

CITATION: *Newland v Northern Territory of Australia* [2003] NTMC 058

PARTIES: STEVEN HOWARD NEWLAND

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20303483

DELIVERED ON: 12th November 2003

DELIVERED AT: Darwin

HEARING DATE(s): 6th November 2003

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Crimes Victims Assistance- Commission of a crime – assessment of damages – sick leave

Briginshaw v Briginshaw [1968] 60 CLR 336

Gieszler v Northern Territory of Australia and Bojczuk [1996] unreported NT Court of Appeal

Graham v Baker [1961] 106 CLR 340

Paff v Speed [1961] 105 CLR 549

Wolf v Punitham [29 May 2003] unreported NT Supreme Court

Parker v Commonwealth of Australia [1975] 49 ALJR 221

REPRESENTATION:

Counsel:

Applicant: Ms Tregear

Respondent: Ms Bonser

Solicitors:

Applicant: Hunt & Hunt

Respondent: Priestly Walsh

Judgment category classification: C

Judgment ID number: [2003] NTMC 058

Number of paragraphs: 40

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

No. 20303483

[2003] NTMC 058

BETWEEN:

Steven Howard Newland
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 11th November 2003)

Judicial Registrar Fong Lim:

1. The Applicant applies for an Assistance Certificate to issue in his favour pursuant to section 5 of the *Crimes (Victims Assistance) Act*. The issues to decide in this matter are whether the Applicant is a “victim” pursuant to the provisions of the Act and if so the quantum of his damages.
2. The Applicant relied upon his affidavit of the 3rd November 2003, the PROMIS report from the Police and some notes from his dentist. The Respondent relied upon the affidavit of Police Officer Ian Kennon.
3. The circumstances of the incident are in dispute. The Applicant attests that he had been out nightclubbing and having consumed several beers he had lain down underneath a tree on the Esplanade and fallen asleep. He awoke to find two people a male and female standing over him. He discovered that his wallet was missing from his pocket and after asking the male and female where his wallet was they indicated to him that it was over underneath

another tree. The Applicant says that having retrieved his wallet he then followed the male and female to Daly street overtaking them on the way to Mitchell Street. It is after he overtook the two people that he says he was attacked from behind being punched or kicked in the head. The Applicant is not sure if he lost consciousness but it seems from his statement to the police that it is most likely that he did. He then took a taxi to the hospital where he was treated for his injuries.

4. The Applicant suffered bruises to his face, a cut lip which required stitching and a broken nose. He was sent home from the hospital with pain killers and returned some 3 weeks later to have an operation on his nose to straighten it. As a result of the assault the Applicant had 8 days off work for which he was paid sick leave.
5. The Respondent relied on the affidavit of Police Officer Kennon (“Kennon”) to bring into issue the Applicant’s version of events. Kennon attests that he attended the scene and spoke with a witness, a Elizabeth Jackson, who recounted a different version of events. Ms Jackson stated that the Applicant had assaulted her by walking up to her and putting his arm around her and refusing to leave her alone when asked. She says she was calling for help when an unidentified male came up to the Applicant, punched him in the face, and then left the scene. Kennon then attests that when he later attempted to get a formal statement from Ms Jackson and she was not registered at the hotel that she had advised as her temporary address and that when he tried the mobile phone number she had given him. Kennon also attests that he interviewed another person in relation to the incident but there were no further leads so the file was closed.
6. Kennon states that when he interviewed the Applicant he identified Ms Jackson as the female he had seen standing over him and who had pointed out where his wallet was. Kennon also states that the Applicant did not make any complaint about the anything missing from his wallet.

7. Ms Bonser for the Respondent argued that I should accept the evidence of Kennon and what he had been told by Ms Jackson. Ms Bonser further argues that should I accept Ms Jackson's version of events then I should not issue an Assistance certificate in the Applicants favour because section 12 (f) prohibits the issuing of a certificate for the benefit of a victim who was injured during the commissioning of a crime by the victim. Ms Bonser argued that if Ms Jackson is to be believed then the Applicant was assaulting her when he himself was assaulted.
8. It is clear from both the Applicant's version of events and even the hearsay evidence of Ms Jackson that the Applicant is a victim as defined by the Act in that he has suffered an injury from an offence, namely and assault upon himself.
9. The question is whether the Applicant is precluded from an assistance certificate by virtue of section 12(f) of the Act.

