

CITATION: *Duan Cubillo v Northern Territory of Australia & Camm* [2004] NTMC 064

PARTIES: DUAN RICARDO CUBILLO

v

NORTHERN TERRITORY OF AUSTRALIA
&
PETER CAMM

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victim's Assistance)

FILE NO(s): 20216327

DELIVERED ON: 16 August 2004

DELIVERED AT: Darwin

HEARING DATE(s): 20 July 2004

JUDGMENT OF: B Monaghan

CATCHWORDS:

Whether the injury suffered by the applicant was as a result of an offence.
Application of Briginshaw test.

Crimes(Victims Assistance) Act ss4, 5, 12(f)
Criminal Code ss187,188,154,200.

Sambono v NTA & Hallett [2003] NTMC 035
Briginshaw v Briginshaw (1938)60 CLR 233

REPRESENTATION:

Counsel:

Applicant: Mr Currie
Respondent: Ms Truman

Solicitors:

Applicant: Morgan Buckley
Respondent: Halfpennys

Judgment category classification:

Judgment ID number: [2004] NTMC 064

Number of paragraphs: 19

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

No. 20216327

BETWEEN:

DUAN RICARDO CUBILLO
Applicant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
1ST Respondent
&
PETER CAMM
2nd Respondent

REASONS FOR DECISION

(Delivered 16 August 2004)

Ms MONAGHAN JR:

1. The matter before me is an application for Crimes (Victim's Assistance) for injuries suffered by the child Duan Cubillo following incidents he witnessed on 25 January 2002. The particular incidents that are most significant for this application involve claims in the applicant's evidence that the second respondent's manner of driving caused injury to the child Duan.
2. At the time of the incident, Duan was seven years of age. The affidavit evidence confirms that the child suffers from an autism spectrum disorder and that his behaviour deteriorated significantly following the events of 25 January 2002. I consider that there is sufficient uncontested evidence contained in the affidavits of Donna Cubillo sworn 24 November 2003, Carol Rykiert sworn 28 November 2003, Michael Millar sworn 9 December 2003 and Pamela Young sworn 24 November 2003 to support a finding that

a psychological injury was suffered by Duan as a result of the incidents and exchanges he witnessed on 25 January 2002.

3. The main issue before me however is whether on the balance of probabilities an offence was committed by the second respondent Peter Camm on 25 January which resulted in that injury to Duan.

The *Crimes (Victims Assistance) Act* (the Act) states:

5. Application for assistance certificate

(1) A victim or, where the victim is an infant or the Court is satisfied the victim, because of injury, disease or physical or mental infirmity, is not capable of managing his or her affairs in relation to the application, a person who, in the opinion of the Court, is a suitable person to represent the interests of a victim, may, within 12 months after the date of the offence, apply to a Court for an assistance certificate in respect of the injury suffered by the victim as a result of that offence.

4. It is clear from the Act that in order to be compensable, the injury suffered by the applicant must result from an offence. The definitions of “offence” and “victim” are found in s4(1) of the Act as follows:

"offence" means an offence, whether indictable or not, committed by one or more persons which results in injury to another person;

"victim" means a person who is injured or dies as the result of the commission of an offence by another person.

Further, s 12(f) of the Act provides that an assistance certificate shall not be issued :

(e) in respect of an injury or death caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code

5. The events that occurred on 25 January 2002 are unclear as there is conflicting evidence presented by the parties on significant issues.

6. Mr Currie on behalf of the applicant submits that Duan Cubillo is a victim as defined by the *Crimes Victim's Assistance Act* in that he was injured as a result of the commission of an offence by the second respondent. Mr Currie submits that the offence in question related to the second respondent's actions in driving his vehicle directly at the vehicle in which the applicant was travelling in a threatening and dangerous manner. It is his submission that these actions would attract a conviction under a number of provisions of the Criminal Code. Mr Currie submits that Mr Camm's actions falls within the definition of assault in s 187 of the Criminal Code which states as follows:

187. Definition

In this Code "assault" means –

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representations as to the nature of the act or by personation; or

(b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words,

other than the application of force –

(c) when rescuing or resuscitating a person or when giving any medical treatment or first aid reasonably needed by the person to whom it is given or when restraining a person who needs to be restrained for his own protection or benefit or when attempting to do any such act;

(d) in the course of a sporting activity where the force used is not in contravention of the rules of the game; or

(e) that is used for and is reasonably needed for the common intercourse of life.

Mr Currie further looks to s 188 of the Criminal Code claiming a common assault occurred when the second respondent drove his motor vehicle in the manner alleged. Alternatively, Mr Currie relies on s 154 of the Criminal Code alleging a dangerous act occurred. S 154 of the Code reads:

154. Dangerous acts or omissions

(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years. (See back note 2)

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section.

