

CITATION: *Pache v Northern Territory of Australia* [2004] NTMC 063

PARTIES: Martin Ian Pache
v
Northern Territory of Australia

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance)

FILE NO(s): 20202973

DELIVERED ON: 12th August 2004

DELIVERED AT: Darwin

HEARING DATE(s): 3rd August 2004

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Offence – Contributory behaviour – commission of a crime – sections 10 & 12(f)
Crimes (Victims Assistance) Act

May v Northern Territory of Australia [2003] NTMC 021

Lanyon v Northern Territory of Australia [2002] NTSC 6

Briginshaw v Briginshaw [1938] 60 CLR 336

REPRESENTATION:

Counsel:

Applicant: Mr Alderman
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: [2004] NTMC 063
Number of paragraphs: 37

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

No. 20202973

BETWEEN:

Martin Pache
Applicant

AND:

Northern Territory of Australia
1st Respondent

Craig Hislop
2nd Respondent

REASONS FOR JUDGMENT

(Delivered 12th August 2004)

Judicial Registrar Fong Lim:

1. The Applicant has applied for an Assistance Certificate to issue in his favour arising out of an assault allegedly perpetrated upon him by the second respondent. The Second Respondent did not attend the hearing and noting that the criminal prosecution had been adjourned with a warrant issuing for the Second Respondent's arrest for failure to appear, the hearing proceeded in the Second Respondent's absence. From the outset the Territory accepted that should the court decide to issue an Assistance Certificate in the Applicant's favour the maximum quantum was appropriate not taking into account any contribution ordered.
2. The Applicant was involved in a consensual fight with the second respondent. The fight occurred after both parties had been drinking alcohol for a period of time and both parties were intoxicated. The fight was witnessed in various stages by various witnesses and out of that fight the

Applicant was hit in the back of the head with a star picket which rendered him unconscious and has necessitated him having operations on his head and steel plates inserted. The circumstances of the fight are generally agreed and both the Applicant and the First Respondent relied statements given to the police by witnesses and the transcript of the committal hearing to establish the facts.

3. The Applicant argued there was clearly an offence out of which the Applicant was injured and therefore a certificate should issue however he accepts that his behaviour may have contributed to the situation and suggested that if the court was minded to discount the amount of the certificate it should not be more than by 50%.
4. The First Respondent argued that there were only three possible alternatives the court should consider:
 - (a) That there was no offence because the Second Respondent was acting in self defence to an aggravated assault
 - (b) That there was an offence but as the Applicant was the aggressor his contributory behaviour should lead the court to discount the certificate by 100%
 - (c) That pursuant to section 12(f) the Applicant was injured during the commissioning of a crime and therefore no certificate should issue at all.
5. To consider whether or not a certificate should issue the Court must consider whether the Applicant has established for the Court on the balance of probabilities that an offence has occurred.
6. The evidence relied upon to establish the Applicant's case was as follows:
 - (a) Affidavit of Applicant 31st July 2003
 - (b) Affidavit of Nicole Dunn 27th November 2003 annexing medical records
 - (c) Affidavit of Cathy Spurr 6th May 2004 annexing documentation from the Director of Public Prosecutions file including the transcript of the

committal.

(d) Various medical reports

7. The criminal prosecution has been through a committal proceedings which resulted in the Second Respondent being committed for hearing. A warrant now exists for the arrest of the Second Respondent to failure to appear. The Court was provided with a copy of that transcript.
8. Statements were taken from several witnesses as to the circumstances that led up to the Applicant being hit by the Second Respondent. All witnesses agree that both the Applicant and the Second Respondent had been drinking together when an argument ensued between them about a woman.
9. The Second Respondent's record of interview at page 5 of 14 set out that there was an argument about a woman and that is confirmed by Mr Trevy's evidence at the committal hearing at page 14 when he stated that there was an argument "over a girl". There were some offensive comments made by the Applicant and the Second Respondent responded with yelling and screaming.
10. The main witnesses to the actual fight between the Applicant and the Second Respondent are Mr Trevy, and Mr Garling . The Applicant has no independent memory of the actual fight.
11. Mr Trevy was the flatmate of the Second Respondent he had been drinking with the Second Respondent all afternoon celebrating the Second Respondent's birthday. When they came home from the Buffs Club they were joined by the Applicant and continued drinking. In his statement to the police the day after the incident Mr Trevy states that they went back to his flat and

“ continued drinking at my place we got pretty drunk I can remember Marty leaving my flat, but cannot remember the time that he left, Craig and I were still drinking.

