

CITATION: *Northern Territory of Australia v Nicolas Makrylos* [2009] NTMC 026

PARTIES: NORTHERN TERRITORY OF AUSTRALIA

v

NICHOLAS MAKRYLOS

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20818061

DELIVERED ON: 19 June 2009

DELIVERED AT: Darwin

HEARING DATE(s): 1 and 17 June 2009

JUDGMENT OF: Ms Fong Lim RSM

CATCHWORDS:

Practice and Procedure – irregular pleadings – regular default judgement – setting aside

Crimes (Victims Assistance) – recovery action by Northern Territory – liability of co- offenders – application of *Law Reform Miscellaneous Provisions Act* ss 12 & 13 - statutory right of recovery - s 5, 20, 21 and 22 *Crimes (Victims Assistance) Act* (NT)

Northern Territory of Australia v Miaris [2006] NTMC 085

REPRESENTATION:

Counsel:

Plaintiff: Mr Jobson

Defendant: Mr Downs

Solicitors:

Plaintiff: Solicitor for the Northern Territory

Defendant: Withnalls

Judgment category classification: C

Judgment ID number: [2009] NTMC 026

Number of paragraphs: 27

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

No. 20818061

[2009] NTMC 026

BETWEEN:

**NORTHERN TERRITORY OF
AUSTRALIA**
Plaintiff

AND:

NICHOLAS MAKRYLOS
Defendant

REASONS FOR DECISION

(Delivered 19 June 2009)

Ms FONG LIM RSM:

1. The Defendant makes application to set aside a default judgment obtained by the Plaintiff on 16 February 2009. There is no dispute that the Defendant was served with the Statement of Claim, nor that he failed to file his Defence within time. The judgement was for the amount paid by the Plaintiff pursuant to the issue of a Crimes Victims Assistance Certificate issued under s 20 of the *Crimes (Victims Assistance) Act* and associated legal costs. The Plaintiff's action is pursuant to s 21 of the *Crimes (Victims Assistance) Act* for the recovery of those amounts paid to the victim.
2. **Facts agreed:** The parties agree that the Defendant was one of three co-offenders who were involved in an assault on the victim on 28 December 2003. It is agreed that the victim suffered injuries out of that assault and that the Defendant has been convicted of aggravated assault causing bodily harm on the victim, on 20 February 2006. One of the co-offenders has been found guilty in the Supreme Court of aggravated assault causing bodily harm, on

20 May 2006 and the other while committed to stand trial in the Supreme Court has yet to have his charges finalised. The Defendant was a minor at the time of the assault, 17 years old, but has since turned 18 years old.

3. It is further agreed that a Certificate of Assistance issued pursuant to s 20 of the *Crimes (Victims Assistance) Act* for \$25,000.00 and that amount plus \$5,559.97 costs and disbursements have been paid to the Victim.
4. **Plaintiff's right of recovery:** The Plaintiff's right of recovery is set out in s 21 of the *Crimes (Victims Assistance) Act* as follows:

“21. Territory may commence proceedings to recover from offender

(1) Where the Territory has paid an amount under section 20, it may commence proceedings for recovery of an equal amount from the offender alleged to have committed the offence that resulted in the injury or death in respect of which the payment was made.

(2) Proceedings under this section are to be commenced not later than 3 years after the date of issue of the assistance certificate relating to the amount paid under section 20.

(3) In proceedings under this section, the Territory must prove to the satisfaction of the Court –

(a) that the Territory paid an amount under section 20;

(b) the total amount paid by the Territory under section 20; and

(c) that the offender named in the proceedings was found guilty of an offence that resulted in the injury or death in respect of which that payment was made or that on the balance of probabilities the offender committed that offence.

(4) The Court may reduce the amount to be recovered by the Territory in proceedings under this section if –

(a) the offender satisfies the Court that the victim contributed to his or her injuries or death; or

(b) the Court is satisfied that the amount paid under section 20 was excessive in the circumstances.

(5) Subsection (4) applies even though the amount of assistance has already been reduced under section 10(2).

(6) If the Court is satisfied that the assistance certificate specifying the amount to be paid by the Territory should not have been issued, the Court may determine that the Territory is not entitled to recover any amount from the offender.

