

CITATION: [2008] NTMC 060

PARTIES: PAMELA NOTEBOOM

v

NORTHERN TERRITORY OF  
AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 20712137

DELIVERED ON: 4 September 2008

DELIVERED AT: Darwin

HEARING DATE(s): 15 August 2008

JUDGMENT OF: D Trigg SM

**CATCHWORDS:**

*Section 12(e) Crimes (Victims Assistance) Act  
Sections 174B, 174D, 174F of Criminal Code Act  
Meaning of "harm" and "serious harm"*

**REPRESENTATION:**

*Counsel:*

Applicant: Mr Randhawa  
Respondent: Ms Spurr

*Solicitors:*

Applicant: Priestleys  
Respondent: Halfpennys

Judgment category classification: C

Judgment ID number: [2008] NTMC 060

Number of paragraphs: 72

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

No. 20712137

*[2008] NTMC 060*

BETWEEN:

**PAMELA NOTEBOOM**  
Applicant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

REASONS FOR DECISION

(Delivered 4 September 2008)

Mr D TRIGG SM:

1. This Application commenced on the 30<sup>th</sup> day of April 2007 when the applicant filed an Application for assistance certificate in respect of injury. This Application was brought under the now repealed *Crimes (Victims Assistance) Act* (hereinafter referred to as “the Act”) and, became ExP1.

2. *Section 5(1) of the Act* stated:

A victim or, where the victim is an infant or the Court is satisfied the victim, because of injury, disease or physical or mental infirmity, is not capable of managing his or her affairs in relation to the application, a person who, in the opinion of the Court, is a suitable person to represent the interests of a victim, may, within 12 months after the date of the offence, apply to a Court for an assistance certificate in respect of the injury suffered by the victim as a result of that offence.

3. Accordingly, in order to be entitled to the issue of an assistance certificate the applicant must prove (on the balance of probabilities)

that she was a victim, and that she suffered injury as a result of an offence, and that she made the application within 12 months of the offence.

4. In Exp1 the applicant alleged that she was born on 30 April 1968 and she was a “victim”.
5. “Victim” was defined in *section 4(1) of the Act* to mean “a person who is injured or dies as the result of the commission of an offence by another person”.
6. “Offence” was defined in *section 4(1) of the Act* to mean “an offence, whether indictable or not, committed by one or more persons which results in injury to another person.”
7. In Exp1 the applicant particularised the offence (which is a pre-requisite to her entitlement) as follows:

Time and date: 15 February 2007, 11:30 pm

Location: McMillans Road, Marrara

What happened: The applicant was turning right on McMillans Road, when a truck went through a red light and crashed into her car. The truck driver was intoxicated.

8. Because the injury is alleged to have been caused by a motor vehicle *section 12(e) of the Act* becomes relevant. This section stated that:

The court shall not issue an assistance certificate 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.

9. Hence, in the instant case the applicant must prove not only that she was injured as the result of an offence committed against her, but in

addition, that it was some offence under the Criminal Code. It is this issue that the Respondent primarily takes issue with.

10. Mr Randhawa (counsel for the applicant) sought to rely upon two affidavits of the applicant as the only evidence in his case. The first of these affidavits was sworn on the 25<sup>th</sup> day of June 2007 and became Exp2.
11. I will deal with the issue of liability first.

### **LIABILITY**

12. In Exp2 (paragraph 3) the applicant annexes a statement she made to the police (which she swore she had “re-read and it remains true and correct as of my own knowledge”) as PKN-1. In this statement the applicant stated (amongst other things):
  5. I drove my car out through the car park and turned left onto Abala Road I then drove along Abala until I turned right onto Marrara Drive. I noticed a car stopped at the lights I noticed that this car had its right hand indicator on. I would describe this car as being small and light in colour. I approached the vehicle and stopped behind it at the lights. I think we were waiting for about 30 seconds before the lights turned green.
  6. On the change of the lights I noticed that the green arrows for a right turn lit up. The vehicle in front of me accelerated away and turned right onto McMillans Road, I then started to accelerate and follow through so I could turn right onto McMillans Road as well.
  7. As I was driving through the intersection I noticed a yellow 4x4 Utility stopped at the intersection on McMillans Road, this vehicle was on my right hand side and appeared to be heading in the direction of the city. I then noticed a second set of headlights appear on my right hand side. I could tell the vehicle was moving and that it was not going to be able to stop. I then formed the opinion that it was going to hit my car. I then heard Nik scream.

8. By this time I was already fully into the intersection, I believe I was starting to enter the second lane. The car then hit my car. I recall seeing the head lights of the truck as it struck the front of my car. My car was pushed backwards and to the left. My car then bounced up over the island that is there for cars turning left onto McMillans Road. My car came to a stop facing back towards the Marrara Sports Stadium up against the gutter.
9. Nik jumped out of the car and I gave her my mobile phone. I remember Nik saying "the fucker didn't stop". The car that was in front of me turning right had stopped and the driver ran back over to us. I heard him say to Nik "yes, he's over there". I then hopped out of my car and saw the truck upside down on the other side of McMillans Road. I had pains in my adnominal area.
10. A girl came running over to us and said "I'm on the phone to the police now". I then went and sat on the grass near my car. I was about a metre or so away from my car. I was in shock from the accident. I could see my car was badly damaged, all of the damage was at the front of the car. I remember saying to people standing around, "He ran a red light, I couldn't do anything". They said "Yeah we saw it".
11. The police arrived at the accident shortly after. I was approached by a police officer and asked to move away from my car as it was leaking fluids everywhere. My details were taken by the police officer. The same police officer then asked me to do a breath test. I passed the test and stayed where I was. I was advised by the police to attend to the hospital, I refused at first thinking I would be fine.....
12. ....
13. Further to, I had a sample of blood taken from me at the hospital and was given a sample for myself. At the time of the accident the driver of the other vehicle ran a red light, my vehicle has been written off. This is my only vehicle. As earlier stated I'm on a disability pension and need transport to get around. I've been fortunate enough to have a friend assist me for the time being. I would like to see the driver prosecuted.

