CITATION:	*Walker v Northern Territory of Australia, Yost and Barra* [2003] NTMC 032
PARTIES:	GLEN JOHN WALKER v NORTHERN TERRITORY OF AUSTRALIA AND DION YOST AND STEVEN BARRA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes Victims Assistance
FILE NO(s):	20208227
DELIVERED ON:	5 August 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	22 April 2003
DECISION OF:	Jenny Blokland SM

CATCHWORDS:

Victims Assistance – Exclusion Provisions – - relevance of imprisonment

Crimes (*Victims Assistance) Act*, s 12 (b) and (c);

Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583;
L v The Commonwealth (1996) 10 ALR 269;

Briginshaw v Briginshaw (1938) 60 CLR 336;
Geiszler v Northern Territory of Australia (1976) NT (CA), unreported;
Kinsella v Solicitor of the Northern Territory (1997) 138 FLR 218;
Re Milos Milosevic (1996) 90 A Crim R 312;
Zedenkowski, "Prisoners Denied Access to the Courts" (1980) 5:5 Legal Services Bulletin 239;
Ian Freckleton, *Criminal Injuries Compensation*: *Law*, *Practice and Policy*, (2001) LBC.

REPRESENTATION:

Counsel:

Applicant:	Mr Julian Johnson
1st Respondent:	Ms Jodi Truman

Solicitors:

Applicant:	Priestley Walsh
1st Respondent:	Halfpenny's

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 032
Number of paragraphs:	17

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

No. 20208227

BETWEEN:

GLEN JOHN WALKER
(APPLICANT)

v

NORTHERN TERRITORY OF
AUSTRALIA
(FIRST RESPONDENT)

AND

DION YOST
(SECOND RESPONDENT)

AND

STEVEN BARRA
(THIRD RESPONDENT)

REASONS FOR DECISION

(Delivered 5 August 2003)

Jenny Blokland SM:

Background

1. This is an application for an assistance certificate under the *Crimes (Victims Assistance) Act.* At the commencement of this hearing, the parties advised the Court that the primary issue concerned whether the applicant was excluded from relief under *s 12(b) Crimes (Victim's Assistance) Act,* (failure to report the commission of the offence within a reasonable time). During

the course of the hearing it became apparent that consideration ought to be given on whether the applicant might also be excluded for failure to assist the police in the investigation and prosecution of the offence: *(s 12(c) Crimes Victim's Assistance Act).* Neither the second or third respondents, (the alleged perpetrators), were represented at the hearing of this matter. In all of the circumstances, (including the fact that both the second and third respondents had been served with the application and the second respondent was made aware of this hearing date), I ordered the hearing proceed. Both counsel for the Applicant and the First Respondent wanted the hearing to proceed. I have had regard to the affidavit sworn and filed by the second respondent. He denies the commission of any offence by him on the applicant.

2. The context of this application is slightly unusual in that it is alleged that the offence was perpetrated by the second and third respondents who were prisoners at a time when the applicant himself was a remand prisoner in the Berrimah Corrections Centre. Prisoners are not disentitled under the *Crimes (Victims Assistance) Act* to claim for injuries suffered as a result of the commission of offences against them while in custody. Although there were historically some restrictions on the legal capacity of prisoners (*eg Dugan v Mirror Newspapers Ltd (1978);* Zedenkowski, "Prisoners Denied Access to the Courts" *(1980) 5:5 Legal Service Bulletin 239)* no remnants of those restrictions are applicable to the statutory scheme and this jurisdiction has previously acknowledged in the common law setting, the duty of care for the safety of prisoners : *L V Commonwealth (1976) 10 ALR 269*. The context of custody is however significant in this case as it goes some way to explaining why certain steps may not have been taken by the applicant at the time he alleges the offence was perpetrated.

3. In his affidavit sworn 17 January 2003, the applicant states he was assaulted on 25 November 1997. On 10 April 2002 he made a statement to police: *(Annexure GJW-1)*. That statement is relied on in these proceedings to

establish the primary facts. The applicant was not cross-examined by the first respondent. *Annexure GJW-1* states the applicant was on remand at the relevant time; the second and third respondents were also on remand at the relevant time; on the day in question the applicant was let out of his cell into the yard; he spoke to the second respondent who did not respond to him; the second respondent then said *come with me*; the applicant followed the second respondent to the toilet block; without warning the second respondent hit the applicant with his clenched right fist to the left of the applicant's face and then hit him with his left hand to the right of his face; the second respondent said *this is my area*; the applicant then felt a punch or a hit to the back of his head and saw the third respondent standing behind him; the applicant crouched over, covered his face and quickly left the toilet block.

4. The applicant states that he felt his jaw was broken and reported his injury to a prison officer named Williams. He did not give a true account of the injury, stating to the prison authorities that he jumped up on the table and tripped and fell on the ground. Another prison officer took him to the office and he was taken by ambulance to the Royal Darwin Hospital. His treatment included surgery and he states he remained in hospital for two days. Upon his return he stated he was moved to "A" wing in the prison and then to the protection area because he was worried about being hit again. He states that two days later police came to see him at the prison; he disclosed the identity of the perpetrators but says these discussions were *off the record.* The applicant told police he didn't want any action taken because he was afraid of being bashed; he stated he had been told he would have his food poisoned if he didn't *keep his mouth shut*. As a result of the alleged assault, the applicant states he suffered a broken jaw requiring ongoing treatment, pain management and a negative effect on his mental state.

5. On 31 July 2002 Mr Loadman SM granted the applicant leave to file and serve the application for an assistance certificate out of time. In summary,

the crucial dates appear to be: 25 November 1997 – commission of the alleged offence and initial treatment; late November or early December 1997 - conversation between the applicant and the police, *off the record*; January/February 1998 – applicant's release from prison; 14 July 1998 – further surgery at Royal Darwin Hospital; October 2000 - July 2001 – further period of imprisonment; July 2001 -release from prison; February 2002 – consultation with solicitor; 27 February 2002 – *formal* report by applicant to police in relation to the assault; 21 May 2002 – application for victim's assistance certificate filed.

Evaluation of evidence concerning the offence

6. Prior to the consideration of possible disqualifying factors, it is convenient to determine whether the injury or injuries were suffered as a result of an *offence*. The Applicant's affidavit of 17 January 2003 attests to the fact that the second and third respondents assaulted him in the manner described above. What weakens the applicant's evidence is the fact that he initially described the source of his injury as a fall. Although weakening his evidence, it is not fatal in the circumstances. The applicant has stated he was scared to report the true cause of his injury for fear of retribution. In his statement to police dated *10 July 2002* the applicant states that after he returned to prison from hospital he was *put into A wing so I wouldn't be around Bara or Yost. I did not stay there long as I was worried about being hit again so I went into protection. A few days later two police detectives came out to the gaol to see me. Off the record I told them that Dion Yost and Steve Bara had assaulted me but I did not want any action taken. The reason was that I was in gaol and if I made a complaint I would have been bashed. I can't remember who told me this but I was told if I didn't keep my mouth shut I would have my food poisoned.* This is essentially the explanation the applicant has given throughout his case for the initial false information. The Royal Darwin Hospital notes of his first admission in relation to this injury (*Annexure GJW-4 of the Applicant's Affidavit, 17 January 2003),* are as

follows: *Prisoner accompanied by prison officers. Kick to face. No LOC/HI.* On discharge the records note,.....*needs to avoid physical contact for 4-6/52 ? possibility of transfer to another cell or protective custody to prevent further assault.* The second respondent has denied the assault on affidavit saying essentially he is unaware of the incident.

7. On balance, I find that an offence in the nature of an *aggravated assault* or, alternatively, *cause grievous harm* was the source of the injuries to the applicant despite the initial attempt to disguise the true nature of the incident. I find the initial explanation for the injury, (falling off of a table), inherently unlikely to have occurred given the consequent injury. In any event, it appears the applicant gave a history to hospital staff that was consistent with an assault, (notwithstanding it was described as *kicking*) and his discharge notes indicate he was to be managed as a victim of assault. I have considered the second respondent's affidavit but I find the applicant's description compelling and I don't see any reason for rejecting it. Neither party sought to cross-examine the second respondent who is currently in custody in another jurisdiction. It is difficult to make any clear assessment of the competing credibilities, however, upon the applicant giving clarification on why he described the incident as a *fall*, there is no reason to doubt his claims about the assault. I note also that Detective Sergeant Frederick Huysse, (who conducted an investigation once the applicant had come forward) states in his affidavit at paragraph nine: *Upon presenting this additional information to the Applicant,he informed me and I verily believe that one of the reasons for his failure to make a complaint immediately at the time was due to his fear of further assault by the Second Respondent if the Second Respondent was informed of his complaint.*

8. The applicant bears the onus on the balance of probabilities as enhanced by *Briginshaw v Briginshaw (1938) 60 CLR 336*. In my view, after proper scrutiny, the assault is firmly established on balance.

