

CITATION: *Turnbull v NT of Aust* [2005] NTMC 077

PARTIES: MELIKA BELISHA TURNBULL

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20429475

DELIVERED ON: 29 November 2005

DELIVERED AT: Darwin

HEARING DATE(s): 17th November 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Offence – balance of probabilities – contributory behaviour – continuing injury – section 10 Crimes (Victims Assistance) Act

REPRESENTATION:

Counsel:

Applicant: Mr Bradley

Respondent: Ms Spurr

Solicitors:

Applicant: Withnalls

Respondent: Halfpennys

Judgment category classification: C

Judgment ID number: [2005] NTMC 077

Number of paragraphs: 72

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

No. 20429475

BETWEEN:

Melika Belisha Turnbull
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 29 November 2005)

Judicial Registrar Fong Lim:

1. The Applicant makes application for an Assistance Certificate to issue in her favour pursuant to section 5 of the Crimes (Victims Assistance) Act. The Applicant claims that she was a victim of a sexual assault and arising out of that assault she had some minor physical injuries and a major mental injury.
2. The Applicant claims that she attended the Howard Springs Tavern on the 6th of August 2004 having been driven there by a friend, Ms Hector. Ms Hector had one drink and then left promising to pick the Applicant up some time before the Tavern closed at 2:00am. The Applicant then continued socialising with acquaintances. She states that it was the first time in several weeks that she had been at the Tavern. The Applicant had some conversation with the alleged offender, Mr Petty, as he was an acquaintance of hers from previous meetings at the Tavern. The Tavern then closed early and Petty asked the Applicant to join him at the Hells Angel Clubhouse to continue to

listen to music and dance. The Applicant agreed as long as Petty promised to return her to the Tavern at 2:00am in time for Ms Hector to pick her up.

3. While at the clubhouse the Applicant says she only drank water and started to feel tired and unwell with a stomach ache. When she asked Petty to take her back to the Tavern to wait for her friend he suggested as it would be better if she went back to his caravan to wait instead of being alone at the Tavern. The Applicant went with Petty's to his caravan because she says she trusted him having been in his caravan before and feeling safe with him. Once back at the caravan the Applicant asked if she could lie down for a rest which she did. The Applicant says she only rested for a short while when she opened her eyes and Petty was removing his clothes to get into bed with her.
4. Petty then forcibly removed the Applicant's clothes, held her face down and either rubbed his penis in her buttocks or actually penetrated the Applicant's anus. The Applicant claims that Petty also restrained her from leaving his caravan for 4 – 5 hours.
5. The Applicant then claims she was sent out of the caravan by Petty at which time she found a public telephone box and called her father. She didn't tell him of the attack. She managed to then get a lift from someone to her husband's place where she slept for few hours after which she got her husband to take her back to her unit. When a friend called in later that day she told him of the attack and he then took her to Ms Hector's place. From there Ms Hector and her partner took control of the situation ringing the police and taking the Applicant to the police station to report the incident and the Sexual Assault Referral Clinic for an examination.
6. There is no sworn evidence to the contrary from Petty. The contrary evidence comes in the form of the transcribed record of interview of Petty on the 26th of August 2004 as annexed to the affidavit of Cathy Spurr. In that record of interview Petty claims the Applicant was quite well known to

him from their times socialising at the Tavern and that on that night she did go back to his caravan with him. He says that once back in the caravan the Applicant took off all of her clothes except her knickers and laid down on his bed. Petty then says he took off his clothes and attempted to have sex with the Applicant but she said no so he got angry and told her to get out. When asked by the police officer how far he had gone Petty says he couldn't remember only that he had his arm around her. Petty also says the Applicant could have been in the caravan for a range of 10 minutes to perhaps an hour.

7. Petty was vague as to detail of what happened inside of his van in his answers to the police officer's questions yet was very specific about what happened afterwards eg the Applicant looking for her jumper in his truck after he had directed her to leave his van. Petty was also specific about the photos that were on his camera of the Applicant from a previous Friday night at the Tavern.
8. Petty also suggested that there had been some suggestion by the Applicant previously that he move in with her but that he had said no.
9. There were no witnesses to the alleged assault. There were witnesses to what happened that night at the Tavern and to what the Applicant did after she left Petty's caravan.
10. The police obtained statements from nine other people during the investigation into the alleged assault. It should be noted at this point that Petty was not charged with an offence on the basis that the Police formed the view that there was little likelihood of a successful prosecution.
11. Ms Hector confirmed the Applicant's story except that she states that she returned to the tavern at about 1:00am to pick up the Applicant, the Tavern was open and she couldn't find the Applicant. The statement of Hans Rothe, a friend of Petty also confirms that his recollection is that Petty and the Applicant left well before closing time to go to the Hells Angel Clubhouse.

