CITATION:	*Haverkort & Grassby & Rothwell & Annegarn v Northern Territory of Australia* [2006] NTMC 068
PARTIES:	CHARLOTTE FRANCISCA HAVERKORT v NORTHERN TERRITORY OF AUSTRALIA & ALEX ROBERT GRASSBY v NORTHERN TERRITORY OF AUSTRALIA & JAMES ROTHWELL v NORTHERN TERRITORY OF AUSTRALIA & MIRIAM MELISSA ANNEGARN v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance) Act
FILE NO(s):	20322182, 20322183, 20322190, 20322226
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CRIMES VICTIM'S ASSISTANCE – DANGEROUS OMISSION – CONTRIBUTION – CAUSATION

Crimes (Victims Assistance) Act, ss 4, 5, 9, 10
Criminal Code (NT), s2, 154

Young v Northern Territory of Australia and Another [2004] NTSC 16
Hillcoat v Northern Territory of Australia [2001] NTSC 114
Chabrel v Northern Territory of Australia and Ron Pulla Mills, [1999] NTSC 113

REPRESENTATION:

Counsel:

Applicant:	Ms Spurr
Respondent:	Ms McDade

Solicitors:

Applicant:	Halfpennys
Respondent:	Department of Justice

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 068
Number of paragraphs:	49

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

No. 20322182, 20322183, 20322190, 20322226

BETWEEN:

CHARLOTTE FRANCISCA HAVERKORT
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

ALEX ROBERT GRASSBY
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

JAMES ROTHWELL
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

MIRIAM MELISSA ANNEGARN
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR DECISION

(Delivered 8 August 2006)

JENNY BLOKLAND CM:

Introduction

1. These four applications brought pursuant to the *Crimes (Victims Assistance) Act* were heard together. Although there are individual matters that are relevant to each particular applicant, the general matters relevant to all applications are more conveniently dealt with at the outset. The four applicants were members of a tour group in October 2002. As part of the tour, the applicants visited Kakadu National Park. On 22 October 2002, one of the group, a young international tourist, Isobel Von Jordan was tragically killed by a crocodile when swimming at Sandy Billabong. At the time of the incident leading to Ms Von Jordan's death, the applicants were also swimming at Sandy Billabong. Each of the applicants seeks the issue of a Crimes Victims Assistance Certificate pursuant to s 5 *Crimes (Victims Assistance) Act* for injury they allege is the result of the Commission of an offence.

2. As required by the rules, all applicants have filed individual affidavits. Annexed to those affidavits, as well as material supporting their individual cases, is a copy of the indictment charging Glen Bernard Robless with *dangerous omission involving circumstances of aggravation* and the Crown facts tendered to the Supreme Court in the criminal proceedings arising from the same incident. It is common ground that Glen Bernard Robless was convicted and sentenced by the Supreme Court on 28 March 2003 for the

offence of *dangerous omission causing death*. The ex-officio indictment reads as follows:

> "On 22 October 2002 at Sandy Billabong at Kakadu in the Northern Territory of Australia, being a tour guide employed by Gondwana Tours and Operators Pty Ltd and responsible for Isobel Von Jordan and eight other members of a tour group, in allowing Isobel Von Jordan and various members of the tour group to enter the waters and swim in Sandy Billabong, made an omission or omissions, namely, failed to warn and sufficiently warn Isobel Von Jordan and the eight other member of the tour group (hereafter collectively described as the Gondwana tour group) of the dangers of swimming in Sandy Billabong owing to the presence of estuarine crocodiles therein, thereby causing serious danger to the lives, health or safety of Isobel Von Jordan and the eight other members of the Gondwana tour group in such circumstances where an ordinary person similarly circumstanced would clearly have foreseen such danger and would not have allowed Isobel Von Jordan and various members of the Gondwana tour group to enter Sandy Billabong.
>
> AND THAT the dangerous omission involved the following circumstances of aggravation, namely,
>
> i. That Glen Bernard Robless thereby caused the death of Isobel Von Jordan. Section 154(1) and (3) of the Criminal Code"

3. In terms of further undisputed material filed in these proceedings, are the Crown facts that were relied on by the Supreme Court.

> "The offender in this matter, Glen Bernard Robless, was born in Singapore on 3 June 1956 and is 46 years of age. He was 46 years of age at the date of this offence.
>
> The deceased, Isabel Von Jordan, was born in Germany on 28 June 1979 and was 23 years of age when she died.
>
> The offender was a tour guide employed by Gondwana Adventure Tours and Expeditions, a business based in Darwin. He commenced his employment with Gondwana Tours in 1997.
>
> At approximately 7am on Sunday 20 October 2002 a Gondwana tour to Kakadu left Darwin, guided by the offender. The tour was expected to run for 4 days. The tour group comprised 9 young international tourists, 4 women and 5 males. The males were all from the United Kingdom and were aged 20, 24, 28, 32 and 33 years.

Two of the females were Dutch tourists aged 23 and 25. The deceased and her sister Valarie, aged 21, completed the tour party.

The tour party set out to visit the major sights in Kakadu National Park and enjoy the various camping, walking and swimming opportunities available in the park. During the day of Sunday 20 October 2002 the group travelled down the Stuart Highway to Pine Creek where that highway intersects with Kakadu Highway. The group headed up the Kakadu Highway and took lunch and swam at a waterhole not far from the intersection of the highways. Later that afternoon the group visited Barramundi Gorge where they walked and swam. That night the tour party camped at the Jim Jim Billabong campground.

On Monday 21 October 2002 the tour group was up at approximately 6:00am and visited Cooinda. From there the group went to the Twin Falls and surrounding area and spent most of the day walking, climbing and swimming. That night the group camped at the Jim Jim Falls camping ground. At one point later in the evening the group went for a swim at a nearby waterhole.

On the morning of Tuesday 22 October 2002 the group broke camp at approximately 8am and travelled to the Jim Jim Falls where they stayed until approximately noon. The group then visited the Warrajin Aboriginal Cultural Centre and, later in the afternoon, visited Nourlangie Rock. At approximately 7:30pm the group reached Sandy Billabong campground and set up for the night.

The Sandy Billabong campground is approximately 40 kilometres south of Jabiru and approximately 800 metres from the beach area of the Sandy Billabong. The campground is situated next to a large pond that is fed from an off-shoot of the Nourlangie Creek. Sandy Billabong can be described as a swollen stretch of Nourlangie Creek that runs for some 2.2 kilometres and is between 50 to 100 metres wide.

After having prepared then eaten the evening meal, the offender and a number of the group decided to go swimming. The offender told the group that he knew of an attractive area nearby that would be a good place for a swim. The group decided to go to this place which was a beach area of the Sandy Billabong to swim and view the full moon that was apparent that night. The offender drove the group to the beach area. Members of the group recall that the offender told them that he believed it was safe to swim at this part of the billabong because local Aboriginal people swam there. At the point where the vehicle pulled up there was a sign declaring “Crocodile safety” and

"Danger" and "Crocodiles inhabit this area. Attacks cause injury or death" together with symbols and further advice including a warning to "Keep away from the water's edge". This sign was posted at the start of a short track that led approximately 30 metres to where the billabong meets the beach.

Members of the group report that the offender went some way into the water and using his torch looked about the water near to the beach area. The offender was saying he was looking for "eye shine", being the reflection from the eyes of crocodiles in the water. When the offender did not observe any "eye shine" he allowed the group to swim in the area. The offender entered the water first and then seven of the group entered the water and began to frolic about. Two of the males stayed on the beach and built a small fire. The offender stayed with the group for some 15 or so minutes before he left and drove to where another Gondwana tour group had pitched camp in the Sandy Billabong campground. Before leaving the group the offender told the group to stay together and not to go too far to the other side of the billabong. It appears the offender was looking to meet up with the guide leading the other group and suggest that member of that other group might also wish to swim at the billabong.

Several minutes after the offender's departure, at approximately 11:00pm, three of the group, the deceased, her sister and one of the males, swam out and were treading water and talking some 10 metres from the sandy bank of the billabong. At this point the water was approximately 4 metres deep. These three persons were talking and were approximately at arm's length distance from each other. Several of the other members of the group were closer to the bank, knee deep in the water. The male that was in the deeper water with the sisters says he felt "something" hit his left leg and he then looked across to where Isabel was, heard her scream and then disappear underwater.

Initially there was confusion and several of the group thought that one of the males had played a prank by dragging Isobel down into the deeper water. Within a minute or two however the group members realised something had gone badly wrong and began shining torches into the water. Several of the group report they saw a large crocodile in the water swimming away from the spot where the sisters and the male had been swimming some 10 metres off shore. Isabel did not resurface.

