PARTIES:	LMP v LENNIS COLLINS LMP v JOSEPH TURNER JURRAH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM LOCAL COURT
FILE NOS:	No.1 of 1993 and No.2 of 1993
DELIVERED:	Alice Springs 17 February 1993
HEARING DATES:	3 February 1993
JUDGMENT OF:	Kearney J

CATCHWORDS:

Appeal and new trial - practice and procedure - Northern Territory - Leave to appeal from Local Court - "final order of the Court" - compensation certificate is a final order of the Court

Local Court Act 1989 (N.T.) s19(1)(b); s19(3)
Jones v Territory Insurance Office (1988) 55 NTR 17; (1988) 59 NTR 12, distinguished
Patterson v Public Service Board of New South Wales [1984] 1 NSWLR 237, followed
Carr v Finance Corporation of Australia (No.1) (1981) 147 CLR 246, applied

Appeal and new trial - practice and procedure - Northern Territory - service of notice of appeal on all interested parties - due notice required - avoidance of service may constitute wavering of right to be served

Local Court Act 1989 (N.T.) s19(5)
Supreme Court Rules (N.T.) r6.06, r83.10(2)(b), r82.04(1)(b)
R v McDonald [1979] 1 NSWLR 451, followed
R v Babic [1980] 2 NSWLR 743, applied

Appeal and new trial - appeal - general principles - interference with discretion of Court below - statutory compensation limit - compensation for victim of crime - assessment of compensation to be made without reference to statutory reference - compensation not to be quantified as proportionate to gravity of offence by an artificial scale

Crimes (Victims) Assistance Act (N.T.) s13(1)
S. v Turner (1979) 1 NTR 17, followed

Appeal and new trial - appeal - general principles - interference with discretion of court below - statutory compensation for victim of crime - measure of compensation to be awarded as in actions of tort subject to statutory modifications - compensation must be just and reasonable

Crimes (Victims) Assistance Act (N.T.) s13(1)
Rigby v Northern Territory (unreported, Angel J, 3 October 1991), followed
R v McDonald [1979] 1 NSWLR 451, followed
Morrison v Groom (1979) 21 SASR 153, followed
Australian Coal and Shale Employees' Federation v The Commonwealth (1953) 94 CLR 621, followed
Sharman v Evans 1976-77) 138 CLR 563, followed
Gamser v The Nominal Defendant (1976-77) 136 CLR 145, followed

Appeal and new trial - appeal - general principles - inadequate damages - statutory compensation for victim of crime - series of sexual assaults following abduction - global amount - common law approach of awarding a global amount of compensation for non-pecuniary loss adopted - standard of determining compensation is that of the "contemporary community" and circumstances of offence

Crimes (Victims) Assistance Act (N.T.) s13(1)
Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 118, followed
Van Velzen v Wagener [1975] 10 SASR 549, applied
Rigby v Northern Territory (unreported, Angel J, 3 October 1991), followed
P v South Australia (1992) 60 A Crim R 286, followed
S. v Turner (1979) 1 NTR 17, followed
R v Fraser [1975] 2 NSWLR 522, followed
W v Meah; D v Meah [1986] 1 All ER 935, followed

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 1 of 1993

IN THE MATTER of the Local Court Act 1989

AND IN THE MATTER of an appeal from an order of the Local Court in proceedings No.9204240 at Alice Springs

BETWEEN:

L.M.P.
Appellant

AND:

LENNIS COLLINS
First Respondent

AND

THE NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

No.2 of 1993

IN THE MATTER of the Local Court Act 1989

AND IN THE MATTER of an appeal from an order of the Local Court in proceedings No.9204242 at Alice Springs

BETWEEN:

L.M.P.
Appellant

AND:

JOSEPH TURNER JURRAH
First Respondent

AND

THE NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

No.3 of 1993

IN THE MATTER of the Local Court Act 1989

AND IN THE MATTER of an appeal from an order of the Local Court in proceedings No.9204243 at Alice Springs

BETWEEN:

L.M.P.
Appellant

AND:

MICHAEL JUNGARI TURNER
First Respondent

AND

ALLAN JAMBAJIMBA NORMAN
Second Respondent

AND

LENNIS COLLINS
Third Respondent

AND

THE NORTHERN TERRITORY OF AUSTRALIA
Fourth Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 17 February 1993)

These are in form 3 applications for leave to appeal, and appeals, from orders by the Local Court at Alice Springs on 14 December 1992 in proceedings Nos.9204240, 9204242 and 9204243 that compensation certificates issue. As will be later seen (pp16-17) they are in fact appeals simpliciter. It is common ground that the Local Court was exercising jurisdiction under the Crimes Compensation Act

(herein "the Act") which is the Crimes (Victims) Assistance Act before it was extensively amended (and renamed) on 1 August 1990 by Act No.83 of 1989. By consent, the 3 applications for leave to appeal were heard together with the submissions on the substantive appeals. The appellant seeks to establish that amounts of $10,000, certified in each of the 3 compensation certificates as proper to be paid to her, are inadequate as a result of errors of law, and should each be increased to the statutory limit under the Act of $15,000, making a total of $45,000 as opposed to the present $30,000.

The applications to the Local Court

It was common ground that on the evidence the only heads of damages for which compensation was payable were those set out in s9(e), (f) and (g) of the Act, viz:-

> "9. In assessing the amount of compensation to be specified in a compensation certificate, the Court may, subject to this Act, include an amount in respect of -
> - - -
> (e) pain and suffering of the victim;
> (f) mental distress of the victim;
> (g) loss of the amenities of life by the victim;
> - - -"

These are the most common forms of heads of damages in claims under the Act in respect of sexual assault.

(a) The background

The facts which gave rise to the applications for compensation certificates are set out succinctly in the learned Magistrate's reasons for issuing them, viz:-

> "- - the applicant was picked up [on the Stuart Highway on 7 October 1989] whilst hitch-hiking with another person near McGrath Creek [about 50kms north of Alice Springs]. Around the Mt Allen turnoff the other person - - - was forced out of the car. [The applicant] attempted to get out but was stopped from doing so. She did then succeed in getting out, but was caught up by the group in the car and forced back into the vehicle. She was then taken to an area in the region of Mt Allen Station and raped [that night] by the respondent Jurrah. [This gave rise to her application No.9204242 now the subject of appeal No.2 of 1993].

> On the following morning [8 October 1989] she was again forced in to the car [by Jurrah] and taken to another area [by a nearby lake] where she was raped by Michael Turner. He then left her - - - and another person Allen Norman then raped her. He then left her where she was and two other men [Lennis Collins and a person unknown] also raped her. All of the men left the area and left her where she was. [This series of rapes by the lake gave rise to her application No.9204243 now the subject of appeal No.3 of 1993; they gave rise to a single application because of the restrictive effect of s14(2) of the Act - see p12]. She managed to return to the place where she had spent the previous night and fell asleep. Some time later [that night] Lennis Collins again had sexual intercourse [with her] without her consent. [This rape gave rise to her application No.9204240 now the subject of appeal No.2 of 1993]. The following morning [9 October 1989] she was taken by Jurrah to an area not far from Mt Allen. The car broke down and a Police vehicle came upon them, she spoke to the Police and made a complaint to them."

On 20 February 1992 Jurrah and Turner were convicted of aggravated sexual assaults upon the appellant following their joint trial, and sentenced to terms of imprisonment. On 6 May 1992 Norman was convicted of an aggravated sexual assault on the appellant, upon his plea of guilty; he was sentenced to a term of imprisonment. The certificates of the convictions of these 3 men were admitted before the Local Court as evidence of their commission of their respective offences, under s26A(1) and s26C(2) of the Evidence Act. An applicant must prove that an offence was committed, though it is not necessary that any named offender has been convicted or even charged - see *Brown v Baxter* (1987) 87 FLR 449 at 450 - because it is for the Local Court to decide, on the balance of probabilities (s17(1)), whether the offence was committed. Collins was committed for trial on 7 December 1990 for aggravated sexual assaults on the appellant, did not answer to his bail and has not yet been located; a warrant for his arrest issued on 22 February 1991.

