CITATION:	*Gary Dean v Northern Territory of Australia & McKinnon* [2005] NTMC 023
PARTIES:	GARY DEAN v NORTHERN TERRITORY OF AUSTRALIA & DAVE MCKINNON
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victim's Assistance)
FILE NO(s):	20115735
DELIVERED ON:	15 April 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	15 December 2004
JUDGMENT OF:	Mr Wallace SM

CATCHWORDS:

Crimes (Victim's Assistance) Act 2 10 – "conduct of the victim" – proximity between victim's conduct and the offender's response – where victim charged and acquitted of an offence, the effect of that acquittal.

REPRESENTATION:

Counsel:

Applicant:	J Lewis
First Respondent:	C Spurr
Second Respondent:	K Saraglou

Solicitors:

Applicant:	John McCormack
First Respondent:	Halfpennys
Second Respondent	Withnall Maley

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 023
Number of paragraphs:	35

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

No. 20115735

BETWEEN:

GARY DEAN
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND

DAVE McKINNON
Second Respondent

REASONS FOR DECISION

(Delivered 15 April 2005)

Mr WALLACE SM:

1. This is an application for assistance brought pursuant to s 5 of the *Crimes (Victim's Assistance) Act* ("the Act"). The applicant ("Mr Dean") was on 12 October 2000 assaulted by the second respondent ("Mr McKinnon"), who punched, kicked and kneed Mr Dean, and hit him with a bar stool. On 14 October 2002 Mr McKinnon was convicted and sentenced for the assault, aggravated by two circumstances: that Mr Dean suffered bodily harm; and that Mr Dean was threatened with an offensive weapon, namely a bar stool. A Certificate of Proceedings, certifying those matters is Annexure 1 to an affidavit sworn by Mr Dean on 25 March 2004. As a result of the assault Mr Dean suffered injuries.

2. Thus it is clear that Mr Dean is a "victim" within the meaning of the Act, and it is clear that he is the victim of an "offence" within the meaning of the Act, and that he suffered "injury" within the meaning of the Act. That far, the case is a straightforward one. The matters at issue are first, whether Mr Dean is disentitled to assistance by reason of his conduct contributing to his injury (s 10 of the Act) and, secondly, the extent of Mr Dean's injuries properly attributable to the offence.

Contributory Conduct

3. Mr McKinnon had a girlfriend, "J", with whom he had maintained a relationship for more that a year as at the date of the assault. It is perfectly clear that Mr McKinnon's motive for assaulting Mr Dean was his belief that Mr Dean had raped J on 10 October 2000, two days before the assault. Mr McKinnon had strong reasons for his belief. I quote from his affidavit of 21 June 2004

> "It was about a week before this time, just after Gary had arrived in town from working, J had told me that Gary was making her feel uncomfortable. He had given her a necklace and told her that he liked her a lot. She told him that she didn't like him that way and was my girlfriend.
>
> I was working as a full time road train driver at the time and was regularly travelling in and out of town. I was worried about J so I arranged to have a barbeque at a friend's house where I was staying, at 11 Mile on the corner of McKinnon Road. I organised the barbeque so that Gary could attend because I wanted to see what my friends thought of him and hopefully arrange for him to stay there instead of at J's. I had previously discussed this proposal with Gary and he had agreed to pay $50 a week for rent. This arrangement did not eventuate due to the circumstances relating to J's sexual assault.
>
> On or about 10 October 2000 I phoned J's house at about 5:30 p.m. to confirm the barbeque. Gary answered the phone and informed me that J was asleep. I told him that I would be coming over soon, that I would be having a shower, and that I would be there in about 15 minutes. When I arrived at J's house I yelled out to J but no one came out and I couldn't see anyone. The door was unlocked and this was unusual as J always locked the door even when she was at home.

> J yelled out to me to come in so I entered the house. J was sitting at the end of the table sobbing and saying that Gary had raped her. She was shaking trembling and crying. I immediately phoned the Police and tried to calm her down. She told me that Gary had raped her only 10 minutes beforehand and that he ran out the front door. J also informed me, and I verily believe that she went next door to her neighbour, John (whose surname is unknown to me), where she told him about what had happened before returning to her house.
>
> I noticed a carton of beer sitting on the bench that Gary was going to bring to the barbeque but had left behind. Gary had also left behind other behind other belongings including clothing that he had worn. To my knowledge, Gary never returned for these items nor did he ever request the return of these items."

4. It is Mr Dean's conduct, which gave rise to the allegation of rape, which Ms Spurr, counsel for the First respondent, argues is conduct which contributed to his injury.

