CITATION: *John Anthony Weir v Solicitor for the Northern Territory & Wilfred Brown (Deceased)* [2004] NTMC 045

PARTIES:	JOHN ANTHONY WEIR v SOLICITOR FOR THE NORTHERN TERRITORY AND WILFRED BROWN (DECEASED)
TITLE OF COURT:	Crimes (Victim's Assistance)
JURISDICTION:	Local Court – Alice Springs
FILE NO(s):	20016214
DELIVERED ON:	21 MAY 2004
DELIVERED AT:	Alice Springs
HEARING DATE(s):	12 February 2004
JUDGMENT OF:	M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Applicant:	R Goldflam
First Respondent:	M Heitmann

Solicitors:

Applicant:	NTLAC
First Respondent:	M Heitman

Judgment category classification:
Judgment ID number: [2004] NTMC 045
Number of paragraphs: 33

IN THE CRIMES (VICTIM'S ASSISTANCE) COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20016213

BETWEEN:

JOHN ANTHONY WEIR
Applicant

AND:

SOLICITOR FOR THE NORTHERN TERRITORY
First Respondent

And

WILFRED BROWN (Deceased)
Second Respondent

REASONS FOR JUDGMENT

(Delivered 21 May 2004)

Ms M LITTLE SM:

1. The applicant John Weir has made an application pursuant to s.5 (1) of the Crimes (Victims Assistance) Act ("the Act") that an assistance certificate be issued. The application relates to an offence on the 7th of October 1999 at approximately 7.30pm. An amended application is now before the Court. The original application was filed within time. Leave was granted for Dr Jacob Ollapallil to be cross-examined by the applicant's solicitor, pursuant to s.17 (3) of the Act.

2. On the 12th of February 2004 a hearing proceeded by way of documentary and oral evidence from Dr Jacob Ollapallil and b affidavits and documents were tendered by consent. The exhibits in the matter are as follows:

R1 - Affidavit of Mark Heitmann (with annexures) dated the 12th of December 2003

A2 - Medical report from Dr Jacob Ollapallil dated the 2nd of

September 2002

A3 - Emergency department medical records from the Alice Springs Hospital dated the 8th of October 1999

A4 - St Johns Ambulance notes from the 8th of October 1999

A5 - Affidavit of the applicant John Anthony Weir dated the 21st of November 2002 with annexures (annexures being Centrelink, treating doctors' report, report from Dr Butcher dated the 27th of October 2000, death certificate of Wilfred Brown)

A6 - Northern Territory Police letter to the applicant's solicitor dated the 18th of October 2000

A7 - Report from Dr Michael Pearson dated the 3rd of October 2001

R2 - Northern Territory Case Management Report of the applicant reporting the incident on the 12th of January 2000 (this exhibit number is somewhat irregularly numbered)

Submissions were made and I reserved my decision following the hearing.

3. There is no dispute between the parties that on or about the 7th of October 1999 the applicant was injured as a result of the commission of an offence and that Wilfred Brown, now deceased, was the offender and second respondent. The circumstances of the offence as deposed by the applicant were as follows: The applicant was at his defacto's home at house 27, Charles Creek Camp soon after dark on the 7th of October 1999. The second respondent was about to assault the second respondent's auntie, Susan White. Susan White ran behind the applicant. The second respondent picked up a metal office swivel chair, raised it above his shoulders and threw it towards the direction of the applicant, with Susan White standing behind the applicant. The applicant put his left arm in front of his face to fend off the chair, and was hit on the left forearm with what he believes was the metal base of the chair. The applicant had been consuming alcohol around the time of the offence. He states he was not really drunk. He states that Susan White and the second respondent were full drunk. These matters are set out in exhibit A5. When I look at the other documentary evidence in the matter, there are some factual issues which are not in accordance with this affidavit. I will raise these matters below. Contribution by the applicant at the time of the incident is not

raised. His conduct after the offence is said to reduce any award I make, based upon his failure to stay at the hospital on the 8th of October 1999.

