Auton v Northern Territory of Australia & Anor [2002] NTSC 69

PARTIES:	AUTON, Shane Lyall v NORTHERN TERRITORY OF AUSTRALIA AND: ROBERTS, Doc
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 11 of 2002 (20205018)
DELIVERED:	20 December 2002
HEARING DATES:	15 November 2002
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Solicitors:

Appellant:	D Alderman (William Forster Chambers
Respondent:	W Priestley (Priestley Walsh)

Judgment category classification:	B
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Mar0232

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

Auton v Northern Territory of Australia & Anor [2002] NTSC 69
No. LA 11 of 2002

BETWEEN:

SHANE LYALL AUTON
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND:

DOC ROBERTS
Second Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 20 December 2002)

[1] Appeal under s 19 of the Local Courts Act 1999 (NT) from a final order of the Local Court in proceedings brought by the appellant for an assistance certificate pursuant to the Crimes (Victims Assistance) Act.

[2] The appellant is a "victim" within the meaning of the Act, being a person injured as a result of the commission of an offence. For the purposes of the Act an "injury" relevantly means bodily harm, mental injury, mental shock or nervous shock. An application having been made pursuant to s 5 of the

Act, the Court had jurisdiction to hear the application and issue an assistance certificate (s 8). The application was heard on 15 August 2002 at which time it was provided in s 17 of the Act that "a fact to be proved by an applicant shall be sufficiently proved where it is proved on the balance of probabilities."

[3] In its application to this case, s 9 of the Act provides that in assessing the amount of assistance to be specified in an assistance certificate, the Court may include an amount in respect of pain and suffering, mental distress and loss of the amenities of life by the victim.

[4] The first respondent is obliged to pay the amount specified in the certificate within 28 days after it has issued and in certain circumstances has the right of recovery as against the person who committed the offence giving rise to the injury, in this case, the second respondent.

[5] The applicant mainly relied upon his affidavit sworn 17 June 2002. He thereby deposed he was a prison officer and that at about 6pm on 9 May 2001 he delivered food to prisoners, including the second respondent. Delivery was made by opening a hatch and putting the meal through it. When he put the meal through the second respondent's hatch he grabbed the applicant by the arm, pulled his arm into the cell and bit him on the hand; the bite drew blood and left the applicant with a bite mark on the back of his right hand which was sore for approximately three or four days. In addition to the injury thus described, the affidavit proceeds as follows:

"5. I then underwent bio hazard tests for diseases such as hepatitis and HIV. I asked other prisoner officers whether the second respondent had any of the dreaded diseases and I was advised that he did, but I was not told which one. I subsequently discovered that the second respondent did in fact have hepatitis C.

6. For approximately three months after the assault I practised safe sex with my wife. During that period I became aggravated much more easily and I was worried about catching a disease, particularly hepatitis C. Whilst I knew that it was unlikely that I would contract hepatitis C from the bite, I was still worried.

7. I have two children and it was always in the back of my mind that I might have caught a disease from the second respondent.

8. I initially received treatment at the prison medical service but subsequently sought treatment from Dr Ash Sankarayya."

[6] The medical records of that latter consultation disclose that the appellant was seen on 31 May 2001 by Dr Lyndon Best who noted that he was "bitten by a prisoner". The report goes on to say that the applicant was given a prescription for Stilnox (a Hypnotic) and sick leave for 31 May and 1 June 2001. (The difference in identity of the doctor whom the applicant consulted as disclosed in his affidavit and the medical report which was signed by Dr Sankarayya has assumed no importance).

[7] When the affidavit and medical report had been put before his Worship counsel for the applicant said there was no further evidence. She explained that Stilnox was a sedative. His Worship directed no question to the applicant's legal representative concerning any problems with the evidence before him and she did not address the court as to any inferences which was

sought to be drawn from the facts in evidence. The first respondent was represented but presented no evidence and made no submissions. The second respondent was not represented upon the hearing. He was in Darwin prison.

[8] As to quantum, the applicant's counsel submitted that:

> "The quantum of the certificate is at the higher end of the scale in terms of these type of cases and that is particularly because the applicant became aware that the second respondent did have hepatitis C. And, obviously, that creates a higher difficulty for the applicant than just a suspicion that the second respondent might be carrying some sort of disease."

[9] In his Worship's extemporary judgment, delivered at the close of the proceedings, he expressed himself satisfied as to the applicant's entitlement to an assistance certificate. Turning to the evidence regarding injuries, his Worship was satisfied that the applicant had suffered pain and suffering and mental distress, but said that neither was "amplified or elaborated upon". His Worship also noted the evidence that the injury to the hand was sore for three or four days, but again remarked that there was no evidence as to the extent of the soreness. His Worship then noted that the applicant had been prescribed Stilnox and was on sick leave for two days, but that there was nothing in the evidence to indicate whether the Hypnotic had any moderating effect so far as the pain was concerned or whether it enabled him to sleep and thus assist him with the pain. His Worship appears to have overlooked the fact that the applicant did not seek medical treatment from his doctor until 31 May, that is, 22 days after the incident and about 17 days

after the soreness had subsided. Clearly the problem for which the applicant sought medical advice on 31 May was not to do with the soreness.

[10] His Worship then turned to the question of the applicant's concerns regarding whether he may have become infected by the bite. His Worship commented that the applicant did not state the extent of his concern or worry although he claimed to have become aggravated much more easily, but he gave no examples of it. However, his Worship accepted that there was some mental distress or mental tension, although he was unable to determine the precise basis of it.

[11] Turning to the reference to the children, his Worship noted there was nothing before him as to how the applicant's concerns in any way affected his relationship with his children.

[12] As to the evidence that the applicant practised safe sex with his wife for approximately three months after the assault, his Worship noted that he did not say that that was brought about solely because of the bite:

> "There's an inference that he did, but I would have preferred to have appreciated more information as to why the safe sex was practised. It is not unknown for couples to practice safe sex as part of a normal routine, simply to avoid pregnancy. Whether the safe sex was practised as a result of the bite or for other reasons, I am not told".

[13] In the result his Worship found that there was some pain and suffering, but not the extent of it, that there was some mental distress and that there could

have been loss of amenities of life but he was not satisfied as to the extent of either.

[14] Concluding his remarks his Worship said:

> "In view of the vagueness and the lack of particularity of the effect of the assault on the applicant, I am of the view that only a small award is appropriate. I order that an assistance certificate, certifying that the Territory should pay the sum of $800 by way of assistance for the injury suffered by the applicant and costs."

[15] The grounds of the appeal are that the learned Magistrate erred in the award of $800, it being manifestly inadequate. Going to his Worship's reasons, it is suggested that he erred in that:

1. he determined that the appellant may have been practising safe sex for some reason other than that he had been bitten by the second respondent;

2. erred in his determination that he could not decide what effect the Hypnotic had on the pain and suffering of the applicant;

3. erred in his determination that he could not decide that the basis of the applicant's increase in aggravation was the bite;

4. erred in his determination that he could not decide that the applicant's relationship with his children had deteriorated as a result of the bite.

[16] By way of submission on appeal, it was put on behalf of the applicant that the learned Magistrate should have inferred that the Hypnotic was prescribed for the relief of pain and helping him to sleep, his increased aggravation was because of the fear he had of contracting a disease, and his relationship with his children deteriorated as a result of fear of contracting the disease. The question was also raised of the failure by his Worship to infer that the adoption of safe sex practises was as a result of the fear about contracting the disease from the bite.

[17] It can not be doubted that his Worship accepted the evidence which was placed before him, but it is now contended that he erred in law in failing to draw the inferences for which the appellant now contends.

