

CITATION: *Dunn v Northern Territory of Australia & Ellis* [2003] NTMC 046

PARTIES: GEORGE ALEXANDER DUNN

v

NORTHERN TERRITORY OF AUSTRALIA

AND

TRYSTON DARRYL ELLIS

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20104141

DELIVERED ON: 22nd September 2003

DELIVERED AT: Darwin

HEARING DATE(s): 11th September 2003

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Damages – Future economic loss – young applicant – loss of opportunity - tertiary education

Wade v Allsopp [1976] 10 ALR 353

REPRESENTATION:

Counsel:

Applicant:	Mr Cvjeticanin
1st Respondent:	Ms Spurr
2nd Respondent:	no appearance

Solicitors:

Applicant:	Ward Keller
1st Respondent:	Halfpennys
2nd Respondent:	self

Judgment category classification:	A
Judgment ID number:	[2003] NTMC 046
Number of paragraphs:	34

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

No. 20104141

[2003] NTMC 046

BETWEEN:

GEORGE ALEXANDER DUNN
Applicant

AND:

NORTHERN TERRITORY
1st Respondent

TRYSTON DARRYL ELLIS
2nd Respondent

REASONS FOR JUDGMENT

(Delivered 22nd September 2003)

JUDICIAL REGISTRAR FONG LIM:

1. The applicant is a 20 year old man who attempted to stop the commissioning of a robbery at a neighbour's house. The second respondent was convicted of that robbery with the aggravating circumstance of causing bodily harm to the Applicant. The Applicant makes an application for assistance pursuant to section 5 of the *Crimes (Victims Assistance) Act*.
2. The First Respondent indicated that there was no issue with liability for the claim conceding there was an offence and that the Applicant had suffered an injury arising out of that offence making him a victim under the *Crimes (Victims Assistance) Act*. The matter of dispute between the parties was the quantum of the certificate to issue.
3. The quantum of assistance is assessed on common law principles with some guidance from section 9 of the Act as to what can be included. The

Applicant's claim is for pain & suffering, loss of amenities of life, loss of opportunity, past & future medical expenses and clothing. The parties have agreed on the past medicals and loss of clothing at \$421.00.

4. **Facts**

The Applicant gives two different explanations as to what he was doing at the time immediately preceding the assault which explanation is true does not really affect my deliberations. The Applicant was either studying or seeing his girlfriend off home at 12:30am when he heard or saw a person acting suspiciously at the neighbour's house. The Applicant decided to confront the intruder and did so by grabbing the intruder by the neck and questioning him. A struggle ensued and the Applicant and the Second Respondent fell through a window. The Second Respondent escaped and then the Applicant realised that he had been cut. The Applicant was conveyed to the hospital in an ambulance and put under general anaesthetic so that his wounds could be tended to.

5. It is not totally clear how much time the Applicant took off school after the assault. In paragraph 20 of his affidavit of the 12th March 2002 he says his mother looked after him for 3 weeks at home "helped me move from my bed to the chair, to the bathroom and the living room" indicating a inability to walk around by his own. Yet in paragraph 22 he states he was "off school for about a week after the assault". The father's evidence does not corroborate either.

6. The Applicant then says he had been so affected by the assault that he was lacking in concentration and was suffering sleeplessness therefore he did not return to school after the July school holidays. He claims that before the assault he was a "B" –"C" student and after he became a "C" –"D" student. Following that the Applicant claims he has lost the opportunity to pursue a tertiary education and gain an Engineering degree.

7. **The physical injury**

The applicant claims he was stabbed four times however there is some doubt whether two of the cuts received by him in the struggle were stab wounds or cuts from falling through the plate glass window. The doctor who attended the Applicant confirmed to the investigating officer that at least two of the cuts received were consistent with stab wounds. The police officer concluded that the cut to the leg was due to a stab wound because the cut went through the Applicant's jeans. In any event it is my view that even if the other wounds were caused by the fall through the window the injury arose out of the offence of the robbery and therefore assistance can be issued for those injuries as well. The evidence is that Applicant required stitches, a course of antibiotics and was on pain relievers for about 3 weeks. There are no permanent effects of the physical injury. In relation to this part of the Applicant's claim I award \$3000 for pain and suffering

8. **Mental Distress**

The Applicant describes the shock at having been stabbed and the fear he held of payback from the Second Respondent. He suffered sleeplessness, bad dreams and anxiety every time he sees someone who resembles the Second Respondent. These effects are now abating. The Applicant has become more security conscious putting a lock on his bedroom door and making sure he has a weapon available should there be an intruder. There has been an obvious change in the Applicant's outlook on life and a "fear" which was not there before the incident.

