Northern Territory of Australia v Dean [2006] NTCA 6

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v DEAN, Gary Roy
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 10 of 2005
DELIVERED:	24 August 2006
HEARING DATES:	5 May 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ
APPEAL FROM:	*Northern Territory of Australia v Dean* [2005] NTSC 66

CATCHWORDS:

CRIMINAL LAW – victims of crime – contribution of victim's conduct to injury – whether provocation by victim's conduct – causation of injury – whether reduction of amount – Crimes (Victims Assistance) Act NT s 10 – appeal dismissed

Crimes (Victims Assistance) Act, s 5, s 10, s 10(2)
Crimes Compensation Amendment Act 1989, s 12(a)
Criminal Code, s 34

Austin J,*"A Plea for Excuses"* (1956) 57 Proceedings of the Aristotelian Society 3

Dressler J, *"Provocation Partial Justification or Partial Excuse?"* (1988) 51 M.L.R. 467

McAuley F, *"The Theory of Justification and Excuse: Some Italian Lessons"* (1987) 35 Am. J. Comparative Law 359

McAuley F,*"Anticipating the Past: The Defence of Provocation in Irish Law"* (1987) 50 M.L.R. 133

Followed

Lanyon v Northern Territory of Australia & Anor (2001) 166 FLR 189

March v E & MH Stramare Pty Ltd & Anor (1991) 171 CLR 506

South Australia v Nguyen (1991) 57 SASR 252

South Australia v Richards (1997) 69 SASR 263

Referred to

Graeme v Dean [2001] QSC 420

Hart v R (2003) 27 WAR 441

R v Criminal Injuries Compensation Board; ex parte Ince [1973] 1 WLR 1334

R v Haywood (1833) 6 C&P 157; 172 ER 1188

Re Koot v Crimes Compensation Tribunal (1989) 3 VAR 142

REPRESENTATION:

Counsel:

Appellant:	M Grant
Respondent:	J McCormack

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent:	John McCormack

Judgment category classification:	B
Judgment ID Number:	Mil06378
Number of pages:	29

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

Northern Territory of Australia v Dean [2006] NTCA 6
No. AP 10 of 2005

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

GARY ROY DEAN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 24 August 2006)

Martin (BR) CJ:

[1] The facts of this appeal are set out in the judgments of Mildren and Southwood JJ. At issue is the application of s 10 of the Crimes (Victims Assistance) Act and the proper construction of that section.

[2] The test to be applied is found in the wording of s 10(2). Proximity between the relevant conduct of the victim and the causing of injury to or the death of the victim is a relevant factor in determining whether the victim's conduct "contributed to" that injury or the death. But such proximity is not the legal test of contribution for the purposes of s 10.

[3] In my view, while there is room for the view that the learned Magistrate and learned Judge treated the issue of proximity as if it was the determinative test, in the circumstances as found by the Magistrate there was no causal link between the conduct of the respondent and the unprovoked assault which caused the relevant injuries to the respondent.

[4] I agree with the reasons of Mildren and Southwood JJ for dismissing the appeal.

Mildren J:

[5] This appeal involves the proper interpretation to be given to s 10 of the Crimes (Victims Assistance) Act.

Factual background

[6] On 12 October 2000 the respondent was assaulted by one David Graham McKinnon (McKinnon) whilst sitting in a bar known as the "Blue Heelers Bar" in Mitchell Street, Darwin. As a result of the assault, the respondent suffered personal injuries and sought compensation under the provisions of the Crimes (Victims Assistance) Act. The application was brought against the Northern Territory of Australia and against McKinnon in terms of the legislation as it then required.

[7] Section 10 of the Act provides:

> **10. Behaviour of victim, &c., to be taken into account**
>
> (1) In considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate, the

> Court shall have regard to the conduct of the victim and to any other matters it considers relevant.
>
> (2) Where the Court, on having regard under subsection (1) to the conduct of the victim, is satisfied that the victim's conduct contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate by such amount as it considers appropriate in all the circumstances.

[8] It was contended on behalf of the appellant in the original proceedings brought in the Local Court that the amount of assistance payable to the respondent should be reduced under s 10.

Circumstances giving rise to the claim for contribution

[9] According to the affidavit material lodged in the Local Court, the respondent originally came to the Northern Territory in 1999. Initially he spent about six months working with a tree logging operation in Katherine, after which he came to Darwin in October of that year. In December 1999, he commenced employment with Paspaley Pearls at Raffles Bay near Crocker Island.

[10] The respondent's work required him to live at Raffles Bay for periods of some five weeks at a time. He would then be brought back to Darwin, where he would enjoy a week off.

[11] The respondent knew a woman, J, who lived in a flat in The Narrows. The respondent had known J for about 10 years. J had been in a romantic relationship with McKinnon since August 1999.

[12] In about August 2000, the respondent had visited Darwin and stayed with J at her flat for about two days.

[13] On Thursday 5 October 2000, J received a phone call from the respondent asking if he could stay with her again. J indicated to him that this would be all right. The respondent arrived at her flat on Friday 6 October at about 1:00 pm.