[18] In *Australian Broadcasting Tribunal v Bond* (1991) 170 CLR 321 at p 355 Mason CJ said:

> "The question whether there is any evidence of a particular fact is a question of law: *McPhee v S Bennett Ltd* (1934) 52 WN (NSW) 8, at p 9; *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, at pp 137-138. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light Co v Valuer-General*; *Hope v Bathurst City Council* (1980) 144 CLR 1, at pp 8-9. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v Broken Hill South Ltd* (1941) 65 CLR 150, at pp 155, 157, 160. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473, at pp 481, 483.
>
> But it is said that "[t]here is no error of law simply in making a wrong finding of fact": *Waterford v The Commonwealth* (1987) 163

CLR 54, at p 77, per Brennan J. Similarly, Menzies J observed in *Reg v District Court; Ex parte White* (1966) 116 CLR 644, at p 654:

> "Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law."

Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

[19] Leaving aside for the time being the complaint as to the inadequacy of the award, to bring himself within the appeal provisions the appellant must demonstrate that any or all the inferences for which he contends can be drawn by pointing to evidence which admits of different conclusions, one of which supports his claim. Once that basis in law for the drawing of inference has been demonstrated, then the Appeal Court is in as good a position as the trial Judge to decide on a proper inference (*Warren v Coombes* (1979) 142 CLR 531).

[20] Does the evidence reasonably admit of any different conclusions? That is, did the matters in relation to which the applicant made complaint in his affidavit relate to the bite and concerns he expressed concerning his becoming diseased, or did they not? I think so. In seems that his Worship did so infer, except for the safe sex question. Given the context in which the evidence was advanced, I consider that his Worship erred in not

inferring that the safe sex practise was adopted because of the appellant's concerns about disease arising from the bite. That was an error of law.

[21] However, there are no primary facts from which any inference could be drawn on the path of assessing the amount of assistance to be specified. His Worship noted that there was no evidence going to the degree of pain and suffering or mental distress which he found to have existed. He erred in relation to the relationship between the medication prescribed at the end of May and pain relief. There was no evidence to that effect. Such evidence as there is is suggestive of medication being prescribed in relation to symptoms arising from the appellant's concerns about disease. However, and for example, there is no evidence as to how long after the event those concerns gave rise to the symptoms, how they affected the appellant and the degree to which the medication alleviated them, and as to what period elapsed after the medication was prescribed and the symptoms were relieved.

[22] The nature of the "safe sex" practises is not disclosed nor is any evidence as to what, if any, compensable loss was brought about as a result. As embarrassing as detailed evidence of sexual relations may be, potentially the courts can not speculate.

[23] Facts necessary to found a proper assessment must be proved and not "left to rest in surmise, conjecture or guesswork" per Buckley LJ in *Hawkins v Powells Tillery Steam Coal Co Limited* [1911] KB 988 at 996.

[24] The identified errors do not lead me to consider that the amount of $800 specified ought to be increased.

[25] It is open to doubt whether an appeal against an assessment under the Act upon the ground that the amount specified was manifestly inadequate is an allegation of an error of law. This was not a matter upon which submissions were made before me, but I would refer the parties to the judgment of Dixon CJ and Kitto J in *Miller v Jennings* (1954) 92 CLR 190 at 195.

[26] Upon hearing the appeal counsel for the respondent referred to *Water Board v Moustakas* (1987) 180 CLR 491 in support of a submission that the appellant should not be allowed upon the hearing of the appeal to advance matters that were not advanced in the Local Court. It was not put that the respondent was disadvantaged by not being in a position to call evidence in response to the new submissions. In any event, given the result upon appeal, it is not necessary for me to pursue that submission any further.

[27] As to appeals from the Local Court under the Crimes (Victims Assistance) Act see, for example, *LMP v Collins & Ors* (1993) 112 FLR 289, *Hansen v Northern Territory of Australia* (1994) JSCNT 777 and *Ahfatt v Northern Territory of Australia*, Supreme Court of the Northern Territory, unreported, 6 November 1998.

[28] The appeal is dismissed.