On 27 February 1992 the appellant made 3 separate applications to the Local Court for compensation

certificates under s5(1) of the Act in respect of her injury from the 3 incidents of rape of 7 and 8 October 1989. Section 5 provides, as far as is material:-

> "(1) A victim [defined in s4(1) as a person injured as the result of the commission of an offence by another person] may, within 12 months after the date of the offence, apply to a [Local] Court for a compensation certificate in respect of the injury suffered by him as a result of that offence.
>
> - - -
>
> (3) The Court may, as it thinks fit, extend the period within which an application under subsection (1) - - - may be made."

It can be seen that the applications were made well outside the 12-months time limit in s5(1); time was extended under s5(3) to the extent necessary, without objection.

(b) The hearing

(i) Service of notice on the parties

On 26 October 1992 the applications came on before the Local Court. Only the appellant and the Northern Territory appeared. Jurrah and Turner had been served on 28 February 1992 with notice of the applications, and supporting documents, including an application under s5(3) to extend the time to apply; Norman was similarly served on 21 April 1992. There was affidavit evidence of unsuccessful attempts to locate and serve Collins; on 22 April 1992 the learned Magistrate dispensed with service on him, pursuant to s6(2).

(ii) Can "a person unknown" be a party?

Ms McCrohan of counsel for the appellant noted that the 5 defendants to application No.9204243 included "an unknown person". This was clearly a reference to the unknown person said to have participated in the series of rapes near the lake (p4). No point was taken before her Worship as to whether this person was properly joined as a party. Section 7 of the Act provides:-

> "7. The Crown and, where the identity of the offender who caused the injury or death is known, the offender shall be parties to proceedings in

respect of an application under section 5." (emphasis mine)

"A person unknown" was also named as one of the respondents in proceedings No.3 of 1993. I raised with Ms McCrohan the question whether it is competent to join a person unknown, as a party to s5 proceedings. A person against whom relief is sought in legal proceedings must be identified and given an opportunity to appear in Court and answer the claim, unless special provision to the contrary exists; that is inherent in our accusatorial process. There is no general power to issue process against unknown persons - see *Friern Barnet U.D.C. v Adams* [1927] 2 Ch. 25 at 31-33, *Bristol Corporation v persons unknown* [1974] 1 All ER 593, the observations of Stamp J in *In re Wykeham Terrace* [1961] Ch, 204 at 208-9, and Order 53 of the Supreme Court Rules. After hearing submissions on the matter I am not persuaded that it is possible to join a person unknown, in light of the general law and the provisions of s7; accordingly, I have struck out the reference to that party in the title to proceedings No.3 of 1993, pursuant to r83.07(2) of the Supreme Court Rules. I have also corrected the respondent named in each of the proceedings as "The Solicitor for the Northern Territory" to "The Northern Territory of Australia"; see s7 of the Act, and s6 of the Claims by and against the Government Act. Neither change affects the outcome of these proceedings.

(iii) <u>The evidence</u>

Section 15(3) of the Act provides:-

"(3) Subject to this Act, the [Local] Court is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit."

Ms McCrohan relied on the affidavit of the appellant of 25 February 1992 and a report by a psychiatrist Dr Bourke of 3 September 1992. In her affidavit the appellant deposed as follows:-

"1. I am the applicant. My date of birth is the 25th August 1964. I am a 27 year old single woman and the mother of a nine year old daughter, Antoinette.

2. I was born at Doomadgee near Burketown near the Gulf of Carpentaria in Queensland. Doomadgee is an isolated Aboriginal community of about 1,200 people. I grew up and lived there my entire life with my mother and father and daughter Antoinette."

The appellant then deposed to the circumstances of her abduction and the forcible rapes summarized at pp3-4, and to her fear and pain during them - for example,

"12. - - I was in tears and crying now - - -.

13. I was in a lot of pain and I was bleeding from my vagina and rectum",

her shame in recounting the events to the Police, her fear when seeing her attackers at the committals and Jurrah and Turner at their trial and her embarrassment in giving evidence at the committals and trial. She continued:-

"22. - - - I felt like the jury would believe it was my fault and that I was guilty. I wanted to fly away.

23. On the 7th and 8th of October 1989 I was terrified during the time that I was kept captive by Jurrah and raped by him, Turner, Collins and Norman and the unknown Defendant. I felt the rapes were somehow my fault. I felt guilty about it. I felt dirty.

24. Not long after I identified the three men at the lineup in October 1989 I returned to my home at Doomadgee in the house where I lived with my mother and my daughter. I was too ashamed and embarrassed to tell anybody what happened. I couldn't even talk to my mother about it or my cousins.

25. I was too embarrassed and ashamed to even leave my house. About a month later everybody in the community found out about what happened. I don't know how they found out. No one said anything to me but I felt that they all believed that what had happened was my fault.

26. Before I was raped I was happy living in Doomadgee. I would spend all day going out to visit my friends and to walk around. Every day I would go to visit people and go to the community store. I had many friends both female and male. I went out at night

with men to the disco. I had fun like any other woman my age. I had one special boyfriend I thought I might marry. I lost touch with him before I went to Alice Springs in 1989.

27. Since the rapes I have spent every day inside of my house. I read books all day. I read a hundred books in the last year. The only friends I have now are my three cousins. They are all young women. They come by to visit my mum. I don't go shopping any more. I don't go out because I am afraid people will blame me for what happened.

28. I do not go to the discos any more because there are a lot of drunk people there. I do not know what might happen. I'm afraid I might get raped again.

29. Since I was raped, my daughter knows something has happened. She now goes to stay with my sister on the weekends because she's bored at home with me because I don't go out or go on walks with her like I used to.

30. When I left my home at Doomadgee in February 1992 to come to Alice Springs for the trial of Jurrah and Turner, my daughter thought I was going to gaol. I could not make her understand why I was coming to Alice Springs. I felt awful about what she was going through. I had to stay in Alice Springs for two weeks and was not able to telephone my daughter or explain to her that I was O.K. while I was in Alice Springs.

31. Before the rapes I had a special relationship with my mother. I was able to talk to her about everything. After the rapes things have changed. I have not been able to talk to my mother about the rapes. She has become very protective of me. It's too much pressure. She tries to tell me to go out and to walk around but I do not want to and I get mad at her for telling me this.

32. I have had nightmares regularly since I was raped. I dream about the rapes. I also dream that I'm being dragged by a car or something. I have had these dreams two or three times a week since I was raped.

33. Once or twice a day since I was raped, suddenly and without warning, I see again in my mind how I was raped on those days in

October 1989. It's like a film playing again what happened. I also see what happened if I see violence on T.V. and when I try to go to sleep at night. That's why I try to read and keep my mind occupied. When I'm not reading or if I stop thinking about other things these thoughts about what happened to me come into my mind.

34. I still feel very ashamed and dirty and guilty about what happened. I got a disease from the rape. The doctors gave me tablets to take. I still feel diseased and dirty. I was also afraid I would get pregnant from these rapes and I was worried and upset about that.

35. I am afraid to walk around alone now. When I do go out for brief periods of time I keep looking behind me to see if anyone's there. I am too afraid to go out at night at all.

36. I am now very worried that something might happen to my daughter Antoinette and that she might be raped like I was. I am also afraid that something might happen to me now and I would not be able to look after her.

37. Since I was raped I think all men are the same. I'll say hullo to them but I don't want to know any men. I believe that all they want is just a woman's body that's all they all want.

