CITATION: *Naomi Dick v Northern Territory of Australia* [2005] NTMC 065

PARTIES:	NAOMI DICK
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20417133
DELIVERED ON:	17 October 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	23 September 2005
JUDGMENT OF:	Dr J. Lowndes

CATCHWORDS:

Crimes (Victims Assistance) Act – appeal from decision of Judicial Registrar – nature of appeal – fresh evidence rule – cogency of evidence under review

Section 15A(1) *Crimes (Victims Assistance) Act*
Gibson v Northern Territory [2005] NTMC 021 followed
Chabrel v Northern Territory & Mills [1999] NTSC 113 applied

REPRESENTATION:

Counsel:

Plaintiff:	Mr Davis
Defendant:	Ms Tregear

Solicitors:

Plaintiff:	Davis Norman
Defendant:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 065
Number of paragraphs:	44

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

No. 20417133

BETWEEN:

NAOMI DICK
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

REASONS FOR DECISION

(Delivered 17 October 2005)

Dr J LOWNDES SM:

THE NATURE OF THE PROCEEDINGS

1. On 18 February 2005 the Judicial Registrar, Ms Tanya Fong-Lim, dismissed the appellant's application for victims' assistance. The reasons for decision were reduced to writing and read as follows:

> "No physical injury. No mental injury – nothing beyond 'mere sorrow or grief': Chabrel's case. No medicals confirming depression – mental distress only factor arising out of - no evidence of effect on normal enjoyment of life."

2. The formal order made by the Judicial Registrar was as follows:

> "There being no evidence of a physical injury or mental injury the application for assistance is dismissed."

3. The evidence before the Judicial Registrar consisted of the appellant's affidavit sworn 7 January 2005 to which was annexed a statement that she made to police on 2 June 2003.

4. The statement was confined to the alleged indecent assault and is silent as to any injury suffered by the appellant as a result of the alleged offence. The affidavit was extremely brief, consisting of 4 paragraphs which occupied less than a third of a page. The evidence as to injury was scant and unsophisticated:

> " (4) The events referred to in my affidavit[1] were a source of great humiliation to me.
>
> Ironbark believes he can treat women as he likes. His ongoing threats and refusal to accept no as an answer placed me in fear of my safety which became worse because he continued with his threats and demands."

5. The only other information as to injury which was made available to the Judicial Registrar was that provided in paragraph 6 of the application which read "Injuries Suffered and Continuing Disabilities: Depression".

6. This is an appeal against the Judicial Registrar's order dismissing the application. The appeal is brought pursuant to the provisions of s15A(1) of the *Crimes (Victims Assistance) Act:*

> "A party to proceedings in respect of an application under section 5 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar that an assistance certificate is, or is not, to be issued."

7. Subsection (3) provides that any such appeal is to be in accordance with Part 37 of the Local Court Rules.

8. Part 37 gives no indication as to the nature of the appeal. However, I have had the benefit of reading a decision made by Ms Blokland SM in the matter

[1] I believe that this should read "statutory declaration" (the statement to police) rather than "affidavit".

of *Gibson v Northern Territory of Australia* [2005] NTMC 021, 13 April 2005. Ms Blokland held that an appeal pursuant to s 15A of the *Crimes (Victims Assistance) Act* is a re-hearing on the materials before the Judicial Registrar with a limited discretion to hear fresh evidence. Her Worship went on to say:

> "The conditions for the reception of fresh evidence are that it must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced. Further, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to produce at the first trial and the failure to produce the evidence must be properly explained."

9. I agree with her Worship's conclusion regarding the nature of an appeal pursuant to s 15A(1) of the Act, and proceed to deal with the present appeal on that basis.

THE MERITS OF THE APPEAL

10. The first inquiry is directed at whether the Judicial Registrar erred in declining to issue a victims assistance certificate and dismissing the appellant's application for assistance.

11. It is apparent from her reasons for decision that the Judicial Registrar was satisfied that the appellant was the victim of an offence committed by another person. However, the Judicial Registrar was not satisfied that the appellant had been injured as a result of the commission of the offence.