13. The reference to “the car then hit me” in paragraph 8 of PKN-1 appears to be an error, as all the other information (including the unsigned statements of witnesses annexed to Ms Spurr’s affidavit, which became ExR1) suggests that the applicant was hit by a truck only.
  
14. One of the unsigned statements annexed to Ms Spurr’s affidavit (ExR1) was by John Kirk Baylis. I queried why I should read or consider any unsigned documents, but both counsel seemed to have no problem with this occurring. I do not consider that *section 17(4) of the Act* makes an unexecuted statutory declaration evidence. However, since both counsel took no issue with anything annexed to any of the three affidavits relied upon I will proceed to consider this document, as the circumstances of the collision do not appear to be in issue. In paragraphs 3 to 6 of the unsigned statutory declaration Baylis allegedly stated:
  3. On Thursday the 15<sup>th</sup> of February 2007 at about 11:30pm, I was driving my car along McMillans Road towards Bagot Road, I had just driven past the Northlake’s Shopping Centre and was approaching a left and hand bend at the speed of 80kph, I was travelling in the centre lane.

As I was driving along I noticed a white cab over truck try and over take me. I noticed this vehicle because it was going about 10 kph quicker then I was, and it came into my lane and nearly side swiped my vehicle. I would describe the vehicle as being in new condition. I also noticed that it was towing a trailer that had a small bob cat in it. As the truck pulled away, I could see that it had trouble staying in its own lane. He was drifting all over the place. I then feared for my safety on the road and changed to the far left hand lane to avoid any further close calls with the truck.
  4. We were approaching the intersection of Lee Point Road and McMillans Road. I could clearly see that we had a red light on McMillans Road. I started to slow down for the red light. The truck didn’t break he was still travelling

at the same speed as he approached the intersection. I also noticed there were 2 vehicles stopped at the same intersection on the Marrara side waiting to go to the Lee Point Side. We were about 200-300 hundred meters away when I saw this.

5. I next saw the cars on the Marrara side start to take off, I noticed that the truck still hadn't slowed down and that he was about 50 meters away from the intersection. To that point in time there was no break lights from the truck, he was still travelling at the same speed. I had a really bad feeling that a bad accident was about to happen.
6. The truck then swerved to the left to avoid the first car that went through the intersection. He then smashed into the second car coming from the left hand side I would describe this car as being a dark coloured Mitsubishi wagon. The car spun around and was sent back to in the direction it came from and ended up in the gutter. The truck was sliding out of control towards the centre island it did a 180 degree turn before it hit the island. The truck hit the island and rolled over. I saw that the whole front end of the truck get ripped off. After it's first roll, it then rolled onto it's roof and stopped in the centre of the road.

15. It is apparent from a police précis attached to Ms Spurr's affidavit that the driver of the truck was Florentino Pereira Das Neves, and that he was subsequently charged with the following offences:

Drive under the influence;

Exceeding .08% alcohol per 100ml of blood, namely .153%;

Drive without due care;

Disobey red traffic light; and

Drive motor vehicle in a manner dangerous.

16. I firstly note that all of these offences are under the *Traffic Act*. Accordingly, the other driver was not charged with the commission of any offence under the *Criminal Code*. But this is not determinative of the issue before me. The fact that prosecuting authorities choose not

to lay a particular charge (which they would then need to prove beyond all reasonable doubt) does not preclude this court from finding that a person has committed another offence that was not charged (on the balance of probabilities).

17. I was told by Mr Randhawa from the bar table (without any objection from Ms Spurr) that the other driver apparently failed to attend court and a warrant for his arrest is currently outstanding.
18. On these facts, could I be satisfied (on the balance of probabilities) that Das Neves has committed any (and what) offence under the *Criminal Code*. In her closing submissions Ms Spurr referred to *section 174F of the Criminal Code* only. I queried with Mr Randhawa whether he sought to draw my attention to, or rely upon, any other section of the *Criminal Code*, but he did not wish to do so.
19. *Section 174F of the Criminal Code* states as follows:

**174F Driving motor vehicle causing death or serious harm**

(1) A person is guilty of a crime if –

- (a) the person drives a motor vehicle dangerously; and
- (b) that conduct causes the death of any person.

Penalty: Imprisonment for 10 years.

(2) A person is guilty of a crime if –

- (a) the person drives a motor vehicle dangerously; and
- (b) that conduct causes serious harm to any person.

Penalty: Imprisonment for 7 years.

(3) For subsections (1)(a) and (2)(a), a person drives a motor vehicle dangerously if the person drives the vehicle –



(a) while under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle; or

(b) at a speed that is dangerous to another person; or

(c) in a manner that is dangerous to another person.

(4) An offence against subsection (1) or (2) is an offence of strict liability.

(5) A person who is convicted or acquitted of an offence against subsection (1) or (2) is not liable to be convicted of another offence against this Code on the same facts or substantially the same facts.

20. Accordingly, for Das Neves to be guilty of an offence against this section I must be satisfied (on the balance of probabilities) that he was driving dangerously, and that “serious harm” was caused to a person (as it was not suggested that anybody died in the collision). Nor is it suggested that any “serious harm” was caused to anyone other than the applicant. Accordingly, the issue comes down to whether “serious harm” was caused to the applicant. I will return to consider this issue when I consider the question of quantum.

