CITATION:	*Selin v NT of Australia* [2005] NTMC 063
PARTIES:	STEPHEN SELIN
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance) Act
FILE NO(s):	20307222
DELIVERED ON:	3rd of October 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	15th September 2005
JUDGMENT OF:	Judicial Registrar

CATCHWORDS:

Crimes (Victims Assistance) – injury while commissioning a crime – contributory behaviour – burden of proof – insufficient evidence -section 10(2) and 12(f) Crimes (Victims Assistance) Act

Briginshaw v Bringinshaw [1938] 60 CLR 336
Lomax v Northern Territory of Australia (14th February 1997)
Allmich v Northern Territory & Daniel Long [2000] NTMC
Lanyon v NT of Australia [2002] NTSC 6.

REPRESENTATION:

Counsel:

Applicant:	Mr Buckland
Respondent:	Ms Spurr

Solicitors:

Applicant:	Anthony Buckland
Respondent:	Halfpennys

Judgment category classification:	C
Judgment ID number:	NTMC [2005] 063
Number of paragraphs:	108

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

No. 20307222

BETWEEN:

STEPHEN SELIN
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR JUDGMENT

(Delivered 3rd October 2005)

Judicial Registrar Fong Lim:

1. The Applicant has applied for the issue of a Certificate of Assistance in his favour pursuant to section 5 of the Crimes (Victims Assistance) Act ("the Act").

2. The Respondent is opposing the issue of a certificate on the basis of section 12(f) of the Act. Section 12 (f) states that an assistance certificate shall not be issued :

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

3. The Respondent is also arguing that should the Court find that section 12(f) does not apply then the certificate should be discounted by 100% pursuant to section 10(2) of the Act. Section 10(2) states:

> "(2) Where the Court, on having regard under subsection (1) to the conduct of the victim, is satisfied that the victim's conduct

contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate by such amount as it considers appropriate in all the circumstances."

4. The Applicant relies on his affidavits of the 31st of March 2004 and the 13th of August 2005, the documents summonsed from the police file including all of the witness statements collected by the Police, medical reports of Drs Neroni and Loukas, hospital notes from Kintore clinic and the Royal Darwin Hospital and various tax documents.

5. The Respondent relies on the police records and the affidavit of Mr Moussa, the alleged offender.

6. **The Offence -** The Applicant claims that he was assaulted by Mr Moussa on the 29th of September 2002 at the Katherine Hotel. He claims after a verbal argument with Mr Mousa a scuffle Mr Mousa attacked him from behind with a pool cue resulting in the Applicant having a split ear.

7. There are varying versions of the incident by the witnesses but what is clear is that Mr Mousa did in fact hit the Applicant across the head with a pool cue and that is clearly an offence unless justified by self defence.

8. The statements of different witnesses were in the least confusing in their description of the lead up to this assault. Some say that Moussa and the Applicant had words outside of bar before returning inside and carried on the argument inside. Some witnesses say that the Applicant wasat the bar and then challenged Mousa aggressively when he walked by. One witness besides the Applicant says that Mousa first attacked the Applicant.

9. Charges were laid against Mousa but in the end the Director of Public Prosecutions decided to withdraw the charges.

10. The Court must be convinced on the balance of probabilities and to its reasonable satisfaction that the assault occurred and of any mitigating facts

in relation to that assault (Briginshaw v Briginshaw [1938] 60 CLR 336). The court should not allow itself to be convinced on unsafe evidence.

11. For an Assistance Certificate to be refused pursuant to section 12(f) the court must be satisfied that the Applicant had acted in a manner that constituted an offence at the time Mousa hit him with the pool cue, thereby invoking section 12(f). In the alternative the court must consider whether the Applicant's behaviour contributed to the injury he has sustained such that any certificate issued should be discounted by 100% under section 10(2).

12. Mr Mousa's evidence is that he was in fear of his life when he hit the Applicant with the pool cue. He relates that he was just doing his job and trying to calm the Applicant down when the Applicant grabbed him by the throat and had him bent over across the bar. Mr Mousa says that:

> "He had his hand around my throat and he was choking me over the bar. It felt like I was being held underwater and I started freaking out".

13. Mr Mousa states that this incident happened after people had tried to separate he and the Applicant. In the next paragraph Mr Mousa states he doesn't know how he came to be released only that he was and that he felt "extremely shocked and scared."

14. In the next paragraph of his affidavit Mr Mousa states:

> "I remember staggering backwards. I remember seeing him in front of me and watching him going off his head. I don't remember where I got the pool cue from but I remember stumbling and grabbing it in my hand when I was leaning. I remember swinging it at him to keep him away from me."

