CITATION: *O'Donnell v Northern Territory of Australia* [2006] NTMC 057

PARTIES:	CARL O'DONNELL
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance) Act
FILE NO(s):	20413086
DELIVERED ON:	23 June 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	2 March 2006
JUDGMENT OF:	Dr J A Lowndes

CATCHWORDS:

CRIMES VICTIMS ASSISTANCE – CONSENSUAL FIGHT – JUSTIFIED DEFENSIVE CONDUCT – CONTRIBUTORY CONDUCT S10 CRIMES (VICTIMS ASSITANCE) ACT

REPRESENTATION:

Counsel:

Applicant:	Ms Tys
Respondent:	Mr Priestley

Solicitors:

Applicant:	Morgan Buckley
Respondent:	Priestleys

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 057
Number of paragraphs:	190

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

No.

BETWEEN:

CARL O'DONNELL
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR DECISION

(Delivered 23 June 2006)

Dr J A LOWNDES SM:

1. Carl O'Donnell, the applicant, seeks the issue of a victims assistance certificate pursuant to s 5 of the *Crimes (Victims Assistance) Act*.

2. Put briefly, the applicant alleges that he was assaulted on I June 2003 between midnight and 1 am at RJ's Bar Katherine Hotel Motel, Giles Street, Katherine. The applicant says that the offender, Wade Dempsey, grabbed him by the back of the shirt and attempted to punch him to the head and the upper body. The applicant claims that when he ducked to avoid being punched, the offender bit down on the applicant's left ear. Consequently, a part of the applicant's ear was torn away. The ear was medically re-attached, but the surgery proved unsuccessful.

3. The applicant claims that as a result of the assault he suffered an injury to his left ear whereby part of his auricular pina was severed. He claims that he now has a permanently disfigured ear. The applicant complains that physical contact with his ear still causes pain. He says that cold weather also causes

pain. The applicant also says that during the assault he suffered a fracture of a knuckle on his right hand, resulting in some deformity to that hand. He says that he has lost partial strength and grip in his right hand and cold weather also causes him pain.

4. The applicant claims that he has suffered psychological injury as a result of the assault and the disfigurement.

5. The offender's account of the incident differs from that given by the applicant. Although the offender concedes having bitten the applicant's ear he says that that was done in self defence.

6. The full extent of the conflict between the two accounts is borne out by the affidavits sworn by the applicant and the offender, which have been presented as part of the evidence in these proceedings. Those affidavits and the substantial factual dispute they create is thoroughly examined below during the fact finding process, which the Court is obliged to undertake in order to determine the entitlement, if any, of the applicant to the issue of an assistance certificate and the amount of assistance that is to be specified in any certificate that the Court considers proper to issue.

7. The offender was not convicted as he was never prosecuted. The reasons why a prosecution did not ensue are not known. However, the Northern Territory does not rely upon a failure of the applicant to report the commission of an offence: see s 12 (b) of the Act. Nor does it rely upon a failure of the applicant to assist police in the investigation or prosecution of the offence: see also 12 (c) of the Act.

THE STATUTORY PRECONDITIONS FOR THE ISSUE OF A VICTIMS ASSISTANCE CERTIFICATE

8. In order to be entitled to the issue of a victim's assistance certificate, specifying a sum of money to be paid to the applicant by the Northern Territory of Australia, the applicant must satisfy the Court on the balance of

probabilities that he was a victim within the meaning of the *Crimes (Victims Assistance) Act*.

9. "Victim" is defined in s 4 of the Act to mean " a person who is injured or dies as a result of the commission of an offence by another person". Accordingly, a certificate will only be issued if the Court is satisfied that the applicant suffered injury as a result of the commission of an offence.

10. "Offence" is defined in s 4 to mean "an offence, whether indictable or not, committed by one or more persons which results in injury to another person".

11. The third element – "injury" – is also defined in s 4 as meaning:

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

12. S 12(f) provides that the Court shall not issue an assistance certificate in respect of an injury or death that occurred during the commission of a crime by the victim.

13. The Court also needs to be mindful of s 10 of the Act when considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate. That section provides as follows:

" (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 that 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."

14. In order to be satisfied that the victim's conduct contributed to the injury or death the Court must be satisfied on the balance of probabilities that the victim's conduct contributed to that injury or death.[1]

THE AFFIDAVIT EVIDENCE

15. All of the evidence presented in these proceedings was by way of affidavit. Neither party sought to cross-examine any of the deponents of the affidavits.

16. The following affidavits were tendered in the applicant's case:

- Affidavit of Carl O'Donnell sworn 23 March 2005 (Ex 1)
- Affidavit of Mathhew James Culp sworn (Ex 2)
- Affidavit of Rodny Jame Neander sworn (Ex 3)
- Affidavit of Kym John Windows sworn (Ex 4)
- Prior convictions of Wade Dempsey (Ex 8)

17. The following affidavits were tendered in the respondent's case"

- Affidavit of Wade Dempsey sworn 5 October 2005 (Ex 5)
- Affidavit of Christian Newton Block sworn 6 October 2005 (Ex 6)
- Affidavit of Shane Dexter sworn 12 October 2005 (Ex 7). This exhibit included a number of annexed statutory declarations: the declarations of Nicola Kidney, John Fraser, Caroline Cribbs, Grant William Hadden,

[1] See s 17 Crimes (Victims Assistance) Act.

Emily Graham, Jenna Wone, Leigh-Anne Hoddgetts, Jamie McCulloah and Dr David Berallat.

THE SUBMISSIONS IN RELATION TO THE INCIDENT

- **The applicant's submissions**

18. Ms Tys, who appeared on behalf of the applicant, made the following submissions in relation to the applicant's entitlement to a victims assistance certificate.

19. It was submitted that it was clear that prima facie an offence had been committed, namely an assault under s 187 of the *Criminal Code* (NT), during which the applicant's ear was bitten off by the offender. Ms Tys submitted that the various defences such as authorisation, justification and defensive conduct under the Code which were potentially available to the offender could not succeed. Therefore an offence had been committed against the applicant.

20. Ms Tys submitted that any defence that the applicant had authorised the assault – that is consented to the infliction of the injury he sustained – could not be sustained as one cannot consent to the infliction of grievous harm. It was further submitted that the term "grievous harm" should be given the meaning accorded to it under the Code.

21. Ms Tys also foresaw a possible argument pursuant to s 12 (f) of the *Crimes (Victims Assistance) Act* to the effect that as the applicant had started the fight – committed the first assault- he had committed an offence at the time of the incident, and was therefore not entitled to the benefit of a victims assistance certificate. She submitted that the statutory defence was not open on the evidence. Ms Tys submitted that although there were many different versions of what occurred on 1 June 2003, the evidence overwhelmingly showed that the applicant had not started the fight.

22. Ms Tys relied upon the fact that although the applicant's affidavit was not sworn until 23 March 2005 that affidavit had annexed to it and adopted his statutory declaration made on 31 August 2003. She submitted that it was open to the Court to consider that when he made his statutory declaration the incident was still fresh in his mind, thereby lending reliability to his account. She also relied upon the very close proximity of the statutory declarations of the witnesses, Neander, Culph and Window to the incident – they were made within days after the incident.[2] Ms Tys submitted that the evidence given by those three witnesses should therefore be considered reliable.

23. It was submitted that although the offender made a statutory declaration[3] within 7 days after the incident, there was some apparent inconsistencies between the contents of his statutory declaration and those of his affidavit. Ms Tys submitted that those discrepancies went to the credit of offender.

24. It was submitted by Ms Tys that insofar as the affidavit of Christian Block deposed to the actual incident, his account should not be considered reliable, bearing in mind that he swore the affidavit some two and a half years after the incident.

25. Ms Tys submitted that although there was evidence that the applicant was intoxicated the evidence showed that the offender was a lot more intoxicated. She submitted that the level of intoxication of both men was relevant to their recollection of events surrounding the incident. Ms Tys also pointed out the importance of examining the evidence of other witnesses of fact. In particular she relied on the evidence of two witnesses – Window and Neander, both of whom said that prior to the incident the offender was "name calling" and "stirring" or "niggling" the applicant. Ms Tys also relied on the evidence of the witness - Wone – who said that the offender asked the applicant if he would be his princess and grabbed him on the shoulder with

[2] The statutory declarations were annexed to the witness' later affidavits sworn in 2005.

his mouth. Reliance was also placed on the account given by Morris to the effect that prior to the incident the offender had bit the applicant on his shoulder, whereupon the applicant told him not to touch him.

