

CITATION: *Kerinaia v Northern Territory of Australia* [2009] NTMC 021

PARTIES: MARIE CARMEL KERINAIUA  
v  
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance)

FILE NO(s): 20628458

DELIVERED ON: 26<sup>th</sup> May 2009

DELIVERED AT: Darwin

HEARING DATE(s): 18<sup>th</sup> May 2009

JUDGMENT OF: Ms Fong Lim RSM

**CATCHWORDS:**

Crimes (Victims Assistance) – mental injury – grief – assessment of damages for mental injury– sections 5(2A) and 13 Crimes (Victims Assistance) Act (NT) , sections 18 and 62A Interpretation Act (NT)

*Chabrel v Northern Territory of Australia* (1999) 9 NTLR 69  
*LMP v Collins* (1993) 112 FLR 289

**REPRESENTATION:**

*Counsel:*

Applicant: Ms Coroneo  
Respondent: Ms Short

*Solicitors:*

Applicant: NAAJA  
Respondent: Priestleys

Judgment category classification: C  
Judgment ID number: [2009] NTMC 021  
Number of paragraphs: 36

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

No. 20628458

[2009] NTMC 021

BETWEEN:

**MARIA CARMEL KERNAIUA**  
Applicant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

REASONS FOR DECISION

(Delivered 26<sup>th</sup> May 2009)

Ms FONG LIM RSM:

1. The Applicant has applied for the issue of an assistance certificate pursuant to section 5(1) of the *Crimes (Victims Assistance) Act*. The Applicant had also made an application pursuant to section 5(2A) and was granted a certificate or grief for \$3000.00.
2. The Applicant claims she has suffered a mental injury arising out of witnessing the violent death of her husband. She saw him stabbed by his sister, she saw the knife entering into his body, the blood and his pain and confusion as what had happened. The Applicant and the deceased had been in a 20 year relationship and at the time of her husband's death had three teenage daughters.
3. The evidence in support of the application is an affidavit sworn by the Applicant on the 8<sup>th</sup> of May 2008. That affidavit was also used to support her application for grief pursuant to section 5(2A). Annexed to that

affidavit is the report of psychologist Kim Groves who saw the applicant on the 30<sup>th</sup> January 2008.

4. The evidence of the Applicant's mental injury is brief. She states:

“I was in a state of shock when I witnessed this” (the stabbing of her husband)

“I still think about what happened on that night. I still see the blood. It is a horrible memory and I don't think I will ever forget it”.

“In the months after my husband was killed, I felt really, really sad. It was really hard to sleep and I kept waking up at night. I didn't feel like doing anything. I couldn't just get on with normal life again. I wasn't interested in the people around me. I didn't even feel like eating.”

“I felt very lonely without my husband. I missed having him around me and our grandchildren. I felt so angry that his life was taken away so suddenly, and so upset to think that he would never be with me and our grandchildren again.”

“I never feel truly happy anymore. The only thing that makes me feel a bit better and gives me some enjoyment in my life now is looking after my grandchildren”

5. Ms Groves conclusion is:

“Ms Kerinauia describes signs and symptoms consistent with grief at the loss of her long-term husband.

As a secondary victim she sustained mental injury that involved emotional upset beyond that of mere grief, although not consistent with a recognisable psychiatric condition. Prior to her husband's death, she was happy and able to enjoy a relationship with her husband. After her husband's death, there was significant impact on her mental health and well being, in that her normal enjoyment of life had been affected by the fact that she feels unable to engage in another intimate relationship again, this reaction represents a significant deleterious affect on her normal enjoyment of life that is beyond mere transient grief”

6. It is trite law that “mental injury” includes a condition that is not a psychiatric condition but is more than mere grief. In Chabrel v Northern

Territory of Australia [1999] 9 NTLR 69 his honour Mildren J applied Olsson J's reasoning in Delaney v Celon [1980] 24 SASR 443 at 335:

“ ... if the practical effect of the relevant conduct has been to bring about a morbid situation in which there has been some more than transient deleterious effect upon a claimant's mental health and well being so as adversely to effect that person's normal enjoyment of life beyond a situation of mere transient sorrow and grief, then, in the relevant sense, the person has suffered a mental injury.”