12. "Injury" is defined in s4 of the Act as follows:

> " 'Injury' means bodily harm, mental injury, pregnancy, mental shock or nervous shock but does not include an injury arising from the loss of or damage to property (which loss or damage is the result of an offence relating to that property).

13. This definition of "injury" has received extensive judicial consideration and its meaning and effect is well established.

14. In *Chabrel v Northern Territory of Australia and Mills* [1999] NTSC 113 at [14]-[17] Mildren J stated that it was clear that "mental shock" and "nervous shock" are treated as subgroups of "mental injury". His Honour went on to note that the Northern Territory has followed a line of authority in South Australia to the effect that it is not necessary for an applicant for compensation to prove that he or she suffered a mental or psychiatric illness as a result of an offence to bring himself or herself within the ambit of "mental injury". Consistent with that line of authority, his Honour held that the concept of mental injury in s 4 of the Act includes emotional upset if it causes "actual injury to physical or mental health going beyond mere grief". It is clear from his Honour's reasons for judgment that he accepted a number of propositions distilled from the South Australian cases which he considered were applicable to the concept of mental injury under the Northern Territory Act:

> (a) Although mere sorrow and grief which cause emotional distress are, on their own, insufficient to establish a compensable injury, distress which in addition results in actual injury to physical, mental or psychological health is compensable: *T v The State of South Australia & Anor* (1992) Aust Torts Rep 8-167 per Legoe J; *Delaney v Celon* (1980) 24 SASR 443 at 447 per Jacobs J;
>
> (b) "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 so, 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: *T v The State of South Australia & Anor* (1992) Aust Torts Rep 8-167 per Olsson J pp61, 334-5;
>
> 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 wellbeing, so as to adversely 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": *T v The State of South Australia & Anor* (1992) Aust Torts Rep 8-167 per Olsson J at pp 61, 334-5.

15. The statutory definition of "injury" in s 4 of the *Crimes (Assistance) Act* refers to "mental shock" and "nervous shock". It would appear that little by way of distinction is to be drawn between the two forms of injury.[2]

16. In *Re Fripp and Fripp* (unreported, ACT Sup Ct, 2 February 1996) Miles CJ adopted the view of "nervous shock" expressed by Brennan J (as he then was) in *Jaensch v Coffey* (1984) 155 CLR 549 at 560:

> "The term 'nervous shock' is useful … as a term of art to indicate the aetiology of a psychiatric illness for which damages are recoverable in an action on the case when the other elements of the cause of action are present".

17. However, in *R v Fraser* [1975] 2 NSWLR 521 at 525-6 Wootten J warned against attributing a narrow or technical meaning to the words "mental or nervous shock". Although the words include any mental or psychological disturbance,[3] they have been held "to be able to comprehend a wider category of psychiatric illness".[4]

18. In *Chong v Chong* (unreported, Qld Sup Ct CA, 13 August 1999) the Queensland Court of Appeal agreed with the decision of Macrossan CJ in *R*

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[2] See for example *Re Fripp and Fripp* (unreported, ACT Sup Ct, 2 February 1996) per Miles CJ at p 3. See also *West v Morrison* (1996) 89 A Crim R 21 at 23 where Macrossan J made the observation that the concepts of "mental and nervous shock" have been used interchangeably in tort law for a considerable period of time.

[3] See *West v Morrison* (1996) 89 Crim R 21 at 23 per Macrossan J.

[4] See Freckleton I, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services 2001) p 233

v Morrison; Ex parte West [1998] Qld R 79 that "mental and nervous shock" should be construed as including the full range of psychiatric illnesses.

19. In *O v J* (unreported, WA Sup Ct, 13 February 1992) Wallwork J stated:

> "The words ['mental shock and nervous shock'] should be given their natural and ordinary meaning which includes 'a sudden and disturbing physical or mental impression'...The words in my opinion would therefore include such results of criminal conduct as distress, horror, disgust and humiliation, and other similar adverse mental reactions".