5. **Defendant's application:** The Defendant makes his application to set aside the default judgement on two basis and they are as follows:
 - (a) the judgement was entered irregularly because the Statement of Claim was irregular, or
 - (b) if the judgement was regular then the Defendant has reasonable excuse for his failure to file a Defence and he has a meritorious defence.
6. The defendant supports his application with affidavits from Soula Makryllos 29 April and 5 June 2009, Helen Ginnis 20 April 2009, Antony Downs 29 April 2009, Nicholas Makrylos 5 June 2009 and Ian Rowbottom 17 June 2009. The Plaintiff relies on the affidavits of Louise Noto 27 May 2009, Lisa Zipf 2009 and Chelsea Sargent 27 May 2009.
7. **Irregularity of judgement:** It is trite law that if a judgment is irregularly entered it must be set aside as a matter of course. It is also trite that if the Statement of Claim fails to properly plead a cause of action, any default judgment entered on the basis of that Statement of Claim must be irregular.
8. The Defendant submits that the Statement of Claim is irregular because it does not plead the extent of the victim's injuries, to what degree the Defendant contributed to those injuries and how the amount of \$25,000.00 was apportioned between those injuries. The Defendant also complains of the failure to breakdown the costs and disbursements. In essence, the Defendant submits the lack of particularity of the Statement of Claim does not allow the Defendant to file a meaningful defence.

9. The Statement of Claim pleaded:

“1. The Plaintiff brings these proceedings pursuant to section 21 of the Crimes (Victims Assistance) Act (“the Act”).

2. On 20 February 2006, the Defendant was convicted of the offence of unlawful aggravated assault (“the offence”) in the Court of Summary Jurisdiction of the Northern Territory at Darwin.

3. Pursuant to section 5 of the Act, France Carnesi (“the victim”) filed an application for an assistance certificate in respect of the injuries suffered by him as a result of the offence.

4. On 6 February 2007 in proceedings numbered 20428206, the Local Court at Darwin ordered that an assistance certificate issued in favour of the victim in the amount of \$25000.00. The Court also ordered that the Territory pay the victim’s costs and disbursements to be taxed in default of agreement.

5. An assistance certificate ordering the Territory to pay the victim \$25000.00 plus costs and disbursements to be taxed in default of agreement was subsequently issued. Costs and disbursements were agreed at \$5559.97.

6. The Plaintiff paid to the victim a total of \$30559.97 under section 20 of the Act, being \$25000.00 for the assistance amount and \$5559.97 for costs and disbursements.”

10. Section 21(3) of the *Crimes (Victims Assistance) Act* sets out what the Plaintiff needs to prove to recover from the Defendant and the Plaintiff has clearly pleaded those facts. The Statement of Claim pleads the facts necessary to establish a complete cause of action. The Statement of Claim as pleaded sets out the facts that are the basis of the cause of action the Defendant has to face and is therefore not irregular.
11. The possible defences available to the Defendant in these proceedings are that the Assistance Certificate ought not to have been issued (s 21(6)) or that the victim contributed to his own injuries or the amount paid was excessive (s 21(4)). There is no restriction on how the Defendant might challenge the issuing of the certificate. The Defendant would have had knowledge of the injuries claimed by the victim arising out of the criminal matter whether by

way of agreed facts or through evidence in the contested hearing and therefore, could still plead whether he thought the amount paid to the victim was excessive in the circumstances of the case.

12. It is my view that the Statement of Claim does not breach the Local Court Rules, is regular in its form and content and therefore, the judgement entered is regularly entered.
13. **Explanation for delay:** Having found that the judgment was regularly entered, I must now consider whether the Defendant has produced to the Court evidence of a reasonable explanation for his delay in filing his defence and if there is a reasonable explanation whether the Defendant has a meritorious defence to the Plaintiff's action.
14. The Defendant's evidence is that when he was served with the Statement of Claim he was shocked and needed his mother to explain it to him. He was surprised at the amount claimed, as he was not the only person involved in the incident. The Defendant asked his mother to contact Mr Rowbottom of Withnalls to attend to the matter and she advised him later that she had contacted Mr Rowbottom and he was looking into it. After that the Defendant assumed that Withnalls were dealing with the matter. He was shocked when he found out about the judgement against him and again asked his mother to contact Withnalls and "sort it all out". The Defendant cites his culture and heritage as to why he, at the age of 23, did not take personal responsibility for these proceedings, instead relied on his mother to arrange things for him with the solicitors.
15. Mrs Makrylos, the Defendant's mother states after her son was served with the Statement of Claim, she contacted the Solicitor for the Northern Territory, enquired as to the process and then spoke to and then took the documents to Mr Rowbottom at Withnalls. She says she spoke several times with Mr Rowbottom and assumed that he was attending to the matter for her son.