5. Mr Dean was charged with the rape of J – having sexual intercourse with her without her consent, contrary to s 192 of the Criminal Code - and committed for trial and at his trial found not guilty. Ms Spurr argues that, notwithstanding that acquittal, I can be satisfied, on the balance of probabilities, that Mr Dean did commit that offence. Further, she argues that even if I am not so satisfied I can be satisfied of conduct by Mr Dean such that it would be appropriate, in the exercise of the discretion created by s 10(2) of the Act, to reduce the amount of assistance otherwise payable under the Act by 100%.

6. Mr Lewis, counsel for Mr Dean, argued that, so far as the question of his client's having committed the offence of rape was concerned, the jury's verdict of not guilty was the end of the matter, was declarative, final and binding. I am not sure that this is correct. I agree with Mr Lewis that it is unseemly to revisit the evidence in a criminal trial as part of an enquiry directed at the question whether the accused was probably guilty of the crime of which he was acquitted. But I can see no reason of principle why it should not be done, where necessary. In particular I am of the opinion that

the Northern Territory of Australia, the first respondent herein, is not estopped from raising the question, being a (slightly) different party from the Queen, in whose name the indictment against Mr Dean was laid.

7. There is in logic, no inconsistency between a verdict of Not Guilty, and an assertion that the accused probably was guilty. Indeed, defence counsel have been known to address juries acknowledging that the jurors could probably be persuaded that he might have done it – he probably did it, even – but that they must still acquit because they cannot be satisfied beyond a reasonable doubt. There is also the imperfect analogy with these many instances where an accused acquitted of a criminal charge of assault has later been successfully sued in a civil action for assault, trespass against the person. The analogy is imperfect because the two species of assault do not have quite the same elements, but the instances do go to show that a jury's verdict of not guilty is not necessarily the end to all legal inquiry into the matter.

8. Section 12(f) of the Act has it that the Court shall not issue a certificate:

> "in respect of an injury or death that occurred during the commission of a crime by the victim".

9. In my opinion that subsection is clearly not relevant in this case – whether or not Mr Dean committed a crime, his injury occurred two days after, not during the commission of whatever it was. If s 12(f) were relevant, I think I would be bound to scrutinise the evidence of pertaining to what Mr Dean did that day with a view to deciding whether it amounted to the commission of a crime. In looking at the evidence I would have before me both more and less evidence than the jury did at trial – more, because I have affidavits and statements made before and after the trial, and the transcript of the committal; less because I have only transcript of the trial, not live witnesses.

10. All the same, it would be an uncomfortable thing to revisit the trial evidence for that purpose, and it seems to me that there are arguments of policy that

militate against doing so unless it is strictly necessary. In addition, there is the awkward question, best avoided where possible, of what it means to prove the commission of a criminal offence on the balance of probabilities. In *Briscoe and Others v The Northern Territory of Australia and O'Bryan*, an unreported judgement of mine of 27 October 1999 (9905503, 9905504, 9905506), I wrote:

> "It seems to me that it is no simple thing to understand what is required to prove the commission of a criminal offence on the balance of probabilities.
>
> The task of the prosecution at the trial of the defendant for that offence is clear. The jury must be satisfied beyond reasonable doubt, that each and every element of the offence has been made out by the evidence. If the jury has a reasonable doubt as to one element's being made out, the prosecution fails. Likewise, clearly enough – where proof is on the balance of probabilities, if the trier of fact is not satisfied to that standard as to one element of the offence, as I am not satisfied as to the element involving the ordinary person in this case, then the offence's having been committed is not proved. That is straightforward enough.
>
> The more troubling instance is one where the trier of fact is satisfied of each element of the balance of probabilities. As to one element, the proof may be overwhelming, and the court's confidence as to its being the case may approach certainty. As to another element, the degree of confidence may be no stronger than that it is a bit more likely than not. In relation to a third element the degree of confidence may be somewhere in between. A question arises as to how these various items of uncertainty – tiny, large or middling – combine in the decision whether the offence has, on the balance of probabilities, been committed. Each finding incorporates its own uncertainty.
>
> It is fatuous to ascribe percentages to the degree of certainty or doubt one feels; and it is never that case that each of the salient facts, or elements stand to be decided on material entirely independent from that pertinent to others. Notwithstanding that, if one may be fatuous and unrealistic enough to imagine a mater in which there are four necessary findings to the plaintiff's case and the tribunal comes to the conclusion that in each instance the probability is 80 per cent that such was the case (ie that it is four times as likely as not), and if each of these findings is, as it were, and independent variable, then the

probability of all four is $(8/10)^4$, which is a fair bit less than 50 per cent (4096/10000). I am unsure whether, in a case like that, one would regard the "fact" (of the offence) as proved. In another example, where the applicant needs to prove three (or four) independent things, and does so in each instance barely; that is, satisfies the tribunal that each is fractionally more likely than not, but no more, then the product of the several uncertainties would be slightly better than a 1/8 (or 1/16) chance that all three (or four) were the case. In such a case as that, I am sure that it would be perverse and wrong for the tribunal to be satisfied that an offence had been committed (notwithstanding that the tribunal was satisfied that each element of the offence was – just – made out).

11. Section 10 requires me to have regard to "…the conduct of the victim…" It does not, I think, require me to characterise that conduct in terms of whether it amounts to a criminal offence, and in a case like the present one, it is in my view better to avoid that characterisation. I might note in passing that magistrates are accustomed to such avoidance when sitting as Coroners, to comply with s 36(3) of the *Coroners Act*.

Mr Dean's Conduct

12. There is not among the very large amount of material filed in evidence in this matter a short coherent account by Mr Dean himself of what happened between him and J. He did not give evidence at his trial (see p 139 of the trial transcript annexed to an affidavit of John McCormack at JM 12). He did take part in a recorded interview with police, which filled 6 audiotapes transcribed as annexures JM 17-22. Perhaps the most compact rendering of his account occurs towards the very end, on pages 2-3 of annexure JM 22:

INGRAM: Did you have permission to have sex with J?

DEAN: Well she didn't ask.

INGRAM: Did you have permission – did she let you know – did – did you have her consent to have sex with her?

DEAN: Yeah, we both went to the bedroom.

INGRAM: How do you know you had her consent?

DEAN: 'Cause I went in there straight after her like she was cuddling me in the lounge, we was standing (inaudible) in the lounge room and we was cuddlin' and I kissed her a few times on the neck an' that and' – and followed her into the bedroom.

INGRAM: Did she at any time tell you that she wanted to have sex with you?

DEAN: No

INGRAM: Then how do you know she wanted to have sex with you or she was letting you have sex with her"

DEAN: I was under the impression.

INGRAM: Okay

DEAN: And I – yeah.

INGRAM: That's fine. You said that um – you shouldn't have got her or that – 'cause she was intoxicated or drunk, was taking advantage of her, you said words along those lines, is that correct?

DEAN: Yes

INGRAM: Okay. Why do you say that?

DEAN: Well it's like taking advantage of something when you don't know what they're doin'.

INGRAM: When you wanted to have sex with her did you think she was really drunk or did you know she was really drunk?

DEAN: No we – we're always getting' drunk together, it's just one of them things, we're just with each other you know, ragin.

INGRAM: Okay, so when – so you know how she is when she gets drink then, is that what you're saying?

DEAN: Yeah, just the same like real crazy (inaudible), I dribble um – bullshit an' that when I'm drunk, that's the way we are.

INGRAM: Okay. I'm just trying to understand that you've said that you took advantage of her but then you – then you're also saying that you didn't think she was that drunk, that she was okay, I'm not quite sure what you mean.

DEAN: Well she was drunk, yeah.

INGRAM: Yeah.

DEAN: I was drunk, I dunno', at the last minute she just realised that no, she didn't wanna', so she shoved me off, pushed me away. I still say I didn't rape her.

INGRAM: Do you understand what sexual intercourse without consent means?

DEAN: Yeah, rape.

INGRAM: Okay. But you understand that when you have sex with someone that they are letting you, they're saying it's okay from the beginning?

DEAN: Yeah, well she was lettin' me but then changed her mind.

INGRAM: How do you know she was letting you?

DEAN: 'Cause she was moaning when I was – went in the bedroom and just laid on top of her, we were just on the bed and I was rubbing her boobs and down there and she was moanin'.

INGRAM: Did she say anything at all?

DEAN: No, I was kissing her on the neck.

INGRAM: Do you think that she knew it was you doing it and not Mongo, if she was moaning, if she was drunk?

DEAN: Yeah, probably, might.

13. A little further towards the end, speaking of Mr McKinnon's assault on him Mr Dean said (p 5 of JM 22):

BAHNERT: If she was asleep –

DEAN: She wasn't asleep, I know she wasn't. She's changing things around, she wasn't asleep, maybe she thought she was asleep, I don't know, but she wasn't, she just changed her mind. Feelin' guilty, I dunno', just and now all this happening so, I dunno' maybe just – it's all – why all this happening, I didn't rape her.

INGRAM: Do you want to make a formal complaint against the person who did that to you?