4. The applicant immediately felt a sharp pain to his left arm. His arm did not bleed but started to swell up. At that stage he did not think he was seriously injured and did not seek immediate medical attention. The next day when he woke up his arm was hurting a great deal and it was swollen. In exhibit A5 the applicant states that he walked to the hospital. Before the Court is a St John Ambulance report which demonstrates that he was taken to the hospital by ambulance (exhibit A4). The emergency department's medical records from the Alice Springs Hospital are exhibit A3. Those notes indicate that at 9.30am on the 8th of October 1999 the applicant arrived at the emergency department. He was seen at 11am, at 11.17am he was given panadeine forte and he left the hospital at 11.25am. After some initial observations were made, the notes set out that he was to be reviewed in the emergency department. The notes then say "patient disappeared before being seen by (?) RG" (the question mark is mine, I take RG to mean registrar).

5. In paragraph 12 of exhibit A5 the applicant says that he was waiting in accident and emergency for a long time and eventually left without treatment because he was sick of waiting. He then went back to the Alice Springs Hospital on the 10th of October 1999 because the arm had got much worse. He was admitted to hospital and operated upon. He was transferred to the Royal Adelaide Hospital on the 23rd of October 1999 and had a total of five surgical procedures.

6. There is no dispute that the applicant is now suffering a severe injury to his left arm as a result of evolving compartment syndrome. The injury to his arm is so serious that it more than justifies an award of the maximum under the Crimes (Victims Assistance) Act, unless by virtue of s.10 that sum is reduced (and even then he may still get the maximum) or unless he is barred from any award by s.12 (b) of the Act. I have nominated these sections as they are the two matters in issue before the Court.

7. I will first deal with the s.12 (b) issue. That subsection reads:

> 12. The Court <u>shall not</u> 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.

(My emphasis)

8. The assault was reported to the police on the 10th of January 2000 at 8am. The promis number was 207263. The additional police remarks are: "no charges were laid against the offender in this matter (Woodford Brown). We were advised that the offender is now deceased. There are no statements on file" (exhibit A6). I note here that the word Woodford appears to have been incorrect and the second respondent is actually named Wilfred Brown. That sounds like a misunderstanding of the name that the applicant would have given to the police and I take no issue with the fact that the name is slightly different on the police report. The date of the offence is said to be the 8th of October 1999. Once again this information is incorrect and should read the 7th of October 1999. Clearly the date of the report is not an inordinate time after the date of the offence. However the question to be decided is whether the offence was reported within a "reasonable time" (s.12 (b) of the Act). What is a reasonable time will depend upon all of the circumstances of the case.

9. Exhibit R2 is the Northern Territory Police case management report with respect to the report by the applicant. In that report the applicant has said that he was assaulted on the 8th of October 1999 with an iron bar. I note that an iron bar is said to be the weapon, as opposed to a chair. I note also in A4 it is reported to the St Johns worker that he was hit with a stick or chair. He reported to the police that he was hit on the left arm and that the incident happened at Hoppy's camp. This differs from exhibit A5 where at paragraphs 2 and 4 the applicant says he was house 27 Charles Creek Camp when the incident occurred. He reported to the police that the offender is now deceased and that he was reporting the incident for claim purposes. A medical release form was signed by the applicant. The police have indicated no action is to be taken, as the offender was deceased.

10. Exhibit A5 is the death certificate relating to Wilfred Brown the second respondent. The second respondent died on the 12th of November 1999 in the Royal Adelaide Hospital. He died just over one month after the assault upon the applicant.

11. The applicant has set out in paragraphs 18 and 19 of his affidavit, exhibit A5, as to why he had not reported the matter prior to January 2000. He deposes that he thought Susan White had told the police about the assault because he said he remembered "her telling me she had done so". He also said that he did not want to get Wilfred into trouble. The applicant stated that he knew if he reported the matter to the police he might get in trouble from Wilfred's family and he did not want this to happen. He said he did not want to get assaulted again. I do not know who he believes may have assaulted him (paragraph 18 of exhibit A5). In paragraph 19 he said that he was in hospital from three days after the assault until after Wilfred passed away and after that time it did not occur to him to report the matter to police as Wilfred had died. An inference can be drawn from the material before me that had the second respondent not died, the applicant may not have gone to the police station to report the offence at all, irrespective of the serious nature of the injury.