38. I don't have friends any more and I don't think I can trust men or women. I'm afraid to have women friends because I'm afraid they will think it was my fault I got raped. I can't have men friends because I know all they want is my body and they might hurt me.

39. Before I was raped I planned to get married and I would have married my boyfriend. Now I don't believe I'll ever get married. I don't think I'll ever be able to trust any man. I'm afraid that men now think I want to have sex with them because of what happened.

40. Since I was raped in October 1987 [sic, 1989] I have lived at Doomadgee Mission in Queensland. I have had no counselling from anyone about the rapes. I have not spoken to any lawyers or field officers about the rapes."

In his report of 3 September 1992 Dr Bourke noted that as well as reading relevant written materials he had seen the appellant for one hour on 1 September 1992 to assess "any psychological damage she may have suffered." In his careful and detailed report he stated, inter alia:-

> "- - She can't separate out any degree of feeling worse during the three offences, saying that it was all bad and she was frightened all the time. - - -
>
> EMOTIONS AND LIFE STYLE FOLLOWING THE CRIMES
>
> Since the rapes, [the appellant] has experienced a number of unpleasant symptoms. She suffers from nightmares, usually involving being on a road and in a car, sometimes being forced into a car or the car being in an accident and rolling and rolling. She wakes up screaming from these nightmares, and they occur two or three times a week and do not seem to be diminishing in frequency with the passage of time.
>
> She told me she was a talkative outgoing friendly person before the rapes. Since the rapes happened she has become a quiet person who doesn't talk much and who often has her mind on what happened. The main thought she has about the events now is that she was lucky to survive and not be killed. She regularly thinks about what happened and she has withdrawn socially as a consequence. She does not go out as much as she used to, so that she does not have outings with friends nor does she take her daughter out walking or visiting. She is very worried for her daughter Antoinette and watches over her carefully in case anything might happen to her. She would have to know a person very very well before she would consider going out with him and she is avoidant of any man who might be drunk. This means that she does not go out on dates nowadays and she is very careful in her choice of clothes so she doesn't wear anything that looks tight or could look sexy. She is anxious about her gynaecological health. If she should find a special man that she could trust, she worries as to whether she would ever be able to get pregnant and if she did whether she would be able to carry the child or whether the injuries that she suffered have affected her gynaecologically.
>
> With regard to her relationships within her family, she has commented on a positive relationship with her mother and it would appear

that she now feels she can talk to her mother more about the rapes than she was able to do in February of this year. Talking to her mother helps her when she is feeling particularly distressed. At night time she has to be the last person to go to bed because she wants to make sure that the doors and windows are safely locked.

The reasons for her social withdrawal and self protectiveness are partly the shame that she has continued to feel, partly the caution, and partly the preoccupation that she has with what has happened, filling some of her waking thoughts. She also is greatful (sic) that there are two dogs in the household to be protective as well.

PERSONAL LIFE HISTORY

[The appellant] was born in Doomadgee, the middle child of a sibship of five. Her mother and father were good to her and her father died early this year. She feels the family were brought up in a good way and when asked whether they were involved with the Church, she said mother is and she used to be.

[The appellant] went to school at Doomadgee and left at the level of grade 10 but she didn't pass Grade 10. She had worked in the Post Office, in the Tuckshop at the School under the C.D.P. Scheme and once she joined the Rodeo she worked in the Canteen. She has had a committed relationship with her child's father around the age of nineteen or so but once she became pregnant the relationship broke up and the father of Antoinette has not supported his child in any way.

- - -

SUMMARY

- - -

She is describing symptoms consistent with a diagnosis of Post Traumatic Stress Disorder of a prolonged nature, in that she has suffered an event outside the realm of normal human experience and as a consequence has developed symptomatology of hyper-vigilance and hyper-alertness, intrusive unwanted recollections of the trauma, disturbed sleep and nightmares related to the event and a change in her emotional expression such that she now describes herself as quieter than she used to be and more withdrawn. This is in line with the restriction of affect described under the heading of Post Traumatic Stress Disorder.

> Her prognosis is guarded because the symptoms have become somewhat entrenched and there has been little change in their nature. I believe she will continue to suffer from this syndrome although it would probably be somewhat ameliorated were it possible for her to have ongoing therapy.
>
> You asked me to address the question of whether or not the damages caused to [the appellant] as a result of the successive rape incidents could be distinguished separately. The answer is no, I could not separate out the emotional damage in this way. The reading of the evidence might suggest that the worst fear and pain would have been attached to the gang rape incident but the patient did not identify this to me in my questioning of her at the interview.
>
> In conclusion [the appellant] is definitely suffering from a psychiatric syndrome specifically linked to the crimes which were committed against her - - -." (emphasis mine)

I note that the symptoms and sequelae described by Dr. Bourke are very commonly found in victims of rape; they appear repeatedly in their evidence in claims for compensation, which are usually founded largely if not wholly, as here, on the heads of damage set out in s9(e)-(g) of the Act. The psychological injury frequently experienced by victims of sexual assault can be intense, extensive and protracted. Some facets of the form of mental trauma identified in the Vietnam conflict and now known as 'post-traumatic stress disorder', as diagnosed by Dr. Bourke, are set out by R.J. Bragg in (1992) 136 Solic. J. 674.

(iv) Were multiple applications open to be made?

A question raised but not discussed in any detail before the Local Court was whether on the facts as found (pp3-4) the applicant could apply for more than one compensation certificate. Sections 5, 8 and 14 of the Act are relevant to this point. Section 5(1) is set out at p5. Section 8 of the Act provides, as far as material:-

> "(1) Upon hearing an application under section 5, the Court may issue a compensation certificate, but shall not issue more than one certificate in respect of any one application.

(2) A compensation certificate under sub-section (1) shall certify that, in the opinion of the Court, it would be proper for the Minister to pay -

(a) in respect of an application under section 5(1), to the victim, an amount specified in the certificate by way of compensation for the injury suffered by the victim;

- - -

together with such amount, if any, by way of costs, as the Court thinks fit." (emphasis mine)

Section 14(1) of the Act deals with a single offence committed by multiple offenders as, for example, a rape by A aided by B and C; it provides, as far as material:-

"(1) Where a victim suffers an injury - - as a result of an offence committed by more than one offender, the Court may issue only one compensation certificate in respect of the injury - - -".

Section 14(2) of the Act deals with the situation where the injury flows not from a single offence but from a series of offences; if the series of offences is committed in certain circumstances, s14(2) operates restrictively so as to equate the series to a single offence for compensation purposes, viz:-

"(2) Where a victim suffers an injury, - - - as a result of a series of offences committed consecutively by one offender, or a series of offences committed simultaneously or consecutively <u>by offenders acting in concert or in circumstances in which those offences constitute a single incident</u>, the Court may issue only one compensation certificate in respect of the injury - - - ." (emphasis mine)

See, for example, *R v Newman* (1985) 4 NSWLR 225 and cf *R v Bridge and Madams; ex p. Larkin* [1989] 1 Qd.R. 554. It can be seen that the general scheme of the Act is to enable a victim who suffers injury from an offence to apply for a compensation certificate; one application may be made in respect of each offence, and one certificate may issue in respect of each application, subject to the restriction in s14. The question is whether, on the facts, s14 applied in this case. Ms McCrohan submitted that s14 did not apply to the 3 incidents relied on. Here there were 3 incidents of

rape: a series of offences, committed neither simultaneously nor consecutively by offenders who were not acting in concert (apart from the distinct series of rapes by the lake which clearly fell within s14(2) and in respect of which only one certificate was sought), in circumstances where the series did not constitute a single incident. That is to say, the series of offences comprised 3 separate offences for the purposes of s5(1) of the Act, and did not fall within s14(2). They warranted 3 separate applications and the issue of 3 separate compensation certificates each specifying a separate amount. Ms McCrohan referred to the decision of Thomas CSM (as she then was) in *E.K.B. v Mason & Ors* (Local Court, Darwin, No.852466, 18 June 1987) where the facts were similar. In that case her Worship found on the facts:-

> " - - - there were two separate and distinct incidents committed in two different places albeit within a short time of each other. The first incident involved three persons two of whom were also involved in the second incident. These two - - - together with three other offenders - - - were involved in the second series of rapes and physical assaults. There is no evidence before me that the three offenders - - - who were only involved in the second incident which occurred at the beach acted in concert with the three offenders in the first incident. Nor do I think that they were [committed] in circumstances in which those offences constitute a single incident.
>
> - - - The second series of offences were committed by five men, three of whom had not been involved in the first series of rapes and physical assaults.
>
> I consider the applicant is entitled to the issue of a compensation certificate in respect of each application."

