

SUPREME COURT OF QUEENSLAND

CITATION: *Cuthbert v Adams* [2003] QSC 320

PARTIES: **STEPHEN THOMAS CUTHBERT**
(applicant)
v
WALLACE BRUCE ADAMS
(respondent)

FILE NO/S: BS 8237/03

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 22 September 2003

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 19 September 2003

JUDGE: McMurdo J

ORDER: **1. Pursuant to r 377(1)(b) of the *Uniform civil Procedure Rules 1999*, the applicant has leave to amend its originating application filed by leave on 19 September 2003;**
2. Pursuant to s 77D of the *Personal Injuries Proceedings Act 2002* the applicant has leave to start a proceeding in this Court in respect of the matters set out in his notice of claim by 18 December 2003;
3. Pursuant to s 18(1)(c)(ii) of the *Personal Injuries Proceedings Act 2002* the applicant is authorised to proceed further with the claim despite non-compliance with s 9;
4. Declare that the respondent is taken to have been given a complying notice of claim.

CATCHWORDS: LIMITATION OF ACTIONS – PERSONAL INJURIES -
Where applicant wishes to commence proceedings for personal injuries – where limitation period for commencement of proceedings expires after order is sought under s 77D – whether section 77D applicable – whether applicant should be given leave to commence proceedings pursuant to section 77D(2)

LIMITATION OF ACTIONS – PERSONAL INJURIES -
Where notice of claim given nine months out of time – where pursuant to section 18(1)(c)(ii) *Personal Injuries Proceedings Act* court may authorise an applicant to proceed despite non-compliance with the notice provisions - whether the notice should be treated as complying

Acts Interpretation Act 1954, s 38
Criminal Offence Victims Act 1995, s 22
Limitation of Actions Act 1974
Personal Injuries Proceedings Act 2002, s 9, s 18, s 43, s 77D

Lamb v State of Queensland & Anor [2003] QDC 003,
 considered
Nicholls v Brisbane Slipways and Engineering Pty Ltd [2003]
 QSC 193, considered
Thomas v Trans Pacific Industries Pty Ltd [2003] 1 Qd R
 328, considered

COUNSEL: R Jackson for the applicant
 R King for the respondent

SOLICITORS: Wonderley & Hall for the applicant
 Cranston Meachern for the respondents

- [1] **McMURDO J:** The applicant was born on 21 September 1982, he was subjected to numerous sexual offences committed by the respondent between 21 September 1992 and 31 December 1997. The respondent was convicted of those offences upon his plea of guilty on 23 June 2000. He was sentenced upon six counts for various terms of imprisonment of up to seven years to be served concurrently.
- [2] The applicant wishes to commence proceedings to claim damages from the respondent for these acts, in consequence of what has been diagnosed as his chronic post traumatic stress disorder and major depressive disorder. In each case, the alleged cause of action has a limitation period expiring three years from his eighteenth birthday, i.e. expiring on 21 September 2003. see s 29(2)(c) of the *Limitation of Actions Act 1974*. His proposed claim is subject to the *Personal Injuries Proceedings Act 2002*.
- [3] By the original application filed on 17 September, the applicant sought leave pursuant to s 43 of the Act. But at the hearing on 19 September, the applicant was given leave to amend the application to seek leave pursuant to s 77D(2)(b), together with an order pursuant to s 18(1)(c)(ii). That second order is required because the applicant's notice of claim was given outside the time required by s 9.
- [4] Section 77D provides:

“Alteration of limitation period for personal injury arising out of an incident happening before 18 June 2002

1. This section applies in relation to a personal injury arising out of an incident happening before 18 June 2002 if –
- (a) the period of limitation for a proceeding based on a claim for the personal injury ends during the period starting 18 June 2002 and ending at the end of 18 December 2003; and

- (b) a proceeding based on the claim has not been started in a court, including in a court outside Queensland or Australia
- 2. If the period of limitation has ended, the claimant may start a proceeding in a court based on the claim –
 - (a) If a complying notice of claim is given before 18 June 2003; or
 - (b) At a later time, not more than 6 months after the complying notice of claim is given and not later than the end of 18 December 2003, with the court’s leave.
- 3. If a proceeding is started under subsection (2) without the claimant having complied with chapter 2, part 1, the proceeding is stayed until, the claimant complies with the part or the proceeding otherwise ends.
- 4. This section does not limit section 43.¹

[5] This section was not part of the Act as originally enacted. It was inserted as part of a series of provisions required by the extension of the Act’s operation to a personal injury arising from something happening before 18 June 2002. The applicant’s case falls within s 77D because all of the relevant incidents occurred before that date, the period of limitation ends between 18 June 2002 and 18 December 2003 and a proceeding based on the claim has not been commenced. Going to s 77D(2), the applicant could start his proposed proceeding if he could bring his case within paragraph (a) or paragraph (b). Paragraph (a) is susceptible to different interpretations. The words “before 18 June 2003” could refer to the date of the complying notice of claim. Alternatively, they could refer to the date by which a claimant may start a proceeding without the court’s leave, if a complying notice of claim has been given. The latter interpretation requires the paragraph to be read as if it contained a comma after the word “given”. As Judge McGill SC pointed out in *Lamb v State of Queensland & Anor* [2003] QDC 003, the former interpretation would permit the claimant to start a proceeding at any time and I agree with his view that the second of those interpretations is the correct one. In the present case, however, as no notice of claim, compliant or otherwise, was given before 18 June 2003, upon any view the case is not within paragraph (a).

