

CITATION: *May v Northern Territory of Australia & Anabtawi* [2003] NTMC 021

PARTIES: JAMES DEAN MAY

v

NORTHERN TERRITORY OF AUSTRALIA

AND

MEGDI ANABTAWI

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance)

FILE NO(s): 20204449

DELIVERED ON: 16th May 2003

DELIVERED AT: Darwin

HEARING DATE(s): 2nd May 2003

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Onus of proof – balance of probabilities - serious offence – contributory behaviour of victim – section 10 of Crimes (Victims Assistance) Act – *Briginshaw v Briginshaw* (1938) 60 CLR 336 –*Northern Territory of Australia v Herbert & Williams* (2002)NTSC 4

REPRESENTATION:

Counsel:

| | |
|----------------------------|---------------|
| Plaintiff: | Ms Tomlinson |
| 1 st Defendant: | Mr Lewis |
| 2 nd Defendant: | no appearance |

Solicitors:

| | |
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| Plaintiff: | De Silva Hebron |
| 1 st Defendant: | Priestly Walsh |
| 2 nd Defendant: | self |

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| Judgment category classification: | A |
| Judgment ID number: | [2003] NTMC 021 |
| Number of paragraphs: | 30 |

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

No. 20204449

[2003] NTMC 021

BETWEEN:

James Dean May
Applicant

AND:

Northern Territory of Australia
1st Respondent

and

Megdi Anabtawi
2nd Respondent

REASONS FOR DECISION

(Delivered 16 May 2003)

JUDICIAL REGISTRAR FONG LIM:

1. The Application for assistance arises out of an alleged offence which occurred on the 1st of October 2001 and after which the Applicant was found to have two stab wounds to the chest. The Second respondent was questioned about the incident but the Police made the decision not to prosecute because in their opinion there was not enough evidence to support a likely conviction.
2. The Applicant made his application after the expiry of the 12 months set by the Crimes (victims Assistance) Act and was successful in applying for an extension of time in which to file his application.

3. The agreed facts are that the Applicant was involved in a fight with the second respondent after a night of celebrating his 21st birthday. The fight took place at about 3:35am outside a popular nightclub on Mitchell Street. The Applicant and the second Respondent had a verbal altercation followed by a physical fight which involved punching and wrestling at one stage causing both to be on the ground. After that fight the Applicant found he had stab wounds to the chest which were treated at the Royal Darwin Hospital. Since the incident the Applicant's mental health has slowly deteriorated causing him to be unfit for employment and loss of enjoyment of life.
4. It is conceded by the Counsel for the Northern Territory that should I find on the balance of probabilities that an offence occurred then the Applicant's present problems seem to be caused by the incident. The Applicant may be entitled to the maximum amount of assistance not taking into account and contributory behaviour by the Applicant. I will deal with the issue of contributory behaviour later in this decision.
5. The main issue put before me by the first Respondent is that there is not enough evidence to reasonably convince me on the balance of probabilities that an offence took place.
6. I was referred to affidavits of the Applicant and other witnesses to the fight and also to the statutory declarations by witnesses taken by the police at the time.
7. The Second respondent argues that there were so many inconsistencies in the evidence that I could not possibly find to my reasonable satisfaction that an offence took place.
8. The Applicant's counsel argued that there was enough evidence to support an offence under section 181, 186, 188 or 154 of the criminal code. The Second respondent argues that those offences cannot be established because

the fight was consensual and there is no substantial evidence that the second respondent had a knife and stabbed the Applicant.

9. The burden of proof lies with the Applicant to provide the court with enough evidence to convince the court that on the balance of probabilities an offence occurred and the injury sustained by the Applicant arose out of the commissioning of that offence. In Northern Territory of Australia v Herbert (2002) NTSC 4 His Honour Chief Justice Martin applied Briginshaw v Briginshaw (1938) 60 CLR 336 in setting the level of proof required. Sir Owen Dixon in Briginshaw's case observed at page 36:

The truth is that when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It can not be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of the allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proof, indefinite testimony or indirect inferences."

