

CITATION: *Jeffrey Lawrence Gilder v Northern Territory of Australia* [2004]  
NTMC 069

PARTIES: JEFFREY LAWRENCE GILDER  
  
v  
  
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victim Assistance) Act

FILE NO(s): 20314952

DELIVERED ON: 1<sup>st</sup> September 2004

DELIVERED AT: Darwin

HEARING DATE(s): 27<sup>th</sup> August 2004

JUDGMENT OF: Judicial Registrar Fong Lim

**CATCHWORDS:**

Mental Injury – causal link  
Dillingham constructions Pty Ltd v Steel Mains Pty Ltd (1975) 49 ALJR 233

**REPRESENTATION:**

*Counsel:*

Applicant: Mr Priestley  
Respondent: Ms Saraglou

*Solicitors:*

Applicant: Priestleys  
Respondent: Withnall Maley

Judgment category classification:

Judgment ID number: [2004] NTMC 069

Number of paragraphs: 27

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

No. 20314952

BETWEEN:

Jeffrey Gilder  
Applicant

AND:

Northern Territory of Australia  
Respondent

REASONS FOR DECISION

(Delivered 1<sup>st</sup> September 2004 )

**Judicial Registrar Fong Lim:**

1. The Applicant has applied for an assistance certificate to issue in his favour pursuant to section 5 of the Crimes (Victims Assistance) Act. There is no dispute between the parties that the applicant is a victim within the meaning of the Act and that he is entitled to an assistance certificate. The only issue is the quantum of that certificate.
2. **The facts:** The Applicant was drinking with a few people at a mates place on the 22<sup>nd</sup> of April 2003. After quite a few drinks the mates whose place it was asked everyone to leave. The offender did not want to leave and then had an argument with the Applicant about whether they should leave. In fact everyone moved to outside of the unit. The Applicant recounts sitting outside, seeing the offender's feet in front of him, looking up seeing the offender with a knife and then being stabbed in the stomach and the

shoulder. The stab to the stomach was severe enough that part of the Applicant's intestines were hanging out when he went to hospital.

3. The Applicant was taken to hospital in an ambulance where he was put under general anaesthetic for the cleaning and closure of the wounds. During the recovery time from the surgery the Applicant developed spiking temperatures and vomiting. The Applicant also developed suicidal thoughts and was referred to a psychiatric assessment. As a result of the psychiatric assessment the Applicant was given anti – depressants and referred to the Tamarind Centre for treatment upon discharge. The Applicant was discharged on the 2<sup>nd</sup> of May 2003.
4. The Applicant claims that while he has had mental illness before the assault his symptoms had been resolving. The Applicant could not explain the sudden onset of symptoms while in hospital he only knows that he started to have suicidal thoughts when he had been relatively well before the assault.
5. The Applicant relates symptoms of depression and anxiety and regular stomach pain since the assault and continuing panic attacks. It should be noted that the Applicant's affidavit was sworn in December of 2003 and no up to date information about his present situation has been given by the Applicant himself.
6. The Applicant produced reports of Dr McLaren in support of his claim and the Respondent a report from Dr Markou.
7. The Respondent argued that the history given to Dr McLaren is inconsistent with that noted on the hospital records and the history given to Dr Markou. They further argue that because of that inconsistency Dr Markou's report should be preferred over Dr McLaren's reports.
8. There were three reports from Dr McLaren dated the 16<sup>th</sup> September 2003, 19<sup>th</sup> August 2004 and 25<sup>th</sup> August 2004. Dr McLaren like Dr Markou only saw the Applicant for the purposes of assessing him for this application. Dr

McLaren saw the Applicant most recently on the 18<sup>th</sup> of August 2004 resulting in his report of the 19<sup>th</sup> of August 2004

9. The major query the Respondent places over the Applicant's history given to the doctors relates to his drug and alcohol use. The Applicant's history given to Dr McLaren led him to the conclusion that the Applicant seems to have avoided

“ the major social complications of personality instability mainly alcohol and drug abuse”(see page 4 of the report of 16<sup>th</sup> September 2003)

10. The hospital notes show that on the 29<sup>th</sup> April 2003 on the inpatient clinical progress notes under the heading “ Mendel's prognosis” that the Applicant was seen by a Dr Mendel who notes as follows:

“Substs: ETOH weekly binge drinking with friends  
Cannabis \$50 – 75 weekly

Impression

ETOH dependence 0 binge type  
Cannabis misuse  
.....