DEAN: No, it's her boyfriend, he's –

INGRAM: When I say a formal complaint, do you want him to be – do you want to press charges against him for assault?

DEAN: No, he was defending him um – his woman.

INGRAM: All right.

DEAN: So - - -

INGRAM: We have to give you the opportunity it you want to press charges against him.

DEAN: No, nah. It wouldn't be right.

INGRAM: That's your choice, I can't –

DEAN: Yeah, well that's the way I think.

And on p 6:

BAHNERT: What else?

DEAN: I said "Look, I'm sorry mate, I didn't mean to …", I think I said I had sex with J, I didn't mean to, I'm sorry. I didn't know what else to say.

BAHNERT: What do you mean you didn't mean to?

DEAN: Well that's her boyfriend, you shouldn't.

BAHNERT: Was anything else said?

DEAN: Yeah he said he was going to the toilet and his friends said ah – "Do you – do you know him?" and I says "Oh – I've known J for a while, about ten years ago", they said "No Mongo", (inaudible) "No, I only met him a few days ago", something like that. They said he's a wild bloke. And Mongo come back, didn't – I don't think he said anything and then he yelled out "You mongrel" and started swinging, picked up a stool and that's how I got all this.

BAHNERT: Why do you think he was upset?

DEAN: 'Cause I had sex with his girlfriend.

BAHNERT: Do you think there was any other reason?

DEAN: Yeah well goin' by her statements he would have told her – told him that um I took advantage of her.

BAHNERT: How?

DEAN: While she was asleep, I think her statement – that's the statement she's making.

14. J's account can probably be inferred from what I have reduced from Mr McKinnon's affidavit and Mr Dean's police interview, but for the sake of completeness I shall reproduce the part of her statement to police central to her allegation of rape. The statement was annexed to an affidavit by J produced, it seems, for the purpose of her victims assistance claim against the Northern Territory and Mr Dean. I don't know whether that claim was determined before J died, but I suspect it was not. From the fifth and sixth pages of that statutory declaration (which pages are not numbered):

> "We got back to the flat I was very tired and fairly drunk as I hadn't eaten all day. I still knew what I was doing and decided to go and have a sleep. I told Gary I was so tired I'm going to have to crash out for a while. I then went into my bedroom and left the door ajar so that Gary could still use the bathroom if he wanted to. I then went

into the bathroom and changed out of my denim jeans and put on a pair of purple boxer shorts. I still had on the black lace sleeveless shirt. I then got into bed and went to sleep.

I was asleep maybe one or two hours when I woke up when I felt someone on top of me. I opened my eyes and saw Gary, who I now know his last name is Dean, he was kissing me on the face and I was also able to feel that he had his penis inside my vagina. I then started to scream at him "Fuck off, get off me, Gary Fuck off" I was screaming this at the top of my lungs and it caused my throat to go sore. I kept screaming this over and over. There was daylight coming in through the bathroom window and the lounge room door and I could clearly see it was Gary. I was able to see his short auburn hair and his face that was wrinkled around the eyes. He was saying things to me while I was screaming but I wasn't taking any notice of what he was saying but I was able to recognise his voice. I was laying on my back and he was laying on top of me with our chests touching. My legs were slightly apart and he was laying between them and had his penis inside my vagina. I could feel it inside me as he was erect and thrusting his penis in and out of my vagina. He would have thrust his penis into me about two times from when I was awake and knew what was going on. I then was able to push him off. Throughout the whole time I continued to scream at him as I said before. I remember him being off me I leapt up and then noticed my boxer shorts were down around the top of my knees and I had to pull then back up.

The next thing I remember I was in the flat next door where John the old bloke in the wheel chair lives at number 66. I was hysterical telling him that I had been raped, that Gary had raped me. I was really upset and completely shocked that he could have violated me like that.

I then heard Mongo's car and I ran out to him and told him what had happened. I told him Gary had raped me and told him the details of how it had happened. I then went back into the flat and I noticed that Gary and all his belongings had gone".

15. Consideration of all of the surrounding material bearing first, upon the long standing non-sexual friendship between Mr Dean and J, secondly upon Mr Dean's unprecedented purchase of a necklace for J, and thirdly upon Mr Dean's flight immediately after the accusation was made against him tends to evoke doubts about the reliability of his account, of the event, and to add weight to J's. The material bearing on the previous day or two, however,

makes it pretty clear just how much alcohol Mr Dean and J had drunk, how little sleep they had probably had, and consequently, how unreliable their perceptions may have been at the time of the event and how unreliable their memories after it. I am not surprised that Mr Dean felt some guilt, vis a vis Mr McKinnon, having at the least, having drunkenly taken advantage of Mr McKinnon's drunken girlfriend. Mr Dean seems to have understood – approved even – Mr McKinnon's being angry with him in either event.