10. The evidence of all of the witnesses show that there was a consensual fight and that some of the witnesses show the Applicant as taking the first physical action which precipitated the fight or that it was not clear who started the fight. See the following evidence:

- 10.1 page para 12 of the Applicant's affidavit " I thought he was going to hit me so I grabbed his right hand",

- 10.2 page 1 of the Applicant's statutory declaration " I walked over to where he was and grabbed his right hand"

- 10.3 second page of statutory declaration of Alan May “ they both started punching each other”
- 10.4 page 2 of Casey Coomer’s statutory declaration “....started to push each other”
11. The Applicant’s consent to the fight would mean that any charges pursuant to sections 186 and 188 of the *Criminal Code* would be unlikely to proceed to a conviction.
12. The two other offences relied upon by the Applicant are sections 154 and 181. To prove an offence was committed pursuant to both of these sections the Applicant would have to prove on the balance of probabilities that the second respondent was in the possession of a knife at the time of the fight and used that knife to stab the Second Respondent.
13. The second respondent was not apprehended on the morning of the fight and when he was questioned about the alleged stabbing he of course denied that he had a knife and that he had stabbed the second respondent.
14. The evidence which supports the contention that the second respondent had stabbed the Applicant in the fight is as follows:
- 14.1 Both the Applicant and his brother (who also fought with the second respondent that morning) were treated to “stab wounds” at the Royal Darwin Hospital that day. The hospital notes and the reports by the hospital on the Police prosecutions file establish that treatment,
- 14.2 The only people involved in the fight were the Applicant, second Respondent and later the Applicant’s brother although there is no evidence that both the Applicant and the Applicant’s brother were fighting the second respondent at the same time.
- 14.3 The Applicant advice that he heard someone shout “he’s got a fucking knife”

- 14.4 Jamie Blythe's description of the damage to the shirt that the Applicant had been wearing at the time of the fight. She describes the damage as "one small cut at the top, one big cut, and 2 other smaller cuts just below that" (see page 2 of Blythe's statutory declaration)
- 14.5 Tara Jeffrey in her affidavit at paragraph 24 describes the shirt as "...a stone washed blue denim" and having "four cuts on the left hand side of the shirt".
- 14.6 A curious piece of evidence is contained in the Royal Darwin Hospital notes exhibited on page 64 of the Applicant's book of evidence where there is a reference to a "4 inch flick knife". There is nothing to indicate why that note was made or how the author came to that conclusion and as such no weight can be attached to that evidence.
15. The question for this court is whether that evidence is enough on the balance of probabilities to find that the second Respondent had committed grievous harm or a dangerous act in contravention of section 154 or 181 of the *Criminal Code*.
16. The seriousness of the offence requires the court to be reasonable satisfied that the offence took place.
17. Counsel for the First Respondent submitted that I cannot be reasonably satisfied given there is no evidence that anyone actually saw a knife or saw the second respondent stab the Applicant. There is also evidence that the during the fight the Applicant and the Second Respondent had fallen to the ground and that, argues the counsel for the First Respondent, could mean that the Applicant could have been "stabbed" by falling on something.

18. Certainly the Second Respondent's suggested alternative scenario would likely to create reasonable doubt however I do not accept that it is enough to tip the balance against the Applicant.
19. It is my view that evidence supports the following findings of fact
 - 19.1 That the Applicant and his brother were in good health before the fight
 - 19.2 The Applicant and his brother were treated for stabs wounds as a result of the fight
 - 19.3 The Applicant, his brother and the Second Respondent were the only participants in the fight.
 - 19.4 The Applicant's shirt being made of a strong material such as denim had cuts through it.
20. With those findings of fact and taking into account that *the Crimes (Victims Assistance) Act* is beneficial legislation I am satisfied on the balance of probabilities that the Applicant was stabbed in the fight and suffered grievous harm, therefore an offence was committed.
21. **Quantum** - the Applicant has provided medical evidence that arising out of the stabbing he has suffered a severe psychiatric reaction to the stabbing rendering him unable to work. There is evidence before me to establish that since the stabbing the Applicant has taken more and more sick leave until he was unable to continue working. The Applicant went through the pain of the original wound and the pain of a subsequent infection. The continuing injuries are permanent scarring and continued psychiatric symptoms supported by medical reports of Doctors Markou and Maclaren. The Applicant has had a significant change in personality which has effected his capacity to work as well as his relationship with his De facto partner. Taking all of those factors into account the applicant should be issued with a

Victims Assistance certificate of \$25000.00 without taking anything into account pursuant to section 10(2) of the *Crimes (Victims Assistance) Act*.