The uncontroverted evidence established a series of offences from which injury was suffered: a rape by Jurrah on 7 October 1989, a pack rape by Turner, Norman, Collins and an unknown man on 8 October, and a third rape later that night by Collins. Ms Johnston of counsel for the Northern Territory accepted the evidence placed before the Court; she conceded on that evidence that the appellant was a victim of

3 separate offences for the purposes of the Act, and that s14(2) did not apply. Her Worship clearly so found (see below), a finding open on the evidence and not sought to be controverted on appeal. Whether s14(2) applies is clearly a question of fact and degree in each case; see *McKenzie v Donald* (1984) 37 SASR 1.

(v) The assessment of compensation

Ms McCrohan submitted that a certificate should issue in each application for the maximum amount available under s13(1) of the Act ($15,000), together with certain costs and disbursements. As to that submission her Worship correctly observed (transcript p7.3):-

> "Which means that [the applicant has] basically got a maximum of $45,000, effectively."

Ms Johnston submitted that "the amount of compensation is within your [Worship's] discretion." There were no submissions as to the principles on which assessment should be made.

(c) The decision

There was no dispute as to the evidence. On 14 December 1992 her Worship issued 3 compensation certificates each in the amount of $10,000, a total of $30,000, in respect of the 3 incidents of rape, together with a sum for costs and disbursements; and published her reasons. At pp3-4 are the facts as found by her Worship. Then appears a recital of the trauma suffered by the appellant, as indicated by the material at pp6-12. Her Worship succinctly expressed her reasons for her decision as follows:-

> "The offences against this woman were committed over a period of some two days and there were in all four separate incidents. [The number "four" presumably refers to the 3 incidents of rape relied on by the appellant and the initial forcible abduction by Jurrah.] I am satisfied that with respect to each of [the offenders] that a separate application should and has been made and that compensation should be awarded for each independent incident. Given the effects upon [the applicant] set out in her own affidavit and also in the psychiatric report of Dr. W. J. Bourke, who is of the view that there is likely to be little

> change of the symptoms in the future, I consider that she should be given a compensation certificate with respect to each incident in the amount of $10,000.00"

It is clear that her Worship found that the 3 offences had been committed, and that the applicant had suffered injury from those offences. Her Worship also dealt with the question of costs and disbursements; this aspect is no longer in dispute.

The appeals

(a) Whether leave to appeal is required

The applications for leave to appeal, and the appeals, were instituted on 4 January 1993, 21 days after the certificates and reasons for decision issued on the basis that leave to appeal was required under s19(3) of the Local Court Act 1989. Section 19(3) provides, as far as material:-

> "(3) A party to a proceeding - - - may, within 14 days after the day on which the order complained of was made, appeal to the Supreme Court from an order of the Court, (other than a final order in that proceeding), with the leave of the Supreme Court". (emphasis mine)

It can be seen that s19(3) deals with appeals against non-final orders of the Local Court; it requires that an application for leave to appeal against such an order be filed within 14 days. The applications for leave were lodged outside this 14-day period. Rule 83.23 of the Supreme Court Rules, which allows 28 days, cannot stand against the express time-limit in s19(3). I do not consider that the time-limit in s19(3) is merely directory, or that the Act contemplates that this Court may grant leave to extend it. Contrast, for example, s19(3) with s19(1)(b) (p17) and see generally *Jones v Territory Insurance Office* (1988) 55 NTR 17 at 22-27, and, on appeal (1988) 59 NTR 12 at 26, 32-33 and 38-39, dealing with a similar provision. If s19(3) applies, the applications cannot be entertained because they were lodged outside the express mandatory statutory time-limit; see *Patterson v Public Service Board of New South Wales* [1984] 1 NSWLR 237. Failure to comply

with the statutory time-limit in s19(3) goes to the jurisdiction of this Court to entertain the applications; accordingly, the fact that the Northern Territory did not object to the late lodgment is irrelevant, and the purported applications and appeals would be incompetent.

However, I do not consider that s19(3) applies in this case. The test for whether an order is final or not is whether its legal effect is to finally determine the rights of the parties before the Local Court; see *Carr v Finance Corporation of Australia (No.1)* (1981) 147 CLR 246 at 248, per Gibbs CJ. The order that the compensation certificates issue is clearly a "final order of the Court". It finally decided the issue brought before the Court; that is, whether or not the applicant should be granted the compensation certificates applied for. Appeal from such an order is therefore regulated by s19(1) which provides, as far as is material:-

> "(1) A party to a proceeding - - - may -
>
> - - -
>
> (a) within 28 days; or
>
> (b) with the leave of the Supreme Court, after the expiration of 28 days,
>
> after the day on which the order complained of was made, appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding."

Here the order complained of was made on 14 December 1992; appeals were lodged on 4 January 1993, well within the 28-day period prescribed by s19(1)(a), and accordingly no application under s19(1)(b) for leave to appeal out of time is required.

In the result, the appellant does not need leave to appeal; her appeals are competent, in that they are as of right under s19(1), and were lodged within time.

(b) Notice of the appeals

When the appeals came on for hearing on 2 February only the appellant and the Northern Territory appeared. The

affidavits of service of Ms Pearson of 13 January 1993 showed that Jurrah, Turner and Norman had all been duly served. Collins had not been served. Ms McCrohan initially sought to dispense with service on him, for the reasons in the affidavit of Mr Foy of 27 January 1993, which set out some secondhand hearsay that Collins was "avoiding service of Court process." It is important, in the interests of natural justice, both at the hearing of an application and any appeal, that parties have due notice and a sufficient opportunity of being heard; see *R v McDonald* [1979] 1 NSWLR 451 at 462. It will be recalled, however, that Police have been unable for 2 years to execute the Warrant for Collins' arrest to answer the sexual assault charges following his committal; he may be regarded as having waived his right to be served - see *R v Babic* [1980] 2 NSWLR 743. Ms McCrohan later conceded that some further effort should be made to bring these proceedings to Collins' attention; this has now been done, as appears by affidavit evidence now filed, and he has not sought to appear in these proceedings. Although it has proved impracticable to serve Collins in the manner required by the combined effect of s19(5) of the Local Court Act 1989 and r83.10(2)(b), 82.04(1)(b) and 6.06 of the Supreme Court Rules, I consider that the steps taken were sufficient for the purpose of bringing these proceedings to his notice and I direct that he is deemed to have been served.

(c) <u>The grounds of appeal</u>

The grounds of appeal relied on are:-

"1. The learned Stipendiary Magistrate erred in failing to apply the common law principles of damages in a civil suit in assessing compensation under the Crimes Compensation Act.

2. The amount of compensation assessed by the learned Magistrate was manifestly inadequate in all the circumstances [and thus erroneous in law]."

Each ground alleged error of law, as required by s19(1) of the Local Court Act 1989. It was common ground (as in the Local Court) that the facts were such as to

warrant 3 applications, the maximum amount recoverable being $15,000 on each application, a total of $45,000 as her Worship had observed (p15).