16. Had Mr McKinnon returned to J's house before Mr Dean made his escape on 10 October 2000, and responded to J's accusation by assaulting Mr Dean, that would have been one thing and Mr Dean's conduct, whether ungallant or criminal, would, in my opinion, have been properly characterised as conduct contributing (to a lesser or greater degree) to the commission of the crime against him. But that is not what happened. As Mr Dean wrote in his affidavit of 25 March 2004:

> "The circumstances of the assault were these. On Thursday 12 October 2000, at approximately 7pm, I went to have a few drinks at the Blue Healer Bar, located in Mitchell Street Darwin. At the time, I was on 7 rostered days off from my employment at the pearl farm. I had been sitting at the main bar, by myself, for about 1 hour, when the second respondent, a much larger man than I am, who I knew as Mongo, entered. He stood next to me, on my right hand side, and ordered a beer. He said "Hi" to me. When his beer was served, he placed it down on the bar and said: "I'll be back. I just have to go to the toilet." When he returned to the same standing position, he said: "What's going on?" referring to me having sex with his girlfriend J Reid. I replied: "Look I'm sorry, me and J slept together". McKinnon then asked me several times to step outside. He said this was because he wished to talk to me. On each occasion I refused. He was standing about ½ meter away from me. I was still sitting down.
>
> Suddenly, McKinnon hit me on my jaw with a clenched fist. The impact of the blow knocked me off my seat but I managed to remain standing. I then ducked down and attempted to get past him heading in the direction of the door. As I was doing this, I saw McKinnon pick up a bar stool raise it over his head and swing it at me, striking me across my back. This knocked me down onto my knees. I curled up to protect myself. A second blow from the bar stool knocked me

flat to the floor where I lay curled up and was struck once more with the stool. While I was on the ground, MrKinnon started to kick me continuously. He started kicking me in the back then went to the head area, which my hands were protecting. Then he dropped his knee into my left side near my kidneys and whilst kneeling on me punched me several times to the head. Eventually he stopped, stood up, walked back to the bar and sat down".

17. Mr McKinnon's account differs in some of the details. He wrote in his affidavit of 21/6/04:

> "On 12 October 2000 at or about 8:00 p.m., I went to the Blue Heelers Bar. When I arrived, I saw Gary at the bar. I walked up to Gary and said, "How're you going?" I was really angry and upset and wanted to hit Gary but the Police detective had warned me that, in the long run, it wouldn't be good for me to do that and so I refrained from doing so. Gary did not reply to my query and I ordered a drink while I stood there and then went straight to the toilets where I rang the Police from my mobile telephone. I told the Police to come and get Gary but they said that it had nothing to do with them and it was out of their hands as the detectives were dealing with the matter. In reply to Paragraph 6 of Gary's sworn affidavit of 25 March 2004, Gary did not reply to me as he says nor did Gary inform me that he had slept with J.
>
> Nothing was said after I came back to the bar from the toilet, and I immediately approached Gary and punched him in the side of the head before he had time to say anything. I was so angry, upset and frustrated and when I walked out into the bar, Gary was still sitting there and looking at me when I punched him. When I hit Gary, he fell to the ground but jumped up quickly. Gary stood facing away from me but towards the door. I then picked up a bar-stool and hit Gary across his back one time, causing Gary to fall to the floor again. In reply to Paragraph 7 of Gary's affidavit, I did not hit Gary more than once with the bar-stool. Gary then rolled towards the wall and I kicked Gary three times in the middle of the back. I also punched Gary approximately six times in the head".

18. Mr McKinnon gave evidence at Mr Dean's committal and trial. On the former occasion he exercised his right to decline to answer questions concerning the assault. On the latter he appears not to have been asked anything about events in Blue Heelers.

19. The two accounts coincide in many respects. Significantly, both have it that Mr Dean was in the bar before Mr McKinnon arrived. It cannot be suggested therefore that Mr Dean had gone looking for trouble. Also significantly, there is no suggestion that anything Mr Dean then did or said was of a nature calculated to inflame Mr McKinnon's ire (which was already fairly hot). In Mr Dean's account his words were apologetic. In Mr McKinnon's account there were no words. (I note that in Mr Dean's interview with police on 13 October, he claimed to have said apologetic words – see above).