15. Mr Mousa did have an interview with the police on the 29th of September 2002. This court was not provided with a transcript of that interview however the Master tape log sheet was provided and that gives some

indication of what Mr Mousa said to the police at the time. The following words were noted on the log sheet:

> "People trying to split us up
>
> Still agro – he was
>
> I then let go – split up
>
> He rushed me
>
> Pushed me into bar
>
> Choking me
>
> I reached for post
>
> He was coming at me
>
> Couldn't defend myself
>
> I was scared, rattled
>
> I grabbed pool cue
>
> Hit side of his head once
>
> Situation was then diffused"

16. At the time of the interview Mr Mousa clearly believed he acted in self defence. If the Court accepts Mr Mousa's version of events then it would be clear that the Applicant was injured in the course of his assault on Mr Mousa and section 12(f) would operate.

17. The Applicant tells a different story. The Applicant's statement to the police, taken on the day after the incident, states:

> "Later on in the evening (I can't recall the time), I was standing, facing Joe and talking to him. All of a sudden I felt a hard whack to the right side of my head. I felt a lot of sharp pain."

18. The Applicant does not give any description of the events leading up to him being hit in the head and if his statement to the police is taken on the face of it there was no lead up and he was hit from behind out of the blue. On the statements from other witnesses this is clearly not what happened.

19. The Applicant then swears an affidavit on the 31st of March 2004 in which he reiterates what he had said in his statement to the police. He prefaced his description of the assault with the following statement:

> "I had consumed about three cans of rum and coke.
>
> I do not remember any more after this except being assaulted"

20. The description of the assault is as follows:

> "I recall standing facing Joe and talking to him and then all of a sudden feeling a hard whack to the right side of my head. I felt a lot of severe and sharp pain."

21. The Applicant then files a further affidavit sworn the 13th of August 2005 in which he goes into great detail of what happened that night. The Applicant claims he was at the bar minding his own business when he was approached by Mousa who said something to him about turfing out a troublemaker. The Applicant then says that before he could finish his reply that Mousa grabbed him by the throat and then a fight ensued.

22. In his later affidavit the Applicant seems to have a remarkable recollection of all of the details of the altercation between himself and Mr Mousa so clear is his recollection that he is able to deny specific elements of Mr Mousa's affidavit and put an alternative version of what happened.

23. There is no explanation of how the Applicant's memory can be so clear some 3 years after the incident when only a day later he had no recollection nor did he have such a recollection 18 months after the incident when he swore his first affidavit. At the time of swearing his first affidavit the

Applicant had even spoken with others about the incident and that hadn't even assisted him. At paragraph 10 the Applicant states:

> "My memories appear to have got jumbled when I compare them to what other people told me what happened."

24. Mr Buckland, counsel for the Applicant suggested that the reason why the Applicant's memory had become clearer is that he has been having treatment which has caused him to remember in more detail what happened. This conjecture is not confirmed by the Applicant in his affidavits nor is it confirmed by the reports of the Doctors who have been treating the Applicant. Dr Neroni states that the Applicant has had "memory problems' but does not make any suggestion that those "memory problems" were in relation to the incident or that with treatment his memory of the incident has improved. In my view Dr Neroni has not been asked the question and therefore has not provided an opinion on this issue.

25. The court cannot make the assumption, as Mr Buckland is suggesting it does, that the Applicant's memory has improved as to the detail of the fight because he has had treatment, there simply is no evidence to support this view.

26. Dr Loukas' report is of some help in explaining the Applicant's supposed recall of the details of the incident. In his report the doctor repeats the description given to him by the Applicant:

> "He stated that his overall recollection of the event was not good but he did remember being grabbed by the throat and that he was trying to remove the assailants hand from his throat. Mr Selin felt very fearful during this episode. Mr Selin also remembered being in the car park later and then going to hospital. Mr Selin was able to fill in more details of the episode from what he had been told by his friend "Joe"."

27. There is no suggestion by Dr Loukas that the Applicant has regained his memory through treatment rather that Mr Selin filled in details from what he

had been told. It is my view that the Applicant has very little independent memory of the incident and has reconstructed the incident in his mind from what he has been told by his friend and what he has read in the police witness statements. Accordingly the Applicant's evidence contained in his second affidavit and any reference to his description of events prior to being hit in the medical reports must be given very little weight.

28. It is important to closely analyse the evidence of the independent witnesses to the assault before the court can come to a conclusion as to the most probable version of the facts.

29. The statements from all of the other witnesses have a lot of inconsistencies about the detail of the events leading up to the assault and the moments immediately before Mousa hit the Applicant.

30. There were two witnesses who supported Mr Mousa's claim that the Applicant was verbally abusing him and acting aggressively towards him at the time he hit him with pool cue. Those witnesses were Mr Adams (Mousa's boss) and Ms Eccleston a fellow employee.

31. Ms Eccleston states:

> "George was trying to keep his distance from the other fellow to avoid further conflict, but he just kept on following George and acting aggressively,. I then saw George pick up a pool cue and told the man something I didn't hear. He didn't listen and kept coming towards George. George swung the pool cue towards the man. It hit him in the head."