Finally Mr Currie directs attention to s 200 of the Criminal Code which states as follows:

200. Threats - Any person who threatens to do any injury, or cause any detriment, of any kind to another with intent to prevent or hinder that other person from doing any act that he is lawfully entitled to do, or with intent to compel him to do any act that he is lawfully entitled to abstain from doing, is guilty of a crime and is liable to imprisonment for 2 years.

7. The respondent, in opposing this application, places great emphasis on the competing facts as disclosed in the affidavits relied upon by each of the parties. Ms Truman, counsel for the respondent, notes s 12(e) of the Act

which only allows an Assistance Certificate to be issued if the manner in which the motor vehicle was used by Mr Camm constitutes an offence under the Criminal Code. The act relied upon to constitute an offence was the manner in which Mr Camm drove his vehicle toward the car in which the applicant was travelling. Ms Truman emphasises that this specific incident is denied by the second respondent and she queries whether a court can be satisfied on the conflicting evidence before it that Mr Camm's manner of driving was such that it amounted to an offence under the Code. I intend to consider this issue first.

8. The sequence of events on 25 January 2002 are contained in the two affidavits of Carole Rykiert sworn 28 November 2003 and 18 June 2004 and in the affidavit of Peter Camm sworn 28 April 2004. The recollection of Mrs Rykiert conflicts with that of Mr Camm. Mrs Rykiert's recollection as deposed to in her affidavits is as follows. Mrs Rykiert is the grandmother of the applicant Duan Cubillo. On 25 January 2002 she was travelling with her three grandchildren (including Duan) and her husband John to Western Wagait where they intended to camp. Whilst crossing La Belle Downs Station -a pastoral lease property owned by the second respondent Peter Camm- they encountered a locked gate. The gate was in clear view of the homestead. They were unable to open the gate as the lock had been changed and they waited for approximately ten to fifteen minutes for someone to come and unlock it. When nobody came they cut the chain and secured the gate behind them with rope.
9. After driving for approximately 30 minutes, they noticed a car behind them. The car swerved in front of their vehicle causing them to stop by blocking their access. Peter Camm was the driver. After a brief discussion, Mr Camm abused them and threatened to call the police. Mr Rykiert suggested he do so. The verbal abuse from Mr Camm continued and the children were very distressed. Mr Camm called Mrs Rykiert a "white gin" and other abuse at which stage Mr Rykiert made a move to get out of the vehicle. Mr Camm

then jumped into his car and sped off in the direction of the Bulgul Community threatening to lock the next set of gates between the station and the community. The Rykierts' followed him towards the community.

Paragraph 13 of Mrs Rykierts affidavit of 28 November states as follows:

“We then proceeded towards the community ourselves. We had been driving for approximately five minutes when we saw Camm’s vehicle come into sight again. He was driving back towards the homestead. We stopped our vehicle as he threatened to ram our vehicle by driving towards us on the wrong side of the road. He was yelling out things like he would ram our vehicle and at one stage he reversed and stopped only inches away from our car. Camm said that if we proceeded he would have the road blocked by heavy machinery on our return. Duan was frightened and crying at this point so I told John that we should turn around and go back to the main gate”.

10. The Rykierts then turned their vehicle and returned home to Darwin.

11. In her later affidavit dated 18 June 2004 Mrs Rykiert states:

“7: The second respondent was aware that there were young children in the car when he drove his vehicle in the opposite direction to our car.

8: The allegations made by the second respondent in paragraph 7 of his affidavit are not a true account of what happened and the second respondent drove off in his vehicle, therefore never overtaking us the second time as is alleged.

9: The second respondent drove off to the next gate however as we were coming towards the gate he drove back towards us. He was driving on our side of the road, directly at us. Whenever we moved further to the left to get out of his way, he moved further to the left.

10: My husband and I both became instantly alarmed and felt that our lives and that of our grandchildren were in danger.

11: My husband then brought the car to a complete stop as we honestly believed that the second respondent would have driven into us had we not stopped and moved as far to the left as possible. We could not go completely off the road as there was a large amount of water on either side of the road.

12: The second respondent at the last minute veered his car out of our path and pulled up beside our car, he would have only missed the front of our car by inches. He was then abusive as set out in my affidavit sworn 28 November 2003.

13: This was a terrifying experience for not only my husband and I but especially for our three grandchildren who were in the back seat witnessing the events that took place.

14: For the safety of my grandchildren I asked my husband to turn the car around and return to Darwin as I was not prepared to have my grandchildren witness such abusive and aggressive behaviour. They were clearly distraught by this time and I would not allow them to suffer any longer”.