12. Mr Rothe also states that he saw the Applicant at the tavern the next Friday night having a good time singing karaoke and dancing.
13. A further statement by a Mr Heath Costello on the 27th of August 2004 confirms that he remembers a Friday night “several weeks ago” where a part aboriginal woman fitting the Applicant’s description was dancing with others and Petty and raising her top to expose her breasts. Costello also remembers that the next Friday night the same woman was at the Tavern dancing and having a good time. Costello wasn’t sure if Petty was there on the second Friday night.
14. The Applicant claims that after Petty had attacked her she rang her biological father from a public phone reverse charges. The Applicant also says that she doesn’t often contact her father. The statement from the Applicant’s adoptive father, Bob Jones, confirms that he remembers getting a late night reverse charges call from the Applicant sometime in August in which she asked to speak with his grandson but she didn’t say why she rang. Mr Jones also stated that it was not unusual for the Applicant to make reverse charges calls at night time to him and that they keep in touch twice a week. The Applicant does not say in her statement that she also rang her adoptive father when she clearly did.
15. There was also a statement taken from the Applicant’s husband who confirms that she visited him and their son between 5:00am and 6:00am on Saturday morning. He answered the door to her they greeted each other and she simply walked past him to sleep with their son on the double bed. The next day he took her back to the unit. Mr Turnbull then states that he had received a call 3 days later from the Applicant advising him that she had been anally raped by Petty and that he had also hit on the head and dragged her back to his caravan.

16. Ms Hector's partner, Paul Costello also gave a statement to the police the contents of which corroborated Ms Hector's evidence that the Applicant had come to them in a distressed state claiming she had been sexually assaulted.
17. There was also a statement from Tracy Johns from the Sexual Assault Referral Centre who was the medical practitioner who examined the Applicant. Dr Johns concludes that

“.. the findings on genital examination could indicate that some attempt a penetration was made, causing the tenderness and erythema from friction. It is unlikely that anal penetration succeeded as some tearing would be expected if the penetration was resisted.”
18. The Applicant must prove to the court's reasonable satisfaction (*Briginshaw v Briginshaw* [1938] 60 CLR 336) that Petty had committed an offence, in this case had assaulted her, and that she has suffered an injury from that assault.
19. The Respondent argues that the evidence of the Applicant before the court has so many contradictions in it and that coupled with the independent evidence meant that this court cannot be satisfied that events occurred as the Applicant says they did.
20. I accept that there are inconsistencies in the Applicant's evidence, in her affidavit she claims she was anally raped with full penetration and held against her will by Petty for 4 or 5 hours. In her statement to the police made the next day, she says

“I don't know if he put his cock inside me by I could feel him pushing it against me”

“he just kept going until he had done what he wanted ... when he finished he said to me “get the fuck out of my van”.
21. There was no mention of being held in the van for 4 to 5 hours against her will.

22. Ms Hector reports:

“Merika told me that he had rubbed his penis between the cheeks of her bottom forcefully.”

23. Mr Paul Costello says the Applicant said:

“ ... he had ripped her pants off or something and tried to have sex with her. She also told me that she had tried to fight him or push him off. I asked her, “did he stop you from leaving the premises?” she said yes.”

24. The Applicant then reports to her husband three days later that :

“He raped me and stuck his dick up my bum at the caravan park.. he hit me on the head and dragged me back to the caravan.”

25. This is the only mention of the Applicant being dragged back into the caravan after supposedly attempting to leave. The words “back to the caravan” suggests that she was in the caravan and had left but was forced back in.

26. Dr Johns reports the history as relayed by the Applicant as:

“...held her down while he tried to penetrate her. She says her bottom hurts and she thought he may have entered her anus but did not think he entered her vaginally.

27. It is logical that if the Applicant was resisting the assault as she says she was she would know if she had been penetrated. It is also illogical that she didn't know while the event was fresh in her mind yet three days later was certain there was penetration.

28. Other inconsistencies in the evidence are that the Applicant says in her affidavit that she called her biological father reverse charges yet there is only evidence from her adoptive father of a call. It is curious in the least that the Applicant could possibly not remember whether it was her biological father or her adoptive father. The fact that the Applicant actually states in her affidavit that she called her “biological” father indicates that

she differentiates between the two yet she does not mention in her affidavit or her statement to the police that she made two calls that night.