ETOH dependence 0 binge type  
Cannabis misuse  
.....

Recommendation

Referral for substance rehab.....  
Recommence fluoxetine

11. Dr Mendel also notes that the Applicant had admitted to some petrol abuse and had some psychotic episodes when actually intoxicated with petrol. Dr Mendel's note indicate that he offered a reference to Tamarind Centre and that the Applicant refused.

12. It should be noted that in his victim impact statement the Applicant vows that he has given up alcohol. This could explain why some evidence shows the Applicant as having an alcohol problem and what he recounted to Dr McLaren in September of 2003. There is no period of time indicated in Dr Mendel's notes and it is not clear if the issues of substance abuse were present or past.
13. In his second report Dr McLaren relates that he had seen the Applicant again for a review and with Dr Markou's report in hand. He confirms that the Applicant was continuing to feel "sad and hopeless" with episodes of anxiety particularly around crowds. He confirms that the Applicant confirmed that he was drinking alcohol but not using drugs. However even given acceptance that the Applicant may have an alcohol problem Dr McLaren concludes:

"For the present, it would appear that the loss of his children is having quite a severe effect upon this man's mental state but he does not deny that he has been left with significant mental problems as a result of the assault. Given his background, I would accept that he was probably quite paranoid before the assault but there do appear to be fairly strong grounds for accepting that any paranoid inclination has been exacerbated as a result of the assault."

14. Dr McLaren goes on further to say

" Suffice it to say that Mr Gilder has a significant mental disorder that a certain proportion of this probably was present prior to the assault and that the separation from his family has exacerbated his symptoms but this does not and can never deny that that assault has had a significant effect upon his disposition."

15. Dr Markou assesses the Applicant as

".. an individual who has been intermittently quite psychiatrically unwell, who has taken drugs and alcohol for long periods of his life, and who would appear from his mental health unit records to have quite an unstable mental state characterised by depression, anxiety and anger."

16. Further in his report Dr Markou reaches the conclusion that while the Applicant says he was an essentially normal person prior to the assault all of the evidence points to the opposite. He concludes that

“.. Mr Gilder has been a troubled individual for a number of years and that the assault has occurred in the context of this past difficulty. It is certainly possible that the assault which occurred has exacerbated any underlying psychiatric problems, but at this point in time it is not the major contributor to his current difficulties”

17. Both of the doctors agree that there are other contributing factors to the Applicant’s present psychiatric condition and even Dr Markou accepts that the assault could have exacerbated the underlying psychiatric condition that the Applicant obviously suffered. The real question for the court is how much of the Applicant’s present condition is due to the assault.
18. An assistance certificate can only be issued to a “victim” which is someone is who is injured as a result of the commissioning of an offence. The words “as a result” require a causal link between the injury and the offence. Here there is a causal link between the assault and the Applicant’s mental condition however it is clear that the even though the assault continues to effect Applicant in some way the split from his partner and the loss of his children are the main stressors which are causing his present condition.
19. **Physical injury** – the Applicant suffered a horrific injury. The immediate physical pain of the stabbing, the requirement for surgery and two week recovery time in hospital including a time of spiking temperature and vomiting are all factors to consider. The Applicant suffered sharp abdominal pain for approximately seven months subsequent to the assault upon coughing sneezing or overexertion. The pain would last for a couple of minutes each time and then gradually disappear. He is also left with a scar of 20 cm across his abdomen and 12 cm on left shoulder.
20. **Mental distress** – the Applicant has obviously suffered substantial mental distress at the stabbing. He expressed anger at being stabbed and says he

now feels constantly anxious that something similar will happen to him again. The natural shock of seeing his intestines poking out of the wound would also have caused him some distress although he does not mention that at all in any of his statements or affidavits. The Applicant also states that he continues to fear reprisal from members of the offenders family as he has been verbally threatened by them.

21. **Mental injury** – it is my view given the psychiatric evidence available that the assault had an immediate effect upon the Applicant. He was and continues to be a mentally vulnerable individual who according to himself had begun to stabilise until the assault sent him on another downward spiral. The Applicant accepts that he had previously been treated for depression however it is clear from the Tamarind centre notes that from about September 2002 he hadn't required any further treatment from that service until he returned there after the stabbing. Without independent evidence of the Applicant's mental state before then it is difficult to assess the true effect the assault had on his mental state. It is clear however that even if the Applicant was continuing to have symptoms of depression prior to the assault there was an acute increase in symptoms after the assault eg the suicidal thoughts while in hospital.
22. I am convinced that on the balance of probabilities that prior to the assault the Applicant was a mentally vulnerable young man who had problems with substance abuse in the past and was continuing to have alcohol abuse problems at the time of the assault. The Applicant had previously been treated for depression and self harm. The assault caused the return of symptoms previously suffered, eg depression, suicidal ideation, and sleeplessness, and the emergence of others eg anxiety in crowds, paranoia. At the time of his affidavit on the 2<sup>nd</sup> of December 2003 the Applicant seemed to be slowly recovering his life (see paragraph 11 of his affidavit) however his symptoms were exacerbated and continue because of a further

trauma in his life and that is the split from his de facto partner and the loss of contact with his children.

23. **Pain and Suffering and Loss of Amenities in life** - Given the above I cannot agree with Mr Priestley that the Applicant would be awarded in excess of \$10000.00 at common law, he certainly would not be granted that on the paucity of evidence I have before of his pre morbid state. In Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd & anor [1975] 49 ALJR 233 the High Court considered the issue of responsibility for damage to a person who had a predisposition. The facts of that case were that a person who was a worker of the Appellant, Dillingham, was injured while working with the Appellant he received common law damages for that injury. The worker then went on to work for the Respondent and suffered a similar injury to his back while working for the Respondent. The Respondent sued the Appellant for the contribution to the compensation paid to the worker for the second injury on the basis that some of the damage suffered by the worker was because of his original injury. The High Court analysed there responsibility of the second tortfeasor and came to the conclusion per Barwick CJ:

“ The subsequent tortfeasor is not in any sense liable for the injury which the first tortfeasor caused or for its consequences thought if he is unable in point of proof to establish the pre – existing disability of the injured person the damages he may be required to pay will no be diminished by reason of the pre- existing condition of the injured person”

24. This reasoning can be applied in relation to the facts of this case. Here we have a person who has a predisposition to mental illness who has suffered and exacerbation of his symptoms through two events first the assault and second the split with his partner and loss of contact with his children. The High Court’s reasoning in Dillingham’s case would mean that the Respondent has to take the Applicant as he is found, but is still only liable to the extent that the injuries may the Applicant’s condition worse. If that



reasoning is extended then it also appropriate that the Respondent is not responsible for symptoms brought on by a subsequent event, in this case the Applicant's split with his partner and his loss of contact with his children.

25. I accept however that under this heading of damages the Applicant would be awarded something close to the maximum allowable under the Act given the severity of the physical injury, scarring, and the mental injury he has suffered. It is my view for this head of damage the Applicant should be entitled to \$20000.00.
  
26. **Medical expenses** – The Applicant has also applied for an award for medical treatment namely psychiatric care under Dr McLaren. He states that he will attend for treatment with Dr McLaren if he is awarded an amount for that treatment in his assistance certificate. The Applicant's history shows that he is willing to accept treatment but his motivation to continue with treatment may be a little lacking however it is clear to me and both psychiatrists that he is need of treatment with Dr McLaren suggesting that treatment would cost about \$3000.00. It would be impossible to estimate what part of that treatment would be needed for those symptoms which are only arising out of the assault and those which are caused by the split with the partner therefore it is my view that the Assistance certificate should include an amount for that treatment.

27. **I therefore order:**

27.1 An Assistance certificate issue in the sum of \$23000.00 in favour of the Applicant.

27.2 The Respondent pay the Applicant's reasonable costs and disbursements to be taxed in default of agreement.

Dated this 1st day of September 2004

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Tanya Fong Lim  
JUDICIAL REGISTRAR