(d) The appellant's submissions

(i) The grounds of appeal

As to the first ground of appeal Ms McCrohan submitted that her Worship did not indicate in her reasons how she had arrived at the amount of $10,000 in respect of each incident. Her Worship simply relied on "the effects [upon the applicant]" as warranting these amounts; see pp15-16. Ms McCrohan submitted that the learned Magistrate may have treated the amount of $45,000 (p15) for the 3 incidents not as marking the limit of jurisdiction under s13(1) of the Act, but as the 'top of the scale', applicable only to a 'worst case' injury, and had accordingly awarded 2/3 as a proportion thereof. She submitted that such an approach was erroneous as it was clear from the case law, first, that the assessment should be made without reference to the statutory limit, and second, it should be made on the basis of the damages which would be awarded in a common law action in tort, subject to the modifications in the Act. The amount of $15,000 is a ceiling for the amount which can be specified in a certificate, not the top of a graduated artificial scale; it is not the amount reserved only for certification in the 'worst' cases.

The authorities support both these propositions. As to the first, in *S. v Turner* (1979) 1 NTR 17, a decision on the repealed Criminal Injuries (Compensation) Act 1976, Muirhead J at pp22-3 approved the application of the following general proposition of Reynolds JA in *R v Forsythe* [1972] 2 NSWLR 951 at 955:-

> "In courts, the jurisdiction of which is limited in amount, if the amount proved exceeds the jurisdictional limit, the full amount of the limit is recoverable. No question of proportion arises."

Muirhead J continued at p23:-

> "*R v Forsythe*, supra, is authority for the well established proposition that the sum of $4000 [as the statutory limit then was] represents a jurisdictional limit, not the top of the scale, not the appropriate sum for the worst injuries. - - -
>
> In determining the amount of compensation, there is no question of aggravated or punitive damages (*Re Sargeant and Farrelly* (1973) 6 SASR 321) [now specifically prohibited by s11(1) of the Act] nor should the maximum sum payable be regarded as the top of any scale, the appropriate sum for the worst injuries; rather it signifies a limit of jurisdiction: *R v Forsythe*. In *R v Fraser*, supra, Wootten J stated ([1975] 2 NSWLR at 526): "The question I have to consider in the first place, having regard to the limit on the jurisdiction - - is whether the appropriate compensation to award in this case is less than $4000 [the then statutory limit] for 'injury'. Unless I am of that view - - it is not necessary for me to endeavour to put any particular figure upon the compensation for injury." This appears to be the logical and correct approach."

As to the second proposition, that the approach to assessment is analogous to that in an action in tort, I respectfully agree with Angel J's summation in *Rigby v Northern Territory* (unreported, 3 October 1991) at p3:-

> "The principles of assessment of compensation for the purposes of the Act are well-known. It is for the court to assess what would be payable according to the principles applicable to an award of damages in a civil suit. The court is to assess the compensation as if it were an award of damages in the ordinary way. If the sum is less than the maximum award under s13 - $15,000 - the court should award that sum, and if it exceeds $15,000 it should award $15,000: see generally *Davey v Haidukewicz* (1980) 4 N.T.R. 40 at 41, the cases cited therein and *R v Forsythe* [1972] 2 N.S.W.L.R. 951, *R v McDonald* [1979] 1 N.S.W.L.R. 451. The task may be contrasted with the method of fixing the "proportion" under the *Motor Accidents Act 1988 (NSW)* s79, see *Southgate v Waterford* (1990) 21 N.S.W.L.R. 427, particularly at 437, 438, 440, 441, and the approach to assigning a numerical value for the purposes of s35a of the South Australian *Wrongs Act*, see *Percario v Kordysz* (1989) 54 S.A.S.R. 259."

I note that in *R v McDonald* (supra) Street CJ said at p458:-

> "- - the amount of compensation itself is to be assessed in accordance with the ordinary principles governing the quantum of damages so far as applicable. - - -"

To the same general effect see *Re The Criminal Injuries Compensation Ordinance 1983* (1984) 58 ACTR 17, *Ballister v Cooper* (1976) 14 SASR 225 and *R v MacGowan* [1984] 3 NSWLR 440. The approach is the same in the United Kingdom; see the Criminal Justice Act 1988, Schedule 7, para8.

As to the second ground of appeal, manifest inadequacy, Ms McCrohan submitted that in comparable cases in this jurisdiction, involving a series of rapes and multiple certificates, the victims suffering similar sequelae as the applicant, the amount awarded was the maximum amount available - the jurisdictional limit - of $15,000. This submission assumes that the use of verdicts in comparable cases is a legitimate standard by which to measure the adequacy of an award - as to which see pp21-22, 24-25. She also submitted that common law damages awarded for the injury suffered by the appellant would be well in excess of $15,000, in respect of each of these incidents. She referred to Dr Bourke's summary (see pp11-12) in which he was unable to distinguish the damages which flowed from each incident considered separately, but dealt with its significance only in reply (p32).

(ii) <u>The principles applicable on assessment</u>

Ms McCrohan then turned to the principles upon which the assessment should have been made. She submitted that at common law a global amount was usually awarded for those elements of non-pecuniary loss embraced by s9(e) and (g) of the Act, the standard being that of the "contemporary community". I accept that.

She submitted that the application of that standard meant that the damages should be reasonably proportionate to damages awarded in comparable cases. This proposition is supported by cases overseas such as *Singh v Toong Fong Omnibus Co. Ltd* [1964] 3 All ER 925 (P.C.) at 927

and *Chan Wai Tong v Li Ping Sum* [1985] A.C. 446 at 458, on the basis that on appeal it cannot rationally be said that an award is manifestly inadequate, except by comparison with comparable awards. This approach promotes consistency in awards. These comparable awards are said to manifest the "general standards prevailing in the community", the touchstone indicated in *O'Brien v Dunsdon* (1965) 39 ALJR 78.

However, this 'tariff' approach (for the purpose of comparing damages awards is to derive a conventional range, a norm or standard) has been consistently rejected by the High Court; see *Thatcher v Charles* (1961) 104 CLR 57 at 71-2, per Windeyer J, and *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124-5. For penetrating discussion of *Planet Fisheries* see *Moran v McMahon* (1985) 3 NSWLR 700 at 703-712 and 724. The Australian approach is more visceral and less satisfactory than the approach in other common law jurisdictions. The Local Court is required to ensure that its award is proportionate to the injury and its consequences to the particular victim, as disclosed by the evidence; in doing so, it will give weight to its own general awareness of current community ideas of fairness. The practical problem is how to attain that general awareness, in light of the strictures in *Planet Fisheries*. As to this, I respectfully agree with the views of Walters and Wells JJ in *Van Velzen v Wagener* [1975] 10 SASR 549 at 553:-

> "Despite what was said by the High Court in *Planet Fisheries Pty. Ltd. v La Rosa* ((1968) 42 ALJR 237) about too free a use of awards in other cases, purporting to show some norm or standard, we agree with the remarks of Bray CJ in *Hirsch v Bennett* ([1969] SASR 493, at p494), that in the estimation of damages for non-economic loss, a judge is not prevented from making use of his experience "which can be in part at least vicarious and derived from what the judge has read and heard of the cases in his own jurisdiction as well as from his knowledge of cases in which he has been personally concerned either at the bar or on the bench.""

A court may thereby take into account the general range of awards of common law damages for non-pecuniary loss, but not specific awards in comparable cases. As Angel J put it in *Rigby v Northern Territory* (supra) at p7, the Courts may -

> "- - - have regard to the general run of verdicts as a means of informing their judicial experience which has necessarily to be brought to bear to reach a figure that is reasonably proportionate to the non-economic loss established on the particular facts in the individual case."

As to the applicant's loss of the amenities of life (s9(g)), Ms McCrohan relied in particular on paras26-28 and 35-38 of the applicant's affidavit (see pp7-8).

As to the applicant's pain and suffering (s9(e)), Ms McCrohan submitted that this head of damages embraced the applicant's subjective pain and suffering, that is, what she had experienced in that regard, as well as the physical pain and suffering at the time. I do not fully understand this distinction; this head of damages is for both physical and mental pain and suffering but is concerned only with the victim's subjective sensation of it.

Ms McCrohan submitted that any particularly unpleasant circumstances in which injury was sustained or which made those injuries more serious, warranted additional damages, although she conceded regard could not be had to aggravated damages which are prohibited by s11(a) of the Act. At common law aggravated damages, which are compensatory in nature, apply when a wrongful act causes harm which is aggravated by the particular manner in which that act was done; see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118. The plaintiff is compensated for the effect on her feelings of the particular manner of the defendant's wrongdoing - the injury to her feelings caused by emotional hurt, insult, humiliation and the like. See, for example, *Lackersteen v Jones* (1988) 92 FLR 6 at 40-41, and *Henry v Thompson* (1989) 2 Qd. R. 412 at 415-6; in the latter case, in an assault the victim was urinated on. The prohibition on aggravated damages in s11(a) prevents the effect on the applicant's feelings being taken into account under the Act. However, I accept that, for example, particularly brutal circumstances in which a rape is committed may cause increased pain and suffering or mental distress; in this sense, the circumstances of the offence 37

are relevant to the assessment of those statutory heads of damage. In this connection I respectfully agree with the observation by Millhouse J in *P v South Australia* (1992) 60 A Crim R 286 at p290:-

> "Almost every rape - I put in the qualification 'almost' with hesitation - is harmful and dreadful; that is in the nature of the crime although the circumstances of some are worse than others".

In that jurisdiction aggravated damages may be taken into account; it is puzzling that it is prohibited in this jurisdiction under s11(a), since such damages are compensatory in nature, as opposed to exemplary and punitive damages.

Ms McCrohan relied in particular on *S. v Turner* (supra) where Muirhead J took account at p22 of the "fright, humiliation and anguish" experienced by the victim during and immediately after the rape; I respectfully agree that these are relevant matters, insofar as they are encompassed by "mental injury". In that case I note that his Honour in fact awarded less than the statutory maximum, stating at pp23-24:-

> "- - the evidence indicates that the physical hurt, the bruising and laceration of the lips quickly healed and of more importance the evidence does not justify a finding of any significant residual psychological or physical consequences. As I have said there is no evidence that the plaintiff's life style has been affected or that her sense of well being was materially reduced for other than a short period."

The evidence in the present case is to quite different effect, as regards psychological consequences.

Pursuant to her general submission on the second ground of appeal (see p21) Ms McCrohan then referred in some detail to cases which, she submitted, were more or less comparable to the present case. Although I permitted this to be done and I note those cases below, for the purpose of informing my experience vicariously, it is clear that in Australia neither an appellate court nor a trial court can determine the adequacy or inadequacy of an award of damages

by reference to specific awards in other cases. It follows that an applicant should not be allowed to cite particular comparable verdicts in submissions to the Local Court or on appeal; see *Moran v McMahon* (supra) at 724 per Priestley JA and at 726 per McHugh JA. The Local Court is required to decide what is fair and reasonable compensation, if it does not exceed the statutory limit, its touchstone being its conception of the current general opinion as to fairness, derived from its general experience which includes the general knowledge it has acquired of other cases. Angel J dealt with this aspect specifically in *Rigby v Northern Territory* (supra), citing with approval observations by Cox J in *Packer v Cameron* (1989) 545 ASR 246 at 251 and by Bray CJ in *Hirsch v Bennett* [1969] SASR 493 at 494. The outcome, as his Honour put it in *Rigby* at p6, is that a successful applicant should be awarded -

> "- - - a figure which ought to strike the learned Magistrate as being fair in the light of the experience of the courts of the measure of damages that are currently being awarded in broadly comparable cases - - -".

The Local Court's task of assessment "can only be carried out by way of a broad and largely arbitrary or subjective assessment of what, according to correct community attitudes, would be regarded as reasonable compensation", as Wootten J put it in *R v Fraser* [1975] 2 NSWLR 521 at 524.

As comparable cases, Ms McCrohan referred to *J. v Northern Territory & Anr.* (Local Court, 8 November 1991) and *M. v Northern Territory & Anr.* (Local Court, 28 April 1992) in both of which the statutory maximum was awarded for a single incident of sexual assault. The sequelae in *J.* were broadly similar to those in this case. Ms McCrohan relied particularly on *B. v Mason & 4 Ors.* (Local Court, 18 June 1987) and *M. v Northern Territory & Anr.* (Local Court, 14 December 1990). She submitted that these 2 cases were "almost on all fours" with the present case. *B.* involved 2 separate rapes by several offenders. The victim suffered injuries in the 2 incidents, and made 2 applications. Ms. Thomas CSM found that:-

> "In respect [of] each application including the claim for special damages i.e. loss of wages, I consider that Miss B. has evidence to support an award in excess of $15,000."

Her Worship issued a certificate in the jurisdictional limit of $15,000, in each application. In *M.* there were 2 separate and distinct sexual assaults on the 13-year old victim; there were 2 applications which resulted in 2 certificates for $15,000 each. The psychiatric evidence was that:-

> "- - - we are dealing with two separate events which have had different psychological consequences for Ms. M. The first assault, by the group of young boys, is significant, because Ms. M was affected by alcohol at the time, and seems unable to remember details of the assault. - - - Whatever the explanation, the fact that she cannot remember much of those events torments Ms. M on a daily basis. She <u>knows</u> these things have happened to her, and that knowledge gives her a sense of shame and disgust. She is also pre-occupied with guilt; she knows she was affected by alcohol at the time, and dwells on issues of self-blame. This issue, more than anything else, escalates her lack of self-worth, - - -
>
> - - -
>
> The second assault by the older man is very clear in Ms. M's mind. - - she carries no guilt about this incident, and she feels appropriate anger towards the offender. Nevertheless, this incident has added to her distrust of males, and her general sense of powerlessness in her life.
>
> It is difficult, therefore, to accept any argument that one assault has been more damaging than the other: each has had long-term implications for Ms. M. Although it seems clear to me that the assaults are quite separate events, the sum total of the assaults has, in my opinion, led to a number of common long-term difficulties for Ms. M."

Counsel for the Northern Territory described this case as -

> "- - probably one of the worst cases ever to come before the Crimes Compensation jurisdiction."

It will be noted that the evidence was such as to enable separate injuries to be attributed to each of the offences; that is not the case here. Mr Hook S.M., in certifying for the maximum permissible under the Act, stated:-

> "- - I add the rider that, in my view, it will be worth a lot more. Quite bluntly, I don't believe any amount of money could compensate a female for this type of thing."

Ms McCrohan referred to *B. v W.* (District Court, Western Australia, 21 September 1989), but submitted it was not strictly comparable. In that case the jurisdictional limit was $7,500. *W.* was the victim's father by adoption; he was convicted on 10 counts of defiling her between the ages of 11 and 16. These were representative counts. Williams J noted that there were 10 applications, one for each of the 10 unrelated incidents, the civil standard of proof applied, and the amount payable was as compensation for injury or loss. His Honour said at pp22-23:-

> "She has been severely damaged by being subject to repeated sexual abuse by the respondent.
>
> I am mindful of the comments of Wootten J in *R v Fraser* ([1975] 2 NSWLR 521 at 524) that the task of assessing compensation can only be carried out by way of a broad and largely arbitrary or subjective assessment of what, according to current community attitudes, would be regarded as reasonable compensation.
>
> The modern community attitude towards the offences of which the respondent was convicted is that of the utmost revulsion. - - -
>
> They each involve a terrible affront to the applicant's dignity and a cruel invasion of her privacy.
>
> The evidence justifies a finding of significant residual psychological damage.
>
> - - -
>
> It is abundantly clear from the applicant's statement to the police and her affidavit that the offences of which the respondent has been convicted are only a representative sample. If the Crown has chosen to indict the respondent in respect to either more or less offences then that would have the arbitrary effect of affecting an award of compensation under the Act. Therefore I propose to make an award in respect to each offence but at the same time to keep an eye on the global sum that I finally award to the applicant. In the end result my task is to award the sum that

would according to current community standards be regarded as reasonable compensation.

