

CITATION: *Greenough v Northern Territory of Australia & Unknown* [2003]  
NTMC 039

PARTIES: BRUCE LEE GREENOUGH  
  
v  
  
NORTHERN TERRITORY OF AUSTRALIA  
  
AND  
  
UNKNOWN

=

TITLE OF COURT: Local Court  
JURISDICTION: Crimes (Victims Assistance)  
FILE NO(s): 20205263  
DELIVERED ON: 1<sup>st</sup> August 2003  
DELIVERED AT: Darwin  
HEARING DATE(s): 6<sup>th</sup> June 2003 & 29<sup>th</sup> July 2003  
JUDGMENT OF: Judicial Registrar Fong Lim

**CATCHWORDS:**

Crimes (Victims Assistance) -“Offence” – requirement of intention – burden of proof – balance of probabilities  
R v Mardday [1988] NTLR 192  
Sections 23, 27, 31,187 & 188 of the Criminal Code(NT)

**REPRESENTATION:**

*Counsel:*

Applicant: Mr Randhawa  
1st Respondent: Ms Spurr

*Solicitors:*

Applicant: Priestleys  
1st Respondent: Halfpennys

Judgment category classification: C  
Judgment ID number: [2003] NTMC 039  
Number of paragraphs: 33

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

No. 20205263

*[2003] NTMC 039*

BETWEEN:

Bruce Lee Greenough  
Applicant

AND:

Northern Territory of Australia  
1st Respondent

Unknown  
2<sup>nd</sup> Respondent

REASONS FOR JUDGMENT

(Delivered 1st August 2003)

Judicial Registrar Fong Lim:

1. The Applicant has made an application for assistance pursuant to the Crimes (Victim's Assistance) Act. The application is opposed on the basis that there is no evidence to support that an offence was committed resulting in the Applicant's injury.
2. Section 5 of the Crimes (Victims Assistance) Act provides among other things that a "victim" may apply to the court for an assistance certificate "in respect of an injury suffered by the victim as a result of the offence." Therefore for an assistance certificate to issue there must be a "victim" an "injury" and an "offence". The applicant must prove all three elements on the balance of probabilities.
3. Section 4 of the Act defines the following:

"injury" means bodily harm, mental injury, pregnancy, mental shock or nervous shock but does not include an injury arising from the loss of or damage to property (which loss or damage is the result of an offence relating to that property);

"offence" means an offence, whether indictable or not, committed by one or more persons which results in injury to another person;

"victim" means a person who is injured or dies as the result of the commission of an offence by another person.

4. It is clear that applicant suffered an injury to his ankle in the early morning of the 17<sup>th</sup> November 2001 which required him to be hospitalised.
5. The main issue between the parties is whether an offence took place to cause that injury.
6. The applicant relies on his affidavit of the 26<sup>th</sup> November 2002 and the affidavit of Dr Markou of the 7<sup>th</sup> of March 2003. The Respondent put forward no evidence. The applicant's evidence is uncontroverted.
7. Paragraphs 10,11,& 12 of the applicant's affidavit provides the only evidence which is relied upon to establish the commissioning of an offence. The evidence is as follows:

“10 at this point the security officers approached us. I was then grabbed in a bear hug by a bouncer. It was at this time that I felt someone's shoe run down the left side of my right leg and suddenly felt my right leg give way. The bouncers then carried me outside of the nightclub.

11. As I was in pain I attempted to hop to the front garden area to sit on the concrete ledge. It was at this point that I realised something serious was wrong with my leg as I could not put any weight whatsoever on my right ankle. Whilst I was sitting down the man I was speaking to before attempted to once again assault me but he was stopped by some other people who I don't know.

12. Just after this man had left one of the bouncers who was manning the door of the Vic said to me “ You must have weak ankles” I don't; know if it was this bouncer that broke my ankle as I was grabbed from behind and did not see who it was.”

8. The offence the applicant claims has occurred is the offence of assault.

Section 187 of the Criminal Code defines assault as

"assault" means –

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representations as to the nature of the act or by personation.

9. Section 188 of the Criminal Code creates the offence:

(1) Any person who unlawfully assaults another is guilty of an offence and, if no greater punishment is provided, is liable to imprisonment for one year.

