

CITATION: *Lisa Jane Hall v Northern Territory of Australia* [2007] NTMC 030

PARTIES: LISA JANE HALL
BY HER LITIGATION GUARDIAN
KRY'S JANE ROBERTS

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMES VICTIMS ASSISTANCE

FILE NO(s): 20525957

DELIVERED ON: 8TH June 2007

DELIVERED AT: DARWIN

HEARING DATE(s): 1ST June 2007

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Damages - Mental injury – causation – “as a result of” – psychological treatment
Crimes (Victims Assistance) Act

REPRESENTATION:

Counsel:

Applicant: Ms McLaren
Respondent: Ms Dennis

Solicitors:

Applicant: Asha McLaren
Respondent: Solicitor for the Northern Territory

Judgment category classification: C
Judgment ID number: [2007] NTMC 030
Number of paragraphs: 44

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

No. 20525957

BETWEEN:

LISA JANE HALL
BY HER LITIGATION GUARDIAN
KRYS JANE ROBERTS
Applicant

AND:

THE TERRITORY
Respondent

REASONS FOR JUDGMENT

(Delivered 8th June 2007)

JUDICIAL REGISTRAR FONG LIM:

1. The Applicant is a 15 year old girl who applies for an assistance certificate to issue in her favour pursuant to section 5 of the Crimes (Victims Assistance) Act (“the Act”). There is no dispute from the Respondent about the actual offence alleged. The dispute lies in the effect that offence has had on the applicant and therefore the amount for which the certificate should be issued.
2. Section 5 of the Act provides that

“5(1) A victim or, where a the victim is an infanta 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.”
3. Injury is defined as :

“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)”

4. Section 9 sets out the principles for assessment of assistance:

“ In assessing the amount of assistance to be specified in an assistance certificate in respect of an application under section 5(1) or (2) the court may subject to this Act include an amount in respect of –

- (a) expenses actually incurred as a result of the injury suffered by or the death of, the victim
- (b) pecuniary loss to the victim as a result of his or her total or partial incapacity for work;
- (c) pecuniary loss to the dependants of the victim as a result of his her death
- (d) any other pecuniary loss arising in consequence of injury suffered by, or death of , the victim and any other expenses reasonably so incurred;
- (e) pain and suffering of the victim;
- (f) mental distress of the victim;
- (g) loss of amenities of life by the victim;
- (h) loss of expectation of life by the victim;and
- (i) loss of or damage to, the clothing of the victim being time of commission of the offence.

(2) for the purposes of subsection (1)(f) , mental distress does not include grief.”

5. The victim was 12 years old at the time of the offence. On the 31st of December 2004 she and her friend and her friend’s mother, Ms Lee (the offender) went to Mandorah where the applicant’s mother worked to see the in the new year. All the way through the night the offender acted badly toward the victim’s friend including pushing her into the sea before they got

onto the ferry to return to Darwin. On the journey home from the ferry terminal the offender started to beat up on her daughter and at one stage attempted to throw her out of the moving vehicle. It was then that the victim was assaulted by the offender. In an attempt to protect her friend the victim put herself between the offender and her daughter and received several blows to the neck and head by the offender's closed fist. It is that assault that is the basis of this application for assistance.

6. The Applicant relied on the affidavits of the litigation guardian of the 12th of April 2006 and the 26th of September 2006, the reports of Di Knox of the 14th March 2007 and the 28th May 2007 and the affidavit of Asha McLaren of the 1st of June 2007. The Respondent relied on the affidavits of Kristy Rogerson of the 23rd and 25th of October 2006 and the reports of Dr McLaren of the 4th May 2006 and the 21st of March 2007.
7. The litigation guardian attests that as a result of the assault the victim suffered the following physical injuries:
 - (a) concussion amnesia
 - (b) constant severe migraines
 - (c) bruising to the throat, collarbone and shoulder which took 3 to 4 months the heal.
8. The litigation guardian also attests to other effects of the assault as follows:
 - (a) the victim started to sleep with her mother again and suffered terrible nightmares
 - (b) the victim has developed a nervous disorder and shakes a lot
 - (c) sleeplessness
 - (d) scared to go out by herself and got to work at Hungry Jacks
 - (e) does not participate in activities such as ballet, gym, swimming, karate, and fishing.

(f) Lost her job at Hungry Jacks because she became unreliable

9. The Litigation guardian claims the victim has changed from an extrovert to a virtual recluse.
10. The Applicant supports these claims with reports from Dr Diplock the paediatrician who examined the Applicant 3 days after the incident and the psychologist Dianne Knox who saw the applicant for the purposes of a medical legal report.
11. Surprisingly the applicant did not tender her own statement or victim impact statement in support of her claim that was left to the solicitor for the respondent. In her statement made on the 5th of January 2005 the Applicant makes no claims regarding the effects of the assault on her however in her victim impact statement dated the 10th August 2005 she claims that she continued to have headaches and her neck and shoulder were still sore. She also claims that she had some x-rays and was required to return to the hospital for treatment. The report from NT Imaging annexed to the affidavit of Rogerson was practically unreadable but that which could be read indicates nothing unusual in the Applicant's spine.
12. The Applicant also claims that since the assault she cannot play with her friend anymore because the offender had stopped the friendship and that the offender's other children had bullied her so much so that she had to move schools. The victim also expressed sorrow at not being able to see her friend
13. **Physical injuries:** Dr Diplock confirms in his report of the 24th March 2005 that he examined the Applicant on the 5th January 2005. He records some tenderness to the back of the head, and the right side of the neck and collarbone but no visible swelling or bruising. He also found "based on the history of amnesia" that there must have been a concussion.

14. The Royal Darwin Hospital records show that the Applicant presented to the hospital on the 4th of January 2006 complaining of headaches, vomiting and feeling unwell. She was also reported by the mother to have had a fever, vomiting and a runny nose. The Applicant left on that occasion before investigations could be carried out and treatment prescribed. On the 12th of January 2006 the Applicant then presented to the Royal Darwin Hospital also complaining of headaches but no longer vomiting or fever. It is further recorded that a CT of the head was taken and there was “no evidence of bleed” which I take notice to mean no evidence of concussion. She was recommended to take pain killers and come back if pain persists. The Applicant did not return to the hospital for treatment and was next shown to attend a GP in on the 4th of August 2005 complaining of back pain arising out of the assault. The GP refers her to another doctor and suggests a referral to counselling.
15. The CT scan was not available to Dr Diplock at the time he saw the Applicant places some doubts on his diagnosis. It is clear that Dr Diplock relied on the history given by the applicant to him of amnesia coupled with the soreness around the neck and complaint of headaches to come to the conclusion that there must have been a concussion. Dr Diplock may not have come to the same conclusion had the CT scan been made available to him and the Applicant’s statement to the police where she clearly describes events immediately after the assault even though she told Dr Diplock she cannot remember. It should also be noted that the statement given to the police was on the same day Dr Diplock saw the Applicant. These factors must place some doubt on the voracity of Dr Diplock’s diagnosis of concussion.
16. What Dr Diplock’s examination does show however is that the litigation guardian’s claim that the bruising was so bad that it took months to heal and was so painful that it the applicant screamed every time her hair was

brushed is an exaggeration of the Applicant's injuries. Dr Diplock did not see and bruising at the time of his examination 3 days after the assault.

17. At this point it is important to note that it is my view that the Litigation guardian has embellished her evidence on several occasions. Her affidavit of the 26th of September 2006 gives a detailed account of the attack on her daughter however when she attends the hospital with the Applicant 3 days after the assault she has indicated to hospital staff she hadn't realised her daughter had been assaulted until that day. It is noted in the hospital records that "incident involved patients friend and mother – who did not realised until today – that her own child was actually assaulted". It is my view that the litigation guardian's affidavit of the 26th of September 2006 is a reconstruction of the incident by her based on what she has been told by her daughters and not of her own knowledge. Given those to instances and other inconsistencies in the litigation guardian's evidence her evidence must be consider very carefully in relation to the weight given to it.
18. It is clear that the Applicant suffered some bruising arising out of the assault however notwithstanding Dr Diplock's report I cannot be reasonably satisfied that there was a concussion or that the headaches complained of by the Applicant were caused by the assault.
19. It is also clear that the Applicant has suffered some headaches since the assault and that is evidenced by the medical records of the Applicant from the hospital and the GP however there is no evidence, eg a report from a doctor linking those headaches to the assault of confirming that the Applicant has suffered migraines as a result of the assault.
20. **Mental distress** – for any 12 year old child to suffer an assault such as described and to witness her best friend physically suffer at the hands of a parent would be extremely distressing to that child. The Applicant expresses her distress in her Victim Impact Statement produced for the purposes of the criminal prosecution of the offender. The distress at this loss of her