I am of the view that a sum of $5,000 in respect to each offence would be an appropriate sum. That results in a global award to the applicant in the sum of $50,000." (emphasis mine)

I note 5 other cases. *Application CIC 69 of 1969* (Master Hogan, A.C.T. Supreme Court, 4 March 1991) was very similar to *B. v W.* (supra); it involved many acts of incest of which 9 were charged. The applicant sought 9 separate awards in her single application; that was permissible in the Australian Capital Territory, but not in this jurisdiction in light of s8(1) - see p13.

In approaching the assessment of damages the Master said at pp5-6:-

"- - - if the applicant were to have brought an action for damages against her father for the nine assaults committed by him upon her, the tribunal of fact would be able, and would be obliged, as best it could, to award damages in respect of each incident, on the basis that each consisted of a separate tort, each causing its own part of her total damage, and the later torts exacerbating the harmful effects upon her of the previous ones" (emphasis mine)

Dealing with the apportioning of damage to each injury, a matter of relevance in the present case, the Master said at p7:-

"The next problem arises from the impossibility of separating out the extent to which her present psychological condition is the result of each separate incident. - - -

The task of apportioning her damage to the separate incidents is indeed a difficult one, and impossible to carry out with any pretence of precision.

But it is not unlike another situation with which common law courts must grapple quite often, where as a result of a series of work or motor car accidents a plaintiff finishes up with a complex of injuries and disabilities. All that can be done is to adopt a broad and common sense approach, often starting with a total sum which represents full compensation, and dividing it roughly according to the responsibility of each tortious act in contributing to the total loss." (emphasis mine)

F v J (unreported, Supreme Court of Western Australia, 3 September 1992) was similar to *B. v. W.* (supra): an award was sought for 6 rapes by a guardian on a victim between ages 13 and 19, with sequelae similar to this case; Nicholson J awarded the jurisdictional limit in each case, a total of $34,000.

K v SK (Local Court, 31 January 1992) involved 3 applications arising out of separate and distinct offences involving 2 indecent dealings and a rape by the victim's father. There were lasting psychological effects and some lasting physical effects. Mr Gray SM noted at p5 that "- - it is the totality of [the victim's] father's conduct which has led to her present condition", and adopted the approach taken by Master Hogan in *CIC 69 of 1989* (supra), stating at p6:-

> "In my opinion [the Act] - - requires the Court to fix a separate award in relation to each offence. In cases of this nature it is of course extremely difficult if not impossible to do so with any precision and the approach taken by Master Hogan is obviously a commonsense one; it is probably also the most realistic. <u>It would be quite unrealistic to ignore the total impact of the various offences against the applicant</u>. However, it is clear in my opinion, from the words and structure of the Act that I must make separate awards of compensation in respect of each of the three incidents." (emphasis mine)

B v Northern Territory (Local Court, 31 July 1992) involved 4 applications arising out of 4 acts of incest selected from many which the father committed on the victim between the ages of 11 and 13. The victim suffered serious psychological injuries expected to last many years. The Court certified for the jurisdictional limit of $15,000 in each application.

C v C (unreported, Supreme Court, 22 January 1993) involved 10 applications under the repealed Criminal Injuries (Compensation) Act 1975 arising out of 4 rapes and 6 indecent assaults by the victim's stepfather between ages 12 and 14, these being part of a history of his sexual abuse

of the victim from age 10. There were serious psychological injuries. Thomas J awarded the jurisdictional limit ($4000) on each application. At p7 her Honour said:-

> "I consider that it is appropriate I apply a global approach and that it would not be a reasonable or sensible exercise to attempt to differentiate between the individual offences. The plaintiff in these proceedings endured sexual assault and abuse over many years. From the age of ten years she was the victim of sexual assault at frequent intervals perpetrated by a person who was in a position of trust. As a consequence of these assaults the plaintiff suffered physical injuries and severe psychological damage. Her education and self development have been severely affected and she has sustained permanent emotional damage.
>
> The total effect of her physical and psychological injuries would entitle her to an award of damages in excess of forty thousand dollars.
>
> For these reasons I propose to allocate the amount of damages to the maximum amount of $4,000 in respect of the conviction for each offence making a total amount of $40,000." (emphasis mine)

(e) The Northern Territory's submissions

Ms Johnston submitted that while it was open to the Local Court on the evidence to have certified the jurisdictional limit of $15,000 in respect of each of the 3 applications, the judgment of Dixon, Evatt and McTiernan JJ in *House v The King* [1936] 55 CLR 499 established that to succeed on appeal the appellant must show that the learned Magistrate erred in exercising her discretion when determining the amount at $10,000. Their Honours said at p505:-

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which

> the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred." (emphasis mine)

Ms Johnston submitted that in the absence of identified error by the Local Court the amount certified must be shown to be manifestly inadequate. I accept that proposition.

Ms Johnston referred to *B. v Northern Territory & Anr.* (Local Court, 2 November 1987), where Mr McCormack SM certified for $11,000 for injuries received in a rape. His Worship allocated various amounts to the different heads of damages, and referred briefly to the facts and amounts awarded in some 16 cases decided between 1975 and 1987, mainly based on injuries received in rapes, to assist him "in arriving at what would be regarded as reasonable compensation."

Ms Johnston also referred to *J. v. Northern Territory & Anr.* (Local Court, 2 August 1991) a case of injuries received in the course of a rape, where assessment of the 3 heads of damage under s9(e), (f) and (g) was approached globally, as is the common practice. Mr Gray SM stated at p5:-

> "In this, as in most, if not all, rape cases, the emotional and psychological impact was infinitely more serious than the short term physical impact and trauma. Indeed the true trauma is of psychological, emotional and mental nature.
>
> - - -
>
> As in all applications of this nature, the critical question is the amount of emotional suffering, psychological trauma and mental distress."

I respectfully agree with these observations.

(f) Series of offences causing indivisible injury: assessment of damages

Ms Johnston submitted that the learned Magistrate may have determined that $30,000 was the proper amount to be certified in respect of the injury established by the evidence at pp6-12, that is, the whole of the injury

suffered by the appellant as a result of all 3 incidents of rape taken together, and had then allocated $10,000 to each incident in each certificate. Ms Johnston submitted this was a legitimate approach to assessment where there were separate applications in respect of separate offences which resulted in single injury of the type relied on here, separate elements or proportions of which could not be rationally attributed to each offence. Ms McCrohan submitted in reply that such an approach was erroneous, because each incident should be treated completely separately. In this case, she submitted, since the evidence did not enable a conclusion to be drawn as to which injuries, or which proportions of the total injury, were referable to each offence (see pp10 and 12), it must be assumed that all of the injury suffered was attributable to each separate incident.

In terms of tort law, Ms McCrohan's submission appears to be that the offenders were several concurrent tortfeasors whose independent tortious acts caused a single indivisible injury for which each is responsible and liable in full. However this may be, the plaintiff cannot recover for more than the total injury she sustained; accordingly, it is not necessary to pursue this analysis, unless the total award of $30,000 is shown to be manifestly inadequate.

Conclusions

The Act provides for an individualized judicial assessment of damages in accordance with common law principles. It is remedial legislation which should be interpreted liberally and beneficially. It assumes that an injury can be attributed to a particular offence; it does not expressly deal with the situation which obtains here, where a series of offences outside the scope of s14(2) results in a single injury responsibility for which cannot be apportioned other than arbitrarily between the different offences in the series.