16. Mr Rowbottom supports Ms Makrylos' recall that she attended his office regarding the defence of the action, however he could not locate his notes of that conversation or the documents. He does recall seeing the Statement of Claim and further talking to Mrs Makrylos about fees. His recollection is that he advised he would file a defence for Mr Makrylos as soon as monies were received into his trust account, then other personal events took his attention and that was the last he had to do with the matter.
17. The misunderstanding of Mrs Makrylos that Mr Rowbottom was attending to the matter is in my view a credible and reasonable excuse for the Defendant having not filed his Defence in time and I accept that as an explanation for the Defendant's default.
18. Having accepted the Defendant has a reasonable excuse for his default, I must now consider whether he has a meritorious defence to the Plaintiff's action.
19. It is a general rule of law in an application to set aside judgement the Defendant must produce an affidavit of his own personal knowledge of facts which support a meritorious claim. It is not enough for a solicitor to swear an affidavit on the basis of instructions see *Sharples v Northern Territory of Australia* (1988) 55 NTR 35.
20. The Defendant's counsel submits the defence to this action is the defendant was only one of three co-offenders and because s 5 of the *Crimes (Victims Assistance) Act* refers to a payment for injury resulting from the offence, the Defendant should only be responsible for whatever injury the victim suffered arising out of his offending and not the offending of others. The Defendant maintains that he was less culpable in the assault on the victim than the other two co-offenders. The Defendant's counsel also argues that s 12 & 13 of the *Law Reform Miscellaneous Provisions Act* requires there to be an apportionment of damages between joint tortfeasors, even if there are separate actions against the different tortfeasors.

21. In support of those submissions, the Defendant's affidavit states the following facts:
- “15. There were two other adult males involved in the incident with Carnesi. I was under the age of 18 at the time.
 - 16. I did not initiate the fight in which the person Carnesi suffered his injuries.
 - 17. I also suffered injuries in the fight.
 - 33. I have been told by my solicitor Antony Downs that Carnesi suffered a fractured cheek bone, broken nose, lacerations under the eye and knee, bruised ribs, bruising to the face and swelling, abrasions to the neck/body, and other injuries. I do not agree that I caused or am responsible for those injuries.”
22. It is clear that the Defendant is attempting to apply the principles relating to joint tortfeasors to the statutory recovery action of the Plaintiff. Sections 12 & 13 of the *Law Reform Miscellaneous Provisions Act* certainly would apply to an action taken by the victim against the Defendant and his co-offenders, but do not apply to the Plaintiff's action. The Plaintiff's action is not an action “for damage arising out of a tort” it is an action for recovery of a payment made pursuant to the provisions of the *Crimes (Victims Assistance) Act*.
23. In relation to the argument that the Defendant should not be held responsible for all of the injuries sustained by the victim arising out of the offending of others. It is not disputed by the Defendant that the assaults on the victim by he and his co-offenders happened at the same time. The Defendant does not attest to the facts of the assault as he remembers and therefore does not provide the Court with any evidence contrary to the claim that his offending resulted in the injuries to the victim, a bald statement that he did not cause all of the injuries is not sufficient. In any event, s 14 of the *Crimes (Victims Assistance) Act* makes it clear that where the victim suffers an injury as a result of :

“14(a) and offence committed by more than one offender only one application can be made”

24. The legislature is clear in its intention that where there are co-offenders, the victim cannot be compensated twice by applying for assistance arising out of each of the co-offenders offending and the corollary of that must be that co-offenders are jointly and severally liable for any injuries resulting from that offending.

25. In relation to the Plaintiff’s recovery action, I adopt Her Honour the Chief Magistrate’s reasoning in *Northern Territory of Australia v Miaris* [2006] NTMC 085:

“The *Crimes (Victims Assistance) Act* does not allow me to divide the amount equally or proportionately between relevant offenders for recovery purposes. I note that it appears to be accepted that the only finding of guilt for aggravated assault was made in relation to Mr Miaris. There is insufficient material before me to satisfy me that the victim contributed to his injuries or that the amount paid to the victim was excessive in all the circumstances. Section 21 Crimes (Victims Assistance) Act refers to an excessive “amount paid”. It therefore refers to the sum actually paid to the victim, not the circumstances more broadly defined. It does not envisage reducing the sum on the basis of multiple offenders. On that basis I could not find the amount paid to the victim was “excessive”.

26. The Defendant has not produced any evidence to suggest that the victim’s behaviour contributed to his injuries, he has not produced any evidence to support a finding that the amount paid to the victim in relation to the actual injuries received was excessive, he has not produced any evidence to suggest that the injuries claimed were not received by the victim as a result of the offending of he and his co-offenders, he cannot claim he was not guilty of the offence and therefore, has not produced any evidence which supports a defence to the Plaintiff’s action.

27. My orders are as follows:

(1) Defendant’s application to set aside judgment is dismissed.

(2) Costs are reserved.

Dated this 19th day of June 2009.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE