

Step v Collins & Ors [2007] NTSC 35

PARTIES: STEP, ANTHEA KANDAPUMA

v

COLLINS, JOHN JOSEPH
HURLEY, JULIANNE KAYE
ZYLSTRA, SALLY ANNE
GOLDSTEIN, DEAN ANDREW
COOK, STEPHEN JOHN
AND
COMMISSIONER OF NT POLICE

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: No 183 of 2003 (20327300)
No 131 of 2004 (20422397)

DELIVERED: 23 May 2007

HEARING DATES: 10 May 2007

JUDGMENT OF: MILDREN J

CATCHWORDS:

PRACTICE AND PROCEDURES – Appearance – application by lay advocate to appear for unrepresented litigant – Court’s discretion to refuse or permit representation – relevant principles – application refused

Statutes:

Compensation (Fatal Injuries) Act, s 4(2), s 10
Crimes (Victims Assistance) Act, s 13(2)(a), s 13A, s 23
Law Reform (Miscellaneous Provisions) Act, s 12(2)

Supreme Court Act, s 75
Supreme Court Rules, O 21.02(2), O 21.03(b)

Citations:

Damjanovic v Maley (2003) 195 ALR 256

REPRESENTATION:

Counsel:

Plaintiff:	Va'clav Step (Lay Advocate)
First Defendant:	No Appearance
Second – Sixth Defendants:	E Hutton

Solicitors:

Plaintiff:	Self-Represented
First Defendant:	No Appearance
Second – Sixth Defendants:	Hunt & Hunt

Judgment category classification: B

Number of pages: 13

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

Step v Collins & Ors [2007] NTSC 35
No. 183 of 2003 (20327300) & No 131 of 2004 (20422397)

BETWEEN:

ANTHEA KANDAPUMA STEP
Plaintiff

AND:

JOHN JOSEPH COLLINS
JULIANNE KAYE HURLEY
SALLY ANNE ZYLSTRA
DEAN ANDREW GOLDSTEIN
STEPHEN JOHN COOK and
COMMISSIONER OF NT POLICE
Defendants

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 23 May 2007)

- [1] This is an application by the plaintiff for an order that the plaintiff's father, Mr Va'clav Step, be given leave to represent the plaintiff as her lay advocate.
- [2] This action is brought by the plaintiff for her own benefit and for the benefit of a number of other relatives of the deceased pursuant to the provisions of the Compensation (Fatal Injuries) Act. The plaintiff also claims damages at common law for nervous shock. The plaintiff claims that on 3 October 2001

the first defendant, John Joseph Collins, battered the plaintiff's mother inside a house at 44 Brolga Street, Wulagi. The battery was severe and resulted in the deceased bleeding to death from a ruptured spleen. Collins has not entered an appearance to the proceedings. I have drawn to the plaintiff's attention the provisions of Order 21.02(2) and Order 21.03(b) of the Supreme Court Rules and s 12(2) of the Law Reform (Miscellaneous Provisions) Act which may entitle the plaintiff to obtain default judgment against the defendant Collins for damages to be assessed without resulting in any release to the other defendants from any liability that they may eventually be found to have. The plaintiff has indicated through her father, Mr Va'clav Step, that as the plaintiff has recovered \$25,000 under the provisions of the Crimes (Victims Assistance) Act as a result of Mr Collins' behaviour, she does not wish to pursue Mr Collins any further because she believes that any sum which may be recovered against him will have to be repaid to the extent of the \$25,000 already awarded. Mr Step advised that this was a consequence of a consent agreement being entered into between the plaintiff and the Northern Territory in relation to the issue of the assistance certificate. I note that s 23 of the Crimes (Victims Assistance) Act provides:

- “(1) Nothing in this Act affects the right of a person to claim or recover compensation or damages otherwise than under this Act.
- (2) A Court by which an action for damages under a law, other than this Act, is heard shall not take into consideration that an

amount by way of assistance has been or may be paid under this Act.”

- [3] Nevertheless, there may be a requirement to repay from any damages awarded because of s 13(2)(a) and s 13A of that Act.
- [4] The second, third, fourth and fifth defendants are all police officers who were performing duties in their capacity as police officers at the time of the deceased’s death. The claim against the second defendant, Julianne Kaye Hurley, is that she failed to dispatch a police unit to 44 Brolga Street promptly and that had she done so the injuries suffered by the deceased would have been prevented. The claim against the third defendant, Sally Anne Zylstra, is similar as she was Julianne Hurley’s superior and it is alleged that she should have stepped into ensure that the police unit was dispatched promptly. It is alleged against the fourth defendant, Dean Andrew Goldstein, and the fifth defendant, Stephen John Cook, who were police officers that they breached their duty of care towards the deceased by failing to convey the deceased to a hospital or to call an ambulance. It is alleged against both of these defendants that they committed battery against the deceased because they tortiously authorised Collins to drag and carry the deceased from the back of a police van, where she had been originally placed, back inside the house where she was further assaulted by Collins and later died. The claim against the Commissioner of the Northern Territory Police is that he is vicariously liable for the wrongful acts of the other defendants, except for the defendant Collins.

- [5] The plaintiff is the daughter of the deceased. She is now 20 years of age, having been born on 10 June 1986. At the time of the deceased's death she was 15 years of age. It is not clear to me whether the plaintiff was living with her mother at the time of the deceased's death. It seems that at least after that time, she was living with her father until late 2006 when she left her father and obtained a flat of her own.
- [6] The damages claimed include damages pursuant to s 10 of the Compensation (Fatal Injuries) Act and damages at common law for mental injuries and loss of enjoyment of life. So far as the former is concerned no specific head of damage is pleaded. It is likely that the plaintiff's claim would be limited to damages for solatium. So far as the other members of the family for whom the action is brought, I note that a number of the potential claimants are grandchildren who are not "members of a deceased person's family" for the purposes of s 4(2) of the Compensation (Fatal Injuries) Act. This leaves seven persons in all, including the plaintiff. All of these claims are likely to be limited to relatively small claims for solatium. So far as the plaintiff's common law damages are concerned, there is a claim for nervous shock and mental injuries which it is said are still ongoing and which have interrupted the plaintiff's schooling. There are also claims for exemplary damages and aggravated damages which are very unlikely to succeed. The total claims are most unlikely to exceed \$100,000 assuming liability is proved. The action therefore could be heard in the Local Court.

- [7] So far as Mr Va'clav Step is concerned, he was born in Czechoslovakia in 1951 and arrived in Australia in 1979. He was educated in Czechoslovakia to the completion of high school level. In Australia he has worked as a labourer, truck driver and wood cutter and has also done ceramic tiling for many years. He has a very good understanding of English, both oral and written. He speaks with a slight accent. He has lived in a camp on Crown land since 1996. The camp is equipped with a generator and has solar panels, computers, office equipment and access to broadband internet.
- [8] Mr Step is not currently employed. He is studying in order to gain university entrance. His only income is Austudy of \$440 per fortnight. Since 2002, he has assisted the plaintiff with her crimes victims claim and with these proceedings which were commenced in 2003 and 2004. Mr Step obviously has no legal qualifications. He accesses information concerning the law through the plaintiff who is a first year student studying law at Charles Darwin University. Mr Step in his appearances before the Court has always been punctual, polite, well dressed and well prepared. He says that he has no convictions. I have no reason to doubt his genuineness and his honesty.
- [9] Mr Step informed me that the plaintiff did her high school at home and he acted as her home tutor.
- [10] In her affidavit, the plaintiff says that she is unable to conduct the proceedings herself and that she is unable to find a solicitor or counsel to

represent her. She says that she wishes her father to represent her in these proceedings.

[11] Her reasons for not being able to represent herself are:

- (1) she has little life experience and little experience in court matters;
- (2) she suffered nervous shock and consequent depression due to the discovery that her mother's death was "caused by crimes and negligence committed by NT police officers";
- (3) when she thinks of her mother's death and the "terrible circumstances in which she died" she is still distressed and unable to concentrate on court proceedings; and
- (4) she is seven months pregnant and is afraid that if she had to conduct these proceedings it would negatively affect the development of her child and performance of her parental duties after birth.