26. On the other hand, Ms Tys acknowledged the evidence given by Lock which was to the effect that both men "were trading insults at each other". However, she pointed out that at the time the witness was about four metres away from the two men, and may not have been able to hear what was being said. Ms Tys also relied upon the fact that the witness swore his affidavit some two and half years after the incident.

27. It was submitted on behalf of the applicant that the offender was "provoking or niggling" the applicant prior to the commencement of the fight and that was supported by consistent accounts given by independent witnesses. Ms Tys said that this was relevant to the issue of whether the applicant had contributed to the injury he received during the incident.

28. Ms Tys pointed out that neither in his statutory declaration nor affidavit did the offender say that the applicant had invited himself outside to have a fight. She stressed that in his statutory declaration the offender did not say why he went outside. However, in his affidavit – more than two years afterwards – he states that "he did not intend to have a physical confrontation with Carl O'Donnell". It was submitted that this subsequent statement of intention was designed to remove an earlier inference that he intended to have a fight with the applicant, and the statement smacked of recent invention.

29. Ms Tys relied upon the applicant's evidence that the offender had asked him to go outside. In that regard, she said that it was important to look at the evidence of three witnesses – Culph, Neander and Morris – who had the offender saying to the applicant things like " come you pig cunt, no law", "outside, cunt no law" and "outside, no law".

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[3] That statutory declaration was annexed to the offender's later affidavit sworn in 2005.

30. Ms`Tys submitted that there was no evidence from any witness other than the offender that the applicant started any verbal confrontation between them. However, she argued that the preponderance of the evidence pointed to the offender having "picked" or provoked a fight with the applicant. Ms Tys submitted that the evidence did not sustain an argument that the applicant had consented to have a fight with the offender or in any way contributed to his injury.

31. As to who started the fight, Ms Tys relied upon the evidence of the applicant who stated that as he was walking towards the door he was grabbed by the offender who then attempted to throw him in the direction of the door. It was submitted that the offender's actions constituted an assault – he was the aggressor. Ms Tys relied upon the evidence of Neander and Culph, both of whom corroborated the applicant's account. She submitted that both witnesses were reliable because they "were specifically watching the events play out because they 'd heard Wade Dempsey provoking Carl O'Donnell and inviting him outside". Ms Tys submitted that particular credence should be given to Neander's evidence as he was sober.

32. Ms Tys contrasted the evidence of the applicant and the corroborative witnesses with the account given by the offender. She pointed out that offender did not identify who "king hit" him; but simply implies that it must have been the applicant.

33. It was submitted that the only evidence that supported the offender's account came from the witness Block . However, although that witness says that he saw the offender get punched on the left side of his face, he is unable to identify the assailant. Again, it was submitted that only limited weight ought to be given to that witness' evidence as he was about 4 metres away from the incident and his account was not given in close proximity to the incident, but two and half years later.

34. Ms Tys submitted that the account given by Morris was consistent with the accounts given by the applicant, Neandner and Culph. The fact that she saw the applicant trying to walk past the offender was consistent with the scenario that the offender had grabbed him by the shirt and tried to push him through the door and was inconsistent with the hypothesis that the applicant had “king hit” the offender on his way to the door.

35. Ms`Tys said that although the witness Kidney was not able to say how the scuffle broke out, it is significant that she did not say that the applicant “king hit” the offender; and one would have expected that if that had happened she would have seen it, bearing in mind she says that she was standing between the two men at the time.

36. It was submitted by Ms Tys that the Court was presented with different versions as to the progress of the fight.

37. Ms Tys said that according to the applicant, when he was grabbed by the offender he threw his elbow back to protect himself. That elbow came into contact with the offender. According to the applicant the offender came at him, attempting to punch him in the upper body and face. Again according to the applicant, the offender grabbed hold of his shirt and kept trying to punch him in the face using the shirt. The applicant says that was ducking to prevent the offender from hitting him. The applicant says that is how they came to be close to one another.

38. Ms Tys submitted that the evidence of Culp – “ they both started throwing punches after that initial commencement of the fight” - was consistent with the applicant’s evidence that “he was defending blows from Wade Dempsey, possibility also retaliating.

39. Ms Tys also relied on the evidence of the witness Neander who said “that after the initial throw by Wade Dempsey, which Carl O’Donnell defended with his left arm”. Ms Tys also referred to the witness’ evidence which was

to the following effect: " that Wade Dempsey was trying to throw Carl O'Donnell on the floor and then they were throwing punches at each other". Ms Tys relied on this evidence as showing the offender to be the aggressor. As a further indication of the aggressive demeanour of the offender she pointed to the evidence of Neander which was along these lines: " as he was trying to pull Carl O'Donnell away, Wade Dempsey was still coming at Carl O'Donnell and that he grabbed him". Ms Tys submitted that the circumstances showed that the applicant was acting in self defence or engaging in defensive conduct.

40. Turning to the alternative version advanced by the offender, Ms Tys noted his evidence that after he was "king hit", the applicant continued to strike him repeatedly until he was on the ground; and he then got up and placed the applicant in a "bear hug". Ms Tys submitted that that version was not only inconsistent with the account given by the applicant but inconsistent with the accounts given by Neander and Culph. There was the word of three witnesses against one. Accordingly, the version put forward by the offender should be rejected.

41. Ms Tys submitted that little weight ought to be accorded to Lock's affidavit because he did not see what was unfolding: all he knew was that a scuffle was taking place.

42. At page 26 of the transcript Ms Tys made the following further submissions in relation to the evidence of other witnesses:

> " There is a statement by John Frazer which appears at fort glance to support Wade Dempsey's story. But it's inconsistent with Wade Dempsey's statement because Wade Dempsey doesn't allege being held by the hair when he's punched on the ground, only by the shirt. Also John Fraser's statement is inconsistent with the other two affidavits of those who saw the fight because they don't agree that Wade Dempsey ended up on the ground. Nor that Matthew Culph pushed Carl O'Donnell away while they were fighting. So John Fraser's statutory declaration, it's not a sworn affidavit. He was not close to the events, appears to be a passing glance. And the contents

> are not detailed. I would submit that it shouldn't be persuasive enough to displace the three sworn affidavits with which is inconsistent.
>
> There's another statement of a Grant Hadden, that also at first glance seems to support Wade Dempsey's affidavit and to paint Carl O'Donnell as the aggressor. But on examination of that statement, I would submit that's not the case. He sees a tall skinny fella, which is Carl O'Donnell with another bloke in a headlock, Wade Dempsey punching into the head of the other fellow with his right clenched fist. Now in our submission that's completely consistent with Carl O'Donnell's statement that once he has felt Wade Dempsey bite down on his ear, he's punching Wade Dempsey with his right fist in an attempt to get Wade Dempsey to let go.
>
> So on the evidence so far, we'd submit the evidence is highly persuasive that, and more than on a balance of probabilities that Carl O'Donnell did not start this fight and Wade Dempsey was the aggressor throughout. So on our submission, there is nothing to convince this court on the balance of probabilities that Carl O'Donnell has committed an offence at all."

43. Turning to the bite on the ear and the defensive conduct of the offender, Ms Tys submitted that there was "no evidence from any of the other witnesses to conclusively support" the offender's assertion that he bit the applicant's ear in self defence as his eye was being gouged, whilst he and the applicant were in a bear hug.

44. Ms Tys submitted that although there were witnesses who saw an injury to the offender's eye and there is photographic and medical evidence of the injury[4] the essential question is whether the injury was the result of an eye gouge. Ms Tys submitted that although the doctor stated that the injury was consistent with an eye gouge, the eye injury may have predated the incident. Ms Tys also submitted that the injury may well be consistent with a strong punch to the eye. She submitted that on the evidence the injury to the eye

[4] See Dr David Berallat's statutory declaration.

could have been the result of a punch at any time during the fight, and not merely confined to the time the offender bit the applicant's ear. Furthermore, she submitted that, given the melee, the punch that caused the injury could have been thrown by someone other than the applicant. Finally, Ms Tys submitted that the offender did not identify the applicant as the person who had gouged his eye. In the final analysis, she submitted that the Court ought to find that the offender invented the eye gouging incident.