7. There is no dispute that the Applicant has suffered a mental injury. The issues between the parties are, given the Applicant has been compensated for grief how much more should she be compensated for her remaining mental injury and should that amount be decreased by the amount already awarded for the grief.
8. The parties referred to section 13 (2) of the *Crimes (Victims Assistance) Act* which provides:

“In assessing the amount to be specified in an assistance certificate the Court shall have regard to the amount of any payment received by or payable to the victim or dependant of the victim for injury or death of the victim caused by the commission of the offence including any amount of any payment received or payable-”
9. The section then goes on to list specific sorts of payments none of which are relevant here.
10. The solicitor for the Respondent submits that section 13(2) requires the court to have regard to any payment the victim, being the Applicant, may have received and that includes any payment for grief pursuant to section 5(2A) of the Act. It is submitted that the purpose of this section is to prevent any victim from being compensated twice for the same injury.
11. The Applicant's solicitor submits section 13(2) does not apply to payments made under section 5(2A) of the Act. The argument is twofold, firstly based in the definitions of the terms “victim” and “dependant” and secondly in the scope of the section as drafted.

12. The solicitor for the Applicant submits as the Applicant has received the assistance under section 5(2A) as a “widow” it was not a payment made to her as a “victim” or “dependant” in relation to the “injury” within the meaning of section 13(2) and therefore does not need to be taken into account. The argument is that the Act treats widows differently to “victims” providing for them separately in section 5(2A) in relation to grief.

13. To add strength to that argument the solicitor for the Applicant referred to the long title of the Act for guidance on the beneficial purpose and the intention to distinguish between assistance for injury and grief. The long title is:

“An act to provide assistance to certain persons injured or who suffer grief as a result of criminal acts.”

14. It is submitted that this indicates that it was intended that compensation for grief and compensation for injury be treated separately. I agree with that submission however it does not advance the Applicant’s argument much further. It is clear that grief and mental injury are treated separately and a person could be compensated for either or both depending on the circumstances. It is a recognition that grief is a separate head of damages.

15. It is certainly a legitimate tool of interpretation to use the long title if there is some ambiguity about the operation of the section, however it is also a legitimate tool of interpretation to consider whether a particular construction of a section would lead to an absurdity. It is always also important to consider the intention of the section in the context of the Act (see section 18 of *Interpretation Act* (NT)).

16. The Applicant’s argument is fundamentally flawed because it does not consider the words of section 13(2) in the context of the section. “Victim” is defined in the Act as:

“a person who is injured or dies as the result of the commission of an offence by another person”

17. This definition includes a person who is not the “victim” of the offence and therefore when reading section 13(2) in relation to secondary victims the court must be read giving the word “victim” first occurring a different meaning to “victim” second and third occurring for the section to have a workable meaning.
18. The Applicant is the “victim” in these proceedings applying for an assistance certificate for her mental injury arising out of the death of her husband the “victim” of the commission of the offence. In this case in relation to section 13(2) the Applicant is the “victim” first occurring and her husband the “victim” second and third occurring. The word “victim” second and third occurring must be read in context of the commission of the offence. The confusion in the interpretation of this section is caused by the wide definition of “victim”, which includes secondary victims.
19. It is also important to note the purpose of section 13(2) in the context of the Act (see section 62A of the *Interpretation Act* (NT)). The clear purpose of section 13(2) is to prevent Applicants from receiving compensation twice for the same loss or damage whether it be under a statutory scheme or otherwise. The effect of that section must be that a payment for grief has to be considered when assessing the loss pursuant to section 5(1) of the Act.
20. The Applicant “victim”, has received a payment for the death of her husband “victim”, and regard shall be had to that payment.
21. Further on an assessment of damages on a common law basis the quantum of the Applicant’s assistance certificate should take into account any payments she has received relating to the loss she has suffered. Clearly she has been compensated for her grief pursuant to the Act and that quantum is fixed by the provisions of the Act. On a common law basis if her mental injury is based in that grief then the amount she has received for her assistance certificate for grief must be taken into account to ensure she is not compensated twice or over the statutory maximum for that grief.

22. In relation to the scope of the section the Applicant submits if section 13(2) was meant to include payments under section 5(2A) of the Act the legislature would have included it in the specific payments to be regarded as set out in 13(2)(a) – (b). The contrary to that argument is of course if legislature intended to exclude consideration of payments made for grief under the Act then it would have specifically set that out.
23. I find that the payment made to the Applicant pursuant to section 5(2A) must be considered in the assessment of her compensation for her mental injury only to ensure that there are no elements of the grief, for which she has already been compensated, included in her claim for mental injury. This of course is a difficult and sometimes arbitrary task which the Court must undertake.
24. It should be noted at this stage it is the clear intention of the Act that any compensation for grief under this Act must be limited to \$3000.00 (see s13 (b)). This does not mean that the amount of \$3000.00 should be deducted from an assessment of her further damage regarding her mental injury just that an applicant cannot receive any more than \$3000.00 for grief even if under common law she may have received more.
25. It is also trite law that the assessment of the Applicant's mental injury is not limited to the statutory maximum of \$25000.00, the rule is to assess on common law principles and then reduce to the statutory maximum if that assessment is over that limit. (see *LMP v Collins* (1993) FLR 289 at 302)
26. On common law principles a party should not be compensated twice for damages arising out of the same injury. In this case the Court has to assess damages arising out of the mental injury which is over and above mere grief.
27. Ms Groves' report concludes that the Applicant has a mental injury more than transient grief however doesn't really elaborate what part of the Applicant's reported symptoms join together to form that mental injury.

The question is where does the grief end and the mental injury begin. In her conclusions Ms Grove's highlights the Applicant's inability to enter into another intimate relationship as a symptom of her more than transient grief. It is also clear from the Applicant's affidavit that the sleeplessness and loss of appetite reported by the Applicant was only for the few months after her husband's death that would suggest that those symptoms were only transient.

28. It was conceded by the Respondent that it is open to the court to take into account cultural reasons why the Applicant may not have reported her symptoms in detail and it is accepted that this Applicant being a traditional indigenous woman may have been very reticent about discussing her feelings on the matter.
29. It is also conceded it is open to the court to consider current community views on fairness in relation to the fact of the case. The court can consider the general range of awards given for non – pecuniary loss to help establish what are current community views on fairness however should not have regard to specific awards. Each case has separate facts and is distinguishable on those facts. Each Applicant has their own characteristics and background which will affect their reaction to the incidents. (see *LMP v Collins supra* at 303.
30. Pursuant to section 9(1) of the Act the court must have regard to, among other things:
  - “(e) pain and suffering of the victim
  - (f) mental distress of the victim
  - (g) loss of amenities of life of the victim”
31. The Applicant has suffered the immediate pain and suffering and mental distress at seeing her husband being violently murdered as well as the continuing sadness in her life at the loss of her partner.



32. In relation to loss of amenities of life the Applicant says that “it’s a memory I don’t think I will ever forget” and “I never really feel happy anymore”, those statements in addition to Ms Groves’ opinion about her inability to enter into another intimate relationship establish a loss of amenities of life.
33. Although the discretion of the court is unfettered except for the operation of section 13(2) the court was referred to previous findings of this court in matters where a distinction between grief and mental injury was at issue. None of those cases had similar facts to the present case and therefore are of limited assistance to the Court except to show the vast range of awards granted for non- pecuniary loss which have been granted in the past.
34. The Applicant witnessed the violent death of her long time partner at the hand of his sister, she saw his horror as he realised what had happened and no doubt repercussions within the family during the court process dealing with the offender. The Applicant rightly or wrongly feels aggrieved at sentence imposed on the offender. She has suffered the loss of companionship of her long time partner and feels she will never have that sort of relationship again with another. Her sadness at the death of her partner continues but is not at such a level that it can be diagnosed as clinical depression or post traumatic stress disorder.
35. Given all of the above I assess the Applicant’s loss for pain and suffering, immediate and continuing, mental distress, immediate and continuing and loss of amenities of life at \$10,000.00. I have taken into account that the Applicant has already been paid the statutory maximum for her grief.

36. I order:

(a) An Assistance certificate issue in favour of the Applicant in the sum of \$10,000.00

(b) I will hear the parties on costs.

Dated this 26<sup>th</sup> day of May 2009.

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**Tanya Fong Lim**  
RELIEVING STIPENDIARY MAGISTRATE