CITATION: *Fuller v Northern Territory of Australia & Torrens* [2002] NTMC 008

PARTIES:	TONY JAMES FULLER
	V
	NORTHERN TERRITORY OF AUSTRALIA
	AND GLEN TORRENS
TITLE OF COURT:	Local Court
JURISDICTION:	*Crimes (Victims Assistance) Act*
FILE NO(s):	20102660
DELIVERED ON:	26 February 2002
DELIVERED AT:	Darwin
HEARING DATE(s):	29 January 2002
DECISION OF	Mr V M Luppino SM

CATCHWORDS:

Crimes Victims Assistance – Evidence - Jones v Dunkel inference – Interrelationship with s 12(2) Evidence Act – Whether inference can or should be drawn – Right of patient pursuant to s 12(2) Evidence Act – Whether a claim to privilege is maintainable – Whether the privilege can be waived – Mental injury and proof thereof – Matters relevant to ss 13(2) and 13A Crimes (Victims Assistance) Act.

Crimes (Victims Assistance) Act ss4, 9, 13(2), 13A, 17;
Evidence Act s 12(2)

Jones v Dunkel (1959) 101CLR 298;
Payne v Parker [1976] NSWLR 191;
Cafe v Australian Portman Cement Pty Ltd (1965) 83 WN (Pt 1) (NSW) 280;
Chabrel v Northern Territory of Australia and Mills (1999) 9 NTLR 69;
T v State of South Australia and Anor (1992) Aust Torts Rep 8-167;
Hollington v Northern Territory of Australia, unreported, Mildren J, Supreme Court of Northern Territory, 4 December 2001

REPRESENTATION:

Counsel:

Plaintiff:	Mr Wallbridge
First Respondent	Ms Spurr
Second Respondent	Not represented

Solicitors:

Plaintiff	Morgan Buckley
First Respondent	Halfpenny
Second Respondent	Not represented

Judgment category classification:	B
Judgment ID number:	[2002] NTMC 008
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IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20102660

BETWEEN:

TONY JAMES FULLER
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

And

GLEN TORRENS
Second Respondent

REASONS FOR DECISION

(Delivered 26 February 2002)

Mr V M LUPPINO SM:

1. This is an application for Crimes Victims Assistance. The applicant is a police officer. He was injured in the course of dealing with a prisoner at Police Headquarters on 2 April 2000. There is some issue regarding the circumstances of the injury which I will discuss in more detail below.

2. Service of the application upon the second respondent had previously been dispensed with and he was therefore not represented in the hearing before me. He has not been convicted of any offence in relation to the circumstances leading up to the injury as he failed to answer his bail. This does not prevent the issue of an assistance certificate to the applicant. However, pursuant to section 17 of the *Crimes (Victims Assistance) Act* ("the Act"), it must be established by the applicant on the balance of

probabilities that he sustained an "injury" (as defined in section 4 of the Act) as a result of the commission of an "offence" (also defined in the Act) by another person. A conviction of the person committing the offence is not a condition precedent to the issue of an assistance certificate.

3. The applicant alleges that after the second respondent was arrested for various offences, he was ultimately placed in cells at the watchhouse. It is alleged that the second respondent was attempting to escape from the cells. The applicant gave evidence to the effect that to ensure that the second respondent did not escape from the cells, it was necessary to forcibly restrain the second respondent and he did this by taking him by the throat with his right arm extended and pushing him against the wall of the cell. The applicant says that in consequence of that motion, combined with the resistance of the second respondent, that he injured his right shoulder.

4. A number of documents were put in evidence before me. Objection was raised to the reception of the two reports of the applicant's general practitioner namely, Dr Meadows. Those reports are dated 25 January 2001 and 17 July 2001.

5. The issue in relation to these documents is based on section 12(2) of the *Evidence Act* which provides as follows:

> "A medical practitioner shall not, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient is the matter in dispute) any communication made to him in his professional character by the patient, and necessary to enable him to prescribe or act for the patient."

6. It was not disputed that the applicant claimed "privilege" over the documents. I think it is a misnomer to describe the claim as one of privilege. It is clear from section 12(2) that communications of the type described therein cannot be divulged by the medical practitioner without the consent of the patient. It is therefore more correct to say that the applicant has refused to give his consent rather than to claim privilege. This has arisen in

the context of a subpoena directed to Dr Meadows for production of his medical records. Leave had been given to the parties to inspect the documents subject to any claim for "privilege". The applicant purported to make such a claim. Leaving aside the question of the proper terminology for the claim, the net effect has been that the first respondent has been denied inspection of those documents. During the course of the hearing before me the applicant sought to put the two reports referred to in paragraph 4 in evidence. Initially it was argued that the applicant's actions in seeking to rely on those reports amounted to a waiver of any entitlement to privilege. In consequence I was asked to order production of Dr Meadows' records. I am of the view that the claim to waiver cannot be maintained. Waiver of privilege is something which occurs in the context of legal professional privilege and is I think unique to that privilege. Although the applicant has apparently claimed a "privilege", the applicant's right is in fact a statutory right not to have his communications to his medical practitioner divulged by that practitioner. It is not a privilege in the context of waiver of legal professional privilege. Furthermore, the *Evidence Act* does not stipulate any repercussions consequent upon the exercise of that right. The prohibition in section 12(2) operates only against the medical practitioner and only in the context of disclosing communications made to that medical practitioner by the patient. I cannot see therefore how there can be any scope for the application of the concept of waiver in relation to the right given by section 12(2) of the *Evidence Act*.

7. That the patient's consent is required before a medical practitioner can disclose a communication of the nature referred to made to that practitioner by his patient does not necessarily mean that the patient's consent is required before all documents in the medical practitioners file can be produced in response to subpoena. The prohibition in section 12(2) only operates in relation to communications made by the patient to his medical practitioner. Production of documents can only therefore validly be refused

where production of the document would have the effect of disclosing a communication of the nature referred to in that section. Not all documents in a medical practitioner's file would satisfy that requirement. That point however was not taken at the time. As the *Evidence Act* does not give the medical practitioner's file the status of legally privileged documents, then even though the patient can exercise his right to refuse his consent to disclosure of the prohibited material, it would not prevent the applicant from being cross-examined about matters which might be in his medical practitioner's medical records, or for that matter what information he provided to his medical practitioner.

8. The first respondent submitted that in consequence of the applicant's refusal to allow production of the documents that an adverse inference in accordance with *Jones v Dunkel* (1959) 101 CLR 298 should be drawn against the applicant. The rule in *Jones v Dunkel* does not apply where the failure to produce documents or call evidence is explained on the basis of the refusal to waive privilege. *Payne v Parker* [1976] NSWLR 191. Even though the right given a patient by section 12(2) of the *Evidence Act* is not equivalent to a claim of legal professional privilege, I see no reason why the principle in *Payne v Parker* cannot apply to treat the refusal to consent under section 12(2) as likewise creating an acceptable explanation for the failure to call that evidence or to put those documents in evidence.

9. In the event that I am wrong in that I note that in any event the *Jones v Dunkel* inference only enables a court to draw an inference that if evidence had been called, or documents were produced, they would not have supported the case of the party required to produce those documents or call that evidence. It does not permit an inference that the untendered evidence would in fact have been damaging to the party not providing that evidence.

10. In light of that it is difficult to see what inference could be validly drawn in the present case. It was submitted that inferences could be drawn in relation

to possible other causes of injury. That however I think is not a valid inference as it effectively requires me to make a positive inference i.e. that the untendered evidence would have been damaging to the applicant's case.

11. In any event questions on the topic of alternative possible causes were put to the applicant in cross-examination. He spontaneously denied the suggestion. I thought that the applicant gave his evidence very well and in a very believable manner. His evidence in that regard was also supported by the medical evidence which I discuss in more detail below. For those reasons I am prepared to accept the applicant's evidence.

12. It was also submitted that I could draw an inference that the consequences of the injury are not as severe as the applicant describes in his evidence. Although in my view that is an inference of the type that is valid under the principle of *Jones v Dunkel*, the applicant was not cross-examined in any detail on this issue. I have already stated that in my view section 12(2) of the *Evidence Act* would not prohibit him from being questioned about that nor would he be entitled to refuse to answer that question. It is difficult therefore to weigh any inference which can legitimately be drawn from this uncalled evidence against the applicant's own evidence which I have chosen to accept as credible in all respects. I note that having the ability to draw an inference pursuant to *Jones v Dunkel* does not mean that it is mandatory to draw an inference in appropriate circumstances (*Cafe v Australian Portman Cement Pty Ltd* (1965) 83WN (Pt 1) (NSW) 280). Given that the applicant was not seriously challenged in his evidence regarding the severity of his symptoms, given that I am prepared to accept the applicant's evidence as credible and given that the applicant's evidence is supported by the medical evidence, I do not consider it appropriate to draw the adverse inference suggested for those reasons.

13. I now deal with the substantive evidence relevant to the assessment of an assistance certificate. The events described by the applicant in his evidence

were consistent in general terms with the matters pleaded in the Application, albeit that his evidence provided more detail. It was also consistent with a number of the documents put in evidence particularly Exhibit A9. This was a business record of the Commissioner of Police and is a log kept of observations relevant to prisoners in custody at the watchhouse. That confirmed that the second respondent had feigned self harm in an attempt to attract attention and that when police officers attended to him he then attempted to escape. He then forcibly and aggressively resisted police measures to prevent his escape and had to be restrained.

14. The police precis prepared for prosecution purposes dated 2 April 2000 was also put in evidence as Exhibit A2. I must bear in mind that this was prepared for prosecution purposes and the emphasis of that document is clearly on what is relevant to the prosecution. For that purpose the actual mechanics and circumstances of the injury to the applicant were not relevant. The matters described in the precis are consequently incomplete and imprecise from the point of view of matters relevant to the current application. However there is a reference therein to the resistance of the second respondent and the struggle in the cells. Although it is not as precise as the applicant's version as given in his evidence and although the emphasis was on the criminal damage and not on the injuries, sufficient consistency in the versions exits.

15. Similarly in relation to Exhibit A1, which is the applicant's statutory declaration dated 16 July 2000. This was again prepared essentially for prosecution purposes. Therein the applicant describes how he observed the second respondent lunge at another police officer and therefore went to the assistance of that other officer. Again what is noted in that declaration is in less detail and not as precise as the applicant's evidence. Again I think that is explained by the fact that the declaration was prepared for prosecution purposes and therefore had a different emphasis.

16. The first respondent submitted that there was a difference between the version in the applicant's evidence and tendered documents particularly in the description of events in Exhibit A1. I think in any event that any differences can be explained by the difference in purpose for which those documents were prepared (i.e. a criminal prosecution) as opposed to the current civil proceedings. In any event I do not consider that any such differences are sufficient to warrant rejection of the applicant's evidence. As I have indicted previously I thought the applicant gave his evidence well, his answers were spontaneous, his evidence was consistent with the medical evidence and I was of the view that he was entirely truthful in his evidence before me.

17. I therefore find that the applicant was injured as described in his evidence.

18. There also appeared to be some issue as to whether an "offence" within the meaning of section 4 of the Act exits. The issue of an assistance certificate can only be made for a "injury" to a "victim". The net effect of the definitions is that it must be proved that the injuries result from an offence. The definition of an offence makes it irrelevant as to whether the offence is indictable or not. In my view an offence under section 158 of the *Police Administration Act* could be made out on the findings that I have made. Alternately an offence of attempted escape from lawful custody (section 112 of the *Criminal Code*) could also be made out on the facts. Counsel for the applicant also submitted, and I agree, that an offence under section 121 of the *Criminal Code*, namely resisting a public officer in the discharge of his duty, could also be made out.

19. Accordingly I find that the applicant is a victim within the meaning of the Act and that he suffered an injury within the meaning of the Act.

20. The extent of the injury is also an issue. The applicant also claims a mental injury. This can be the subject of an assistance certificate within the terms of the Act given that the definition of injury includes "mental injury". This

is also reinforced by section 9 which sets out the principles for assessment of an assistance certificate and which provides that the mental distress of a victim is one of the factors to be taken into account in the assessment.

21. However I have no evidence before me of any mental injury. The applicant submitted that I could make some allowance for it in the assistance certificate based on inferences that I am able to draw. However having regard to the fact that applicant is a police officer of some 14 years standing I can infer that he has found himself in same or worse situations numerous times during the course of his career. I think this then works against an inference in favour of a finding of mental distress. It was also very telling that the applicant gave no evidence of any mental distress.

22. In C*habrel v Northern Territory of Australia and Mills* (1999) 9 NTLR 69, Mildren J approved of the decision of Olsson J in *T v State of South Australia and Anor* (1992) Aust Torts Rep 8-167 where in discussing the term "mental injury" used in the South Australian Act his Honour said;

> "Whilst I accept that the statute obviously has in contemplation something more than a condition of mere sorrow and grief, nevertheless what the court is required to do so is to consider the situation of a claimant following a relevant criminal act and contrast it with that which pre-existed the Act in question. Leaving aside proven conditions of mental or nervous shock, if the practical effect of the relevant conduct has been to bring about a morbid situation in which there has been some more than transient deleterious effect upon a claimant's mental health and well being, so as to adversely affect that persons normal enjoyment of life beyond a situation of mere transient sorrow and grief, then, in the relevant sense, the person has sustained mental injury."

23. In the absence of some positive evidence to that effect I cannot find that there has been any adverse effect to the applicant's normal enjoyment of life beyond something akin to mere transient sorrow and grief. I accordingly make no allowance for "mental injury" in my assessment.

24. In respect of the physical injuries sustained or suffered by the applicant, the evidence shows that the applicant attended at Royal Darwin Hospital Accident and Emergency Department on the same day. This is confirmed by Exhibit A3. He was found to have a stiffened painful shoulder but no limitation of movement and no anatomical deformity or swelling. X-rays were normal.

25. Exhibit A4, shows that the applicant consulted Dr Meadows on 12 April 2000. At that time an ultrasound was ordered which dismissed the possibility of any ligament damage. The applicant next saw Dr Meadows again in June or July 2001 i.e. a little over 12 months later. At the time he reported having had niggling symptoms over the preceding period which he described as being of a minor nature. This time Dr Meadows found a "click" and tenderness. He then arranged for a cortisone injection. A second injection was administered at a later time. Dr Meadows acknowledged the possibility of recurrence as he described the possibility that discomfort might return.

26. Exhibit A5 is a report from the physiotherapist the applicant consulted. The applicant had physiotherapy between 13 April 2000 and 4 May 2000. The history recorded by the physiotherapist is consistent largely with the applicant's evidence. There is a reference therein to the applicant "getting pain on and off since…". Clearly however this can only refer to the period up to 4 May 2000. There was however a reference to a possible "persistent muscle tightness" which therefore, at least in the physiotherapist's view at the time, formed some basis for ongoing discomfort although the impression given is that it could only have been of a minor nature.

27. Exhibit A7 is another report of Dr Meadows dated 17 July 2001. Again this confirms the report made to Dr Meadows by the applicant that he had had symptoms which had not been complained of because of their minor nature.

Dr Meadows also makes a reference to the possibility of some flare ups occurring.