[12] The Court has not been told anything about whether or not the plaintiff is in a relationship with the father of the child and, if so, what the circumstances of that relationship may be.

[13] It is of course very desirable that the plaintiff has someone to represent her and this would be so even if she were very experienced in life and not suffering from any trauma. In this particular case the claims are not altogether straightforward, either factually or legally. The preparation for the case will be time consuming and require considerable skill. Witnesses

will have to be spoken to and located and it is desirable that detailed signed witness statements are taken. The plaintiff is not qualified to know what evidence is necessary to be called at trial and what evidence is admissible and what is inadmissible. If the plaintiff represents herself, she will have to call herself as a witness. It is difficult for a lay person to give evidence in their own cause without the assistance of counsel. The plaintiff is not skilled in the law and, although she has access to legal materials as a first year law student, she will have difficulty addressing the Court on the legal issues which this case raises.

[14] The plaintiff claims that she is unable to obtain a solicitor or counsel to represent her although she has tried to do so many times over the years. She has had difficulty obtaining legal assistance to present her case in the Local Court for compensation under the Crimes (Victims Assistance) Act. She says that a number of solicitors refused to act for her even on a legal aid basis. I note that in May 2006 a senior solicitor from the North Australian Aboriginal Legal Aid Service (NAALAS) wrote a referral letter suggesting that the claims were meritorious and recommending that pro bono assistance be given. There is no formal pro bono scheme operating in the NT. The plaintiff was given a list of contacts interstate through which pro bono assistance might be obtained. This has not been followed up because these contacts were not local. It is my experience that there are many local solicitors who take on personal injury cases on a “no win no fee” basis, but usually only where the claim is obviously meritorious. The plaintiff, who is

part Aboriginal, was unable to obtain legal aid through NAALAS because it was representing Mr Collins. However, as the plaintiff no longer wishes to proceed against Mr Collins, she may still be entitled to seek legal aid through the North Australian Aboriginal Justice Agency (NAAJA) which has replaced NAALAS. There has been no recent attempt to obtain legal assistance from this quarter.

[15] I accept that the plaintiff is impecunious. Her only income is an Abstudy payment of \$343.20 per fortnight. She has already spent the \$25,000 which was the compensation she received under the Crimes (Victims Assistance) Act. Between 20 January 2005 and 10 March 2005 she had a private solicitor to represent her while she was overseas. That solicitor was allegedly not prepared to act for her on a legal aid basis. She has approached two other lawyers since then. One refused to act for her because he did not handle matters of this kind. Another was a barrister who would accept a brief only on the instructions of a solicitor.

[16] Prior to 2005 it appears that she may have spoken to or approached other solicitors who have declined to act for her. It is not clear to me why this is so. There may be any number of reasons and it would be fruitless to speculate.

[17] The plaintiff wishes to have her father represent her. She has confidence in her father who represented her successfully in the Crimes (Victims

Assistance) Act litigation. Mr Step is prepared to act for the plaintiff without any hope of personal financial reward.

[18] Section 75 of the Supreme Court Act provides:

“Subject to any other law in force in the Territory, a party in a proceedings may appear before a Court either personally or by a legal practitioner having the right to practise in Court”.

[19] In *Damjanovic v Maley* (2003) 195 ALR 256 the Court of Appeal of the Supreme Court of New South Wales discussed the principles upon which a superior court may grant or refuse leave for a party to be represented by a lay advocate. It is clear that there is a discretion in the Court, notwithstanding s 75 of the Supreme Court Act, to grant leave in circumstances where the achievement of justice cannot be otherwise secured.

[20] The fact that the case is one of complexity is a relevant factor pointing towards the refusal of leave. It is relevant also to consider any genuine difficulties of the unrepresented party to represent herself. These include such matters as unexpected language difficulties and emergencies. These are not relevant factors in this case.