32. Mr Adams states:

> "While they were apart the white male was yelling abuse towards George and appeared very threatening. At this stage we were right next to the pool tables.
>
> I was facing the white male and George was behind me. I was distracted momentarily when all of a sudden I heard "crack". I saw

> the white male hold the side of his head. He was saying "my ear my ear". I turned around and saw George holding a pool cue."

33. Mr Griffiths, a visitor to Katherine, Mr Adams nephew, states that Mousa and the Applicant had been separated by Adams and were walking along the length of the bar:

> "The order as they walked in single file was the bouncer, the manager and then the white male.
>
> I then saw that they were walking past the pool tables. As they did so I saw the bouncer pick up a pool cue off the table. I saw that he turned around to face the white male and then he swung the pool cue in a sideways arc like a baseball swing."

34. A further witness who actually saw the assault has a completely different version, Joseph Solly, friend of the Applicant at the time, states:

> "Steve was standing about 6' in front of me and facing me. The manager was about 10' away to the right of Stevo. All of a sudden I saw the manager swing a pool cue at Stevos' head.

35. The final witness Maureen Blitner states:

> "I didn't keep my eyes on them all the time, but next time I looked I saw George grab a pool cue from the table and whack Stephen over the head. It happened so quick. I don't know why he done it. When George hit him, Stephen was standing up. I didn't see Stephen shaping up to George or anything like that."

36. One thing that is clear from all accounts is that there was a fight between Mousa and the Applicant (who started it is an issue).

37. There is nothing in the evidence of any of the witnesses which would suggest that their evidence should be preferred over the other. Mr Solly's evidence could be tainted because he is a friend of the Applicant, Mr Adams and Ms Eccleston both work with Mousa so there recollection may favour Mousa for those reasons. Ms Blitner was clearly as friend of the Applicant as she acknowledged knowing him and felt it necessary to go to the hospital

with him. In any event Ms Blitner did not observe what happened in the moments before Mousa hit the Applicant with the pool cue.

38. The statements from the two independent witnesses, Griffiths and Miles, should be given the most weight because they did not know either the Applicant or Mousa and should be preferred when they conflict with other witnesses evidence. Miles did not see what happened immediately before Mousa hit the Applicant with the pool cue. Griffiths account does not totally agree with Mousa or the Applicant.

39. Counsel for the Applicant made much of the allegation that the Applicant and Mousa had been separately for a "substantial" amount of time before Mousa took the pool cue to the Applicant. The claim that there was a "substantial" amount of time cannot be established on any reading of the evidence. If I accept Mr Griffiths account of events as the most accurate then the Applicant and Mousa were separated long enough to commence walking down the length of the bar before Mousa had the opportunity to grab the pool cue and hit the Applicant. What is important is that on Griffiths version of events Mousa turned and faced the Applicant before he hit him. That version doesn't necessarily negate the Applicant's and Solly's version that the Applicant was facing his friend at the time he was hit. He could have simply have turned around at the time he was hit.

40. Mr Miles' evidence is not that helpful as to the moments just before Mousa hit the Applicant as he did not see that happen, what he did see is an argument between the Applicant and Mousa and the separation of the Applicant and Mousa:

> "Then a skirmish developed between the two and the white man pushed George up against the bar and held him there. It looked like he held him by the front of the shirt. Then a few people separated them and I thought that it was all over."

41. The Respondent argues that I should accept Mousa's and Adam's version of events. The Respondent argues that Mousa had been a victim of an assault by the Applicant, who was still continuing to be aggressive towards when Mousa hit him with the pool cue. The Respondent submits that the court should accept that given the Applicant's behaviour Mousa was reasonably in fear of his life and was merely defending himself with justification.

42. In accepting Mr Griffth's version of events I cannot accept the view recounted by Adams and Mousa. There is no mention by Griffiths of the Applicant still continuing to act aggressively toward Mousa after they had been separated, although Griffiths is certain that he heard someone say "let's take this outside". That comment could have been made by anyone but it does make it possible that someone felt the fight had not yet finished.

43. Given the above I do not accept that the Applicant was acting aggressively towards Mousa at the time Mousa hit him with the cue. I also do not accept that the fight was over between the Mousa and the Applicant it is highly unlikely that two large aggressive males (who by all accounts had gotten into a serious fight) would have calmed down completely when separated. In fact it is clear that neither had calmed down as Mousa hit the Applicant with the pool cue and the Applicant was clearly still very aggressive when he went to the hospital. The hospital notes show the Applicant as aggressive and making offensive remarks to the nursing staff to the extent that they were threatening to call the police on him.

44. In my view section 12(f) does not apply in these circumstances. The Applicant and Mousa were involved in fight, one which may have been started by the Applicant or may have been started by Mousa, but after the first physical contact was had both the Applicant and Mousa were involved in a two way physical fight. However, at the time Mousa hit the Applicant they had been separated and the fight had ceased for the time being. Given the separation, while I do not accept that separation was for a "substantial"

amount of time as submitted by Mr Buckland, it is my view that the Applicant was not committing an offence at the time he was hit.

45. While Mousa claims that he was in fear for his life at the time he hit the Applicant none of the other evidence supports his claim even Adams' evidence states that the Applicant and Mousa had been separated and even though the Applicant may have been verbally abusing Mousa in a threatening way Adams did not say that he thought Mousa was in danger at the time. There is no description of what words were used nor of what sort of threat Adams thought was being made, therefore there is no basis upon which the court can find that Mousa was under physical threat at the time he hit the Applicant.

46. The Respondent argued that if the court did not accept that section 12(f) applied then the circumstances warranted that any assistance certificate issued to the Applicant should be discounted by 100% because his behaviour led to the altercation and caused Mousa to be in fear of his life thereby "defending" himself.

47. I agree that the Applicant's behaviour did contribute to the situation and the fight and that his behaviour certainly contributed to the assault on him and any injury incurred arising out of that assault. However it is not my view that the certificate should be discounted completely as I am not convinced that Mousa did fear for his life at the time he chose to hit the Applicant with the pool cue. I would only discount a certificate by 100% if I was of the view that the Applicant was the main aggressor in the fight and deliberately put himself in a situation where he could be expected to realise that his actions could mean he will be hit with a weapon. I do not accept this to be the case. Even if I accept that Mousa was frightened and that the Applicant was verbally abusing him that is not enough justification for a Mousa to use a weapon such as the pool cue to hit the applicant around the head. Mousa's conduct was clearly disproportionate to the "threat" he faced. Mousa had

been separated from the Applicant and there was a person standing between Mousa and the Applicant. There was no evidence to say that the Applicant was trying to reach across that person and physically attack Mousa.

48. I have been referred to the decisions in Lomax v Northern Territory of Australia (14th February 1997) Mr Wallace SM, Allmich v Northern Territory & Daniel Long [2000] NTMC Mr Wallace SM, and Lanyon v NT of Australia [2002] NTSC 6. In all of these matters it was found that the assistance certificate should be discounted by 100%.

49. In Lomax's case the Applicant and the offender and various other people had been drinking for a sustained period of time. There was some violence between the offender and his de facto and the offender and other parties. There was generally a lot of aggression all around. There was a fist fight between the offender and the Applicant which had ceased, the Applicant having left the scene and getting treatment from a friend on his hands. The offender then picked up a knife and called out to the Applicant to come out and fight. The Applicant did come out and join in a fight with the offender and was stabbed by the offender. His honour found that the Applicant did not have to come outside and join with the offender in a fight and his honour then referred the judgment of Mr Trigg in Mellick v Northern Territory of Australia and Thirwell [1995] in which his honour found:

> "I find I am satisfied on the balance of probabilities that the applicant Melick was a person who rather than seeking to avoid any fight was an active organiser and a protagonist of a fight. He wanted a fight and was going to do everything necessary to have a fight. I would think that the applicant is a person who clearly has a violent disposition and clearly on the evidence that he gave, whether it be bravado or whatever, clearly on his evidence he was the aggressor throughout"

50. In Allmich's case the facts were that the Applicant went with his de facto to visit her daughter and grandchildren. The offender in this case was the de facto partner of the Applicant's de facto's daughter. The Applicant and his

partner were clearly not welcome by the offender and his partner and were in no uncertain terms told to leave. The Applicant and his partner refused to leave and made their way into the offender's home. The offender and the Applicant then got into a fight. The Applicant says the he was knocked over and the offender started hitting him with a baseball bat. The offender says that he thought the Applicant went to the car to get a gun but he came back with a baseball bat. The offender says that the Applicant then attempted to strike him with the bat and that is when the offender wrestled the bat off the applicant and laid into him. His honour found that the offender's use of the bat on the Applicant was not justified and that it constituted an offence.

51. His honour then referred to the decision in Melick v Northern Territory of Australia and Thirwell in which his honour Mr Trigg stated:

> "...I would add that this court is not to be used by persons who themselves go outside the law and then when matters don't go exactly as they have planned then seek to have compensation for incidents which have arisen out of their own unlawful acts."

52. His honour then found that the Applicant's "injuries were inextricably linked to the unlawfulness of his own conduct" and that "It would fly in the face of s10 of the Act, and indirectly encourage unlawful behaviour to award any assistance to Mr Allmich"

53. In Lanyon v Northern Territory of Australia and Staker [2002] NTSC 6 Justice Bailey agreed with the Magistrate's decision to discount the assistance certificate to the applicant by 100%. In Lanyon's case the applicant was injured during a drug deal gone wrong in which he was the supplier and the offender was the buyer. The court at first instance found that the applicant should have foreseen that a drug addict desperate for drugs and obviously going into withdrawal will act unpredictably if threatened. The Applicant pulled a knife on the offender and then was stabbed with his own knife. His Honour found:

> "Whether or not a victim's unlawful conduct will preclude any assistance or reduce the amount of assistance must be matter of fact and degree to be determined in light o the particular circumstances of a case by applying a common sense test of causation. No doubt there are circumstances where it would be inappropriate to make a reduction in the amount of assistance certificate despite some unlawful conduct on the part of the victim. These would be cases where the unlawfulness of the victim's conduct made no substantial contribution to the injury suffered by the victim. On the other hand there may be circumstances where the victim's conduct so contributed to his injury that the amount of assistance to be awarded should be reduced substantially or eliminated entirely."

54. His Honour further found that the Applicant was "entirely the author of his own misfortune" and as such his honour was not prepared to disturbed the Magistrate's decision to discount the Applicant's certificate entirely.

55. All of the cases discussed were decided before the introduction of section 12 (f). In fact it was soon after the decision in Lanyon's case that the Act was amended to include 12(f). This may have had something to do with Justice Bailey's comment that:

> "I think it is clear that the act does not contemplate that unlawful conduct on the part of a victim will necessarily act as a complete bar to an award of assistance. If the Legislature had intended such a result, no doubt such a provision would have been included in s12 of the Act"

56. It is clear from his decision that Justice Bailey was also of the view that just because it wasn't included in section 12 that did not stop the Court from exercising its discretion under section 10 to completely discount the assistance certificate in these circumstances.

57. The question is whether the introduction of section 12 (f) has affected the discretion of the court under section 10 when the two sections are read together. It is my view that the Court still has a wide discretion under section 10 as to the amount it choses to discount a certificate. The introduction of section 12(f) takes away the discretion of the court in a limited way in that if the Court finds that the victim was injured in the

commissioning of an offence by himself then an assistance certificate cannot issue in his favour at all. When section 12(f) did not exist there was still discretion in the court to decide whether the certificate should be discounted by 100% or less. In the four cases discussed the court chose to discount the Applicant's certificate by 100% as it had found that the Applicant was the author of his own fate, had acted in an unlawful way that "but for" those actions he would not have been injured and on the basis that it would be against public policy to reward a person involved in illegal activity such as a drug dealing if a drug deal went wrong.

58. Of course each case must be dealt with on its facts. In all of the cases discussed above the Court had found that the Applicant was injured during the commissioning of an offence. In the present case I have found that given that the Applicant and Mousa had been separated even if the Applicant had been committing an offence of assault prior to that time the separation of the parties was significant enough to end that offence before Mousa attacked the Applicant with the pool cue.

59. However it is my view that the Applicant's behaviour just prior to the separation that is his willingness or eagerness to be engaged in a fight with Moussa substantially contributed to him being injured.

60. For reasons set out above I have preferred the evidence of Mr Griffiths and Mr Miles in their descriptions as to what happened on that night. Both of those witnesses saw the Applicant throw an aboriginal man out of the hotel after he had annoyed the Applicant by interfering with his game of pool. Mr Griffiths states that he then saw the Applicant go back to the bar and the following ensued:

> "The white male then across to the bar and stood there. You could see that he was quite angry. I then saw a member of the hotel staff whom would be the bouncer come out of a room near where I was sitting and walk to the front door and have a look out, The bouncer then went to the bar. Her was walking past the white male. I then got

> the impression that the white male said something to the bouncer and then bouncer turned and said something back…….The bouncer was then flung around and he hit the bar. The bouncer was pushed back against the bar be the white male who had his hands around the bouncer's throat and was trying to hold him down. It did not look like he was trying to choke him but trying to hold him down."

61. Mr Miles states that he saw a couple of men playing pool when an aboriginal man walked up and interrupted their game. Mr Miles then saw one of the men push the aboriginal man out of the hotel. He then states:

> "After this happened, George (who I recognised as the bar manager) spoke to the white man and an argument ensued. I was about 10 to 15 feet away so I couldn't hear clearly what they were arguing about. Then there was a skirmish developed between the two men and the white man pushed George up against the bar and held him there."

62. From these two statements it would seem that the Applicant made the first physical contact with Mousa. Even Mr Solly's statement suggests that the first physical contact was from the Applicant:

> "Stevo mentioned something about "why aren't you doing your job". The manager stated he was in his office. From this point the argument became a bit more animated and aggressive. I think at this point Stevo pushed the manager away because he was right in his face."

63. The rest of Mr Solly's statement as to what ensued next I cannot accept because it is so far different to what all of the other witnesses say. That is Mr Solly suggests that Mousa then grabbed the Applicant by the throat. None of the other witnesses saw this happen and Mr Griffiths and Mr Miles both state that they saw all of what happened from the time the argument started to just before Mousa hit the Applicant with the pool cue and neither of them saw Mousa with his hands around the Applicant's neck.

64. It is my view that both the Applicant and Mousa were strong men who had both lost their tempers at each other. They have both given a version of the story which best suits their interests and their evidence must be viewed in

that light. In preferring Mr Griffiths and Mr Miles version of the fight it is my view that it is more likely that the Applicant started the physical fight, he was already feeling aggressive because of the incident at the pool table, he had been drinking and Mousa was standing up to him. Had the Applicant not lost his temper with Mousa he would not have been injured however given the separation of the parties at the time Mousa picked up that pool cue I am not of the view that the certificate should be discounted by 100% under section 10(2).

65. By granting the Applicant a certificate in these circumstances this court would not be rewarding a person for his criminal activity gone wrong, or rewarding the main protagonist in a fight it will be granting assistance to a man who has willingly gotten himself into a fight but could not have expected to be the victim of an assault with a weapon.

66. In light of the above the Applicant's certificate should be discounted by 80% to take into account his contributory behaviour.

67. **Quantum** – the Applicant has made a claim for loss of earnings as well as pain and suffering. The physical injuries incurred by the Applicant are described in the Katherine (exhibit I) and Darwin hospital notes. He suffered a laceration to the ear and split cartilage to that ear. He also have bruising and swelling to the jaw. The Applicant claims he had bruising to the neck from Mousa's hand and that he had taken photos of that bruising. Curiously even though he says he still has the film of those photos he does not produce them to the court. There is no mention of such bruising in the hospital notes and therefore I cannot be satisfied on the balance of probabilities that the bruising existed.

68. The Applicant then attended the hospital 2 days later with dizziness, headaches, ringing in the ear and deafness in the ear. The notes suggested that the Applicant needed a CT scan and an ENT assessment in Darwin. The Royal Darwin Hospital notes (exhibit H) show the Applicant that the

Applicant attended that hospital on the 20th September 2002 complaining of continuing pain and dizziness. The examination showed swelling around the ear, both ear drums in tact and after a CT scan concluded there were no fractures of the head but there was "extensive mucosal thickening throughout the paranasl sinuses". He was given painkillers and sent home.

69. The Applicant then attended the Katherine hospital again at the end of October 2002 complaining of continuing pain and trouble with sleep with a request for a certificate for Centrelink. It is unclear from the notes available what treatment was given to him at that time.

70. In his earlier affidavit the Applicant states that he suffered the following symptoms:

> "Head pain, migraine like pain, headaches, dizziness, ear infections, loss of concentration, toothaches, I am constantly aroused and tense, I am suffer from nervousness, anxiety, and I have outbursts of anger which I do not understand"

71. The Applicant left the Territory because he says that he couldn't work in his trade as a butcher because of the headaches, dizziness and loss of concentration. When in South Australia the Applicant consulted with a Dr Neroni who provided two reports, it should be noted that even though Dr Neroni states the Applicant had been his patient since 1989 his report suggests first seeing the Applicant regarding his present problems some 8 months after the assault.

72. In his first report Dr Neroni says the Applicant attended him complaining of "recurrent headaches, dizziness, right ear pain, memory problems, insomnia, anxiety and depression since the assault". He diagnoses a closed head injury and post traumatic stress disorder as a result of the assault. Dr Neroni and then refers the Applicant to a ear, nose and throat specialist. The court is not provided with a report from the ear nose and throat specialist.

73. Dr Neroni certifies the Applicant as unfit for work because of his persisting symptoms from the 6.8.03 – 11.11.04 in three monthly periods.

74. There is nothing in Doctor Neroni's reports that confirms all of the symptoms suffered by the Applicant are caused by the conditions he has diagnosed.

75. In his second report Dr Neroni reports that Dr Williams, the ear, nose and throat specialist, concluded that the persistent dizziness suffered by the Applicant was due to his post traumatic stress disorder. Interestingly there is no confirmation that the right ear pain is due to that condition nor is an explanation offered for the right ear pain.

76. Dr Neroni did refer the Applicant to a neurologist and the only mention of his findings is that he had a MRI scan with showed a mile paranasal air sinusitis and left maxillary sinusitis. There is no description of what can cause this condition however I take notice that sinusitis generally caused by allergies or viral or bacterial infection. It can also be caused by a structural damage to the nasal cartilage. There is no evidence that the Applicant was struck on the nose during the assault and no medical evidence to support the argument that the sinusitis suffered by the Applicant was caused by the assault. In fact the second report of Dr Neroni refers to as CT scan of the Applicant which showed he had "ethmoidal sinus disease".

77. One of the main symptoms of sinusitis is headache. The medical reports available to the court do not differentiate between the symptoms suffered because of the sinusitis and the symptoms suffered because of the closed head injury particularly Dr Neroni does not consider whether any of those symptoms are caused by anything other than the assault. There is clearly no neurological reason for the headaches and loss of concentration reported to Dr Neroni by the neurologist only the sinusitis.

78. While counsel for the Applicant argues that Dr Neroni's opinion is very clear in relation to connecting all of the Applicant's symptoms to the "closed head injury and post traumatic stress disorder as a result of his assault on 17/9/02" the doctor was also clearly of the opinion that there needed to be further investigation of the Applicant's symptoms by an ear, nose and throat specialist and a neurologist. It is my view that Dr Neroni was not sure of the cause of the physical symptoms and therefore arranged for further investigation. Unfortunately Dr Neroni's second report, written after he had received feedback from the specialists, does not make it any clearer whether some of the symptoms suffered are caused by the sinus disease or the closed head injury.

79. The court must be convinced on the balance of probabilities that the symptoms the Applicant is suffering are caused by the offence. In relation to the continued headaches and ear pain I cannot be convinced that they are caused by the assault and not the sinus disease.

80. The Applicant also claims that he is suffering from Post traumatic stress disorder and a major depressive illness. This claim is confirmed by the psychiatrist treating the Applicant, Dr Loukas. Dr Loukas opins that:

> "I am very confidant that Mr Selin's injury for which I am treating him for has arisen from the assault which occurred in September 2002" and
>
> "It is my opinion that the assault which occurred in Katherine on the 17th of September 2002 was the cause of Mr Selin's injury"

81. There is no reason to doubt the opinion of Dr Loukas and as the Respondent has not provided the court with a medical opinion to the contrary I accept Dr Loukas opinion. Dr Loukas also is of the opinion that the Applicant will require ongoing pharmacological treatment and regular psychotherapy for a further 2 years.

82. What Dr Loukas does not say is that the Applicant's condition is the cause of his inability to work. Dr Loukas repeats the Applicant's view that his condition stops him from working however Dr Loukas does not offer an opinion on the working capacity of the Applicant. I do not know whether Dr Loukas has been asked whether the Applicant's condition stops him from working because I am not provided with the letter requesting the report which obviously contained questions, the doctor is clearly answering questions in his report.

83. Dr Neroni has certified the Applicant unfit to work given his psychiatric condition and I accept his judgment on that matter.

84. Therefore the Applicant should be granted an assistance certificate for pain & suffering and mental distress as well as some pecuniary loss he has suffered because of his inability to work.

85. Pain & Suffering, mental distress and loss of amenities of life - it is clear that there would have been immediate pain to the Applicant when he was hit by the pool cue. His ear was split and required stiches. It took months for the ear to heal but since the assault he has had headaches & dizziness regularly. I am prepared to discount some of the headache pain to the Applicant's sinus disease however I am sure that at least some of those headaches were caused by the assault. It is clear also on the psychiatric report that the Applicant has suffered and continues to suffer significant mental distress in the form of Post Traumatic Stress disorder and Depression but that will be addressed with some medication and therapy. The Applicant's variety of symptoms have continued now for about 3 years in varying degrees of intensity and there has been no real attempt to describe the intensity of those symptoms and how they have affected the Applicant's life.

86. The Applicant does say that he is less sociable and reports that his alcohol consumption has increased since the assault.

87. Assistance of $18000 will issue for this head of damage.

88. Pecuniary loss the Applicant states that approximately four days after the assault he told his boss that he could not be guarantee to be reliable. He then states:

> "Ken, my boss told me that under the circumstances he could not keep me on and I lost my job."

89. To support this claim the Applicant sought to rely on a document (exhibit G) which his solicitor referred to as his termination pay slip. That pay slip refers to pay period ending the 11th of October 2002. The Applicant obviously worked more than four days after the assault before he terminated his employment with Town & Country butchers. The document also refers to the Applicant perhaps working on the next Monday so it is not clear that this was the Applicant's last payslip. The document was not annexed to the Applicant's affidavit or an affidavit of his previous employer.

90. In his second affidavit the Applicant refers to a "representative weekly pay slip" which was also referred to being annexed to the Applicant's affidavit when in fact there were no annexures to that affidavit. In that same paragraph he says he received his final pay sheet when he finished up but that he had lost that.

91. The Applicant's evidence is confused on the one hand he is saying he was terminated from his employment about four days after the assault and on the other hand shows the court a document that states he clearly worked in the weekly pay period ending the 11th of October 2002. The documentary evidence tendered to the court included a PAYG payment summary from Town & Country Butchery which shows the Applicant's employment as terminating on the 18th of October 2002 and his wage at $452.00 per week.

92. The Applicant is clearly an unreliable witness when it comes to providing the court with the details of his employment since the assault.

93. The Applicant then says after attempting to stay in the Northern Territory for a while and being unsuccessful in obtaining work he then moved to Narrogin in South Australia where he says he was successful in obtaining work at the Hillside Abbatoir. Again the Applicant refers to an annexure to his affidavit that he refers to as his payslip for the period but again the document is not attached to his affidavit. Part of exhibit is a PAYG payment summary for the Applicant showing that he worked for the abattoir for two weeks from 11.11.2002 -26.11.2002 over which time he earnt $1243.00.

94. This document is useful in that it shows that the Applicant did leave the Territory before November 2002. Given that he left work with Town and Country Butchery on the 18th of October 2002, those dates show the Applicant was only unemployed for about 3 three weeks after the assault before he got another job. The Applicant says that he could not continue to work at the abattoir because his lack of concentration meant he wasn't safe with knives. He suggests in his affidavit that because "They could not employ me part time so I lost the job." There is no medical evidence to support the Applicant's claim that his condition in late 2002 caused him not to be able to work at that time however as I have accepted Dr Loukas' diagnosis of the Applicant's condition it is more likely than not that his PSTD had affected his ability to work in an abattoir.

95. The Applicant then obtained a job with PR Hepple and Sons which he says he lost because of the ear infections associated with his ear injury. There is no evidence of what sort of work PR Hepple and Sons did. There is no medical evidence supporting the Applicant's contention that his problem with ear infections was caused by the assault. The Applicant consulted with an ear nose and throat specialist and no report has been tabled from that specialist nor has his doctor Dr Neroni mentioned any ear infections or linkage of those infections to the injury. Dr Neroni only mentions ear pain

that needed further investigation. The Applicant worked with that organisation for 9 weeks and earnt $5248.00 over that period of time.

96. The Applicant claims that since that time he has been unable to work and his only source of income has been a Disability payment from Centrelink. There is a paucity of evidence as to what that payment is and what disability Centrelink accepts causes the Applicant to be unable to work. It would have been a simple exercise to put that evidence before the court.

97. However the documents that make up exhibit F show that the Applicant did in fact work for two weeks in March of 2005 for Diversified Personnel Pty Ltd earning approximately $500.00 nett per week. Again there is no indication what sort of work the Applicant did for these wages.

98. There is also a paucity of evidence as to the exact causes of some of the symptoms suffered by the Applicant and the effect of those symptoms on the Applicant's ability to work. The only reliable evidence is that of Dr Loukas whose opinion is that it is clear that Applicant's psychiatric condition has caused him to be unable to work as a butcher.

99. Dr Loukas does not say that the Applicant is unable to work at all and there no evidence that the Applicant has attempted to find alternative employment since he left PJ Hepple and Sons. Given that the amount of assistance granted is calculated on common law principles then it is Applicant's obligation to mitigate his economic loss by at least attempting to find suitable employment and, if he is not capable of working at all then he should provide the court with medical evidence to support that view.

100. In my view the Applicant has not been totally unable to work because of his variety of symptoms and that the Applicant himself is also of that view having taken on some work in March of this year contrary to what he says in his affidavit. The Applicant is clearly able to take on some sort of work even

if it is casual work and doing that can earn approximately $500.00 per week, that is more than he was earning as a butcher at the time of the assault.

101. The Applicant has the ability to earn approximately the same weekly wage as he could as a butcher at the time of the injury however that may be only on a casual basis. The difficulty is the Applicant's evidence regarding his work history is unreliable for reasons set out above and the medical evidence is not sufficient for the Court to link the Applicant's medical condition to his alleged total incapacity to work.

102. In summary, it is my view that on the balance of probabilities the Applicant does suffer a psychiatric condition arising out of the assault and that condition has affected his ability to work however the Applicant is only partially incapacitated to work and on the evidence produced to me by the Applicant has not established with any certainty what the level of his incapacity is or the periods which he has been unable to work because of the injury. Without sufficient evidence I cannot make a ruling as to the amount of the Applicant's loss of earnings.

103. It is the Applicant's onus to provide the court with enough evidence to establish his claim in this case he has not done so and therefore this court cannot make a ruling regarding the Applicant's loss of earnings.

104. Medical Expenses - The Applicant has also claimed an amount for future medical treatment specifically psychiatric care and medication. Dr Loukas estimates the twenty four months of treatment every three to four weeks at $150 per session, say $3600.00 plus medication of $100 per month, $2400.00.

105. Counsel for the Respondent argued that the Applicant should not be granted assistance for that treatment unless he has indicated to the Court that he would be availing himself of that treatment. The Applicant has been using the medication prescribed for him in the past and there is no reason to

believe otherwise of him in the future. The Applicant also swears in his affidavit of the 31st of March 2005 that his doctor and psychiatrist want him to have frequent counselling and that he would like to do that if he could afford it. I accept the Applicant's statement and find that any certificate issued should include and amount for the medication and counselling.

106. I also note that the Applicant has claimed that he has had to have some dental work on his teeth however there is no evidence of what work is required to be done and the cost of that work so no ruling can be made in relation to that cost. The Applicant produced a receipt for some dental work done on his teeth in December of 2002 but no statement from the dentist that the work was required because of the assault.

107. In conclusion the Applicant should be awarded an assistance for the following amount:

Pain & suffering	$18000.00
Medical treatment	$3600.00
Medication	$2400.00
	———
	$24000.00

discounted by 80% for contributory behaviour.

108. I order that an assistance certificate issue in favour of the Applicant in the sum of $4800.00 and the costs of the application are reserved.

Dated this 3rd day of October 2005

_____
Tanya Fong Lim
JUDICIAL REGISTRAR