Woodruffe v Northern Territory of Australia [2000] NTCA 8

PARTIES:	BARBARA WOODRUFFE
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. AP25 of 1999 (9708707)
DELIVERED:	14 July 2000
HEARING DATES:	12 April 2000
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

CATCHWORDS:

Interpretation

General rules of construction of instruments - admissibility of extrinsic evidence in relation to instruments - whether to issue assistance where the "offence was not reported to the police" - *Crimes (Victim's Assistance) Act* 1983 (NT), s12(b).

Crimes (Victims Assistance) Act 1983 (NT); ss5(1), (2); 5(2A); 5(3), (4); 6(1)(a); 7; 12(b); see also ss10(2); 12(c); 21.
Interpretation Act NT; ss62A and 62B
Schmidt v South Australia (1985) 37 SASR 570 at 573, 575, applied.
Geiszler v Northern Territory (1996) NTSC, unreported, 3 April 1996, at pp3, 4, 5, and 17, applied.
Kinsella v Solicitor for the Northern Territory (1987) 138 FLR 213 at 220, applied.
Murray v Baxter and Others (1914) 18 CLR 622 at 632-33, considered.

Rose v Secretary, Department of Social Security (1990) 92 ALR 521 at 524, applied
Khoury (M & S) v Government Insurance Office of New South Wales (1984) 54 ALR 639 at 649-50, applied.

Damages

General principles - assessment of damages for applications under the *Crimes (Victim's Assistance) Act.*
Crimes (Victim's Assistance) Act 1983 (NT); ss5, 9, 13, 21.
Rigby v Solicitor for the Northern Territory (1991) 105 FLR 48 at 51, referred to.
LMP v Collins (1993) 112 FLR 289 at 309, applied.
R v McDonald (1979) 1 NSWLR 451 at 458, referred to
Application for Criminal Injuries Compensation No. 69 of 1989 (1991) 103 FLR 297, considered.
Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd & Another (1975) 49 ALJR 233, referred to.
Watts v Rake (1960) 108 CLR 158, referred to.
Purkess v Crittenden (1965) 114 CLR 164 at 168, referred to.
The Law of Torts 9th Edn. pages 229-230 by Professor Flemming.
Pearce and Geddes, *Statutory Interpretation in Australia*, 4th Edn. para [9.2]

REPRESENTATION:

Counsel:

Appellant:	J. Lawrence
Respondent:	R. Webb

Solicitors:

Appellant:	Top End Women’s Legal Services
Respondent:	Hunt & Hunt

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COURT OF APPEAL OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Woodruffe v Northern Territory of Australia [2000] NTCA 8
No. AP25 of 1999 (9708707)

BETWEEN:

BARBARA WOODRUFFE
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MARTIN CJ, MILDREN AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 14 July 2000)

THE COURT

[1] The *Crimes (Victim's Assistance) Act* created a statutory scheme to provide assistance "to certain persons injured or who suffer grief as a result of criminal acts". The Act permits a "victim" (ie a person who is injured or dies as a result of the commission of an offence by another person) to obtain an assistance certificate and that certificate, in turn, requires the Northern Territory to pay to the recipient a sum of money by way of assistance for the injury suffered by the victim.

[2] The appellant in these proceedings made eight applications for assistance certificates pursuant to the provisions of the Act. The offender in each case was a person with whom she had been living in a de facto relationship from 1988 to 1995. The particular incidents giving rise to the applications occurred between 18 April 1991 and 17 September 1996. It seems that these incidents were part of an on-going course of conduct by the offender against the appellant and they were described as "representative samples of numerous assaults committed by the offender upon the appellant over a period of some 10 years."

[3] The matter came before the Local Court at Darwin on 23 February 1999 when that Court ordered that assistance certificates issue in relation to six of the eight applications. The learned Magistrate assessed a "global entitlement" in favour of the appellant in the sum of $80,000. He then apportioned that sum into five certificates of $13,500 each and one certificate of $12,500.

[4] The respondent appealed against that decision. On 1 October 1999 the Supreme Court allowed the appeal. It directed that one assistance certificate (No 9708707) be set aside and that the remaining five applications be remitted to the Magistrate for the amount of assistance to be assessed in accordance with law.