Section 12(b) and 12(c) considerations

9. Section *12(b) Crimes (Victim's Assistance) Act* provides: *The Court shall not issue an assistance certificate.....(b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence.*

10. *Geiszler v Northern Territory of Australia (1996), CA,* and *Kinsella v Solicitor for the Northern Territory (1997) 138 FLR 213* stand for the proposition that in a case such as this, the first respondent bears the onus on showing a *failure to report within a reasonable time.* According to Mildren J in *Geiszler*, the applicant then bears the onus to satisfy the court that *circumstances existed which prevented the reporting of the commission of the offence.* On the first limb of *s 12(b)*, in my view the respondent has made out a case of unreasonable delay in reporting. In *Kinsella* the Court of Appeal (at page 220) said:

> "The proviso enabling an applicant to produce evidence of circumstances preventing the applicant from reporting the commission of the offence (before it was reported) demonstrates that it is not for the applicant to show that the commission of the offence (before it was reported) demonstrates that it is not for the applicant to show that the commission of the offence was reported within a reasonable time but it is for the Northern Territory to show that it was not. Reasonableness is to be assessed taking into account circumstances other than the reason for the delay in reporting, which may be permitted to override a finding that the time after the commission of the offence within which it was reported was unreasonable. What is "reasonable" must be looked at from the perspective of the police receiving a report and the time it is received. The factors which may be relevant in deciding the point are not for this court presently to decide."

11. Bearing in mind the perspective of investigators, there are two or possibly three *reports* that fall for consideration. First, the applicant states that despite his initial description of the cause of his injury, police did attend at

the prison a few days after the applicant's discharge from hospital. The Applicant's statement indicates he told police of the assaults *off the record,* and that he advised police he didn't *want any action taken.* In my view, nothing is ever conclusively *off the record* when dealing with police as there may be circumstances when police are compelled, save for genuinely privileged information, to reveal the contents of such conversations. As there is very little information on the content of this discussion with police and how it was conducted, I have concluded, although hesitantly, that this *off the record* discussion cannot be regarded as a *report* for the purpose of this part of the *Crimes (Victims Assistance) Act*. Although *report* has many possible meanings, in my view *s 12(b)* requires some acceptance or at least sense of formality or officialdom in the discussion. I am aware that *report* in this context is *liberally construed* (as mentioned by Freckelton, *Criminal Injuries Compensation* at 146), but it seems to me that a intentionally *off the record* discussion stretches the concept too far. In reality there is not enough information to draw a firm conclusion that there was a *report* at that time. It would have been open to police to act on the information, notwithstanding it was said to be *off the record*, however, it would appear there was no intention on the part of the applicant to *report* the matter, nor, I gather, did police act on it. Alternatively, some other person, not named in these proceedings may have drawn the assault to the attention of police, sparking their meeting with the Applicant. That scenario requires speculation and there is not enough information to conclude that another person reported the matter to police. If I am wrong on these points and the initial contact with police can be considered a *report* within the meaning of the section, then what follows in paragraph 12 and 13 is irrelevant as the *report* will have been made without delay.

12. There is here a delay of four and a half years between the commission of the offence, (November 1997), and formally reporting the matter to police (April 2002). I conclude the delay in reporting is unreasonable. A number of

the decisions referred to me by counsel deal with much shorter delays: *(see eg Geiszler – two months);* however the real test is whether from the perspective of investigators, the delay is unreasonable. Apart from the affidavit of Detective Huysse, pointing out that police are unable to find independent evidence, it is obvious that a delay of this nature would prejudice the investigation. Any real evidence of the assault (save for the injuries on the applicant) would evaporate soon after the assault. Mr Johnson argued that investigators could have obtained the photo of the Applicant taken by Corrections officers at the time and that investigators could have found the third respondent to interview him, (as he points out, the Applicant did locate him to enable service of the application). They are minor points in the overall picture. They don't persuade me to a different conclusion.