20. It seems to me that the "conduct of the victim" spoken on in s 10(1) of the Act, seen in the light of the phrasing of s 10(2) "the victim's conduct contributed to the injury or death of the victim", entails a fair degree of proximity, especially temporal proximity, between the conduct of the victim, on the one hand, and the injury or death, on the other. Such proximity would certainly be lacking between the conduct of a paedophile, on the one hand, and the beatings administered to him by fellow prisoners after his conviction and imprisonment, on the other. Similarly, proximity would be lacking in the case of a spearing administered after due consideration as "payback" according to aboriginal custom or law. It seems to me that the necessary proximity is lacking in the present case. Things might be different if Mr Dean, knowing that Mr McKinnon was very angry with him, had gone looking for him in order to try to pacify him. That might be conduct as stupid as the conduct of the unsuccessful claimant in the *Re Manson and Criminal Injuries Compensation Board* (1989) 68 OR (2d) in which, at p 117 Campbell J said:

> "In this case the appellant ought to have foreseen the probable consequence of twice inciting a further dispute with an armed man who had just put a gun to his head and threatened to blow his head off. The appellant got an injury of the type that any reasonable prudent person should have foreseen, that he should have foreseen."

21. Here the case is very different. Not only did Mr Dean not go looking for trouble, and not only did he not incite it. Additionally, the first contact between him and Mr McKinnon went off peaceably enough. It was only after Mr McKinnon's return from the toilet that he boiled over and attacked Mr Dean without warning. In my judgment, even if I were persuaded that Mr Dean had raped J two days before – even if he had been found guilty of that rape – his crime would not in these circumstances be characterised as conduct contributing to his injury.

The Injuries

22. For the purposes of this section of these Reasons the central document is Mr Dean's affidavit sworn 25 March, ("the affidavit").

23. Mr Dean went home after the assault to the backpacker's lodge further down Mitchell Street where he was then staying. He was sore all over and the pain worsened during the night after he went to bed. Next morning he went to tell his employer that he was unfit to return to work, because of his injuries, then went to the Royal Darwin Hospital. The medical notes made upon his admission disclose injuries consistent with the assault described by Mr Dean and Mr McKinnon. An entry made on 13/10/00 speaks of "multiple abrasions and scratches over arms abrasions over back (shoulder blades and ___ ___". The writing then becomes illegible by me, before speaking of Mr Dean's left and right hands. These, and Mr Dean's wrists, are the seat of his ongoing problems. A report on radiological examination of the wrists dated 7/12/00 says:

> "….The left hand is fractured at the base of the 2nd metacarpal with maintenance of normal alignment……
>
> …..RIGHT WRIST
>
> There is a fracture through the waist of the right scaphoid bone which is unchanged in alignment from the previous study of the same day. The fracture appears to be sub acute as the fracture lines are

slightly irregular and sclerotic. Clinical correlation is required. There appears to be slight narrowing of the scaplic-henate joint space……

BOTH HANDS

The right scaphoid displays an unreunited old fracture with a secondary carpal collapse instability pattern. There is also a fracture which appears more recent involving the base of the left 2nd metacarpal. This fracture extends into the carpometacarpal joint. No other long pathology."

24. Mr Dean gives an account of the possible cause of the old injury to his right wrist. In paragraph 3(c) of the affidavit, (an account of his work history, and apparently speaking of some time in the 1970s) he writes:

> "For a brief period I went back to dairy farming work in South Australia; in the course of this work I was kicked very hard in the right wrist area by a cow; I worked through the consequent aching pain (this lasted several weeks) and had no medical treatment for this injury; at the time of [the assault on him]… I was experiencing no problem or difficulty with the right wrist."

25. In response to letters from Mr McCormack, Mr Dean's lawyer, A/Prof John Hart, consultant orthopaedic surgeon provided a number of reports dated 25 September 2003, 24 October 2003 and 8 December 2003. Concerning Mr Dean's right wrist injury, Prof Hart in his first report wrote:

> "I now respond to the specific questions outlined in your letter dated 14 July 2003:
>
> *1. Any exacerbation of, or other relevant inter-relationship between the pre-existing un-united fracture of the right wrist and the injury to the right hand left second metacarpal joint caused by the assault, and the likely effect on Mr Dean's capacity to undertake heavy manual work; in any event has the trauma of the assault exacerbated the un-united old fracture, and if so in what manner?*
>
> Mr Dean claims he was struck on both wrists when he was attempting to defend himself against the assault in the bar on 12 October 2000. When he presented to the Emergency Department at Darwin Hospital however there is no record of him complaining of pain in his right wrist but more of pain in his left wrist and his right forearm.