12. The leading case with respect to section 12(b) of the Crimes (Victims Assistance) Act is the case of *Woodruffe v The Northern Territory of Australia* 10 NTLR 52. At paragraph 20 the Court stated;

> " On the plain reading of the subsection, it provides for a period in relation to which a failure to report the offence is to be considered beginning with the date of the commission of the offence and ending at a time which is a reasonable time thereafter (which we will call "the relevant period"). The subsection has nothing to say about whether or not the offence is reported at some later time. Consequently, the enquiry as to whether circumstances existed which prevented the reporting of the offence, is limited to the relevant period and it is irrelevant to that enquiry that there was no report at all and that circumstances existed or did not exist, which prevented the reporting of the offence after the relevant period. "

13. In the circumstances of this case I find that the relevant period is from the date of the offence to the date of the death of the offender, that is from the 7th of October 1999 to the 12th of November 1999. The reporting of the offence did not occur in the relevant period.

14. The applicant bears the onus of proof, on the balance of probabilities, to satisfy the Court that there are circumstances in existence which prevented the reporting of the commission of the offence in the relevant period. (Sections 12(b) and 17 of the Crimes (Victims Assistance) Act).

15. Section 12 (b) of the Crimes (Victims Assistance) Act acts as a bar to the issuing of an assistance certificate, unless the court is satisfied that circumstances existed which prevented the reporting of the commission of the offence. Offences that are not reported cannot proceed to investigation and/or prosecution witness statements can not be prepared. There may be prejudice to the respondent if witness statements are not taken or taken very late. The person alleged to have committed the offence can be questioned and, if warranted, charged with the offence. Further investigation may result as a consequence of the interview with the suspect. The results of any investigation can be relied upon in any claim under the Crimes (Victim's Assistance) Act.

16. In *Woodruffe* (supra) the Supreme Court stated:

> " The purpose or object underlying the Act is to provide compensation to victims of crime. The preamble to the Act is that it is "An Act to provide assistance to certain persons injured or who suffer grief as a result of criminal acts". The Act is remedial and therefore should be construed beneficially, although excepting provisions in a remedial Act do not necessarily have to be given a liberal interpretation: *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521 at 524. Nevertheless, a provision such as s 12(b) which permits a person to be excused from his failure to give notice within a reasonable time, is a beneficial provision and should be construed accordingly: *Khoury v Government Insurance Office (NSW* (1984) 54 ALR 639 at 649-650 per Mason, Brennan, Deane and Dawson JJ. The words in the proviso to s

12(b) must therefore be given a construction so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open. This approach is not confined to cases of ambiguity: *Pearce and Geddes, Statutory Interpretation in Australia,* 4th ed, par [9.2]. " (Paragraph 28 10 NTLR 52)

17. There are numerous occasions when the applicant's memory of the incident has proven incorrect: for example he says he walked to the hospital on the 8th of October 1999, but there is clear evidence he was taken by ambulance, he says the date of the incident was the 8th of October 1999 not the 7th of October 1999; on the 8th of October 1999 he says to the St John's worker he was hit with a stick or a chair, on the 12th of January 2000 he reports to the police he was hit with an iron bar, yet in his affidavit of the 21st of November 2002 (now A5) he says it was a metal office swivel chair and finally says he that he was at house 27 Charles Creek Camp when he was assaulted (A5) and when reporting the matters to the police he says it occurred at Hoppy's Camp. None of these matters, in themselves, are fatal to his claim. However, they do go to his ability as an historian and I find that he is not a reliable historian.

18. This finding is relevant when considering the s.12 (b) issue. There is no independent evidence which corroborates the applicant's version on any of the matters he raises with respect to s.12 (b) of the Act and in particular with respect to Ms White, fears he had for his own safety or any other reasons he has put forward to demonstrate that circumstances existed which prevented the reporting of the commission of the offence, save for the evidence that he was in hospital for part of the time in the relevant period. Even that evidence is inconclusive as to the dates he was in hospital and as to his condition and in particular as to whether there was anything preventing him from contacting the police.

19. The applicant states: "I did not report the assault to the police at the time. I thought that Susan White had told police about the assault because I remember her telling me she had done so. I did not want to get Wilfred into trouble. I knew that if I reported the matter to police I might get into trouble from Wilfred's family and I did not want this to happen. I did not want to get assaulted again." (Paragraph 18, Exhibit A5).

20. This evidence makes it clear that during the relevant period the applicant was considering the question of whether he would personally report the matter to the police. In particular he says that he did not want to get Wilfred into trouble and that he knew if he reported the matter to police he might get in trouble from Wilfred's family. He was considering the question of reporting the matter to the police. In the relevant period he knew he had a serious injury as a consequence of the assault. He was born on the 10th of October 1967 making him 32 years of age in the relevant period. On the 8th of October 1999 he went by ambulance to the hospital. I have no explanation as to why the police were not also contacted, given that the applicant was then aware the injury was such as to require an ambulance to be called.

21. He says that he believed Susan White, the auntie of the offender and the person who had ran behind him prior to the incident, had reported the incident. I accept that another person can report an offence - that it does not have to be the victim of the offence (and can not be in same cases). In this case, there is no evidence that Ms White did report the matter to the police and I find that she did not report the offence.

22. The applicant says that he remembered Susan White telling him that she had reported the assault to the police. I do not have any evidence as to when he was told this by Susan White, and whether it was in the relevant period. I do not have any evidence as to what Susan White was said to have reported to the police. For example, I do not know whether Susan White was said to have reported the incident as it affected her or the incident which involved the applicant, or the whole incident. I do not have any evidence from Susan White that she had told the applicant that she had reported the matter to the police or that she had had a conversation with him which may have led him to believe that she had reported the matter to the police. The evidence of the applicant was that Susan White was "full drunk" at the time of the incident (paragraph 6, exhibit A5). I have no evidence as to any efforts made by the applicant, or his representatives, to locate Ms White in order that she could provide evidence in this case.

23. The evidence is unsatisfactory and arguably inconsistent to the extent that the applicant states he believed the offence had been reported and yet he says there are reasons why he did not go to the police to report the matter.

24. As stated earlier the onus of proof lies with the applicant. The applicant is a poor historian. There is no independent evidence on these issues. If an applicant raises such matters it is incumbent upon them to place credible and reliable evidence before the Court. I am not satisfied that he has proven on the balance of probabilities that Susan White had told him that she had reported the matter to the police or that he had fears for his safety if he reported the matter in the relevant period.

25. The incident happened on the 7th of October 1999. He was able to report the matter on the evening of the 7th of October 1999. The applicant went to the Accident and Emergency section of the Alice Springs Hospital on the morning of the 8th of October 1999 and was there for approximately two hours on that day. He then went back to the hospital on the 10th of October 1999. During that time he was able to attend at the police station and report the matter. It is open to me to find that from the time of the incident until his admission into hospital on the 10th of October 1999 he was aware that his arm injury was causing him difficulties. I have not been made aware of any circumstances preventing him reporting the matter to the police at that time.

26. Exhibit A6 is a report from Dr Charles Butcher, dated the 27th of October 2000. He has prepared the report from case notes and entries at the Alice Springs Hospital. He noted that during the attendance on the 8th of October 1999 the applicant was recorded as being intoxicated. When the applicant returned on the 10th of October 1999 he was again noted to be intoxicated. While I must interpret this legislation beneficially, I do not accept that a person who is intoxicated during the relevant period should be treated any differently than a person who is sober. I find there was no circumstance which prevented him reporting the offence between the time of the assault and when he was admitted into hospital on the 10th of October 1999.

