CITATION:	*McBride v Northern Territory of Australia* [2006] NTMC 078
PARTIES:	BRYCE MCBRIDE (GILLIAN MCBRIDE AS LITIGATION GUARDIAN) v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance)
FILE NO(s):	20411941
DELIVERED ON:	22nd September 2006
DELIVERED AT:	Darwin
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JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Victim committing crime – victims contribution – section 12(f) and 10 of the Crimes *(Victims Assistance) Act* – section 154 *Criminal Code*

Anderson v TIO Board [1999] NTSC 21, [1999] 128 NTR 16

REPRESENTATION:

Counsel:

Applicant:	Ms McMasters
Respondent:	Ms Spurr

Solicitors:

Applicant:	Priestleys
Respondent:	Halfpennys

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 078
Number of paragraphs:	32

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

No. 20411941

BETWEEN:

BRYCE MCBRIDE
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR JUDGMENT

(Delivered 22 September 2006)

Judicial Registrar Fong Lim:

1. The Applicant was injured by falling off the bonnet of a moving vehicle. The offender was convicted under section 30 of the Traffic Act for driving on a public street in a manner dangerous. The offender was not charged under section 154 of the Criminal Code. The Application before me is only on the question of liability.

2. Section 12 of the Crimes (Victims Assistance) Act provides that an assistance certificate shall not issue in certain circumstances inter alia:

> "(e) in respect of an injury or death caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code; or
>
> (f) in respect of an injury or death that occurred during the commission of a crime by the victim."

3. The only offence under the criminal code which is applicable to section 12(e) is that under section 154 of the Criminal code. Even though the

offender was not prosecuted under section 154 of the Criminal code it was conceded by the Respondent that the evidence supported the argument that, on the balance of probabilities, the offender was guilty of a dangerous act pursuant to section 154 of the Criminal Code.

4. The Respondent does however argue that the Applicant should not be entitled to an assistance certificate because of section 12(f) in that he was injured while committing a crime pursuant to the criminal code. The Respondent argues that by being on the bonnet a moving car, bonnet surfing, the applicant was committing a crime by aiding and abetting the offender to commit the crime in contravention of section 154 of the Act.

5. The Applicant made a statement to an assessor for the TIO on the 31st March 2004 but does not seem to have made a statement to the police, at least this court was not referred to such a statement. The Applicant confirmed his statement in his affidavit filed in support of this application. There were also statements given to the police by the Applicant's brother, two other friends (Ellis and Johnson) and the driver of the vehicle (Mann).

6. It is clear from all of the statements that a group of young friends went for a drive in the middle of the day and when they returned to the Applicant's home the Applicant and his brother got onto the bonnet of the car which was either moving at the time or started moving after they had got onto the bonnet. The Applicant and his brother remained on the bonnet as the car travelled approximately 40-50 metres, the driver then applied the brakes and as a result the inevitable occurred and the Applicant was propelled off the bonnet getting hurt in the process.

7. The statements are all in agreement that both the Applicant and his brother were on the bonnet of the car driven by Jennifer Mann ("Mann") and that they were face down on the bonnet while this was happening. They also agree that at sometime the Applicant told Mann not to apply the brakes.

8. Mann states that the car was moving at the time the Applicant and his brother go onto the bonnet. All other witnesses state that the car was stationary at the time.

9. The Applicant submits states in his affidavit that when he got on the bonnet of the car he had no idea that Mann was going to drive away. At paragraph 4 of is affidavit he states:

> "I did not expect her to drive off. At first she was going at about walking pace. I hung on to a gap in front of the windscreen wipers with my left hand. I tried to grab the inside corner of the passenger window, which was down, with my right hand but I couldn't reach it before I fell off the bonnet. Jennifer went slowly down the road for a few metres and then accelerated very quickly. Neither Dwayne nor I had asked her to speed up, and I didn't expect her to do that."

10. Counsel for the Respondent made much of the statement by the Applicant that he had held onto the bonnet by placing his fingers in the gap between the windscreen and the bonnet. She submitted that the only reason a person would put himself in that position was if he was intending to be on the bonnet while the car is moving.