> Nevertheless his right wrist was X-rayed and did demonstrate an un-united fracture of the right scaphoid which was considered to be old. As stated in my report he did sustain an injury to his right wrist some time earlier when he was kicked by a cow for which he never sought medical treatment. He claimed to have had no problem with his wrist prior to the episode in the bar. This would therefore constitute an aggravation of a pre-existing injury if in fact his wrist was injured in the bar incident".

In the second, Prof Hart wrote:

> "From the hospital notes there is some doubt as to whether Mr Dean had right wrist pain when he presented to the Emergency Department at Darwin Hospital following the assault at the bar. He told me that he developed pain in his right wrist after the incident, although this was not a major symptom at his initial presentation.
>
> Following my review of the reports and the comments made by the Emergency staff and Mr Nyunt in his Outpatient appointment notes, it appears that the lesion in Mr Dean's right wrist was an ununited fracture of the right scaphoid and, in my view, occurred as a result of the injury that he sustained some years earlier as the result of receiving a kick to his right wrist from a cow.
>
> The movements of his right wrist are significantly restricted compared to the left. In the absence of acute pain on movement and his ability to work in his very demanding job, I suspect that this is due to degenerative change rather than an ongoing acute problem in his right wrist.
>
> You have queried my response to question 8 and this is understandable. Basically I am saying that the long-term effect of the injury Mr Dean sustained in the bar is minimal because I suspect that the need for wrist fusion most likely emanates from his initial injury rather that from this more recent injury. In view of the fact that he has been able to continue with his current job, the injury sustained to his right wrist in the bar was an aggravation of a pre-existing disorder, which was temporary and has now resolved."

And in the third (Mr McCormack not giving up easily) Prof Hart wrote:

> "I have previously reported to you on two occasions concerning your client Mr Gary Dean. I have now received X-rays undertaken on 30 October 2003. As you correctly point out it is a pity that stress views were not obtained. The x-rays do show an old fracture of the waist of the scaphoid with a clear non-union and possibly some

avascular changes in the proximal pole. I could see no evidence of arthritis in his wrist on the X-rays that I have seen, not is there any evidence of increased space between the lunate and scaphoid to indicate a scapholunate dissociation, but I agree with you that stress views would be necessary to absolutely exclude this abnormality."

26. In the face of that material I cannot be satisfied on the balance of probabilities that Mr McKinnon caused anything more than a transient aggravation to a pre existing injury to Mr Dean's right wrist. If Mr Dean has experienced serious problems with that wrist – he says he has and I have no reason to doubt him – these problems, that pain is not proved to be referable to the assault. Rather, it would seem very likely to be coincidental. Mr Dean's old injury – from the cow's kick, if that was the cause – has caught up with him, perhaps brought out of its slumber by the extremely vigorous work he does, or perhaps brought more into his consciousness by association of thought about the new injury, to his left wrist.

27. In relation to that wrist, Prof Hart wrote in his first report:

> "6. *Whether surgery remains indicated for the left wrist, and if so its nature and prognosis;*
>
> The fracture of the left metacarpal was a relatively minor injury. It was an undisplaced fracture and should not lead to any significant long-term problems. Movements of his left wrist are almost back to their normal limits and I doubt that any surgery will be required for his left wrist."

28. It appears from the affidavit that Mr Dean's problems with this wrist are much less serious than with the right. It is worth reproducing paragraphs 24 and 25 and some of 26 of the affidavit in which Mr Dean describes his work:

> "24. Shell cleaning is the most difficult and arduous work I have ever done or know of. It must be done in all weathers and sea states. On the scale of difficulty and discomfort, it is about as remote from my earlier job as a gardener/odd-job man as it is possible to imagine. Although, strictly speaking, I am in an age bracket where the demands of this kind of work should be beyond me, I have

persevered with it since my return to work, because apart from my wrists, especially the right, I am physically fit. Moreover, at least in the beginning I had thought there was some prospect I might be able to get back my former gardening/odd-job employment dream job I lost. If I am unable to keep up with the physical demands of my present work, I will be dismissed from my job. I believe if I lose my present job I will have difficulty finding any employment. This is because of my lack of skills other that as a labourer, and my age.

25. The work duties of a shell chipper are these. Oyster shells to be cleaned and submerged in panels hanging from lines strung between buoys. There are 2 lines between each pair of buoys. The cleaning team is in a boat. It is winched along the line that is being worked. There are 70 panels per line and between 6 and 8 oysters to a panel. Working flat out, it takes about ¾ of an hour to traverse a line. All work is performed from the standing position and involves bending over the shell being cleaned. The boat we work from is moving continuously with the sea conditions. This work is done in all weathers. As the workboat is winched along the line, the panels are brought into the boat, and given a high-pressure wash. Then, while the shell is still in the panel it is placed on a plastic covered mesh where barnacles are scraped off manually with a chipper. The work requires continuous use of both hands. I chip with the right hand, and hold the shells with the left. I use mainly the left hand for pulling on ropes.