One of the males from the group ran off in the direction that the offender had walked. That male caught up with the offender as the offender was returning from his visit to the other group and told him

what had happened. Within a short space of time both the offender and the other tour guide, Darren Raymond, arrived at the beach.

After they had assessed the situation, the offender and Raymond decided to telephone the head of Gondwana Tours, Michael Dunbar. Dunbar says he received a call from Raymond on the company mobile satellite phone shortly before midnight. Dunbar says he told Raymond to telephone the police.

At 12:04am on Wednesday 23 October 2002 the police communications unit called Senior Constable Peter Gray of the Jabiru Police Station. Senior Constable Gray called into action other police officer and rangers employed by Parks North Australia. By 1.00am Gray was at the beach at Sandy Billabong with Acting Senior Sergeant Iddon. By 1:30am park rangers Andrew Wellings and Gary Lindner were at the scene with support personnel. Wellings made an initial search of the immediate area with his torch and found crocodile tail slide marks on the sandy bank some 20 metres from where the deceased was taken. It was decided to put a boat in the water and conduct a search on the billabong.

At 2.30am on Wednesday 23 October 2003, Wellings, Lindner and two other Parks North employees set out upstream. As they moved along Wellings reports they saw five small to medium sized (4 to 10 foot) estuarine (saltwater) crocodiles and a freshwater crocodile before, approximately 1000 metres from where the deceased was taken, they saw a very large crocodile. Wellings estimates that the time was 3:15pm when they made this sighting. Using torches and with the crocodile near the surface, Wellings and his team were able to see that the crocodile was approximately 15 feet in length with an unusually pale and deformed snout. They saw that this crocodile had a human body in its mouth. As they neared the animal, it submerged and swam away. The rangers gave chase in their boat.

At 3.55am ranger Lindner was able to harpoon this crocodile, identifiable by its size, unusual snout and unusual manner of swimming. Shortly thereafter, after the animal had swum downstream for some distance, he was able to harpoon the animal on two further occasions. These harpoons forced the animal deep into the water where it remained until 4:32pm when it surfaced. At this point the rangers shot the animal several times to ensure it was dead.

The crocodile, by this stage, did not have the human body in its mouth. The crocodile was lashed to the side of the boat and returned to the beach area of the billabong. Enroute to the beach, the rangers

estimated they saw the “eye-shine” of at least a further six crocodiles.

The crocodile was later measured and found to be 4.61 metres in length and had an estimated weight of 500 kilograms. It was injured and, in particular, it had a serious be healing wound to its right front foot.

A search was conducted for the deceased’s body after the crocodile had been secured to the boat but before the animal was returned to the beach. However, as it was still dark, this search was fruitless and it was decided to get the crocodile back to the beach and wait until first light.

At 6am Wellings and his men set out again on the billabong. By 6.25am the body of the deceased was located at the point where the crocodile was first harpooned. The body was recovered.

At approximately 5am on Wednesday 23 October several Darwin-based senior detectives were briefed on the situation and made their way to Jabiru. They spent the day taking statements from potential witnesses. The offender was spoken to later in the day and he was requested to attend the Peter McAulay Centre. The offender was at the Centre by 7:35pm where he met Detective Sergeant Barnett and they made arrangements for the offender to re-attend the centre at noon the next day.

At 12:09pm on Thursday 24 October 2002, Detective Barnett commenced an electronically recorded interview with the offender. During the course of the interview the offender described what he recalled had happened on the trip and the night in question in a detailed fashion. The interview finished at 2:10pm.

An autopsy was carried out on the deceased’s body by Dr Allan Cala at the Royal Darwin Hospital on 25 October 2002. Dr Cala found that the direct cause of death was drowning. It was noted that the deceased had “sustained lacerations and abrasions to the front and back of the chest consistent with claw marks and a possible bite mark inflicted by the crocodile. There was a defect in the front of the chest associated with a lacerated left lung and fractures of the left 3rd to 5th ribs, these injuries being consistent with a bite mark and crushing type injury from a crocodile’s jaws”. The doctor went on to report that “Although there were injuries present, they were not life threatening by themselves and I believe the deceased has died as a result of drowning”. The deceased’s body was intact and these injuries resulting in minimal disfigurement. The deceased’s blood

was screened for alcohol. The toxicology report reveals that "Alcohol was not detected in the blood".

The additional particulars of the dangerous omission on which the Crown relies are the failure and/or omission:

a) To ensure that it was safe for the Gondwana tour group, or members of it, to enter the waters of Sandy Billabong,

b) To maintain any or any proper lookout for estuarine crocodiles in Sandy Billabong while the Gondwana tour group, or member of it, were swimming therein,

c) To ensure that the Gondwana tour group did not remain in the waters of Sandy Billabong four more than a reasonable time,

d) To supervise properly or at all the activities of the Gondwana tour group while in the waters of Sandy Billabong,

e) To remain with the Gondwana tour group while member of it were swimming in Sandy Billabong.

f) To observe the warning provided by a sign which was erected at Sandy Billabong and was headed "Crocodile Safety…..Danger"."

(References to procedural matters at the conclusion of the facts have been omitted).

General Principles Applicable

4. In general terms, Ms Spurr advised the Court that it was clear that an offence had been committed (dangerous omission, s 154 *Criminal Code*) and that each of the applicants are to be regarded as *secondary victims*. It was submitted that s 4 *Crimes (Victims Assistance) Act* definition of "victim" applies: "victim means a person who is injured or dies as the result of the commission of an offence by another person". This is to be read with s 5 *Crimes (Victims Assistance) Act*:

> A victim or, where the victim is an infant or the Court is satisfied the victim, because of injury, disease or physical or mental infirmity, is not capable of managing his or her affairs in relation to the application, a person who, in the opinion of the Court, is a suitable person to represent the interests of a victim, may, within 12 months

> after the date of the offence, apply to a Court for an assistance certificate in respect of the injury suffered by the victim as a result of that offence.

The applicants in these proceedings principally claim "mental injury". It is noted at the outset that "injury" means "bodily harm, mental injury, pregnancy, mental shock or nervous shock but does not include an injury arising from the loss of or damage to property (which loss or damage is the result of an offence relating to that property)".

5. As an initial observation, I think it can be fairly said that the facts and the particular offence are unusual within the setting of Crimes (Victims Assistance) applications. Although at one level it is accepted the applicants are to be regarded *secondary victims*, it is clear that for the purpose of the dangerous omission *simpliciter* pursuant to s 154(1) the applicants might also be regarded as *primary victims* as they were part of the "other eight members of Gondwana tour group" that the indictment charges were put into *serious danger*, (obviously as well as Ms Von Jordan who sadly lost her life as a result of the incident). It is the applicants' alleged injury that resulted from their presence at the death of Ms Von Jordan that is the basis of their application. Ms Von Jordan's death is an aggravating circumstance (s154(3)) of the original series of omissions alleged against Mr Robless. The fact that the applicants can be regarded as primary and secondary victims is an unusual state of affairs but not necessarily problematic, save that a large part of the argument before this Court is whether any of the applicants should receive reduced compensation (if they are successful at all) bearing in mind s 10 *Crimes (Victims Assistance) Act* that 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 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.

6. The argument on behalf of the respondent is that any certificate granted by the Court should be reduced substantially because of the alleged contribution of each applicant to their injuries. This will be commented upon further in relation to each individual applicant but I note that the respondent submits very strongly that in each individual case, and with regard to the group as a whole, the various participants were aware of the dangers of crocodiles in Kakadu National Park. The respondent points out that that at Sandy Billabong there were danger signs warning people not to swim. Photographs depicting those scenes at Sandy Billabong and the "Kakadu National Park – Visitors Guide and Maps" are before the Court and I have had regard to them. That brochure specifically warns visitors numerous times not to enter the water in Kakadu because of the danger of crocodiles.

7. Although not the subject of specific argument before me, I have noted His Honour Martin (BR) CJ dealt with the issue of primary and secondary victims in the context of s 10 Crimes (Victims Assistance) Act 2002 in *Young v Northern Territory of Australia and Another* [2004] NTSC 16. At para 41 His Honour states " in my opinion, the plain wording of s 10 and its relationship with applications pursuant to s 5, particularly those applications made by applicants that are not victims, evinces an intention on the part of the legislature to impose limits on amounts to be paid pursuant to the Act based on considerations of the conduct of the primary victim who was the immediate subject of the offence. A policy is evident which contemplates that not withstanding that a claimant for assistance might not have contributed in any way to the injury or death of the primary victim, nevertheless the opportunity for such claimants to obtain assistance might be

adversely effected and limited by reason of the conduct of the primary victim which contributed to the injury or death caused to the primary victims."