12. The affidavit of Peter Camm sworn 28 April 2004 differs in many respects to the account put forward by Mrs Rykiert. Mr Camm states that on 25 January 2002 he and his son had been separating cows from their calves and had locked the gate to the access road. Soon after completing this job, Mr Camm noticed that some of the cattle were back in the yard. Upon investigation, his son advised that someone had cut the chain to the lock and the cows had re-entered through the gate. Upon hearing this, Mr Camm and his son got into their vehicle and headed down the road to see who had come through. They were travelling at about 40 kilometres per hour. They saw a car up ahead, passed the car and parked their vehicle sideways across the track to make them stop. Upon Mr Camm approaching the vehicle, the driver confirmed he had cut the lock. When advised by Mr Camm that there was a sign saying “*Trespassers will be prosecuted*”, the driver ignored him, swore at him and then drove his vehicle around the car and left. Mr Camm’s affidavit continues at paragraph 8:

“8.As a result I got back into my vehicle and drove my son and I back after the car. Again we wouldn’t have been travelling any more than approximately 40 kilometres per hour because of the state of the track. I could see the car ahead of us and when I got to an area I could safely overtake, I overtook the car and then continued to drive on to an area where I knew the road narrowed and where I would therefore be able to block the car and prevent it from passing me.

Paragraph 9: I got up to an area where the road narrowed and I stopped my car and parked it at right angles to the road. I then stood at the back of my vehicle and waited for the other car to arrive. The first time that I had stopped the vehicle was about five to six kilometres from our homestead. Then, after the driver took off the second time, I was able to stop him about fifteen kilometres from the homestead. I therefore had been forced to pursue the driver for approximately ten kilometres with them knowing that I believed them to be trespassers.

Paragraph 11: When the vehicle arrived at the spot that I had blocked I once again went up and approached the driver. I told the driver that I considered he was trespassing and he was to turn around and get off my property. At this point in time the driver and his female passenger immediately began to start calling me names. The female passenger was far more vocal than the driver. They began using words such as nigger hater and swearing using both the f and c words. They also described me as nothing but a racist and nothing but a redneck. The female passenger had the worst tongue of the two. On a couple of occasions I heard the driver tell his female passenger to cool it.

Paragraph 12: Because of the behaviour of the pair I became concerned about the situation escalating and I took myself out of the way of their vehicle. At this point in time I could hear children crying in the back of the car and I realised for the first time that there were children passengers in the back. As a result I said to the driver “why don’t you do the right thing and turn around and take your kids back”. I stated “I have had enough, your kids are upset and I am driving ahead and am going to wire the next gate” I told them that they wouldn’t be able to proceed any further and that if they wanted they could come back with me to the homestead to call the police to sort the situation out.

Paragraph 13: I then got back into my vehicle and drove ahead to the next gate. I began wiring that gate up and a short time later the other vehicle arrived. They saw me wiring the gate and began to turn around. They then started heading back towards the homestead and I followed them. By the time I got back to the homestead it was already very dark. The drive had taken a while and I had thought about the matter a little more and decided that if they apologised I would let them go through. Once we parked at the homestead I approached the vehicle and said that if they apologised then they could continue on to the community. At this point in time the female passenger simply said to me “No you can stick your offer where the sun don’t shine”. They then left the property.....

Paragraph 15: I am aware that is alleged that I tried to ram, or threatened to ram their vehicle. I state that at no stage did I ever try to ram their car, nor did I ever threaten to ram their car. I state that I did drive around them on a dirt road but only drove around where it was safe to do so and where the track was wide enough to do so safely. I am aware that they alleged that my car was facing their car, I state that at no time did I ever drive with my vehicle facing in the direction of their vehicle. My car was parked at right angles to block them on the road to prevent them from continuing any further. I would quite simply never drive my vehicle at another vehicle under any circumstances. I had my 14 year old son in the vehicle at the time with me and there is not way I would have put his life at risk. In addition I have broken my back in three places and I am therefore unable to put myself in any real physical confrontation in case I once again break my back”.

13. The account of Mr Camm differs significantly from that of Mrs Rykiert in a number of important aspects. Each blames the other of verbal abuse. Further Mr Camm specifically denies driving his vehicle directly at the Rykierts' vehicle or threatening to ram their vehicle. I have before me two affidavits which give two significantly different accounts of the incident in question. Further, I have no extrinsic evidence which supports one person's account more than the other. The PROMIS notes from the Northern Territory Police appear to simply confirm the accounts that each of the parties have told. Attached to Mrs Donna Cubillo's affidavit sworn 24 November 2003 is a letter from Ngatpuk Aboriginal Corporation from Rosetta Smith (member) dated 29 July 2002 outlining access problems experienced by Bulgul community members via la Belle station. I can take no account of this letter for the purposes of deciding the veracity or otherwise of the affidavit evidence.
14. I am therefore left in a position where I have two accounts of the incident in question which conflict in vital particulars. There is no affidavit from Mr Rykiert – the only other adult who witnessed the incident. Whilst I read nothing into this, it simply means that I am left with conflicting accounts from two individuals with no way of deciding which account is more credible.

