

JJ) were unanimous in holding that the claim for damages for personal injury in that action came within the description in s 95(b), read with the definition in s 6 of the word "property" in the Act, but their Honours differed to some extent about whether it was an "action of a property nature" or "for the recovery of any … damage". Their doubts were prompted in part by differences in some earlier decisions about whether or not a right of action in tort was "a chose in action" within the meaning of the definition of "property" in s 6 in similar legislation. See *Brown v Teare* (1902) 22 NZLR 155, 157-158, and *Prus-Grzybowski v Everingham* (1983) ALR 468, 478.

[4] On this appeal, Mr Mullins of counsel for the plaintiff acknowledged that, unless *Fitzpatrick v Jackson* [1989] 2 Qd R 542 was wrongly decided and we were willing now to overrule it, this Court was bound to affirm the decision of the District Court dismissing the plaintiff's action. As to that, counsel did not dispute that his client's cause of action was, within the terms of s 95(b) read with s 6 of the Act, a chose in action. Following the decision in *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, there can no longer be any doubt that it is. Instead, the submission is that the reasoning in *Fitzpatrick v Jackson* rested, at least to some extent, on the distinction between statutory provisions that are mandatory and those that are discretionary, which has now been discredited. See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 374, and especially at 389. It was said there that, in determining whether an act done in breach or contravention of a particular statutory provision or condition is invalid, it is the statute itself, its subject matter and objects, "and the consequences for the parties of holding void every act done in breach of" the specified provision or condition that must be examined, and not simply whether or not that provision is, in form, mandatory or directory.

[5] The plaintiff's submission derives some support in this context from the decision in *Jol v State of New South Wales* (1998) 45 NSWLR 283, where, by applying the approach in *Project Blue Sky Inc*, the Court of Appeal was able to conclude that failure to satisfy the requirements of ss 4 and 5 of the *Felons (Civil Proceedings) Act* 1981 (NSW) did not necessarily invalidate proceedings instituted by a person who was in custody as result of having been convicted of a felony. Leave of the court to institute such proceedings could therefore be sought, and in that instance was granted, even after those proceedings had been begun without leave of the court.

[6] The differences between the statutory regime regulating the institution of civil proceedings by convicts in New South Wales and that in Queensland are, however, such as to make the decision in *Jol v State of New South Wales* of no more than indirect assistance in the determination of this appeal. Section 3 of the New South Wales Act of 1981 was enacted as a consequence of the decision in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, which applied the common law rule that a convicted capital felon could not maintain an action in New South Wales for a civil wrong. That Act in s 3 abolished the rule that a convicted felon could not institute or maintain civil proceedings in any court by making such a person "not … incapable" of doing so. In place of the common law, s 4 imposes a rule that a person in custody as a result of a felony conviction may not institute civil proceedings except by leave of a court granted on application to it. Section 5 provides that the court shall not grant leave under s 4 unless satisfied that the proceedings are not an abuse of process and that there is a prima facie ground for the proceedings. In providing that

a convict is not incapable of instituting proceedings, the New South Wales statutory provisions therefore begins from the opposite starting point from our own.