The task of the learned Magistrate was to assess compensation for the injury disclosed by the evidence at

pp6-12. This was in fact the aggregate injury from the 3 offences. In such a case the only practicable course open to her Worship was to assess the amount to be certified for that injury under the heads of damage relied on, and allocate that amount on an arbitrary basis equally between the 3 offences. I have no doubt that that is in fact the way her Worship proceeded, as had Master Hogan in *Application CIC 69 of 1969* (supra) (at p28), and Thomas J in *C v C* (supra) (at pp29-30).

I consider that the first ground of appeal (p18) is not established. There is nothing to suggest that her Worship treated the statutory maximum of $45,000 as reserved only for three "worst case" incidents; her reference to that amount at p15 does not carry that connotation. Nor is there anything to suggest that she failed to assess the amount for the aggregate injury as if it were an award of damages in tort. No complaint is made that her terse reasons (pp15-16) are inadequate, and given the nature of the matters to be assessed and the method of assessment, they are clearly sufficient.

The second ground of appeal (p18) is that the amount of $30,000 is manifestly inadequate. Verdicts in broadly comparable cases cannot be looked at as constituting the touchstone, the focus being on the particular case. As indicated earlier (p22), the court is to assess the award in the general way allowed by *Planet Fisheries Pty Ltd v La Rosa* (supra) to determine what is fair and reasonable compensation, using its general experience of the current community awareness of what is fair.

Two general considerations relevant to that assessment should be borne in mind. First there are the cautionary words of Wootten J in *R v Fraser* [1975] 2 NSWLR 522 at 523-5, viz:-

> "The task of expressing in money terms the effect on a woman of being raped involves insoluble problems, - - - To some extent, the task may be assisted by evidence from the applicant and her medical advisers as to specific symptoms indicative of the psychological injury which she

has suffered, if such evidence is available, as it is in this case. But it would be unreal to regard the injury as merely the sum total of these overt symptoms, and it would be a rare woman who possessed both the measure of detached psychological perception needed to identify the nature and extent of her own psychological injury, and the capacity to express it in words in the witness-box. The task of assessing compensation, therefore, calls for some empathy with the victim who appears in the witness-box, a capacity for which judges have no claim to enjoy in a greater degree than other men, let alone women. Even with the aid of some evidence and some empathy, the task of assessing compensation can only be carried out by way of a broad and largely arbitrary or subjective assessment of what, according to current community attitudes, would be regarded as reasonable compensation. In doing this one must be conscious of the artificiality of the assessment, because money is to a large extent not merely inadequate, but irrelevant. - - -

I have referred to the need to consider the matter in the light of current community attitudes in making this largely arbitrary assessment, because it seems to me that a judge has a duty to reflect these rather than any idiosyncratic personal attitudes he may have. Community attitudes are, of course, spread out over a wide range, and judges are only too often accused of being found in the rear guard. Sometimes they are in the vanguard, but it seems to me they should at least try to be on the same path as the community which they are employed to serve, and I have endeavoured, in considering how the assessment should be made, to have some regard to community attitudes to rape as they appear to me, and as, indeed, they have been expressed by the Court of Criminal Appeal in dealing with the sentencing of persons convicted of rape. These attitudes are also relevant to appreciating the effect of the offence on a woman who must move in the community as a known victim of rape.

Despite the frequency with which it is currently committed, rape remains one of the most serious offences in the criminal law. - - - The frequency of its occurrence is a sign of social disintegration, and not in any degree a sign of community acceptance. There is, if anything, an increasing revulsion towards the offence. Of course, the nature of the attitudes to it has changed. Victorian mumbo-jumbo, secrecy and repressive attitudes about sex have largely been discarded, virginity is not prized in the same

way, and its loss no longer causes a woman to be regarded as dishonoured or defiled, even though there is an uninformed and bigoted minority which regards every attack as being partly the woman's fault. But these very changes have brought with them a greater appreciation of, and increased sensitivity to, the terrible affront to human dignity, and the cruel invasion of human privacy, which is involved in the rape of a woman. The recognition of a woman's right to sexual freedom and sexual equality, which largely underlay the dropping of repressive attitudes to sex, has brought even stronger revulsion against the humiliating denial of that freedom and equality which is involved in rape.

If one looks for some analogy to this revulsion, it may perhaps be found more in our attitudes to slavery, and the denial of human dignity involved in it, than in anything else. The community, it seems to me, is coming to have some appreciation of the terrible psychological wound involved when male violence and aggression forces a woman's participation in an act which, when voluntarily and lovingly undertaken, can be one of the most transcending of human experiences. All this is no less true of a woman of considerable experience than of an inexperienced girl, although the latter may, depending on the circumstances, suffer much additional shock, distress and lasting psychological damage." (emphasis mine)

Second, there are the observations of Woolf J in *W v Meah; D v Meah* [1986] 1 All ER. 935. These cases involved the assessment of damages in common law actions for personal injuries, one arising from a rape and the other from a serious sexual assault. His Lordship said at p942:-

"- - - it is important that the court bears in mind that the award in this case must bear a proper relationship to the awards which the court makes in more conventional personal injury cases. Although these ladies underwent terrible experiences, sadly as a result of a traffic accident, others undergo experiences which are every bit as cataclysmic, so far as they are concerned, as those undergone by the plaintiffs and, unfortunately, very often the physical injuries that the victims of traffic accidents sustain are much more serious than the physical injuries that these two ladies suffered.

- - -

> - - the primary purpose of the damages must still remain to compensate the person concerned for the injuries they have suffered, although of course the circumstances in which the injuries are suffered does affect the amount of injury they are entitled to be compensated for." (emphasis mine)

The approach which this Court must take, sitting on appeal, is of prime importance to the disposition of this appeal. An appeal against the assessment of compensation is to be determined on the same principles which apply to an appeal against the assessment of damages in a civil action; *Morrison v Groom* (1979) 21 SASR 153. An appeal against the amount awarded for non-pecuniary loss is analogous to an appeal against a discretionary judgment. As to that, see the observations of Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616-7, and *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627 per Kitto J, viz:-

> "- - the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. - - - the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance: *House v The King* (1936) 55 CLR 499, at pp504, 505." (emphasis mine)

The general observations by Barwick CJ in *Sharman v Evans* (1976-77) 138 CLR 563 at 565 should be borne in mind:-

> "- - the fundamental principle is that the exercise of discretion by the trial judge in the estimation of damages ought not to be interfered with by an appellate court unless the trial judge has erred in point of law or in his approach to the assessment or unless the assessment itself, by its disproportion to the injuries received, demonstrates error on the part of the trial judge. - - - It cannot be too strongly said that a mere difference of opinion as to what ought to have been the proper award of damages does not indicate error on the part of the trial judge." (emphasis mine)

Where the appeal is from an assessment by a judge or magistrate sitting alone, for the award to be upset as manifestly inadequate it must be shown to be a wholly erroneous estimate of the damage suffered, unreasonable or plainly unjust, below the range of a sound discretionary judgement; see generally *Gamser v The Nominal Defendant* (1976-77) 136 CLR 145 at 148-9. The award for the heads of damages in s9(e)-(g) cannot be precisely quantified because they deal in incommensurables; dispute as to the adequacy of such an award cannot be resolved by reason or investigation. The award is in truth of a conventional nature, involving a range within which any particular award is valid, bounded only by concepts of community fairness, a matter ascertained by judicial experience.

Applying the principles which an appellate court is required to observe in an appeal of this nature and bearing in mind the considerations mentioned above, I do not consider that the global award of $30,000 for the injury sustained has been shown to be manifestly inadequate.

Orders

The appeals are dismissed and the order of 14 December 1992 for the issue of the 3 certificates is affirmed.