45. Ms Tys placed great reliance on the evidence of the witness, Neander, who stated that after the fight he heard the offender say "I was punched in the face, I'm bleeding, I just want to go home". She says that that is not consistent with the offender's allegation that he was eye gouged.

46. Ms Tys submitted that Neandner was so close to the incident that had the applicant eye gouged the offender he would have seen it. She says that this is further evidence that the eye gouge did not occur.

47. Ms Tys pointed out that in his statutory declaration the offender did not identify the person who was responsible for the eye gouge. However, in his affidavit the offender believed that the applicant was gouging his eye and for that reason bit his ear. Ms Tys submitted that the difference between the statutory declaration and the affidavit adversely affects the credibility of the offender, given the self serving character of his subsequent evidence, wherein the offender tried to justify his actions.

48. At pages 29 to 30 Ms Tys submitted that the offender's allegation that he was eye gouged was not credible given the position the two men were in and their respective movements.

49. Ms Tys submitted that there could be no issue of the applicant having consented to the injury he received as it would be a nonsense to say that he had consented to part of his ear being bitten off. It was submitted that the harm that was occasioned amounted to grievous harm, at least in the sense

of “really serious harm”; and one cannot consent to the infliction of grievous harm under the *Criminal Code* (NT).

50. Ms Tys submitted that in order to take advantage of s 12(f) of the Act the respondent would have to establish on the balance of probabilities that the applicant either started the fight with a “king hit” or gouged the offender’s eye. Ms Tys submitted that the evidence did not establish either of those events. She submitted that “…there’s nothing…on the evidence to satisfy the court on the balance of probabilities that Carl O’Donnell committed an assault or anything other than defend himself after being attacked by Dempsey”.

51. Ms Tys submitted that as the evidence overwhelmingly showed the offender to have been the aggressor, there was no contributory conduct on the part of the applicant that might operate to reduce the amount that would otherwise be payable under an assistance certificate: see s 10 of the Act.

52. Finally, it was submitted by Ms Tys that the offender’s record of prior convictions (Ex 8) was relevant to the credit of the offender.

- **The respondent’s submissions**

53. The respondent’s written submissions dated 14 November 2005 may be summarised as follows.

54. Mr Priestley, who appeared on behalf of the respondent, argued that the applicant’s version of events conflicted with every other eyewitness. He went on to submit: “The applicant doesn’t state he hit Dempsey. He gives no explanation as to how his hand was injured (“inferentially by punching Dempsey in the head”). The applicant’s evidence should not be accepted.”

55. Mr Priestley said that it was significant that the witness Morris stated that the offender was at the door when the applicant tried to walk past him to go outside when the scuffle started. He says that her evidence conflicts with the

applicant's evidence that the offender grabbed him from behind as he (the applicant) was walking in front of the offender to the door. He points out that the only two witnesses who support the applicant's version are Neander and Culph, who are both friends of the applicant.

56. Mr Priestley says that the evidence given by the witness Window lacks clarity and is confused as to whether the offender grabbed the applicant.

57. It was submitted that the accounts given by Neander and Culph seriously conflict with the version given by the applicant. Mr Priestley says:

> "…they (Neander and Culph) both acknowledge the applicant was throwing punches which they thought were hitting Dempsey prior to the 'scrum' or wrestling that followed the initial blows from the applicant. The applicant's evidence that he only started punching Dempsey after his ear was bitten is either contradicted or unsupported by every eye witness and should be disbelieved. As a result, evidence of other witnesses should be accepted whenever it conflicts with O"Donnell's."

58. Mr Priestley relied upon the observations of other witnesses as to the general demeanour and behaviour of the applicant as a basis for rejecting the applicant's version of events.

59. Reliance was placed on the declaration of Nicola Kidney who deposed to the two men having words and the offender's exclamation " he's not going to fucking talk to me like that". Mr Priestly also relied upon the witness' statement that when the fight broke out the offender did not move forward and that prior to the "scrum" or wrestling punches were exchanged.

60. Mr Priestly also points to and relies upon the statement made by John Fraser that prior to the wrestle he saw the offender on "arse" with the "other bloke" (the applicant) holding the offender by the hair and delivering about four uppercuts around the face.

61. As to the applicant's demeanour, reliance was placed on the evidence given by Caroline Cripps to the effect that prior to the actual fight she observed the applicant acting arrogantly, "making horrible comments to everyone".

62. Mr Priestley also relied upon the evidence given by the witness Haddan as undermining the account given by the applicant. That witness stated that he saw two blokes "going for it", the tall skinny one (the applicant) having the other male (the offender) in a headlock. The witness further stated that the applicant was punching the offender on his head with his right clenched fist.

63. Again as to the demeanour of the applicant, Mr Priestley relied upon the evidence of the witness Graham who attests to some obnoxious behaviour by the applicant prior to the fight. Furthermore her evidence as to what occurred when Culph had ejected the offender conflicts with the account given by Culph. Mr Priestley submitted that there is no reason to disbelieve Graham and her evidence should be preferred to that of Culph.

64. Mr Priestley submitted that the evidence given by the witness Wone also assisted the respondent's case. He also has the applicant acting obnoxiously prior to the fight. Furthermore, Mr Priestley says that the witness' evidence as to the behaviour of the witness Neander toward Dempsey at the door to the car park supports the account provided by Graham and further erodes Neander's evidence.

65. The declaration of Leigh- Anne Hodgetts is also relied upon by the respondent to show that prior to the fight both men were talking to one another, which is said to contradict the applicant's version.

66. Mr Priestley relied upon the declaration of Dr Brummitt as confirmation of the injury to the offender's eye, which injury is consistent with an eye gouge.

67. Mr Priestley submitted that the offender gave a straightforward account of the incident and the defensive conduct he engaged in to put a stop to the eye gouging.

68. Finally, Mr Priestley relies upon the evidence given by the witness Lock. Significantly , he says that the two men were trading insults prior to the fight and about three metres from the door the offender was hit from behind to the side of his face with what appeared to be a clenched fist.

69. The respondent urged the Court to accept the version put forward by the offender as being the preferred one. Mr Priestley submitted that the applicant has failed to discharge the onus of proof, the requisite standard being on the balance of probabilities as expounded upon by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 363. Further, he submitted that the biting of the applicant's ear constituted defensive conduct as provided by s 29 *Criminal Code* (NT).

70. During oral submissions Mr Priestley submitted that the applicant's version should be rejected on the basis that the events as narrated by him were totally improbable.

71. Mr Priestley referred to the applicant's statement that he intended to go outside and talk with the offender so as to avoid a scene in the bar as bordering on the ludicrous, it being obvious that they were going outside to fight.

72. It was submitted on behalf of the respondent that it was entirely open to the court to conclude that the applicant and the offender intended to engage in a consensual fight outside the bar. Mr Priestley submitted that as the harm the applicant suffered during the subsequent fight was not grievous harm he was consenting to the harm suffered by him. Accordingly, no offence was committed by the offender.

73. In addition, Mr Priestley submitted that the Court could find that the applicant attempted to short circuit the intended consensual fight by king hitting the offender before they had exited the bar. It was submitted that by reason of his actions the applicant committed an offence in the circumstances set out in s12(f) of the Act, thereby disentitling the applicant to the issue of an assistance certificate.

74. In the alternative, Mr Priestley submitted that if the Court were inclined to find that the offender was the aggressor and had assaulted the applicant, the court should find that the actions of the offender in biting the applicant's ear amounted to justified defensive conduct in accordance with s 29 *Criminal Code* (NT).

75. Finally, Mr Priestley submitted that if the Court were minded to issue a certificate in favour of the applicant, on being reasonably satisfied on the balance of probabilities that the applicant was a victim within the meaning of the Act - that is he was injured as the result of an offence – then, pursuant to s 10 of the Act, the amount of assistance assessed as payable to the applicant in relation to the injury should be reduced by 100% on account of the applicant's contribution to his injury.

76. In relation to Exhibit 8 Mr Priestley submitted that little, if no, weight should be accorded to the offender's record of prior convictions in assessing the credit of the offender.

ASSESSMENT OF THE EVIDENCE AND FINDINGS OF FACT

77. The fact finding function that the Court must perform in this case is particularly difficult because of the sheer number of witnesses who had something to say about the incident, in varying degrees, and the conflicting and competing versions that emerged from their accounts of the incident. The fact finding exercise is made even more difficult by the fact that none of the witnesses were called to give evidence, nor were they cross-examined.

78. In an earlier decision of mine in the matter of *Sertic v Northern Territory of Australia* [2005] NTMC 51[48] I commented upon the difficulties facing a tribunal fact in a case where there was a body of fallible and contradictory evidence that had to evaluated and weighed without the benefit of hearing and seeing witnesses and having their evidence tested under cross-examination:

> " … the credibility and reliability of all witnesses is in issue. The task of each of the witnesses, in terms of their credibility and reliability, is made extremely difficult in this case by the fact that none of the witnesses gave vice voce evidence and subjected to the rigours of cross-examination. The Court was denied the benefit of seeing and hearing any of the witnesses. The demeanour of a witness can be significant in determining the weight to be accorded to the evidence of that witness. The credibility and reliability of each of the witnesses is left to be assessed on "the papers"- so as to speak – and by carefully scrutinising the various affidavits, scouring for significant inconsistencies and juxtaposing the contents of those affidavits with any reliable item or items of evidence which might reveal where the true facts lie."

79. In a similar vein, I pointed out in that decision that as no opportunity was afforded to any of the witnesses to explain inconsistencies in their evidence or to counsel appearing on behalf of the parties to explore and explicate any such inconsistencies, the Court was left to deal with and resolve those inconsistencies on the face of and strength of the tendered affidavits, without the benefit and assistance of the usual dynamics of the adversarial process: *Sertic v Northern Territory of Australia* (supra [57].

80. The observations that I made in *Sertic v Northern Territory of Australia* (supra) in relation to a statutory compensation scheme whereunder entitlement to compensation is primarily and usually determined by reference to "the papers" apply with equal force to the present application for victim's assistance.

81. The starting point is whether or not the applicant has reasonably satisfied the Court on the balance of probabilities that he suffered an injury as the result of an offence, whether indictable or not.

82. The first hypothesis advanced by the respondent was that no offence had been committed as the applicant and the offender had engaged in a consensual fight. According to that argument no offence, in the nature of an assault, had been committed because the applicant had consented to the application of force; and the absence of consent is an essential element of an assault. Furthermore, it was argued that the applicant had consented to the degree of force that was used in the assault.

83. It is for the applicant to establish the commission of an offence on the balance of probabilities. As lack of consent is an element of the offence of assault[5] it is incumbent on the applicant to satisfy the Court that he did not consent to the assault, or, if he did give such consent, he did not consent to the degree of force used in the assault.

84. The applicant stated that after the offender had said something unpleasant to him he replied along the lines of “don’t talk to me, I would rather not talk to you”. The applicant then said that the offender replied by saying “ do you have a problem pig. If so we should go outside and talk about this”. The applicant then stated that he agreed to go outside and talk with the offender with the intention of avoiding a scene in the bar. He went on to say that he was then grabbed by the offender before he left the bar.

85. The offender said that the applicant had told him that he was a trouble maker. He said that he returned the insult, whereafter the two continued to trade insults. The offender recalled someone saying something about going outside, though he could not say who said that. The offender agreed that they should go outside so as not to cause a scene in the bar and to avoid personal embarrassment. The offender said that it was his intention to go

outside to “sort out the argument”. However, the offender stated it was not his intention to have a physical confrontation with the applicant. The offender then said that he was king hit before leaving the bar.

86. The evidence of other witnesses as to the interaction between the two men prior the scuffle was as follows.

87. The witness Culph says that he heard the offender say to the applicant “Come on you, pig cunt” and then saw both men walk towards the door whereupon the offender grabbed the applicant.

88. Neander recalled the offender calling the applicant a “pig cunt”. He then saw the offender grab the applicant.

89. The witness window stated that prior to grabbing hold of the applicant the offender had engaged in name calling and stirring.

90. The witness Lock stated that prior to the offender being punched near the door the applicant and the offender had been trading insults.

91. Morris recalled the offender saying to the applicant “outside, no law” and saw both men walking towards the door prior to the scuffle.

92. The witness Kedney said that prior to the scuffle both men were arguing.

93. The first thing that the witness Fraser knew of was a scuffle between the two men.

94. According to the witness Cripps she only heard an argument prior to seeing two men fall on a sofa.

95. The witness Haddin only saw two men “going for it”.

96. Graham did not witness any conversation between the applicant and the offender prior to the scuffle that broke out.

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[5] See a 187 *Criminal Code* (NT).

97. The witness Wone recalled a conversation between the applicant and the offender during which the offender said to the applicant " will you be my princess?" She stated that the offender then grabbed the applicant's neck. She said that some unidentified person said something after that. She did not know what was said. She did not witness the subsequent altercation between the two men in the bar.

98. The witness Hodgetts was not privy to any conversation taking place between the two men prior to the scuffle breaking out.

99. Finally, McCullagh only witnessed the scuffle.

100. The question that arises is whether the applicant consented to have a fight with the offender. The applicant bears the burden of establishing on the balance of probabilities that he was assaulted without his consent

101. The first thing that needs to be considered is what is contemplated by the notion of consent in the context of a consensual fight.

102. In that context some authorities speak of "consent" in the sense of an agreement to have a fight: see for example *R v Raabe* (1985) 1 Qd R 115 at 119. However, it seems to me that any such agreement should not be viewed in the strict sense of a legally enforceable contract. Agreement in the present context should be considered to be a somewhat loose agreement, the essential elements of which are a proposal or invitation by one party to the other to have a fight and an indication on the part of the other party to go along with the proposal or to accept the invitation to fight: see Young *The Law of Consent* (1986) Law Book Co, p 24.

103. The next thing that must be considered is what form evidence of consent in the relevant sense may take. It is clear that the issue of consent may be raised, and indeed established, by either direct evidence or circumstantial evidence: see *The Laws of Australia* Vol 10.2 [38]: "consent may be actual or implied". There may be direct evidence of consent, that is consent may be

conveyed by express words: see *The Laws of Australia* supra. It may also be inferred from circumstances: see *The Laws of Australia* supra.

104. I must say that I am unable to treat the dialogue that occurred between the two men, on the strength of their evidence, as direct evidence that the applicant had agreed in the relevant sense to fight the offender. First, according to the applicant he said nothing to the offender that could be treated as an invitation to the offender to engage in a fight. Quite to the contrary, he agreed to go outside with the offender to talk about an apparent problem; and he did that with the intention of not creating a scene in the bar. Secondly, although the offender stated that someone had said something about going outside, he could not recall who said that. What is significant is that he is unable to attribute that statement to the applicant. Furthermore, by way of response to that statement, he agreed to go outside so as to avoid a scene and further embarrassment, and ultimately to sort out the problem without the intention of engaging in a physical conflict with the applicant. In my opinion, the combined evidence of the applicant and the offender provides no evidence of an intention to engage in a consensual fight. At the most, it provides evidence of an intention to go outside to settle an argument, without necessarily resorting to physical force, for the purpose of avoiding a scene in the bar and personal embarrassment.

105. It is my opinion that the evidence of the other witnesses, even taken in conjunction with the accounts of the applicant and the offender, fails to provide direct evidence (or sufficient evidence) of an agreement between the two men to engage in a consensual fight.

106. Having reached that conclusion, the Court must nonetheless consider whether the evidence circumstantially gives rise to a consensual fight.

107. Can an inference be properly drawn from the evidence given by the applicant and the offender as well as the evidence given by other material witnesses that the applicant had agreed to participate in a consensual fight?

108. In my view, the evidence does not give rise to such an inference. In other words, consent on the part of the applicant to take part in a fight with the offender cannot be properly inferred from the circumstances. In order to make that inference it would be necessary to look behind the express intention of the applicant and the offender, which was to go outside to settle their dispute without resorting to physical force. One might think that was not their real motive, and that their ulterior motive was to settle their dispute by having a fight. However, to entertain any such thoughts is to descend into the realm of speculation; and conjecture or surmise does not equate with inference.

109. It is also my view that the other evidence relating to discussions that took place between the two men in the bar – even when combined with the evidence of the applicant and the offender - does not properly raise an inference that the applicant consented to engage in a fight with the offender.

110. However, if I have reached an incorrect view in relation to the drawing of an inference, any inference that the applicant was consenting to fight the offender would be outweighed by that body of evidence indicating nothing more than an agreement to settle a dispute by non-violent means. The result would have been the same: absence of consent would have been established to the reasonable satisfaction of the Court.

111. There is another basis for concluding that the applicant did not consent to a fight with the offender. If there were an “agreement to fight” (which hypothesis is rejected), then the scope of that agreement was that the fight would take place outside in the car park, and not within the confines of the bar. The evidence clearly establishes that the scuffle began inside the bar, there being three possible versions as to how it began. The first is that the offender pre-emptively grabbed the applicant while they were still inside the premises – the applicant’s version. The second version is that the offender

was king hit by a person that the offender is unable to identify – the offender's version. The third version is that by implication the person who king hit the offender was the applicant. However, what is clear is that the scuffle inside the bar, including the triggering event (whatever form that may have taken), was not contemplated by any agreement to go outside to engage in a fight and fell outside such an agreement, if in fact such an agreement existed. If the offender were guilty of a pre-emptive strike, the applicant could not be treated as having consented to that application of force or indeed any subsequent application of force – including having part of his ear bitten off – because the application of such force inside the bar was neither anticipated or foreseen by the applicant; nor was the risk of being subjected to such an attack voluntarily assumed by the applicant. In other words, the application of force occurred outside the scope of the "agreement to fight". Similarly, if the offender were struck by an unidentified third party, the applicant could not be treated as having consented to taking part in the ensuing scuffle as that scuffle was not within the contemplation of any "agreement to fight". Finally, if the applicant in fact king hit the offender, the contemplated agreement would have been frustrated by the actions of the applicant, and the real issue would be whether the applicant had committed a crime (assault without consent) such as to disentitle him to the issue of an assistance certificate pursuant to s 12(f) of the Act.

112. In light of the above findings, it is not necessary to consider the further issue raised by the parties, that is whether the applicant consented to the specific injury that he received during the scuffle because that presupposes that the applicant consented to take part in a fight with the offender. However, had it been necessary to determine the issue, I would have most likely concluded that the applicant was not consenting to having part of his ear bitten off because consent to fight usually contemplates the application of force with fists and does not contemplate acts of quite a different and

more serious nature such as biting off part of an ear: see *Milam v Milam* 90 P 595 (1907). The Code's requirement that a person cannot consent to the infliction of grievous harm and the fact that the injury sustained by the applicant did not constitute grievous harm within the meaning of the Code does not mean that the applicant was consenting to serious bodily harm such as having part of his ear bitten off. Whether or not a person was consenting to a particular kind of bodily harm depends on the circumstances and is a matter of fact and degree.

113. It remains for the Court to find the facts in relation to the scuffle that unfolded in the bar.

114. I am reasonably satisfied on the balance of probabilities that the offender instigated the scuffle that occurred in the bar. In my opinion the preponderance of the evidence points to the offender as having been the aggressor. The two alternative hypotheses that the offender was struck by the applicant or struck by an unidentified third party can be safely rejected on the balance of probabilities. My reasons for coming to those conclusions are as follows.

115. The applicant portrays the offender as the aggressor, and in that portrayal is supported by two witnesses who observed the incident from the start. I consider their observations to have been accurate,[6] and although both witnesses were friends of the applicant I am satisfied that their account of the incident was not coloured by that friendship. The fact that the applicant was corroborated by two witnesses in relation to the event that initiated the scuffle renders the applicant's version more likely to be correct.[7] Furthermore, the internal consistency of the account given by the applicant

[6] The reliability of the two witnesses is enhanced by the fact that both made statutory declarations in relation to the incident within days after the incident when the incident would still have been fresh in their minds.

[7] This observation is consistent with the observation made by Mr Justice P W Young in his article "Practical Evidence" (1998) 72 ALJ 21:

"A witness whose evidence is consistent with the other witnesses is more likely to be correct."

first in his statutory declaration and later in his affidavit lends credence to his account of the initiating event.[8]

116. It is significant that the offender himself does not identify the applicant as the assailant who king hit him, although there is a strong implication in his account that the perpetrator was the applicant. It seems most unlikely that a third party was responsible for the alleged king hit. It really comes down to this: either the applicant or the offender started the scuffle. However, the offender's account does not directly point the finger at the applicant and that lack of certainty does nothing to increase the likelihood of his version being correct.

117. It is also significant that the only witness (Lock) who tends to support the offender's version only saw the offender "king hit", but did not see who threw the punch. The witness' evidence was that given the position of the applicant at the time it was *possible* that the applicant delivered that punch. I make two observations about the evidence given by Lock. The fist is that although it contradicts the accounts given by the applicant and the two corroborating witnesses it does not go so far as to assert that the applicant struck the first blow. It simply asserts the *possibility* that the applicant initiated the scuffle by delivering a "king hit". The second observation is that the Court must have real doubts about the reliability of the account given by Lock as he did not make a statement (or affidavit) until two and half years after the incident. It is conceivable that his memory might have faded over that substantial period of time, and indeed the lack of certainty that permeates his account about what happened at the start of the scuffle is, in my opinion, indicative of a faded recollection or a mistaken account. It would seem to me that if someone witnessed a person being "king hit" from behind, then he or she should be capable, under normal circumstances, of either identifying the assailant or at least providing a description of the assailant sufficient to establish his or her identity. It is significant that at the

[8] See Mr Justice P W Young , n 6 at 21.

time the witness was only four metres away and his view was not obscured until after the initial event.

118. The next issue that needs to be determined goes to the core of this case. Was the offender acting in self defence or engaged in justified defensive conduct when he bit off part of the applicant's ear?

119. The offender's claim that he was engaged in justified defensive conduct rests on his assertion that he bit the applicant's ear in order to prevent his eye being gouged by the applicant or a person whom he believed to be the applicant.

120. In order to fully test the hypothesis raised by the offender it is necessary to review the state of the evidence relating to the alleged eye gouge and the surrounding circumstances.

121. The applicant stated that as he was in the process of leaving the bar the offender grabbed him by the back of the shirt and tried to throw him in the direction of the door. The applicant stated that in an effort to protect himself he threw his left elbow back which connected with the offender. He stated that the offender then tried to attack him by swinging his closed fists towards his upper body and face. The applicant said that he managed to block his fists so as to avoid contact with his body and face. He went onto say that the offender grabbed him by the shirt and again tried to punch in the face. The applicant stated that he ducked to avoid being hit. He said that the offender then bit down on his left ear. In an attempt to get the offender to let go of his ear the applicant said that he began to punch him. The applicant stated that the next thing he recalled was severe pain emanating from his ear and the sensation of blood streaming down his face.

122. Although the applicant says that he threw his left elbow back in order to protect himself after he had been grabbed by the offender, took action to avoid punches being delivered by the offender and ultimately punched the

offender when he bit down on his ear, he does not say that he gouged the offender's eye. On this account, it is possible that the injury to the offender's eye was occasioned by the applicant punching the offender and not as a result of the applicant gouging the offender's eye.

123. Although the witness Culph gives a different account of the scuffle after the initial account – that is he has both men throwing punches before coming together in a bear hug – he says nothing about the applicant gouging the offender's eye. However, in support of the offender's version, he observed blood issuing from the offender's left eye. According to this account of the incident, it is possible that the injury to the eye may have occurred during the exchange of punches. If the two men were in a bear hug, it is difficult to see how the applicant might have got his hands free to gouge the offender's eye.

124. Like Culph, the witness Neander had both men throwing punches after the initial event. He then saw the two men come together in a bear hug. The witness said that he tried to push the offender away while Culph still had hold of the offender. Neander said that he then saw the offender open his mouth and bite down on the applicant's left ear. He said that when he let go of the applicant Culph had the offender in a headlock and was dragging him back. It was at that point that the offender bit the applicant's ear. Significantly, the witness heard the offender exclaim that he had been punched in the face and was bleeding. On this account it is possible that the offender's eye was injured as a result of a punch. Again, according to the witness' account of the incident, it is difficult to see how the applicant could have gouged the offender's eye. First there appears to have been little, if no, opportunity for that to occur; and secondly, any eye gouge would have most likely been observed by the witness, but he saw no such thing. Finally, if it is accepted that the witness correctly heard the offender say that he had been punched in the face and was bleeding, that further militates against the offender's claim that his eye was being gouged. Had the offender been eye

gouged, one would expect any exclamation by the offender to be along those lines rather than an exclamation that he had been punched.

125. Although the witness Window saw both men take hold of one another he made no mention of eye gouging. His account does nothing to advance the situation.

126. The witness Lock, who offered the offender the most support in relation to the event that triggered the scuffle, did not see what happened during the scuffle, that is whether any punches were thrown. However, he did see both men in a bear hug. Lock noticed that the offender's left eye was very swollen and was bleeding. He said that the offender was also claiming that his eye had been gouged. This version of events invites a number of observations. The first is that is again difficult to see how the offender's eye could have been gouged during the bear hug. Secondly, it is entirely possible that the eye was injured at some other time and by some means other than an eye gouge. Thirdly, the fact that the offender's eye was swollen and bleeding is not conclusive that his eye was gouged. Such an injury could be equally consistent with a punch. Fourthly, the offender's contemporaneous complaint that he had been eye gouged needs to be considered;[9] however it is inconsistent with what the witness Neander says he heard the offender say after the scuffle.

127. The witness Morris had nothing to say on the subject of the eye gouge. However, she did see the offender after the scuffle, noticing that the left side of his face was swollen. She made no specific observation that his eye was swollen; nor did she see any blood.

128. The witness Kedney was unable to throw any light on the dynamics of the scuffle, and, in particular, on whether the applicant eye gouged the offender.

[9] It would seem that the Court could treat the complaint as part of the res gestae. However, if in fact the evidence is strictly inadmissible, the Court could can still take that piece of evidence into account and to attribute to it whatever weight it considers appropriate, having regard to the fact that the Court is not bound by the rules of evidence: see 15(3) of the *Crimes(Victims Assistance) Act.*

However, she noticed that the right side of the offender's face was covered in blood and his eye was like a golf ball. Once again the observed injury to the eye is not conclusive evidence of an eye gouge. The injury could quite easily have been sustained during the course of the struggle by means other than an eye gouge, the principal cause coming to mind being a punch.

129. The account given by the witness Fraser is significant because it has the applicant delivering, during the scuffle, a number of punches which conceivably might have caused the injury to the offender's eye.

130. According to Cripps she did not follow the progress of the scuffle and did not see anyone throw punches. However, she noticed after the scuffle that the offender's left eye looked like it had a golf ball on the side. The eye was also cut and black. Again her observations of injury do not establish an eye gouge. The eye injury could have been sustained by some other means during the scuffle which did not become apparent to her.

131. The evidence given by the witness Haddin is illuminating because it suggests that the applicant was punching the offender while he had him in a headlock. It is conceivable that the offender's eye was injured at that time.

132. The witness Graham can throw no light on the dynamics of the scuffle. However, after the scuffle she observed the offender to have a cut above his left eye which was swollen like an egg. Again, the observed injury does not establish an eye gouge and the injury to the eye may have been occasioned in some other way.

133. The witness Wone was of a similar ilk. She did not witness the dynamics of the scuffle. However, after the scuffle ended she noticed that the offender had a bloodied nose and a graze across his left eye.

134. The account given by the witness Hodgetts does not take the matter very far, though she believed that punches were thrown. She did not notice the

offender after the incident. She only saw the applicant who she said had red marks on his face and what appeared to be a band –aid on his left ear.

135. The account given by the witness McCullagh was in a similar vein. However she did see the two men in a bear hug. She later observed the applicant's ear which was bleeding profusely.

136. Finally, there is the account given by the offender which alleges that he was eye gouged during the scuffle.

137. The offender says that after he was king hit on the left hand side of his head by the applicant he was grabbed by the shirt by the applicant. The applicant turned him around and then "pulled him into a punch that connected to the left side on (his) head near (his) eye". The offender recalled being punched repeatedly – about four or five times - to the left side of his head. The offender stated that he put his hands up around his head to try and protect himself from the blows. He said that he then got back to his feet and grabbed the applicant in a bear hug in an attempt to prevent the applicant form punching him further. He said that Matthew Culph came from behind and grabbed him around the neck with his arm. The offender said that as he was struggling with the applicant and Culph he felt a finger gouging his left eye. He could not see whose finger it was, but it was causing him extreme pain. He said that he was unable to remove the finger from his eye as he and the applicant were too close together and Culph also had his arm around his neck and shoulders. The offender stated that he was in great fear of his safety and he felt that he had to do something to stop the eye gouging. He said that by that time the pain was excruciating. As his head was right next to the applicant's head, he bit down on his ear. He stated that immediately the finger came out of his eye. The offender stated that he had bit the applicant's ear in self defence, as he was only trying to prevent his eye being gouged. He said that was the only way of getting him to stop. He added that he had no intention of severing part of the applicant's ear.

138. The first observation that needs to be made about the offender's account is that has the applicant being the aggressor throughout the scuffle and himself being in defensive mode. In effect, he has portrayed himself as a person who did no wrong. He grabbed the applicant in a bear hug to prevent further punches being delivered by the applicant and bit the applicant's ear to protect himself against the eye gouge. His account does not accord with the evidence of other witnesses. The general impression to be gained from the accounts of other witnesses is that the two men were engaged in a scuffle – which connotes a confused struggle or disorderly fight[10] - or "going for it". In my view the offender's account comes across as being monochromatic – in contrast to the more balanced account given by the applicant – and not in accord with the reality of the situation, and against the objective probabilities.

139. The second observation – and this is one made by Ms Tys – is that there was a discrepancy between the account given by the offender in his statutory declaration which was made in close proximity to the incident and the account he gave in his much later sworn affidavit. In his statutory declaration he said that he was not able to identify who was responsible for biting his ear. However, in his affidavit he moved up to the position that he believed that the applicant was biting his ear. To my mind, that shift in his evidence represented a conscious attempt to attribute blame to the applicant in order to justify his actions in biting the applicant's ear. It is not without significance that a reasonable belief or perception that the applicant was the assailant would lay the foundation for a defence of justified defensive conduct: see s 29 *Criminal Code* (NT). The change in the offender's evidence tends to be self serving and deliberately skewed towards a justification pursuant to that provision.

140. The statutory declaration of Dr Brummitt is equivocal in relation to whether the offender's eye injury was the result of an eye gouge.

[10] See The Concise Oxford Dictionary.

141. Although the medical history relied upon by Dr Brummitt included a report of the offender having had a finger placed in his eye, there was also a report of the offender having been punched at the same time. The history reported to the attending doctor (Dr Filipcic) leaves open the real possibility that the "red eye and blurring vision from the left eye" was due to a punch or punches.

142. The following extract from Dr Brummitt's statutory declaration is indicative of the equivocal nature of the evidence:

> "His injuries were of a resolving scleral haematoma with reduced visual acuity which may have preceded the injury. The injuries were consistent with the history provided."

143. An opinion that injury X is consistent with cause Y is never determinative, for it leaves open the possibility that injury Y is also consistent with cause Z. It is worth mentioning that Dr Brummitt suggests that the observed injury was consistent with the history given, which included not only an eye gouge but also a punch. Does it not follow that the injury may have been occasioned by a punch or punches?

144. There are a number of aspects that lead the Court to reach the conclusion that it is more likely than not that the applicant did not gouge the offender's eye:

- The applicant's overall account of the scuffle is to be preferred to the coloured account given by the offender. In arriving at that preference I did not consider that the offender's record of prior convictions in any way affected his credit;

- The offenders' account is contaminated by an internal inconsistency which affects his credibility;

- No other witness says that they saw the applicant gouge the offender's eye;

- The observations made by various witnesses as to the injury to the offender's eye is not sufficiently indicative of an eye gouge;

- The photographic evidence of the offender's injury, either taken alone or in combination with the other evidence, is not sufficiently indicative of an eye gouge;

- Finally, the medical evidence was equivocal and even taken in conjunction with the other evidence tending to establish an eye gouge, is not sufficiently indicative of an eye gouge.

145. In my opinion, the state of the evidence was not such as to leave the Court unable to choose between two equally probable hypotheses – the first being that the offender was eye gouged by the applicant and the second being that the applicant did not eye gouge the offender. In my opinion, the evidence clearly established that it was more probable than not that the applicant did not eye gouge the offender.

146. However, that does not end the matter. It is still necessary to consider whether some other person eye gouged the offender, but the offender reasonably believed or perceived that person to be the applicant.

147. First, I am reasonably satisfied on the balance of probabilities that no other person eye gouged the offender. There is no evidence that any of the persons who attempted to separate the applicant and the offender engaged in such conduct. Furthermore, It is most unlikely that any of those persons, or indeed any other person present at the scene, would have eye gouged the offender.

148. Secondly, I reasonably satisfied on the balance of probabilities that the offender did not, in fact, believe that someone had eye gouged him and reasonably believe that the applicant was that person.

149. In my opinion, the defence of self defence or justified defensive conduct predicated on the alleged eye gouging incident has been excluded on the balance of probabilities.

150. The matter of self defence or justified defensive conduct still needs to be considered in another context. Although the Court is reasonably satisfied that the applicant did not eye gouge the offender, was the offender's actions in biting the applicant's ear justified in terms of protecting himself against the conduct of the applicant during the scuffle? In my opinion, the answer to that inquiry is clear, and must be answered in the negative.

151. The conclusion that I have reached is that the applicant was a "victim" within the meaning of the Act, that is to say, that he suffered injury as the result of an offence, namely, an assault. The defences of consent and self defence or justified defensive conduct have been excluded on the balance of probabilities. Furthermore, I do not consider that the applicant is disentitled to the issue of an assistance certificate on the basis of s 12(f) of the Act. Accordingly, the applicant is entitled to the issue of an assistance certificate upon proof of a compensable injury, subject to any deduction deemed to be appropriate pursuant to s 10 of the Act.

152. It is my opinion that the applicant contributed to the injuries he sustained during the scuffle on 1 June 2003 for the following reasons.

153. There is sufficient evidence to show that the applicant had consumed a considerable amount of alcohol during the course of the evening of 31 May 2003 up until the incident during the early hours of 1 June 2003, and that he was sufficiently affected by alcohol to become involved in the type of

argument that unfolded between himself and the offender.[11] In my opinion, his lack of sobriety and demeanour predisposed him to the argument that developed between him and the offender.

154. There is clear evidence that the applicant and the offender had an argument in the bar.[12] This was the genesis of the scuffle that occurred shortly later. It is also clear on the evidence that both men agreed to go outside to sort out their argument, though not with the intention of fighting one another. However, there was clear potential for a fight to break out at some stage – and in fact that did occur inside the bar. By agreeing to go outside with the offender the applicant was clearly inviting or courting trouble, given his own lack of sobriety and general demeanour at the time and the offender's state of intoxication and demeanour.[13] In my view, by agreeing to go outside he was inviting misfortune, which inevitably befell him a short time later. Good sense should have prevailed and the applicant should have completely distanced himself from the offender and walked way from the argument, so as to speak, rather than perpetuating a potentially volatile situation by agreeing to go outside to sort out of the argument, albeit at a non-physical level. As` one witness has observed, the two men were acting stupidly.

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[11] See the applicant's evidence as to the number of drinks that he consumed during the relevant period . The witness Neander stated that the applicant had been drinking all night, although not slurring or swearing. See the evidence of the witness Window to the effect that the applicant had been rude, uttering words to the effect " I was fucking listening to that" when she went to turn up the music in the bar. The witness Cripps stated that prior to the incident the applicant was acting in an arrogant manner and was "making horrible comments to everyone". See the evidence of the witness Graham to the effect that the applicant was being a smart arse and "being cheeky". She said that she had had a conversation with the applicant during which they had "put shit on each other". The witness Wone said that the applicant appeared to be intoxicated and was giving cheek to her and her friend. She went on to say that he was "being a smart alec saying things about us putting on weight because of drinking too much alcohol."

[12] See the account given by both the applicant and the offender. See the evidence of the witness Culph. to the effect that he overheard the manager saying to both men "don't be stupid". The witness Lock said that both the applicant and the offender were trading insults. The witness Kedney stated that both men began to argue. The witness Cripps heard what sounded like an argument

[13] See the evidence of the witness window to the effect that the offender was stirring people. See also the evidence of Lock to the effect that both men were trading insults. The witness Morris deposed to the fact that at an earlier time the offender had leaned over and bit the applicant on the shoulder. She also said that he appeared angry and was loud. The witness Wone said that although the offender was reasonably well behaved he had consumed a lot of drinks. The witness Window stated that the offender was "looking for trouble" and was "pretty drunk". The offender himself said that he felt moderately intoxicated by the end of the night.

155. Although the applicant may have been protecting himself immediately after he was assaulted near the door the preponderance of the evidence shows that both men were engaged in a scuffle and fighting in a public place.[14] Furthermore, neither the applicant nor the offender seemed prepared to desist and indeed the two men had to be separated.[15]

156. To say that a victim has contributed to his or her injury is to attribute responsibility to the victim for the resultant injury. In my view, the applicant was partially responsible for the injury he received because he allowed himself to become affected by alcohol he predisposed himself to the argument that ensued between himself and the offender, he foolishly agreed to go outside with the offender to sort out the argument thereby courting misfortune and he behaved in a most undignified manner by engaging in a brawl in a public place - and on licensed premises - which required the intervention of members of the public.

157. In my opinion, the applicant substantially contributed to his injury by reason of the foregoing circumstances. It is appropriate to reduce any amount of assistance payable to the applicant by 75%.

EVIDENCE OF INJURY AND ASSESSMENT OF THE AMOUNT OF ASSISTANCE

158. In his affidavit (Exhibit1) the applicant deposed that as a result of the incident he was taken to Katherine Hospital. As a result of the assault, a portion of his ear was torn off and unsuccessfully reattached by medical practitioners.

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[14] See the evidence of the witnesses Culph and Neander. See also the account given by Window who has both men taking hold of one another and going to ground. The witness Morris spoke of the two men having a wrestle. The witness Fraser referred to the incident as a "scuffle". The witness Haddin described the two men as "going for it". The witness Hodgetts described the incident in terms of "arms going everywhere.

[15] See the evidence of the two witnesses Culph and Neander. Significantly, Neander said that he grabbed the applicant by the arm to try and drag him away. He also told the applicant to settle down. The witness Lock spoke of the need to separate the two men. See also the evidence of Morris to a similar effect. The evidence of Kedney was in a similar vein.

159. On 6 June 2003 the applicant attended the Hospital and was examined by Dr Van Son Nguyen. He was informed that the part of his ear that had been reattached had turned necrotic and plastic surgery was required.

160. The applicant flew to Brisbane to obtain specialised medical attention. The applicant was experiencing excruciating pain and was admitted whereupon 28 stitches were removed from his ear. He was subsequently informed by the plastic surgeons that infection had set in and that they were not able to operate until the infection had gone.

161. On 8 June 2003 the applicant was informed that he required surgery to his ear.

162. On 12 June 2003 Dr Bayley conducted a split skin graft operation on his ear. During that procedure he had skin removed from his upper left thigh which was grafted to his ear. He was discharged the next day and provided with Fiberol for pain relief. He was told that he had to apply a cream to his leg and ear to assist with the healing process. He was also told to keep his ear out of direct sunlight as his ear was susceptible to skin cancer.

163. The applicant said that despite surgery, his ear is not, and will never be, restored to its original shape and appearance.

164. The applicant further deposed that following the assault “he felt embarrassed, depressed, saddened and stressed”. He said that he was subject to ridicule in the Katherine Times Newspaper. Consequently, he found it very difficult to carry out his police duties and to socialise with friends.

165. The applicant stated that while he was in Brisbane he received counselling on two occasions from Dr Jones, a psychologist, to assist him in coping with the assault and its aftermath.

166. The applicant stated that as a result of the assault he was extremely conscious of the deformity to his left ear. He said that he no longer felt comfortable with his appearance and felt as though people were looking at him when he is in public. He stated that this has had an impact on his relationship with others as he instinctively pulls away whenever someone comes close to his left ear.

167. The applicant said that following the assault his relationship with his partner was significantly affected. He said that at times she would accidentally bump his ear while sleeping. The applicant said that this caused her to be upset as she had caused him pain. Furthermore, the applicant had undergone medical tests for infectious diseases as a result of the assault and had to wear condoms while waiting for the test results.

168. The applicant stated that for a period of about 6 months after the assault his sleep was disrupted on account of “nightmares, physical pain and stress relating to the attack”.

169. He said that his lifestyle had been significantly affected by the injury to his ear. He now has to care for his ear on a daily basis. He says that he needs to apply sunscreen to his ear before going outside and finds it difficult to wear some hats as they rub up against his ear, causing pain and discomfort. Finally, he says that he cannot put a telephone to his ear as it is too sensitive and itches constantly. However, because of the sensitivity of his ear he finds he is unable to scratch it.

170. In his earlier statutory declaration the applicant said that as a result of the assault he received multiple suturing to his left ear and was required to wear a bandage around his head to head to minimise infection. He also took various forms of medication to relieve pain.

171. In that declaration he also said that he had sustained a fracture to his right hand. The bone above his small finger top knuckle was broken. He said that

he had to wear a cast from his hand to his elbow and he expected it remain for about the next month. He said that caused him pain and discomfort.

172. Annexure "A" to the applicant's affidavit was a statutory declaration by Dr Nguyen wherein the doctor opined as follows:

> " There is a permanent cosmetic defect to his left ear and some deformity to high right hand but there is unlikely any physical disability out of these injuries except perhaps psychological injury."

173. Annexure "D" to the applicant's affidavit was a medical report from Doctor Goh. The doctor expressed this opinion:

> "The result of his injuries include disfigurement of the left ear which is noticeable compared to the other. He should have no hearing impairment as a result of his injuries."

174. Annexure "F" was a medical report from Dr Mahajani. In that report the doctor stated that the ear defect had been reconstructed with a split-skin graft. He said that the defect was quite noticeable. He said that the first problem in relation to the skin graft was cosmetic: the "shape of the ear…does not resemble the contralateral ear" and there is "a loss of definition of the helical rim". The doctor said that was not a major concern at the present time. The doctor went on to say that the graft was sensitive and there was a risk of solar damage to the graft.

175. The doctor made the following observations:

> " …because the graft is thin and the ear is sensitive I have told him that he may have some problems with pain and this usually goes over a 12 to 24 month period after which it tends to settle down. …he may at risk of solar-related damage including skin cancers in the future. What that risk is, is generally unknown but it would be the same as the risk of the general population. The skin form this upper thigh is probably not as resilient to the sun and skin grafts being thin are possibly more susceptible to sun-related damage. I think given this he will need to be vigilant and keep an eye on that ear and wear sun protection. I think he should wear a SPF 15+ on the ear when he goes

> out in the sun and wear a broad-rimmed hat. On examination… there were no features that were suggestive of solar-related damage.
>
> The contour deformity can be addressed if he wishes. These would involve major surgeries usually 2 or 3 operations and take skin from the back of the ear to try and reconstruct the helix."

176. The psychological report of Dr Jones was annexure H to the applicant's affidavit. In that report, the psychologist opined that the applicant was currently suffering a post traumatic stress disorder that is directly attributable to the assault in June 2003. He went on to say that "his condition is aggravated by his role as a police officer and his constant fear of assault and greater damage is central to that condition".

177. Dr Jones stated:

> " This is critically heightened by his awareness of certain sociopathic elements in society seeing the scarring and the deformity as a 'badge' of achievement for one of their kind. Mr O'Donnell has, in effect, been permanently 'tagged' as a victim of unlawfulness by one of them and their community, as a whole, shares in the triumph."

178. The doctor went on to observe that the applicant's "condition places him under constant threat of attempts to intimidate him and re-injure him whenever he is on duty". He expressed the opinion that his fears in that regard were quite real.

179. Dr Jones stated:

> "As a result of a daily reminder of his injury and the assault, Mr O'Donnell is unable to put the matter behind him. It is a recurring matter. Consequently, as a factor within PTSD, he must be considered to be suffering from an Acute Adjustment Disorder."

180. The doctor said that the greatest concern was that the applicant's "anger could become clinically 'embedded' unless some action is taken to redress the physical injury". In other words, "his anger could become a character trait (unconsciously enacted habitually replicated behaviours and moods) rather than just an anger state, as at the present".

181. Dr Jones went on to say:

> " Experience shows that after about three years it becomes extremely difficult to address a chronic anger profile. Its presence within a chronically depressed state certainly has an immediate effect on social relationships and life enjoyment and can create, as it apparently has with Mr O'Donnell a measurable onset of withdrawal and reduced intimacy in relationships."

182. Dr Jones stated that the applicant has suffered "a severe impact from the assault and it needs to be assessed as urgently as possible".

183. The doctor made the following recommendations. The first is that the applicant undergo whatever plastic surgery is required to reform the helix. The doctor was of the opinion that the applicant's depressed state and adjustment disorder would be greatly reduced after the surgery had been completed; though the degree of improvement would depend on the success of the surgery. The second recommendation was that following surgery the applicant be "provided with psychological support to assist him in vocalising his concerns and readjusting to the demands of police life". It was recommended that he undertake possibly six sessions of brief therapy over six weeks and monthly follow-ups for six months. The third recommendation was that pending surgery, which might not occur for 12 months, the applicant undertake counselling consisting of monthly sessions at the rate of $175 per session. Finally, the doctor believed that the applicant could reasonably be provided with up to 24 sessions of counselling.

184. The applicant sought to rely on further evidence which was permitted by the Court to be adduced after the conclusion of the hearing. That additional

evidence was contained in two affidavits – the affidavit of Cassandra Lee Emmett (the applicant's legal practitioner) sworn 14 June 2006 and the affidavit of Carl O'Donnell (the applicant) sworn 14 June 2006.

185. The affidavit of Cassandra Lee Emmett had annexed to it a series of emails passing between herself and Dr Jones during the period 9 June and 12 June 2006.

186. In his affidavit the applicant deposed as to the following:

- He was currently on leave from the NT Police Force and on secondment to the Australian Federal Police, having commenced work on the Solomon Islands for 12 months, working 3 months at a time with one month leave in between. He has just commenced his first period of leave;

- He left Katherine soon after the assault in 2003 and was posted to Lajamanu Police Station where he remained until his recent secondment;

- While posted at Lajamanu it was too difficult for him to get leave to travel to Darwin for treatment. His present posting at a remote village in the Solomon Islands has precluded him from accessing psychological counselling. Consequently, he has been unable to access the regular psychological treatment that Dr Jones recommended;

- He continued to suffer ongoing psychological symptoms related to the assault while in the employ of the NT Police Force – disrupted sleep, self-consciousness and anxiety. These have abated since his secondment to the Australian Federal Police. However, he expressed concern that he may suffer a recurrence of those symptoms upon his return to the NT Police Force in 8 months time;

- He intends to access counselling as recommended by Dr Jones upon his full time return to Darwin. He anticipates that he will require about 6 sessions as recommended by Dr Jones;

- He does not intend to undergo surgery on his ear, given his past experiences of pain during prior admissions to hospital and painful surgery. He wishes to put all of that behind him and to get on with his life.

187. In her additional written submissions dated 14 June 2006 the solicitor for the applicant asked the Court to make allowance under s 9(1) (a) of the *Crimes (Victims) Act* for psychological treatment in the amount of $1,100, being 6 sessions at a cost of $185.00 per session.

188. Having regard to all of the evidence concerning the applicant's injury and aftermath, I consider that it would be proper, subject to any reduction pursuant to s 10 of the Act, to award the applicant $15,000 on account of pain and suffering, mental distress and loss of amenities of life together with the amount of $1,100 on account of future counselling expenses,[16] making a total of $16,100.

THE ISSUE OF AN ASSISTANCE CERTIFICATE

189. Having regard to the earlier finding that the applicant contributed 75% to the injury he suffered as a result of the assault, the Court orders that an assistance certificate issue certifying that the Territory shall pay to the applicant the amount of $4025.

190. In addition the Court orders that the respondent pay the applicant's cost of and incidental to the proceedings save and except the costs ordered to be paid by the applicant to the respondent on 12 October 2005.

[16] See McIfratick and Chard (unreported decision of the Supreme Court of the Northern Territory delivered 4 September 1995 per Angel J.

Dated this 23 day of June 2006.

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Dr J A Lowndes
STIPENDIARY MAGISTRATE