20. However notwithstanding the very broad view taken of "mental and nervous shock" and "mental injury", mere fright, humiliation and anguish have been held not to constitute a compensable injury: see *The Applicant v Larkin* (1976) WAR 199 at 201, per Wickham: J; *M v Hoogwerf* (unreported, WA Sup Ct, 23 January 1998), per parker J. In the first cited case Wickham J held that the term "nervous shock" used in the definition of "injury" under the *Criminal Injuries (Compensation) Act* 1975 was "a compound phrase adopted from the law of tort" and the word "shock" was used "not in the sense of a mental reaction but in a medical sense as the equivalent of nervous shock". Consequently, his Honour held that "fright, humiliation and anguish" were necessarily excluded from the definition of "injury" and were not compensable under the legislation.

21. In the *Applicant v Larkin* (1976) WAR 199 at 201 Wickham J held that although "fright, humiliation and anguish" were excluded from the definition of "injury" contained in the *Criminal Injuries Compensation Act* 1985 (WA), such mental reactions may be the cause of , or may aggravate, a physical condition and may indicate the intensity or duration of such a condition.

22. Two observations need to be made about the Western Australian strand of authority. The first is that the decision in *O v J* (supra) is at odds with the balance of the Western Australian authorities for in that case Wallwork J

was of the view that humiliation could fall within the purview of "mental or nervous shock". The second is that the definition of "injury" as it has appeared in the Western Australian legislation, in its various manifestations, has not included "mental injury": the definitions have merely referred to "mental shock or nervous shock". Therefore, the Western Australian authorities leave open the possibility that mental reactions such as fright, humiliation and anguish could fall within the definition of "mental injury". However, in the Northern Territory, such mental reactions will only be compensable if there is evidence which satisfies the test laid in *Chabrel's case* (supra).

23. It is important not to overlook the case of *S v Turner* (1979) 1 NTR 1. In that case Muirhead J (at 20-21) held that the act of rape must be taken into account and regarded in itself as "bodily harm" (as defined by s 2 of the Criminal Injuries (Compensation) Ordinance (1976) NT[5] compensable as injury [6] His Honour went on to hold that the fright, humiliation and anguish experienced by the applicant for compensation during and immediately after the rape should not be excluded in the assessment of compensation. His Honour was of the view that in assessing compensation it was proper to have regard to the nature of the offence itself as well as to the injury which has resulted. His Honour considered that in assessing compensation the Court was entitled to compensate the victim for "fear and affront to dignity and the humiliation and gross invasion of human privacy involved in the crime": the Court was not confined to a consideration of the aftermath of the offence. Therefore, his Honour concluded that the victim should be compensated for the fear, humiliation and hurt occasioned by the rape and shock, and the confusion which must have followed.

[5] "Injury" was defined as meaning "bodily harm and includes pregnancy, mental shock and nervous shock."

[6] This broad view of "bodily harm" was affirmed by Mildren J in *Alfonso v Northern Territory of Australia* [1999] NTSC 117 at [14].

24. It is clear that Muirhead J declined to follow the different approach adopted by Wickham J in *The Applicant v Larkin* (supra) which was discussed above.

25. The appellant in the present case relies upon the decision in *S v Turner* (supra) by way of establishing a compensable injury. In my opinion, in order to be entitled to the issue of an assistance certificate it would have been necessary for the appellant to persuade the Judicial Registrar that she had suffered an injury in terms of bodily harm, mental injury or mental shock or nervous shock.

26. The evidence before the Judicial Registrar did not disclose any physical injury or injuries suffered by the appellant. Without in any way downgrading the seriousness of the offence committed against the appellant, I do not consider that the act or conduct constituting the assault – in light of all the circumstances - could be properly regarded in itself as "bodily harm" (as defined by s 4 of the *Crimes (Victims (Assistance) Act*) compensable as injury. The nature of the offence being considered here can be distinguished from the gross violation of a woman's body constituted by the act of rape. I accept that there may be instances of indecent assault which themselves constitute "bodily harm". However, in my opinion, the present case falls outside that category of indecent assault. Accordingly, I cannot see how the appellant could be compensated for fear and humiliation during or immediately after the assault on the basis of the reasoning in *S v Turner* (supra).

27. However, if I have erred in the view that I have taken, then the evidence before the Judicial Registrar was not sufficiently cogent to persuade the Judicial Registrar that the assault had in fact been a source of great humiliation to the appellant and made her fear for her safety No direct evidence was adduced as to the way in which the offence caused the appellant great humiliation. The manner in which the offence caused the appellant humiliation was a matter of mere conjecture. The evidence as to

the fear she experienced was scant. Furthermore, there was a body of evidence which did not sit comfortably with the appellant's allegation that she suffered humiliation and feared for her safety. I am referring here to the evidence contained in the appellant's statutory declaration. At paragraph 8 she says that she rejected Ironbark's request that she touch his "dick" and ignored him. She goes on to say that when he grabbed her several times in the crutch area she pushed his hand away and told him to desist. At paragraph 11 the appellant says that when they arrived at Willaroo Station, Ironbark got in the grader and told her to follow him in his car. The appellant says that she was "happy to do so". She subsequently returned to his camp, but left after Ironbark had requested her to get into bed with him. At paragraph 21 of her statutory declaration the appellant stated: " The first time I went out to Ironbark's caravan with Irene, he showed me photographs of naked, aboriginal women". While she says that she feared for her safety she says nothing about that in her statutory declaration. In my opinion, the evidence which was before the Judicial Registrar was not such as to raise a more probable inference in favour of what the appellant was alleging, and the circumstances appearing in the evidence did not give rise to a reasonable and definite inference that the appellant experienced humiliation and fear during and immediately after the assault: see *Holloway v McFetters* (1956) 94 CLR 470 at per Williams, Webb and Taylor JJ.

28. In my opinion the evidence before the Judicial Registrar was insufficient to establish a compensable injury in the nature of a mental injury or mental shock or nervous shock. In order for the humiliation and fear that the appellant says she experienced as a result of the assault to be compensable there would need to be sufficient evidence bringing those mental reactions within the ambit of a mental injury or mental or nervous shock in accordance with the test applied by Mildren J in *Chabrel's case*. Quite apart from the deficiencies in the evidence relating to the humiliation and fear said to have been experienced by the appellant – a matter discussed in an

earlier context – the evidence failed to show that the assault brought about a morbid situation in which there was some more than transient deleterious effect on the appellant's mental health and wellbeing, so as to adversely affect her normal enjoyment of life beyond a situation of mere sorrow and grief.

29. Mr Davis, who appeared on behalf of the appellant, made various submissions in relation to the compensability of the humiliation alleged to have been suffered by the appellant as a result of the assault. Those submissions are to be found on page 2 of Mr Davis's written submissions dated 16 August 2005. In my opinion they do not assist the appellant, and do not persuade me to allow the appeal.

30. The statement that "Ironbark believes he can treat women as he likes" is purely observational, and not evidentially linked to any demonstrated mental injury or other compensable injury, that is mental or nervous shock.

31. Finally, the bald assertion in the application for assistance that the appellant suffered depression does not support a compensable injury. First, a mere assertion in these terms could not reasonably satisfy a tribunal of fact that the appellant had suffered depression as a result of the assault. Secondly, there is no mention of depression in the appellant's affidavit sworn 7 January 2005. One would have expected some reference to depression in that affidavit if the appellant had genuinely suffered depression as a consequence of the assault. The conspicuous and unexplained absence of any mention of depression in the affidavit lends no credence to the allegation of depression in the application. Thirdly, even assuming the allegation were true, the necessary evidential groundwork for bringing the allegation within the ambit of a compensable injury had not been laid. In my view, the Judicial Registrar did not err in declining to find that the appellant had suffered a compensable injury, namely depression.