21. On the material before me I find (on the balance of probabilities) that, at about 1130pm on 15 February 2007, Das Neves:

- Drove a truck (namely a white Mitsubishi Canter tip truck) towing a dual axle box trailer (which had industrial tools, heavy duty tools, steel star pickets, industrial equipment and a mini Bob Cat) along McMillans Road;
- Drove in excess of the 80km/hour speed limit, namely at about 90km/hour;
- Drove whilst under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle;

- Drove with a blood alcohol level of .153%;
- Was swerving the truck within his lane;
- Had a red light facing his direction of travel at the intersection with Lee Point Road;
- Made no attempt to brake or slow his truck as he approached the red light;
- Entered the intersection against the red light whilst doing about 90 km/hour whilst two motor vehicles were lawfully turning right onto McMillans Road in accordance with a green turning arrow which was facing their direction of travel;
- Upon entering the intersection against the red light he swerved to the left to miss the first car that was lawfully turning right;
- Collided with the second motor (that was being driven by the applicant) that was also lawfully turning right;
- Was driving at a dangerous speed given the type of vehicle that he was driving and the trailer that he was towing;
- Was driving in a dangerous and reckless manner;
- Was driving in a manner that caused a serious risk of death or serious harm to other road users (and in particular the occupants of the two motor vehicles that were lawfully turning right);
- Was reckless as to that risk of death or serious harm.

22. I would therefore have no difficulty in being satisfied that the requirements of *section 174F(2)(a) (when read with section 174F(3))* were satisfied. However, for Das Neves to be guilty of an offence against *section 174F(2)* the requirements of *subsection (2)(b)* (namely that the conduct caused serious harm to any person) would still need to be met. I will return to this aspect when I consider the issue of quantum herein.

23. In the course of writing these reasons I also noted *section 174D of the Criminal Code*, which states:

**174D Recklessly endangering serious harm**

A person is guilty of a crime if –

- (a) the person engages in conduct; and
- (b) that conduct gives rise to a danger of serious harm to any person; and
- (c) the person is reckless as to the danger of serious harm to any person that arises from the conduct.

Penalty: Imprisonment for 7 years or, for an aggravated offence, 10 years.

24. The major difference (for current purposes) between this offence and *section 174F* is that the applicant would not have to prove that she in fact suffered “serious harm”.
25. Conduct is defined in *section 43AD* as follows:

**43AD Conduct and engaging in conduct**

- (1) Conduct is an act, an omission to perform an act or a state of affairs.
- (2) Engage in conduct is to –
  - (a) perform an act; or
  - (b) omit to perform an act.

26. Accordingly, there is nothing to suggest that “conduct” would not include driving a motor vehicle.

27. On my factual findings as noted above, I would have no difficulty in finding that Das Neves was guilty of an offence against *section 174D*. But, as neither counsel had addressed me on this section, I re-listed

the matter on 1 September 2008 to give both counsel the opportunity to address me on why I should, or shouldn't, have regard to this section also.

28. On 1 September 2008 Mr Randhawa submitted that I could have regard to *section 174D*, and Ms Spurr submitted that I could not. Neither counsel referred me to any authority in support of their submission. Ms Spurr did seek to rely upon the second reading speech. In the second reading speech the section numbers identified do not appear to correspond with the actual amendments, and this would appear to be because *section 174C* of the Bill (which related to omissions) appears to have not made it into the final Act. Accordingly, to make the second reading speech correspond with the actual Act I have altered the numbering. The relevant passages are as follows:

#### **174C Recklessly endangering life**

This provision creates an offence where a person engages in conduct that gives rise to a danger of death and is reckless as to the danger of death arising from his or her conduct. Combined with 174A it defines an offence where there is conduct that creates a substantial risk that is known to be unjustifiable.

#### **174D Recklessly endangering serious harm**

The offence created by this provision is identical to that under 174C except that level of endangerment is serious harm not death.

#### **174F Driving motor vehicle causing death or serious harm**

This provision will create a specific offence of causing death or serious harm by driving a motor vehicle dangerously. Driving dangerously includes being under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle, driving at a speed that is dangerous or driving in a manner that is dangerous to another person.

These offences are designed as strict liability offences. This standard is consistent with similar offences in other jurisdictions. That is no fault element is required to be proved only the objective physical elements. A defence of mistake of fact is however available.

MCCOC did not recommend a specific offence in relation to causing death or serious harm by driving. It is notable however that all other States and the ACT do criminalize this conduct, generally by strict liability offences. (see for example Jiminez (1992) 173 CLR 572). In the Northern Territory this conduct was previously prosecuted under the section 153 Dangerous Act provision.

The creation of this offence does not preclude the prosecution of cases where death or serious harm results from conduct in driving a vehicle under more serious criminal offences, for example as manslaughter by recklessness or negligence and may act as an alternative charge on such prosecutions.

29. I do not see how this last paragraph assists Ms Spurr's submission. If *s174F* wasn't intended to preclude the laying of other charges for offences (that don't on their face refer specifically to motor vehicles) then I don't see how *s174D* would equally not be a possibility.
30. This is not a case where the same facts established that a person might be guilty of more than one offence, which would be duplicitous if both were laid, and one was a general provision and the other specifically related to driving a motor vehicle. In that event there may be a good argument for saying that the offence that specifically related to a motor vehicle is the appropriate charge. But in the instant case, I could see no good reason why the driver could not have been charged with an offence under *section 174F*, with a further charge under *section 174D* as a back-up, in the event that the prosecution could not prove that serious harm had in fact been caused.
31. I therefore find that in considering this matter I can have regard not only to *section 174F*, but also to *section 174D*.