“the Court shall not issue an Assistance Certificate..... (f) in respect of an injury or death that occurred during the commission of a crime by the victim.”

10. The evidence of Kennon regarding the information that was given to him by Ms Jackson suggests that the Applicant was in fact commissioning an assault upon Ms Jackson.
11. To deny the Applicant his assistance certificate through the application of section 12(f) I must be reasonably satisfied that the incident did in fact take place how Ms Jackson described it (see *Briginshaw v Briginshaw* (1938) 60 CLR 336) and that if it did that it constituted a “crime”. The crime, although not articulated by the solicitor for the first Respondent, would be assault with the aggravating circumstance of male on female.
12. At this point I must indicate that even though the evidence of Ms Jackson is hearsay evidence I am prepared to admit that evidence as I am not bound by

the rules of evidence and I am not convinced that it is so unreliable that to take it into account would result in a grave injustice to the Applicant.

13. To decide whether I am reasonably satisfied I must weigh up all the evidence before me. It is an interesting fact that the Applicant identified Ms Jackson as the female who he believed had been standing over him and later advised him where the wallet was. It is also interesting that the Applicant did not seem to be concerned about whether anything was missing from his wallet. Of further interest is that it seems Ms Jackson gave incorrect contact details to Police Officer Kennon. These facts place some doubt as to the credibility of statements made by both the Applicant and Ms Jackson.
14. It could be inferred that Ms Jackson gave false contact details purposefully because she was the female who originally took the Applicant's wallet. It could be inferred that the Applicant did not mention anything because in fact he was more concerned about creating a version of events which was inconsistent with him having assaulted Ms Jackson. There could be number of credible explanations for this combination of facts.
15. If I believe Mr Newland's version of events then I could infer that Ms Jackson (as having been identified as one of the persons who had taken Mr Newland's wallet) was lying about the incident so that she could be seen as a victim and not a suspect. If I believe what Ms Jackson apparently told Kennon then I could infer that Mr Newland had not been accurate in his recount of the assault because he did not want to get into trouble for assaulting Ms Jackson. Those two examples are only two possible scenarios which can be supported by the scant evidence available.
16. I do not have enough evidence before me to form the view to my reasonable satisfaction that the Applicant had assaulted Ms Jackson nor can I be satisfied Mr Newland did not commit the assault. Mr Newland did not comment on Ms Jackson's version at all in his evidence. I do not know whether that version of events was ever provided to him for comment. The

fact that he has not denied the alleged assault directly would be of interest only if he has had the opportunity to read the affidavit of Kennon. I have no way of knowing whether Mr Newland has had that opportunity.

17. Given the state of the evidence and my inability to reach a conclusion about the alleged assault upon Ms Jackson it is now important to decide who has the burden of proof regarding that alleged assault.
18. The question is that once the Respondent has brought the matter into issue then does the burden change to the Applicant to disprove that the crime did not take place or does the burden of proof stay with the Respondent to prove that the assault did take place. If former then the Applicant cannot be given any assistance if the latter then the Northern Territory has not discharged its burden of proof and therefore I must give the Applicant his certificate.
19. The Court of Appeal in Geisler v Northern Territory of Australia and Bojczuk (1996) considered the issue of the burden of proof in relation to section 12(b) of the Act. Section 12(b) states

“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”

20. The Court, per Mildren J, held that as the *Crimes (Victims Assistance) Act* is remedial legislation any ambiguity should be constructed in favour of the Applicant. The issue in that case was whether the reporting of the offence was a condition precedent to the issuing of an assistance certificate. Mildren J stated

“Section 12 of the Act does not make it entirely clear where the onus lies in relation to proof that the report of the offence was made to the police within a reasonable time. In my opinion the wording of section 12 does not clearly make proof of that matter a condition precedent to the issuing of a certificate.Our attention was directed to

s12(a) where it was submitted that logically the Applicant should bear the onus in respect of proving that the relevant person was a victim, as defined . Even if that be so it does not necessarily follow that the onus in respect to of any of the other matters in s 12 which operate to preclude the issuing of a certificate ought to be construed in the same way. Section 12 (a) precludes the issue of a certificate where the Court is not satisfied that the person killed or injured was a victim and because of this it is easy to conclude that casts upon an Applicant a matter about which there must be proof. The other subparagraphs of s12 are not worded in that fashion. I consider that the correct conclusion is that the burden of proving that an offence was not reported in within a reasonable time rested with the first Respondent”

21. I respectfully agree with the Court of Appeal, and it is my view that this line of reasoning should be applied to section 12(f) as well. It is cannot be the Applicant’s responsibility to disprove the commissioning of any crime that would be too onerous. It must be the Respondent’s burden to establish that a crime was commissioned by the Applicant if it wishes to rely on the provision to deny the Applicant the right to a certificate. There is nothing within section 12(f) which would suggest the burden would change unlike in section 12 (b) where the burden must be on the Respondent to first show that the offence was not reported within a reasonable time but then the burden must lie with the Applicant to prove there were circumstances which prevented the reporting of the offence.
22. Given that the burden of proof lies with the second Respondent I find that as I cannot be reasonably satisfied a crime did not take place then the Applicant is entitled to an assistance certificate.
23. **Quantum** The Applicant has applied to an assistance certificate for the following things:
 - 23.1 Taxi fare to hospital
 - 23.2 Cost of the repair to his chipped tooth.
 - 23.3 Pecuniary loss for the sick leave used

23.4 Pain & suffering

24. Taxi fare the Applicant claims that he took a taxi to the hospital which cost him \$25.08 (see paragraph 10 of his affidavit) he annexes a copy of a taxi invoice in support of that claim. Unfortunately the document is not very clear however it is clear to me that the amount on that docket shows the sum of \$22.00 or \$32.00 not the amount claimed by the Applicant. I cannot be satisfied that the document exhibited relates to the taxi ride to the hospital and certainly cannot be satisfied as to the amount. Therefore I cannot allow any amount for that taxi fare.
25. Repair to chipped tooth the Applicant states in his affidavit that he suffered a chipped tooth as a result of the assault and produced some patient progress notes from his dentist to show that he had some repair work done on his tooth at a cost of \$131.90. The notes confirm that there was a chip in one of the Applicant's teeth and Mr Gordon repeats what he had been told by the Applicant but there is no conclusion by Mr Gordon that the chip in the tooth was caused by the assault. Further there is no mention of a chipped tooth in the hospital records. The Applicant must prove on the balance of probabilities that the chip in his tooth was caused by the assault. He has not done that. I refuse the claim for dental work.
26. Loss of sick pay benefit The Applicant lost 8 days at work 5 days immediately subsequent to the injury and 3 days later after he had the operation to straighten his nose. In his affidavit at paragraph 12 the Applicant claims the sum of \$1385.66 for loss of sick benefit however upon further investigation it was established that the Applicant was basing his claim on his pay rate for 2003 and not 2002 when the incident occurred. The appropriate rate is \$1557.00 nett per fortnight.
27. The Respondent argues that the Applicant is not entitled to loss of earnings because he was paid for the period of time that he was off work and therefore has suffered no economic loss. The Respondent relies on the High

Court authority of Graham v Baker (1961) 106 CLR 340. Their honours referred to a line of authorities which

“clearly shows that where, by virtue of an implied term of the contract of employment, “wages” are payable to an employee who, by reason of illness, is absent from work, the amounts which he receives during the period of his absence are his ordinary wages and not something additional thereto or of any different character. The position is, of course, precisely the same where as here the matter is not left to implication and the contract of employment provides expressly for “sick leave on full pay”

28. The Court found that

“In the present case the sick leave credit or entitlement is not such that it can be converted into cash if the employee does not otherwise find it necessary to avail himself of it. It is the measure no more and no less of the employee’s right to receive ordinary pay notwithstanding his absence on sick leave. If received pursuant to such a right it is in our view impossible to say that pro tanto there has been any loss of wages.”

29. The Respondent argues that in applying the reasoning in Graham v Baker the Applicant can make no claim for loss of earnings. I agree with the Respondent in that application of the case. However the Applicant here is not applying for loss of earnings rather for the loss of the sick leave taken.

30. The issue of damage for loss of sick leave was not an something the High Court in Graham v Baker had to decide on however they did refer to it obiter and found that

“in an appropriate case, the extinguishment or diminution of sick leave credits of the character in question here may, notwithstanding the view we have expressed, result in some damage.”