9. The Applicant's evidence is supported by the medical reports of Dr McLaren who states that while there is no psychiatric disorder attributable to the assault the applicant does present a "mixed picture of mental disturbance". Dr McLaren is of the opinion that the Applicant may think that he is recovering but what in fact has happened is the Applicant's perception of the world has changed and he has adjusted his lifestyle accordingly. Dr

McLaren suggests that the direction the Applicant has taken in his life is “unstable” and “treatment would be advisable”.

10. Dr McLaren states in his second report that unless the Applicant gets treatment he will become increasingly alienated causing him restriction on educational and employment opportunities. However in his latest report Dr McLaren accepts that the Applicant’s symptoms have stabilized and that the Applicant has a minor residual symptoms “equivalent to 10% whole body disability. Dr McLaren maintains his recommendation for treatment and suggests the Applicant should not work in areas where he has extensive contact with the public (but does not really explain why).
11. It is clear that the Applicant has suffered mental distress arising out of the assault and continues to do so causing him to be more security conscious and will continue to do so unless he has some treatment accordingly I award the Applicant \$1500 for mental distress.
12. **Psychological Injury**
The reports of Dr McLaren indicate the applicant is suffering some change to his psychological well fare. He has become hypersensitive to security which had effected his social life but does not continue to do so. The applicant did suffer some flashbacks and bad dreams but these have now dissipated (although not completely). The Applicant perceives himself as having returned to virtually a normal life (in terms of socialising and coping with fear) however Dr McLaren claims the adjustment the Applicant has made to his life is an adjustment to an abnormal life style which may lead to difficulties later on in life. The Applicant’s perception on life has changed.
13. The Applicant’s father claims his son has lost confidence and doesn’t play the sports he used to before the incident.
14. The Applicant states that “I don’t think I will ever get over the incident” and that he is still wary when going out.

15. Accordingly the Applicant has lost some of his enjoyment of life and for that head of damage I grant \$2000 assistance.

16. **Loss of opportunity**

The Applicant has claimed that because of the assault he has suffered a change in his psychological well being resulting in him being unable to fulfil his ambition to be an Engineer like one of his brothers. The Applicant claims that prior to the incident he was on track to obtaining high enough marks in his Year 12 to qualify for entry into Engineering. Subsequent to the assault he found that the lack of concentration and the inability to apply himself to his studies caused him not to return to school for six months. When he did return to school he completed Year 12 but did not pass even though he took less demanding subjects. At present the applicant is studying Year 11 Physics, English and Maths to enable him to get into the Australian Defence Forces.

17. The Applicant's father confirmed that his son had been a good student who worked hard at improving his grades to get into university but accepted that his son's grades were "not up to the standard required to enable him to enter university".

18. The only independent evidence of the Applicant's academic abilities was the report of Jacqueline Fidler a psychologist with Countrywide injury management. I note I was not provided with any qualification of Ms Fidler of her experience or expertise in assessing a person's academic ability and their employability. Ms Fidler says in her report that she spoke with Darwin High School about the Applicant's academic performance prior to the assault. She apparently reports what she was told on the sixth page of her report of the 29th of May 2003. The second paragraph on that page reads:

"During 1996 to 1998 Mr Dunn achieved average grades, ranging from outstanding results through to competent. However in Year 11, Mr Dunn's results significantly lowered, achieving a range of marginal to low results. In all subjects completed by Mr Dunn in

1999, the highest mark he achieved was 11 out of a possible 20. When asked about the decrease in his marks during Year 11 , Mr Dunn reported that he had difficulty with one of his Physics teachers which effected his motivation to apply himself.”

19. Ms Fidler explains the tests she set the Applicant and how those tests could be interpreted. She stated that even though the tests showed the Applicant’s “full scale IQ as slightly below average” the difference shown between two of the tests makes the Applicant’s “full scale IQ... not interpretable”. She concluded that the tests showed the Applicant as being average at verbal tasks and high average at performance tasks. Ms Fidler then concludes “I believed that Mr Dunn were it not for the assault, had the ability to successfully pass Year 12”.
20. The limitation that must be placed upon Ms Fidler’s conclusion is that she does not specify whether she thought the Applicant could pass those subjects required for entry into Engineering at University. Later in her report Ms Fidler states:

“Based on the results from the WAIS III it is my opinion that Mr Dunn would have been capable of obtaining an entry into the Northern Territory University. However we are not able to predict whether Mr Dunn would he able to achieve entry into his preferred course given that we are unsure of the number of the applicants and what his Tertiary Entrance Score would have been if he had completed Year 12 in 2000”
21. It can be seen from that statement that Ms Fidler is unsure as to whether Mr Dunn would have been capable of obtaining a score which would get him into engineering.
22. The Applicant stated a desire to become and Engineer and his father saw him working towards that end (even though he had his doubts that his son had the marks to get the necessary score) however when considering loss of opportunity the Court must assess what the Applicant was in fact capable of and if that capability has been effected by the assault. The Court cannot base

its assessment on what could be the unrealistic expectations of the Applicant.