11. The statement referred to was contained in the record of interview with the assessor as follows:

> "Q 140 Alright I want to go now into the actual accident itself. You told me before that you were sitting on the bonnet, or lying on the bonnet of the car, how are you holding on so to speak at this stage?
>
> A Where the bonnet meets the windshield there's a little gap and I just had my fingers in there holding on."

12. In his statement and his affidavit sworn and filed in this court the Applicant can give no explanation for why he was on the bonnet of the car in first place or why he chose to lay on the bonnet with his fingers in the gap between the windscreen and the bonnet. When asked by the investigator why he was lying on the bonnet the Applicant answers:

> "No reason at all really
>
> Q 125 Just because?
>
> Yeah"

13. The Applicant states that he and his brother had been on the bonnet for a short time before it started to move. This was confirmed in the Applicant's brother's statement. Dwayne McBride states in his statement to the police:

> "Before I did this I turned and layed on the bonnet of Jennifer's car. Bruce then joined me a short time later."

14. There was no reason given by the Applicant's brother for lying on the vehicle either.

15. The most objective statements as to what happened comes from the two passengers of the vehicle at the time of the incident.

16. Cain Ellis and Rachel Johnson, both gave statements to the police and were consistent in their view of what had happened. In my view the evidence of Ellis and Johnson should be preferred over that of the McBride brothers and Mann where there are inconsistencies because they are clearly the most objective of the witnesses.

17. Both Ellis and Johnson state that they were out driving with Mann and the McBride brothers and that when they returned to the McBride brothers' house both the Applicant and his brother got out of the car and immediately lay on the bonnet of the car facing the driver. Both witnesses were clear that the car was stationary at the time the McBrides got onto the bonnet and how they were placed on the vehicle.

18. There is no evidence of any conversation between the parties prior to the car being driven forwards except of the Applicant that he saw his brother have a conversation with Mann before she started the car but he could not hear what was said. This conversation is not corroborated by the statement of the

brother or Mann. Nor was any conversation referred to by Ellis or Johnson and therefore I do not accept that there was any such conversation took place.

19. The question before the court is whether the evidence supports the proposition that the Applicant and his brother were engaging in bonnet surfing and whether the Applicant was engaging in a crime when injured.

20. The parties referred me to the authority of Anderson v TIO Board [1999] NTSC 21,128 NTR 16 in which the Supreme Court considered issues similar to the present case in the context of the Motor Accidents Compensation Act("MACA")se involved an applicant applying for benefits pursuant to MACA arising out of an car surfing incident. The Applicant in that case was injured when car surfing on the bonnet of a moving vehicle and the driver in that particular incident was convicted of committing a dangerous act pursuant to section 154. While the facts are different to the present case, eg in Anderson's case the car was moving at speed and the applicant had climbed out of the vehicle while the vehicle was moving to "surf" firstly on the roof and then on the bonnet, the application of the law is right on point. Justice Bailey analyses the law at paragraphs 40 -47 as follows:

> Were the applicant's injuries suffered in or as a result of an accident while he was using a motor vehicle ... in the commission of an indictable offence?
>
> [40] Section 10 of the Act relevantly provides:
>
> "A person is not entitled to a benefit under this Act in respect of the death of another person or injury to himself in or as a result of an accident-
>
> (a) that occurred while he was using a motor vehicle ... in the commission of an indictable offence...".

[41] Mr Nosworthy submits that at the time of the accident, the applicant was committing an offence of "dangerous act" contrary to section 154 of the *Criminal Code.*

[42] Section 154 of the *Criminal Code* relevantly provides:

"(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section."

[43] Section 154 designates an offence against that provision as a "crime" and accordingly, pursuant to section 3(2) of the *Criminal Code* is an indictable offence.

[44] Mr Nosworthy submits that the applicant, either alone or jointly with the driver of the vehicle, Mr Cole, was using the vehicle in the commission of an offence contrary to section 154 of the *Criminal Code* and accordingly his entitlement to benefits under the Act is barred by section 10 of the Act.

[45] Conviction of an offence contrary to section 154 of the *Criminal Code* requires proof of the following elements:

(a) The accused did an act;

(b) The act caused serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public); and

(c) An ordinary person, similarly circumstantial to the accused, would have clearly foreseen the serious danger referred to in (b) above and not have done that act.

[46] The Court of Criminal Appeal in *Sanby v R* (1993) 117 FLR 218 considered the proper construction of section 154 of the *Criminal Code*. Mildren J (with whom Martin CJ was in general agreement) observed at 231:-

."...it is, in my opinion, clear that the section requires more than proof of conduct which, in a civil court, might be sufficient to sound in damages for negligence. First, the section requires proof of an act or omission that causes *serious* danger, actual or potential, to the life, health or safety of another. Although the act or omission need not be of a quality that it causes any actual danger, so long as there is a potential danger, (it is in this sense that the offence may be comparatively trivial) nevertheless the danger, whether actual or potential, must be 'serious'. Obviously this is a question of degree calling for an evaluation of the severity of the risk. If the danger is 'serious', the quality of the seriousness of the risk is to be judged by the requirement that the danger must be *clearly* foreseeable by an ordinary man, and of such a quality, that the ordinary man would not have taken it. The use of the word 'clearly' indicates, as does the word 'serious', that the risk must not be too slight, too remote, too improbable or unlikely; but that is not to say that only risks that are fanciful or far-fetched are outside of the section. In my opinion the test of foreseeability of risk is not the same as reasonable foreseeability of risk of injury in the law of civil negligence. The test to be applied is that of the 'ordinary person similarly circumstanced' in contradistinction from that of a 'reasonable person similarly circumstanced': cf s31(2) of the Code. This is another indication that the proper test is a higher one than the standard of care of the reasonable man on the Clapham omnibus. The test of the 'ordinary man similarly circumstanced' who must 'clearly' foresee the risk, is an indication that the section intends to make allowance for ordinary human fallibility - the sort of common place errors of judgment and inadvertent acts of carelessness that happen because the risk is outside of normal human experience, because the wrongdoer's attention is distracted, because the wrongdoer makes the wrong choice when confronted with the need for sudden decision, or because of other similar factors. But to say that is not to substitute a different test from that required by the section. The jury must be satisfied beyond reasonable doubt that the act or omission caused serious danger to the life, health or safety of some other person in circumstances where an ordinary person, similarly circumstanced to the appellant, would clearly have foreseen such danger and not have done or made that act or omission. In applying that test, the jury must take into account all of the circumstances that the appellant found himself in as well as take into account the age, experience and level of skill of the appellant in whatever he was engaged in, if relevant to the foreseeability of danger by the act or omission in question."

[47] Angel J observed at p. 221: -

"Section 154 of the Criminal Code is very broad in scope and covers all manner of conduct: *Baumer v The Queen* (1988) 166 CLR 51 at 55, *Attorney-General v Wurrabadlumba* (1990) 101 FLR 414. Whilst the act or omission giving rise to the danger needs to be voluntary, the danger created thereby need not be an intended consequence, nor a consequence actually foreseen by the perpetrator of the particular act or omission in question. The section creates an offence regardless of consequences beyond the danger, actual or potential itself. The section relates to voluntary conduct constituted by acts and/or omissions which objectively cause serious actual or potential danger irrespective of any consequential harm. The deliberate use of the words 'serious' and 'clearly' is significant. The offence created by s 154 is a lesser crime than manslaughter which, under the Code, relevantly requires actual foresight of the possibility of death. Section 154 addresses the question of foresight in terms of an ordinary person in similar circumstances to the accused clearly foreseeing a serious danger being caused by the Accused's voluntary acts and/or omissions. I am of the opinion of the use of 'serious' and 'clearly' is intended to permit juries to say in any given case where the line should be drawn between dangers which by plainly blameworthy conduct. In my opinion, s154 is not directed at conduct which causes dangers which are ordinarily accepted as incidents of modern life, or, conduct which, even if giving rise to civil liability in negligence, would not widely or generally be regarded as 'criminal'. The use of 'serious' and 'clearly, in my view, requires the jury to say in any given case on which side of the line between an acceptable or an unacceptable risk of danger to others, the case before them falls. Questions of foreseeability are inevitably addressed in hindsight and as Lord Pearce said in a different context in *Hughes v Lord Advocate* [1963] AC 837 at 857: '..to demand too great precision in the test of foreseeability would be unfair... since the facets of misadventure are unnumerable...'

The jury's task in approaching these matters is a practical and commonsense one. The terms of s 154 enable due allowance to be made for errors of judgment, momentary lapses of attention and the like which no reasonable person would label 'criminal'."

21. His honour then went on to find that even though there was no evidence of prior agreement between the parties to "car surf" he was in no doubt that the act of car surfing on the roof and on the bonnet create "a serious potential danger to the lives an health and safety of all those in the vehicle and any other road users who happened to be in the vicinity of the vehicle".

22. His honour was also satisfied that an "ordinary person similarly circumstanced" would have clearly foreseen the potential danger.

23. Clearly if I find that there is enough evidence for me to be reasonably satisfied that the Applicant was engaging in an act of bonnet surfing then he can equally be found to have been engaging in a dangerous act in contravention of section 154 and therefore excluded from the issue of a certificate by section 12(f) of the Crimes (Victims assistance) Act.

24. It is clear to me from the evidence that on the balance of probabilities the Applicant has not been truthful with his evidence to the court. The Applicant has tried to disguise the fact that he and his brother were bonnet surfing by being vague when asked why he was on the bonnet in the first place and by suggesting that he didn't realise that Mann was going to drive off. While he had not climbed out of a moving vehicle onto the bonnet he had laid down on the bonnet holding on as if he were expecting Mann to drive on. Even if he were not originally on the bonnet for the purpose of surfing when the car started moving he could have got off the vehicle with no real danger (the evidence of all parties is that the car started to move slowly) yet he chose to remain on the vehicle. The fact that the Applicant's brother did the same thing indicates to me that they intended to go along for the ride.

25. I do not adhere to the Respondent's submission that by participating in the bonnet surfing that the Applicant could necessarily be found complicit in the commission of Mann's dangerous act but I do find that the Applicant himself could be the principal of a dangerous act which would be found to be in contravention of section 154 of the Criminal Code.

26. It is interesting to note that Ellis stated that he thought what they did was dangerous. I see that statement from Ellis as an indication that an ordinary man similarly circumstanced would have viewed the act as being dangerous and creating danger.

27. By being on the bonnet while the car was moving Applicant and his brother would have clearly been a distraction for Mann while she was driving and as such were creating a serious danger to those in the car and other road users. A distracted driver no matter how slow they are driving creates a potentially fatal danger to other road users. Mann could have drifted into the path of another vehicle travelling at 50 km per hour causing collision. The fact that the Applicant and brother were on the travelling vehicle in the way they were could have caused a distraction to other drivers causing them to have an accident. Mann concentrating on the Applicant and his brother and stopping without causing harm to them could have failed to see a pedestrian and run the pedestrian down, the list of possible foreseeable dangers goes on.

28. Given the above I find that on the balance of probabilities the Applicant was participating in a dangerous act in breach of section 154 of the Criminal Code and consequently should be excluded from the issue of an assistance certificate pursuant to section 12(f) of the Crimes (Victims Assistance) Act.

29. In the event that I am wrong in characterising the Applicant's actions as a breach of section 154 the Respondent submits that the Applicant's actions contributed in such a way to his injuries that any certificate should be discounted by 100% pursuant to section 10(2) of the Crimes (Victims Assistance) Act in any event.

30. Section 10 reads:

> 10. Behaviour of victim, &c., to be taken into account
>
> (1) In considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate, the Court shall have regard to the conduct of the victim and to any other matters it considers relevant.

> (2) Where the Court, on having regard under subsection (1) to the conduct of the victim, is satisfied that the victim's conduct contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate by such amount as it considers appropriate in all the circumstances.

31. It is clear to me that the Applicant placed himself in harms way by participating in bonnet surfing, an inherently dangerous activity, had he not lay on the bonnet in the first place or even if he had got off when Mann had started to slowly drive away he would not have been injured at all. I find that the Applicant contributed to his own injury to such an extent that any certificate to issue in his favour ought to be discounted by 100%.

32. My orders are:

32.1 The applicant's application for an assistance certificate is refused.

32.2 The costs of this application are reserved.

Dated this 22nd day of September 2006

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Tanya Fong Lim
JUDICIAL REGISTRAR