

CITATION: *Zeron Dalton v Northern Territory of Australia & Lester & Rose* [2004]  
NTMC 033

PARTIES: ZERON DALTON  
  
v  
  
NORTHERN TERRITORY OF AUSTRALIA  
  
AND  
  
ANDREW GREGORY LESTER  
  
AND  
  
MATHEW TREVOR ROSE

TITLE OF COURT: Local Court  
JURISDICTION: Crimes (Victims Assistance)  
FILE NO(s): 20115919  
DELIVERED ON: 22<sup>nd</sup> April 2004  
DELIVERED AT: Darwin  
HEARING DATE(s): 15<sup>th</sup> April 2004  
JUDGMENT OF: Judicial Registrar Fong Lim

**CATCHWORDS:**

Section 12(f) Crimes (Victims Assistance) Act—commissioning of a crime – mental injury – Loss of opportunity

*McIlpatrick v Chard* [1995] 5 NTLR 9

*Briginshaw v Briginshaw*[1938]60 CLR

**REPRESENTATION:**

*Counsel:*

Applicant:	Mr Currie
1st Respondent:	Ms Spurr
2 <sup>nd</sup> & 3 <sup>rd</sup> Respondent:	no appearance

*Solicitors:*

Applicant:	Morgan Buckley
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1st Respondent:	Halfpennys
2 <sup>nd</sup> & 3 <sup>rd</sup> Respondent:	Self
Judgment category classification:	C
Judgment ID number:	[2004] NTMC 033
Number of paragraphs:	42

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

No. 20115919

BETWEEN:

Zeron Dalton  
Applicant

AND:

Northern Territory of Australia  
1st Respondent

Andrew Lester Gregory  
2nd Respondent

Mathew Trevor Rose  
3<sup>rd</sup> Respondent

REASONS FOR JUDGMENT

(Delivered 22<sup>nd</sup> April 2004)

Judicial Registrar Fong Lim:

1. The Applicant has made an application for an Assistance certificate to issue in his favour pursuant the Crimes ( Victims Assistance ) Act. The First Respondent accepts that the Applicant suffered a violent assault at the hands of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. The dispute between the parties is whether a certificate should issue given the application of section 12(f) of the Act.

2. Section 12 (f) states:

12. Assistance certificate not to be issued in certain circumstances

The Court shall not issue an assistance certificate –

(a) where it is not satisfied, on the balance of probabilities, that the person whom the applicant claims was injured or killed was a victim within the meaning of this Act;

.....

(f) in respect of an injury or death that occurred during the commission of a crime by the victim.

3. The First Respondent claims that the Applicant was injured during the commissioning of a crime that is interfering with a motor vehicle.
4. The evidence provided on the circumstances of the assault was as follows:
  - Affidavit of the Applicant of the 19<sup>th</sup> November 2004.
  - Statutory declarations of Micheal Foley, Jason McMahon, David Graham, Zeron Dalton and Wayne O'Neill
5. In his affidavit and statutory declaration the Applicant states that he and his mates had ridden and walked into town and were just outside Gecko Lodge when the applicant saw a man jogging towards him then the next thing he knew he received a blow to the head. The Applicant says he then scrambled to his feet and made it to the bushes near the lodge when he was grabbed from behind and assaulted. The Applicant states he was surprised by the attack and kept on “screaming at him” “ it wasn’t me it wasn’t me”.
6. The evidence of the Applicant’s friends Graham and MacMahon does not assist in establishing the circumstances of the assault as all they could say was that they were waiting for the Applicant to catch up and then they heard someone being assaulted behind the fence of the Gecko Lodge. They did not see the assault.
7. The evidence of the Mathew Rose is that he was returning to Gecko Lodge with his friend Andrew Lester when he noticed light on in the interior of his friend’s car. He walked over toward the car when he saw two legs hanging out of the driver’s side. Upon further investigation ( see paragraph 2 of his

affidavit) he realised that there were two people in the car. Both he and his mate then attempted to catch the people in the car Lester pursuing the person on the passenger side and Rose the person on the driver's side. Rose then says that the applicant hid behind a tree and it was there that Rose caught him.

8. The Applicant drew the court's attention to the evidence of Wayne O'Neill who was one of the attending police officers. Officer O'Neill recounted what Rose had told him:

"Rose directed me to the glove box and said that he had caught Dalton going through it. He further stated he caught Dalton doing this, so he grabbed hold of him and assaulted him"

9. Counsel for the Applicant suggested that the inconsistency between Rose's affidavit and what he told the police is an indication that he did not have an accurate memory of the incident. Counsel also suggested that the court assume that Rose was intoxicated at the time of the assault because of the time of the assault, 1:00am, and the fact that the Magistrate noted in his sentencing of Rose "he had consumed some alcohol on that night". I cannot make such an assumption. There is no evidence that Rose was intoxicated. There is no explanation for the inconsistency in Rose's story.
10. Counsel for the First Respondent argued that Rose's story has been consistent all along from the time that he spoke with Mr Foley to his affidavit. He always maintained that the applicant was breaking into his friend's car and that is why he assaulted him. Counsel argued that it is clear that the Applicant was committing a crime at the time of the assault and therefore ought not be granted an assistance certificate.
11. The only independent statement taken was that of Mr Foley however it does not assist in the circumstances of the assault except to confirm what he was told by Mr Rose and that the Applicant had called out " Let me go" or something similar. Mr Foley did not see the lead up to the assault he only

came upon the 2<sup>nd</sup> and 3<sup>rd</sup> respondents punching the Applicant and was told by Rose that they had caught the Applicant breaking into the car.

12. I accept that Rose believes the Applicant to be one of the people breaking into his friends car. I accept that the Applicant was in the vicinity of that crime taking place. There is, however, some doubt created as to the Applicant's involvement in the breaking into the car and that doubt is created by the differing stories from Rose in his initial statement recounted by Police Officer O'Neill and his later affidavit. The Applicant has always maintained that he was innocent of breaking into the car and it interesting to note that no charges were laid in relation to that crime.
13. In applying the principles set out in *Briginshaw v Briginshaw*[1938]60 CLR 336 the Court must be convinced to it reasonable satisfaction that, on the balance of probabilities, the Applicant was injured while commissioning a crime. Counsel for the Applicant suggested that I should not be convinced that the Applicant was the same person as was seen to be in the car because there was a period of time that the person who was in the car disappeared from view of Rose. Certainly if this were a matter before the Court of Summary Jurisdiction for the prosecution of the Applicant I am sure that given the present evidence would be a reasonable doubt as to the identity of the offender ( to the breaking into the vehicle) given that he was out of sight of Rose before he was "caught" and there is no statement from Rose as to how he identified the Applicant as being the same person as was in the car.
14. The evidence of all parties contradict in many ways as you would expect that in these circumstances. The independent witness Mr Foley does shed some light on the physical positions the parties were in at the time he saw them. He describes the physical surroundings as follows:

“ A five foot Cyclone wire fence surrounds the whole premises. In between the lodge and the carpark is a BBQ area and Spa. This area is separated from the carpark by a Cyclone wire fence which has black shade cloth up on it.”

15. Mr Foley describes how he heard a scuffle and someone saying “Let me go” and then he walked around the fence to investigate what was happening. It is then he saw “two males standing along the fence line adjacent to Mitchell Street.” This would indicate that the respondents and the applicant were just inside the fence line when Mr Foley saw them.
16. In his statement to the police and his affidavit Mr Dalton says he was outside of the fence when he was attacked by Rose “ I was standing directly in front of the fence and turned my head to my left looking over my left shoulder. That’s when I see male person running..... .. He was saying something like “oye oye you” and he startled me. It all happened so quickly because then I felt a blow to the head.”
17. Mr Dalton states that after the first blow he scrambled to his feet and “I scrambled into the Gecko lodge yard near the bushes.”
18. This story is inconsistent with Jason McMahon’s statement in which he claims that Zeron wanted to go to the toilet and that “He ( Zeron) went into the carpark area of Gecko Lodge” then 2 -3 minutes later he heard “noises coming from the car park, the noises were obviously of somebody being bashed.”
19. David Graham states that the “ When Zeron around the corner near the car park, Jason and I were about 50 metres away.....We were standing there when we heard noises coming from near Zeron was, ...”
20. Both of the Applicant’s friends say that he entered the car park area before they heard anything which would related to the assault. It is my view that the evidence of McMahon and Graham contradict Mr Dalton’s statement and that along with Mr Foley’s account would on the balance of probabilities place Mr Dalton inside the fence line when he was attacked. However that does not place him in the vehicle as suggested by Mr Rose.

21. If the Applicant was inside the fence line then he was closer to the vehicle in question however without an explanation by Rose of how he knew that the applicant was the same person as was in the vehicle I cannot be convinced to my reasonable satisfaction that the Applicant was in fact the person in the vehicle. I accept that Rose believed the Applicant to be the same person and that there may have been some reason for that belief however that has not been established on the evidence before me.
22. Accordingly I find that the Applicant was not commissioning a crime at the time he was assaulted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and therefore should not be excluded from assistance pursuant to section 12(f).
23. Now I turn to the issue of quantum. It is clear that the Applicant was a victim of a serious assault not only was he punched he was thrown against a vehicle and kicked. The hospital notes show that he was brought in on a stretcher but was conscious and had some abrasions to his arms, face and torso. The ambulance notes state that the Applicant was complaining of headache but there was “ No neurological deficit”, there is no explanation of what tests the ambulance officers undertook to make that assessment.
24. Mr Dalton was not admitted and was sent home with his parents. The Court was provided with photographs of Mr Daltons bruises and abrasions which considering the viciousness of the assault seem relatively minor.
25. The Applicant claims that the assault has been the cause of him being unable to complete his Year 11 and 12 and continues to effect his life because he is easily irritated and had problems with his temper. The Applicant was examined and assessed by Neuropsychologist Mark Reid who, in his report of 30<sup>th</sup> November 2004, concluded:

“On the basis of all the information I have to hand at the present time I believe it is probable that Mr Dalton suffered from a severe concussional head injury and it is also probable that his is continuing to demonstrate some residual effects from this head injury, including that slowing of information processing speed in general as well as



some impairment in sustained concentration or vigilance. It is less clear whether the behavioural changes described are directly attributable to the primary brain injury, but he describes no improvement or amelioration of these symptoms since the assault occurred, which is somewhat unusual in my experience. There is clearly the added possibility that Mr Dalton is simply very angry that he was assaulted in the first place and it is not uncommon that such anger can be displaced more generally onto other people or objects.”

26. Mr Reid is not convinced that the mood changes are due to any neurological changes but accepts that the Applicant may have a mild slowing of information processing and some impairment in sustained concentration. Mr Reid further suggests a review of the Applicant because he was of the opinion that the Applicant’s condition had not stabilised and it was too early to give a definitive prognosis. The Applicant did not go back to Mr Reid.
27. A report was obtained from a clinical psychologist, Kim Groves, on 24<sup>th</sup> September 2004. Ms Groves was not referred to the report of Mr Reid. Ms Groves undertook various tests upon the Applicant and came to the conclusion that “ Mr Dalton’s performance revealed his general intelligence to be at the lower end of the average range (IQ 92).”
28. Ms Groves has the opinion that any behavioural difficulties associated with the head injury would normally resolve in about 6 months however Mr Dalton continues to have problems because he believes his mental abilities have changed significantly when in fact his mental abilities are only slightly affected.
29. The Applicant and his parents claimed that he was doing well at school prior to the assault and the effects of the assault have caused him to fail to complete Year 11 and 12 at school ruining his chances to become a park ranger. I do not have any independent evidence before of the Applicant’s performance at school prior to the assault. There is no evidence of what educational requirements there are to become a park ranger and whether the Applicant had the ability to attain those educational requirements. If the

Applicant is claiming loss of opportunity he has not put enough evidence before the court to convince the court on the balance of probabilities that he has suffered that loss.

30. Ms Groves also refers to the fact that the applicant has commenced university (see paragraph 4 of her opinion on page 10 of her report). There is no explanation of how Mr Dalton came to commence university without passing his Year 11 & 12 nor does Mr Dalton refer to his university course in his affidavit.
31. Ms Groves diagnoses Mr Dalton as suffering post traumatic stress disorder which is in direct conflict with Mr Reid's conclusion (at page 5 of his report) that there is no evidence that Mr Dalton suffered from post traumatic stress disorder. Ms Groves was not asked to consider Mr Reid's report and therefore did not have the benefit of his observations which were made closer to the assault, if she had done then she may have been able to explain why her diagnoses was different to Mr Reid's. Both Mr Reid and Ms Groves are qualified psychologists Ms Groves is a clinical psychologist who treats patients through counselling and Mr Reid a neuropsychologist specialising in the effects of head trauma on cognitive skills etc. Mr Reid diagnoses a severe concussion and similarly Ms Groves diagnoses a mild traumatic closed head injury. Their opinions are similar in the effect of that injury on Mr Dalton's cognitive skills (ie mild effect on those skills). Where they differ is the effect the assault has had on Mr Dalton's emotional well being.
32. Mr Reid states that

“It is less clear whether the behavioural changes as described are directly attributable to the primary brain injury.... There is clearly the added possibility that Mr Dalton is simply very angry that he was assaulted in the first place and it is not uncommon that such anger can be displaced more generally onto other people objects.”

33. Ms Groves agrees that

“He continues to harbour a pervasive sense of anger which he brings to his interpersonal reactions”

34. She further opines that the continuing problems Mr Dalton is reporting to have are not as a result of Post Traumatic Stress Disorder rather a result of his “affective state” due to the original effects of the assault on his cognitive skills. Ms Grove states that the symptoms of Post Traumatic Stress disorder (mild) had begun to resolve around March 2003 and basically the continuing problems are caused by Mr Dalton thinking he has continuing difficulties when in fact there should be no reason for them.
35. A “victim” as defined by the Crimes (Victims Assistance) Act is entitled to be compensated for any physical or mental injury received due to an offence. The Applicant in his Application for assistance has applied for compensation for :

“Brain injuries including memory loss, loss of ability to concentrate, excessive sleep, loss of appetite”

36. There is no claim for mental injury as described by the Act just the physical effects of the “brain injury”. However as the Crimes ( Victims Assistance) Act is beneficial legislation and the whole tenor of the submissions before me were to establish whether or not the Applicant had Post Traumatic Stress Disorder with continuing symptoms I am prepared to consider that claim. If I accept Ms Groves report over Mr Reid I will be accepting that the Applicant has had mental injury however any residual effects could be resolved with some counselling. If I accept Mr Reid there is no evidence of mental injury just anger at the assault which would fall into the category of mental distress not injury.
37. In this matter I prefer Ms Groves opinion over Mr Reid in relation to the continuing problems suffered by the applicant. Mr Reid only interviewed the Applicant and also stated that at the stage of the examination:

“At this stage it does not appear that his condition is stable”

38. Mr Reid accepts that the Applicant's condition could fluctuate and change.
39. Ms Groves had the benefit of also interviewing the applicant's family who confirmed that since the assault the Applicant's behaviour has changed with mood swings and lack of motivation. There is no reason to think that the family's observations are anything less than truthful. Therefore I accept that Mr Dalton may have suffered some Post Traumatic Stress Disorder however that the present difficulties are part of his affective state which could be rectified by counselling.
40. **Conclusion** – Having accepted Ms Groves opinion I am of the view that Mr Dalton is entitled to an assistance certificate for pain and suffering and mental distress arising out of the physical effects of the assault ( which by both Mr Reid and Ms Groves report should have resolved by now) and some assistance for mental injury which was resolving by March of 2003 and could have completely resolved had Mr Dalton undertaken some counselling. I will not be giving any amount for the cost of counselling as the Applicant has not indicated an intention to undertake that counselling ( (see *McIlpatrick v Chard* [1995] 5 NTLR 9 )
41. In relation to the claim for loss of opportunity, inability to finish school, I do not have enough independent evidence before me to make any allowance for that claim. It would have been a simple matter for the Applicant to tender his previous school reports to establish his level of scholarship before and after the assault. There is also no explanation of Ms Groves comment that the Applicant had commenced University, eg what course was undertaken whether he continues to undertake the course etc.

42. **My orders are:**

42.1 An assistance certificate issue for the sum of \$7000 for past pain and suffering and mental distress and for the period of time which the Applicant suffered symptoms of Post Traumatic Stress Disorder.

42.2 The First Respondent pay the Applicants reasonable costs and disbursements to be taxed in default of agreement.

Dated this 22<sup>nd</sup> day of April 2004

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Tanya Fong Lim  
JUDICIAL REGISTRAR