[7] The provisions of s 95(b) of the *Public Trustee Act* 1978 are a re-enactment of an earlier provision in s 86(2) of *The Public Curator Act of* 1915, which was adopted from the *Convicts Forfeitures Act* 1871 of New Zealand. That legislation was in turn based on s 8 of the Forfeiture Act 1870; 33 & 34 Vic c 23, which was an Act of the British Parliament. It was not, however, an imperial statute in the sense of being applicable to the whole of the empire. On the contrary, it contained affirmative indications that it was not intended to apply outside England, Wales and Ireland, or to Scotland (cf ss 32 and 33). If, in the colonies at that time, the common law rules were to be altered, it fell to be done by local legislation of the kind exemplified by the New Zealand legislation of 1871, and by the *Treason and Felony Act* 1874 (S Aust) considered in the Northern Territory decision of *Prus Gryzybowski v Everingham* (1983) 45 ALR 468. The Forfeiture Act 1870 enacted by the British Parliament was only partly reproduced in New South Wales by legislation passed in 1883, which is discussed in some detail in *Dugan v Mirror Newspapers Ltd* (1979) 142 CLR 583, 593-599, 605-606; and which, as is mentioned there, did not include the critical provisions of s 8 precluding actions of a property nature or for recovery of debt or damages. When *The Escheat (Procedure and Amendment) Act of* 1891 was enacted in Queensland, it followed the New South Wales precedent of adopting s 1 of the Act of 1870, which abolished forfeiture on conviction for felony, but not s 8 which prohibited actions by imprisoned convicts. Nor did it adopt the provisions of ss 9 and 10 of the Forfeiture Act of 1870 providing for the appointment of administrators of convicts' property.

[8] The provisions of ss 8, 9 and 10 of the Act of 1870 did not become part of the law of Queensland until 1915, when they did so as a result of their adoption from a New Zealand statute of 1908, in which the provisions of the *Convicts Forfeiture Act* 1871 had by then been re-enacted. It seems clear that, at the time of their enactment in England in 1870 and shortly afterwards in the colonies, the provisions of s 8 were regarded as disqualifying an imprisoned convict from suing for the recovery of any property, debt or damage. The marginal note to s 8 in the Act of 1870 is "Convict disabled to sue for or to alienate property, etc". In *Brown v Teare* (1902) 22 NZLR 155, Stout CJ held that the plaintiff convict's action for personal injuries was not time-barred under the old Statute of Limitations of James I for the very reason that the plaintiff was disabled in law from suing by the operation of s 8 of the New Zealand Act, which had adopted the language of s 8 of the Forfeiture Act of 1870. Similar reasoning would have applied to the provisions of s 85(2) of *The Public Curator Act of* 1915, from the terms of which s 95(b) of the *Public Trustee Act* 1978 has since been reproduced.

[9] The impression that s 95(b) imposes a disqualification or disability from suing, rather than a prohibition that is breached if action is brought without the written consent of the Public Trustee, is supported by the particular language of s 95(b) itself. It provides that "a prisoner shall be incapable, except with the consent in writing of the Public Trustee … (b) of bringing … any action …". Moreover, what seems to me to be conclusive against any other interpretation of the section is the provision in s 94(1)(f) of the Act. In specifying the powers of the Public Trustee as manager of the estate of a prisoner, s 94(1)(f) provides that the Public Trustee may, in its corporate name or in the name of the prisoner, "institute any proceedings of a

property nature or for the recovery of any debt or damage" which the prisoner might have instituted.

[10] The words quoted from s 94(1)(f) are indistinguishable in substance and effect from those used in s 95(b) in imposing the disability from bringing any action that is comprehended in that subsection. The proceedings which, under s 94(1)(f), the Public Trustee may institute are identified as those which the prisoner might have instituted "but for the provisions of this Part". From this it is clear that the proceedings which the Public Trustee is by s 94(1)(f) authorised to institute in the prisoner's own name are precisely those that the prisoner is by s 95(b) disabled from bringing himself. It seems clear that the Act does not contemplate that two sets of proceedings might at the same time be instituted in the prisoner's name, one of them by the Public Trustee and the other by the prisoner himself. Section 94(1)(f) thus confirms that, without the written consent of the Public Trustee, the prisoner is disabled from instituting proceedings because it is only the Public Trustee who may institute them. All action so taken is binding on the prisoner: see s 94(2).