22. **Contributory behaviour** – Section 10(2) of the Crimes (Victims Assistance) Act provides:

2) Where the Court, on having regard under subsection (1) to the conduct of the victim, is satisfied that the victim's conduct contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate by such amount as it considers appropriate in all the circumstances.

23. I have already found that it was clear from the evidence that the Applicant did participate in a consensual fight therefore there must be a reduction of any assistance certificate issued to him. I was referred to Lanyon v Northern Territory of Australia & Staker (2002) NTSC 6 where the Supreme Court of the Northern Territory dismissed the appeal of the victim of the decision by the Magistrate not to issue a certificate because of the victims contributory behaviour. In Lanyon's case the applicant was a drug dealer who got into a fight with one of his customers during which the customer pulled a knife on the applicant and the applicant responded by pulling his own knife. The fight resulted in the applicant being stabbed by the customer who later pleaded guilty to aggravated assault on the applicant. The Magistrate refused to issue an assistance certificate to the Applicant on the basis “that people who got themselves in that sort of trouble he (the applicant) got into in these circumstances, would be denied recovery all together”. His Honour Justice Bailey at page 7 of his judgement agreed with the submission that “there maybe circumstances where the victim's conduct so contributed to his injury that the amount of assistance to be awarded should be reduced substantially or eliminated entirely.” His honour agreed that the appellant's contribution to his injury was so substantial that it was appropriate for the learned magistrate to exercise his discretion by refusing to issue an assistance certificate.”

24. The Applicant in the present case argues that Lanyon's case is easily distinguishable from the present case on the facts. I agree that the Applicant's behaviour in this case was not as culpable as that applicant in Lanyon's case but his behaviour did in my view contribute substantially to his injury.
25. I have stated earlier it is not clear from the evidence before me the exact circumstances of the fight. There are many inconsistencies within the witnesses statements and even between the Applicant's affidavit and his statutory declaration as to what happened. If the version of events in the affidavit of the applicant is preferred to that in his statutory declaration then the Applicant would be seen in a more favourable light. His affidavit suggests that the Second Respondent was the protagonist and the Applicant merely defending himself. The words in the conversation as set out in paragraph 11 of his affidavit suggests the Applicant was trying to calm the second respondent down saying "just settle down". The words of the conversation as relayed in the statutory declaration were more likely to inflame the situation, the applicant saying "no you come here" in response to the Second Respondent's "why don't you come here".
26. In his affidavit the applicant's description of the fight suggests that after falling to the ground, when wrestling with the Second Respondent, he took no further part in the fight except to grab his brother and tell him "that's enough" after discovering he had been stabbed (see paragraphs 13 –17 of the applicant's affidavit). The description the Applicant gives in his statement to the police suggests that he continued to fight with the Second Respondent after the wrestling on the ground and also that he pursued the Second Respondent to the laneway next to the café besides Discovery to continue to fight. The Applicant states further in his affidavit that he went back to fight the Second Respondent after he had discovered he had been stabbed.

27. The Applicant's counsel explained the inconsistencies between the documents on the basis that the Applicant's memory of events had been effected by the passage of time. I find that explanation difficult to accept given that the applicant has annexed the statutory declaration to his affidavit and presumably would have had a chance to refresh his memory from that declaration. The Statutory declarations of Alan May, Jamie Blyth, Casey Coomer and Andrew Clarke all state that the fight continued at after the wrestling on the ground. Coomer and Clarke also confirm that at one stage the Second Respondent ran away and was followed by the Applicant who once he caught up with the Second Respondent continued to fight with him.
28. In my view the weight of evidence suggests that the Applicant was at some time during the fight more on the offensive than the defensive as is suggested in his affidavit and while he may not have known the Second Respondent may have had a knife he should have known in acting in this manner he was likely to get hurt.
29. I find that the Applicant's behaviour contributed substantially to the circumstances which led to his injury and that there should be a reduction in the certificate issued to him in the amount of 50%.
30. Therefore my orders today are:
- 30.1 A certificate of assistance issue in favour of the Applicant for the sum of \$12,500.00.
- 30.2 I will hear the parties on the question of costs.

Dated this 16th day of May 2003.

Tanya Fong Lim
JUDICIAL REGISTRAR