8. It would therefore appear that the conduct of the applicants and of the deceased are both potentially relevant to considerations under s 10. Although the applicants are in a sense both primary and secondary victims, I accept the injury alleged for the purposes of the *Crimes (Victims Assistance) Act* is primarily related to the death of Ms Von Jordan and in that sense the applicants are secondary victims. Although in theory the conduct of the deceased must also be considered under s 10, there is no evidence that any risk she may have appreciated was any greater or less than any of the applicants. Given there is so much overlap in the conduct as between primary and secondary victims and any risk assumed by the deceased cannot be any greater than any of the applicants, any reduction under s 10 is more appropriately dealt with by reference to each individual applicant's conduct.

9. The issue of contribution pursuant to s 10 *Crimes (Victims Assistance) Act* resonates also with the issue of causation. As noted, a "victim" under the *Crimes (Victims Assistance) Act* means a person who is injured or dies "as a result of the commission of an offence of another person." The offence alleged is primarily put as an offence of *omission* rather than *commission*. Clearly Northern Territory criminal law recognizes that offences can be committed through *act omission or event*, event being the consequence of acts and or omissions: (Criminal Code s 2). I take it that the *Crimes (Victims Assistance) Act*, by use of the word "commission" embraces offences constituted by omission. The criminal proceedings conclusively acknowledged that through various *omissions* Mr Robless *caused the death* of Ms Von Jordan. For the purposes of the proceedings before me it becomes a question of whether on balance Mr Robless can be said to have *caused* the injury to the applicants as a result of his omissions that *caused* the death of Ms Von Jordan. In *Hillcoat v Northern Territory of Australia*

[2001] NTSC 114, 18 December 2001, His Honour Justice Riley dealt with an unusual causation question reserved for the Supreme Court concerning a case where an offender assaulted the applicant and other persons by menacing them with an axe and advancing on them in a threatening manner. It was accepted that an offence of aggravated assault had occurred. In self defence the applicant, who was a police officer, fired shots at the offender and killed him. The officer suffered a mental injury due to the fact that he killed the offender. The question reserved was given the applicant suffered the injury by virtue of his reaction to having killed the offender, could the applicant's injury be said to be "as a result of" the offence. His Honour answered in the affirmative as in those circumstances he considered that the injury to the applicant was suffered "as a result of" the offence within the meaning of the definitions of s 4 of the *Crimes (Victims Assistance) Act* of "offence" and "victim". I have with respect applied His Honour's analysis to the applications before me, in particular paragraphs 7 – 14 as follows:

> 7. In *Fagan v The Crimes Compensation Tribunal* (1982) 150 CLR 666 the High Court considered a similar provision in the Victorian *Criminal Injuries Compensation Act*. That Act provided that an injury gave rise to an entitlement to compensation if it occurred "by or as a result of the criminal act" of another person. There Mason and Wilson JJ (who adopted as their own a judgment prepared by Aickin J) observed (at 673):
>
> "There is no basis in the context of the Act itself for regarding the words as having a narrow operation. The words are ordinary English words carrying no special or technical meaning. All that is required is a causal relationship; both the word "by" and the phrase "as a result of" indicate a causal connexion. Whether that relationship exists or not is primarily a question of fact. The fact that other unconnected events may also have had some relationship to the occurrence is not material if the criminal act was a cause, even if not the sole cause. The only requirement is that the injury is caused "by or as a result of" a criminal act."
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> 8. In *Fagan v The Crimes Compensation Tribunal* (supra at 673) their Honours observed that what had to be considered was the meaning of the words contained in the statute "without supposing that they are intending to copy or reproduce common law rules". It is a mistake to

suppose the Act is "concerned only with the kind of injuries recognised by the common law as entitling the plaintiff to damages if they are caused by the negligence of a defendant". The Act does not require a consideration of proximity or foreseeability but only causation.

9. In the present case the statutory requirement is expressed slightly differently from that in Victoria. The injury must be suffered "as a result of" the offence. However the approach to the interpretation of these words will be the same. I agree with the remarks of Mildren J in *Chabrel v Northern Territory of Australia and Mills* (1999) 9 NTLR 1 where he said that the abovementioned observations of Mason and Wilson JJ in *Fagan v The Crimes Compensation Tribunal* are equally applicable to the Northern Territory Act. It follows that it will be sufficient if the applicant in this case can establish that the mental injury suffered by him was causally related to the offence. That is primarily a question of fact.

10. In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 the High Court dealt with the difficult concept of causation in relation to negligence. The Court held (as is seen from the headnote) that causation is essentially a question of fact to be answered by reference to commonsense and experience and is one into which considerations of policy and value judgments necessarily enter. Deane J (at 524) stated that the answer to the question whether conduct is a "cause" of injury remains to be determined by a value judgment involving ordinary notions of language and commonsense. He said (at 522):

    "For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility whether an identified negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it".

11. In that case Mason CJ (with whom Toohey and Gaudron JJ agreed) noted (at 517) that the presence of a deliberate or voluntary intervening action does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct. His Honour went on to say (518):

    "As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in

the ordinary course of things. In such a situation, the defendant's negligence satisfies the "but for" test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it."

12. Although, in the present matter, we are not dealing with actions in negligence but rather with a statutory scheme providing compensation for the victims of crime, the same approach will apply. In my view it is necessary to determine as a matter of logic, commonsense and experience whether the mental injury suffered by the applicant was suffered as a result of the offence.

13. A reasonable act performed for the purpose of self-preservation being an act caused by the act of the offender does not operate as a novus actus interveniens: *Pagett* (1983) 76 Cr. App. Rep. 279. In *Royall v The Queen* (1991) 172 CLR 378 Mason CJ discussed causation in relation to the *Crimes Act (NSW).* He said (at 388):

    "Generally speaking, an act done by a person in the interests of self-preservation, in the face of violence or threats of violence on the part of another, which results in the death of the first person, does not negative causal connexion between the violence or threats of violence and the death. The intervening act of the deceased does not break the chain of causation."

14. In this case it would be artificial to separate the assault from the necessary, legitimate and lawful response to the assault. The assault and the response were part of the one episode and the act of self defence arose out of the offence by way of direct response. Although proximity is not a prerequisite to an injury being determined to be the "result of" an offence, there was in this case, a direct and proximate causal link between the offence and the injury suffered by the applicant. The applicant would not have discharged his firearm but for the criminal act of the second respondent. It was the assault that led to the death of the second respondent by virtue of the applicant defending himself from that assault. The injury suffered by the applicant was caused by the assault.

10. A question to be considered throughout these applications is whether the result of the dangerous omissions on the part of Mr Robless can be said to have *caused* the mental injury to the applicants, or whether the risk taken by the applicants by swimming in the billabong in the circumstances that they did constitutes an intervening act. If it does not constitute an intervening

act, the secondary question under s 10 of the *Crimes (Victims Assistance) Act* still arises.

11. In relation to “injury” I note the well established approach taken by His Honour Mildren J in *Chabrel v Northern Territory of Australia and Ron Pulla Mills*, [1999] NTSC 113 in particular paras 12 – 16:

> 12. The words "mental injury" are wide enough to include grief, but s5A and s9(2) of the Act prevents the award of any amount in respect of grief to the appellant in this case, as an award for grief is limited to claims by a parent of a victim under the age of eighteen or the widow, widower or surviving *de facto* partner of the victim: see *Ah Fatt v The Northern Territory of Australia and Dingul, supra,* at p14.
>
> 13. The Act does not further define "mental injury", but the concept has been discussed in decisions, particularly of the Supreme Court of South Australia, in the context of a definition of "injury" in the *Criminal Injuries Compensation Act,* 1969-1974 (SA), viz:
>
> "injury" means physical or mental injury sustained by any person, and includes pregnancy, mental shock and nervous shock.
>
> It is clear from the definition in this Act that "mental shock" and "nervous shock" are treated as subgroups of "mental injury", as is evident from the word "includes". The definition used in the Northern Territory's Act lacks the elegance and logical simplicity of that used in the South Australian Act, but I am satisfied that there is no significant difference for these purposes.
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> 14. The South Australian authorities, which have considered what is meant by "mental injury", have concluded that it is not necessary to show that the applicant suffered any mental or psychiatric illness. The concept of mental injury included emotional upset if it caused actual injury to physical or mental health going beyond mere grief: see *Battista v Cooper* (1976) 14 SASR 225 at 227; *T v The State of South Australia & Anor* (1992) Aust Torts Rep 8-167. In the latter case, Legoe J (with whom Millhouse J agreed), said, at p61,328:
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> 1. It is now well settled that the definition of injury (in section 4) equates the sort of physical or mental injury for which compensation may be recovered under the Act, with the sort of physical or mental injury for which damages may be recovered at common law; see *Battista & Ors v Cooper & Ors* (1976) 14 SASR, 225 at 227 per Bray CJ; *In Re Gollan* (1979) 21 SASR 79; *Saunders v Rowden & the State*

of South Australia (1980) 24 SASR 547 and *Delaney v Celon* (1980) 24 SASR 443 at 447 per Jacobs J.

2, Although mere sorrow and grief which cause emotional distress and no more, are insufficient taken alone to establish a compensable injury under the Act, nevertheless distress which in addition results in some sort of actual injury to physical, mental or psychological health, will be compensable under section 7 of the Act; see *Delaney v Celon*, *supra*, at 447 per Jacobs J.

15. In the same case, Olsson J said, at pps 61,334-5:

Like the learned trial judge, I am of the opinion that the definition contained in the statute, does not require the court to conclude that the evidence unequivocally establishes that symptomatology exhibited by a claimant is such as to warrant medical classification as some recognizable, psychiatric condition, as a prerequisite to coming to a conclusion that a claimant has proved the existence of a relevant injury. Indeed, such a conclusion would run counter to its express terms.

The statutory definition itself stipulates that the existence of mental shock or nervous shock alone is sufficient to constitute an injury in the relevant sense. In my opinion it is quite impracticable and undesirable to attempt to do that which the statute itself does not attempt to do, and develop precise definitions or identify ranges of practical situations which do or do not fall within the concept of injury as defined.

What is essentially involved is a question of fact and degree which needs to be considered on a case by case basis.

Whilst I accept that the statute obviously has in contemplation something more than a condition of mere sorrow and grief, nevertheless, what the court is required to do is to consider the situation of a claimant following a relevant criminal act and contrast it with that which pre-existed the act in question. Leaving aside proven conditions of mental or nervous shock, if the practical effect of the relevant conduct has been to bring about a morbid situation in which there has been some more than transient deleterious effect upon a claimant's mental health and wellbeing, so as adversely to effect that person's normal enjoyment of life beyond a situation of mere transient sorrow and grief, then, in the relevant sense, the person has sustained mental injury.

> 16 Further, the Full Court's decision unanimously held that the trial judge erred in discounting or deducting from the award any amount for normal grief and distress. Olsson J said, at p63,335:
>
> Once it be established that a relevant injury as defined has been sustained by a claimant in compensable circumstances, then the court is required, as a first step, to make a monetary assessment of the damages which ought properly to flow, in recognition of the total relevant deleterious change in the condition of a claimant which has been brought by the wrongful conduct of an offender.
>
> What is necessarily in contemplation is the actual condition to which a claimant has been reduced by virtue of the relevant injury, by way of contrast with that which pre-existed the conduct under contemplation. I know of no common law principle which requires some discount to be applied by way of allowance, for that component of the sequelae of wrongful conduct which can be attributed to what might loosely be described as normal mere grief or sorrow. In any event an attempt to do so would, in most instances, be a pointless and impossible exercise.

12. Naturally I will follow this approach in the assessment of the applications currently before this Court.

Charlotte Francisca Haverkort

13. Ms Haverkort's statement to police is annexed to her affidavit: (statement dated 23 October 2002). Ms Haverkort is a Netherlands national and at the time was traveling with her cousin, (also an applicant in these proceedings), Melissa Annegarn. In her statement (para 6) she says that Mr Robless told the group of certain dangers at the commencement of the tour and also stopped near a lake and showed a sign that said "No Swimming because of Crocodiles"; she said he told them about crocodiles and they were shown a crocodile track. She said on the first evening at the camp site they drove to some water to spot a crocodile; she said they didn't see any crocodiles, just their eyes as well as a water snake. She said later some of the group had a swim but she did not feel comfortable in the dark because she couldn't see the bottom. She sat on the beach watching Isobel (the deceased), Valarie (the deceased's sister), Melissa, James and Glen swimming; she said while

they were swimming they were pretending to be crocodiles and some of them came out of the water crawling like crocodiles: (para 12). She said on 22 October they had swim at a plunge pool near Jim Jim Falls and later had a picnic lunch near the Aboriginal Cultural Centre; she said someone in the group asked if they could swim at a nearby lake and they were told by Mr Robless that it was not safe because of crocodiles. Later on that same date at a camp site near another lake she said Glen told them not to go near the water as it wasn't safe; after dinner they drove to a spot that Glen told them was safe: (para 18). She also stated that Melissa asked him if it was safe to swim there and that he replied that a lot of people swam there: "Aboriginals and kids and they launch the boats there. He also said you could never be totally sure about any water." She said she'd been swimming for about fifteen minutes and Glen got out and said he was going to get another tour group and that he told them to stay together and not go too deep. She said she wanted to get out of the water as she had had enough of a swim to be refreshed and "wasn't comfortable in the water." She said she went and sat near the fire with other members of the group. She stated that she heard a short scream and thought someone was "kidding around"; the urgency of the situation then revealed itself. At the end of her statement Ms Haverkort states (para 30) "on the way to the swimming spot where the attack happened I think I saw a sign that said it was area checked by rangers so it was safe to swim. During the tour of the park I saw a lot of signs near water. Some of them said not to swim because of crocodiles and others were like the ones I think I saw here, the area is checked by rangers. I felt that these areas safer than the others. I know you take a risk swimming anywhere but I didn't think it was great."

14. In her affidavit sworn at The Hague on 16 March 2005, Ms Haverkort speaks of being in shock and panic at the realization of Isobel missing from the group. She also speaks of how scared she was. She said she felt numb the next day on being told the full extent of the tragedy. Ms Haverkort explains

that English is not her first language and she says that she struggles to put her feelings into language. Ms Haverkort explained that in arranging her tour to Kakadu she put her trust in "a seemingly professional organization with seemingly professional guides. I was not familiar with the dangers of the area we were going to visit and I consciously chose the tour thinking that it would be safe and reliable. It turned out that I was completely wrong." She also states in her affidavit that she cannot trust people as easily as before and often casts doubt on what people say which wasn't her approach in the past.

15. Ms Haverkort provided a report from Lidy Evertsen, a "*unitive body psychotherapist*" and "*body shock trauma*" therapist who she consulted. Ms Evertsen reports that Ms Haverkort "had frequent nightmares, a massive fear for water (which means she can not swim anymore) and a serious disturbance of her abilities to trust other people as well as to trust her own abilities to judge people and situations. This last fact could become a serious threat for her and her career. Furthermore I noticed a split in Ms Haverkort, while telling her story, between telling about the events and her ability to express emotions, which is one of the signs of shock trauma. There were other signs of shock like getting pale and cold, shivering and an inclination to withdraw attention. The physical signs were an unusual need for sleep and a heightened stress level that caused rapid exhaustion. That is why we decided upon starting a therapy process to heal the consequences of what happened to Ms Haverkort as a result of this shock event. When Ms Haverkort came to my practice the events had happened three quarters of a year earlier, so it was not likely that her complaints would disappear by itself. We had to come to the conclusion that they needed treatment. After a year, we can say good progress has been made. My prognosis is that another year or maybe one and a half is needed to safely land Ms Haverkort." The total figure for treatment was estimated between 6,500 and

8,000 euros. At the time of the application Ms Haverkort had spent 3,233 euros on the therapy.

16. Ms Haverkort also reported that prior to the incident she would go sailing on lakes and in the sea in The Netherlands but no longer enjoyed those activities; she said she doesn't swim in cloudy water anymore, that means she doesn't swim in The Netherlands as all waterways are cloudy although she acknowledges that there are no dangerous animals in the waterways; she says she is still afraid. Her affidavit refers to regular nightmares about the incident and about "losing people" who are near to her. She acknowledges the nightmares are less frequent. She says she sometimes suffers panic reactions and feels tense for many days. She says she has maintained frequent contact with the deceased's sister and she feels a heavy burden in relation to responsibility and guilt. Ms Haverkort also reports unpleasant experiences with journalists in Australia and difficulties dealing with the German Consulate in that regard. Ms Haverkort also claims $500.00 for needing to change her travel arrangements as she said she needed to stay to accompany the deceased's sister until she returned home; she claims an extra $150.00 to upgrade her accommodation as a result of how she felt after the incident; she also claims approximately $300.00 because of extra phone calls that she made as a result of the incident; she also claims costs associated with the application and refund of the tour which was not complete.

17. The further affidavit of Ms Haverkort sworn the 28th March 2006 at the Hague indicates that she has had further treatment from Ms Evertsen and the cost of that therapy as at the 28th March 2005 was 4,163.50 euros. She also attaches Ms Evertsen's curriculum vitae and states that she sought treatment from Ms Evertsen because "she has a good reputation of being able to achieve good outcomes with shock and trauma therapy for people who have suffered a traumatic experience." She also indicated that in the Netherlands there is a long waiting list to obtain orthodox treatment making it difficult to

access. She also attests to the fact that she wanted to leave Darwin as soon as possible after the incident which is why she did not seek treatment in Darwin. She mentions again being "harassed by journalists and I really could not cope with this."

18. On behalf of the respondent Ms McDade submitted that Ms Haverkort demonstrates that she was aware of the dangers of crocodiles and notes that Ms Haverkort was aware that the tour guide was looking for "eye-shine"; that she was aware that the group were playing jokes about crocodiles; that she was an adult and no-one forced her to go into the water; that she was aware that she and other members of the group were being exposed to the possible risk of being molested or taken by crocodile. Ms McDade strongly submitted that pursuant to s 10 *Crimes (Victim Assistance) Act*, Ms Haverkort needs to accept some responsibility herself for the risks that she was exposed to. It was also submitted that Ms Haverkort knew the risks of going into the water; she took the risk and that has consequences under s 10 *Crimes (Victim Assistance) Act*.

19. Ms McDade also suggested that Ms Evertsen is an unorthodox provider and there maybe something of psycho babble about the material provided. On behalf of the respondent a report by consultant psychiatrist Dr McLaren was obtained to give an opinion commenting on the treatment and opinions given by various health professionals on each of the applicants. This was objected to on behalf of the applicants, however in the circumstances where all four applicants currently live overseas, where it is not unknown for psychiatrists to comment on other psychiatrists or health professionals in related fields, I have admitted Dr McLaren's report for the purposes of these proceedings, however I am open to arguments concerning the weight that should be given to his report in relation to each of the applicants as clearly he has not examined the applicants himself. It is my view that it is legitimate in the context of this type of proceeding for a psychiatrist to comment on the work of other health professionals. Dr McLaren, in his report of 7 February 2006

states that Ms Evertsen has no medical or psychological qualifications; he indicates that her practice appears to be based on Freudian psychoanalytic concepts and what he says is "primal therapy"; he states those forms of therapy have been discredited; he said the cost is five or six times than the cost of orthodox treatment in Australia; he suggests that Ms Evertsen has said that Ms Haverkort is symptom free; he says there does not appear to be any residual permanent impairment. He suggests also that leaving the scene (the Northern Territory) was counter-therapeutic for Ms Haverkort. He indicates that if the applicants (including Ms Haverkort) had received early treatment in Darwin they would have made a faster and better recovery. Dr McLaren says that all applications should be settled "at the lower end of the scale".

20. In the light of this Ms McDade also indicated that Ms Evertsen was totally reliant upon what she was told by Ms Haverkort; that Ms Haverkort did not stay in the Northern Territory and receive treatment. It is also submitted that the various costs associated with the change of plans for travel and telephone calls are not well documented and should not be accepted as substantiating the claim.

21. Apparently in response to Dr McLaren's queries Ms Evertsen did provide further details of the therapy indicating that Ms Haverkort had fulfilled "all her therapy goals". Ms Evertsen also provided further details of her specialization in shock trauma therapy and professional positions on various Dutch and European Psychotherapy Organizations.

22. I have come to the conclusion that the applicant Ms Haverkort suffered a mental injury as a result of the commission of an offence, namely dangerous omission causing death. I have come to the conclusion that on the balance of probabilities on the material before me, incorporating the facts and the conviction before the Supreme Court that Mr Robless' various omissions substantially caused the injury suffered by the applicant Ms Haverkort

despite the fact that Ms Haverkort had some knowledge of the risks posed by crocodiles, it is highly unlikely that she would have gone into the water or indeed that any of the group would have gone into the water without a tour guide who purported to give the assurances that Mr Robless gave them. This applicant would not have gone into the water without Mr Robless indicating that it was safe to swim after he did some of the checks. On the other hand, the material before me indicates the applicant was aware there was still some, albeit a greatly reduced risk. I was reminded that not all members of the group actually entered the water. In my view it is an appropriate case in the circumstances to make a minor negative adjustment to the assessment by virtue of the considerations of s 10 of the *Crimes (Victim Assistance) Act*. Although Dr McLaren has made certain criticisms of Ms Evertsen's expertise, it would appear from all the material before me that she is well accepted as a therapist in The Netherlands, had a particular reputation that this applicant thought was suitable in the circumstances and has in fact provided what appears to be successful treatment. Further, it would have been impracticable in the circumstances to expect this applicant to have stayed and received treatment in the Northern Territory after the incident.

23. I turn to the assessment under s 9 *Crimes (Victims Assistance) Act*. In terms of expenses actually incurred as a result of the injury, the applicant has given the costs of $500.00 for changing her travel arrangements at the time; it is not precise but in my view appears to be fair and reasonable; in my view after such a traumatic event and the obvious mental distress evident at the time, $500.00 is a reasonable amount. Similarly, after such a traumatic event it is reasonable that slightly better accommodation would be required; it was shared with her cousin and does not appear to be in any way extravagant and I will allow the $150.00 as claimed. I will disallow the $300.00 in phone calls as although I am sure that the applicant needed to make extra calls, without more precision on cost I cannot assess it. In all of

the circumstances including the information concerning the lack of availability of orthodox treatment in The Netherlands I will allow the treatment costs in the sum of $7,066.36. In terms of mental distress, pain and suffering and loss of amenities I would award $7,000. I have disregarded the evidence concerning the personal bond the applicant feels to the deceased's sister and certain other obligations she feels. I do not regard them as affecting her life in a negative manner for compensation. That makes an interim total of $14,716.36. I am disallowing the items mentioned in paragraph 22(v) and (vi). I am reducing the total sum by a moderate amount as a result of the consideration given to matters under s 10 *Crimes (Victim Assistance) Act*. There will be an assistance certificate in the sum of $13,244.72.

Alex Robert Grassby

24. Mr Grassby's affidavit also incorporates the indictment and Crown facts that were before the Supreme Court. His primary affidavit indicates that in July 2002 he was on a world trip and that one of his destinations was Australia. He says he came to Darwin because of his interest in wildlife and booked the tour with Gondwana Tours to Kakadu National Park. He said that the nine persons in the group all became well acquainted with each other including the tour guide Mr Robless. He said he was the youngest in the group being only 20 at the time. He said on the 22 October 2002 one of the members of the group asked Mr Robless if they could go for a swim to "freshen up". He said others in the group were also keen and they "pressed him" to go for a swim after dinner. He states that at about 11:00pm on the night of the incident Mr Robless took the group to Sandy Creek Billabong for a night swim; he states that others in the group had asked him about the dangers of crocodiles and that Mr Robless assured them it would be safe to swim in the area; he said he believed Mr Robless because he had told them that he had fifteen years experience in the area as a guide; he said "I thought that the area was practically his back yard and he would be very familiar

with it"; he said there was "some doubt by some one in the group" but he said that he trusted Mr Robless; he too said Mr Robless said it was safe and justified that by saying "Aboriginal women and children have been bathing in the creek for years"; he said Mr Robless had told them he was part Aboriginal. He said he didn't think any more of it and couldn't wait to go for a swim.

25. He said some members of the group hesitantly edged their way into the water whereas other entered the water with confidence. He states that he jumped in and was swimming around comfortably in and under the water. He said that as a joke he ducked under the water and swam to the deceased and grabbed her on the leg and gave her a little pull to try and submerge her. He said he thought she got a fright but everyone seemed to be amused by it and was laughing. He said that he, the deceased and her sister Valarie, James and himself swam a further eight to ten metres from the bank. He said he was no more than four metres away when the deceased let out a "little scream" and was immediately dragged under the water. He said this was the last time he saw her alive.

26. He said he had formed a close friendship with the deceased and her sister, Valarie Von Jordan and he found losing her in such a "horrific way" and seeing her sister so upset was very traumatic. He said he was shocked but he thought at first it hadn't really affected him apart from having nightmares; upon trying to swim again in an open area he froze and felt vulnerable; he said he is still affected in the same way and unable to swim in any type of pond, lake, river or waterway that resembles a billabong. He does not involve himself in certain water sports. He says he has had numerous flash backs since the incident and he cannot pursue things that he enjoyed such as swimming and skin diving because of his anxieties. He said the nightmares were frequent but as time progressed they became less frequent and are now occasional. He says he blames himself for the incident and he feels guilty.

27. He said he pursued his trip after the incident but he could not enjoy himself. He is a resident of England and found that after he had gone home he could not settle down; he said his concentration was short and he became restless; he states he is enrolled in studies but he finds it very demanding as he is unable to concentrate for long periods of time and forgets basic instructions. He thinks this is because of his disturbed sleeping patterns. He says he has mood swings that are persistent and his personality is "quite snappy and temperamental". He said he was previously a strong athlete and personal fitness trainer but he has lacked motivation and his physical appearance and weight have deteriorated. He said he has not had medical attention as he is embarrassed to cope with his flashbacks and inability to go into the water. In terms of his assessment of the risks, he does say at the outset "during our time in the park there was always signs warning about crocodiles and we had repeatedly been told by Glen, our guide, that crocs had occasionally been found in the waterways but regular checks had been carried out and traps had been set, but it was down to our own risk if we wanted to go in or not. He repeatedly said that we don't have to go into the waters and if we just wanted to sit and watch we could or we could abandon it all together."

28. Part of Mr Grassby's material indicates that he did see a doctor in Thailand Chaichana Nimnuan MD. Dr Nimnuan states

> "Mr Alex Grassby came to see me on 24 March 2004 at BNH Hospital. He stated that he has suffered from panic symptoms when going to swim in the river on the sea especially in the dark. He described that these symptoms occurred to him after the incident in Australia in October 2002 as you already knew. After that incident, he has had some guilty felling towards his friend's death. However, one month before this visit, he went swimming in the sea in Thailand without definite physical symptoms of anxiety. Mental status examination (24 March 2004) showed: a young Caucasian male in casual dress, cooperative, lively, verbal with coherent and relevant speech, no depressed mood, no delusion and hallucinations detectable. No evidence of any cognitive impairment is shown by general mental status examination. Mr Grassby also reported he has no problem in self care or socialization. He drinks occasionally but

> denied any elicit drugs involved. He is now looking for a job and also a study in Thailand.
>
> In summary, (1) Mr Grassby may suffer some degree of guilt and anxiety symptoms which may be the result of the crocodile attack in 2002. (2) Mr Grassby's symptoms are not severe enough to fulfill any criteria for mental disorder. (3) Mr Grassby's lifestyle and career prospects are preserved (4) No limitation is evidence. (5) No treatment is required. (6) No prognosis is given due to the fact that no current diagnosis of mental disorder was made."

29. It was submitted on Mr Grassby's behalf that it was a particularly horrific and traumatic incident for him given his close proximity to the deceased; that he had previously enjoyed swimming and scuba diving and those types of activities but now could not do so and that he did suffer anxiety and nightmares. It was also submitted on his behalf that he did suffer mood swings and had difficulty concentrating.

30. On behalf of the respondent it was argued that Mr Grassby was only showing temporal impacts of the event which would have been upsetting and concerning. It was submitted that he sought no treatment in Darwin and continued on his journey and did not have a medical consultation until March 2004. It is indicated in that report that he was upset and may have been anxious but there was no treatment advisable and there was an indication of no deterioration in his lifestyle. It is submitted that his case lacks credibility as he alleges he suffered yet and did nothing about it. It is submitted he would have sought professional assistance if he had any significant injury. I was reminded that it is normal to be upset after such an incident but it did not indicate a "mental injury" and that any such injury needed to be more than being upset in a transient way.

31. In relation to issues concerning s 10 of the *Crimes (Victim Assistance) Act* it was submitted that Mr Grassby was an adult and no one forced him into the water but he made a decision to go into the water; it was submitted that he was part of a group who wanted to go swimming and they took the risk and they all watched while Mr Robless was "looking for eye-shine". I was

reminded that Kakadu is full of signs and that although Mr Robless had some responsibility towards members of the group they had made a wrong decision and put themselves at risk. I was also reminded that he and the deceased went ten metres into the water whereas they should have stayed near the shore; that they had been playing around making out they were crocodiles and they had been speaking regularly about crocodiles.

32. It was submitted that if it was true that Mr Grassby "could not settle down" after he returned to England, then it was questionable as to why he would go back. It was submitted that there was not appropriate evidence of medical injury, loss of amenity or any significant distress before the Court. It was submitted that if he had suffered any injury it was minor or insignificant. My attention was drawn to Dr McLaren's report. Dr McLaren concludes "I am satisfied that if the interviewing psychiatrist said that the applicant had no significant mental disorder, then he was being assessed against current American standards which are applicable here. The report indicates that at the time of the interview (24 March 2004), the applicant was essentially living a normal life. This is what one would expect. The application should be settled on the base of pain and suffering only as there are no compensable residual symptoms". I accept Dr McLaren's report contains a reasonable commentary on the psychiatric material placed before the Court. I accept the evidence is that as at March 2004 there were no significant negative psychological effects.

33. There are no significant on going issues with this applicant and for the most part he has resumed a normal life. I must place some weight on what the applicant has said in his affidavit however which in my view accords with an expected or understandable response to the incident and is not negatived by the later psychiatric material. While it is true that he went on with his trip it must be remembered that Mr Grassby was only 20 at the time; it is not unknown for people to carry on after traumatic incidents and try to cope for themselves. There is an indication from the psychiatrist in Thailand that he

suffered a degree of guilt and anxiety symptoms. I accept that there has been no diagnosis of a mental disorder but in my view given the evidence of the trauma at the time, nightmares, anxiety and guilt, there is evidence of mental distress that might be expected after witnessing an incident such as this. I would not be prepared to find however that the symptoms are on going. In my view the affidavit evidence combined with what might be expected from being in close proximity to the primary victim satisfies me on balance that there was a mental injury capable of being compensated under the Act. I agree that it is at the lower end of the scale and I would award $3000.00 for pain and suffering, mental distress and combined with loss of amenities of life. For similar reasons as indicated in Mr Haverkort's matter, I would reduce the compensation for s 10 matters giving a total of $2,700.00. There will be an assistance certificate in the sum of $2,700.00

James Rothwell

34. Mr Rothwell also relies on the indictment and crown facts presented against Mr Robless as well as his statement to police sworn on the 23rd of October 2002. Mr Rothwell is also a resident of England and was 24 years of age at the time of the incident. His statement indicates he had been traveling in Australia since the 3rd August 2002 and arrived in Darwin on the 17th October 2002. He joined the Gondwana Tour. He said Mr Robless told them what they could expect to see on the tour including wildlife such as snakes, spiders and maybe salt and freshwater crocodiles. He said he did not recall if Mr Robless mentioned specific dangers associated with the crocodiles but he said the difference between fresh and saltwater crocodiles was explained. He said "I took this to mean that if a saltwater crocodile saw you in the water then he would attack, a freshwater crocodile wouldn't necessarily attack unless it felt threatened". He said Mr Robless explained that where they were going in the waterholes it would be OK for them to swim. He said Mr Robless also explained a survey concerning catching crocodiles and that while one could not be 100% certain, the understanding

was that the areas that they were going to would be fairly safe. He said at the first waterhole they stopped at there had been at least two other tour groups swimming. He felt this was safe due to the large number of people there and that they all went in swimming including Mr Robless. He said on the 21st October after a walk they were informed by Mr Robless that the area had crocs in it and so they couldn't swim there. He said on the evening of the 21st October a group of them went swimming but before they got into the water Mr Robless had told them there might be a "freshie" in the water. He said that they could all stay together and sit in the shallows. Mr Rothwell said that before any of them went into the water Mr Robless said he was going in himself and that they could join him if they wanted. He said that Glen checked the water by shining a torch across the water to see if there were any reflections of crocs eyes above the surface; he said Glen told them that any eyes would be red; he said Glen also told them to check the bank. He said they stayed in the shallows that night for around half an hour and then returned to camp.

35. Mr Rothwell said on the evening of the 22nd October 2002 they went to another area to have a swim and that Glen and those who had torches checked the water by shining the torches across the water; he said he asked Glen if he could swim across to the other side; that Glen had said "no" and told them to stay close to the beach side. He said he thought all of them went into the water although he couldn't remember if Stuart was there; he said they were all clowning around swimming under the water and dragging each other under the water. Glen went to get another group. He said Glen told them to stay close to the bank and stay together and not go swimming off on their own. He stated that a number of the group were on the beach sitting around the fire and three of the group were knee deep in water. He said that he, the deceased, and her sister Valarie were ten metres from the bank treading water and talking but they were all in sight of each other. He said he felt something hit his left leg, he heard Valarie scream, he thought

he heard Isobel scream and then disappear under water. He said he thought someone was "mucking around" and then saw every one was shining torches. He essentially then realized something was badly wrong. He explained the distressing scene. He did state "every one of us made the decision to go swimming, we were aware of the dangers. Glen had told us to be careful every time we were near water, I myself thought that if Glen was swimming then he must have felt safe and knew the area. I think that this made all of us feel the same way. We had taken what I would consider reasonable precautions before going into the water by shining the torches across the water and on to the banks like Glen had shown us."

36. Mr Rothwell states that after about a week he felt he couldn't go on with his trip and cut his trip short to return home. He was uncomfortable with media representatives who he said were "constantly harassing my friends and myself". He said given he had become friends with the deceased he was finding it difficult to deal with the emotional anguish and was not emotionally fit to continue to travel; he said he was unable to deal with his own personal trauma and guilt. He then purchased a one way ticket from Australia to England when he was four months into a one year world trip. He said upon his return to England he was contacted by the deceased's family who requested that he attend her funeral in Germany; he was asked to be a pall bearer and he felt he could not refuse; he said it was an upsetting occasion for him. He said he was later persuaded to continue his trip. He said upon returning to Australia the effects on him were greater than he thought; he felt constantly guilty and it tainted the rest of his trip and made minor tasks difficult. He also said he held a fear of going back into the water no matter what country he was in; he found the loss of confidence devastating because he previously loved to swim and jump into water.

37. He states that on his return to England in June 2003 he worked in his previous position as a police officer in the drugs and robbery squad for the Metropolitan Police in East London; because of the guilt and constant flash

backs it became too difficult to deal with his lack of trust in other peoples' judgment and those in authority; he said he developed strained relationships with colleagues and commanders. He said it was with reluctance that he spoke to a psychiatrist about the issue in the hope that he could find "closure". He said he felt so unsettled and embarrassed that he eventually sold his flat in England and left his job. He said he didn't think it was fair on his colleagues that they be forced to work while he was unstable; he said he had not undertaken further counseling as he didn't feel comfortable talking to a stranger at length about the tragedy. He said as at July 2004 he had taken three years leave of absence to try and sort himself out and has not earned a salary since then; he said he's relied on the proceeds from the sale of his flat in London. He claims airfares for approximately US $4,000 for flights (a) Australia to London made soon after the incident; (b) London to Munich for the deceased's funeral; and (c) London to Australia for approximately five weeks after the incident. He claims also $460.00 for the incomplete tour.

38. Part of the material tendered on his behalf is a psychiatric report by Dr Navin Savla a Consultant Psychiatrist, London. Dr Savla appears to have conducted a thorough examination. Dr Savla states there was evidence of flash backs leading to occasional panic attacks and some difficulty talking about the events. Dr Savla said he also developed avoidance behaviour, lacked confidence and his concentration was poor. He said the clinical picture was of moderate anxiety disorder as a result of the incident. He did however describe the prognosis as generally good and said he had given Mr Rothwell literature about cognitive behaviour therapy. Dr Savla advises that if Mr Rothwell undertakes ten sessions of cognitive therapy he would make a full recovery. His conclusion is that Mr Rothwell has suffered psychological symptoms of anxiety and depression and as at April 2004 his symptoms were of anxiety disorder of moderate intensity. Dr Savla indicates he's been unable to take part in usual sports activities, his self

esteem has been low and he has had to take a break from the Police Force because of lack of confidence and his inability to perform his job properly; his limitations have been in his professional life and personal life mainly pursuing his hobbies. He indicates that the cost of treatment would be £150 per session for ten weeks and that the prognosis is good with appropriate treatment.

39. In the applicant's affidavit dated 24 February 2006 he states that when he came to Australia he was not specifically warned about the danger of saltwater crocodiles; he said that is why he would never have entered the water had he known that saltwater crocodiles were likely to be in the vicinity; he said that as the group were swimming at night, no warning signs were visible; he said he understood he was with a guide who had worked in the area for fifteen years and accepted his advice that it was safe to swim. He said he did not work from May 2004 until February 2006 and as a result he has lost income in the area of £48,000. He said he commenced work again on 24th February 2006. He stated he was not taking unnecessary risks but took the advice of the tour guide. His affidavit includes copies of his pay slips from 20 May 2004 indicating his income at that time and his pay slip for the pay period commencing 28 February 2006 indicating his payment for his first pay back at work. He states in his affidavit which is objected to by the respondent that he could not work between those two dates because he was "simply unable to cope. This was due to the trauma that I suffered as a result of Isobel being taken".

40. It is submitted on Mr Rothwell's behalf that his experience was particularly traumatic and he lived with a great deal of guilt trying to carry on and lived with a real fear about water; he suffered lack of trust and strained relationships with supervisors and others that he worked with. It is submitted that much of what he states is supported by Dr Savla. It is submitted that given his income loss is around £48,000 as well as his

inability to cope, he should be receiving a certificate in the maximum amount available.

41. On behalf of the respondent Dr McLaren's opinion is offered. Dr McLaren states in relation to the assessment of the psychiatric assessment of April 2004 that it isn't clear why a police officer should be so affected by fatality. Dr McLaren says he accepts that Europeans are less likely to see crocodiles as a "quotidian hazard" of life but the group were explicitly warned of the dangers these animals represented. He points out there are repeated references to guilt in his depositions but the reason for it, he says is not self evident. Dr McLaren queries that there is no indication that Dr Savla used any medication which strongly suggests the symptoms were at the milder end of the scale. Dr McLaren is of the view that the rate for treatment was excessive compared to the Australian Medicare rebate for specialist psychiatric attention. He points out that there is no indication in the report as to the outcome of the treatment. The respondent submits that if the impact of the experience was so negative on Mr Rothwell it would be expected that he would have received some form of ongoing psychiatric help and not the few sessions that he has had with Dr Savla. It is pointed out that he left the Northern Territory without any assistance and he did not appear to seek any assistance for quite some time. It is submitted that there is a failure to mitigate in the face of a description of strong symptoms. Further, it is suggested that it is simply not credible to remove oneself from work without any further or on going medical treatment or opinion; there is no indication that he had any regular treatment despite the fact that it is suggested he did not work for some two years. This is in the face of his continual travel until June 2003. There is no indication that he has undertaken the ten treatments suggested. In relation to the airfares claimed for his travel it is suggested that these costs were all as a result of decisions that he made; that it is not in the category of immediate economic loss as contemplated by the *Crimes (Victim Assistance) Act*. It is submitted on

behalf of the respondent that it was his choice to go to the deceased's funeral but that is not a matter he can receive compensation for under this Act. On behalf of the respondent it is submitted that given the enormity of Mr Rothwell's complaints of injury for what at the most has been diagnosed as "moderate anxiety disorder" he has taken years off of work, it is simply not credible that he would not have some on going medical assistance and treatment.

42. Although I accept Mr Rothwell has taken a significant amount of time off of work and I accept much of his latter affidavit sworn the 8th of April 2006, I cannot accept on the balance of probabilities that his two years out of work is to be attributed to an injury suffered as a result of the incident on 22 October 2002. I note that in his earlier affidavit he says that of July 2004 he is taking *three years of absence, to try and sort myself out.* Obviously as it turns out he has gone back to work earlier. He indicates that he has been living off of the proceeds of sale some property. I must say I agree with counsel for the respondent that with the enormity of the injury that is alleged, one would expect there to be much more substantial evidence indicating the need to take eighteen months to three years off of work. I just don't accept that his time taken off of work is substantially atributable to the event. I would expect some-one working in a large organization such as the police force to have gone into great detail about alternative duties and any number of other options including other treatments if they were having difficulties. That is not to say that there has been no injury. In my view on balance Mr Robless's omissions contributed substantially to a mental injury suffered by Mr Rothwell. It is difficult to assess precisely to what degree it has resolved but it is clear and in accordance with the symptoms described and confirmed to a degree by the psychiatrist that there was a mental injury. It is impossible to find on balance of probabilities that he requires or has undertaken or is committed to undertaking the course of treatment suggested so I will not make an award for future treatment. For pain and suffering,

mental distress and loss of amenities of life I would award the sum of $5000.00. I will not award the claimed airfares. I do not think they are the types of costs contemplated under the Act. In relation to the issues of contribution, there is some indication that Mr Rothwell was aware that despite the fact he trusted Mr Robless as the tour guide, he was aware that he was taking something of a risk. In relation to the s 10 issues for similar reasons as the other applications I would reduce the award to $4,500.00. I note that Mr Rothwell is definitely back at work and the symptoms appear to have resolved. The will be an Assistance Certificate in the sum of $4,500.00

Miriam Melissa Annegarn

43. Ms Annegarn's application also primarily relates to mental and psychological injuries suffered. She too relies on the indictment and Crown facts that were presented to the Supreme Court. Annexed to her affidavit of 4 November 2004 is her victim impact statement dated 17 August 2004. Her affidavit states "the whole ordeal surrounding the incident has been an extremely traumatic experience for me". Ms Annegarn's statement to police on 23 October 2002 indicates she too is a national of The Netherlands and was holidaying in Australia with her cousin, the applicant Ms Haverkort. She said she originally wanted to go to Bali but because of the recent bombings in Bali, she went to Kakadu instead with Gondwana Tours. As part of the preparation for the trip she said "Glen also said about dangerous animals when we signed the paper that said it was at our own risk. He told us about the snakes, spiders and crocodiles. …… Glen also said there were two kinds of crocodiles, fresh and salt water and he told us about the dangers of the salt water crocodiles". She said the chose Gondwana "as Glen was quite honest about the trip and what you could expect; he didn't hide things to make it better. She said that during the trip every one swam quite a lot because they needed to cool down. She said she recalled Glen saying sometimes crocodiles have been seen where they were swimming but

they were fresh water crocodiles. She said that he showed them the "No swimming signs" at some of the waterholes and explained what they meant; she said she recalled that before they would go swimming she would see Glen shine a torch around the banks of the waterhole looking for crocodiles. She said that at some of the waterholes they went to Glen would not let them swim because there were crocodiles in the water. She said she asked Glen if it would be OK to swim at the waterhole after dinner on the 22nd October 2002. She said Glen told her it was safe to swim and that it was a famous place and Aboriginal people had been going there for years with their children to teach them to swim; that he said something about fresh water crocodiles and they would not hurt unless you annoyed them and "he also warned us again about salt water crocodiles". She said Glen also checked the waterhole with his torch and every one went swimming. She said Glen told them to stay together and not to go too far into the water. She thought there were two people who did not go swimming. She said she was in the water but stayed on the beach side; she heard a splash and a scream but didn't think anything of it and started to swim towards the group. Soon the realization of what had occurred became apparent. In the morning Ms Annegarn identified the deceased's body when police attended. She said she thought Glen was very professional and that everyone trusted him; she said he seemed responsible and well organized and she had no doubts about him; she said she trusted him because of his Aboriginal background and he seemed well educated.

44. In her victim impact statement Ms Annegarn said that the evening before the incident she had dreamt the group were attacked by a crocodile; she told the group about her dream and that the deceased would be caught first; she said everybody was making fun of it. She said because of that feeling she had asked Mr Robless several times whether it was really safe to swim and he convinced her that it was. She indicated that well after the incident she found out that there were in fact eight other crocodiles in the water at that

time and she indicated that it was unbelievable that Glen didn't know about those crocodiles. She speaks also about being surrounded by journalists in Darwin; that they went to the German Consulate instead of her own hostel; she had some difficulties in relaying that she wanted to call her mother and she felt that the Consul created difficulties for her and her cousin in relation to journalists. "We felt really misunderstood". She said after they took Valarie to the airport she broke down completely. She said the incident had occurred at the beginning of their journey and it overshadowed the rest of their travels. She said she felt very responsible for the deceased's sister and had telephone conversations with her several times a week; she said she felt restless and guilty towards her and that they are still in contact. She said she has the feeling that she has a sentence for life and that she needs to be there for the deceased's sister and her parents she believes that the psychologist for the deceased's sister has said their contact is very important for the deceased's sister.

45. Her victim impact statement says that she and her cousin decided not to go home after the incident as they would only have nasty memories of their trip and she thought she wouldn't be able to get back into her life. She said some of the good things she experienced in Australia after the incident made it easier for her to handle it. They did make some changes to their travel plans. She said she heard a lot of rumours and stories about the incident such as suggestions they were drunk; she said she found that very difficult to cope with. She said the accident was in her head every day although it was getting less painful. She said she went to Cairns to dive but was afraid to get into the water even though she usually loves to swim; she said she was really scared to do a night dive; a number of incidents reminded her of the tragedy. She said that although it was slowly getting better she was still scared of doing a lot of activities like traveling and skiing; still experiencing bad dreams especially about seeing the deceased after she was taken out of the water and feeling terrible and depressed. She feels her life will never be

the same; she feels older and more serious in her approach than previously; she said she feels like a stranger sometimes with her friends. She said when she resumed work she had difficulty concentrating, was easily irritated and cried often. She said her colleagues did not understand these issues because she worked in a law firm where performance is an issue; she said it had all had an adverse effect on her functioning as a tax lawyer. She said she was still receiving flash backs at the time of writing the victim impact statement; she says she still cries, especially when she sees or hears things that remind her of the incident and she is hoping that it will not hurt her as much in the future and she will regain her self esteem. She said she is not consulting a psychologist because she was trying to cope without help but she thinks it may be necessary to do so.

46. Ms Annegarn was seen by M Kazemier, a psychiatrist based in Rotterdam, The Netherlands. Ms Annegarn's previous personal history revealed a very healthy happy person from a stable family. She consulted the psychiatrist for complaints of anxiety, fears of being alone and recurrent uncontrolled reflections of a fearful accident. The report speaks of her guilt and grief. The report indicates that she feels "de-stabilized"; that previously she was described as a "pillar" to her friends but now the contrary is true and she spends recreational energies on supporting the sister of the deceased. The conclusion is that at the time of seeing the psychiatrist Ms Annegarn suffered post traumatic stress disorder as a result of the incident. She was described as impaired in her social functioning, easily brought to tears, impaired by intrusive memories and suffers distress and impaired stress tolerance. She fears surroundings that remind her or bring about associations with the incident. The report suggests recent improvement and her prognosis was described as "not bad but impairment in concentrating and stress tolerance has to be expected for a long time".

47. In Dr McLaren's commentary he indicates that prior to the commencement of treatment the symptoms were settling. He noted there is no indication

that the applicant completed any treatment. Dr McLaren indicates that the pre-morbid personality is not well accounted. In my view the report is appropriately detailed on that matter, at least to the standard that the Court often finds in psychiatric reports in comparable matters. Dr McLaren has attributed the post traumatic stress to the Bali Bombing which he says was "at the time of the beginning of her holiday in Australia". The applicant has corrected this in her later affidavit sworn 28 March 2006 at the Hague. She states Dr McLaren's report is based on incorrect facts. She says at paragraph 3 "I do not agree with Dr McLaren's proposition that I was significantly affected by the Bali Bombings. I did not lose friends in the Bali Bombing. It was Valarie and Isobel who had lost friends in the Bali Bombing. Dr Kazemier incorrectly stated in his report that I had lost friends." It is obvious that this also accords with other evidence before the Court concerning Ms Haverkort's application. I must discount much of Dr McLaren's commentary in relation to his conclusions that places the source of the post traumatic stress as losing friends in the Bali Bombing. That does not accord with the facts. This was clearly an error in Dr Kazemier's report. In this case I readily accept on the balance of probabilities that Ms Annegarn has suffered an injury as a result of the offence. It is clear she has suffered post traumatic stress disorder. The evidence from the applicant herself and the psychiatrist is compelling and there is no reason to doubt its credibility. Dr McLaren's report must be discounted. There are indications that this applicant has not sought counseling due to expense although I note she is claiming (item 11 possible counseling expenses in the future), but I do not think it appropriate to award for future counseling in the circumstances as it is unclear on whether it will be needed. The respondent submits that Ms Annegarn did not seek treatment immediately but continued her travel. She has explained her actions that she thought the further traveling might assist her. It is also submitted that she was aware of the risks as with the other applicants and I should make an adjustment on that basis. It is also submitted on behalf of the respondent that the various expenses and flights

that the applicant has made have been her choice and are not compensable under this scheme.

48. Apart from the miscommunication in the psychiatrist's report that lead to misleading Dr McLaren in his report, I find this application to be credible. In terms of the claim I am unable to allow certain expenses which may be the subject of costs. (Items 1, 2, 3). The applicant is claiming she had to take off a half a working day at the value of $151.00, however the loss is not appropriately authenticated and I am not satisfied it is a loss that can be compensated. The phone expenses are approximate and as with the applicant Haverkort I am unable to be certain about them. The travel expenses in item 6 in my view do not represent a loss in the contemplation of the *Crimes (Victim Assistance) Act*. In my view the re-scheduling of the trip is a cost that is a loss that should be compensated and I will allow a AUS$500.00. Item 8 concerns legal expenses which can be dealt with by way of costs. I cannot allow the refund for the tour. I will allow the reasonable cost of the changed room at Australian AUS $150.00. I will not allow items 11, 12, 13 and 14. I am satisfied on balance however that there has been a mental injury and that for pain and suffering, mental distress and loss of amenities I assess that at $7,000.00, totaling $7650.00. For the purposes of s 10 and for similar reasons to other applicants I will adjust the award to $6,795.00, An Assistance Certificate will issue for $6,795.00.

49. These reasons will be distributed to the parties' representatives today and listed for final orders and any cost application on 9 August 2006 at 9:30am. Should this date be inconvenient, the parties may approach the listing registrar for an alternative date.

Dated this 8th day of August 2006.

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Jenny Blokland
CHIEF MAGISTRATE