10. Although no mental element is set out in the section 188 the effect of sections 23 & 31 of the Criminal Code operates to impute intent by providing:

“23. Effect of authorization, justification or excuse

A person is not guilty of an offence if any act, omission or event constituting that offence done, made or caused by him was authorized, justified or excused.

31. Unwilled act, &c., and accident

(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.”

11. The Respondent conceded that it was most likely that it was the bouncer’s foot that ran down the Applicant’s leg however the evidence does not show that the act of running down the foot on the leg was intentional. The

respondent argues that the injury was incurred through an accident and that the Crimes (Victims Assistance) Act does not provide assistance for injuries arising out of an accident.

12. The Court of Criminal Appeal in the case of R v Mardday [1998] 7 NTLR 192 considered the application of section 31, in particular what had to be intended or foreseen for an offence not to be excused. The conclusion of the court was that “the circumstance of aggravation as prescribed by section 188(2) does not form part of the definition of the crime created by section 188 (1) and (2) (a)” and that “ a crime would not be excused merely because the circumstance of aggravation was not intended or foreseen as possible by the accused”.
13. Applying the reasoning in R v Mardday the applicant has to prove, on the balance of probabilities, that the bouncer intended to apply force to the applicant. The evidence shows that the bouncer grabbed the applicant from behind in a bear hug thereby applying force on the applicant without his consent. The act of the bear hug was intentional. The Applicant does not then have to prove that the injury, a circumstance of aggravation, was intended or foreseen. Therefore the assault cannot be excused under section 31 of the Criminal Code.
14. The next question must be was that assault on the applicant unlawful. The Respondent argued that should I find there was an assault that assault was justified as defined by section 27 and in particular subsections (c) and (e). Pursuant to these subsections the bouncer’s assault on the applicant would be justified if :

“.... the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or grievous harm

.....

(c) to prevent the continuance of a breach of the peace or a renewal of it and to detain any person who is committing or about to join in or to renew the breach of the peace for such time as may be reasonably necessary in order to give him into the custody of a police officer;

.....

(e) to prevent the commission of an offence”

15. I accept that the application of force by the bouncer was to prevent the continuance of a breach of the peace and to possibly prevent the commission of an offence by the applicant however before I can consider that justification I must consider whether the application of force was “reasonable”.
16. It should also be noted at this point that section 121 Liquor Act places an obligation upon the licensee to remove persons who are, among other thing, violent or intoxicated from the premises and in subsection (4) allows the licensee or its employee to apply reasonable force in removing that person. Therefore it may be that the actions of the bouncer is also authorised by the Liquor Act and therefore not unlawful if force used was reasonable.
17. The evidence of the circumstances leading up to the assault is limited to what the applicant describes in his affidavit. The applicant describes an incident in which he had grabbed the hands of another person who had pushed him with the intention to fight him. He states he was only trying to protect himself. It was then he says the bouncers intervened.
18. If events occurred in this fashion then the intervention by the bouncer of the bear hug would not be in my view the application of reasonable force. The bouncer could have stepped between the two parties, separated them and asked them to leave, it would have been unnecessary to manhandle the applicant. Of course without hearing what the bouncer had to say about the situation it is impossible to really know what was reasonable at the time however I can only make my decision on what is before me. The applicant had been out at hotel and nightclubs the whole night and the incident occurred at

about 2:30 in the morning. The applicant admits to having a few drinks though there is no evidence as to his level of intoxication. It is likely that an ordinary person in those circumstances cannot be fully alert and would not require a lot of physical restraint to be removed from a premises unless he was all agitated and violent for whatever reason. In the applicant's case having been involved in an altercation with another. There is no evidence that the applicant was in that state.

19. Therefore on the evidence provided to me it is probable that there was an assault by the bouncer and that assault was not lawful by justification, authorisation or excuse.
20. Having accepted that there was an assault by the bouncer I must not consider whether there is a causal link between that assault and the applicant's injury being the broken ankle.
21. The applicant's evidence as to the order of two significant events is contradictory between his affidavit and the statutory declaration he gave to the police a month after the assault. In his affidavit in paragraph 10 the applicant says:

“I was then grabbed in a bear hug by a bouncer. It was at this time that I felt someone's shoe run down the left side of my right leg and suddenly I felt my right leg give way”

22. In his statutory declaration he states:

“Almost straight away the security came, and I felt someone's shoe run down the left side of my leg and then I felt my leg give way and go all floppy and a bouncer then grab me in a bear hug and slowly carried me outside of the nightclub.”