13. I do however find on the balance of probabilities that *circumstances existed which prevented the reporting of the commission of the offence.* Although Ms Truman for the first respondent argued valiantly that there was not enough detail in the Applicant's case to find he was *prevented* from reporting, I disagree. Fear of retaliation on the part of the applicant is a strong feature in the evidence that is not controverted by any other evidence. Significantly, fear of retaliation for some of the period occurred in the context of a prison. The Applicant's evidence is that he was told his food could be poisoned, consequentially even if he was separated from the perpetrators, he still held this fear. He also attests to threats of bashings and even death threats: *(Applicant's affidavit 21 May 2002).* In terms of the periods of time when he was released from custody, he has attested in further detail that he still felt threatened because of other former prisoners who lived in Darwin. I accept the matters raised in the Applicant's affidavit of 21 May 2002 filed in support of his application to extend time. Many of the considerations in that application are relevant to this application and I have had regard to them. His vulnerability mentally is also important as in

combination with his fear, the material indicates a deteriorating mental state for some time after the assault: *(Report, Dr Petros Markou, 8 October 2002)*. I reject the argument that the applicant's fear was not genuine because he must have told hospital staff of the source of his injury. In my view the circumstances of the hospital are quite different from the prison in terms of confidentiality and protection at the time shortly after the assault. I have concluded that the deteriorating mental state, (Dr Markou notes previous significant depressive periods and hyper-vigilance), and fear of reprisals together prevented the Applicant from reporting the offence. The applicant did travel to Perth for a short period some time after his first release from prison in 1998. He states he went to Perth to recuperate but was still feeling threatened by the events that had taken place. The reasons for failure to report in this instance have some resonance with underlying factors that would be expected to be present in other circumstances of legitimised delay in reporting. Freckelton lists examples at page 146 as *the context of sexual assault, the dynamics of a domestically violent relationship, a bad relationship between the victim's family and police and a relationship between a youth officer of a Youth Training Centre and a detainee.* This list by Freckelton underlines the importance of the particular context and circumstance of each case, including the relevance of the pressure of particular relationships.

14. Bearing in mind the purpose of this legislation and this particular part of *s 12 (b)*, it is reasonable to conclude that the circumstances of the assault and the condition of the Applicant did *prevent* the report. Being beneficial legislation it should not be interpreted in such a way as to exclude victims who have a reasonable explanation concerning circumstances that have prevented them from making a report. While it is important to ensure that public money is not expended otherwise than in accordance with the Act, the purpose of the legislation would be diminished if *s 12 (b)* was applied in a manner more relevant to the protection of private rights as opposed to a

beneficial scheme: (I consider the approach that should be taken here to be somewhat analogous with that of Hogan AJ in *Re Milos Milosevic (1996) 90 A Crim R 312 at 318).*

15. In relation to *s 12(c)*, it appeared to me that the evidence of an *off the record* conversation might be evidence of failure to *assist.* After considering the matter further, I am not satisfied that there is evidence of a failure to assist. As mentioned above, the evidence of that conversation is sketchy. With no evidence of whether police actually required or requested any assistance, there is no evidence of a failure to assist.

Assessment of Compensation

16. Thus far I have not described the Applicant's injuries. First is the fracture to the right side of the mandible and another to the left side of the mandible. On 25 November 1997 he was admitted to hospital and underwent surgery under general anaesthetic. There is considerable detail in the Hospital Records annexed to the applicant's affidavit. He underwent further surgery in 1998 involving the removal of plates and screws from the first operation. He attests to having experienced significant pain at the time of the assault and for a period of time after the first operation he could not eat solids. He has attended the pain clinic at Royal Darwin Hospital and takes regular medication for pain. The evidence on the cost of the medication is not clear. The applicant was unable to establish the cost through evidence, particularly in relation to relevant rebates. While I don't at all doubt that he regularly expends money on medication, the evidence is not firm enough for me to award compensation on that limb. The strongest component of this claim is pain and suffering which is significant. It is a serious assault with serious consequences. In terms of mental distress, there is evidence in Dr Markou's report of symptoms of depression and anxiety, although at the time of the consultation with Dr Markou the applicant was not suffering significant

psychiatric symptoms. Dr Markou's report also supports a component of loss of amenities of life.

Orders

17. I therefore order that an assistance certificate issue for compensation in the sum of $17,000 and will hear the parties on costs.

Dated this 5th day of August 2003.

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Jenny Blokland
STIPENDIARY MAGISTRATE