29. Petty, his friends Rothe and Heath Costello along with photographic evidence paint a picture of the applicant acting in a promiscuous way on the night of the alleged assault and prior to that night. However such behaviour does not excuse sexual assault although it might explain why Petty thought the Applicant was willing to have sex with him at first.
30. There is no doubt that the Applicant is a confused individual who has had a history of depression and hallucinations. The report of Dr Newlands of the 1st November 2004 confirms that the Applicant has had several incidents in her life which have clearly affected her mental health. Particular incidents are of being raped by relatives and friends on two different occasions when she was in her mid twenties. The Applicant has previously suffered from self harm ideation and has attempted to commit suicide in the past.
31. The Applicant's actions immediately after the alleged assault were consistent with a person who was confused and perhaps in shock also given the circumstances as she had been assaulted by a person who she considered to be a friend. The Applicant's past medical history could also explain her thoughts of low self worth and her inability to talk to her father or husband about the incident on the night it happened.
32. The medical history doesn't explain the Applicant's affidavit evidence that she called her biological father not her adoptive father when from the evidence of the adoptive father and the Applicant's statement to the police she did in fact call her adoptive father. It doesn't explain why she tells some people there was anal penetration and others that she was not sure. The medical evidence is that there was no penetration and that would suggest that the Applicant was exaggerating her explanation of the incident to her husband and later to her solicitors who drafted the affidavit for her.

33. The Applicant also stated to her husband that Petty had hit on the head and dragged her back into the caravan. It is clear she did not make this allegation to anyone else, particularly the police, and she has not explained why she made that allegation to her husband in any answering affidavit. She doesn't address this inconsistency in her affidavit evidence nor does she explain why she claimed she was going to get \$17000 compensation to her father.
34. Even taking into account the inconsistencies in Applicant's evidence, the Applicant's report to the police of the assault later the next day, her statements to others, and the evidence from the Sexual Assault Referral Centre of the physical evidence indicate that on the balance of probabilities there was an attack on the Applicant by Petty and that assault consisted of him holding her down on the bed a while he rubbed his penis up and down in between her buttocks. I accept the evidence of Petty and his friends that the Applicant had been acting promiscuously at the Tavern that night and on previous nights and I can understand that Petty may have thought she would welcome his advances. However Petty in his record of interview acknowledged that the Applicant told him to stop so there is no allegation that the Applicant consented to the sexual advances of Petty.
35. I find that Petty did sexually assault the Applicant by rubbing his penis between her buttocks without her consent. I find that there is not enough evidence to convince me to my reasonable satisfaction that the Applicant was held inside the caravan for 4 – 5 hours although she was obviously held there for the time of the assault. I find that the inconsistencies of in the Applicant's account of events to different people can be explained by the fact that she is obviously a person with a mental illness who had just been through a terrible experience which no doubt reminded her of the times in the past when she had been raped.

36. It is also my view that the Applicant in her confusion and distress has at times exaggerated events.
37. I therefore find that the Applicant was the victim of an offence upon her and that she suffered the physical injury of soreness and bruising around the buttocks for a approximately 4 weeks subsequent to the assault. The Applicant also claims that she had some bleeding from her bowels however there is no medical evidence to support the claim that this was because of the assault. I cannot accept that the bleeding was caused by the assault because besides the fact that there is no medical evidence to support that claim I cannot be reasonably satisfied that anal penetration actually occurred.
38. The Applicant also makes a claim that she suffers from lower back pain from the assault however there is no medical evidence to support that claim so I cannot be reasonably satisfied that the back pain has been caused by the assault.
39. The Applicant also claims that she had suffered a mental injury due to the assault. It is clear from the evidence of Dr Newlands that the Applicant had previously had problems with depression and suicidal ideology. The Applicant has been the victim of two previous rapes by the relatives. The Applicant accepts that she had been treated for depression but says that she had been doing better since her son had been born six years ago until this incident with Petty.
40. The Applicant lists ongoing psychological injuries as:
 - 40.1 Difficulty in getting to sleep
 - 40.2 Flashbacks of the offence and the offender
 - 40.3 Suicidal ideation
 - 40.4 Depression

- 40.5 Low self- esteem
 - 40.6 Feeling dirty so that I feel compelled to pour a liquid cleanser on myself twice per day, particularly around my ano-genital area
 - 40.7 Inability to sing and dance hobbies that I enjoyed prior to the offence
 - 40.8 Fear of the offender and of men generally
 - 40.9 Lack of appetite
 - 40.10 Loss of concentration
 - 40.11 Reduced memory
 - 40.12 Lack of Interest in my personal appearance
 - 40.13 Fear of the dark
 - 40.14 Fear of crowds
 - 40.15 Difficulty expressing positive feelings towards my son Joshua
 - 40.16 Anger and violent behaviour towards my husband David.
41. The Applicant also suffers hallucinations of small dwarf like creatures when she is feeling distressed.
42. In relation to the Applicant's inability "to sing and dance like before", the evidence of the Rothe and Heath Costello is that the Applicant was back at the Tavern the next week singing and dancing just as she had previously done in weeks before. This clearly contradicts the Applicant's evidence. The Applicant confirmed to Dr Newlands that (page 7 of Newlands report):

"She could not longer get up and sing....."

She had been back to the Howard Springs Tavern on one or two occasions but was now fearful that if he were to turn up she would probably want to crack him with a bottle. Hence she did not go."

43. That is contrary to the Applicant's evidence that she no longer went out because she couldn't enjoy herself. What she told Dr Newlands was more like her protecting herself from becoming violent with the offender should she see him.

44. The Applicant places her suicidal ideation as an effect of the assault however in the Mental Health Triage Assessment it is clear she has told the staff at hospital that it is a chronic problem. See page 2 of the Assessment notes:

“Merika said that she has thoughts about ending her life for many years, this is chronic ideation. States that she has not acted on this type of thinking as she wants to be around for her son Joshua ”

45. The report of Dr Newlands also confirms that suicidal ideation.

46. The Applicant states that the assault has caused her not to sleep very well yet on page 4 of the Mental Health Triage Assessment it is recorded that:

“States that she hadn't slept well for years”

47. The Applicant states that her concentration has been affected by the assault yet in the Mental Health Triage Assessment the service notes the Applicant's concentration as:

“Good, did not require the questions to be repeated and was appropriate with all her responses.”

48. Dr Newlands stated at page 9 of her report that:

“She appeared cognitively intact, thought this was not formally tested”

49. Dr Newlands opins at page 10:

“Certainly, symptomatology is in the case of the Post Traumatic Stress Disorder, directly related to her recent rape. There is of course the possibility that the previous rapes had sensitised her, though she would appear to have coped well with previous events, had not sought compensation, and had the support of family and friends.”

50. At page 11 Dr Newlands also states:

“The exacerbation of her major depression is also directly related to the alleged assault. It would appear to have acted as a psycho – social stressor, triggering a further episode.”

51. It might be argued that Dr Newlands opinion should be considered in light of the history given to her by the Applicant. The Applicant has told Dr Newlands that all of the symptoms she has listed were caused by the attack upon her by Petty however it is clear that she was having some of those symptoms prior to the assault eg sleeplessness, suicidal ideation, anger, depression. Dr Newlands has based her opinion in her accepting all of what the Applicant has relayed to her.

52. The Applicant has exaggerated her symptoms to Dr Newlands she has claimed that she suffered none of those symptoms listed for some time before the attack whereas it is clear that she had. I accept that the assault is most likely to have exacerbated some symptoms however it is clear that all of the Applicant’s mental illness is not caused by the assault.

53. In situations where an Applicant is found to have an injury which is not caused solely by the offence then the court can only compensate for that which is caused by the offence. Typically the issue arises in cases such as the present matter where the applicant has an underlying mental illness which had been aggravated or exacerbated by the offence. If the Respondent wants the Court to apportion the effect of different elements on the Applicant’s mental state then the onus is on the Respondent to provide to the court evidence to assist the court in any apportionment.

54. In *Watts v Rake* (1960) 108 CLR158, the court found that if the disabilities of the appellant:

“....can be disentangled and one or more traced to causes in which the injuries (she) sustained through the (offences) play no part, it is the defendant who should be required to do the disentangling and to

exclude the operation of the (offences) as a contributory cause (per Dixon CJ, at p160)”.

55. The Respondent in this case has not provided any evidence to suggest any sort of apportionment and indeed did not put any argument regarding an apportionment.
56. The Applicant is clearly a mentally vulnerable person who has suffered an attack from Petty. The attack has caused a flare up of her underlying depressive state and has caused her to suffer post traumatic stress disorder for which Dr Newlands recommends the Applicant should receive treatment. The Applicant states that she would undertake that treatment should she be awarded the money for that treatment however her lack of motivation to access treatment already available through Territory Health Services indicates that she is unlikely to avail herself of that treatment.
57. **Contributory behaviour** the Respondent also argued that should the court be in favour of issuing an assistance certificate in favour of the Applicant then it should consider a discount of the amount of the certificate because the Applicant has failed to undertake treatment readily available to her.
58. Section 10 of the Crimes (Victims Assistance) Act provides:
 10. Behaviour of victim, &c., to be taken into account
 - (1) In considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate, the Court shall have regard to the conduct of the victim and to any other matters it considers relevant.
 - (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.
59. The Respondent’s argument is that the mental injury claimed by the Applicant is a continuing injury and the fact that the Applicant has not

sought treatment for that injury has contributed to the continuation of that injury.

60. Section 10 is in two parts, pursuant to section 10(1) the court shall consider the behaviour of the victim and any other matters it considers relevant when assessing the amount. Subsection (2) provides for the reduction of the certificate amount should the court find that the victim's behaviour contributed to her injury.
61. I was not referred to any case law to support the proposition that section 10(2) should be used to impose a duty to mitigate loss upon the victim.
62. The leading authorities on the application of section 10 Lanyon v Northern Territory of Australia [2002]NTSC 6 and Allmich v Northern Territory of Australia and Long [2000] NTMC 5 were both matters where the victim suffered physical injuries and also where both victims were in some way engaged in illegal activities when injured.
63. The legislation is beneficial legislation designed to assist victims of crime, see the long description of the Act:

“An Act to provide assistance to certain persons injured or who suffer grief as a result of criminal acts”

64. The assistance granted in the past has been assessed on a common law basis as compensation for personal injury. It must follow that the principles of mitigation of loss should also apply. If the Respondent can prove that the victim has failed to help herself by undertaking available treatment then the Respondent could argue that the Applicant should not be given as much assistance as others who have helped themselves.
65. The Applicant should have gone to Tamarind House and availed herself of those services and on the 9th of September 2004 it was suggested to her by her GP that she go to the Tamarind Centre for counselling. Dr Newlands is of the opinion that one on one counselling may be beneficial to the

Applicant in resolving some of the symptoms she has because of the assault but is not confident that the depression will be resolved by treatment given its recurrence and the Applicant's history of not taking medication.

66. There is no suggestion in the notes from the Mental Health Services that the Applicant was referred to further counselling however, it defies logic that a person with the symptoms such that the Applicant presented with would not have been referred for further counselling especially as she was expressing suicidal ideation. The fact that the records of the Tamarind Centre show no further contact with the Applicant after the first consultation of the 10th of August 2004 would indicate she did not go back there after her GP suggested she do so.
67. Given the Applicant's failure to attend the Tamarind Centre when referred there by her GP and given that Dr Newlands is of the opinion that counselling would assist the Applicant's recovery I find that the Applicant's conduct in failing to undertake treatment contributed to her continuing mental injury.
68. **Conclusion:** The Applicant is a victim within the meaning of the Act. The Applicant suffered minor physical injuries and a substantial mental injury. The Applicant is a woman previously traumatised from rapes by relatives on two occasions when she was in her early twenties. The Applicant has a continuing mental illness and has shown by her actions in the past that in acute phases of the illness she will take medication or seek treatment but otherwise does not get treatment for her mental illness.
69. Prior to the assault the Applicant says she was coping well enough although she doesn't claim to have been completely symptom free. Subsequent to the assault the Applicant felt the need to admit herself to Cowdy Ward at the Royal Darwin Hospital as she felt she would harm herself. Subsequent to that admission the Applicant has not pursued any further treatment except to get some sleeping tablets prescribed by her GP.

70. It is clear the Applicant is a person who has a propensity for depression and is vulnerable to mental illness. The assault has caused an acute incident of depression resulting in her admission to Cowdy Ward and a more lasting Post traumatic stress disorder which left untreated may resolve or may become a chronic condition. It is my view that the Applicant will not avail herself of further treatment as her actions in the past belie what she states in her affidavit.
71. I therefore order that an Assistance Certificate issue in favour of the Applicant for the following:
- 71.1 Pain and suffering for physical injury - \$500.00
- 71.2 Pain and suffering for mental injury - \$10000.00
- 71.3 Medical Treatment – nil
- 71.4 Less an amount for failure to undertake treatment which could have lessened the mental injury she continues to suffer – 10%
72. Therefore an assistance certificate will issue to the Applicant for \$9450 and the Respondent is to pay the Applicant's costs to be taxed in default of agreement.

Dated this 29th day of November 2005

Tanya Fong Lim
JUDICIAL REGISTRAR