

SUPREME COURT OF QUEENSLAND

CITATION: *AFT v B* [2004] QSC 403

PARTIES: **AFT**
(applicant)
v
LB AND THE ESTATE OF NB (Deceased)
(respondent)

FILE NO: BS8198 of 2004

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 8 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 4 October 2004

JUDGE: Wilson J

ORDER:

- (1) **That the first respondent LB pay to the applicant AFT the sum of \$20,000 by way of compensation for injury suffered by her by reason of the offence of rape of which the first respondent was convicted on 12 July 1985;**
- (2) **That the second respondent The Estate of NB (deceased) pay to the applicant AFT the sum of \$15,000 by way of compensation for injury suffered by her by reason of the offence of rape of which NB was convicted on 12 July 1985;**
- (3) **That the respondents pay the applicant's costs of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: CRIMINAL LAW – GENERAL MATTERS – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND – where the applicant was raped by the second respondent (her stepfather) – where the rape was facilitated by the first respondent (the applicant's mother) – where the second respondent is deceased – where the rape occurred 19 years before the application for compensation – where the applicant

suffers posttraumatic stress disorder as a consequence of the rape

Criminal Code 1899 (Qld), ch 65A, ss663AA(1), 663B(1)

Criminal Offence Victims Act 1995 (Qld), s 46(2)

Limitation of Actions Act 1974 (Qld), s 10(1)(d)

Public Trustee Act 1935 (Qld), s 35

Supreme Court of Queensland Act 1991 (Qld), s 93N

Succession Act 1981 (Qld), s 66(1)

Uniform Civil Procedure Rules 1999, r 71

Griffiths v Kerkemeyer (1977) 139 CLR 161, considered

Jacob v Roberts [2002] QCA 87, followed

R v Chong, ex parte Chong [2001] 2 QdR 301, followed

R v Grahame, ex parte Freeman, followed

R v Jones, ex parte McClintock [1996] 1 QdR 524, followed

R v Morrison, ex parte West [1998] 2 QdR 79, followed

Stewart v Woods [2002] QSC 164, followed

COUNSEL: AJ Kimmins for the applicant

SOLICITORS: Tony Bailey Solicitor for the applicant

- [1] **WILSON J:** On 19 January 1985 the applicant was living in Normanton with her mother (LB) and stepfather (NB). That night she was raped by her stepfather; her mother not only stood by but actively encouraged NB to commit the rape and forced the applicant to submit to the ordeal. On 12 July 1985 LB and NB were both convicted of rape; she was sentenced to 7 years' imprisonment with hard labour, and he was sentenced to 5 years' imprisonment with a recommendation for parole after 2 years. NB has since died.
- [2] The applicant seeks criminal compensation from her mother (the first respondent) and the estate of her stepfather (the second respondent).
- [3] The applicable criminal compensation scheme is that in chapter 65A of the *Criminal Code* (which continues to apply to injuries sustained as a result of the commission of a criminal offence prior to 18 December 1995: see *Criminal Offence Victims Act* 1995 s 46(2)). Section 663B(1) of the *Code* provides –

“663B(1) Court may order payment for compensation

Where a person is convicted on indictment of any indictable offence relating to the person of any person or of more than 1 indictable offence relating to the person of any person (whether in respect of 1 indictment or more than 1 indictment) arising out of the one course of conduct or closely related courses of conduct of that person so convicted, the court, on the application by or on behalf of the person aggrieved by the offence or offences, may, in addition to any other sentence or order it may make, order the person to pay to the person aggrieved a sum not exceeding the prescribed amount by way of

compensation for injury suffered by the person by reason of the offence or offences of which the offender is convicted.”