## QUANTUM

32. In Exp1 the applicant stated her injuries as “pain to neck; pain to back; bruising to abdomen; and mental distress. Further details to be provided upon receipt of medical documentation.”
33. In paragraphs 11 and 12 of annexure PKN-1 to Exp2 the applicant stated:
11. The police arrived at the accident shortly after. I was approached by a police officer and asked to move away from my car as it was leaking fluids everywhere.....I was advised by the police to attend to the hospital, I refused at first thinking I would be fine. I then later decided to go as the police officer kept saying “You really need to be checked out”. I attended to the hospital with Nik in the ambulance. At the time I was felling pain in my stomach from where the steering wheel hit me.
  12. As a result of the accident I have received injuries to my abdominal area, as well as my neck, shoulders and back. The injuries to my neck, shoulders and back were not obvious at the time of the accident, they became more noticeable the days proceeding the accident. The doctor advised me that this was a normal occurrence. I’m currently seeking medical treatment for these injuries and will provide a medical report if needed.
34. Annexure PKN-3 to Exp2 is a set of coloured photos taken of the applicant’s motor vehicle, showing the damage as a result of the collision. The front two thirds of the bonnet of the vehicle is completely destroyed. It was clearly a very forceful impact. It is also apparent that the applicant and her passenger were lucky not to have been more seriously injured. If the point of collision had been a couple of metres further along the applicant’s vehicle a tragic result may have occurred.
35. The applicant said (para 6 of Exp2) that she “was just in complete shock following the accident, and I couldn’t believe that it really

happened. She attended the RDH after the accident. The clinical notes relating to this attendance (annexure PKN-4 of Exp2) stated:

Driver in MVA. Walked from accident. Mild abdo wall and L ankle pain. Clinically well to examine. Small seatbelt mark over abdo but no tenderness. Small contusion over L ankle, no bony tenderness. Discharged with advice to return if any Sx.

36. In paragraphs 7 to 23 of Exp2 (sworn on 25 June 2007) the applicant states:

7. As a result of the accident I suffered the following injuries:

- Pain and bruising to my abdomen;
- Pain to my left ankle;
- Pain and stiffness to my neck;
- Pain to my back;
- Pain to my chest; and
- A musculoligamentous strain injury to my neck and my back.

8. The pain to my ankle lasted for approximately four to five weeks. During this time, my ankle would hurt when I walked. The pain to my abdomen lasted for approximately one week. I also suffered a bruise to the right side of my stomach, which was approximately 20cm by 5cm. This bruise lasted for approximately one week, and during this time it was painful to touch. As a result of this bruise, I could not sleep on my right side during this time.

9. In the days following the accident, I began to feel pain to my neck, to my shoulders and to my upper back. This pain really affected my range of movement and it was hard for me to get around the house.

10. I have suffered from juvenile arthritis and other health conditions in the past. Prior to the accident I was taking 200mg of the painkiller medication Tramadol, twice per

day. However, due to the pain I experienced from the accident, I began to take panadol and I also increased my dosage of Tramadol. For approximately four weeks following the accident I took four panadol tablets per day and for about three weeks following the accident I also increased my dosage of Tramadol. I then returned to my normal levels of Tramadol. However, I still take panadol almost everyday, two tablets at a time. I usually take the panadol at about 2 or 3pm, as I take the Tramadol in the mornings and at night. I will also increase my Tramadol if need be.

11. Following the accident I attended on a GP at the Farrar Medical Centre, who referred me to the Palmerston Physiotherapy Clinic. I do not usually attend upon the Farrar Medical Centre, but my usual GP was not able to refer me to a physiotherapist. I have been undergoing sessions at the Clinic since 19 February 2007.
12. For the first couple of weeks I had two sessions of physiotherapy per week, and then I changed to a session of physiotherapy and a session of gym work. For the last four weeks or so I have had two sessions per week of just gym work. At the time of swearing this affidavit, I have a few more weeks of physiotherapy to go. Annexed hereto and marked with the letters "PKN – 5" is a true copy of my records from the Palmerston Physiotherapy Clinic.
13. The physiotherapy sessions consisted of massage of my neck and upper back with sorbolene cream. The physiotherapist also taught me exercises to do at home. I bought a fit ball from the supermarket to use at home to help me with these exercises. This fit ball cost approximately \$15.00. My physiotherapist has advised me to continue with the exercises at home, even once our sessions have finished.

37. In annexure PKN-5 to ExP2 Dr Forrest states (in a letter of referral, dated 23 February 2007, to the physiotherapist) "Pam has neck pain and stiffness and thoracic posterior pain on thoracic rotation all consistent with musculoligamentous strain". I accept this assessment.



38. Also as part of PKN-5 to ExP2 is a letter of reply from Mr Forrest, the physiotherapist, to Dr Forrest dated 3 March 2007. In the middle two paragraphs of that he states:

On examination there was marked restriction of C/S & T/S ROM in all directions. There was tenderness on palpation of facet joints C1-T12 bilaterally. ULTTs/SLR+DF/slump were negative for symptom reproduction. No neurological symptoms were reported. Clinical findings were consistent with C/S & T/S WAD II.

Treatment will consist of STM/release of suprascapular/paraspinal musculature, mobilisation of C/S & T/S facet joints into extension/rotation/flexion as symptoms allow, progression of ROM exercises/stretching, as well as advice regarding the benefits of active rehabilitation following WAD. Considering the history of juvenile Rheumatoid Arthritis, I expect Pam's recovery to be significantly slower than normally expected for this type of disorder.

39. Also on 23 February 2007 Dr Forrest referred the applicant to Ms Isherwood-Hicks (psychologist) stating:

Thankyou for seeing Pamela K Noteboom who was involved in a Nasty MVA on 15/2/07. She has back and neck pain and is having physio.

Pamela is a disability pensioner who experiences chronic pain in the joints.

Pamela has concerns from the accident, when she closes her eyes to sleep she relives the accident, says she is paranoid and driving and avoids return to the location.

I would appreciate your review and assistance with therapy for these concerns.

40. The second affidavit that Mr Randhawa relied upon was a further affidavit of the applicant sworn on 7 May 2008, which became ExP3.
41. In annexure PKN-2 of ExP3 there is a file note from Dr Forrest, dated 9 July 2007, which states "has finished physio reports she feels can

do exercise at home. Feels the Mac case can close now.

**Examination:** full range of movement spine no tenderness to palpate.”

42. Yet on 12 September 2007 Dr Forrest notes (annexure PKN-2 of ExP3):

Says pain in back persists cannot lift much and pain radiates around the abdomen. No ew leg pain. Takes tramadol 400mg daily and amitriptyline 100mg daily for pain in skin and ? rh arthritis though rh factor went to normal.

**Examination:** has extensive Hailey disease of skin. Indicates pain in t789 area on forward flexion. Has long standing chronic pain and opiate use issues and there may be a predilection to chronicity of pain perception. Advised ct scan of the area and review. (emphasis added)

43. I consider that the underlined portion of this note is important in explaining (at least in part) the applicant’s ongoing complaints.

44. On 2 October 2007 Dr Forrest noted (annexure PKN-2 to ExP3) “advised thoracic ct scan shows no cause for pain. Advised to maintain fitness and reduce body weight.”

45. On 28 January 2008 Mr Foster (physiotherapist) wrote to Priestleys giving specific responses to the points raised in their letter (both appearing at annexure PKN-6 of ExP3) as follows:

1. Currently Pamela complains of constant bilateral mid-thoracic pain that occasionally refers to the inferior sternum.
2. Pamela originally presented with global thoracic and cervical spine pain following an MVA on 15/02/07. Treatment consisted of active range of motion exercise/stretching progression, mobilisation/manipulation of the spinal facet joints, soft/deep tissue massage and trigger point releases, and progression of an in-house gym program once Pamela’s symptoms resolved. Pamela did complain of some symptom re-exacerbation as a

result of ceasing manual therapies but this was expected to again resolve through continuation of a home exercise program. Pamela was discharged from on-going management on 09/07/07.

3. The current diagnosis is that of bilateral T5-8 facet joint and costovertebral joint dysfunction.
4. Yes, the current symptoms are the same as those of July 2007 and can be directly attributed to on-going dysfunction as a result of the accident.
5. I believe these symptoms, although currently present since the accident, may resolve over a period of 6-12 weeks with a resumption of manual therapies/physiotherapy. Without any treatment one would normally expect these symptoms to resolve within a two year period following the accident, although some of these conditions do progress to chronic states, especially with underlying factors such as RA. Upon perusal of resent CT and MRI investigations there is no suggestion of structural abnormalities as a result of the accident so I believe the medium to long term prognosis for Pamela is still very positive.
6. Further physiotherapy treatment over a three month period may cost circa \$1500 at most.
7. Pamela's injuries are not structurally significant, however the current musculoskeletal dysfunctions have impacted significantly on her ability to perform activities of daily living and on general comfort levels. Because the condition is currently longstanding it has also resulted in significant psychological distress and fear avoidance behaviour adversely affecting her lifestyle.
8. Pamela reports significant problems with performing activities of daily living and social tasks that require thoracic rotation/flexion, overhead activities and sustained positions. These include hanging out the washing, vacuuming, sweeping, drying her hair, combing hair, carrying heavy weights, driving 30 minutes etc.

46. On 5 March 2008 Ms Isherwood-Hicks sent a report to Priestleys (annexure PKN-7 of ExP3) in the following terms:

Ms Pamela Noteboom was referred by Dr Keith Forrest in late February 2007 for intervention to address trauma reactions following her involvement in a motor vehicle accident (MVA) on 15 February 2007 in which Ms Noteboom also sustained injuries to her back, shoulders and neck. Ms Noteboom had a friend with her as a passenger when the accident occurred. The lady escaped with minor injury. Ms Noteboom attended an initial consultation on 14 March 2007 and five subsequent consultations over the following three months.

Ms Noteboom presented with a range of observed and described symptoms and problems experienced since the MVA on 15 February 2007, as follows:

#### Presenting Symptoms and Problems at Initial Consultation on 14 March 2007

(Current status in brackets)

#### Observed Symptoms/Problems

1. Elevated anxiety.
2. Depressed affect.
3. Agitation.
4. Anger regarding the driver (who allegedly was over the alcohol limit) of the other vehicle in the collision and who allegedly drove through a red light causing the accident. (Ongoing. The other driver still has not been apprehended by Police.)
5. Tearing, emotional lability.
6. Disproportionately excessive startle response. (Ongoing.)

#### Described Symptoms/Problems

##### Physiological

7. Pain in neck, shoulders and back. (Ongoing problems reported.)
8. Tension headaches. (Initially.)

9. Racing heartbeat. (During and for some days following the accident.)
10. Churning stomach, digestive problems. (Initially.)
11. Hypervigilance. (Ongoing.)
12. 'Jumpiness' in response to sudden movements. (Ongoing.)
13. Heightened awareness and sensitivity to sound. (Ongoing.)
14. Overwhelming feelings of physical weakness. (Initially.)
15. Extreme tiredness, fatigue. (At times, still.)
16. Sleep disturbance. (Ongoing, on occasion.)
17. Appetite disturbance. (Ongoing episodes.)

#### Cognitive

18. Graphic flashbacks to the accident. (On occasion, still.)
19. Intrusive recurring thoughts and ruminations about the accident. (Continue to occur on occasion.)
20. Difficulty concentrating. (Initially quite severe problems. Occasionally still a problem.)
21. Forgetfulness. (At times, still.)
22. Unable to organise thoughts. (Initially.)
23. Bad dreams, nightmares. Content is always crash-related. (Occasionally, still.)

#### Emotional

24. Feelings of terror, feared for her life. (At time of the accident.)
25. Depressed affect, initially. (Occasional low mood.)

26. Anxiety attacks. (On occasion, still, but brings under control.)
27. Elevated anxiety. (On occasion, still.)
28. Fear of reoccurrence/another accident. (Ongoing. Ms Noteboom advised she now is extremely cautious when driving. Recently, could not avoid hitting dog that ran in front of her vehicle.)
29. Tearfulness. (Occasionally, still.)
30. Feelings of vulnerability. (Ongoing.)
31. Feelings of helplessness. (Initially.)
32. Loss of confidence. (Initially.)
33. Irritability, intolerance. (First few months following accident.)

### Mental Status

Ms Noteboom's memory, perception, speech and thought processes are normal. Ms Noteboom is in touch with her feelings and is able to identify her moods and emotions.

### Diagnosis

Ms Noteboom's presenting observed and described range of symptoms and problems at the time of the initial consultation on 14 March 2007 (just on a month post accident) were indicating of a Post Traumatic Stress Disorder (PTSD), according to DSM IV criteria.

When recently seen on 27 February 2008, Ms Noteboom still described experiencing a range of residual PTSD symptoms and problems.

### Prior Issues

Dr Forrest advised in his referral letter dated 23 February 2007 that Ms Noteboom is a disabled pensioner who suffers chronic pains in the joints.

The PTSD suffered by Ms Noteboom following the MVA stands alone in terms of severity of impact and thus would make dealing with any ongoing pain condition more difficult.

Ms Noteboom stated that prior to the consultations with myself following the MVA on 15 February 2007, she had never consulted with, nor been treated by, either a psychologist or a psychiatrist for any mental health disorder.

### Intervention

Ms Noteboom was highly motivated and participated fully in the intervention program focused on addressing the above listed presenting symptoms and problems. Through her own efforts Ms Noteboom was sufficiently successful in dealing the incapacitating PTSD symptoms and problems to return to driving (albeit nervously and with caution) and to try to move on with her life.

When recently seen on 27 February 2008, whilst Ms Noteboom described experiencing a range of residual PTSD symptoms and problems on occasion, she advised that she continued to put effort into controlling the impact of these symptoms in order to maximise her quality of life.

### Prognosis

Whilst, through her own determined efforts, Ms Noteboom has mastered control over most of the powerful post trauma reactions experienced following the accident, there is a high probability that some residual effects of the PTSD Ms Noteboom has suffered will impact negatively on her quality of life from time to time, possibly for the rest of her life.

Access to psychological intervention (of up to ten sessions) may be required in the future in order to consolidate the gains to date and to guard against any deterioration of symptoms. The Australian Psychological Society's current recommended fee for the twelve months from June 2007 is \$192.00 per consultation hour of 50 to 60 minutes.

47. It is apparent from this that a number of the applicant's complaints have resolved over time and are no longer present (as they are noted as "initially" only). Further, nearly all of the applicant's complaints that are alleged to be continuing are not constant, but intermittent only (as

they are noted as “occasionally”). How often they recur, and in what circumstances, and how long they are present for when they recur, is not clear. The only complaints that appear to be “ongoing” are noted as:

Feelings of vulnerability

Anger regarding the driver

Disproportionately excessive startle response

Pain in neck, shoulders and back

Hypervigilance

‘Jumpiness’ in response to sudden movements

Heightened awareness and sensitivity to sound

Fear of reoccurrence/another accident

48. In paragraphs 4 to 18 of ExP3 (as sworn on 7 May 2008) the applicant states:

4. I continued to seek treatment at Palmerston Physiotherapy Clinic (“PPC”) until 9 July 2007, and thereafter I continued with home based exercises to assist in my recovery from my injuries. In particular, at the time that I ceased going to PPC, I was still suffering from pain in the middle of my back, between my shoulder blades. The physiotherapist, Paul Foster, told me that this should resolve with the home based exercises over about the following two months. Annexed hereto and marked with the letters “PKN-1” are true copies of the records and documents obtained by my solicitors from my file at PPC.

5. I stopped seeking Dr Jan Isherwood-Hicks in early June 2007, as TIO had refused to pay for any more treatment from her under my motor accidents compensation claim (“MACA claim”). However, I continued to suffer from many of the same symptoms relating to anxiety and hyper-vigilance that Dr Isherwood-Hicks was helping me with. I would have continued with the treatment with Dr



Isherwood-Hicks, as I felt that I still needed help to recover from these symptoms. However, I could not afford to pay for the treatment myself.

6. Since the accident, I have continued to attend upon my GP in relation to ongoing pain in my spine, which has persisted since the accident. Annexed hereto and marked with the letters "PKN-2" are true copies of further records from Farrar Medical Centre relating to my attendances there since 27 June 2008. I note that those records relate to a person named "Julieanne Noteboom". Julieanne was my birth name, but I was re-named Pamela when I was adopted as a child. I changed my name back to Julieanne for a few years, but changed back to Pamela in or about 2004.
7. In or about December 2007, I stopped going to Farrah Medical Centre and began seeing Dr Mirza Beg at Oasis Medical Centre as my regular GP. I have continued to seek treatment from Dr Beg in relation to the ongoing pain in my spine. Annexed hereto and marked with the letters "PKN-3" are true copies of my records from Oasis Medical Centre relating to those attendances.
8. In September 2007, my GP referred me for a CT scan to try to determine the cause of the ongoing pain in my back. However, the scan could not identify any cause for the pain. Annexed hereto and marked with the letters "PKN-4" is a true copy of that CT scan report dated 20 September 2007.
9. In December 2007, my GP referred me to Dr Nyunt to try to determine the cause of the ongoing pain in my back. Dr Nyunt arranged for me to undergo an MRI scan on 28 December 2007. However, the MRI scan could not identify the cause of the pain and Dr Nyunt was unable to provide me with a diagnosis. Annexed hereto and marked with the letters "PKN-5" are true copies of the MRI report dated 28 December 2007 and a letter from Dr Nyunt to my GP dated 14 January 2008.

