Margaret Myra Chabrel v. Northern Territory of Australia and Ron Pulla Mills
[1999] NTSC 113

PARTIES:	MARGARET MYRA CHABREL
	v
	NORTHERN TERRITORY OF AUSTRALIA AND RON PULLA MILLS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	45 of 1999
DELIVERED:	27 October 1999
HEARING DATES:	13 October 1999
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal – *Crimes (Victims Assistance) Act* – pre-existing condition – grief reaction became pathological – mental injury

Appeal – meaning of victim – compensable injury occurring by or as a result of a criminal act – causal relationship between injury and act is question of fact.

Appeal – meaning of injury – meaning of mental injury, mental shock, nervous shock – impracticable and undesirable to develop precise definition – question of fact and degree – more than mere sorrow and grief.

Appeal – compensable injury – monetary assessment – appellate court to make such order as thinks fit as to costs when Orders certificate to issue

Legislation

1. *Crimes (Victims Assistance) Act:* s5; s5(1); s4(1); s5A; s9(2); s8(10); s13(2)
2. *Local Court Act 1989;* s19(1); s19(6).
3. *Criminal Injuries Compensation Act 1969-1974.*

Cases

1. *Ah Fatt v The Northern Territory of Australia and Dingul* (unreported, 6 November 1998, Mildren J), applied.
2. *Fagan v Crimes Compensation Tribunal,* followed.
3. *Battista v Cooper* (1976) 14 SASR 225, followed.
4. *T v The State of South Australia & Anor* (1992) Aust Torts Rep 8-167, applied.
5. *In Re Gollan* (1979) 21 SASR 79, mentioned.
6. *Saunders v Rowden and the State of South Australia* (1980) 24 SASR 547, mentioned
7. *Delaney v Celon* (1980) 24 SASR 443, mentioned.

REPRESENTATION:

Counsel:

Appellant:	T Morgan
Respondent:	J McBride

Solicitors:

Appellant:	Morgan Buckley
Respondent:	John G McBride

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA AT ALICE SPRINGS
No. 45 of 1999

[1999] NTSC 113

BETWEEN:

MARGARET MYRA CHABREL
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA AND
RON PULLA MILLS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 27 October 1999)

Mildren J

[1] This is an appeal pursuant to s19(1) of the *Local Court Act 1989* from a decision of Ms Deland SM who refused to grant an application for an assistance certificate pursuant to s5 of the *Crimes (Victims Assistance) Act.*

[2] On 29 March 1997 Alison Margaret Vigar (the deceased) was killed as the result of a motor vehicle accident caused by the dangerous driving of the respondent Mills, who was subsequently convicted of an aggravated dangerous act in respect of that driving, and sentenced to a term of imprisonment. The accident occurred at Alice Springs. Later the same evening police called to the appellant's home and advised the appellant that

the deceased, who was her daughter, had been involved in an accident and had died during surgery at the Alice Springs Hospital.

[3] In March 1996 the appellant had been diagnosed as suffering from Glandular Fever. She was then employed as the Program Manager for the Northern Territory Southern Region Children Services Resource And Advisory Program (NTRAP). This was a full time position in which she earned $35,000 per annum. Due to her Glandular Fever, she was unable to work until September 1996, when she resumed her employment on a gradual return to work program. She suffered a relapse in October 1996 but by March 1997 she was able to resume her employment on a limited basis of three hours per day. After being told of her daughter's death, the appellant has not resumed work.

[4] According to the report of her psychiatrist, Dr Jackson, for the first few weeks after the deceased's death she was active and coping well with the practical details of her daughter's death, so that, immediately after the death, her symptoms were reduced, but within a matter of weeks her symptoms returned and she became, to use the appellant's words, "the worst I have ever been".

[5] In May 1997 the appellant's general practitioner diagnosed her condition as Chronic Fatigue Syndrome (CFS). That diagnosis has since been confirmed by two physicians, Dr Ian Buttfield and Mr John R Graham. Their reports indicate that it is connected in some way with viral illnesses she has had in

the past, and Dr Buttfield's report indicates that she has had that complaint for some time and that the previous diagnosis of Glandular Fever was incorrect. The psychiatrist, Dr Jackson, agrees with this diagnosis but adds that she also has a psychiatric illness, which is a component of CFS. In his report, he stated:

> It is my opinion that her daughter's death had a major psychological impact and that this has persisted. By her account, she had a typical, and essentially normal, grief reaction immediately after her daughter's death. It is also my opinion that her grief became caught up with a spectrum of physical conditions, particularly fatigue and weakness, which she, and apparently her doctors, believe are best diagnosed as Chronic Fatigue Syndrome. It is my opinion that her normal grief reaction became pathological in that it was a major contributor to her apparently organic symptoms and disabilities that have persisted since...
>
> The essence of my opinion is that this woman is currently suffering from a moderate to severe psychiatric condition that could be termed a mental injury or mental distress. The death of her daughter is a significant contributing factor to her current mental distress. Further, her current psychiatric condition and mental injury is not normal grief.

[6] In May 1997 the appellant also consulted a psychologist, Mr San Roque. He records a similar history of her coping well immediately after her daughter's death, but needing assistance by the time he saw her. He stated in his report that he undertook to work with the appellant with the principal focus being on 'grief counselling'. However, since then, he had become aware of the diagnosis of CFS, as to which he said:

> I am not qualified to confirm the accuracy of that diagnosis except to say that the symptoms of CFS and the deportment of a person in grief may be similar and indeed, compound each other. I refer to a sense of

> bodily fatigue, difficulty in carrying out normal activity, difficulty in memory and thinking, and a general demeanour of depression and loss of vitality.
>
> It would be far too trite to argue that Ms Chabrel's state of being is due to Chronic Fatigue Syndrome and therefore her current state has no relationship to the impact of her daughter's death. It would be just as valid to argue that the persistence of the condition described as Chronic Fatigue Syndrome is due in large part to her grief and diminished sense of vitality following the loss of her...daughter, Alison.

[7] Subsequently, when Dr Jackson's report became available to him, Mr San Roque wrote:

> Bearing in mind Dr Jackson's report we need to consider that Ms Chabrel's condition involves a combination of physical factors which have been variously diagnosed as Glandular Fever and Chronic Fatigue Syndrome with a combination of psychological factors linked to a grief reaction which has become a pathological condition which can no longer be described as normal grief (Jackson report p5).

[8] At the hearing before the learned Magistrate, the evidence was in the form of the appellant's affidavit to which there were a number of annexures including the various medical reports. No oral evidence was given. The defendants did not call or tender any evidence in reply.

[9] The learned Magistrate held that given the appellant's pre-existing physical condition, she was not satisfied "that her current physical state is not simply a continuation of that illness, irrespective of any effects of any psychological impact of the death of her daughter". She had earlier noted that "there is not evidence before me to tell me the extent of her symptoms prior to the death of her daughter, as compared with those she currently

suffers", and that "she has...suffered symptoms of substantial fatigue which would appear to be consistent with a continuation of the illness she suffered prior to her daughter's death. I accept that if the appellant had suffered from a mental injury which exacerbated her previous condition, that she would be entitled to an assistance certificate, as: "an offender must take the victim as they find them(sic)"."

[10] It was submitted that the appellant was a "victim" within the meaning of the Act notwithstanding that she was not directly involved in the crime. S4(1) of the Act defines "victim" to mean "a person who is injured or dies as the result of the commission of an offence by another person". In *Ah Fatt v The Northern Territory of Australia and Dingul* (unreported, 6/11/98), after reviewing the provisions of the Act in some detail, I said (at p15) that "claims by victims under s5(1) are not limited to injuries caused to victims in the course of a crime against the victim". In *Fagan v. The Crimes Compensation Tribunal* (1982) 150 CLR 666, the High Court held that a child, who suffered nervous shock upon learning of the death of his mother, suffered a compensable injury as it occurred "by or as a result of the criminal act" of the murderer. The wording used in the Northern Territory's Act is not identical to that used by the Victorian Act which the High Court considered, but there is no difference of any significance. It is therefore sufficient if the appellant is able to prove that she was "injured", and that this injury was causally related to the offence. In *Fagan v. The Crimes Compensation Tribunal,* Mason and Wilson JJ (who presented Aickin J's

unpublished judgment as their own), and with whom Murphy J agreed, said (at p673):

> All that is required is a causal relationship; both the word "by" and the phrase "as a result of" indicates a causal connexion. Whether that relationship exists or not is primarily a question of fact. The fact that other unconnected events may also have had some relationship to the occurrence is not material if the criminal act was a cause, even if not the sole cause.

Later on the same page their Honours said that the principles of tort law which have developed to place limitations on those who have claims for damages as the result of "nervous shock" was a mistaken approach; there need only be a causal connection. These observations are equally applicable to the Northern Territory's Act.

[11] S5(1) requires that the "victim" suffered "injury" as the result of that offence; consequently it is necessary to consider the definition of "injury" contained in s4(1):

> "injury" means bodily harm, mental injury, pregnancy, mental shock or nervous shock, but does not include injury arising from the loss of or damage to property (which loss or damage is the result of an offence relating to that property).

[12] The words "mental injury" are wide enough to include grief, but s5A and s9(2) of the Act prevents the award of any amount in respect of grief to the appellant in this case, as an award for grief is limited to claims by a parent of a victim under the age of eighteen or the widow, widower or surviving *de facto* partner of the victim: see *Ah Fatt v The Northern Territory of Australia and Dingul, supra,* at p14.

[13] The Act does not further define "mental injury", but the concept has been discussed in decisions, particularly of the Supreme Court of South Australia, in the context of a definition of "injury" in the *Criminal Injuries Compensation Act*, 1969-1974 (SA), viz:

> "injury" means physical or mental injury sustained by any person, and includes pregnancy, mental shock and nervous shock.

It is clear from the definition in this Act that "mental shock" and "nervous shock" are treated as subgroups of "mental injury", as is evident from the word "includes". The definition used in the Northern Territory's Act lacks the elegance and logical simplicity of that used in the South Australian Act, but I am satisfied that there is no significant difference for these purposes.

[14] The South Australian authorities, which have considered what is meant by "mental injury", have concluded that it is not necessary to show that the applicant suffered any mental or psychiatric illness. The concept of mental injury included emotional upset if it caused actual injury to physical or mental health going beyond mere grief: see *Battista v Cooper* (1976) 14 SASR 225 at 227; *T v The State of South Australia & Anor* (1992) Aust Torts Rep 8-167. In the latter case, Legoe J (with whom Millhouse J agreed), said, at p61,328:

> 1. It is now well settled that the definition of injury (in section 4) equates the sort of physical or mental injury for which compensation may be recovered under the Act, with the sort of physical or mental injury for which damages may be recovered at common law; see *Battista & Ors v Cooper & Ors* (1976) 14 SASR, 225 at 227 per Bray CJ; *In Re Gollan* (1979) 21 SASR 79; *Saunders v Rowden & the State*

of South Australia (1980) 24 SASR 547 and *Delaney v Celon* (1980) 24 SASR 443 at 447 per Jacobs J.

2, Although mere sorrow and grief which cause emotional distress and no more, are insufficient taken alone to establish a compensable injury under the Act, nevertheless distress which in addition results in some sort of actual injury to physical, mental or psychological health, will be compensable under section 7 of the Act; see *Delaney v Celon*, *supra*, at 447 per Jacobs J.

[15] In the same case, Olsson J said, at pps 61,334-5:

Like the learned trial judge, I am of the opinion that the definition contained in the statute, does not require the court to conclude that the evidence unequivocally establishes that symptomatology exhibited by a claimant is such as to warrant medical classification as some recognizable, psychiatric condition, as a prerequisite to coming to a conclusion that a claimant has proved the existence of a relevant injury. Indeed, such a conclusion would run counter to its express terms.

The statutory definition itself stipulates that the existence of mental shock or nervous shock alone is sufficient to constitute an injury in the relevant sense. In my opinion it is quite impracticable and undesirable to attempt to do that which the statute itself does not attempt to do, and develop precise definitions or identify ranges of practical situations which do or do not fall within the concept of injury as defined.

What is essentially involved is a question of fact and degree which needs to be considered on a case by case basis.

Whilst I accept that the statute obviously has in contemplation something more than a condition of mere sorrow and grief, nevertheless, what the court is required to do is to consider the situation of a claimant following a relevant criminal act and contrast it with that which pre-existed the act in question. Leaving aside proven conditions of mental or nervous shock, 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 wellbeing, 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 sustained mental injury.

[16] Further, the Full Court's decision unanimously held that the trial judge erred in discounting or deducting from the award any amount for normal grief and distress. Olsson J said, at p63,335:

> Once it be established that a relevant injury as defined has been sustained by a claimant in compensable circumstances, then the court is required, as a first step, to make a monetary assessment of the damages which ought properly to flow, in recognition of the total relevant deleterious change in the condition of a claimant which has been brought by the wrongful conduct of an offender.
>
> What is necessarily in contemplation is the actual condition to which a claimant has been reduced by virtue of the relevant injury, by way of contrast with that which pre-existed the conduct under contemplation. I know of no common law principle which requires some discount to be applied by way of allowance, for that component of the sequelae of wrongful conduct which can be attributed to what might loosely be described as normal mere grief or sorrow. In any event an attempt to do so would, in most instances, be a pointless and impossible exercise.

[17] I respectfully adopt these observations, which in my opinion accurately reflect the approach to be taken in considering whether or not an injury was sustained by the appellant in this case; and if so, the approach to the assessment of quantum.

[18] Counsel for the appellant, Mr Morgan, relied upon a number of grounds of appeal, but I think it will be sufficient if I mention two particular matters. The first is that there was evidence in the report of the psychiatrist, Dr Jackson, that the appellant had suffered a mental injury which went beyond mere grief (see para [5] above). There was also evidence that the

psychologist apparently later accepted this opinion (see para [7] above), which is not necessarily inconsistent with his earlier opinion that the persistence of the appellant's CFS was due to her grief (see para [6] above). The other reports do not mention any mental injury. The learned Magistrate's conclusion that she was not satisfied that the appellant's *current* physical state was no more than a continuation of her pre-existing illness, overlooks the opinions of the psychiatrist and psychologist. Having regard to the fact that Mr Jackson was aware of the nature of the appellant's pre-existing symptoms, it is a reasonable inference that his opinion was that her pre-existing illness had been exacerbated by her daughter's death (even though he does not specifically use the word "exacerbate"), because he attributes the death as a significant contributing factor to her current mental distress. This inference is supported by the appellant's evidence which shows that prior to March 1997, she was able to work for three hours per day, but since her daughter's death, she had been unable to work at all. The appellant also said in her affidavit (para [11]) that "my injury has changed my life" – she then proceeds to narrate in what way. The learned Magistrate was not prepared to draw this inference apparently because (1) there was no evidence as to the extent of her symptoms before her daughter's death and (2) the symptoms she now suffers are consistent with a continuation of her pre-existing illness. The appellant's significant symptoms before the death of her daughter related to her feelings of fatigue and the extent to which this

prevented her from pursuing her normal activities, as to which, with respect, there was some evidence, albeit perhaps not in much detail.

[19] Mr Morgan relied upon a number of authorities to the general effect that, in a matter where the facts are not in dispute, if the material can reasonably lead to but one conclusion, viz., that the case falls within the ordinary meaning to be given to the words of the statute, and the tribunal of fact has arrived at a different conclusion, there is an error of law; but if different conclusions are reasonably possible, that is a question of fact: see *N.S.W. Associated Blue-Metal Quarries Limited v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512 per Kitto J; *Commissioner of Taxation v Cooper* (1991) 29 FCR 177 at 194-5; *Collector of Customs v Pozzolanic Enterprises Pty Ltd: Collector of Customs v Pressure Tankers Pty Ltd* (1993) 43 FCR 280 at 288; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32 at 38-39; *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1 at 8; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Others* (1997) 115 NTR 25 at 32. In his submission, the facts in this case compelled a finding that the appellant sustained a mental injury as a result of the crime, viz., an exacerbation of her pre-existing illness.

[20] Counsel for the respondent, Mr McBride, submitted that it was open to the learned Magistrate to arrive at the conclusion she did, and in doing so, to evaluate each medical report, and to prefer one account or opinion to another even if, in doing so, the material of a particular author's report is

segmented. The learned Magistrate, so it was suggested, drew up on the lack of any opinion from the physicians, Dr Graham and Dr Buttfield about any mental injury. The problem with this submission is that there is nothing surprising about a physician offering no comment about there being, in addition to a medical condition which is within his or her speciality, another condition which is not. Moreover, the learned Magistrate did not draw the suggested conclusion. All that she said was that, having reviewed certain of the evidence, including the evidence of the physicians, she did not consider any of the reports so far were sufficient to establish that the appellant had suffered a mental injury. However, that is not so with the report of the psychiatrist who said, in a passage quoted by her Worship, that:

> the essence of my opinion is that this woman is currently suffering from a moderate to severe psychiatric condition that could be termed a mental injury or mental distress.

The learned Magistrate says that the evidence is that her symptoms of substantial fatigue would appear to be a continuation of her pre-existing illness. There is no medical evidence which asserts this, and, to the contrary, the evidence of the psychiatrist is, in a passage quoted by the learned Magistrate, that the death of her daughter was a significant contributing factor to her current mental distress.

[21] I consider that the submissions of Mr Morgan must be accepted. The evidence of the psychiatrist demonstrated the existence of a mental injury within the meaning of the authorities to which I have referred and which was

contributed to by the deceased's death, and which went beyond normal grief. There was evidence to show that the appellant's injury had further reduced the appellant's capacity to work and to enjoy life. There was no evidence to support the conclusion arrived at by the learned Magistrate, unless the evidence of the psychologist was to be entirely disregarded. There was no basis for so doing; nor did the learned Magistrate purport to do so. In these circumstances an error of law has been established, as the only conclusion open on the facts not in dispute leads to the opposite conclusion to that arrived at by the learned Magistrate.

[22] As the appeal must be allowed, the question now is what order should be made. S19(6) of the *Local Court Act* provides that in these circumstances the Court may make such order as it thinks fit, including an order remitting the case for rehearing. As the facts are not in contest, I consider that I should myself decide upon the amount of the assistance certificate to be issued.

[23] The evidence is that the appellant is 50 years of age. Prior to March 1997 she worked as the Program Manager for NTRAP. Her pre-existing illness precluded her from then working for more than three hours per day. After she sustained her injury, she has been unable to return to work. There is no evidence which enables me to find that but for her injury, her pre-existing illness may have eventually resolved itself. She is now reliant upon a Red Cross Home Helper to assist her in house cleaning. Since about December 1997, she has been using a wheelchair whenever there is much walking or

standing involved. She is more easily tired and fatigued than she used to be, and suffers from poor concentration, mental fatigue, and some memory loss. She suffers now from shortness of breath when fatigued. She has suffered loss of confidence and self-esteem from not being able to work. She will require ongoing psychological assistance and drugs. Her prognosis is poor, and her condition is close to permanent impairment. In my opinion, damages at common law for mental distress, pain and suffering and loss of amenities of life would significantly exceed the statutory limit of compensation which is fixed at $25,000. There is also evidence of pecuniary loss. As at March 1997, her gross salary for full time work was $35,000 per annum. I am not told what payment she received for the three hours per day she was able to work, but clearly she would have received somewhere around one third of her normal income, say $15,000 per annum gross. I do not have the net figures, but assuming no tax on the first $5,000 and then tax at $33^{1}/_{3}$%, the difference is likely to be about $12,000 per annum, or about $241 per week net. Projected over the remainder of her likely working life, at say 15 years, at 3% tables, the total loss is in the order of $150,000, less an allowance of say 15% for contingencies. There is no evidence that the appellant is entitled to any payment of the kind contemplated by s13(2) of the Act. In the circumstances, as it is plain that the appellant's losses vastly exceeds the statutory maximum, the appellant is entitled to a certificate for the sum of $25,000, and I order that a certificate be issued accordingly. Pursuant to s8(10) of the Act, I further order that the

respondents pay the appellant's costs and disbursements in the Local Court action to be taxed by the Local Court, and that the Northern Territory of Australia pay the appellant's costs of this appeal to be taxed by the Master.