- [4] As I have said, NB is no longer alive. Section 663B created a cause of action which survived his death by virtue of s 66(1) of the *Succession Act 1981*: *R v Chong, ex parte Chong* [2001] 2 QdR 301. After his death a sum of \$7,000-00 was payable to his estate by the Department of Aboriginal and Torres Strait Islander Policy as compensation for the non-payment of award wages. The Public Trustee administered the estate and paid the moneys to the first respondent (the deceased’s de facto). There were no other assets. The Public Trustee was able to do this without filing an election to administer or obtaining letters of administration - presumably pursuant to s 35 of the *Public Trustee Act 1978*.
- [5] In the circumstances, this application has been properly brought against “The Estate of NB (deceased)”. Section 93N of the *Supreme Court of Queensland Act 1991* provides –

“93N Proceeding if no grant of representation when originating process issues

(1) If—

(a) an originating process names as a defendant or respondent a person who is dead when the originating process issues; and

(b) the cause of action survives the person's death; and

(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.

(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.”

and r 71 of the *Uniform Civil Procedure Rules* provides –

“71 Defendant or respondent dead at start of proceeding

(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
 - (ii) a grant of representation has not been made; and
- (b) the cause of action survives the person's death.
- (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.”

I directed that the application and supporting affidavits be served on the Public Trustee, but he declined to take part in the proceeding. There was no other appearance on behalf of the estate. However, the application was served on the first respondent, who was apparently the person entitled to receive the \$7,000 which was the estate's only asset. Accordingly I have concluded that I should determine the application as against both named respondents. See *R v Chong, ex parte Chong* at paras [7] and [8] and *Stewart v Woods* [2002] QSC 164.

- [6] There is a limitation period of 6 years from the conviction for the bringing of an application such as this: *Limitation of Actions Act* 1974 s 10(1)(d) and *R v Chong, ex parte Chong*. However, the limitation provision bars the remedy and not the right, and where (as here) the respondents do not take the point, it is not for the Court to raise it: *Jacob v Roberts* [2002] QCA 87.
- [7] The applicant was born on 6 November 1970. She had a dysfunctional and abusive childhood. Her parents separated at about the time of her birth, and she went to live with her maternal grandmother, with intermittent periods in a children's home, until the age of 10. Then from the age of 10 until the rape (when she was 14), she lived with her mother and step-father NB. Her mother had a long and tempestuous relationship with NB, and she apparently took out some of her frustration on the applicant. The applicant had 1 full brother, and 2 half siblings (one of whom committed suicided after the rape). Between the ages of 6 and 13 the applicant was abused by a maternal uncle; the abuse took the form of touching and oral sex, perpetrated repeatedly about once every 2 months.
- [8] On the night of the offence, NB went out to the local hotel and returned with a carton of beer and a bottle of rum. The applicant and her sister went to bed. Later that night they were awoken by NB who demanded that they sleep on the floor. He and their mother were intoxicated. The mother forced the applicant to drink some alcohol and to lie on a mattress in the lounge next to NB. The sexual assault began with touching and digital penetration of the applicant's vagina and progressed to sustained penile penetration. The mother virtually took charge of what was happening issuing instructions to the applicant and NB and threats to the applicant if she did not submit. As the new day dawned, the mother effectively called off the rape and hit NB on the head with an empty wine bottle. The applicant went outside

and vomited. Her mother told her to have a bath, and when she returned hit her with a broom handle. She then instructed the applicant to go and see the local Church of Christ minister with a view to calling the police.

- [9] The applicant underwent a medical examination and was admitted to the Normanton Hospital where she remained for 2 days. Her physical injuries were mercifully slight – a superficial tender red mark on her left antero lateral flank measuring about 11 cm by 3.5 cm and another on her right postero lateral flank measuring about 6.5 cm by 1 cm, as well as small grazes in her genital area. But, as I shall describe, she has suffered ongoing psychological problems.
- [10] After her discharge from hospital, the applicant was placed in foster care, and so separated from her siblings. After a period in a children's home, she was fostered by an accountant in Mt Garnett. She attended Ravenshoe State High School in years 9 to 12, and subsequently went to Darwin where she completed a child care course at a TAFE college. She married in 1999 after living in a de facto relationship for 11 years. She and her husband have a good relationship. They have 4 children, the eldest of whom is at boarding school in Brisbane, the other three living at home. The applicant has worked as a teacher's aide and as the co-ordinator of a child care centre. They live in Kowanyama, and she is completing a further course in child care through the Cairns TAFE.
- [11] The applicant still suffers flashbacks and nightmares. She returned to live in Kowanyama, where her mother lives, in 2000. Shortly after her return, her mother threatened to bash her with a steel pole, and she took out a domestic violence order against her mother. She is very frightened of her mother whom she tries to avoid, and whenever she sees her mother she has a panic attack. The flashbacks occur daily, and have been more vivid since her return to Kowanyama. She has heart palpitations following the flashbacks and nightmares. She loses concentration and forgets what she is doing. She has become introverted; she has difficulty relating to people she does not know well and is distrustful of others.
- [12] In the opinion of Peter J Stoker, a psychologist who has examined the applicant, she is suffering from chronic posttraumatic stress disorder as a consequence of the rape. He said –