## **EXPERT REPORTS**

10. On 23 January 2008, my solicitor arranged for me to attend a consultation with Paul Foster at PPC for the purpose of obtaining a report in support of the within

application. Annexed hereto and marked with the letters "PKN-6" is a true copy of that report dated 28 January 2008, together with a true copy of the letter from my solicitor requesting the report. If I receive assistance monies through this application, I intend to undergo the treatment recommended by Mr Foster to assist in my recovery.

11. On 27 February 2008, my solicitor arranged for me to attend a consultation with Dr Isherwood-Hicks for the purpose of obtaining a report in support of the within application. Annexed hereto and marked with the letters "PKN-7" is a true copy of that report dated 5 March 2008. If I receive assistance monies through this application, I intend to undergo the treatment recommended by Dr Isherwood-Hicks to assist in my recovery.

### **ONGOING SEQUELAE**

12. I continue to suffer significant mental distress as a result of the accident. In particular:
  - (a) I am still very jumpy and easily startled;
  - (b) I continue to experience flashbacks of the accident, which are graphic and very upsetting;
  - (c) I still occasionally experience nightmares relating to the accident;
  - (d) I feel generally anxious and vulnerable a lot of the time and especially when I am driving; and
  - (e) I still feel extremely nervous and anxious when I'm driving and especially when I drive through the intersection where the accident occurred. I am now an extremely cautious driver, and although I have always been a cautious driver, I was never overly cautious as I have been since the accident. I am extremely wary of other vehicles around intersections and traffic lights, as I feel that I cannot trust other drivers to do the right thing. On several occasions since the accident I have had to pull over whilst I was driving because I was too upset to continue. This generally happens when I see another driver do something stupid. For example,

about 5 or 6 weeks ago I was approaching a roundabout whilst another car was going through the roundabout in the opposite direction. As the other vehicle wasn't indicating to turn right, I entered the roundabout. However, the vehicle proceeded to turn right and nearly crashed into the rear right hand side of my car. This was extremely upsetting, and I had to pull over straight away to compose myself for about 5 minutes before I could continue driving. This wouldn't have bothered me prior to the accident – I would have just thought “what an idiot” and kept on driving. This has got a little better since the accident, but it still affects me a great deal when I am driving.

13. I have had the opportunity to read Dr Isherwood-Hicks' report annexed hereto and marked “PKN-7”. I agree with Dr Isherwood-Hicks' comments about my initial and ongoing symptoms relating to the accident.
14. I have continued to suffer pain since the accident, which is mostly centred around my mid to upper back. This pain has neither improved nor worsened since I swore my first affidavit in June 2007. Some days the pain is worse, such as after I do housework, or exercise, or walk or sit for an extended period of time. Sometimes the pain is better when I relax during the day. But the pain has been there constantly since the accident. Some days it is that bad that I just spend the day in bed.
15. I have suffered from juvenile arthritis and Hayley Haley disease (a skin disorder) since I was a teenager. I was diagnosed with juvenile arthritis when I was 15 and developed the skin disorder when I was 17. However, I had never suffered this type of pain in my back prior to the accident.
16. I attend at Palmerston Medical Clinic in Maluka Street for the purpose of getting my prescriptions. This is because they bulk bill and I cannot afford to pay to see a doctor for this purpose. I did not go to this medical clinic in relation to the accident, as they told me they would not be involved in any motor accident compensation matters. I am currently on two prescribed medications to assist in pain relief. I take 400 to 600mg of Tramadol every day and also take 100mg of Endep per day. Prior to the

accident, I was taking the same amount of Tramadol, but only 50mg per day of Endep.

17. Since the accident, I am unable to carry heavy objects, like heavy shopping bags and books, as this causes the pain my back to flare up. I now do small shopping trips rather than big ones so I only have to carry a few things at a time. I now go shopping every two or three days, whereas prior to the accident I would only go once or twice per fortnight. I have also purchased a suitcase on wheels to carry my university books around.
18. Since the accident, I am unable to hang washing on the line, as lifting the wet clothes up high causes pain in my back. I now use an indoor ailer to dry my clothes. It still takes me a lot longer to get the housework done, as I have to space it out to try to minimise the pain in my back.

49. In her initial affidavit (ExP2) the applicant referred to her taking Panadol (which she had not done prior to the collision). However, there is no mention of this in her most recent affidavit (ExP3). Accordingly, the need to take panadol appears to have ceased some time (and the applicant has not told me when) between 25 June 2007 and 7 May 2008.
50. In broad terms the applicant suffered a whiplash type injury which has been slow to respond to treatment and which leaves her with ongoing discomfort and pain. It has an effect upon what she can do in her daily life as compared with her pre-collision state. In addition, she suffered a post traumatic stress disorder (which I would categorise to be in the mild to moderate range for conditions of this type that I have seen over the years) which has had some impact upon her life and in particular on her driving (albeit that she continues to be able to drive, so it is not debilitating).
51. On the evidence the applicant is still not pain or symptom free, although the level of pain and symptoms has significantly lessened.

Her current level of reported pain and symptoms would suggest that they are significant to her enjoyment of life but not debilitating.

52. I now return to a consideration of the requirements of *section 174F of the Criminal Code* (as set out in full earlier in these reasons).

Pursuant to *section 1A of the Criminal Code*:

1A Harm

(1) Harm is physical harm or harm to a person's mental health, whether temporary or permanent.

(2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.

(3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

(4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

53. Pursuant to *section 1 of the Criminal Code*:

serious harm means any harm (including the cumulative effect of more than one harm) –

(a) that endangers, or is likely to endanger, a person's life; or

(b) that is or is likely to be significant and longstanding.

54. In order to constitute serious harm, the physical aspects of the applicant's injuries must be significant and longstanding. In order to constitute serious harm, any psychological harm must be significant psychological harm, and that significant psychological harm must be likely to be significant and longstanding. Further, or in the alternative,

any combination of the applicant's "harm" needs to be significant and longstanding.

55. "Significant" is defined in the *Macquarie Dictionary (fourth edition)* to mean:

1. Important; of consequence. 2. expressing a meaning; indicative. 3. having a special or covert meaning; special. 4. *Archaic* something significant; a sign.

56. "Longstanding" is defined in the same reference source as:

Existing or occurring for a long time.

57. Accordingly, the harm needs to be "of consequence" and "occurring for a long time". In relation to the requirement for the harm to be "longstanding", it is relevant to note that proceedings must be commenced within 12 months of the date of the offence that gave rise to the injury. In the instant case the hearing took place some 18 months after the collision occurred. On the applicant's affidavits (which are unchallenged as she was not cross-examined) some of her physical and psychological symptoms have persisted up to the time of her last affidavit (7 May 2008) and were ongoing at that time.

58. Accordingly, in my view, in the context of this legislation her "harm" has been "longstanding".

59. I am further satisfied that her "harm" has been "of consequence" in that it has not been transient. Her problems with her back and neck have persisted (although they should resolve, but with her underlying problems there is, in my view, the prospect that they may not fully resolve). No doubt her slow recovery has been compromised by her underlying conditions (as suggested by Mr Foster in annexure PKN-5 of ExP2) but that is not the applicant's fault. Prior to the collision on 15 February 2007 the applicant had no neck or back problems

associated with her pre-existing health issues. She has had since a few days after the collision.

60. I find that the applicant has had ongoing back and neck pain which has adversely affected her life as a result of the collision. I am not satisfied (given her history, her underlying problems, her longstanding opiate and pain medication) that she requires any ongoing physiotherapy or other specific treatment for these problems. I am not satisfied on the balance of probabilities that it would help. It may, but it also may simply help to re-inforce a “victim” mentality. She just needs to be careful and sensible in her exercising and daily chores.
61. She was on significant painkillers before the collision, and is now back to her pre-collision levels with the exception of some extra Endep. It is not clear that this would not have been increased in any event. She is likely to have developed both a tolerance and dependency upon medication given her longstanding use of it prior to any collision. I am not satisfied on the balance of probabilities (as there is no medical evidence to support) that her increase in Endep is as a result of the collision. It might be, but I am unable to find that it is.
62. Before the collision she also did not have any psychological problems that warranted any treatment. She did after the collision. Given the pictures of her motor vehicle after the collision and the description of the collision, I find that it was a very significant collision that could easily have had fatal consequences for her and/or her passenger. I therefore accept the opinion of Ms Isherwood-Hicks that the applicant suffered some post traumatic stress disorder as a consequence.
63. I find that the applicant has had ongoing psychological “harm” which was initially significant, but is now not disabling. I am not satisfied on the balance of probabilities that her current level of psychological

“harm” does require any ongoing treatment or medication. It at times can flare up, but she is now aware of it and how to deal with it. She does not, in my view, require ongoing counselling.

64. Are the applicant’s symptoms significant and longstanding? The physical symptoms commenced within a few days of the collision and continue (although, in my view, to a lesser extent) and are likely to persist for some time yet. They don’t prevent her from working as she was unable to work (she was on a disability pension, and continues to be on it) before the collision due to her underlying physical complaints. She is still able to perform her normal tasks of daily life, but to a reduced extent. The psychological symptoms that persist are not, in my view, debilitating. She is still able to drive. She is now a more nervous driver, and that is not surprising.
65. I consider that the physical symptoms are not insignificant. In which case, they must (as a matter of logic) be significant. They have persisted, in one form or another, for over 18 months and are yet to fully resolve. Accordingly, they are, in my view, longstanding. They don’t need to be “permanent”.
66. I find that the psychological symptoms were initially “significant and significant”, but am not satisfied on the balance of probabilities that they currently are. In my view, the applicant’s current psychological symptoms would not warrant a current diagnosis of post traumatic stress disorder (on the balance of probabilities). In my view, this condition has resolved. What she is left with appears to be (in my view) a residual anxiety state of mild severity. I am not satisfied on the balance of probabilities that the psychological “injury” by itself would be significant, and significant and longstanding.
67. Accordingly, if the psychological injury was looked at in isolation to the physical injury, then an offence against *section 174F of the*



*Criminal Code* has not been established on the balance of probabilities. However, an offence against *section 174F of the Criminal Code* has been established on the balance of probabilities in respect to the physical “injury”.

68. If I am wrong on this, I would also find that an offence against *section 174D of the Criminal Code* has been established on the balance of probabilities.
69. I therefore find that the applicant is entitled to the issue of an assistance certificate. Having gotten over the thresh-hold hurdle of liability, I see no reason why she should not be entitled to be compensated for both the physical and psychological injuries.
70. Neither counsel made any submissions as to what the quantum of the assistance certificate should be. However, Mr Randhawa did advise that the applicant was only seeking pain and suffering as her expenses were covered under her *MACA* claim.
71. Taking into account the applicant’s “harm” and the effect that it has had on her health, her enjoyment of the usual amenities of life, and her pain and psychological “harm” I would award the sum of \$8,000.
72. I will hear the parties on the final form of the order herein and costs and any other relevant issues.

Dated this 4th day of September 2008.

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**D Trigg SM**  
STIPENDIARY MAGISTRATE