friendship with the offender's daughter is also confirmed in the reports of Dianne Knox of the 14th March 2007 at page 2:

“ She cried a lot when relating the loss of her best friend”

and at page 8

“She is also suffering a grief reaction to the loss of her best friend and worries about Crystal's safety”

21. The Applicant also describes her fearfulness of the offender in her Victim Impact Statement and in her presentation to Dianne Knox. In her Victim Impact Statement she states that:

“I am scared and frightened of Peta”

22. In Dianne Knox's report she reports that:

“.. appeared anxious and fearful when talking about Ms Lees' stalking of her and the consequent impact this has had on her”

23. Ms Knox goes on to say in relation to the effect of the assault:

“The most potent and distressing effect has been the loss of her best friend, Crystal. Ms Hall worries about the welfare of her friend who used to spend a lot of time at Miss Hall's family home to escape a difficult and allegedly abusive home environment.”

24. Ms Knox describes the Applicant's loss of her relationship with her friend as the loss of an “esteem enhancing and validating” relationship. Ms Knox further describes the Applicant as suffering a grief reaction to the loss of her friend.
25. It is clear from the Applicant's own statement and the discussion with Ms Knox the Applicant has some grief about the loss of her friendship with her friend. The question for the court is whether that grief is something that has been caused by the assault or other things.

26. **Mental injury:** It is also claimed that the Applicant suffers a mental injury arising out of the assault. Ms Knox is of the opinion that the Applicant suffers from a Generalised Anxiety Disorder and an exacerbation of a significant mood disorder. In his report Dr McLaren accepts that the applicant may be suffering some personality disturbance but does not accept that any of the Applicant's present symptoms is due to the assault only.
27. The Applicant has had many disturbing events in her life, the split of her parents, abusive alcoholic father, possible sexual abuse by a family member, the assault by the offender, harassment by the defendant and ADHD which is treated by amphetamines.
28. It seems that the offender also harassed and stalked Applicant subsequent to the offence so much so that she became frightened of her and reclusive. I accept the Applicant's history of the offender's continued harassment and that has been a part of the cause of the Applicant's present psychological condition.
29. In her interview with Dr McLaren the Applicant was either unwilling or unable to express the effect that these other events have had on her life and even Ms Knox accepts that the Applicant has minimised the effect of other events on herself.
30. Ms Knox opines that while the Applicant clearly had some mental health issues prior to the assault the symptoms of anxiety/avoidance and loss were not there present prior to the assault. She also accepts that "Symptoms and disturbance not related to the assault are recommended to be treated at the claimant's own expense". While Dr McLaren opines that the assault was not the cause of the Applicant's present symptoms he diagnoses the Applicant as having "a severe personality disturbance" which in his view is only slightly contributed to by the assault.

31. Counsel for the Applicant criticized Dr McLaren's report on the basis that it was clear that Dr McLaren had taken a disliking to the Applicant and he had not taken a proper history from the Applicant as he could not get her to respond to his questions. It is agreed however that Dr McLaren did examine the Applicant's mother and sister in relation to this same series of events and arising out of that it is not unsafe to assume that Dr McLaren did know the details of the offence at least as described by the mother and sister. It is clear from Dr McLaren's reports that he accepts that the assault would have had an effect on the Applicant but so did the stalking and other later events in her life.
32. Dr McLaren and Ms Knox also criticize each other's methodology in their reports and clearly disagree with each other's diagnosis.
33. The Applicant has the onus to prove to my reasonable satisfaction that the Applicant suffered a mental injury arising out of the assault. Given the inconsistent history given by the Applicant to the psychiatrist and the psychologist and the difference in their diagnoses it is difficult to choose between them. Even if I accept the Ms Knox's report over Dr McLaren's report it is my view that it does not establish that the Applicant's present anxiety disorder is caused by the assault.
34. The Applicant is entitled to a grant of assistance if she is
- “a person who is injured or dies as a result of the commission of an offence by another person” (emphasis mine see section 4 of the Act)
35. It is trite law that the level of assistance granted to the Applicant is assessed on common law principles and that any injury must have a causal link, be “as a result of the commission of the offence”.
36. In the present case the Applicant clearly has other factors in her life which had affected her mental state. Even taking the evidence of Ms Knox at its highest the stalking and other actions of the offender (including keeping her