“I note she had a reasonably stable pre morbid personality structure, which has resulted in stabilisation of her emotional health post rape. However, the severity of the rape and duration of the rape and, moreover, the fact that her mother was a party to the rape, are such that it continues to traumatise her severely.

Her natural emotional resilience has resulted in her being able to lead a reasonably 'normal' life, despite suffering a significant psychological disorder as a result of the index rape.

This woman would benefit from approximately 20 sessions of counselling over the next eighteen months (cost per session is \$172.00). Counselling would best be provided by a psychologist who is either aboriginal or au fait with aboriginal culture.

This woman's prognosis is guarded. It is now approximately nineteen years since the rape occurred and her psychological health has remained rather poor.

It is my opinion she suffered a moderate form of mental and nervous shock.

Her percentage disability would be in the upper level of the moderate range.

I would have assessed her psychological disability as being higher, had she not been abused over a lengthy period by her maternal uncle. I have taken this abuse into consideration when assessing the impact of the index abuse on her psychological health. I note that the index abuse was a far more traumatic set of occurrences."

- [13] The Court must assess compensation in accordance with the ordinary principles of assessment of damages for personal injuries in civil cases: *R v Jones, ex parte McClintock* [1996] 1 QdR 524 at 527. Here there were 2 offenders, and the comparative degrees of their responsibility has to be assessed, and their respective "shares" of the compensation calculated accordingly. Pursuant to *Criminal Code* s 663AA(1) there is a statutory cap of \$20,000 in the case of "mental shock or nervous shock" – which includes the full range of psychiatric illnesses: *R v Morrison, ex parte West* [1998] 2 QdR 79. That statutory cap must be applied to the compensation assessed against each respondent. See the discussion in *R v Grahame, ex parte Freeman* [2001] 2 QdR 406 at 407.
- [14] Counsel for the applicant submitted that the Court should make a global assessment of \$50,000 as the damages that would be recoverable in a personal injuries proceeding for pain and suffering and loss of the amenities of life. There was no evidence led which would support any damages for economic loss, under the *Griffiths v Kerkemeyer* (1977) 139 CLR 161 principle or for special damages. He asked the Court then to apportion the compensation equally between the respondents and, after applying the statutory cap to each such assessment, to order each respondent to pay \$20,000 compensation.
- [15] The evidence on which the Court is asked to assess the damages that would be recoverable for pain and suffering and loss of the amenities of life is limited to the applicant's fairly short affidavit and the psychologist's report. Doing the best I can, I assess the amount that would be recoverable under this head in a damages action at \$35,000. I adopt the sentencing Judge's view that the first respondent (the applicant's mother) was more culpable than the other offender (the step-father). Accordingly, I apportion the compensation as to \$20,000 against the first respondent and \$15,000 against the second respondent. Neither of these amounts exceeds the statutory cap.
- [16] Costs should follow the event.
- [17] Orders:

- (i) that the first respondent LB pay to the applicant AFT the sum of \$20,000 by way of compensation for injury suffered by her by reason of the offence of rape of which the first respondent was convicted on 12 July 1985;
- (ii) that the second respondent The Estate of NB (deceased) pay to the applicant AFT the sum of \$15,000 by way of compensation for injury suffered by her by reason of the offence of rape of which NB was convicted on 12 July 1985;
- (iii) that the respondents pay the applicant's costs of and incidental to the application to be assessed on the standard basis.