15. Mr Currie submits that Mrs Rykiert's affidavit is more credible. He looks to Mr Camm's affidavit and emphasises Mr Camm's change of heart referred to in paragraph 13 of his affidavit when he stated that if the Rykierts apologised then he would allow them to continue to the community. Mr Currie suggests that such a change of heart is unlikely and that Mrs Rykiert's recollection of events is simply more credible. I cannot make such a finding. I note that the issue of access across this pastoral property has been a point of contention between community members and Mr Camm for some time. I query both versions of the verbal exchange between Mr Camm and Mrs Rykiert and her husband and suggest that the truth may well lie somewhere between the two conflicting accounts before me. Mr Camm was no doubt furious that people he assumed to be trespassers had damaged his property (by cutting the lock) and crossed his land without his consent. Mrs Rykiert and her husband may well have felt equally indignant upon finding that their key to unlock the gate did not fit thus leaving them stranded half way to their destination.
16. I look to the decision of Mr Loadman SM in *Vincent Sambono v The Northern Territory of Australia and Hallett* [2003] NTMC 035, where he discussed the application of the Briginshaw test when dealing with matters criminal in nature in a civil proceeding. He stated at paragraph 34 as follows:
- “...34 As was conceded by Ms Spurr that the test to be observed in dealing with a matter criminal in nature in a civil proceeding was “the Briginshaw test” (*Briginshaw v Briginshaw* (1938) 60 CLR 233). The said judgement of the Chief Justice of the Northern Territory, ironically if not by Mr Hunters design deliberately, related to the reversal of a finding by myself in a *Crimes Victim's Assistance Act* matter. Whilst it is not a complete dissertation of the principle it is true that it entails essentially “the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question where the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be

produced by inexact proof, indefinite testimony, or indirect inferences”.

35: From Sambono, ...”more generally and hopefully more simply stated it is a principle which requires that where, as in this proceeding, there is a need to decide on a matter which has its genesis in what would if established have amounted to a crime, there is not a burden on the applicant to prove the fact an issue beyond reasonable doubt but on a balance of probabilities. The weight of the evidence must however be more all embracing, more persuasive and more weighty than the evidence which would suffice where the facts in issue were not derived from any criminal genesis at all”.(my emphasis)

17. In the matter before me, there is a conflict in the factual evidence provided. The account of Mrs Rykiert would support a finding that an offence had been committed by Mr Camm as a result of his dangerous manner of driving in circumstances where an ordinary person would clearly have foreseen such danger. Alternatively, her account would support a finding that an offence could be founded on s200 of the Code. The difficulty for me is the conflicting account of Mr Camm with no extrinsic evidence to assist me in preferring one affidavit account over the other. Had I had the opportunity of seeing both Mrs Rykiert and Mr Camm in the witness box, their responses and demeanour may have assisted me in deciding which account was to be preferred on crucial issues. I do not have that.
18. Mr Currie directed my attention to the fact that Mr Camm continued to refuse entry to Mr and Mrs Rykiert on subsequent occasions when they tried to cross. He submitted that these refusals were unreasonable and supported his submission that Mr Camm was not as reasonable as his affidavit would suggest. Mr Currie would no doubt also ask me to take into account Mr Camm’s demeanour when he was making submissions on his own behalf from the bar table as support for the picture painted by Mrs Rykiert of him being angry and uncompromising about the issue of access across his land. I did notice the forcefulness of Mr Camm’s feelings on the issue as he did not try to hide them. He spoke of the problems caused to

him by persons using this road in circumstances where he is trying to run a commercial enterprise. He spoke of his meetings with government departments in an attempt to find a solution acceptable to him. Finally, he spoke of the Anti-Discrimination case brought against him since this incident. Whilst I do not doubt that Mr Camm engaged in a heated exchange with Mrs Rykiert and her husband on 25 January, I cannot find on the balance of probabilities that he committed an offence in doing so. Further, whilst I accept on the balance of probabilities that Duan suffered an injury on 25 January, that injury may well have been occasioned by the child overhearing the heated exchanges between his grandparents and Mr Camm and Duan sensing his grandparents heightened emotions.

19. In the circumstances, I have insufficient evidence before me to find on the balance of probabilities that Mr Camm committed an offence on 25 January and thus I am unable to consider granting an Assistance Certificate with respect to the child Duan. The application for Crimes (Victim's Assistance) is dismissed.

Dated this 16th day of August 2004.

B MONAGHAN
JUDICIAL REGISTRAR