daughter from seeing the Applicant) have been a major factor in causing the Applicant's anxiety. It is not the assault itself which has caused the Applicant's mental disorder it is those events which took place after the assault. The question must be, had it just been the assault that was perpetrated on the Applicant then would she have been in the same mental state as she presently is, clearly not.

37. It cannot be found that the stalking and harassment were caused by the assault and as a result the Applicant suffered a mental injury. The causal link between the two is too remote and in fact the other actions of the offender could have constituted separate offences resulting in a disturbance to the Applicant's normal mental state.
38. I therefore find that the Applicant has not suffered a mental injury as a result of the offence itself but that some of her symptoms have been contributed to by the assault in a minor way.
39. **Psychological counselling** – Ms Knox recommends counselling sessions for the Applicant to assist her in recovering from her anxious state. Dr McLaren disagrees, he is of the view that the Applicant would not respond to counselling. Even if I accept the view of Ms Knox I would have been satisfied that the Applicant would undergo that counselling before allow her compensation for those costs. There was no affidavit evidence to confirm the Applicant's intention to undertake the counselling as recommended by Ms Knox however the litigation guardian was in the court and gave oral evidence that she would arrange for her daughter to attend counselling if she was allowed compensation for that amount.
40. I indicated before the litigation guardian gave her evidence that I would have to look very closely at the weight I gave to her evidence as she had been sitting in court when I discussed the lack of evidence with her counsel. The litigation guardian was only asked one question in cross examination and that was whether the issue had been discussed with the Applicant to

which the litigation guardian answered yes and relayed that the Applicant would be willing to undergo the counselling.

41. In submissions the Solicitor for the Respondent suggested that I disregard the evidence of the litigation guardian on this issue completely because she had been in court when the issue was raised and that previous suggestions of counselling to the Applicant had not been taken up.
42. I do not accept I should completely disregard the evidence of the litigation guardian on this issue however I do give it little weight. That and the fact that the Applicant has not availed herself of any counselling services since the assault leaves me not reasonably satisfied on the balance of probabilities that the Applicant would attend counselling sessions. I am also not reasonably satisfied that any need for counselling has been made necessary as a result of the assault itself. No amount of assistance will be allowed for counselling as recommended by Ms Knox.
43. **Summary-** In conclusion I find that the Applicant is a victim pursuant to the Crimes (Victims assistance) Act and that she has suffered physical injuries of some bruising and abrasions, she has suffered pain and suffering during the assault and from the resulting bruising and some headaches. The Applicant has also suffered mental distress of a 12 year old who has been physically assaulted by an adult, that distress is continuing as she has continued to have memories of the assault. She cannot be compensated in these proceedings for any mental distress she has suffered from seeing her friend assaulted or as a result of the stalking and harassment by the offender and her other children as that is distress not as a result of the assault upon herself. She cannot be fully compensated for loss of amenities of life eg her inability to attend her normal activities , the necessity to move schools and the loss of her friendship with the offender's daughter as the evidence indicates that too has been primarily caused by the actions of the offender subsequent to the offence.

44. Taking all of the above into account my orders are as follows:

44.1 An Assistance certificate issue in the amount of \$2000.00.

44.2 The amount of Assistance to be paid to the Public Trustee until the Applicant attains the age of 18 years.

44.3 Costs are reserved with liberty to apply.

Dated this 8th day of June 2007.

Tanya Fong Lim
JUDUCIAL REGISTRAR