[21] I have already noted the other matters upon which the plaintiff seeks to rely. The most significant of these matters is her claim that she is still distressed and unable to concentrate on Court proceedings whenever she thinks of her mother's death. There is evidence that in the course of proceedings before

Mr Trigg SM in the Local Court on 7 November 2003 when the plaintiff was 16 years of age she became upset at one stage and was unable to continue. There is also evidence that she has been assessed by two psychiatrists in 2004. According to the report of Dr Markou the plaintiff was extremely distressed throughout the interview, crying and reporting depressed mood on most days since her mother was killed and that she continued to suffer from an adjustment disorder with mixed anxious and depressed mood. Dr Markou accepted that she was unlikely to be able to manage her affairs in relation to the Court proceedings in relation to the death of her mother because, at times, when called upon to recall the circumstances of her mother's death and the consequences upon her own life she becomes extremely distressed and is unable to focus and concentrate on other matters which are necessary in Court proceedings. Dr Kenny noted that throughout most of the interview he had with her, the plaintiff looked down with tears rolling down her face and that she was obviously distressed and tearful. He thought that her distress was genuine. He said that he had a distinct impression of an intelligent young woman who was chronically depressed but with potential to move on in her life and to take on whatever career or profession she was motivated to move towards and that the legal process would make a significant contribution to an improvement in her depression once it was over.

[22] The plaintiff has appeared before me on two occasions and on neither of those occasions did she appear to be upset or tearful. I note that the reports

are now very much out of date and that the plaintiff is no longer a teenager. She has moved away from living with her father and I note that Dr Kenny considered that one of the determinants of her depression included “the exclusive and perhaps mutually dependant relationship that she and her father have, resulting in an isolated place of residence resulting in the lack of a peer group”. The evidence that the plaintiff would be unable to represent herself is fairly weak as things presently stand.

[23] An important consideration is also that there would be no protection to the plaintiff of the kind available should she be represented by a qualified practitioner at the hearing which would place her at considerable risk. A lay advocate does not owe the same duty to the person who the advocate is representing as does a lawyer. Her father is unqualified, uncredited and uninsured. Because of his close relationship with his daughter it will be very difficult for him to give her unbiased advice and very difficult for her to make decisions which may be advised to her by her father but which are not in her best interests. There is a not inconsiderable risk that should the matter proceed to trial, that the plaintiff may suffer a considerable award of costs against her.

[24] I note in this regard that on 5 April 2007, I provided a notice to her in which I suggested that she ought to obtain legal advice on her prospects of success and of any likely costs order which may be made against her should she lose either the whole action or that part of the action in which she seeks damages

for nervous shock. No effort has been made by Ms Step to obtain advice on these questions since then.

- [25] There is also the important consideration that with unqualified and uninsured lay advocates the Court loses the benefit of the overriding duty which a barrister or solicitor has to the Court and the lack of disciplinary codes which apply in such cases. As was said by Stein JA in *Damjanovic v Maley* at 268 para [78] “... the absence of a disciplinary code and duty to the Court underlines the inappropriateness of permitting unqualified persons to appear apart from an exceptional case”.
- [26] There is also the consideration that Mr Step is very likely to be a witness in the proceedings. It is generally very undesirable for a person who is a witness to also be an advocate in the same cause because of the difficulty which this will give rise to in the advocate maintaining objectivity. Mr Step sought to distinguish *Damjanovic v Maley* on its facts, but this does not alter the fact that the case is an important source of the appropriate considerations to be considered by the Court.
- [27] Finally, as was said in *Damjanovic v Maley*, the guiding principle in the exercise of the discretion is the public interest in the attainment of ends of justice. As Stein JA said at 268 para [83] “the public has an interest in the effective, efficient and expeditious disposal of litigation in the Courts. As a general rule this can best be achieved by parties employing qualified lawyers”.

[28] So far the history of this litigation gives me no comfort that the proceedings will be conducted effectively, efficiently and expeditiously through Mr Step. Little progress has been made in these matters since proceedings were commenced. The principle reason for that is the difficulty which the plaintiff and Mr Step have had in preparing a statement of claim. The statement of claim has been struck out twice by the Master. The present consolidated statement of claim is still very repetitious if not prolix. No application is presently before the Court to have it struck out, but it could be greatly simplified.

[29] Taking all of these matters into consideration, I consider that the application must be refused.