[14] It is not necessary to go into the circumstances leading up to the events on 10 October in great detail. Suffice it to say that the respondent spent a considerable amount of time with J over the period up to 10 October and they had on several occasions been drinking heavily together.

[15] On Monday 9 October 2000, the respondent and J went to the Paspaley showrooms where the respondent purchased a pearl necklace and according to J he gave it to her for allowing the respondent to "crash on my couch". On the following day, 10 October, J and the respondent visited a friend of the respondent's where they consumed a fair amount of alcohol. By the time they returned to J's flat, J said that she was fairly drunk and decided to "crash out for a while". According to her she went into her bedroom, got into bed and went to sleep.

[16] According to McKinnon, J had told him that the respondent had given her the necklace and that his behaviour had made her feel uncomfortable. McKinnon arranged to have a barbeque at a friend's house at the 11 Mile so

that the respondent could attend as he hoped to arrange for the respondent to stay there instead of at J's flat.

[17] At about 5:30 pm on 10 October, McKinnon telephoned J's flat to confirm the arrangements for the barbeque. McKinnon spoke to the respondent who informed him that J was asleep. McKinnon said that he would be coming over soon. When he arrived a little while later the respondent was no longer there. J complained to McKinnon that she had been raped by the respondent, only 10 minutes beforehand. McKinnon arranged for the police to be notified and a police investigation into the alleged rape ensued.

[18] At about 8:00 pm on 12 October 2000, McKinnon went to the Blue Heelers Bar. This was a bar which the respondent frequented as McKinnon well knew. When he entered the bar he saw the respondent sitting at the main bar by himself. There is a difference between the accounts given by the respondent and by McKinnon as to what exactly happened, but it is common ground that McKinnon spoke to the respondent very briefly whilst McKinnon ordered his drink. After having ordered his drink, McKinnon went to the toilets. Upon returning to the bar it is common ground that McKinnon assaulted the respondent. It is also common ground that the respondent had not done anything whilst in the bar to provoke McKinnon.

[19] The respondent was subsequently tried for the rape of J and was acquitted.

[20] J apparently had also made a claim for compensation under the Act, but appears to have passed away before her claim could be finalised.

[21] The material before the learned Magistrate included an affidavit made by J in relation to the alleged rape in which she annexed copies of her statements to the police.

[22] The respondent in his affidavit denied having raped J. According to his account, sexual intercourse between them was consensual. The respondent was not cross-examined on his affidavit.

[23] In addition the learned Magistrate had in evidence before him the respondent's record of interview with the police in which the respondent denied that he had raped J. In the record of interview he did not deny having sexual intercourse with J, but claimed that it was consensual.

[24] The learned Magistrate fell short of finding that the respondent had raped J. The essential reason for doing so was that the learned Magistrate found that irrespective of whether the respondent's behaviour toward J was criminal or merely ungallant, the respondent's conduct did not contribute to his own injury.

[25] The learned Magistrate said:

> "It seems to me that the "conduct of the victim" spoken on in s 10(1) of the Act, seen in the light of the phrasing of s 10(2) "the victim's conduct contribute to the injury or death of the victim", entails a fair degree of proximity, especially temporal proximity, between the conduct of the victim, on the one hand, and the injury or death, on the other. Such proximity would certainly be lacking between the conduct of a paedophile, on the one hand, and the beatings administered to him by fellow prisoners after his conviction and imprisonment, on the other. Similarly, proximity would be lacking in the case of a spearing administered after due consideration as "payback" according to Aboriginal customary law. It seems to me

that the necessary proximity is lacking in the present case. Things might be different if Mr Dean, knowing that Mr McKinnon was very angry with him, had gone looking for him in order to pacify him. That might be conduct as stupid as the conduct of the unsuccessful claimant in Re Manson and Criminal Injuries Compensation Board (1989) 68 OR (2d) in which, at page 117 Campbell J said:

> 'In this case the appellant ought to have foreseen the probable consequence of twice deciding to further a dispute with an armed man who had just put a gun to his head and threatened to blow his head off. The appellant got an injury of the type that any reasonable, prudent person should have seen, that he should have foreseen.'

Here the case is very different. Not only did Mr Dean not go looking for trouble, and not only did he not incite it. Additionally, the first contact between him and Mr McKinnon went off peaceably enough. It was only after Mr McKinnon's return from the toilet that he boiled over and attacked Mr Dean without warning. In my judgment, even if I had been persuaded that Mr Dean had raped J two days before, even if he had been found guilty of that rape – his crime would not in these circumstances be characterised as conduct contributing to his injury."

[26] On appeal to the Supreme Court the learned Judge held that the learned Magistrate had not erred in his conclusion that the only conduct of the respondent relevant to the exercise of his discretion under s 10 of the Act was conduct that was immediately temporally proximate to the assault occasioned upon him Mr McKinnon.

[27] In this Court the appellant argued that both the learned Magistrate and the Judge below had misdirected themselves. It was submitted that s 10 of the Act required the Court to be satisfied that the victim's conduct contributed to the injury or death of the victim. It was submitted that contribution in this sense requires the assessment of the link between the conduct and the injury. The inquiry whether there is a link is not satisfied by determining whether

there was temporal proximity between the conduct and the injury or death. Causal or circumstantial proximity are also relevant. It was put that conduct may be really or effectively causative of injury without being temporally proximate to the event.

[28] In my opinion, s 10(2) when it refers to the Court being satisfied that the "victim's conduct contributed to the injury or death of the victim" requires a causal link.

[29] In *Lanyon v Northern Territory of Australia & Anor* (2001) 166 FLR 189 at 194-195, Bailey J applied a commonsense test of causation. In doing so it is clear that his Honour was referring to the test of causation favoured by the High Court in *March v E & MH Stramare Pty Ltd & Anor* (1991) 171 CLR 506. I agree with his Honour that that is the appropriate test of causation to be applied. It follows from this that proximity in a temporal sense between the conduct and the injury is not always a determinative factor. Section 10 is not only concerned with the acts of a victim which led to the criminal conduct which caused the victim's injury. It is plain that it would also include acts of the victim in failing to take steps to mitigate his or her loss by seeking appropriate medical treatment, for example. Clearly in such a case, such conduct would have contributed to the victim's injury. In this particular case on the findings made by the learned Magistrate, there was no causal link between the conduct of the respondent in having sexual intercourse with J and McKinnon's unprovoked assault in the Blue Heeler Bar two days later. It may be that the fact that the respondent had sexual

intercourse with J was a *causa sine qua non*, but that does not make it a relevant cause for legal purposes. McKinnon was not physically present in the flat at the time intercourse took place. His belief that J had been raped was based upon what J had told him. In my opinion the conclusion which the learned Magistrate and the learned Judge reached in the circumstances of this case is correct. In a case where the Northern Territory is claiming that the conduct of the victim contributed to his own injury because his conduct provoked the assault, I agree with the learned Magistrate and the learned Judge that there must be a sufficient proximity in time between the provoking conduct and the subsequent assault. Therefore, although I consider that on one view of the findings of the learned Magistrate and of the Supreme Court, it maybe that the test of causation was expressed too broadly, I do not consider that there was any error in the end result.

[30] The second aspect of s 10 which I think should be mentioned is that not only must the conduct be causally connected in the relevant sense, but s 10(2) requires the Court, if satisfied that there is a causal connection, to reduce the amount of the assistance "by such amount as it considers appropriate in all the circumstances". Clearly in carrying out that exercise, there are a number of other considerations which will come into play, including the blame worthiness of the victim as well as other factors including the extent to which the victim's conduct contributed towards the victim's injury and whether there are any policy matters which also need to be considered.

[31] It is unnecessary to consider this aspect of the case any further.

[32] For these reasons I joined with the other members of the Court in deciding that the appeal should be dismissed with costs.

Southwood J:

Introduction

[33] This was an appeal from a judgment of Thomas J delivered on 10 October 2005 whereby her Honour dismissed the appellant's appeal from the Local Court. The appeal was dismissed by the Court of Appeal on 5 May 2006.

[34] The history of the proceeding is as follows. On 11 October 2001 the respondent, Mr Dean, made an application in the Local Court for an assistance certificate under s 5 of the Crimes (Victims Assistance) Act ("the Act"). The application was brought against the Northern Territory of Australia and Mr David Graham McKinnon. Mr Dean's application was heard in the Local Court on 15 December 2004. At the hearing in the Local Court the appellant argued that the amount of assistance to be specified in any assistance certificate granted by the Local Court in favour of the respondent should be reduced in accordance with s 10(2) of the Act as the appellant contended that Mr Dean was assaulted by Mr McKinnon because Mr Dean had unlawful sexual intercourse without consent with "J" who was Mr McKinnon's girlfriend.

[35] On 15 April 2005 under s 8 of the Act the Local Court issued an assistance certificate in favour of Mr Dean. The presiding magistrate rejected the appellant's argument. He did not reduce the amount of assistance specified

in the assistance certificate. The presiding magistrate found that Mr Dean's act of sexual intercourse with J did not contribute to the injuries that he received from being assaulted by Mr McKinnon because the act of sexual intercourse was not temporally proximate to the assault. He did not find that Mr Dean's act of sexual intercourse with J was unlawful. On 19 May 2005 the appellant filed an appeal in the Supreme Court which was heard by Thomas J.

Ground of appeal

[36] The sole ground of appeal was that Thomas J erred in law in determining that Mr Dean's act of sexual intercourse with J two days before he was assaulted by Mr McKinnon was irrelevant for the purposes of s 10(2) of the Act because it was not temporally proximate to the assault. Counsel for the appellant submitted that by reasoning so Thomas J applied an incorrect legal test in order to resolve the question of whether Mr Dean's conduct contributed to the injuries he sustained as a result of the assault.

[37] The appellant asked that the appeal be allowed and the amount of assistance specified in the assistance certificate be reduced under s 10(2) of the Act by such percentage as the Court of Appeal deemed appropriate having regard to Mr Dean's conduct.

The principal issue

[38] The principal issue in the appeal was whether Mr Dean's act of drunkenly taking advantage of Mr McKinnon's drunken girlfriend two days before

Mr McKinnon assaulted him contributed to the injuries that he sustained from the assault.