32. Mr Davis made the following written submission:

> "The Applicant's submission is 'great humiliation' resulted in depression as pleaded in Form 9A and that constitutes injury. Further that humiliation results from shock which is an injury of itself."

33. The fundamental difficulty with that submission is that it is completely unsupported by the evidence: the evidential groundwork is simply not there.

34. For the reasons stated above I find no error in either the conclusion that the Judicial Registrar reached or in the decision that she made.

35. I now turn to consider whether the appeal should be allowed on the basis of the "fresh evidence" rule.

36. Although the appellant may have satisfactorily explained why the evidence now sought to be relied upon , that is the evidence contained in the appellant's supplementary affidavit sworn 4 August 2005, was not adduced at the earlier hearing, I do not believe that had that evidence been before the Judicial Registrar that evidence would have produced an opposite result.

37. In paragraph 5 of her supplementary affidavit the appellant says that she was very distressed for several months after the incident. She further says that she did not deserve to be treated by Ironbark in that way. In my view, this piece of evidence does not support a compensable injury. In order for distress to be compensable it must result in "some sort of actual injury to physical, mental or psychological health" : see *Delaney v Celon* (1980) 24 SASR 443 at 447 per Jacobs J; *The State of South Australia & Anor* (1992) Aust Torts Rep 8-167 at p 61,328 per Legoe J. The evidence does not go far enough in establishing a compensable injury in those terms.

38. In paragraph 7 of the affidavit the appellant deposes as follows: "As a result of the incident on the 23rd May 2003 I have feelings of shame and insecurity. I do not want other males believing they can treat me in the same

way as Ironbark". In my opinion, it is most unlikely that had this evidence been before the Judicial Registrar – without something more - she would have been reasonably satisfied that the assault had in fact produced those mental reactions. In any event, such limited evidence would not have persuaded the Judicial Registrar as to the occurrence of a compensable injury according to the criteria applied by Mildren J in *Chabrel's case*.

39. In paragraph 6 of the supplementary affidavit the appellant says that "for several months, I was limited in my social activities, if I ran into Ironbark he would threaten me and say that the Police would do nothing". In paragraph 8 she says "I now avoid places where I am likely to see Ironbark". Presumably this piece of evidence is relied upon in support of an application for loss of amenities of life. However, the evidence is problematical, foremost because it is equivocal. Is the appellant saying that she curtailed her social activities as result of the assault and through fear of running into Ironbark and being threatened by him? Or she is saying that she curtailed her social activities as a result of threats made by Ironbark after the assault?

40. If the appellant's evidence is construed in the latter manner, then it is difficult to see how any loss of enjoyment of life's amenities could be causally related to the assault. Surely, any loss of amenities would have to be seen as being occasioned by the threats which do not form part of the application for victim's assistance; and those threats may or may not have constituted an offence.

41. Given the equivocal nature of the evidence relating to the loss of amenities, it is my considered opinion that had that additional evidence been before the Judicial Registrar she would have been unable to be reasonably satisfied that the claim for loss of amenities was causally related to the assault.

42. However, regardless of how the evidence is construed – and even if I have erred on the issue of causation - the evidence is problematical on a further ground. The additional evidence concerning loss of amenities is not at all

compelling. In my view the necessary groundwork for a claim for loss of amenities of life has not been laid. There is no evidence of her level of activity within a social environment prior to the assault, that is to say as to the nature and extent of her social activities prior to the incident. Nor is there any evidence as to the nature and extent of her social activity following the assault (or the subsequent threats) There is no cogent evidence of a marked change in her enjoyment of life's amenities. There is merely a bald assertion that for several months she was limited in her social activities. I consider that had this additional evidence been before the Judicial Registrar then she would have not been able to be reasonably satisfied on the balance of probabilities that the assault had in fact diminished the appellant's enjoyment of life's amenities.

43. My formal order is that the appeal be dismissed.

44. I will hear the parties on the question of costs at the earliest convenient time.

Dated this 17th day of October 2005

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE