CITATION: [2006] NTMC 076

PARTIES: Adrienne Veronica Elsie Frost
APPLICANT
v
Northern Territory of Australia
RESPONDENT

TITLE OF COURT: LOCAL COURT

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20419286

DELIVERED ON: 15.9.06

DELIVERED AT: Darwin

HEARING DATE(s): 11.5.06 & 27.7.06

JUDGMENT OF: Daynor Trigg SM

CATCHWORDS:

s.12(c) Crimes (Victims Assistance) Act
Onus of proof
Assessment of quantum where many events but only one offence.

REPRESENTATION:

Counsel:
Applicant: Mr Davis
Respondent: Ms Ziebel

Solicitors:
Applicant: Davis Norman
Respondent: Priestleys

Judgment category classification: C
Judgment ID number: [2006] NTMC 076
Number of paragraphs: 46

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

No. 20419286

[2006] NTMC 076

BETWEEN:

Adrienne Veronica Elsie Frost
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 15 September 2006)

Mr D TRIGG SM:

1. This matter commenced on 20 August 2004 when the Applicant filed an Application for Assistance Certificate under the *Crimes (Victim's Assistance) Act* (hereinafter referred to as "the Act"). In that Application the applicant provided the following particulars:

- That she was the alleged victim;
- That the alleged offence occurred on 25/11/03;
- That she was allegedly assaulted;
- That the alleged offender was James Robert Fryer (hereinafter referred to as "Fryer");
- That the matter was reported to police on 25/11/03 to Constable K Manser (hereinafter referred to as "Manser") at Palmerston police station;
- That she incurred no expenses and financial loss; and

- That she suffered injuries, namely bruising to both arms, injury to left knee, ongoing pain in the neck, both arms, thoracic spine and left knee.

2. Although there is no reference to any “mental injury” in the original Application there was evidence introduced to allege the same. No issue was taken with this.

3. In her closing submissions Ms Ziebel, counsel for the respondent conceded that the applicant was the victim of an offence within the meaning of the Act. She also conceded that the applicant suffered injuries as a result of that offence. There appears to be no issue that the offence in question was the assault the subject of this application.

4. Ms Ziebel advised that the respondent opposed the issuing of an assistance certificate relying upon *section 12(c) of the Act*. This section is in the following terms:

> The Court shall not issue an assistance certificate –
>
> (c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;

5. In paragraph 3 and 4 of her written submission, Ms Ziebel correctly (in my view) summarised the current state of the law in relation to that section as follows:

> 3. The law relating to the interpretation of this section is succinctly summarised in the decision of Ms Blokland SM in *Tirak v NTA* [2002] NTMC 035. At paragraph 4 therein, after referring to the decisions of *Dobsonv NTA* and *Wolfe v NTA*, Ms Blokland states:
>
> “The principles revealed in those authorities are first, that an applicant need not take a proactive role; secondly, the applicant's role is contemplated as being secondary to the role of police in the sense of providing assistance when requested to do so; thirdly, the onus of proof is on the respondent to show that an applicant has failed to assist in the sense of the section.”
>
> 4. In the recent decision of *Stratford v NTA* [2006] NTMC 004, Mr Luppino SM further stated what is required of police in the sense of

making a request for assistance. At paragraph [21] therein, he states:

> "A general request must be sufficient and in my view to satisfy that, all that police need to do is to make it clear to the claimant that they seek information to investigate the matter with a view to prosecuting the offender if the investigations reveal that charges should be laid. Obviously the best way to communicate this is by a direct statement. Absent that, indirect evidence and inference can establish the request in those terms."

6. In addition, in his closing submission Mr Davis, counsel for the applicant, also relied upon paragraph 9 of the decision of *NTA v Longmair* [2006] NTMC 005, a further decision of Mr Luppino SM. In that paragraph Mr Luppino SM stated as follows:

> "It is clear on the authorities that section 12(c) does not require a claimant to take a pro-active role. The claimant's role is secondary to that of the Police and only requires the claimant to provide such assistance as is requested by the Police. The respondent to the primary application has the onus of proving that a claimant has failed to assist as required by that section. See *Wolfe v Northern Territory of Australia* [2002] NTSC 26, *Dobson v Northern Territory of Australia* [2002] NTMC 6, *Stratford v Northern Territory of Australia* [2006] NTMC 4."

7. I respectfully adopt and agree with these three decisions, and apply them in the instant case.

8. All evidence was by way of affidavit (in accordance with *s17(3) of the Act*), and neither party sought leave (under *s17(6) of the Act*) to cross-examine the deponent of any of the affidavits relied upon. This was a case where I may well have been assisted if the applicant had been cross-examined, and I may have granted leave if it had been sought. Where issues of credit arise it is even more difficult to determine when the court has no opportunity to see or hear the various deponents of affidavits.

9. The first affidavit filed in the matter was sworn by Mr McGorey, solicitor, on 1.11.04. It was an affidavit sworn in support of an interlocutory application for a summons to produce documents to the Commissioner of Police. As part of that affidavit Mr McGorey deposed (in paragraph 6) that the documents sought "are highly relevant to the central issues in respect of

the Application for Assistance herein, namely (c) whether the applicant has assisted the Police Force in the investigation of the offence.”

10. On 10.11.04 the court granted leave for a summons to produce to be issued to the Commissioner, and this was returnable on 1.12.04. On the return date the Judicial Registrar granted leave to the parties to inspect and copy the documents returned.

11. The matter was next in court on 20.1.05 when the applicant was ordered to file and serve affidavit in support by close of business on 16.3.05. This order was not complied with. The matter was next in court on 17.3.05 when the applicant was again ordered to file and serve affidavit in support, this time by close of business on 7.4.05. This order was complied with.

12. On 5.4.05 the applicant swore an affidavit (which according to paragraph 2 thereof was) “in support of my application and in response to allegation by the Northern Territory Police that I did not request charges to be brought against James Robert Fryer and in support of my claim in general”. However, apart from annexing a number of documents the affidavit itself says very little.

13. The applicant swore further affidavits on 27.10.05, 27.2.06 and 30.3.06. I will refer to the four affidavits of the applicant in more detail later in these reasons. I will refer to each of these affidavits hereafter as Frost [1] to Frost [4] respectively, with [1] referring to the first affidavit in time through to [4] being the last affidavit in time. Those were the affidavits in the applicant’s case.

14. The respondent filed an affidavit of Mr Dexter sworn on 25.7.05 (which simply annexed documents), two affidavits of police officer Manser sworn on 8.2.06 and 6.6.06 (which I will refer to as [1] and [2]), and an affidavit of police officer Hattersley sworn 8.6.06. Again, I will refer to these in more detail later in my reasons.

15. A perusal of the various affidavits and annexures thereto suggests the following chronology:

- The applicant was born in New Zealand on 30.12.65 (annexure AVEF3 to Frost [4]);
- The applicant had the full-time care of her two children from a previous relationship, and had no children with Fryer (annexure AVEF6 to Frost [1]);
- On 30 October 1997 in NZ Fryer committed offences of indecent assault upon a girl under the age of 12, and sexual intercourse with the same girl (annexure AVEF7 to Frost [1]);
- On 12 August 1988 Fryer was convicted of the aforementioned criminal offences in NZ and was sentenced to be imprisoned for five years (annexure AVEF7 to Frost [1]);
- In about 1991 Fryer was released from prison after serving three years, having been recommended for an early release program (annexure AVEF7 to Frost [1]);
- Fryer is a highly skilled welder and boiler maker (annexure AVEF7 to Frost [1]);
- The applicant commenced a relationship with Fryer in 1996 in New Zealand, and there had been no problems in the relationship whilst in New Zealand (annexure AVEF6 to Frost [1]);
- In 1997 the applicant decided to re-locate to Australia with her children, and Fryer came with her (annexure AVEF6 to Frost [1]);
- They arrived in Australia on 31 May 1997 (annexure AVEF7 to Frost [1]);
- Initially the applicant's children remained in New Zealand (*although in annexure AVEF7 to Frost [1] it is suggested that they all arrived in Australia together*), but they subsequently joined her. This was the commencement of problems between the applicant and Fryer, as it became evident that he resented their presence (annexure AVEF6 to Frost [1]);

- Fryer and the applicant had met while working on dairy farms in New Zealand, and for the initial period (in Australia) of just under two years they worked on dairy farms in eastern Victoria (annexure AVEF7 to Frost [1]);
- Fryer began to criticise the applicant's single parent status, made derogatory remarks to her and the children, refused to play a role in caring for the children and made it publicly known he was not the father of the children (annexure AVEF6 to Frost [1]);
- Fryer became aware that the applicant suffered from dyslexia and that she was highly embarrassed and sensitive to this. Fryer made derogatory references to this and threatened to expose this fact to her employers (annexure AVEF6 to Frost [1]);
- In Victoria, Fryer's use of alcohol and amphetamines increased significantly, and this caused him to become more aggressive and suspicious and to experience mood swings (annexure AVEF6 to Frost [1]);
- Fryer's abusive behaviour cost them their employment on at least three occasions, which meant they also lost their accommodation, but he would blame her for this (annexure AVEF6 to Frost [1]);
- From late 1998 until 2000 they travelled around Australia in a large mobile home stopping to work at various locations (annexure AVEF7 to Frost [1]);
- The applicant lost contact with her family in NZ as Fryer would become abusive towards her whenever she telephoned them, and he eventually removed her telephone diary from the home (annexure AVEF6 to Frost [1]);
- The applicant became increasingly isolated and whenever she attempted to address issues in the relationship Fryer would smash her

property, punch holes in the walls and threaten to harm her and the children (annexure AVEF6 to Frost [1]);

- When living at Pyramid Hill in 1999 Fryer became enraged with her and (in the presence of her children) placed a knife at her throat threatening to kill her, resulting in the children pleading with him not to hurt her (annexure AVEF6 to Frost [1]);
- Fryer was demeaning towards the children constantly referring to them as "stupid, idiots and bastards" (annexure AVEF6 to Frost [1]);
- Fryer regularly threatened to harm her children and to kill the applicant (annexure AVEF6 to Frost [1]);
- Whilst Fryer often threatened to leave the relationship he never did so, and the applicant felt too afraid and isolated to do so (annexure AVEF6 to Frost [1]);
- In mid 2000 the applicant and Fryer and the children moved to the NT and they initially lived at Mt Kepler station (annexure AVEF7 to Frost [1]);
- In March 2001 Fryer obtained employment with Darwin Inspection and Testing Services on the oilrigs in the Timor Sea. He was required to be away from Darwin for lengthy periods, interspersed with very short periods back in Darwin. He was paid a salary in excess of $80,000 per annum (annexure AVEF7 to Frost [1]);
- After Fryer obtained this employment the applicant moved the motor home into a caravan park on the outskirts of Darwin (annexure AVEF7 to Frost [1]);
- The applicant then obtained employment at a recreation reserve which allowed her to park the motor home on the reserve, free of rent and electricity in return for general maintenance work (annexure AVEF7 to Frost [1]);

- In late 2001 the applicant and Fryer obtained a bank loan to purchase a block on Livingstone Road, where they moved with their motor home (annexure AVEF7 to Frost [1]);

- Whilst away on the rigs Fryer would ring the applicant and interrogate her about her activities, and frequently accuse her of sleeping around, and constantly criticise her efforts to improve herself (annexure AVEF6 to Frost [1]);

- When Fryer returned from the rigs he would verbally abuse the applicant, ridicule her in the presence of neighbours, destroy her property and offer no financial support (annexure AVEF6 to Frost [1]);

- Fryer was extremely well regarded by his employers and he was described as hardworking, diligent, highly competent, honest and reliable (annexure AVEF7 to Frost [1]);

- When Fryer had a falling out with neighbours he would walk down the street with a knife in his hand threatening to stab the offending party (annexure AVEF6 to Frost [1]);

- Fryer was involved in community work. He had been a volunteer fire fighter, and used his welding skills at the local school and playground (annexure AVEF7 to Frost [1]);

- In March 2002 Mr Kemp (a workmate of Fryer) attended the applicant and Fryer's motor home one evening as an invited guest for dinner. Fryer ran into the bus with a hunting knife in his hand and said "I'm going to cut you up you bitch". The children were terrified. The applicant said "don't do it in front of the kids". They went into a bedroom. Kemp was shocked, but stayed quietly with the children and the applicant was able to talk Fryer down (annexure AVEF7 to Frost [1]);

- On 16 March 2002 Fryer flew to NZ to do a welding course designed to upgrade his trade qualifications and skill (annexure AVEF7 to Frost [1]);

- On 4 April 2002 when returning to Australia from NZ Fryer failed to reveal his criminal history in NZ on the incoming passenger card (annexure AVEF7 to Frost [1]);

- In 2002 Fryer was treated by Dr Best for depression and behavioural problems (annexure AVEF7 to Frost [1]);

- In June 2002 Fryer was referred to Mr Marcou, psychiatrist and placed on anti depressant medication (annexure AVEF7 to Frost [1]);

- In January 2003 Fryer became enraged when the applicant was talking to her son, and threw a chair at her which caused a laceration to her head. Fryer initially refused to take her to the hospital but later took her to the doctor but on the way threatened to smash her face if she told the doctor what happened, so she didn't (annexure AVEF6 to Frost [1]);

- On 5 January 2003 the applicant attended the doctors with a deep laceration on her forehead, larger than 7cm, that required stitching (annexure AVEF1 to Frost [1]);

- When the applicant returned from the doctor's Fryer told her how ugly she was because of the bruising and swelling to her face (annexure AVEF6 to Frost [1]);

- The applicant felt that she was to blame for Fryer's behaviour as he insisted it was her fault (annexure AVEF6 to Frost [1]);

- According to a report from Dr Crompton, Fryer was treated for depression and behaviour disorder for a long time during 2002 and 2003 by Dr Best. In that report it was noted "he has not been seen here recently, but his behaviour seems to have been unpredictable and dangerous at that time" (annexure AVEF7 to Frost [1]);

- In August 2003 neighbours were over for a barbecue and Fryer took exception to a comment the applicant made. Fryer grabbed her by the hair and held a knife to her throat and threatened to kill her. Her

children tried to stop him, and when a neighbour intervened he let her go and resumed drinking (annexure AVEF6 to Frost [1]);

- The applicant felt completely helpless at this time and did not care if Fryer killed her (annexure AVEF6 to Frost [1]);
- Following this incident the applicant lost 80% of her hair, which a doctor advised her was due to stress (annexure AVEF6 to Frost [1]);
- During 2003 the applicant’s sister arrived in Darwin, and it was decided that the applicant’s children would spend time with the sister due to the negative impact that the domestic violence was having on them (annexure AVEF6 to Frost [1]);
- In about early November 2003 Fryer threatened that he could get a gun (annexure AVEF6 to Frost [1]);
- On 25 November 2003 Fryer was at home having lost his job on the rigs. He accused the applicant for being responsible, and when she tried to discuss this he became abusive and told her to shut up, and threatened to harm her. The applicant made an off hand comment and left the room. Fryer then came after her, grabbed her by the arms and threw her on the floor. He then proceeded to hit her head into the floor five or six times, all the while screaming abuse at her. She felt dizzy, had a pain in her head and was unable to defend herself. When Fryer eventually released her she was unable to pick herself up due to pain and shock. Fryer left but came back a short time later and attempted to lift her off the floor. He left again, returned, lifted her off the ground and threw her on the bed. He then held her arms down and screamed that he would bash her face until her sister wouldn’t even recognise her. The applicant was too terrified to respond. Fryer left in her motor vehicle and the applicant was afraid that he would return and kill her. (annexure AVEF6 to Frost [1]);
- The applicant gathered her purse and a change of clothes and proceeded to walk from the property at Livingstone Road to Noonamah

in the dark. Whenever a vehicle came she hid as she imagined it was Fryer coming to look for her and harm her. After some hours she reached a public phone and rang her sister (annexure AVEF6 to Frost [1]);

- The applicant reported this assault to Sergeant Hill by telephone on or before 1246 on 26 November 2003 from her sister's house. Applicant advised that she "wants to make a formal complaint of assault, which occurred at her home address on 25/11 by her defacto husband Fryer. Nil DVU member available to assist due to 2 members off sick, court and prior commitments of other members. Frost has a medical appointment at 2pm & I advised Police would attend her address after 4pm today to ascertain full details of assault & arrange for photographs to be obtained." (annexure AVEF5 to Frost [1]);

- On 26 November 2003 the applicant was seen by Dr Gutierrez who noted that she presented "with bruises in both of her arms and in her L knee. She has got pain in both her arms, on her neck, thoracic spine, shoulders and on her left knee" (annexure AVEF1 to Frost [1]) *but there is no evidence to suggest that these problems persisted beyond 26 November, or if they did, for how long and with what symptoms*;

- Also on 26 November 2003 the applicant attended upon the Palmerston police station in relation to the assault upon her by Fryer, stating that she wished to take out a DVO against him and also wanted him charged with assault (paragraph 2 of Manser [1]);

- A statement was typed up by Manser on 26 November 2003 about the events of 25 November 2003, and this statement said in part "I would like Jamie to be charged with the assault that occurred last night and I will be getting a domestic violence order against him." (annexure AVEF1 to Frost [4]);

- The applicant did not sign this statement and never has. The reason for this is in dispute on the evidence:

Manser says:

3. During the process of preparing the statement, the applicant kept changing her mind as to whether she wished to have the offender charged with assault. I explained to her what would happen if he was charged and what would happen if she simply got a DVO.

4. When the statement was complete, the applicant stated that she no longer wanted the offender charged with assault, and that she would just get a DVO. She further declined to sign the statement that I prepared for her, stating that she wished to think the matter over before proceeding.

5. I advised the applicant that the police could not lay any assault charges against the offender until she provided a signed statement.

6. The applicant then left the police station with a copy of her unsigned statement. (paragraphs 3 to 6 of Manser [1]) *this is consistent with the entries at page 4 of annexure AVEF5 to Frost [1]).*

The applicant says:

3. I further say that I did not sign that document because it was inaccurate and not what I have told the Police Constable including the correct spelling of my name. *Yet at page 15 of AVEF5 to Frost [1] the applicant says the reason was that she was scared, although she goes on at page 17 that it didn't sound like what I said to her, that's why I wanted to re-do it again, but later on that page she says that was a fresh statement about the other matters.*

5. That at the Palmerston Police Station on the 26th November 2003 I told Constable Manser that the draft affidavit was wrong. She wanted me to sign the affidavit to be sworn in its present form and I said I was not happy to swear on oath a document I knew was inaccurate. I then told Constable Manser I would correct her draft affidavit and return to the police station. (paragraphs 3 and 5 of Frost [4]);

16. Accordingly, the applicant would have me believe that her reason for not signing the affidavit was because it was inaccurate, and Manser was unwilling to change it. Nowhere in any of her four affidavits does she suggest that it was any part of her state of mind that she was either scared of charging Fryer, or apprehensive about charging him with assault. However, given what she said in her taped conversation with police (as set out later in the chronology) in relation to her complaint, it is clear, and I

find, that the applicant was fearful of Fryer and was unsure whether she did want Fryer charged at the stage that she left the police station with a copy of her unsigned statement. Her lack of forth-rightness in this regard gives me concern about her credibility. I accept the evidence of Manser on this topic and prefer it to the evidence of the applicant. I further find that the applicant was at all relevant times fully aware that police were unlikely to charge Fryer until they had a signed statement from her.

17. In my view, the lack of a signed statement would not have precluded police from investigating the matter further. They had a statement as to what had occurred (albeit unsigned) and a medical consent (page 4 of AVEF5 of Frost [1]) which would have disclosed physical injuries consistent with the assault. Accordingly, police had enough information to seek to interview Fryer, but there is no evidence to suggest whether they ever did so.

18. I return to the chronology:

- The applicant decided to pursue a domestic violence order against Fryer, *but I do not know whether this was through police, through legal aid (as suggested at page 9 of AVEF5 of Frost [1]), or through who*;
- The applicant says that she prepared an amended draft affidavit (annexure AVEF3 to Frost [4]) with the help of her sister (*her sister did not provide any affidavit confirming this*) before she consulted a solicitor, and she gave a copy of this to the Palmerston Police also before she consulted a solicitor (paragraph 6 of Frost [4]); (*this amended statement clearly was a very important and relevant document, yet it was not produced or referred to until her final affidavit, nor does it appear to have been put to the police as part of the complaint process*);

19. The preparation of this new statement was a crucial part of the applicant's case before me. If what the applicant said is true then the sister should have been able to corroborate the same. She has not. Given the family connection, I would have expected the sister to have been approached to provide an affidavit by the applicant rather than by the respondent. Further, prior to the applicant swearing paragraph 6 of Frost [4], the respondent

would have had no reason to be aware of any involvement of the sister at all. No explanation was offered as to why the sister did not swear or affirm any affidavit to support what the applicant said. If she was not reasonably available, or there was some other good explanation then, in my view, the court should have been advised of it. No such explanation was offered. I infer that whatever the sister might have been able to say may not have assisted the applicant's case: *Jones v Dunkel* (1959) 101 CLR 298.

20. Bearing in mind that the respondent bears the onus of establishing the matters in *s12(c) of the Act*, it appears necessary for the respondent to satisfy me on the balance of probabilities that the applicant did not prepare and deliver an amended statement, that she was prepared to sign, to police. Clearly, as I find to be the case, the applicant knew the ball was in her court. Simply preparing an amended statement would be of no use. The applicant knew that the police were unlikely to proceed to charge Fryer until they had a signed statement from her in relation to the assault.

21. Accordingly, in my view (although the applicant did not need to be pro-active), on the facts of this case the applicant either needed to (in order to assist the police in the prosecution of the offence the subject of this application) swear and return the original statement to police; swear and return the amended statement to police; advise the police of her willingness to now swear the original statement; or, deliver an amended statement to police and advise them of her willingness to swear this if requested by them to do so. It is the last of these alternatives that the applicant says she did. The onus is upon the respondent to satisfy me on the balance of probabilities that she did not.

22. It is clear that at some stage the applicant did prepare an amended statement (as it was produced in evidence), the question is when and for what purpose, and what, if anything, she did with it.

23. I return to the chronology:

- The delivery of this new affidavit is in dispute on the evidence:

The applicant says:

7. That on approximately the 3rd December 2003 I returned to the Palmerston Police Station at about noon. I asked for Constable Manser and the person at the reception desk told me Constable Manser was not available. I then spoke to a person I believe to be Constable Hattersley.

8. That I handed my draft affidavit to a Policeman I believe to be Constable Hattersley. I told that person that I wanted Jamie Fryer charged and when the Police redrafted my statement they should telephone me and I would swear the affidavit.

9. That I was told my draft affidavit would be given to Constable Manser and she would contact me. (paragraphs 7, 8 and 9 of Frost [4]);

Hattersley says:

1. I graduated from the Police College and became a Constable in March 2004.

2. I was in training at the Police College from September 2003 until March 2004. In March 2004 I was posted to work at the Palmerston Local Police Office. Prior to that posting, I had never worked at the Palmerston LPO before.

3. I was not in any way involved in any investigation regarding Frost or Fryer prior to being posted to the Palmerston LPO.

4. Annexed hereto (sic is a copy of the alleged amended statement) provided to me by Priestleys Lawyers. I have read through that document, and I am absolutely certain that I have never seen it before. (paragraphs 1, 2, 3, and 4 of Hattersley affidavit) *but he does not say that he has made any search to ascertain whether it might have been given to someone else and misplaced*;

24. It is clear, and I find, that the applicant did not deliver the amended affidavit to Hattersley as she alleges. She is either mistaken and she gave it to someone else, or her evidence about giving it to anybody at the Palmerston LPO is untrue. I return to the chronology:

- What happened thereafter is also in dispute on the evidence:

Manser says:

6. I had no further dealings in this matter (paragraph 6 of Manser [1]).

The applicant says:

10. That subsequent to December 2003 and until March 2004 I either telephoned or attended at the Palmerston Police and attempted to contact Constable Manser on four occasions (paragraph 10 of Frost [4]) *but she does not say that she left any message, and if so, what message and who with*.

In reply Manser says:

2. I have read through that document (the amended affidavit) and I am absolutely certain that I have never seen it before.

3. I continued working at Palmerston LPO, but I did not receive any calls from the applicant or any messages to contact her in relation to the assault. (paragraphs 2 and 3 of Manser [2]) *but she does not say that she made any enquiries to ascertain if there were any messages that were not relayed, or that she has searched for the alleged draft affidavit within the Palmerston LPO*.

25. I do not know what system there was, if any, in place at the time in the Palmerston LPO to record messages. But, given that the applicant has not said in her affidavits that she did in fact leave any message, it would appear (in my view) unnecessary to attempt to cover that possibility, as it is not squarely raised in the applicant's case. I return to the chronology:

- That continually during 2004 and 2005 the applicant requested the police to charge Fryer in respect of the offence of 26 (sic 25) November 2003 and no action was taken (paragraph 13 of Frost [4]) *this would appear to be inconsistent with what the police say, and absent any particulars it is something that the respondent simply could not reasonably respond to.*

26. I am unable to find that this is the case as there is a complete lack of any detail. It is a bald assertion only.

27. On the evidence I find, on the balance of probabilities that:

1. the applicant declined to sign the statement of 26 November 2003 because she was scared of Fryer, and did not know whether she wanted him charged because of that fear;

2. the applicant took a copy of her affidavit away with her to think about;

3. when the applicant left the police station on 26 November 2003 she knew that the police would not charge Fryer with assault until they had a signed statement from her in respect to the incidents on 25 November 2003;

4. the applicant knew that if Fryer was to be charged with assault, it was up to her to sign a statement for police;

5. the applicant has never signed, and has never been willing to sign, the statement of 26 November 2003;

6. sometime after 26 November 2003 the applicant prepared an amended statement.

28. I have doubts that the applicant did deliver the amended statement to police as she says she did. But doubts and/or suspicions are not enough. In order for the respondent to succeed in it's defence based upon *s12(c) of the Act*, it must satisfy me on the balance of probabilities that she did not. I have not had the opportunity to see or hear from the applicant or Manser. I return to the chronology:

- On 24 February 2004 (annexure AVEF3 to Frost [1]) a domestic violence order was made in Darwin CSJ restraining Fryer from going onto their property except with a police escort for 12 months and from doing various other acts (annexure AVEF7 to Frost [1]), *but a copy of this order was never produced in evidence, nor was any affidavit prepared in relation to obtaining that order, nor do I know who made the application on behalf of the applicant*;

- The applicant left the NT and spent some time in Bendigo sometime in or before March 2004;

- The applicant returned to Darwin from Bendigo in March 2004 and found Fryer had taken an axe to her washing machine and clothes dryer, had

slashed the tyres of the children's bicycles, had put a hole in her water tank and cut all the wires to her generator (annexure AVEF6 to Frost [1]);

- The applicant felt too fearful to return to her home as she believed that Fryer would physically harm her (annexure AVEF6 to Frost [1]);
- On 1 March 2004 Mr Doddrell went to the Livingstone Road property to give the applicant a hand feeding the animals and to clean up. Fryer drove up to within two metres of where they were sitting and kept his lights on them. The applicant went to speak to Fryer for a few minutes. Fryer backed up, got out and walked to a shed. The applicant told Doddrell that she feared for his safety and asked him to leave (annexure AVEF7 to Frost [1]);
- On 3 March 2004 the applicant attended upon the Palmerston LPO to report a breach of the DVO (paragraph 11 of Frost [4]) *but she does not say that she pursued the matter of the assault charges at that time*;
- On 16 March 2004 Fryer left Darwin and travelled to Tennant Creek and then Queensland (annexure AVEF7 to Frost [1]);
- In May 2004 the applicant attended upon Ms McKenna, psychologist, for three sessions for psychological assessment, and this assessment was dated 20 October 2004 and was annexure AVEF6 to Frost [1]. "She reported feelings of poor self esteem, loss of confidence in her abilities and physical appearance, a high level of shame regarding her circumstances. She has difficulty concentrating, feels overwhelmed over minor issues and has difficulty organising herself without the assistance of her sister. At times she finds herself crying for no apparent reason and feels fearful most of the time. She is very sensitive to any build up of feelings of tension and anxiety when she experiences feelings of agitation, negativistic thinking and feelings of hopelessness. Ms Frost is hyper vigilant and avoids those places where she may encounter Fryer. She feels unable to return to her home, as she fears Fryer may be waiting for her and may cause her harm. She is also extremely wary

about the whereabouts of her children and monitors their movements closely.....she perceives that she has lost some of this trust, particularly with respect to men whom she regards with a certain degree of suspicion. She stated that she feels unattractive, insecure and worries that she may never form a trusting and nurturing relationship. She has difficulty sleeping at night, has recurring nightmares and at times feels unable to express her deep-seated fears and anxieties." As a consequence, Ms McKenna diagnosed that the applicant's "history and psychological presentation is consistent with a diagnosis of adjustment disorder and posttraumatic stress syndrome.";

- In mid June 2004 Fryer returned to Darwin (annexure AVEF7 to Frost [1]);
- On 19 June 2004 the applicant was at her property when Fryer attended and spoke to her. The applicant was very scared and reported the matter to police (annexure AVEF2 to Frost [1]);
- In July 2004 Fryer saw Dr Marcou for the last time. His mental state at that time was somewhat precarious (annexure AVEF7 to Frost [1]);
- On 16 July 2004 Fryer appeared in the Darwin CSJ and applied for a variation of the DVO of 24 February 2004. This application was not served upon the applicant (annexure AVEF3 to Frost [1]);
- In July 2004 the applicant was advised that the DVO had been varied without her knowledge "in spite of the fact I had been in regular contact with the Palmerston Police" (paragraph 12 of Frost [4]);
- On 11 August 2004 the applicant's solicitor wrote to the "Chief Commissioner of Police" and complained of a number of matters, including asking why police did not act on the statement of the applicant dated 26 November 2003 and charge Fryer (annexure AVEF3 to Frost [1]) *but Mr Davis makes no reference to the amended draft affidavit at all, and clearly the police could not charge Fryer without a signed statement*;

- Rather than the crux of the problem being addressed by Mr Davis or police (namely getting the applicant to swear an affidavit so that charges could be laid), the matter then appears to have gone off on a tangent while everybody concentrated on the complaints against police;

- No evidence was introduced to suggest that at any time after 26 November 2003 the police ever requested the applicant to do anything in order to proceed against Fryer for the assault herein;

- On 3 September 2004 the applicant was interviewed on tape by Senior Sergeant Smith in relation to her complaints against police (annexure AVEF4 to Frost [1]), and in that interview the following was said in relation to this matter:

“SMITH: Okay, that’s fair enough. All right, yeah, I’ve checked our records in relation to the 26th of November and it indicates that you’ve provided details of a statement for us.

FROST: Yep.

SMITH: Did you – do you recall what the outcome was, or what you wanted at that time?

FROST: So he couldn’t come anywhere near me.

SMITH: Yep.

FROST: That he’d stay off the property.

SMITH: Mm mm.

FROST: And that he was violent. Yeah, I didn’t want for him to come anywhere near us any more, I’d had enough.

SMITH: All right, And that was when the order was taken out?

FROST: Yep, it certainly was. The officers advised me that it would be best – in my best interest so – and it wasn’t – that’s when I started to look at life like it wasn’t as black as it was.

SMITH: Okay. All right. I’m actually talking about, I think, what’s a different statement which was at the end of last

year. I've got a statement and you've supplied a copy here that Mr Davis has sent through and I'll just let you have – I'll just move that tape so you can have a quick look if you recall that one.

FROST: That was some of the statements that I was just going through, you know, like just to get the right one for you guys, you know, like it was my thoughts on paper.

SMITH: Yeah.

FROST That's what the statement was to do with, you know.

SMITH: Yeah.

FROST: So I wanted to write it properly. You know, like you write things and you just want it to be proper, you know what I mean, you don't want anything to be wrong with what you're saying.

SMITH: Yep.

FROST: And I was scared anyway so – but – yeah, that's what I had to learn to do is to write things down to make sure – I can't explain it to you.

SMITH: Just to get your thoughts.

FROST: Yeah.

SMITH: Yeah. Now, did you ever sign this particular statement?

FROST: No, I did not.

SMITH: Okay. And was there a reason that you didn't want to sign it at that time?

FROST: Part of me was very scared still and that's really - - -

SMITH: Yeah.

FROST: Yeah, I was still scared, I didn't know – I was thinking what could he do to me.

SMITH: All right, so you were scared of making a complaint against him at that time?

FROST: Yeah. Yep.

SMITH: Okay.

FROST: But when I went and I got it written out properly in front of the police - - -

SMITH: Yep.

FROST: - - - I knew that that's what I had to do, you know, move on.

SMITH: Mm mm.

FROST: But, yeah, that's because I'm so scared of him.

SMITH: Okay. Just so I'm clear, is that you've make the statement and you've put down in writing with the police what's been occurring but you haven't actually signed that statement?

FROST: No.

SMITH: Okay.

FROST: I went in and made a statement that I felt very comfortable with and I signed that one.

SMITH: Okay. Was that in relation to other matters, as in, when the order was taken out?

FROST: Yeah, when the order was taken out, yes.

SMITH: All right, just going back to this statement, this one in November that you haven't signed. Did the – do you recall what the police told you at the time would be happening in relation to that?

FROST: That it would go to court, they did, and that he would not be able to come near me or my children.

SMITH All right. That's for the order?

FROST: Yeah.

SMITH: Okay. I'll just – I think – I think we're talking about different statements but I'll just double check.

FROST: I noticed when the police lady did my first statement it didn't sound right. It didn't sound - - -

SMITH: What's that, your - - -

FROST: Like this statement, that's - - -

SMITH: Yep.

FROST: - - - why I wanted a copy to go home and read through it again.

SMITH: Yep.

FROST: Because it didn't sound like what I said to her. Do you understand?

SMITH: Yep.

FROST: And that's why I went home and I read through and it didn't feel right, if you know what I mean, as well so – that's why I wanted to re-do it again. Kristy was nice but, that's why I *(inaudible).*

SMITH: You just weren't happy to sign that?

FROST: No.

SMITH: No, all right. Did you ever take – go back to the officer who'd taken it with – to re-do your statement as to be, you know, accurate for you to sigh or wanting to pursue and assault - - -

FROST: Yeah, when I went back - - -

SMITH: - - - complaint.

FROST: And when I went back and done the original – the one that I signed, I was happy with that, you know what I mean.

SMITH: Okay. All right. And it appears I don't have it on file on this particular file of things is a signed statement about those particular matter. I guess I'm just trying to clarify that the matters that you've complained about in this unsigned statement here done back in November, whether you did a fresh statement about other matters.

FROST: Just a fresh statement about the other matters, you know. I just wanted to – I wanted to be right in my head 'cos I mean if things don't sound right, you don't want to sign them, you've got to make sure they're correct.

SMITH: That's absolutely right.

FROST: Always perjuring yourself and you don't want to do that.

SMITH: No. All right. At the time you haven't signed off the statement, did the police give you any advice that – as to what they'd be doing, as in, you know, with an unsigned statement.

FROST: Well they could – they could do nothing until I had done something.

SMITH: Yeah.

FROST: And I knew I had to do something.

SMITH: Yeah.

FROST: You know, it was friends and family, like it was my sister that said, 'Look, you know, to move ahead you've got to get things in order.'

SMITH: Yeah.

FROST: And I knew that and you've got to stop being scared, you know, if you lose any more weight, girl, you're going to die. That was about the sum.

SMITH: All right. So at the time you haven't signed the statement and they've sort of said, you know, the ball is in your court.

FROST: It's in my court.

SMITH: It's up to you.

FROST: Yes, I knew I had to do it.

SMITH: And eventually you did do that?

FROST: Yes, I did. (emphasis added)

This interview is very confusing and unsatisfactory, and still leaves the matter in a state of some confusion. The interviewing officer was trying to clarify what document the applicant was referring to, but the applicant did not assist. At the end of the day it is unclear to as to whether the applicant is referring to a statement that she signed to obtain the DVO, or the amended statement that she says she delivered to the Palmerston LPO on 3 December 2003, or both.

- On 4 September 2004 Fryer's visa was cancelled and he was arrested and placed in immigration detention (annexure AVEF7 to Frost [1]);
- On 7 September 2004 Fryer lodged an application for review before the Migration Review Tribunal, and at the same time an application for a bridging visa in order to be released (annexure AVEF7 to Frost [1]);
- On 9 September 2004 Fryer's application for a bridging visa was refused, and he then sought a review of that refusal to the Administrative Appeals Tribunal (annexure AVEF7 to Frost [1]);
- The applicant gave evidence before the AAT as to Fryer's violence towards her during their relationship (*and this would suggest that she would have also been willing to give evidence in relation to an assault charge as well, if asked*);
- On 8 November 2004 the AAT delivered the following decision:

  > I accept the evidence of Ms Frost, and the corroborating evidence of Dr Gutierrez, Mr Kemp and Mr Doddrell. I find that Mr Fryer has been leading virtually two lives. He has been a model citizen in public and in his work environment. He has been a violent bully in his private life.
  >
  > I find that he is psychiatrically unstable and that he represents an unacceptable risk to Ms Frost, her children and to any new partner that she may have.
  >
  > The decision to refuse a bridging visa is affirmed (annexure AVEF7 to Frost [1]);

- Fryer has been deported from Australia;
- On 16 June 2005 the Joint Review Committee completed it's investigations into the applicant's complaints against police and concluded (in relation to the failure to charge Fryer following the assault on 25 November 2003) that the police officers actions were reasonable in the circumstances as "when interviewed about her complaint, Ms Frost acknowledges that she did not sign the statement taken by constable Manser………Ms Frost states that the police "could do nothing

until I had done something”. Hence, the JRC considered that Manser “acted appropriately in the circumstances. Your client confirms that she did not sign the statement of 26 November 2003 as she did not want to proceed with assault charges at that time. Ms Frost acknowledges that she was aware the police would not proceed with assault charges as she had not signed the statement” (annexure SRD1 to Dexter);

29. I am not sure that I would have come to a similar conclusion, however, I may not have access to all the documents that were before the JRC.

30. There are clearly issues of credit involved in this case, and it is extremely difficult to resolve those on competing documents. I may have been assisted if I had the opportunity to see some of the deponents in the witness box. But the fact is that I haven’t, and I must resolve the matter on the documents before me. The affidavit that the applicant swore in order to obtain her DVO was not placed into evidence, and this may have assisted me as well. I therefore don’t know when it was sworn, who before or what it said. I may have been assisted if I had the whole domestic violence file before me (in accordance with *s15(3) of the Act*), but as neither party raised it I have not sought that file.

31. Another matter of curious interest is the fact that when the applicant’s solicitors requested an assessment and report from Ms McKenna she states that she had before her the applicant’s statutory declaration of 26 November 2003, but apparently not the one that the applicant says she re-typed and provided to the Palmerston LPO. If this was the one that the applicant was unhappy to sign for the assault charge because it was inaccurate, it would be strange for it then to be placed before a medical witness presumably as some history.

32. The applicant’s case has not been presented in a thorough way, but I am reluctant to infer any failures in this regard against her. I bear in mind that the respondent bears the onus on the issue in dispute, not the applicant. It is a very close call on the evidence, but at the end of the day I am not satisfied on the balance of probabilities that the applicant failed to assist

the police in the investigation or prosecution of the offence herein. I am not satisfied on the balance of probabilities that the applicant did not re-do a statement in early December 2003, and drop it off to police with a willingness to sign it if requested. I am not satisfied that she did either. I need to be positively satisfied in my own mind that one scenario is more likely than the other, but I am unable to decide one way or the other. As such, the respondent is unsuccessful, as it has not satisfied it’s onus of proof.

33. I turn to consider the question of quantum.

34. The evidence of mental injury is now quite old. Ms McKenna (psychologist) conducted 3 clinical interviews with the applicant on 4, 11 and 19 May 2004. There is simply no evidence that goes to this aspect after that date. The applicant herself is silent in her affidavits as to how she is feeling. Given that Fryer was in immigration detention from 4 September 2004 and later deported from Australia, I would expect that should have alleviated a large part of the applicant’s fear and anxiety. There is no evidence to suggest that this is not the case.

35. Another problem with the medical evidence is that it is clear that the assault on 25 November 2003 was not the first or last serious incident involving the applicant and Fryer. Yet that is the only incident for which compensation is sought. This difficulty has been dealt with by a number of cases over the years. *In the matter of an application under the Criminal Injuries Compensation Act 1983*, Master Hogan in the ACT Supreme Court said on 4.3.91, at page 7:

> But it is not unlike another situation with which common law courts must grapple quite often, where as a result of a series of work or motor car accidents a plaintiff finishes up with a complex of injuries and disabilities. All that can be done is to adopt a broad and common sense approach, often starting with a total sum which represents full compensation, and dividing it roughly according to the responsibility of each tortious act in contributing to the total loss.

36. In *Northern Territory v Woodruffe* (1999) 152 FLR 264, Bailey J dealt with an appeal from an assessment in relation to eight applications for assistance, where "the incidents in respect of which the applications for assistance were made were what might be described as representative samples of numerous assaults committed against the respondent by the offender over a period the learned magistrate described as "at least ten years"." At pages 271-2 His Honour said:

> On one hand, there was evidence as to the physical injuries, if any, arising from the particular offences for which assistance certificates were granted, but on the other hand the evidence of the respondent's psychological injury suggested that it was the product of the respondent's long relationship with the offender, rather than attributable to any particular offence which was the subject of an application under the Act. Clearly in a case such as the present, where the respondent was in a defacto relationship with the offender for seven years (and their interaction continued over a period of nearly ten years), it would be impossible to identify the contribution of any single offence which was the subject of a successful application under the Act to the respondent's overall psychological injury.
>
> With respect I would agree with the approach adopted by Master Hogan in the above passage for dealing with assessment of assistance in cases such as the present. However, in applying that approach it is important to emphasize the reference to a "total sum which represents full compensation" is a *starting point* which may need to be adjusted or discounted to take account of the particular circumstances.
>
> Accordingly in a case such as the present, the Local Court, while in adopting a "global approach" to assessment of assistance might start with "a total sum which represents full compensation" for the respondent's injuries, would need to take into account the evidence that the psychological damage to the respondent was the result of not only the offences for which assistance certificates were successfully sought, but was contributed to by other offences committed by the offender against the respondent. Depending upon the available evidence, this might call for a substantial, or even very substantial, discount from the starting point of "full compensation" notwithstanding the remedial nature of the Act.

37. BaileyJ's reference to the decision of Master Hogan, is the decision referred to above. The decision of *Woodruffe* went on appeal to the Court

of Appeal (Martin CJ, Mildren and Riley JJ). In a joint judgment delivered on 14 July 2000 Their Honours said:

> [32] It must be said that determining the correct approach to assessing amounts payable by way of assistance in circumstances such as these is difficult indeed. In this case the learned Magistrate was confronted by a series of assaults in relation to each of which he decided to issue an assistance certificate. In addition there were many other assaults and incidents of misconduct by the offender against the appellant where no application for an assistance certificate had been made. Those assaults and that misconduct were part of the abuse, both physical and mental, which was heaped upon the appellant over a period of many years. The cause or causes of the condition of the applicant at the date of assessment were complex and obscure. They involved the interaction of many incidents producing a single indivisible result. The part played by each incident in producing that result is not able to be determined.
>
> [33] At common law if such harm had resulted from the conduct of more than one tortfeasor then each would be liable for the whole of the damage suffered. "The resulting harm (to which both contributed) being indivisible each will be answerable for all the damage". That situation is to be contrasted with the situation in which each of the tortfeasors causes part of the total damage and it is practically feasible to split the aggregate loss between them. In such a case each will ordinarily be liable for that portion of the damage for which he is separately responsible. See the discussion by Professor Fleming in *The Law of Torts (ninth edition*) at pages 229-230.
>
> [34] Although it has been held that common law principles have application to the assessment of the statutory assistance provided under the *Crimes (Victims Assistance) Act* (eg in *Rigby v Solicitor for the Northern Territory* (1991) 105 FLR 48 at 51; *LMP v Collins* (1993) 112 FLR 289 at 309; *R v McDonald* (1979) 1 NSWLR 451 at 458) that observation cannot override a clear expression of legislative intent to be found in the Act. The common law principles of causation and assessment of damages provide no more than a guide to the operation of the statutory scheme of assistance established by the Act. The processes of the statutory scheme are to be governed by the terms of the Act including the provisions of s9, which sets out the applicable principles for assessment of assistance, and *s13*, which imposes limits upon the amount of assistance available. Further, *s5 of the Act* is precise in its language in relation to matters that give rise to an entitlement to an assistance certificate. It permits the issue of "an assistance certificate in respect of the injury suffered by (the victim) as a result of that offence" (emphasis added). <u>It is clear that the legislature does not intend that assistance certificates will provide financial</u>

assistance to victims in relation to matters that are not able to be identified as the injury specifically related to a particular offence.

[35] Both Bailey J and the learned Magistrate adopted observations made by Kearney J in *LMP v Collins* (supra). Kearney J was there dealing with applications arising out of three incidents of rape where the offences were not committed simultaneously or consecutively and the offenders were not acting in concert. Kearney J adopted the observations of Master Hogan in *Application for Criminal Injuries Compensation* No. 69 of 1989 (1991) 103 FLR 297. In that case the Master of the Supreme Court of the Australian Capital Territory was dealing with a matter in which indecent assaults had been committed upon the applicant by her brother and also by her father. There was evidence that some of the offences committed by the father had not been the subject of criminal charges. In some respects the circumstances of the case were not dissimilar to those in the present matter. In his judgement (at 307) Kearney J referred to the following passage from the judgement of Master Hogan (103 FLR at 300):

"The next problem arises from the impossibility of separating out the extent to which her present psychological condition is the result of each separate incident. It is the totality of the conduct over a number of years that has led to her present state.

The task of apportioning her damage to the separate incidents is indeed a difficult one, and impossible to carry out with any pretence at precision.

But it is not unlike another situation with which common law courts must grapple quite often, where as a result of a series of work or motor car accidents a plaintiff finishes up with a complex of injuries and disabilities. All that can be done is to adopt a broad and common sense approach, often starting with a total sum which represents full compensation, and dividing it roughly according to the responsibility of each tortious act in contributing to the total loss."

[36] Having reviewed various authorities Kearney J then made the following observations (at 309):

"The Act provides for an individualized judicial assessment of damages in accordance with common law principles. It is remedial legislation which should be interpreted liberally and beneficially. It assumes that an injury can be attributed to a particular offence; it does not expressly deal with the situation which obtains here, where a series of offences outside the scope of *s14(2)* result in a single injury responsibility (for) which cannot be apportioned other than arbitrarily between the different offences in the series.

The task of the learned Magistrate was to assess compensation for the injury disclosed by the evidence. This was in fact the aggregate injury from the three offences. In such a case the only practicable course open to her Worship was to assess the amount to be certified for that injury under the heads of damage relied on, and allocate that amount on an arbitrary basis equally between the three offences."

[37] In the present matter Bailey J noted that the situation was even more complex than that dealt with in *LMP v Collins* (supra) in that:

"… evidence of the respondent's psychological injury suggested that it was the product of the respondent's long relationship with the offender, rather than attributable to any particular offence which was subject of an application under the Act. Clearly in a case such as the present, where the respondent was in a de facto relationship with the offender for seven years (and their interaction continued over a period of nearly 10 years), it would be impossible to identify the contribution of any single offence which was the subject of a successful application under the Act to the respondent's overall psychological injury."

[38] The complaint before Bailey J was that in assessing damages the learned Magistrate had failed to take into account or to take sufficient account of the evidence that there were numerous offences committed by the offender against the victim which were not the subject of applications for assistance certificates and which contributed to her condition. Bailey J agreed that was so. He said that despite the learned Magistrate identifying the need to limit assistance certificates to the particular injury arising from a particular offence he failed to do so. He said:

"Accordingly in a case such as the present, the Local Court, while in adopting a "global approach" to assessment of assistance might start with "a total sum which represents full compensation" for the respondent's injuries, (it) would need to take into account the evidence that the psychological damage to the respondent was the result of not only the offences for which assistance certificates were successfully sought, but was contributed to by other offences committed by the offender against the respondent. Depending upon the available evidence, this might call for a substantial, or even very substantial, discount from the starting point of "full compensation" notwithstanding the remedial nature of the Act.

[39] The learned Magistrate appears not to have adopted this approach. It is not clear from his reasons whether the "global" figure he fixed upon related to the whole of the psychological damage suffered by the appellant or only that arising from the particular injuries from the particular offences in relation to which assistance certificates had issued. There was no discussion of the contribution

to the condition of the appellant of the incidents in relation to which no certificate had issued or as to how the global figure was reached bearing those incidents in mind. Whilst it is not possible in the circumstances of matters such as this to carry out the task of assessment with precision it must be made clear from the reasoning process that relevant factors were considered and irrelevant factors were not considered. The task of assessment should then be approached in a "broad and commonsense" way."

[40] However, the correct approach is not necessarily to arrive at a total figure for the whole of the damage sustained at the hands of the perpetrator, and then to discount it to allow for that proportion of the psychological injury that was caused for the offences not the subject of the application, although in this particular case, given the state of the evidence, this may be appropriate. It may be that a finding would be open on the evidence that the particular offences the subject of the application, are separately or together sufficient to cause the psychological injuries the appellant ultimately sustained after the first assault in June 1991 and that an award, or awards, can be made on that basis, bearing in mind two considerations. The first is that, to the extent that the appellant was already predisposed to psychological injury prior to then, the respondent must take the victim as she is found, but is still only liable to the extent that the injuries for which the respondent is liable made the condition worse: see *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd & Another* (1975) 49 ALJR 233.

[41] The second is the principle discussed in *Watts v Rake* (1960) 108 CLR 158, that if the disabilities of the appellant:

"…can be disentangled and one or more traced to causes in which the injuries (she) sustained through the (offences) play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the (offences) as a contributory cause. (per Dixon CJ, at p160)."

See also *Purkess v Crittenden* (1965) 114 CLR 164 at 168, where Barwick CJ, Kitto and Taylor JJ explained that if the plaintiff in a negligence case has established a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence to show that the plaintiff's incapacity is wholly or partly due to some pre-existing condition rests with the defendant and in the absence of such evidence, if the plaintiff's evidence is accepted, the plaintiff will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality. Although their Honours did not specifically address intervening causes in that case, clearly the same principles would apply. Their Honours also went on to observe that the evidence must, if accepted, establish with some reasonable measure of precision what the pre-existing condition was, and what its future

> development and progress would be likely to be and the same, no doubt, would apply to intervening causes. It may be that the intervening assaults had only transient effects. Of course, the defendant need not lead evidence itself to establish these facts: it can rely upon evidence elicited through the applicant's witnesses. The difficulty for the appellant in the present case is that it is not clear from the learned Magistrate's reasons how he approached his overall global assessment, because the findings he made are inadequate. The appeal on this ground must be dismissed. (emphasis added)

38. The physical injuries were of a fairly minor and temporary nature. There is no evidence to suggest that any symptoms persisted much beyond 26 November 2003, if at all. I am therefore unable to find that they did. In relation to the physical injuries I allow $200.

39. The psychological injuries are harder to assess. The applicant says nothing in any of her affidavits to suggest ongoing symptoms after she last saw Ms McKenna on 19 May 2004. Given that Fryer was in immigration detention after 4 September 2004 until his deportation, the applicant should have felt reasonably safe from him from that date. I would however have expected there to be ongoing anxiety until the decision to deport him was made and carried out.

40. Absent any evidence of any ongoing symptoms after 19 May 2004 I am unable to be satisfied on the balance of probabilities as to what problems persisted, or to what degree. As a matter of common sense, I would not expect the applicant’s fears and concerns to suddenly disappear on 20 May 2004. There is no evidence to enable me to be satisfied on the balance of probabilities that the applicant had any persisting psychological injury as at the date of hearing.

41. Accordingly, in assessing the “mental injury” from the assault (as opposed to other causes) I am looking at a period from 25 November 2003 until 19 May 2004 with symptoms as set out in AVEF6 in Frost [1], with the symptoms then probably diminishing, and with no evidence of any ongoing symptoms after Fryer went into immigration detention on 4 September 2004. However, as noted above, it would be reasonable to expect some

ongoing apprehension and fear until the decision to deport Fryer was eventually made in early November 2004. After that date I am unable to find that there were any ongoing symptoms (because there is no evidence of the same).

42. It is clear that the symptoms, the applicant complained of to Ms McKenna, were not the sole result of the assault on 25 November 2003. Rather they were the result of a long history of violence and intimidation by Fryer both before and after that date. The applicant would have had symptoms (such as "feelings of poor self esteem, loss of confidence in her abilities and physical appearance, a high level of shame regarding her circumstances. She has difficulty concentrating, feels overwhelmed over minor issues and has difficulty organising herself without the assistance of her sister. At times she finds herself crying for no apparent reason and feels fearful most of the time. She is very sensitive to any build up of feelings of tension and anxiety when she experiences feelings of agitation, negativistic thinking and feelings of hopelessness" as noted by McKenna) prior to the date of the assault herein, but they are likely to have been exacerbated by the assault. Other feelings (such as "Ms Frost is hyper vigilant and avoids those places where she may encounter Fryer. She feels unable to return to her home, as she fears Fryer may be waiting for her and may cause her harm. She is also extremely wary about the whereabouts of her children and monitors their movements closely…..she perceives that she has lost some of this trust, particularly with respect to men whom she regards with a certain degree of suspicion" as noted by McKenna) are more likely to have been a result of the applicant's decision to separate from Fryer, and are therefore more closely linked to the assault herein. Other symptoms (such as "she feels unattractive, insecure and worries that she may never form a trusting and nurturing relationship. She has difficulty sleeping at night, has recurring nightmares and at times feels unable to express her deep-seated fears and anxieties" as noted by McKenna) are likely to be a result of all incidents involving Fryer.

43. Clearly, the assault of 25 November 2003 was significant, as it was this incident that finally led the applicant to leave Fryer. However, I note that unlike some other assaults there was no direct threat to kill the applicant in this incident. Further, also unlike other incidents, there was no use of any weapon on this occasion. The presence of the applicant's sister in Darwin was likely to have been a factor in her finally deciding to leave, as this gave her the support that she had been lacking for many years, as Fryer had gone out of his way to cut the applicant off from her family, and isolate her.

44. I therefore find that the applicant had the symptoms complained of to McKenna (some of which pre-dated the assault, but which were further enhanced by it) up until 19 May 2004. Thereafter they diminished to the extent that they had resolved by early November 2004 (as there was no evidence that they continued in any form). It is not an easy assessment, but I assess the "mental injury", suffered by the applicant as a result of the assault (as opposed to the relationship in general) on 25 November 2003, to be $4,000.

45. Accordingly, I order that an assistance certificate issue certifying that the Territory shall pay $4,200 to the applicant by way of assistance for the injury suffered by her as a result of the assault on 25 November 2003 by Fryer.

46. I will hear the parties on the question of costs and any consequential orders.

Dated this 15th day of September 2006.

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DAYNOR TRIGG
STIPENDIARY MAGISTRATE