

CITATION: *Noble v Northern Territory of Australia* [2006] NTMC 012

PARTIES: ELIZABETH MAY NOBLE

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance)

FILE NO(s): 20402367, 20402545, 20402546, 20402549,
20402551, 20402553, 20402556, 20402364,
20402366, 20402370, 20402371, 20402372, &
20402376

DELIVERED ON: 6 February 2006

DELIVERED AT: Darwin

HEARING DATE(s): 9th December 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Costs – taxation of costs – taxing officer’s discretion – splitting of lump sum –
direction to tax on time basis – Crimes (Victims Assistance) Act section 24

McCartney v Northern Territory of Australia [2004] NTMC 068

Schmidt v Gilmour [1988] WAR 219

Freese v Northern Territory of Australia [2004] NTMC 066

Wentworth v Wentworth [2001] 52 NSWLR 602

Crimes (Victims Assistance) Rules

REPRESENTATION:

Counsel:

Applicant: Ms Tregear

Respondent: Ms Spurr

Solicitors:

Applicant: Halfpennys

Respondent: Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 012
Number of paragraphs:	35

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

No. 20402367, 20402545, 20402546, 20402549, 20402551, 20402553, 20402556,
20402364, 20402366, 20402370, 20402371, 20402372, & 20402376

BETWEEN:

ELIZABETH ANN NOBLE
Applicant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Respondent

REASONS FOR TAXATION RULING

(Delivered 6th February 2006)

Judicial Registrar Fong Lim:

1. The Applicant was an applicant in fifteen applications for assistance certificates under the Crimes (Victims Assistance) Act (“CVA Act”). The applications were resolved in the Applicant’s favour without the need to go to a hearing and with fifteen certificates of Assistance issuing in the Applicant’s favour.
2. Costs under the CVA are governed by section 24 of the Act which provides:

“....(4) The Regulations –

 - (a) may prescribe a lump sum fee for specified work done in respect of an application under section 5, and specified disbursements incurred in doing that work, as the costs allowable in respect of that application; and
 - (b) may prescribe a percentage of the costs otherwise allowable under the Appendix to Order 63 of the Supreme Court Rules as the costs allowable for work done in respect of an application under section 5.

(5) A legal practitioner who is entitled to recover costs in respect of an application under section 5 may claim those costs as prescribed under subsection (4)(a) or as prescribed under subsection (4)(b).

3. A party who is claiming costs can do so on the basis of the lump sum scale provided for in regulations 5, 6, & 7 of the Crimes (Victims Assistance) regulations or on a time basis.
4. The scale set out in the regulations is a lump sum scale in which a party can claim a certain lump sum amount for certain stages of the litigation.

5. Costs: lump sum fees etc. allowable if assistance not over \$5 000

(1) For the purposes of section 24(4)(a) of the Act, the fees and disbursements allowable as costs in respect of an application under section 5 of the Act, where the assistance certificate specifies an amount not exceeding \$5 000, are as follows:

(a) a fee of –

(i) \$750 for work up to and including the first prehearing conference, including taking instructions, obtaining preliminary medical reports, preparing, filing and serving the application, attending the mention and attending the first prehearing conference; or

(ii) \$1 050 if the work referred to in subparagraph (i) also includes an application for an extension of time for the purposes of section 5(3) of the Act;

(b) an additional fee of –

(i) \$350 for further work up to the hearing of the application, including obtaining additional expert medical reports, attending further prehearing conferences and all preparation for the hearing of the application; or

(ii) \$700 if the work referred to in subparagraph (i) relates to an application in respect of which the offender has not been found guilty of the offence that resulted in the injury suffered by the victim and where it was necessary to obtain police records or obtain evidence from witnesses;

(c) for attending the hearing of an application, an additional fee of –

- (i) \$400 if the hearing does not exceed half a day;
 - (ii) \$800 if the hearing exceeds half a day but does not exceed one day; or
 - (iii) \$800 for the first day of the hearing plus \$400 for each day or part of a day thereafter;
 - (d) all reasonable disbursements, excluding counsel's fees.
- (2) A fee referred to in subregulation (1)(c) is not allowable if, during the hearing of the application, the parties reach an agreement in pursuance of section 10A of the Act and the Court specifies the agreed amount in the assistance certificate.

6. Costs: lump sum fees etc. allowable if assistance over \$5 000

(1) For the purposes of section 24(4)(a) of the Act, the fees and disbursements allowable as costs in respect of an application under section 5 of the Act, where the assistance certificate specifies an amount exceeding \$5 000, are as follows:

(a) a fee of –

(i) \$1 000 for work up to and including the first prehearing conference, including taking instructions, obtaining preliminary medical reports, preparing, filing and serving the application, attending the mention and attending the first prehearing conference; or

(ii) \$1 300 if the work referred to in subparagraph (i) also includes an application for an extension of time for the purposes of section 5(3) of the Act;

(b) an additional fee of –

(i) \$400 for further work up to the hearing of the application, including obtaining additional expert medical reports, attending further prehearing conferences and all preparation for the hearing; or

(ii) \$800 if the work referred to in subparagraph (i) relates to an application in respect of which the offender has not been found guilty of the offence that resulted in the injury suffered by the victim and where it was necessary to obtain police records or obtain evidence from witnesses;

(c) for attending the hearing of an application, an additional fee of –

(i) \$500 if the hearing does not exceed half a day;

(ii) \$850 if the hearing exceeds half a day but does not exceed one day; or

(iii) \$850 for the first day of the hearing plus \$500 for each day or part of a day thereafter;

(d) all reasonable disbursements, excluding counsel's fees.

5. In these matters the Applicant has claimed a lump sum amount for each of the applications for extensions of time and for work from instructions to preparation for a hearing.(ie items 6(1)(a)(ii) and (b)(i))
6. I was provided with written submissions by both parties received on the 27th of January 2006. It is interesting to note that neither party saw fit to refer to previous decisions of this court on these issues.
7. The Applicant argues that she is entitled to claim the lump sum for each of the matters at her election and that there is no power in the taxing officer to reduce that amount only a power to increase that amount. The Applicant argues that the Supreme Court cost rules can be applied in this argument. The Applicant argues that the Supreme court rules apply because the Local Court rules apply (as these matters are heard in the Local Court that is a natural assumption) then the Supreme Court rules apply through Rule 1.12 of the Local Court Rules. This analysis makes assumptions that cannot be made.
8. There are specific rules of court relating to Applications for assistance, the Crimes (Victims Assistance) rules and those rules govern procedure in court when hearing Crimes (Victims Assistance) applications. Rule 5 of those rules states what procedure applies other than the rules:

“5. Procedure wanting or in doubt

If the manner or form of the procedure –

(a) for commencing or taking a step in a proceeding; or

(b) by which the jurisdiction, power or authority of the Court is to be exercised,

is not prescribed by these Rules or by or under an Act, the Court may adopt and apply (with the necessary modifications) the relevant rules and forms observed and used under the Local Court Rules.

9. The court has the discretion to apply the Local court rules and thence forth the Supreme court rules. It is my view in relation to costs and how to apply the lump sum scale the court should take guidance from the Supreme Court rules.
10. The Respondent submits that there is clear power in the taxing officer to reduce, disallow or waive the lump sum amounts that the regulations prescribe and given that the taxing officer is not obliged to allow the lump sum scale in all matters. The Respondent provides this court with no authority for the proposition that the taxing officer can reduce a lump sum amount in scale such as provided by the regulations. There is nothing in the Supreme Court rules to support the view that a taxing officer can reduce a lump sum claim only that the amount can be disallowed. The notes in the Appendix of the Order 63 of the Supreme court rules clearly contemplate a taxing officer increasing the fixed amount claimed however it does not contemplate the reduction of a fixed amount.
11. The Applicant's proposition that there is power to increase but not to decrease such lump sum amounts is more acceptable in the Supreme Court given Order 63.66.
12. The Respondent further argues that in fixing costs the court is required to act judicially and referred this Court to Wentworth v Wentworth [2001]52 NSWLR 602 for that proposition. The issue in the Wentworth case was whether or not an order for costs could be sought against a taxing officer

and the court held because the taxing officer was acting with delegated judicial function therefore was entitled to judicial immunity in that function.

13. The issues in the present case are hardly of the same category as in Wentworth's case however I do accept that a taxing officer must act judicially when taxing costs. I also accept that the purpose of a taxation of costs is to ensure that the receiving party is reasonable compensated in costs and that the amount allowed are justified.
14. I refer both parties to my decision in McCartney v Northern Territory of Australia [2004] NTMC 068 in which I consider all of the issues put to the court in this matter. In McCartney's case I found that:

“(a) A taxing officer can look behind the lump sum to assess that the work included is properly included and claimed for should only do so in cases where an anomaly is created.”
15. While I did not express myself very elegantly my intention was to say the taxing officer had the power to look behind the lump sum to see if all the work described in that lump sum had been done but should only do so when an anomaly is created. In that case an anomaly was created in that there were multiple applications and only one affidavit prepared. In that matter the Applicant claimed the lump sum fee for preparation for each of the applications. In that decision I allowed a preparation fee for each of the files.
16. In addition to that decision I agree with the Respondent's submission that it is for the court or taxing master to decide whether the costs claimed are ultimately justified : Schmidt v Gilmour [1988]WAR 219.
17. In this matter we have an Applicant with fifteen applications for assistance, her solicitors have been efficient in the preparation of her case for hearing. The solicitors have taken their client's instructions in relation to each offence and application and put those instructions into one affidavit not fifteen.

18. In my view the skill required in the preparation of an affidavit is not the formal parts of the affidavit it is the taking of instructions and the putting of those instructions into affidavit form. Had there been affidavits produced for each file the skill in preparing each of those affidavits would have been no more than the skill in preparing the single affidavit relating to each offence.
19. More importantly the most difficult issue the solicitors and the courts have in these matters where there are multiple applications is invariably there is a claim for mental injury which has to be split between the applications. This entails the solicitors obtaining instructions from the client as to the effect each offence had on the applicant's state of mind.
20. The solicitor also has to establish for each offence what if any physical injuries there were and the details of each occasion.
21. However on the other hand the solicitor's attendance at the prehearing conferences in these matters only required one appearance and the mention of all the matters at that appearance. The solicitor dealt with these matters as one and ought not be allowed a separate appearance fee for each as submissions were exactly the same. Obviously I agree with Judicial Registrar Monaghan's decision in Freese v the Northern Territory of Australia [2004] NTMC 066 where she found that as there was only one hearing set down for all matters then only one preparation fee for the hearing could be claimed.
22. Unfortunately the lump sum fee for preparation does not allow the court to easily identify what proportion of that fee relates to the prehearing conference attendance and therefore does not allow the taxing officer to separate and split that amount from the lump sum.
23. It is important to note at this point the way the court presently deals with these applications at the prehearing conference stage. Presently all matters are listed for their first prehearing conference in a mention/ callover

situation which is not set up for the discussion of issues as are contemplated by the rules as they were originally drafted. The rules envisage a prehearing conference at which the Applicant's affidavit and medical reports are available to allow the parties to discuss the issues in depth and possibly come to a resolution. In reality there is never a substantial prehearing conference held in these matters and perhaps it is time that the court reconsider its processes.

24. It is also important to note that more often than not the Applicant's affidavit is not filed with the application as is required by the rules and that is also contemplated by the lump sum fee for preparation however as long as the affidavit is in fact drawn then there is no need for the taxing officer to concern themselves as to the inclusion of that element of the preparation.
25. The costs regulations clearly did not contemplate multiple applications and the court must do the best it can in the applying those regulations. It is also clear that the regulations have been drafted on the premise that each application would go through a prehearing conference before being listed for hearing.
26. In previous decisions the Court has not looked at this issue in detail and the more I do so in this matter the more problematic it becomes.
27. If the Applicant is allowed the lump sum preparation fee for each of the applications the court would be ignoring the fact that clearly certain steps included in the lump sum fee have not been undertaken by the Applicant.
28. The general principle of a taxation of costs is to allow a successful party to be paid his costs at a reasonable amount in respect of all costs reasonably incurred (see rule 63.26 of the Supreme Court Cost Rules) this principle of course must be applied within the restrictions that the legislation may place on the costs.

29. The Respondent is arguing that the Applicant has not done the work for each application as claimed which can justify the lump sum amount for each of the applications. The Applicant argues that that there is no power to reduce the amount claimed on a lump sum only to allow or disallow it.
30. It is my view that the Applicant has done most of the work contemplated by the regulations as included in items 6(1)(a)(ii) and (b)(i) of the regulations but that the attendances at pre hearing conferences, mentions and preparation for hearing for each individual application is affected by the fact that all applications were in reality dealt with as one file.
31. It is my view that the Applicant can reasonably claim the lump sum fees in items 6(1)(a)(ii) and (b)(i)) for one file however it would be in my view to unjust to allow the full lump sum item for all files. Within the confines of the cost regime created by the legislature it cannot be ultimately justified that the Applicant should be able to claim the lump sum fee for each application as the work contemplated in that lump sum was not done.
32. Obviously this is contrary to my view in Mckenzie's case however in that case I do not believe I was provided with as much assistance by counsel as I have in this matter and in any event my further analysis of the issues has now led me to this contrary conclusion.
33. I accept the argument that I do not have the power to reduce the lump sum fee claimed and it is only within my power to allow or disallow that fee. Given that limitation it is my view that the Applicant should be allowed one lump sum fee items 6(1)(a)(ii) and (b)(i)) and any further claim for lump sum fee be disallowed.
34. I am not of the opinion that only one fee is a reasonable amount to allow the Applicant to claim for costs as the Applicant's solicitor would have had to do more work to get all fifteen applications ready to be heard (eg the extra work to get information on each offence and subsequent injuries) than they

would have done for one application. The Applicant should be allowed some costs for that work.

35. It is clear that the only just manner in which the matter can be dealt with is by the following orders:

35.1 The Applicant's costs in file number 20402367 taxed and allowed at

35.1.1 \$1870.00 preparation

35.1.2 \$450.00 for taxation

35.1.3 \$1293.00 disbursements

35.2 The Applicant to file and serve amended Bills of Costs in files numbers 20402545, 20402546, 20402547, 20402549, 20502551, 20402553, 20402556, 20402364, 20402366, 20402367, 20402370, 20402371, 20402372, 20402376 and 20402379 calculating costs in those files on a time basis within 14 days and including in eight of those files a filing fee of \$160.00 and in five of those files a taxation fee of \$338.00

35.3 The taxation of the remaining files be adjourned to a date to be fixed at the time of the filing of the amended bills of costs.

Dated this 6th day of February 2006

Tanya Fong Lim
JUDICIAL REGISTRAR