Craig want an argument with anyone that was around....he went downstairs being very aggressive he was yelling and screaming”

12. Trevy and the Second Respondent then went outside where Trevy tried to calm the Second Respondent down outside the flat and after having a scuffle with him he went back inside until he heard the Second Respondent. Trevy went back outside and saw:

“..two blokes with sticks in their hands about fifty metres trying to hit each other I could not recognise them because I was drunk, when I got closer I saw a person go down when I got to the person I saw it was Marty and saw blood on the ground.”

13. Garling was a resident in the unit complex who observed the incident from the footpath outside his unit. Garling did not know who the Second Respondent was but recognised him from a day before when the Second Respondent assisted him with a friend of his who was injured. Garling provided the police with a statement the day after the incident and gave evidence at the committal. Garling was consistent in his evidence and should be preferred as a witness over Trevy and the Second Respondent as he had not be drinking alcohol on that date.

14. While in his unit Garling heard arguing and went outside to investigate. Once outside Garling saw the Second Respondent standing in the carpark banging a star picket on the ground yelling out to someone as follows:

“I am only 5 foot 5 but you picked the wrong bloke”

15. Garling describes how he saw the Second Respondent yell out at people in unit 38 and then throw the star picket up onto the balcony of one unit and go to retrieve it after smashing some pot plants. While this was going on Garling says he had conversation with “Jim” who had told him that the person with the star picket was having a birthday and that he must have had some drugs because they made him aggressive.

16. Jim then left Garling standing and watching. Garling then observed Jim trying to take the star picket from the Second Respondent who threatened Jim by saying “if you try to take it off me I’ll use it on you”.
17. The next significant observation Garling made was as follows:

“Then another bloke who I have never seen before came running from the direction of Unit 45. He was carrying some kind of long stick. It was a piece of tree branch about a meter long.....He ran over to where Jim and the bloke with the picket were standing in front of unit 7. The older bloke with the stick ran right up to them. Then both him and the bloke with the start picket started swinging at each other with their weapons. ”
18. Garling stated that neither man was managing to land a blow on the other until:

“Then the bloke with the wooden stick spun around and the bloke with the star picket landed a two handed hit on the back of his head with the star picket. The bloke with the wooden stick dropped it and then dropped to the ground and did not get up again.”(see paragraph 14 of Garling’s statutory declaration 29th November 2001)
19. Other witnesses interviewed attested to shouting and fighting, the Second Respondent going on a rampage with the star picket hitting vehicles, smashing pot plants and eventually fighting with the Applicant.
20. There is no doubt that the Applicant was assaulted by the Second Respondent with a steel rod of some sort whether it be a star picket or a steel reinforcing rod and that arising out of that assault the Applicant suffered a severe head injury.
21. The Applicant suggested that offence that had been committed was that of assault pursuant to section 188 of the Criminal Code. It is clear from the evidence that the Applicant certainly consented to the assault that is it was a consensual fight therefore it is my view that the Second Respondent would not have been found guilty of common assault. Nevertheless consent to fight cannot excuse an assault causing grievous harm (section 26(3) of the

Criminal code) nor can it excuse a dangerous act causing grievous harm (section 154 of the Criminal Code).

22. The First Respondent did argue that the Second Respondent was justified in his actions because he was acting in self defense, defensive conduct is a justification for an act constituting an offence (sections 23, and 29 of the Criminal Code). The Second Respondent in his record of interview claims he was only defending himself:

“Chapman : and when you had the star picket, what’d ya do with it?
Hislop: I was just swingin’ it. Swingin’ it around to keep people out – keep him out of my way because he was attacking me.” (see page 6 of 14)

”Chapman: When you had-ah- when you swung the star picket at him what’d ya intend doin’ with it?

Hislop: I didn’t intend hittin’ him in the head with it. It was more to protect myself to keep him away from me ‘cos he’s a lot bigger than what I am.....

.....

Chapman: and how much power behind it?

Hislop: I was just swingin it around so he’d stay out of the way, wouldn’t come any closer. Actually I do recall him having somethin’ in his hand actually - ah- I remember he grabbed something but I don’t know what it was. ” (page 10 of 14)

23. Later in that interview the Second Respondent was asked if he could have escaped from the Applicant by going back to the unit and he conceded that he could have but didn’t because “he’d fucken belted me”. Earlier in the interview (at page 9) the second respondent suggests that “He (referring to the applicant) came out front and started belting me in the head”.
24. The record of interview with the Second Respondent suggests that he was not the aggressor but he was acting in self defence and that he was scared of what the Applicant might do to him. However all the independent evidence suggests that even if the Applicant may have run at the Second Respondent with a stick the Second Respondent’s state of mind wasn’t one of fear but one of anger and bravado. The Second Respondent had gone on a rampage

after having far too much alcohol to drink. He had had a verbal argument with the Applicant and he was in the middle of that rampage and was yelling out to someone that they had picked on the wrong bloke. The Second Respondent had already threatened his flat mate about using the star picket on him should he continue to try and take it away from him. The Second Respondent was not sure that the Applicant had a stick in the fight.

25. The independent evidence of Mr Garling was that the Applicant had the stick from the beginning and did not connect with any part of the Second Respondent's body or head during the fight. The Second Respondent was clearly affected by alcohol and his memory of events would not be as reliable as Mr Garling's. On the balance of probabilities it is my view that the Second Respondent was not acting in self defence he as he was a protagonist in a consensual fight.
26. I find that there was an offence committed by the Second Respondent and that is assault causing grievous harm. There was also enough evidence to convince me on the balance of probabilities that the Second Respondent had committed a dangerous act contrary to section 154 of the Criminal Code.
27. **Contributory behaviour – section 10**
The court is bound to take account of any contributory behaviour of the victim when assessing the amount of the assistance certificate. The Applicant accepts that there was some contributory behaviour on his behalf and suggests that the appropriate discount is would be 50%. Counsel for the Applicant referred me to a previous decision of mine in James May v Northern Territory of Australia & Anabtawi [2003] NTMC 021 in which I found that the Applicant had participated in a consensual fight and was at one stage more on the offensive than the defensive. The Applicant in May's case at no stage had any knowledge that the Second Respondent had a knife and was stabbed in the fight. My finding of contribution in May's case was 50%.

28. Counsel for the applicant also referred me to the Supreme Court decision of Lanyon v Northern Territory of Australia and Staker [2002]NTSC 6 the decision of Justice Bailey upholding the decision of Wallace SM to discount the Applicant's Assistance Certificate by 100%. The situation in Lanyon's case was that the Applicant was involved in a deal of drugs with the offender who became agitated and stabbed the Applicant. The Applicant then pulled out a Bowie knife and cut the offender's arm, a struggle ensued and the Applicant ended up being stabbed in the chest. Wallace SM decided that the Applicant should have known that the offender was in the throws of withdrawal and should have realised that to further agitate that person, who has a knife, with your own knife was bound to end up with someone being injured. His Worship basically stated that the Applicant was the maker of his own destiny and his actions substantially caused the offender to injure him and therefore his Assistance certificate should be discounted by 100%.
29. It should be noted that Bailey J, in the appeal of Mr Wallace's decision in Lanyon's case , noted that the Act did not contemplate total ban of the issuing of a certificate if the Applicant was injured while doing something unlawful because that exclusion would be included in section 12. However he did hold that it is open to the court to find an applicant 100% contributory responsible for his own injury. Of course this case was decided before the inclusion of section 12(f) of the Act.
30. It is my view that each case should be decided on its own facts and that this matter is closer to the situation in Lanyon's case than that in May's case. In this matter the Applicant was aware of the Second Respondent's possession of a weapon and should have been aware that given his state of agitation the Second Respondent was likely to cause harm to the Applicant should he approach him, let alone with a large stick. The Applicant's action of running at the Second Respondent with a stick, given the circumstances, when he could have merely stayed away from the Second Respondent, makes him substantially responsible for his own fate. It is my view that should a

certificate issue in favour of the Applicant then that certificate should be discounted by 90%.

31. **Section 12(f)** – the Applicant’s Counsel was asked for submissions on the effect of section 12(f) on his client’s claim. Section 12(f) of course precludes the issue of a certificate if the victim is injured during the commissioning of a crime. It was argued that even if the Applicant was commissioning a crime, that is assaulting the Second Respondent with a deadly weapon without his consent then that crime had ceased at the time the Applicant was injured. The evidence referred to in support of this submission was Mr Garling’s evidence at the committal hearing when he said at page 72 of the transcript of the committal hearing:

“ and that’s when the bloke turned his back and he was hit in the back of the head with the star picket.”

Then at page 73

“You said something about he turned away? Yeah, he turned his back ..

Yes... and then like he didn’t- the other bloke must have thought, you know, it was over and then he got hit in the back of the head, you know he just turned – turned his back of the head, turned around and he got hit in the back of the head..”

then at page 78

”Did it stop or did it continue? ... No No they just – they stopped, you know, and then he turned his back and that’s when he got hit from behind.”

32. The Applicant argued that the evidence indicates that the fight had stopped as far as the Applicant was concerned when he was hit. Therefore if there were a crime being committed by the Applicant it had ceased at the time of the injury.
33. The Respondent pointed out that there was further evidence of Mr Garling which could suggest that he was intending to continue with the fight when

he was hit. At page 79 of the transcript of the committal hearing the evidence was :

“How was this man positioned when that happened; was he standing up straight or was he bending over or doing anything?... No, he was standing up straight – straight and he went to turn and that’s when he got hit.

Did you see where he was turning towards - Turning around to the bloke.”

34. The Respondent suggested that this evidence and the fact that there was only up to a second from when the fight had allegedly stopped to the hit to the back of the Applicant’s head supports the view that the Applicant was still in the act of assaulting the Second Respondent.
35. To deny the Applicant a Certificate of Assistance the Court must be convinced to its reasonable satisfaction that the Applicant was injured during his commissioning of a crime (see Briginshaw v Briginshaw (1938) 60 CLR 336). The difficulty with the Applicant’s reliance on Mr Garling’s evidence is that they are also relying on his interpretation of what the actions of the parties to the fight meant. Mr Garling concluded in his evidence that “ the other bloke must have thought it was over”. It would be a fundamental mistake to rely on that opinion and any conclusion relying on that opinion would be flawed and open to challenge. It is my view that the evidence is such that it can support either version of events and therefore I cannot be reasonably satisfied either way. Accordingly section 12(f) cannot be applied to this Applicant’s claim to deny him the issue of an Assistance certificate.
36. **Summary** - the Applicant is a victim within the meaning of the Crimes (Victims Assistance) Act and an Assistance Certificate should be granted in his favour. The initial quantum of the certificate was agreed at the maximum level of \$25000.00. The Applicant’s behaviour was such that he contributed substantially to the circumstances leading up to his injury, that is he

attacked the Second Respondent with a stick when he could have just avoided confronting him. The First Respondent's application to apply Section 12(f) to the Applicant's claim fails because the evidence does not prove to the court to its reasonable satisfaction that the Applicant was commissioning a crime when he was injured.

37. **My orders are:**

37.1 An Assistance Certificate issue in the sum of \$2500.00.

37.2 Costs reserved

Dated this 11th day of August 2004

Tanya Fong Lim
JUDICIAL REGISTRAR