31. Their Honours referred to Windeyer J in the High Court decision of Paff v Speed (1961) 105 CLR 549 where he reasoned (obiter)

“A plaintiff entitled to be paid by his employer while incapacitated and who when he recovered returned to work in his old position may nevertheless have suffered some compensable loss

by his absence. If for example he was by the terms of his employment permitted only a certain number of days sick leave on pay during the year he would incur some loss if those days were used up in an absence caused by the defendant”

32. Their honours adopted the view that a plaintiff may

“incur a loss because he may face the possibility of being sick in future from extraneous causes at his own expense so far as wages are concerned”

33. This passage of the High Court’s obiter has been adopted by Justice Thomas of the Supreme Court of the Northern Territory in the unreported decision of Wolf v Punitham [29th May 2003] her honour accepted that the loss of the sick leave was a compensable and after quoting the passage from Puff v Speed referred to by the High Court in Graham v Baker her honour found:

“There is no issue as to the amount payable under the heading “sick leave”. That amount is \$2333.92 net and \$3286.86 gross. I consider that in this case the plaintiff has incurred a compensable loss resulting from the use of all her sick pay entitlements and I award the amount of \$3286.86, being the gross amount”

34. In the present case the Applicant has used 8 days of his accumulated leave. Accumulated sick leave of a public servant, as the Applicant is, is not convertible to cash or can be paid out when leaving the public service. Public service terms are that you can accumulate sick leave at a rate of 10 days per year which can be accumulated and used when required however if you leave the public service sick leave is not paid out upon termination.

35. The question must be whether there is a real possibility that the Applicant will require the use of those 8 days of sick leave before he leaves the public service. It is a question of remoteness. In Wolf v Punitham Justice Thomas accepted that the Plaintiff had suffered a loss and awarded her damages accordingly. The facts were that the Plaintiff was employed at the Alice Springs hospital and had to utilise all of her sick leave to recuperate from an operation (made necessary by the Defendant’s negligence). Her honour

found that in the circumstances the Plaintiff should be compensated to the amount of the gross wages the Plaintiff would get for those days off.

36. In the present case the Applicant has not claimed that he has used all of his sick leave available to him. He does not give any further detail as to his sick leave however it is my view that he has lost the benefit of that leave should he require it in the future and taking into the vicissitudes of life that should be included in his damages. The assessment of damages is an inexact science however the reference point for the loss must be the wages which attach to the sick leave. Certainly other courts have used the level of wages as a starting point and then accounted for the future loss by and amount the court at the time thought fit. It seems that Justice Thomas in Wolf v Punitham accepted that the wages were the appropriate measure. The High Court in Parker v Commonwealth of Australia [1975] 49 ALJR 221 per Jacobs J also adopted that view. It is my view that the wages is the only logical measure and therefore the Applicant should be allowed the sum of \$1245.60 for loss of his 8 days sick leave.
37. Pain & Suffering & loss of amenities of life the Applicant suffered a broken nose which had to be corrected at a later date, a cut lip which had to be stitched and some cuts and bruises. He claims that he had also suffered a chipped tooth however I have already decided that I do not have enough evidence to connect the chipped tooth with the assault. The Applicant further claims that since the assault he has had some difficulties with his breathing that he did not have before. There is no medical evidence to support the claim that the difficulties the Applicant is having with his breathing is caused by the broken nose. In fact there is some evidence to show that he has some problems with his sinuses which could also cause the breathing difficulties.
38. The Applicant also claims that since the assault he is more cautious about going out a night and that has limited his enjoyment of that part of his life.

39. The Respondent suggested that I discount the amount I award for pain & suffering on the basis that as the Applicant was intoxicated he would not have felt much pain however I cannot place much credence by that argument. Certainly the Applicant would have suffered quite a bit of pain in the next few days and subsequent to his operation. It is my view that an appropriate amount to award for this head of damage is \$3000.00
40. Therefore I order that
- 40.1 An assistance certificate issue for \$4245.60
- 40.2 The Respondent to pay the Applicant's reasonable cost and disbursements to be taxed in default of agreement.

Dated this 11th day of November 2003

Tanya Fong Lim
JUDICIAL REGISTRAR