27. Following the operation on or around the 10th of October 1999 Dr Butcher says the applicant "was in hospital for some days." The applicant says he was in hospital from 3 days after the assault until after Wilfred Brown had passed away (paragraph 19 of A5). I am not able to ascertain from the information I have before me as to exactly how long he was in hospital. I note that from Dr Butcher's report he was readmitted to the Alice Springs Hospital on the 25th of November 1999. The applicant's affidavit, A5, sets out that on the 23rd of October 1999 he was transferred to the Royal Adelaide Hospital. The evidence before me does not fully outline the admission dates at the Alice Springs Hospital and the Royal Adelaide Hospital. I am not able to ascertain what days the applicant was in hospital in the relevant period and in particular at what times he was suffering the effects of the various procedures which were undertaken with respect to his arm to the extent that he could not arrange for the police to be contacted. A person in hospital is able to make arrangements for police to be contacted, for example through the social workers or nurses. There is no evidence before the Court that he made contact with the police, or attempted to make contact with the police, at anytime in the relevant period. Further there is no evidence before me that because of his hospitalisation he was so incapacitated that he was prevented from contacting the police.

28. In the circumstances I am not satisfied that the applicant has proven, on the balance of probabilities, that circumstances existed which prevented the reporting of the commission of the offence. One of the main reasons the applicant did not report the matter was so that he did not get the second respondent into trouble in the relevant period (that is, while he was still alive). While a person may feel a sense of compassion for another person and not report an offence to the police, and s.12 (b) of the Act should be construed beneficially, s.12 (b) requirements can not be excused for such reasons. It is not an appropriate exercise of the Court discretion to take into account the applicant's concerns as to whether the second respondent "got into trouble".

29. In all the circumstances of this case I decline to issue an assistance certificate in this matter, based upon s.12 (b) of the Crimes (Victim's Assistance) Act.

30. Counsel for the first respondent argued s.10 of the Crimes (Victims Assistance) Act should come into play to reduce any amount of assistance awarded, should I issue an assistance certificate in the matter. I have considered the submissions made and, had I issued an assistance certificate, I would not have reduced the amount of assistance specified in the certificate having regard to the conduct of the victim. The matter before the court was whether the applicant's failure to remain at the hospital on the morning of the 8th of October 1999 resulted in the condition becoming much worse and leading to the significant injury he now suffers. If his failure to remain for treatment did lead to the injury becoming much worse, the issue was whether s.10 of the Act could apply. I accept that s.10 of the Act can apply in these circumstances. Section 10 of the Act is not limited to conduct at the time of the offence although it is generally then that s.10 is raised.

31. I do not doubt the evidence of Dr Jacob Ollapallil that, had the applicant remained at the hospital and received treatment on the 8th of October 1999, it is almost certain that his condition would have been able to be treated far more successfully and that he would not be suffering in the way he is now. The doctor could not rule out the possibility that the compartment syndrome was not irreversible at or around 11:30 am on the 8th of October 1999 when the applicant left the hospital. Nevertheless I am of the view that there is no evidence whatsoever to demonstrate that the applicant was warned that he must remain at the hospital or he would suffer a significant deterioration in his injury. It is clear that a trained person such as Dr Ollapallil can see from the notes, which set out the history and symptoms, including that there was tingling and numbness over the left hand, that there was a significant problem and that compartment syndrome was the most likely diagnosis. Nevertheless there is no evidence to suggest that a lay person, and in particular that this applicant, would have any idea that such an injury would lead to such serious consequences. The affidavit material of the applicant makes it clear that had he been warned he would most certainly have stayed at the hospital. I am of the view that knowledge on the part of the applicant must be present for s.10 of the Act to come into play in these circumstances. As stated earlier, there is no suggestion that he received any such warning and in those circumstances I

decline to rule that s.10 would have had the effect of reducing any awards ordered in this matter, had I issued an assistance certificate.

32. I decline to issue an assistance certificate in this case.

33. The order I make is that the application is dismissed. I will hear the parties on any consequential applications.

Dated this 21st day of May 2004.

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M Little
STIPENDIARY MAGISTRATE