26. These days, at the end of each working day, and quite apart from the pain, I am exhausted. As soon as I have showered and eaten my evening meal I retire to bed. My working hours are spent with younger men, who want to work especially hard to earn performance bonuses. I have no choice but to keep up with them or I would be put out of the team and off the job. I do not believe I will be able to keep up this employment much longer because, regardless of my right wrist and hand difficulties, and the pain in the left wrist and hand, the physical demands are beginning to become too much for any person of my age."

29. In paragraph 15 of the affidavit Mr Dean writes at length of the pain he experiences from his right hand in consequence of this arduous work. He does not mention any difficulty with the left. In paragraph 18 he again touches on the "recent deterioration of my right wrist condition" when discussing whether surgery to that wrist might eventually be the option he chooses. The left is not mentioned. As has been seen above, in paragraph

24 he mentions both wrists "especially the right", and in paragraph 26, pain in both.

30. In paragraph 28, Mr Dean writes:

> 28. When I was seen by Hart, in September 2003, I reported to him that I experienced numbness in the right wrist area at the end of each day's work as well as sharp pain in the left wrist around the base of the second metacarpal when pulling on ropes or using the left hand vigorously. Since then, the right wrist condition has deteriorated, and there has been no improvement with the left."

31. The rest of that paragraph speaks further of the right hand and not of the left. In paragraph 29, speaking of the period of his convalescence after the assault Mr Dean writes he "…could do nothing with my hands….I was in continuous pain and discomfort." In paragraph 31 he writes of his work leading to "…stress to the wrists, especially the right…" and goes on about the right.

32. In the light of all that it seems to me that the comparatively minor pain in the left wrist reported by Mr Dean cannot be certainly associated to the effects of the assault. It is at least possible that the extraordinarily demanding nature of his work would of itself cause pain of the order spoken of in the affidavit – as if does in respect of back pain, which Mr Dean speaks of in paragraph 31 but does not seek to attribute in any way to the belting Mr McKinnon gave his back with the bar stool. However, taking all things together, it appears to me more likely than not that most of Mr Dean's suffering in respect of his left wrist is caused by the injury caused by the offence. Mr Dean is likely to go on experiencing that pain as long as he goes on working as a shell chipper. By the sound of it, that will not be for much longer (Mr Dean will be 50 next year). In the absence of the exacerbation caused by that difficult work, I am not satisfied that Mr Dean is more likely than not to go on suffering pain in that wrist. That is to say, the effect of the injury is not likely to cause continuing loss to the amenities of his life for much longer.

33. In respect of pain and suffering arising from the assault and during the period of convalescence I would allow an award of $6,000. In respect of the continuing pain and suffering (from the left wrist only), and loss of amenities of life – I would allow an award of $1,500. In respect of the fear Mr Dean has of further assault by Mr McKinnon, I regard these as not a mental injury, but rather a rational – I hope, mistaken – belief and I have included these fears in the components that have gone into the loss of amenities of life.

34. In respect of Mr Dean's loss of wages I am satisfied that overall he lost 450 hours' of wages while injured and convalescent (see annexure GD7 to the affidavit). For some of those hours he was paid by using up annual leave; for others by using up sick leave; and some were taken as leave without pay. The first and last categories are straight forward enough and Mr Dean is clearly entitled to be compensated for these hours. The question of sick leave is less obvious – sick leave credits are not, unlike annual leave credits, as good as money in the bank. However, given what I know about Mr Dean's state of fitness it seems very likely that he will need all the sick leave he has ever earned with his employer. That being so, it seems clear to me that his use of sick leave during his convalescence ought to be viewed as "a pecuniary loss to the victim as a result of his…total…incapacity for work" (s 9(1)(b) of the Act).

35. That being so I am satisfied that he has lost all the earnings he would have made in those 450 hours, namely $4,128.00 gross. As I understand the law, the award I make ought to be the value of that amount net of income tax. I do not have that figure before me as far as I can see. I will adjourn the matter for the parties to see if they can either agree on the appropriate net figure (in the 2001 – 2002 tax year), or agree on material they can provide to me to enable me to do the necessary sums.

Dated this 15th day of April 2005.

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R J Wallace
STIPENDIARY MAGISTRATE