23. If I accept the version of events in the applicant's affidavit than the version of events in the statutory declaration then it is more likely that it was the foot of the bouncer that ran down the applicant's leg, if indeed it was a foot. The order of events in the Statutory Declaration leave it open to consider other

scenarios could be possible. The Statutory declaration also supports the view that the injury to the Applicant was not caused by the application of force (bear hug) by the bouncer (the assault) nor could it be a foreseeable consequence of that action as the injury to the ankle was prior to the assault.

24. There was one other piece of evidence that was not referred to in submissions but should be considered and that is the applicant's claim that a bouncer said to him outside words to the effect "you must have weak ankles". It could be argued that this was some sort of admission by the bouncer of him doing something to the applicant's ankle however equally it could merely have been a comment from the bouncer seeing that the applicant had been hurt in the ankle. In short that evidence is of no probative value.
25. Given that the Applicant's evidence is the only evidence available it is incumbent upon me to closely examine and weigh that evidence. It is my view that as the statutory declaration was made a month after the incident whereas the affidavit was sworn almost 12 months subsequent to the incident, I must accept the evidence in the statutory declaration where it differs from the later affidavit.
26. It should be noted in that, even though the submissions from both the Applicant and Respondent assumed the assault was as a result of the bouncer's actions, as the "offender" is unknown, I can still find that there was an offence committed by someone other than the bouncer if the evidence supports that finding.
27. It is my view the evidence does not support the conclusion that the injury to the Applicant's ankle was a result of the assault by the bouncer because although there was a proximity in time of the bear hug and the injured ankle, as the injury came to the ankle first then it cannot be a consequence of the assault. The next question is then whether the ankle was injured as a result of an assault by some other person unknown.



28. The applicant's evidence is that he "felt" someone's foot run down his leg, he did not see a foot or whose. The hospital notes record that the applicant was "in a fight with bouncers at the club and they kicked and stepped on his right ankle", this record like the bouncer's comment about weak ankles must have little probative value as they only record the authors' interpretation of what the applicant reported to them.
29. The Applicant submitted that unfortunately it is all too common that bouncers in Darwin apply more than reasonable force to sort out fights in hotels and the Applicant was a victim of one of those times however, I cannot take into account that conjecture. I would have no hesitation in granting a certificate of assistance if there were enough evidence to show that someone had deliberately kicked or slid their foot down the applicant's leg onto his ankle but apart from the applicant's assumption that what he felt was a foot I have no further evidence. That is not enough to prove to me on the balance of probabilities that an assault took place instead of a mere accident arising out of a fight in a hotel after a long night of drinking and socialising.
30. In summary I accept that the applicant has suffered a serious injury to his ankle and that injury arose from an incident on the morning in question. I further accept that there may have been an assault occasioned upon the Applicant by the bouncer when he applied a bear hug to the applicant. However I do not have enough evidence before me that allows me to accept that the injury to the ankle was a consequence of the assault by the bouncer or of an assault by another person. Therefore the application for assistance in relation to the injury to the Applicant's ankle must be dismissed.
31. The Applicant has also made a claim for psychiatric injury supported by the report of Dr Markou. The report of Dr Markou states that the Applicant has a "major depressive disorder" (see page 6) and would benefit from counselling and anti – depressive medication. The question must be does this condition arise out of an offence. I have found that on the evidence before me

there was an unlawful assault upon the applicant by the bouncer, the bear hug. Looking closely at Dr Markou's report the Doctor has analysed the applicant's social history and attributes his present problems as being produced by the assault. However the assault the Doctor is reporting on is the "assault" that caused the applicant's broken ankle, his traumatic stay in hospital and his fear of being injured again. Dr Markou was not asked to distinguish between the bear hug and the broken ankle incident and there is no reason why he should however it is clear that the Doctor is talking about the effect of the incident causing the broken ankle and the resulting hospitalisation. Having found that there was no offence except the bear hug it is my view that there is no causal link between an offence and the applicant's present depression.

32. Therefore I must refuse the application for assistance.

33. My orders today are that

(a) The application for assistance is dismissed

(b) The question of costs is reserved

(c) The matter is set down for hearing on the issue of costs at 9:00 on the 18<sup>th</sup> August 2003

Dated this 1<sup>st</sup> day of August 2003

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Tanya Fong Lim  
JUDICIAL REGISTRAR