[11] To my mind, those considerations show that the provisions of s95(b) are directed not to imposing a condition that was contravened or breached by the plaintiff here when, without obtaining the written consent of the Public Trustee, he filed his claim in the District Court on 10 May 2001, but to imposing a disability upon his bringing or instituting those proceedings that is removed only by obtaining the written consent of the Public Trustee. To such a provision, the principle of statutory interpretation laid down in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 389, has no evident or ready application. Indeed, if the legislature in the plenitude of its law-making power intended to exclude the operation of that principle of interpretation, it is not easy to see how otherwise it could or would have achieved its intention except by using the legislative technique adopted here, which was to incapacitate the prisoner from suing at all, except with the consent of the Public Trustee.

[12] It may be asked why, in any event, it would have wished to impose such disability on a prisoner. It seems a strong step, rather in the nature of a double punishment, to deprive a person of the right to bring an action for compensation for personal injury simply because he has committed an offence for which he is already undergoing the penalty of imprisonment for three years or more. In the course of the appeal, various reasons of policy were suggested for adopting that course, such as the protection of the creditors or of the family of the convict, or of the convict himself from predatory behaviour by his fellow prisoners. None of these suggestions explain how those persons could benefit from the prisoner losing his right of action altogether, when, as has happened in this case, the statute of limitations has now run against the plaintiff so as to prevent him from suing at all. The disability imposed by s 95(b) may, however be intended to serve as a measure of prison discipline imposed on longer term prisoners as part of a regime of managing their affairs; or it may be intended to prevent actions being brought that are an abuse of process, as is evidently the case in New South Wales. Another, but only partial, response to the question posed is that the incapacity imposed by s 95(b) is not absolute, but may be removed by obtaining the written consent of the Public Trustee, or by inducing the Public Trustee to bring the action itself, either in its own name or in that of the prisoner, under s 94(1)(f) of the Act.

[13] That is precisely what was not done here. Unlike the Act in New South Wales, the provisions of Part 7 of the *Public Trustee Act* 1978 confer no power on courts to give or withhold their consent to the bringing of such an action. For that, if for no other reason, it is not possible to regard it as a mere defect or irregularity in the court's jurisdiction capable, in accordance with *Emanuelle v Australian Securities Commission* (1997) 188 CLR 114, of being cured by a grant of leave or consent *nunc pro tunc*. The resulting injustice (for so it is) merits the attention of the legislature, and could be readily rectified by authorising the Public Trustee to give the written consent contemplated in s 95 after the proceedings or action has been instituted or brought or defended by the prisoner without first obtaining that consent.

[14] In the absence of such a provision in the Act in its current form, I consider it is not open to the Public Trustee now to give consent to the proceedings brought without consent by the plaintiff by his claim filed in the District Court on 10 May 2001, or for the Court to authorise it to be done now. It may indeed, as Mr Wilson of counsel suggested, be a question whether it was open to the plaintiff to institute this appeal at all. In my view, the decision in *Fitzpatrick v Jackson* [1989] 2 Qd R 542 was correct and, until the legislation is amended, it should not be departed from. The learned District Court judge was therefore correct in striking out the plaintiff's claim.

[15] It follows that the appeal should be dismissed with costs.

[16] **WHITE J:** I have read the reasons for judgment of McPherson JA and agree with him that *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 has no application to the construction of the relevant provisions of the *Public Trustee Act* 1978 which govern this appeal. It follows then that the only basis for challenging the decision in *Fitzpatrick v Jackson* [1989] 2 Qd R 542 disappears.

[17] I agree with his Honour's observation that the consequences to a litigant who falls within s 95 of the *Public Trustee Act* and who commences proceedings without first obtaining the consent of the Public Trustee when the limitation period expires appear unduly harsh and merits the consideration of the legislature. An amendment similar in effect to the provision considered in *Jol v State of New South Wales* (1998) 45 NSWLR 283 would enable some control to be exercised over proceedings commenced without consent because an order *nunc pro tunc* is discretionary.

[18] I agree with the order proposed by McPherson JA.

[19] **WILSON J:** I agree with the reasons for judgment of McPherson JA and with the order he proposes.