[6] For this reason the claimant seeks the court’s leave for the purposes of paragraph (b). If that is leave is obtained, the proceeding would have to be commenced by 18 December 2003.

[7] From s 77D(3) it appears that the proceeding can be commenced without the claimant having complied with Chapter 2 Part 1, although the proceeding would then be stayed until the plaintiff complied.

[8] As I have mentioned, the limitation period was three years from 21 September 2000, but it expires today, 22 September, through the operation of s 38 of the *Acts Interpretation Act* 1954. Accordingly, the applicant is still within time to commence the proceeding, but to do so today he would require the order he originally proposed under s 43. If he sued today with the benefit of a s 43 order, the proceeding would be stayed until he complied with Part 1 of Chapter 2, by s 43(3). The course taken, which is to seek to extend the limitation period pursuant to s 77D, might seem unusual when the period has not yet expired. However, if the applicant is to be allowed to commence proceedings, it seems more consistent with the stated purposes of the Act that the limitation period be extended, so as to permit the steps

¹ Section 43 (Need for urgent proceeding)

to be taken by each party which the Act contemplates will occur prior to the commencement of proceedings.

- [9] Mr Jackson drew my attention to an argument against his application, to the effect that the court's leave could not be given until after the period of limitation has ended, although of course he argued that s 77D(2) permits a claimant to start a proceeding after the end of the period of limitation with the court's leave, given before or after the end of that period. In my view, his argument should be accepted. The words "if the period of limitation has ended" are used to describe the circumstances when the claimant starts the proceeding. The structure of s 77D(2) does not indicate that those words describe the circumstances which must exist when the court's leave is given. There is no apparent reason why the power given to the court should be limited to its exercise after the end of the limitation period. In many cases it will be unclear as to precisely when a period of limitation ends, and the operation of the s 77D(2) in that event could be problematical, if the court could give leave only after the end of the period. Accordingly, leave can be given today pursuant to s 77D(2).
- [10] But there would be no point in doing so if the applicant is unable to ultimately comply with Chapter 2 Part 1. As mentioned, his notice of claim was given late. It was given on 16 September 2003. By the combined operation of s 9(3) and s 77A, the notice was required to be given in the present case three months after this Act received assent, which it did on 29 August 2002. The result is that the notice was given some nine months out of time. That is the reason for the further application under s 18(1)(c)(ii). I accept that that provision permits the court to authorise the applicant to proceed further notwithstanding his late notice of claim and that if such an order was made, then by s 20(2)(b) the notice of claim would be taken to be a complying notice: see *Nicholls v Brisbane Slipways and Engineering Pty Ltd* [2003] QSC 193. Accordingly there is a means by which the claimant could comply with Chapter 2 Part 1. For the applicant, it is suggested that it is convenient now to consider whether the notice should be treated as complying, and in my view that matter can be decided now because the notice is not said to be non-complying for any reason other than its lateness. Accordingly, the two applications, under s 77D and s 18, involve effectively the same discretionary considerations to which I now turn.
- [11] As to those considerations, there is some guidance given by decisions upon similar enactments such as the decision of the Court of Appeal in relation to the *Motor Accident Insurance Act 1994* in *Thomas v Trans Pacific Industries Pty Ltd* [2003] 1 Qd R 328. The relevant factors include the extent of the delay, any prejudice to the respondent and the prejudice to the applicant by being permanently shut out of the proceeding, having regard to the strength or otherwise of the applicant's case.
- [12] The notice of claim was given some nine months late, but it was served approximately six weeks from the receipt of a medical report strongly supporting the case and only about 15 days after a supplementary report from the same author. Mr King for the respondent suggests that the applicant's solicitors were to be criticised for seeking medical opinion more favourable to the applicant's case than that originally received, and that, in effect, the applicant should not be given some extension of time corresponding with the time taken to obtain that opinion. In my view this submission should be rejected. There is no basis for suggesting any improper conduct by the applicant's solicitors. The recently obtained medical

opinion would be very material to a decision to make a claim and the delay is satisfactorily explained. In any case, it is not a pre condition to the exercise of the powers under either section that the delay be satisfactorily explained. It is but one factor to be weighed in the exercise of the court's discretion.

- [13] There is no particular prejudice asserted by the respondent. He pleaded guilty and Mr King conceded that the claim would be one of quantum only. Although the court should be mindful of the risk of prejudice simply from the expiration of time, I am satisfied that there no risk of prejudice to the respondent in this case from the fact that the notice of claim was not given some nine months earlier, or from the fact the proceedings might not be commenced until later this year. The essential factual enquiry within this claim concern the applicant's present medical condition. The applicant has an apparently strong case , supported by recent medical opinion. There is no issue as to liability.
- [14] The respondent also submitted that the applicant could be adequately compensated by an award of criminal compensation. I reject this submission because it seems inconsistent with s 22 of the *Criminal Offence Victims Act* 1995 and because it is far from clear that the applicant's potential award of damages would not exceed the amount of compensation to which he is entitled.
- [15] In the circumstances I am persuaded that the applicant should be given the orders he seeks pursuant s 18 and s 77D.