

CITATION: *Mark Kime v Northern Territory of Australia* [2004] NTMC 065

PARTIES: MARK KIME

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victim's Assistance)

FILE NO(s): 20313464

DELIVERED ON: 10 August 2004

DELIVERED AT: Darwin

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JUDGMENT OF: B Monaghan

**CATCHWORDS:**

Definition of "injury" in Crimes (Victims Assistance) Act-whether the applicant suffered an injury as a result of being spat on.

*Crimes (Victims Assistance) Act ss 4,5(1)*

*Chabrel v Northern Territory of Australia* [1999] NTLR 69

*T v State of South Australia and Another* (1992) Aust Torts Rep 81/97

**REPRESENTATION:**

*Counsel:*

Applicant: Ms Saraglou  
Respondent: Ms Spurr

*Solicitors:*

Applicant: Withnall Maley & Co  
Respondent: Halfpennys

Judgment category classification:

Judgment ID number: [2004] NTMC 065

Number of paragraphs: 14

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

No. 20313464

BETWEEN:

**MARK KIME**  
Applicant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

REASONS FOR DECISION

(Delivered 10 August 2004)

Ms MONAGHAN JR:

1. The matter before me is an application for Crimes (Victim's Assistance). The applicant is a police officer who was assaulted by an offender on or about 25 December 2002. The Northern Territory opposes the application for assistance on the grounds that the applicant did not suffer an injury as a result of the assault. The circumstances of the assault are outlined in the applicants affidavit sworn 23 January 2004 which states as follows:

“3 - The facts of the assault are that while I was attending to arresting the offender, the offender spat through the back of the caged section of the police van into my face. The spit went into my right eye and around my facial area. The offender then proceeded to verbally abuse me through the back of the police van. He was then conveyed by my partner and me to the Berrimah watch house.....Following the assault and after placing the offender with officers at the watch house, I immediately went and washed my whole face with Hipicol antiseptic including my eyes and the inside of my mouth. While I was washing my face I kept thinking, that I was not sure whether the spittle that landed in my mouth and eye was infected with some disease. I was also not aware of the offender's

health history. I remember that the offender had blood around his mouth at the time we were arresting him. The effect of that spittle landing in my mouth made me feel quite sick for a long time after that, and I in fact destroyed my uniform after the completion of the shift”.

2. Whilst I have no certificate of conviction provided to me, I understand through submissions that the offender was convicted of assault on 14 March 2003. Section 5(1) of the *Crimes (Victim's Assistance) Act* states:

5(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.

3. It is clear that an applicant needs to sustain an injury in order to obtain Victim’s Assistance. The definition of injury in the Act is as follows:

"injury" means bodily harm, mental injury, pregnancy, mental shock or nervous shock but does not include an injury arising from the loss of or damage to property

4. The Amended Application for Assistance filed 10 December 2003 claims the injury as pain and suffering and mental distress. The affidavit of the applicant appears to also claim a physical injury in that the applicant states at paragraph 8:

“When I attended the hospital (on 29 December 2002) I told the Doctor that I felt a foreign body sensation initially in the eye which had now gone away. I presented at the hospital with my eye red and discharging. I was told that I had some sort of conjunctivitis but on examination everything was normal. I was given some ointment to put on my eye and discharged after discussing my situation with the Doctor”.

5. The hospital records for 29 December however, note under the heading Nursing Diagnosis – “*Eye Injury – Police Officer who was ? poked in eye by*

*prisoner last PM- says also spat in eye 3/7 ago now red swollen*". The clinical notes at annexure C include a report from Dr Mark Boesch dated 29/12/02 which states:

"Mark presented to the E.D. after being poked in the left eye last night. He initially had a foreign body sensation in the eye which has resolved but the eye is now red and discharging. ...."

6. It appears to me from the totality of this evidence that the "foreign body sensation" related to the poke in the eye on 29 December and not the earlier spitting incident on 25 December. It also appears that the poke caused the eye to be red and discharging rather than the earlier incident. This leads me to conclude that paragraph 8 of the applicants affidavit is misleading and must be read in the light of the medical information attached to it. Thus the injury for which the applicant claims compensation is a mental injury or mental shock alone. If I find a mental injury, then pursuant to s 9(1) of the *Crimes Victim's Assistance Act* (the Act), the applicant can be compensated for pain and suffering and mental distress. It is noted that mental distress as defined in the Act does not include grief.

7. What evidence is there before me that the applicant suffered an injury?

There are his words at para 5:

"The effect of the spittle landing in my mouth made me feel quite sick for a long time after that and I in fact destroyed my uniform after the completion of the shift".

Further at para 9 of his affidavit he states:

"I was very anxious and felt ill while waiting for the test results to come back and when they did, I was informed by the Doctor that it was negative and clear of any disease. I was then told by the Doctor that it was not really necessary to have the base line test which is the reason why I did not pursue the base line testing.

Para 10:

I feel that this incident has affected me psychologically and to this day I still feel that I should have had base line testing, if only to

relieve my mind and make me more at ease. Every time that I get sick I feel that it maybe connected to the incident. The assault has left me a little more cautious of certain situations at work especially when dealing with aggravated and intoxicated persons”.

8. Justice Mildren considered the definition of mental injury in *Chabrel & The Northern Territory of Australia* 1999 NTLR 69 and I look to that case for guidance. Justice Mildren referred to South Australian authorities when considering the definition of “mental injury”. These authorities included *T v State of South Australia and Another* (1992) Aust Torts Rep 81/167 in which Legoe J (with whom Millhouse J agreed) said at page 61, 328:

“It is now well settled that the definition of injury (in s 4) equates the sort of physical or mental injury for which compensation may be recovered under the Act, with the sort of physical or mental injury for which damages may be recovered at common law;...

2. Although mere sorrow and grief which cause emotional distress and no more, are insufficient taken alone to establish a compensable injury under the Act, nevertheless distress which in addition results in some sort of actual injury to physical, mental or psychological health will be compensable under s 7 of the Act”. (my emphasis)

In the same decision, Olssen J said at pages 61, 334-335:

“Like the learned Trial Judge, I am of the opinion that the definition contained in the statute, does not require the court to conclude that evidence unequivocally establishes that symptomatology exhibited by a claimant is such as to warrant medical clarification as some recognisable, psychiatric condition, as a pre requisite to coming to a conclusion that a claimant has proved the existence of a relevant injury. Indeed, such a conclusion would run counter to its expressed terms. The statutory definition itself stipulates that the existence of mental shock or nervous shock alone is sufficient to constitute an injury in the relevant sense. In my opinion it is quite impracticable and undesirable to attempt to do that which the statute itself does not attempt to do, and develop precise definitions or identify ranges of practical situations which do or do not fall within the concept of injury as defined. What is essentially involved is a question of fact and degree which needs to be considered on a case by case basis. Whilst I accept that the statute obviously has in contemplation something more than a condition of mere sorrow and grief, nevertheless, what the Court is required to do is consider the

situation of a claimant following a relevant criminal act and contrast it with that which pre existed the act in question. Leaving aside proven conditions of mental or nervous shock, if the practical effect of the relevant conduct is to bring about a morbid situation in which there has been some more than transient deleterious effect upon a claimants mental health and well being, so as adversely to affect that persons normal enjoyment of life beyond a situation of mere transient sorrow and grief, then, in the relevant sense, the person has sustained mental injury".(my emphasis)

9. In the case before me, Ms Spurr, Counsel for the Territory submits that there is no apparent injury to the applicant in this case. Ms Spurr challenges the applicant's affidavit evidence at paragraph 7 of his affidavit that he had blood tests on 29 December 2002. The records from the diagnostic laboratory seemed to suggest that the blood tests were not undergone until 3 February 2003 and the printed reports were obtained on 5 February 2003 and 6 February 2003. Further, there is provided to me a copy of some handwritten medical notes dated 3 February 2003 which support a conclusion that the blood tests were in fact taken on 3 February 2003. These handwritten notes also support a conclusion that the applicant was not making a special visit to the doctor because of his concerns about his eye but was also attending the doctor for a review on an unrelated "sports med" matter.
10. I have two comments to make as a result. The first is that in a case where I have very little evidence before me, this is the second inconsistency in the history provided by the applicant to the court. Had I relied on the affidavit alone, I would have been lead to believe that the applicant's eye four days after the spitting incident was red and discharging as a result of that incident –when that was not the case. I would also have been lead to believe that the applicant sought blood tests four days after the incident when in fact blood tests were not taken until some six weeks later.
11. These inconsistencies leave me with some concern about the reliability of the applicant's evidence as regards the effect of this incident upon his

psychological wellbeing because there is no medical report or extrinsic evidence to corroborate the same. It appears he mentioned the incident to medical practitioners on 2 separate occasions but that on neither occasion was this the primary reason for his visit and no anxiety symptoms that one might expect from someone claiming mental distress (such as sleeplessness or irritability) were noted on the medical files following those visits. It also appears that the applicant waited some six weeks before having basic blood tests. That blood test report recommended “repeat testing 3 months after the last potential exposure” but the applicant elected not to do so.

12. The applicant’s reaction to being spat at in the face by a stranger was one of disgust and he says he felt “*quite sick for a long time and destroyed my uniform at the end of the shift*”. He says he felt anxious and ill while waiting for the test results to come back and that this incident has affected him psychologically as every time that he gets sick he feels that it maybe connected to the incident. Finally, the assault has left him a little more cautious of certain situations at work especially when dealing with aggravated and intoxicated persons.

13. Does the reaction referred to above amount to an injury suffered? I note the words of Olssen J in *T v State of South Australia and Another* (supra) when he states:

if the practical effect of the relevant conduct is to bring about a morbid situation in which there has been some more than transient deleterious effect upon a claimants mental health and well being, so as adversely to affect that person’s normal enjoyment of life beyond a situation of mere transient sorrow and grief, then, in the relevant sense, the person has sustained mental injury”.

14. I acknowledge the applicant’s initial feelings of disgust at what had happened to him on 25 December 2002 and that he felt “quite sick” as a result. I also note that he felt concerned for 2 or 3 days in February 2003 being the time between having blood samples taken and receiving the test results. I note that he wishes he had had the baseline blood tests and that he

is more careful when placed in similar circumstances with aggravated or intoxicated persons. Does this amount to “some more than transient deleterious effect upon a claimants mental health and well being, so as to adversely to effect that persons normal enjoyment of life beyond a situation of mere transient sorrow and grief”? I am not satisfied on the balance of probabilities that it does. For this reason I do not intend to issue an Assistance Certificate in favour of the applicant and the application is dismissed.

Dated this 10th day of August 2004.

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**B MONAGHAN**  
JUDICIAL REGISTRAR