Section 10 - Behaviour of victim to be taken into account

[39] Section 10 of the Act provides as follows:

> (1) In considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate, **the Court shall have regard to the conduct of the victim** *(emphasis added)* and to any other matters it considers relevant.
>
> (2) **Where the Court**, on having regard under subsection (1) to the conduct of the victim, **is satisfied that the victim's conduct contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate***(emphasis added)* by such amount as it considers appropriate in all the circumstances.

[40] The section in its current form was inserted in the Act by s 12 of the Crimes Compensation Amendment Act 1989. In the Second Reading Speech for the Crimes Compensation Amendment Act the Attorney-General stated:

> Section 10 of the current act provides that the court shall have regard to a number of factors. There was an argument that it was not clear whether the court was to have regard to these matters in a positive or negative way. **Accordingly, section 10 is deleted and a new section is inserted which deals only with the issue of conduct and behaviour of the victim which 'contributed' to the injury or death** *(emphasis added)*; that is existing section 10(a). Quite clearly, if the behaviour of the victim provoked, for example, an assault, then the court, in having had regard to that behaviour, should be reducing the amount of assistance that it recommends be paid. The proposed new section 10 specifically provides for this.

[41] Some of the statements contained in the Second Reading Speech are a little curious because under the Criminal Code provocation is a defence to all crimes of violence other than murder and is a partial defence to the crime of

murder: s34 of the Criminal Code. If provocation within the meaning of the Criminal Code were established by a respondent to an application under the Act, in all cases apart from an application involving a murder, there would be no offence and therefore no victim within the meaning of s 4 of the Act. The application would be dismissed without the grant of an assistance certificate: s 12(a) of the Act. Therefore the provocative conduct contemplated by s 10 of the Act must be conduct falling short of provocation as defined by the Criminal Code.

[42] The purpose of s 10 is to require a court to reduce the amount of assistance specified in an assistance certificate by such amount as it considers appropriate in circumstances where the court is satisfied that the victim's conduct contributed to the injury or death of the victim. The ordinary meaning of "contributed to" is to play a part in bringing about the injury sustained by the victim of crime or the death of the victim or to have a part in producing the injury sustained by the victim of crime or the death of the victim. It is necessary for a respondent who relies on s 10(2) to establish a causal relationship between the relevant conduct of the victim and the injury or death. It is not necessary for a respondent who relies on s 10(2) of the Act to establish that the victim's conduct was the sole cause of the victim's injuries. Whether a victim's conduct contributed to the injury sustained by a victim is a matter of fact and degree to be determined in light of the particular facts and circumstances of a case and by the court exercising commonsense: *Lanyon v Northern Territory of Australia & Anor* (2001) 166

FLR 189 at 194-195; *March v E & MH Stramare Pty Ltd & Anor* (1991) 171 CLR 506. The provisions of s 10 have considerable affinity with the common law concept of contributory negligence but also encompass ground covered by the notions of *volenti non fit injuria*, intervening cause, consent and failure to mitigate.

[43] As with causation in law generally, causation in the context of s 10(2) of the Act involves a consideration of both causally relevant conditions and any appropriate criteria for attributing or limiting responsibility. Not only must the established causal elements be necessary elements they must also constitute a sufficient set of causal elements.

[44] For a victim's conduct to have contributed to his or her injuries in a case such as the present the offender's violent response must have at least been caused by the victim's conduct towards the offender and the offender's capacity for self-control must have been significantly impaired by the victim's conduct towards the offender. It was not the intention of parliament by enacting s 10 of the Act that a victim's assistance should be reduced where an offender has voluntarily elected to deliberately assault the victim in a calculated disregard for the law. The offender must have acted while deprived of self-control and before the offender had the opportunity to regain composure. That is, the offender must not truly be acting of his own accord at the time he committed the offence that caused the victim's injury which is the subject of the application under the Act. A mere reprisal by an offender because of the immoral or criminal conduct of the victim does not

result in a reduction in the assistance to which a victim of crime is otherwise entitled under the Act. While the victim's act may be a *causa sine qua non* in such circumstances, merely establishing motive does not establish a sufficient set of causal conditions to prove that the victim's act contributed to his or her injuries.

[45] In determining whether the victim's act caused a loss of self-control on the part of the offender, the temporal proximity of the victim's act to the offence is a relevant causal condition to be considered by the court. Except in certain well established categories such as cases involving a battered spouse or sexual abuse of a child where it is recognised that loss of self-control may develop after a lengthy period of abuse, the provocative act must have occurred in the presence of the offender and there must be closeness in time between the provocative incident and the retaliatory act which is frequently described as an act done suddenly in the heat of passion. There must at least be a sudden and temporary loss of self-control by the offender.

[46] There is a good policy reason as to why temporal proximity is a causally relevant condition. A respondent to an application for victim's assistance should not be excused from liability or responsibility under the Act if the offender has had a fair opportunity to exercise his capacity for self-control. People should not be encouraged to take retribution into their own hands and engage in reprisals.

[47] While temporal proximity is a causally relevant condition and may be a determinative factor when a court is considering whether a victim's conduct provoked the offender to commit the offence that caused the victim's injuries, temporal proximity is not always a causally relevant condition or determinative factor when a court is considering whether the victim's conduct contributed to the victim's injuries. For example, a victim may have assumed the risk of being assaulted as the applicant did in *Lanyon v Northern Territory of Australia* (supra) or a victim may have consented to the infliction of the victim's injuries or a victim may have contributed to his or her injuries by unreasonably failing to undergo appropriate medical treatment.

The appellant's argument

[48] The appellant contends that the discretion granted to the Local Court by s 10 of the Act is so wide that the question for the court is not whether Mr McKinnon could or should have controlled himself, but was his assault on Mr Dean justified by Mr Dean's immoral and ungallant act of drunkenly taking advantage of Mr McKinnon's drunken girlfriend?

[49] Mr Grant argued that the Local Court has a complete discretion, unhampered by any concepts borrowed from other parts of the law to determine whether or not it is appropriate to make a full award or to diminish the amount of compensation or to reject the claim altogether. Against this background he argued that the learned magistrate found that Mr McKinnon's motive for

assaulting Mr Dean was his "ungallant or criminal" conduct towards J. As Mr Dean had committed an immoral act and thereby "brought the assault upon himself" or "got his just deserts" it followed that his conduct contributed in a material sense to the assault and subsequent injury. Mr McKinnon had a valid motive for his conduct. His reprisal was at least partially justified and under s 10(2) of the Act the court was required to consider whether a reduction in assistance was appropriate.

[50] There has been a debate on and off over many years about whether provocation should operate as a justification or an excuse at law: Austin J, *"A Plea for Excuses"* (1956) 57 Proceedings of the Aristotelian Society 3; McAuley F, *"Anticipating the Past: The Defence of Provocation in Irish Law"* (1987) 50 M.L.R. 133; Dressler J, *"Provocation Partial Justification or Partial Excuse?"* (1988) 51 M.L.R. 467. However, Mr Grant's argument takes even the Italian approach to justification law (see McAuley F, *"The Theory of Justification and Excuse: Some Italian Lessons"* (1987) 35 Am. J. Comparative Law 359) to unheard of heights. Mr Grant's argument entails a denial that Mr McKinnon's actions were entirely wrongful in the first place, a denial which he argues should result in a reduction of assistance under victims of crime assistance legislation.

[51] Mr Grant's submissions as to the construction of s 10 of the Act are not supported by the cases on which he relied nor are they consistent with the proper construction of s 10 of the Act. The legislation considered by the Court of Appeal in *R v Criminal Injuries Compensation Board; ex parte Ince*

[1973] 1 WLR 1334 was significantly different to s 10 of the Act. Section 17 of the Criminal Injuries Compensation Scheme 1964 (UK) which was considered by the Court of Appeal provided, "The board will reduce the amount of compensation or reject the application altogether, if having regard to the conduct of the victim, including his conduct before and after the events giving rise to the claim, and to his character and way of life it is inappropriate that he should be granted the full award or any award at all." The issue being considered by the Court of Appeal was whether the victims, who were police officers who were injured in a motor vehicle accident, should have their compensation reduced because they were guilty of contributory negligence. The Court of Appeal held on largely policy grounds that the compensation of the police officers should not be reduced because of their contributory negligence. *Graeme v Dean* [2001] QSC 420 was a case where the offender suffered from a psychiatric condition because he had been subjected to violence and mistreatment by the victim for much of his life. *Re Koot v Crimes Compensation Tribunal* (1989) 3 VAR 142 was a case of *volenti non fit injuria*. The risk of the victim's injury arose out of her criminal activities and drug use.

[52] There is considerable force in Mr McCormack's submission that care should be taken in attempting to apply authorities from other jurisdictions to the construction of s 10 of the Act because the texts of the relevant provisions in other Acts are quite different to s 10 of the Act.

The facts

[53] Courts are under a duty to make all necessary findings of fact which the evidence before a court permits. Such findings should be clearly and succinctly stated in the court's Reasons for Decision. Regrettably the style and manner the presiding magistrate adopted in dealing with the evidence and expressing his conclusions has caused some difficulty in determining the precise extent of his findings of fact. So far as they can be ascertained from his Reasons for Decision, the facts may be stated as follows.

[54] In October 2000 Mr Dean was employed as a pearl chipper at a remotely located pearl farm. He was required to work two weeks on and one week off. He spent his week off in Darwin. Mr Dean was off work from 6 October 2000 to 12 October 2000. From 6 October 2000 to 10 October 2000 he stayed at the home of J who was the girlfriend of Mr McKinnon. Mr McKinnon and J had maintained a romantic relationship for more than a year.

[55] During the time Mr Dean stayed at J's home, J and he consumed a large amount of alcohol. On the afternoon of 10 October 2000 Mr Dean drunkenly took advantage of J who was also drunk and he had sexual intercourse with her. Mr Dean left J's home after he had sexual intercourse with her and he did not return.

[56] Shortly after 5.30 pm on 10 October 2000 Mr McKinnon arrived at J's home. He found her sitting at the end of a table sobbing. She told

Mr McKinnon that she had been raped by Mr Dean. Mr McKinnon immediately telephoned the police and tried to calm her down.

[57] On 12 October 2000 Mr McKinnon assaulted Mr Dean at the Blue Heelers Bar in Darwin. Mr McKinnon punched, kicked and kneed Mr Dean and hit him with a bar stool. As a result of the assault Mr Dean suffered physical injuries and he was off work for a period of time. Mr McKinnon's motives for assaulting Mr Dean were his belief that the respondent had raped J and he wanted to protect her because of what Mr Dean had done to her on 10 October 2000.

[58] The presiding magistrate broadly accepted what Mr Dean said in his affidavit of 25 March 2004 about the assault, namely:

> "The circumstances of the assault were these. On Thursday 12 October 2000 at approximately 7.00pm I went to have a few drinks at the Blue Heeler Bar, located in Mitchell Street, Darwin. At the time, I was on seven rostered days off work from my employment at the Pearl Farm. I had been sitting at the main bar, by myself, for about one hour, when Mr McKinnon, a much larger man than I am, who I knew as Mongo, entered. He stood next to me, on my right hand side, and ordered a beer. He said, "Hi", to me. When his beer was served, he placed it down on the bar and said, "I'll be back. I just have to go to the toilet". When he returned to the same standing position he said, "What's going on?" referring to me having sex with his girlfriend J. I replied: "Look, I'm sorry, me and J slept together." Mr McKinnon then asked me several times to step outside. He said this was because he wished to talk to me. On each occasion I refused. He was standing about half a meter away from me. I was still sitting down.
>
> Suddenly, Mr McKinnon hit me on my jaw with a clenched fist. The impact of the blow knocked me off my seat but I managed to remain standing. I then ducked down and attempted to get past him heading in the direction of the door. As I was doing this, I saw McKinnon pick up a bar stool, raise it over his head and swing it at me, striking

me across my back. This knocked me down onto my knees. I curled up to protect myself. A second blow from the bar stool knocked me flat to the floor where I lay curled up and was struck once more with the stool. While I was on the ground, Mr McKinnon started to kick me continuously. He started kicking me in the back then went to the head area which my hands were protecting. Then he dropped his knee into my left side near my kidneys and while kneeling on me punched me several times to the head. Eventually he stopped; stood up, walked back to the bar and sat down."

[59] His Honour noted that Mr McKinnon's account of the assault differed from Mr Dean's in some of the details. In his affidavit of 21 June 2004 Mr McKinnon deposed that:

> "On 12 October 2000 on or about 8.00pm I went to the Blue Heeler Bar. When I arrived, I saw [Mr Dean] at the bar. I walked up to [Mr Dean] and said, "How are you going?" I was really angry and upset and wanted to hit [Mr Dean] but the police detective had warned me that, in the long run, it would not be good for me to do that and so I refrained from doing so. [Mr Dean] did not reply to my query and I ordered a drink while I stood there and then went straight to the toilets where I rang the police from my mobile telephone. I told the police to come and get [Mr Dean] but they said it had nothing to do with them and it was out of their hands as the detectives were dealing with the matter. In reply to paragraph 6 of [Mr Dean's] sworn affidavit of 25 March 2004 [Mr Dean] did not reply to me nor did [the respondent] inform me that he had slept with J.
>
> Nothing was said after I came back to the bar from the toilet; I immediately approached [Mr Dean] and punched him in the side of the head before he had time to say anything. I was so angry, upset and frustrated and when I walked out into the bar, [Mr Dean] was still sitting there and looking at me when I punched him. When I hit [Mr Dean], he fell to the ground but jumped up quickly. [Mr Dean] stood facing away from me but towards the door. I then picked up a bar stool and hit [Mr Dean] across his back one time, causing [Mr Dean] to fall to the floor again. In reply to paragraph 7 of [Mr Dean] affidavit, I did not hit [Mr Dean] more than once with the bar stool. [Mr Dean] then rolled towards the wall and I kicked [Mr Dean] three times in the middle of the back. I also punched [Mr Dean] approximately six times in the head.

[60] The presiding magistrate concluded that Mr Dean was in the bar before Mr McKinnon arrived. It could not be suggested that Mr Dean had gone looking for trouble. There was no suggestion that anything Mr Dean did or said in the bar was of a nature calculated to inflame Mr McKinnon's ire. Not only did Mr Dean not go looking for trouble he did not incite it. The first contact between Mr Dean and Mr McKinnon went off peacefully enough. It was only after Mr McKinnon's return from the toilet that he boiled over and attacked Mr Dean without warning. In other words at the time the assault occurred Mr Dean did nothing to provoke Mr McKinnon. The presiding magistrate was entitled to so find on the evidence that was before the Local Court.

[61] On 14 October 2002 Mr McKinnon was convicted and sentenced for assaulting Mr Dean, aggravated by two circumstances – Mr Dean suffered bodily harm; and Mr Dean was threatened with an offensive weapon, namely a bar stool. Mr McKinnon was sentenced to three months imprisonment. He was released forthwith on a suspended sentence. The operational period was fixed at 12 months.

[62] Mr Dean was charged with having unlawful sexual intercourse with J contrary to s 192 of the Criminal Code. He was committed for trial. Mr Dean pleaded not guilty. He was tried before a judge and jury on 2-5 September 2002. Mr Dean admitted that he had intercourse with J but denied lack of consent. He was found not guilty and acquitted of the charge of unlawful sexual intercourse without consent.

[63] The presiding magistrate declined to find on the balance of probabilities whether or not Mr Dean had raped J. It was not necessary for his Honour to do so. It is not necessary for a respondent who relies on s 10 of the Act to prove on the balance of probabilities that the victim committed a crime in order to establish that the victim's conduct contributed to his injuries which are the subject of the application for victim's assistance.

[64] His Honour found that even if Mr Dean had been found guilty of rape his conduct would not in the circumstances of this case be characterised as conduct contributing to his injury under s 10(2) of the Act. He was entitled to so find on the evidence before the Local Court.

[65] In par [11] and [12] of his affidavit dated 21 June 2004, Mr McKinnon stated,

> "11. On 12 October 2000 on or about 8pm, I went to the Blue Heelers Bar. When I arrived I saw [Mr Dean] at the bare. I walked up to [Mr Dean] and said, "How are you going?" I was really angry and upset and wanted to hit [Mr Dean] but the police detective had warned me that, in the long run, it wouldn't be good for me to do that and so I refrained from doing so. [Mr Dean] did not reply to my query and I ordered a drink while I stood there and then went straight to the toilets where I rang the police from my mobile telephone. I told the police to come and get [Mr Dean] but they said it had nothing to do with them and it was out of their hands as the detectives were dealing with the matter.
>
> 12. Nothing was said after I came back to the bar from the toilet, and I immediately approached [Mr Dean] and punched him in the side of the head before he had time to say anything. I was so angry, upset and frustrated when I walked out into the bar…"

[66] In par 21 of his affidavit dated 21 June 2004 Mr McKinnon stated that at the time he assaulted Mr Dean he was protecting J because of what Mr Dean had done to her.

[67] In the circumstances it was open to the presiding magistrate to find that Mr Dean's conduct did not contribute to his injuries because his act of sexual intercourse with J did not take place in the presence of Mr McKinnon and was an act done towards J not towards Mr McKinnon, Mr McKinnon was told about what had happened by J and it was not established that she was raped and Mr McKinnon did not lose self-control as a result of being made aware of Mr Dean's conduct towards J. His initial response was to behave lawfully, to comfort J, to call the police and to accept their advice not to assault Mr Dean. Mr McKinnon only took things into his own hands when the police would not immediately respond in the manner he desired them to respond. Mr McKinnon had a fair opportunity to exercise his capacity for self-control.

[68] There is some force in Mr McCormack's argument that the evidence taken as a whole manifests an election by Mr McKinnon, made immediately previous to the assault, to deliberately assault Mr Dean in a calculated disregard of the law. There is also force in Mr McCormack's further submission that the fact that Mr McKinnon assaulted Mr Dean in circumstances where he had been warned by police not to assault Mr Dean and he knew that the allegation of unlawful sexual intercourse was under investigation by police meant that any causal link between the assault and Mr Dean's behaviour

towards J two days before the assault had been utterly severed. There was no sudden and temporary loss of self-control and a lengthy period of brooding before retaliation ordinarily defeats an allegation of provocation: *Hart v R* (2003) 27 WAR 441; *R v Haywood* (1833) 6 C&P 157 at 159; 172 ER 1188 at 1189.

[69] Unlike the victim in *Lanyon v Northern Territory of Australia* (supra) Mr Dean did not assume a risk of being assaulted by Mr McKinnon. He avoided Mr McKinnon after he had sexual intercourse with J and he did nothing to incite or inflame Mr McKinnon when Mr McKinnon saw him at the Blue Heeler's Bar.

The reasons for decision of the Supreme Court

[70] The appellant relied on four grounds of appeal in the appeal at first instance. The grounds of appeal were:

> 1. The learned magistrate erred in law in determining that the conduct on the part of the respondent in respect of J could only be relevant for the purposes of s 10 of the Crimes (Victims Assistance) Act if the same was immediately temporally proximate to the assault occasioned upon him.
>
> 2. The learned magistrate erred in law in failing to determine whether or not conduct on the part of the respondent in respect of J was criminal in nature, contrary to s 10 of the Crimes (Victims Assistance) Act.
>
> 3. The learned magistrate erred in law in issuing a certificate of assistance to the respondent in the circumstance of findings by him as to the conduct of the respondent in respect of J and in circumstances of finding by him as regards the factual matrix surrounding the assault occasioned upon the respondent, contrary to s 10 of the Crimes (Victims Assistance) Act.

> 4. Alternatively, the learned magistrate erred in law in not reducing the amount of assistance specified in the certificate of assistance issued to the respondent on account of conduct on the part of the respondent in respect of J contributory to the assault occasioned upon him, contrary to s 10 of the Crimes (Victims Assistance) Act.

[71] So far as the appeal to this court is concerned the relevant grounds of appeal in the Supreme Court are grounds 1, 3 and 4 above. In relation to ground 1 Thomas J's primary reasons for decision are contained in pars [28] and [29] of her Honour's Reasons for Decision. They were as follows:

> [28] The consequence of this is that the learned magistrate then had to decide whether the conduct of Mr Dean, which did not amount to a criminal offence, contributed to his own injury. The learned magistrate found that conduct amounted to "at the least having drunkenly taken advantage of Mr McKinnon's drunken girlfriend". This was in circumstances where the learned magistrate had also found, with respect to the alleged rape, "how unreliable their perceptions may have been at the time of the event and how unreliable their memories after it". It was this conduct that the learned magistrate found had to be temporally proximate to the assault upon him to be considered as contributing to his own injury. This conduct was not temporally proximate. It had occurred two days prior to the assault upon him by Mr McKinnon.
>
> [29] I did not consider the learned magistrate misdirected himself or applied a wrong principle of law when he determined, **in the particular circumstance of this case** *(emphasis added)***,** that the only conduct of the respondent relevant to the exercise of his discretion pursuant to s 10 of the Act was the conduct immediately temporally proximate to the assault occasioned upon him by Mr McKinnon.

[72] Thomas J's reasons in relation to grounds 3 and 4 of the appeal at first instance are contained in pars [35] to [39] of her Honour's Reasons for Decision. They were:

> [35] Mr Clift, counsel for the appellant, submits that the learned magistrate failed to give any weight to his findings as regards to the

> conduct of the respondent towards J. Mr Clift referred to pars 16 to 19 of the magistrate's reasons for decision (part of which have been reproduced above). It was argued on behalf of the appellant that those findings were capable at law of constituting conduct on the part of the respondent in the nature of provocation offered by the respondent to Mr McKinnon, being causative of the assault occasioned upon him by Mr McKinnon. It is the submission for the appellant that in failing to so find the learned magistrate's decision is vitiated by errors of law.
>
> [36] I accept the proposition put forward on behalf of the appellant that whether or not a victim's conduct will preclude any assistance or reduce the amount of assistance is a matter of fact and agree to be determined in the light of the particular circumstances of the case by applying a commonsense test of causation – see *Lanyon v The Northern Territory of Australian and Anor*; *South Australia v Nguyen and Anor* and *Young v The Northern Territory of Australia and Gutsche* [2004] NTSC 16.
>
> [37] I also accept it is sufficient if the Court finds blameworthy or culpable conduct or other relevant matters worthy of censure …
>
> [38] I agree that it is not necessary for the Court to find unlawful conduct on the part of the victim and/or unlawfulness in respect of other matters it considers relevant although unlawfulness will weigh more heavily in the exercise of the discretion to preclude assistance or reduce the amount of such assistance.
>
> [39] The learned magistrate has discretion under s 10 of the Act to reduce the amount of compensation to be awarded. In the particular circumstances of this case I consider such discretion was judicially exercised and I am not persuaded that there was an error of law such that the appeal should be allowed.

[73] Mr Grant argued that the above reasoning demonstrated that Thomas J had made an error on law. He submitted that "contribution" in s 10(2) of the Act requires an assessment of the link between the respondent's conduct and the injuries he sustained. The enquiry whether there is a link is not satisfied by determining whether there was temporal proximity between the conduct and the injury. Causal and circumstantial proximity are also relevant. In any event, proximity is simply one means by which conduct might be classified

as causative of injury. Conduct may be really or effectively causative of injury without being temporally proximate to the event.

[74] While Mr Grant's statement of the relevant legal principles is generally correct, his argument that Thomas J erred cannot be sustained. Her Honour's reasoning was consistent with the principles to which Mr Grant referred. Temporal proximity may be a relevant causal condition. It was a relevant causal condition in the particular circumstances of this case. The lack of contemporaneity between Mr Dean's conduct towards J and Mr McKinnon assaulting Mr Dean meant that it was truly Mr McKinnon acting on his own accord when he assaulted Mr Dean. At the time of the assault Mr McKinnon's capacity for self-control was not significantly impaired. Mr McKinnon did not act in an unpremeditated way while in the transport of emotion caused by Mr Dean's provocative act. Further, it meant that Mr McKinnon had a fair opportunity to exercise his capacity for self-control.

[75] I accept Mr McCormack's argument that Thomas J's decision was based on the particular facts of the case. Her Honour did not lay down any principle that was restrictive of the future application of s10 of the Act. I also accept Mr McCormack's argument that in the particular circumstances of this case the only conduct that was relevant was Mr Dean's conduct at the Blue Heeler Bar. That was the only relevant time when Mr Dean did anything in Mr McKinnon's presence.

[76] In my opinion Mr Dean's conduct did not contribute to the injuries he sustained from being assaulted by Mr McKinnon and no error of law was made by the Supreme Court. For these reasons I joined with the other members of the Court of Appeal in deciding that the appeal should be dismissed with costs.

[77] I agree with Mildren J that in determining the extent to which a victim's quantum of assistance is to be reduced once a court is satisfied that a victim's conduct contributed to the victim's injury the Local Court may have regard to the blameworthiness of the victim as well as other factors including the extent to which the victim's conduct contributed towards the victim's injury, the proportionality of the offender's response and whether there are any policy matters that need to be considered: *South Australia v Richards* (1997) 69 SASR 263; *South Australia v Nguyen* (1991) 57 SASR 252.
