

CITATION: *James Ernest Last v Northern Territory of Australia* [2005] NTMC 007

PARTIES: JAMES ERNEST LAST

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes Victims Assistance

FILE NO(s): 20411021

DELIVERED ON: 4th February 2005

DELIVERED AT: Darwin

HEARING DATE(s): 28th January 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Definition of “victim” - injury arising out of property offence – section
Crimes Victims Assistance Act

REPRESENTATION:

Counsel:

Applicant: Mr McGorey
Respondent: Ms Tregear

Solicitors:

Applicant: Priestleys
Respondent: Hunt & Hunt

Judgment category classification: C
Judgment ID number: [2005] NTMC 007
Number of paragraphs: 42

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

No. 20411021

BETWEEN:

James Ernest Last
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 4th February 2005)

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*.
2. The Respondent argues that the Applicant does not qualify for an assistance certificate for two reasons, he is not a victim within the meaning of the Act as the offence relied upon is a property offence and further he has not suffered an injury arising out of that offence.
3. The facts are that the Applicant is a 59 year old single man who is a qualified teacher. Prior coming to the Northern Territory the Applicant was working in Pakistan. While in Pakistan the Applicant was the victim of death threats, two abductions and a sexual assault. On the 29th of September 2003 the Applicant was asleep and awoke to a man standing over his bed. The man had unlawfully entered the Applicant's home with stealing as his goal. The Applicant was not physically assaulted. The Applicant claims that

this incident caused him to recall all of the bad things that had happened to him before the intrusion and has had a profound effect on his mental health. The effect of this intrusion on the Applicant's mental health is in debate. The medical reports which have been produced to the court are the undated report of psychologist Helen Pavlin and the reports of psychiatrist Dr McClaren of the 9th and 23rd of November 2004 and the 2nd of June 2005. An analysis of those reports will be undertaken later in this judgment.

4. The *Crimes (Victims Assistance) Act* ("The Act") provides for assistance to be granted to victims of crime, section 5:

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

5. The terms "injury" and "victim" are defined in section 4 of the Act as:

- "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 (which loss or damage is the result of an offence relating to that property);

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

6. **Property crime** – the Respondent argued that the offence that the Applicant wished to rely upon as the basis for his claim for assistance is a "property crime" and any injury arising out of property crime is precluded from the definition of "injury". The Respondent argues that unlawful entry with intent to steal is a property crime and therefore cannot be the basis of a successful claim under the *Crimes (Victims Assistance) Act*. The Court was referred to my decision in *Susan Belbin v Northern Territory of Australia*

(unreported 31st of July 2002) as authority for that proposition. If the Respondent had carefully read that decision I made it clear that the Act refers to “an injury arising from the loss of or damage to property (which loss or damage is the result of an offence relating to that property)” being precluded from the operation of the Act. In the Belbin case the applicant was claiming mental injury arising out of the loss of her business through arson, a case clearly of injury arising from the damage or loss of property as a result of an offence relating to that property. In that case I disallowed the application for Assistance.

7. In fact a “property crime” can be the basis of an application for Assistance under the Act. In Yaxley v Northern Territory of Australia and Collins [2002] NTMC 36 Mr Luppino SM clearly analysed the application of the definition of injury and concluded that unlawful entry to steal is an offence upon which a claim for assistance can be based. In Yaxely’s case the applicant was claiming mental injury arising out of the unlawful entry. The Applicant was claiming that the fact that the offender had unlawfully entered her property had caused her a mental injury. His Worship at paragraph 16 of his judgement sets out the question for the court:

“The issue, however, is from what does the injury arise; is it the fact of the damage to property (if any) or the loss of property (if any) or is it from the unlawful entry”

8. His Worship then went on to find that based on the medical evidence it was clear the injury was not caused by the loss or damage to property but the unlawful injury and therefore it was a compensable injury.
9. In this present case it is clear from the Applicant’s evidence and the evidence of both the psychologist and the psychiatrist that it was the fact that there had been an intruder in his home and that he now felt unsafe in Australia (which had not previously been felt), not any loss or damage to property which has caused the Applicant his mental injury (if any).

10. It is my view that the Applicant is not precluded from the issue of an Assistance Certificate on the basis that his injury is caused by loss or damage to property.
11. **Mental injury-** the Respondent also argues that any mental injury the Applicant may have must surely be caused by the traumatic experiences he had in Pakistan not the intrusion into his house.
12. The Applicant describes his mental state before the intrusion in his affidavit. He confirms that he had obviously suffered some post traumatic stress disorder subsequent to his kidnappings and sexual assault in Pakistan and that he obtained treatment for that condition. It is the Applicant's case that he had recovered from that trauma and was fine until the intrusion caused him to have a relapse. The Applicant relied on the report of Ms Pavlin a psychologist who had treated him in relation to the Pakistan incidents and also saw him subsequent to the intrusion.
13. Ms Pavlin states briefly that she had previously treated the Applicant for his mental well being in 2001 and 2002 however had ceased treatment before he came back to her subsequent to the intruder incident in 2003. Ms Pavlin states that:

“Our contact had ceased each time at a point when he had, in both his opinion and my assessment reached a point of relative emotional and psychological stability. In this context, it may be seen that I was in a position to compare the relative degree of distress he manifested on 19 April 2004 and 21 April 2004 with how I had seen him in the past specifically with when we had terminated the previous services of consultations. I can say that while I had seen him extremely distressed in the past, I had never before seen him so emotionally fragile and vulnerable”

14. Ms Pavlin further opins that

“Mr Last has suffered a reactivation of the symptoms associated with post traumatic stress disorder (PSTD) from which he had largely recovered prior to the intruder incident.”

15. Ms Pavlin also then states that Mr Last had regained some equilibrium but remains vulnerable to event of an intrusive nature.
16. It is unfortunate and unhelpful that Ms Pavlin's report is not dated nor does she say when Mr Last's equilibrium was regained. It is difficult to assess the cause of the Applicant's incapacity to work merely relying on his evidence and the report of Ms Pavlin. The Applicant claims he was unable to work for about some time after the incident however it is not clear from Ms Pavlin's report whether he was medically unfit for work and for what period of time. It is also impossible to assess whether his continued incapacity to work was caused by the intruder incident.
17. Further medical evidence was provided to the court in the form of Dr McLaren's reports of the 2nd June 2004, and 9th and 23rd of November 2004. Dr McLaren is the Applicant's treating psychiatrist who treated him from the 6th of May 2004 to sometime before November 2004 when he referred the Applicant back to his general practitioner.
18. Dr McLaren is of a slightly different view to Ms Pavlin. While Dr McLaren accepts that the intruder event did have the effect of aggravating the Applicant's previous predisposition to the post traumatic stress disorder he is of the opinion that the intruder only contributed to the Applicant's ill health in minor way. In his final report Dr McLaren states

“Because causation of post- traumatic states is always multi – factorial, it is very difficult to state with any authority that attribution of a post-traumatic state especially when there have been a series of incidents. However, bearing this in mind, I would say that any symptoms he experienced after the intruder incident would not have occurred if he had not previously been so severely assaulted in Pakistan.....

Bearing that in mind that I have previously advised that a significant part of his distress after that intruder incident was related to loss of career, etc., I am prepared to state only that ht incident probably contributed no more than 10 or 15% to his total experience of disability and symptoms following that incident.”

19. Dr McLaren says further that:

“I am of the view that the intruder incident was relatively minor. The major part of causation to his mental disorder lay in incidents in Pakistan and the subsequent loss of career. His inappropriate and panicky response to in flying to Pakistan almost certainly contributed to the intensification and prolongation of his symptoms”

20. The Applicant argues though Dr McLaren’s opinion is that the intruder incident is only a minor contributing factor to the Applicant’s ensuing ill health on the principles of common law the Applicant is entitled to compensation for the whole time which that event has affected his ability to work and his quality of life on the “Eggshell skull” principle. The Applicant argues but for the intruder incident he would have been in full time employment and able to enjoy life without the mental distress in the 8 months subsequent to the intrusion, therefore there should not be any discount on the quantum.

21. This question of what is compensable in the context of the Crimes (Victims Assistance Act) when there are many factors contributing to the Applicant’s injury was considered in detail by Mr Luppino SM in Yaxleys’ case. At paragraphs 19 & 20 his Worship stated:

“.. I agree with the submissions of Ms Griffiths that at common law, by application of the principle that you take your victim as you find them, the applicant may have been entitled to have her claim assessed based on her final condition without deduction on account of pre-existing factors. Assessments for the purposes of the Act are based on common law principles as if there were no statutory limit (Rigby v Solicitor for the Northern Territory (1991) 105 FLR 48; LMP v Collins (1993) 112 FLR 289). However, I think that as a result of Woodroffe, that particular common law principle cannot apply to assessments for the purposes of the Act. Woodroffe involved a situation where an applicant made multiple claims for an assistance certificate against the same offender. Moreover, the victim and the offender had been in a de facto relationship extending over a number of years. The victim had been subject to much domestic violence at the hands of the offender. The applicant in that case made a number of claims and claimed globally for mental injury. The medical evidence in that case was to the effect that the applicant's

overall mental state was accounted for by the events over the entire relationship ie not confined only to incidents which were the subject of applications before the court.

20. The Court of Appeal considered a ground of appeal challenging the approach taken by the Magistrate hearing the initial application to the assessment of the assistance certificate. At paragraph 34 the Court of Appeal said:

"Although it has been held that common law principles have application to the assessment of the statutory assistance provided under the Crimes (Victims Assistance) Act ... that observation cannot override the clear expression of the legislative intent to be found in the Act. The common law principles of causation and assessment of damages provide no more than a guide to the operation of the statutory scheme of the assistance established by the Act. The processes of the statutory scheme are to be governed by the terms of the Act including the provisions of s 9, which sets out the applicable principles for assessment of assistance, and s 13, which imposes limits upon the amount of assistance available. Further, s 5 of the Act is precise in its language in relation to matters that give rise to an entitlement to an assistance certificate. It permits the issue of "an assistance certificate in respect of the injury suffered by (the victim) as a result of that offence" (emphasis added). It is clear that the legislature does not intend that assistance certificates will provide financial assistance to victims in relation to matters that are not able to be identified as the injury specifically related to a particular offence."

22. His Worship then went on to make a global assessment of damages for the Applicant in that case and then discounted that amount for the effect of offences and factors other than those relied upon in the Application.
23. I respectfully agree with His Worship's analysis and application of the Act. It is clear that the intent of the legislature was for a victim of crime to be compensated for injury which is causally linked to the offence and no more.
24. In the present case it is clear from Dr McLaren's reports that the Applicant's initial anxiety, mental distress and incapacity to work may have been caused by the intruder incident but the prolonged continued effect is caused by his underlying vulnerability to such incidents because of the horrific experiences he had in Pakistan. Dr McLaren attributed only 10- 15% of the Applicant's symptoms after to the incident to that incident. I accept Dr McLaren's

assessment and I will discount any assessment of quantum of assistance accordingly.

25. **Pecuniary Loss** - the Applicant claims that because of the incident and his severe reaction to that incident he had been unable to work for approximately 8 months and presently is only employed as a relief teacher. His intention is to move to Tasmania and return to full time work as a teacher there. The Applicant claims that he was employed in full time employment as a teacher prior to the incident and since then has not been well enough to obtain full time employment.
26. It is accepted that subsequent to the incident it is most likely (given the medical evidence) that the Applicant was unable to work. It is also accepted by both Ms Pavlin and Dr McLaren that the Applicant's decision to return to Pakistan was inappropriate and would have caused his symptoms to be prolonged. However the decision was clearly an irrational decision made at the time the effect of the intruder incident was at its height and therefore any prolongation of Mr Last's symptoms from this decision can be linked back to the incident. There is no evidence any further incidents happened to the Applicant in Pakistan and therefore it has to be assumed that none occurred.
27. In his submissions Counsel for the Applicant is claiming for loss of wages for approximately 8 months ceasing sometime after the Applicant's return from Pakistan although there is no real explanation for that time frame. According to the Applicant's affidavit of the 16th of July 2004 he was still unable to work full time although he had begun to "gradually re- entered the work force by doing relief teaching". The Applicant also states that he was "hopeful of to be able to progress to full time employment within the coming months." In his report of the 9th of November 2004 Dr McLaren states:

“ I have discharged Mr Last back to the care of his general practitioner because I believe his mental state is now sufficiently settled. I note that he has been granted a Disability Support Pension by Centrelink but I am at a loss to explain as to why this is the case..... The fact that he recovered quickly following the institution of appropriate treatment indicates that his disorder was relatively mild. True or severe post – traumatic states are notoriously long – term”

28. Dr McLaren discharged the Applicant back to his general practitioner on the 14th of October 2004.
29. The evidence doesn't support a definitive cut off date to the Applicant's injury although a suggested date from Counsel for the Applicant was about July of 2004. Given the medical evidence and the evidence of the Applicant it is my view that a period of incapacity of about 8-10 months is appropriate in this case.
30. The Respondent accepts that the Applicant may have had some incapacity to work arising out of the incident but does not accept that he was in fact in employment at the time or that the incident has caused his continuing incapacity to work.
31. In relation to the Applicant's work status at the time of the incident. The documents produced to the court show that the Applicant had in fact resigned from his position with the Department of Education for reasons unrelated to the incident and while he had tried to withdraw that resignation prior to the incident his request had been denied. The simple fact is that the Applicant was unemployed at the time of the incident. It is the Applicant's onus to convince this court on the balance of probabilities that the intruder incident was the cause or part of the cause of his inability to work.
32. It is clear from the evidence that the intruder incident was not the reason for the resignation however that does not mean that the incident did not cause the Applicant to be unable to work for a period of time. According to the medical evidence Mr Last was clearly in a irrational state immediately after

the incident (travelling back to Pakistan) and when he returned from Pakistan was still suffering some effect of the incident which required him to have psychiatric care. Although Dr McLaren does not accept that the intruder incident was the solitary cause of Mr Last's symptoms it is not until later in 2004 does he say that Mr Last is able to work. Dr McLaren states in his report of the 23rd of November 2004 that:

“ ...it is my view that, following the assault, he probably was not capable of working as a schoolteacher. However, he appeared to have settled down while he was in Pakistan and could most likely have resumed work while he was there.”

33. In his report of the 9th of November 2004 Dr McLaren questions the need for Mr Last to be on the disability pension at that time:

“I note that his has been granted a Disability Support Pension by Centrelink but I am at a loss to explain as to why this is the case. Centrelink now make their own decisions and does not seek outside specialist advice but I would not have given him a pension without an adequate trial of treatment. The fact that he recovered quickly following the institution of appropriate treatment indicates that his disorder was relatively mild.”

34. The Respondent was also granted leave to cross examine the Applicant on a limited basis in particular his capacity to work prior to the incident. Mr Last presented to the Court as a truthful witness who was attempting to answer the questions as best he could, he did not break down or become emotional and that is a testament to his efforts to recover from the traumatic incidents in his past. The cross examination did not reveal any further information than what was contained in the written material before the court.
35. The Respondent tried to establish that the real reason Mr Last could not work was that he was unable to adjust to the Education system in Australia (having taught in Pakistan for 16 years). They supported this argument from the observations of Dr McLaren in his report of the 23rd of November 2004 where he states:

“ His main problem in Darwin consists of his difficulty adjusting to the modern teaching environment” and

”At work, he manages reasonably well but says he is frustrated by the very inefficient bureaucratic system here which he finds” professionally distressing”

36. The Respondent argued the fact that the Applicant had resigned showed he did not cope with his conditions of employment and is asking the Court to assume from that the Respondent would not have been employable in the NT education system. That is obviously not correct as he has been able to obtain regular relief work in the more recent past.
37. It is my view that on the balance of probabilities the Respondent has suffered some economic loss because of his injury in that it was part of the reason he was unable to work for a period of approximately 8 – 10 months however that loss will be discounted at an appropriate rate to take into account that a proportion of the Applicant’s disability to work was caused by other factors.
38. **Quantum of certificate -**
Pain and suffering and mental distress - the Applicant was the victim of a minor offence which had a major effect on his mental health in the short term. His pre disposition to react unfavourably to such an incident caused the reaction to be far more severe than someone without his background. The Applicant suffered clear mental distress, anxiety, depression, restlessness, bouts of uncontrollable crying, sleeplessness and loss of concentration. The severity of the Applicant’s symptoms have lessened to the extent that his is now able to work and is looking forward to full time employment in Tasmania. For this head of damages I assess damage at \$4000.
39. Loss of amenities of life - the Applicant states that he used to be outgoing and liked to socialise and for some time after the incident was unable to socialise with anyone. He also says that he is now more reluctant to take

part in activities such as walking, going to the beach, shopping and socialising with friends and family. For this head of damage I assess damages at \$500.

40. Economic Loss - Just prior to the incident the Applicant was employed as a full time teacher at \$838.76 net per week. At the time of the incident he was unemployed. Since the incident he had received Centrelink benefits of \$3186 (as advised by his counsel) and has earned some income as a relief teacher of \$7110.00. It is my view that on the balance of probabilities had the Applicant not been injured he would have been able to obtain some full time employment as a teacher, although not necessarily in the Northern Territory. I therefore accept that for some 8- 10 months the Applicant suffered some economic loss.

9 months (36 weeks) at 838.76 per week	\$30195.36
Less Centerlink received \$3186	\$ 3186.00
less money earned as relief \$7110	\$ 7110.00
Total economic loss	\$19899.36

41. It should be noted that the amounts in the above calculation for Centrelink Benefits and money earned as relief teacher were figures provided to me by counsel for the Applicant in his submissions and if I have noted those figures incorrectly I am willing to recalculate upon further submissions. Total damages are therefore assessed at \$24399.36. This figure must then be discounted by Dr McLaren's assessment of the proportion of the Applicant's symptoms were caused by the intruder incident, I have discounted the amount to 15%.

42. I order that

42.1 An Assistance Certificate be issued in favour of the Applicant for the sum of \$3659.90.

42.2 Costs of this application be reserved for further submissions.

Dated this 4th day of February 2005

Tanya Fong Lim
JUDICIAL REGISTRAR