28. Exhibit A8 is a medico legal report of Dr Blue, an Orthopaedic Surgeon. He is the most qualified of the persons who have provided expert evidence. The history given to Dr Blue is consistent with the version the applicant has given in evidence and is noted in some detail. Dr Blue acknowledges that the applicant had ongoing but minimal problems for a period of six months. He also confirmed and seemed to accept the episodes brought on by water activity while the defendant was overseas on holidays in December 2000. The applicant had described these in evidence. Dr Blue seemed to accept his version and the effects thereof. I also accept the applicant's evidence in that regard. Also in support of the credibility of the applicant is the fact that there was no attempt to feign the extent of the injuries particularly exaggeration or abnormal presentation. That is consistent with my own finding of the applicant. In all Dr Blue acknowledges the injury and accepts the possibility of recurrences as he makes reference to "activity induced recurrent right shoulder pain". He also assessed residual disability apparently on an impairment basis at three percent of the right upper arm which is indicative of ongoing disability.

29. I accept the evidence of the applicant regarding his injury and the symptoms. Clearly the applicant is not a person who complains unnecessarily and this in my view supports his version that he has not complained of minor instances but has simply learnt to deal with them. This however does not mean that the symptoms do not exist. I find the applicant had an initial painful shoulder in April of 2000, he had niggling minor symptoms over a period of time leading up to recurrences of pain brought on by activities. These recurrences led Dr Meadows to prescribe cortisone injections on two occasions.

30. I accept the applicant's evidence that he has restrictions in amenity. He has ongoing niggling pain and he described how activities such as ironing result in pain. As a result of the ongoing nature of the pain and having regard to the level of the pain and the ongoing effect on amenity I order an assistance certificate for the physical injury in the sum of $7,500.00.

31. In doing so I have regard to the fact that the injury sustained by the applicant was a work injury and therefore subject to compensation pursuant to the *Work Health Act*. The work health insurer (TIO) has paid all medical expenses to date totalling $1,211.00. Section 13(2) of the Act directs me to have regard to the amount of any payment "…received by or payable…" to the victim and in particular, payments pursuant to the *Work Health Act*. The Act requires me to reduce the amount so specified in the assistance certificate by such amount as is considered appropriate. This section of the Act was considered by Mildren J in *Hollington v Northern Territory of Australia,* unreported, Supreme Court of the Northern Territory, 4 December 2001. Were it not for the fact that TIO has paid medical expenses to date my award would have been for an additional amount of $1,211.00 and consequently I have regard to section 13(2) of the Act by not making an allowance in the assistance certificate under the head in section 9(1)(a) of the Act on account of medical expenses. Effectively therefore the issue of assistance certificate in the sum of $7,500.00 does not include any allowance on account of medical expenses incurred to date. I do so on the basis that despite the apparent claim to recovery made by TIO as is evident in Exhibit A10, there is in fact no such right given to the insurer under the Act.

32. The assessment of a permanent impairment by Dr Blue may translate to an entitlement under the *Work Health Act* for a lump sum benefit on that account. It is not entirely clear from the way which Dr Blue has expressed his assessment whether the applicant achieves the threshold degree of impairment required for an entitlement under the Act. However, if the

applicant receives any such lump sum payment then an order pursuant to section 13A(1) of the Act should be made. There will therefore be an order under section 13A(1) of the Act that the applicant shall repay a sum of up to $750.00 that he receives by way of lump sum compensation for permanent impairment under the *Work Health Act* arising out of the injury, such payment to be made to the Northern Territory of Australia on account of the Victims Assistance Fund within 14 days of receipt thereof. The figure of $750.00 is what I consider to be an appropriate proportion of the total amount of the assistance certificate attributable to matters relative to the assessment of impairment by Dr Blue.

Dated this 26th day of February 2002.

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V M LUPPINO
STIPENDIARY MAGISTRATE