23. The law certainly allows for damages to be claimed and assessed for loss of future opportunity for a minor who has yet to start on a career. The High Court in Wade v Allsopp [1976] 10 ALR 353 confirms the court's ability to grant damages for that loss of opportunity. The Plaintiff in Wades case was a 17 year old boy who suffered brain trauma and as a result no longer had the capability he had prior to the accident. There was evidence from the Plaintiff's headmaster that he was likely to matriculate into a university faculty such as veterinary science, medicine, pharmacy, science or economics. The Plaintiff had been left with average intelligence and some physical disabilities. Barwick CJ commented at page 345

“It is most difficult to assess first the likelihood of academic success in an institution of tertiary education of a lad under 18 years of age and, second, the likelihood of success in professional life of such a lad if academically successful. It is easy to paint a glowing prospect and to forget the hard realities. But in any case eloquent descriptions in general terms of such a lad's capabilities are more likely to mislead than to assist a sober and objective prognosis.

24. The High Court confirmed that Court of Appeal in an assessment of \$100000 for this head of damage.
25. The evidence of the Applicant was challenged by the First Respondent in submissions. It was argued that the Applicant should have provided the Court with his school reports or academic record to prove his claims in relation to his grades. Those documents would have also provided the Court with information about what subjects the Applicant had completed.
26. Mr Cvjeticanan argued that the evidence of the Applicant and his father cannot be challenged in submissions and that the First Respondent should have cross examined the Applicant if they wanted to challenge the evidence. The difficulty with that argument is that in this jurisdiction there is no cross

examination by right. The act and rules are drafted to allow these applications to be dealt with as little formality as possible and without the need for victims of crime to be subjected to cross examination. It is my view that it is entirely proper for the first respondent to point out to the court the inadequacies of the Applicant's evidence.

27. It is the Applicant's onus to prove to the court to its reasonable satisfaction that on the balance of probabilities he has suffered the loss of opportunity he has claimed. The Applicant cannot expect the court to take him at his word especially when his academic record would be readily available to him from the school. It is not enough for him to say my evidence is uncontroverted therefore it is the best evidence. It is clearly not the best evidence and that best evidence is easily obtainable. It is curious that Ms Fidler's report gives great detail about the results in Year 11 but does not provide equal amount of detail about the period immediately prior to the incident.
28. Given that the Applicant had already fallen in his academic results, not achieving very well at all in Year 11, prior to the incident it is my view that he has not adequately explained that year nor put enough evidence before the court to establish the loss of opportunity to obtain a university degree. It is not the applicant's case that he has suffered a diminution of his intelligence levels only that he couldn't concentrate after the incident therefore requiring him to drop out of year 12 in 2000. He does not explain, nor do the reports of Dr McLaren or Ms Fidler indicate, why he took lower valued subjects in the next year and continued to fail. In fact the Applicant states the Dr McLaren that his concentration had improved.
29. When assessing this Applicant's claim for loss of opportunity I have to be satisfied on the balance of probabilities that he had the abilities and the application to obtain the requisite score on his year 12 to obtain a place in a University. I cannot be satisfied to that extent.

30. The only independent evidence is that of Ms Fidler and her conclusions are confusing and unhelpful. She states the Applicant “would have been capable of obtaining an entry into Northern Territory” implying that the incident affected his ability obtain that entry. However, in her answer to question 3, “How has the assault affected Mr Dunn’s ability to undertake further study and employment?” Ms Fidler states “We would think that he will be likely to pursue study and employment in either the engineering field or as a Airborne Electronics Analysis.” This conclusion indicates to me that at present Ms Fidler is of the opinion that the Applicant could still pursue his chosen career in Engineering.
31. Earlier in her report Ms Fidler states “Based on three interviews with Mr Dunn and the results of the tests administrated I believe that Mr Dunn, were if not for the assault, had the ability to successfully pass year 12.” She does not clarify what subjects in Year 12 or at what level. Ms Fidler seems of two minds as to the Applicant’s present capabilities and the effect, if any, the assault had on the applicant’s abilities. What is clear is that there in no conclusion that Mr Dunn’s intelligence levels have been affected by the assault.
32. I reiterate I cannot be satisfied that the Applicant has suffered the loss of opportunity claimed and therefore refuse to grant any amount of assistance for that head of damage.
33. **Future Medicals**
There is a suggestion that the Applicant will require some medical treatment on the recommendation of Dr McLaren however, it is clear that the Applicant does not intend to take up that recommendation and therefore should not be compensated for that amount.
34. **Orders**
- 34.1 An assistance certificate issue in the sum of \$6921.00

34.2 Costs reserved.

Dated this 22nd day of September 2003

Tanya Fong Lim
JUDICIAL REGISTRAR