CITATION:	*Dandy v Northern Territory of Australia* [2005] NTMC 046
PARTIES:	BERYL DANDY
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Crimes (Victims Assistance) Act (NT)
FILE NO(s):	20406060
DELIVERED ON:	21 July 2005
DELIVERED AT:	DARWIN
HEARING DATE(s):	19 July 2005
JUDGMENT OF:	A/JR Day

CATCHWORDS:

Crimes (Victims Assistance) Act – s.4 - definition of 'injury' - meaning of 'bodily injury'- sexual assault - quantum

REPRESENTATION:

Counsel:

Applicant:	F. Davis
Respondent:	P. Tregear

Solicitors:

Applicant:	Davis Norman
Respondent:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 046
Number of paragraphs:	19

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

No. 20406060

BETWEEN:

BERYL DANDY
Applicant

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR JUDGMENT

(Delivered 21 July 2005)

ACTING JUDICIAL REGISTRAR DAY:

Preliminary

1. By application filed 9 March 2004 the applicant seeks an assistance certificate pursuant to s.5 of the *Crimes (Victims Assistance) Act* ('the Act'). The applicant asserts that she is a victim within the meaning of the Act in that she was sexually assaulted at Katherine on 3 December 2003 and that she has suffered injury as a result of the commission of the offence.

2. The evidence upon which the applicant relies is contained in her affidavit of 12 October 2004 and the affidavit of Pamela Tregear affirmed 19 July 2005.

Was an offence committed

3. No person has been convicted of an offence in this matter. A prosecution was commenced however a *nolle prosequi* was filed and the accused discharged on 14 April 2005. No reason for the filing of the *nolle prosequi* was given in this proceeding.

4. It is therefore for the applicant to prove that, on the balance of probabilities, an offence has been committed. As has been often stated in this jurisdiction, the application of the civil standard of proof is tempered by the approach described by Sir Owen Dixon at p.36 of *Briginshaw v. Briginshaw* (1938) 60 CLR 336 (see for example the decisions of Mr. Loadman SM in *Sambono v. Northern Territory of Australia & Anor.* [2003] NTMC 35 at paragraph 35 and *Noble v. Northern Territory of Australia & Anor.* [2003] NTMC 57 at paragraphs 12 and 14).

5. I have little difficulty in finding in this matter that it is more likely than not that the applicant was the victim of a sexual assault contrary to s.192 of the *Criminal Code* (NT). Annexed to the affidavit of Ms. Tregear is a copy of the applicant's statement to police which was given on 4 December 2003, the day arfter the offence (or possibly the same day as the offence occurred around midnight). The statement is consistent with the Katherine District Hospital notes and the report of Dr. Indra Kalirajah dated 27 May 2004, which documents are also annexed to Ms. Tregear's affidavit. These documents confirm that the applicant presented to the Katherine Hospital at 0.30 hours on 4 December 2003 where she complained of a sexual assault. None of this evidence was contradicted in any way.

6. It was suggested by counsel for the respondent that the applicant's evidence is unreliable because the applicant was intoxicated at the time of the offence. Whilst the applicant's intoxication is admitted by her and recorded in the Katherine Hospital notes there was no evidence to the effect that the applicant's perception or memory of the events was significantly compromised by her alcohol consumption. On the contrary, in the statement given to police the applicant gives a detailed account of the offence.

7. It was further submitted by the respondent's counsel that the applicant's evidence is unreliable because there is an inconsistency between the applicant's account in her statutory declaration to police as to how she came

to be in the company of the man who assaulted her and the account she is recorded as having given to the Katherine Hospital. The applicant states at paragraph 6 of her statutory declaration that she met a man "in the driveway of the bottle shop at Crossways" and walked with him "to the train". The applicant evidence is also that she had seen the same man earlier in the eveing whilst drinking at the "Last Chance" bar in Katherine.

In Dr. Kalirajah's report of 27 May 2004 the doctor writes:

> "Beryl stated she met a man at Crossways hotel that night and both of them drank alcohol together. When the hotel was closed both of them walked out."

This passage appears to have been taken from the notes made by Dr. Kalirajah when she examined the applicant and completed the sexual assault protocol at Katherine Hospital. Whilst I agree that there is a difference of detail (were they drinking together immediately before leaving for the railway area or not) there could be a number of reasons for this. I note in particular that the purpose for which the doctor's notes were taken and the circumstances were different to the purpose and circumstances surrounding the making of the statutory declaration to police. It is unlikely that the applicant was given the opportunity to check the doctor's notes for accuracy. Further, the discrepancy relates to a matter which is not material to the elements of the offence itself. The applicant's evidence is that when the offender attempted to kiss her and later began to have sexual intercourse with her she repeatedly asked him to stop. The discrepancy in the meeting place is therefore not a matter which is sufficiently material to cause me not to be reasonably satisfied that the offence has occurred.

8. The evidence does not sufficiently identify a particular offender in relation to the offence. However, for the purposes of an application under the Act the identification of an offender is not a requirement. I am satisfied that an offence was committed against the applicant and that is all that is necessary in this proceeding.

Is the applicant a 'victim'

9. An order for an assistance certificate can only be made in favour of the applicant if she is a 'victim' as defined in s.4 of the act. A victim is defined as "a person who is injured or dies as the result of the commission of an offence by another person". 'Injury' is defined as "bodily harm, mental injury, pregnancy, mental shock or nervous shock…".

10. It was submitted on behalf of the respondent that the applicant had not suffered an injury. I do not agree. The evidence establishes that this woman was raped. The act of rape has been found to be 'bodily harm' for the purposes of the definition of injury (in very similar terms to the current definition) in the repealed *Criminal Injuries (Compensation) Act* (NT). In *S. v. Turner* (1979) 1 NTR 17 Muirhead J said at p.20

> "It seems to me that the act of rape, sexual intercourse without consent, must be taken into account and regarded in itself as 'bodily harm' compensable as injury. To hold to the contrary would have the result in some cases of denying other than nominal compensation to those who have been victims of one of the worst crimes of violence known to the criminal law. So in assessing compensation in this case I pay regard to the violation of this young woman's body during the commission of the offence and I categorize such violation as 'bodily harm'."

This approach was more recently approved by Mildren J in *Alfonso v. Northern Territory of Australia* (1999) 131 NTR 8 at paragraphs 13 and 14 where His Honour was considering the current definition of Injury in the Act. Therefore in this case I find that the fact that the applicant has proved that she has been raped and therefore that she has suffered a bodily injury. She is a victim within the meaning of the Act.

11. In case I am wrong about that however I should say that I would also be prepared to find in this case that the applicant had suffered a mental injury as a result of the offence. The applicant's evidence as to this is set out in her affidavit as follows:

"9. Following the sexual assault I experience great shame. I am a married woman and I am now rejected by my partner.

10. I still have nightmares when I relive the sexual assault."

12. In *Chabrel v. Northern Territory of Australia & Anor* (1999) 9 NTLR 69 at 76-77 Mildren J adopted the remarks of Olsson J. in the Full Court of the Supreme Court of South Australia in *T. v. State of South Australia* (1992) 59 SASR 278 at 288 - 289, where the latter said:

> "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 the evidence unequivocally establishes that symptomatology exhibited by a claimant is such as to warrant medical classification as some recognisable, psychiatric condition, as a prerequisite 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 express 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 to 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 has been to bring about a morbid situation in which there has been some more than transient deleterious effect upon a claimant's 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."

The same passage and approach was approved as the appropriate approach to the question of whether there is a mental injury within the meaning of the Act by Martin CJ in *Young v. Northern Territory and Anor* [2004] NTSC 16 at paragraph 6.

13. Applying the above to the present case I take into account that the applicant's evidence is that on 12 October 2004 she swore that was suffering the effects of the offence although it had occurred nearly ten months previously. It is true that there is no medical evidence which supports a finding of any recognisable psychiatric injury in the sense that that term is used in the law of negligence. However, as noted above, such a restriction has been held not to be appropriate when considering the statutory definition of injury under the Act, as long as the effects of the injury are more than mere sorrow and grief causing emotional distress. It seems to me that the continuing feelings of shame and nightmares represent more than a transient negative effect upon the applicant's health such to satisfy the criterion for a mental injury under the Act.

Assessment of Damages

14. I turn now to the question of quantum. The evidence presented by the applicant in this regard can best be described as scanty. The only evidence of psychological effects of the injury are those set out above. The meagre evidence does not state whether the effects have changed over time or, importantly, are likely to do so in the future. Nor is there any detailed evidence about the degree of severity of the symptoms suffered by the applicant. The applicant's evidence in this case contains no details of the way in which her life has been affected as a result of the injuries, except as already noted. There is no evidence about whether the applicant has received counselling, whether her work prospects have been affected or the effect upon relationships other than that with her partner which is briefly mentioned. It seems to me that considerable further evidence might have

been available but it is not before the Court. There may be a reason or reasons for the paucity of evidence in this case but I cannot speculate on that. I am obliged to assess the quantum of the claim based upon the evidence which has been presented, inadequate as it is.

15. There is no evidence from any medical practitioner or psychologist as to the effects of the ordeal upon the applicant apart from the report of Dr. Kalirajah of 27 May 2004 in which she states

> "There should be no permanent damage or disabilities from these injuries and I am satisfied that the patients injuries are consistent with the alleged cause."

16. The notes from the Katherine Hospital indicate that there were no observed physical injuries as a result of the offence, with the possible exception of a graze to the left knee which is described in the notes as a 'sand mark'.

17. The approach to assessment of damages under the Act is that the common law principles of causation and assessment of damages provide no more than a guide to the operation of the statutory scheme as set out in the Act: *Woodruffe v Northern Territory of Australia* [2000] NTCA 8 at paragraph 34. As the Court of Appeal has said (in *Woodruffe*) the scheme of the Act is to provide compensation for the effects of the relevant injury. Damages are compensatory only, aggravated and exemplary (or punitive) damages being expressly prohibited by s.11(a) of the Act.

18. In this case the rape (bodily injury) and the mental injury which flowed from it are the relevant injuries. In view of the state of the evidence any amount which is awarded might seem arbitrary. I take into account the matters referred to by Murihead J in *S. v. Turner* (1979) 1 NTR 17 at p.20 – 22 however, like His Honour in that case, I am forced to the conclusion that there is simply no evidence of significant residual psychological or physical injury as a result of this offence. Accordingly I assess damages in the sum of $8,000.

Orders

19. I make the following orders:

(a.) That an assistance certificate issue in favour of the applicant in this proceeding in the sum of $8,000; and

(b.) That the respondent pay the applicant's costs of the proceeding, to be taxed in default of agreement.

Dated this 21st July 2005

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MEREDITH DAY
A/JUDICIAL REGISTRAR