[5] An appeal to this Court followed. The grounds of appeal are as follows:

1. The learned Judge erred in his interpretation of s12(b) of the *Crimes (Victim's Assistance) Act*.

2. The learned Judge erred in finding the learned Magistrate at first instance had, in his method of assessing the quantum of damages in respect of the totality of the applications, erred in law.

[6] At the hearing before this Court a third ground of appeal was added by consent namely that:

> The learned Judge erred in concluding that there was insufficient evidence before the learned Magistrate to find circumstances preventing the appellant reporting to police the commission of the offence which was the subject of application 9708707.

Application Number 9708707

[7] This application related to an assault by the offender upon the appellant on 18 April 1991. It was common ground before this Court that no report concerning that assault was ever made to a member of the Police Force.

[8] The learned Magistrate issued an assistance certificate in relation to this matter however, on appeal, this was declared to have been an error of law. It was held that s12(b) of the Act prevented the issue of an assistance certificate in the circumstances of the application and it was set aside. Section 12 of the Act is in the following terms:

> The Court shall not issue an assistance certificate -
>
> (a) where it is not satisfied, on the balance of probabilities, that the person whom the applicant claims was injured or killed was a victim within the meaning of this Act;

(b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;

(c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;

(d) where it is satisfied that the applicant has made the application in collusion with the offender; or

(e) in respect of an injury or death caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code.

[9] As we have observed the assault which gave rise to this application occurred on 18 April 1991. There is no dispute that neither the applicant nor any other person reported the matter to a member of the Police Force either within a reasonable time or at all. His Worship found that fear of the offender and his indifference to the consequences of breaching the law were "circumstances preventing the reporting of the commission of the offence". Mr Lawrence, who appeared on behalf of the appellant, also pointed to the evidence of the appellant before his Worship where she said:

> I found that going to the police about the violence just made me feel worse. It made me feel more degraded. I felt as though I was wasting the time of the police. I remember that at least once or twice a police officer told me that I was wasting their time … as though I was in a "no win" situation. I thought the police were there to help but many of my contacts with the police made me feel worse. Even if the police picked Kelvin up they often just let him go so that he came back to me and was violent to me again. Eventually instead of contacting the police immediately about the violence I would go to Dawn House and get the workers at Dawn House to help me talk to police.

[10] The learned Judge on appeal declared that it was unnecessary for him to consider this finding by his Worship because of the conclusion he reached in relation to the application of s12(b) of the Act. However he addressed the issue and concluded that his Worship was in error in finding that circumstances existed which prevented the commission of the offence being reported to a member of the Police Force. His Honour was of the view that the finding was not open on the evidence before the learned Magistrate because:

(a) the only evidence in this regard centred upon the reasons why the appellant did not report the offence to the police immediately or soon after the date of the alleged offence (ie 18 April 1991) and did not address circumstances operating from that time until the application came before the Court in 1999; and

(b) there was no evidence as to why the circumstances throughout the period prevented someone other than the appellant from reporting the matter to the police.

[11] In the circumstances his Honour "would have ordered that the assistance certificate in respect of application 9708707 be set aside on this basis". That finding is challenged in the ground of appeal added in the course of the hearing.

[12] As to the operation of s12 of the Act his Honour accepted a submission made on behalf of the present respondent that s12(b) requires, in every case, that a report of the commission of an offence be made to a member of the Police Force and further that the report must be made within a reasonable time after the commission of the offence. If a report is made, but not within a reasonable time, then the Court must be satisfied that circumstances existed which prevented the reporting of the offence within that reasonable time. His Honour held that:

> Section 12(b) of the Act precludes the Local Court from issuing an assistance certificate where the relevant offence was not reported to the police within a reasonable time of the commission of the offence. The proviso to s12(b) operates only where the Local Court is satisfied that circumstances existed which prevented the reporting of the commission of the offence within a reasonable time. The proviso has no application to circumstances where a relevant offence has never been reported to the police. Accordingly, s12 of the Act precludes the issue of an assistance certificate in circumstances where the relevant offence has never been reported to the police.

[13] It was the view of his Honour that this interpretation flowed from the "ordinary and natural meaning of the words" in s12(b) and was also consistent with the intention of the legislature when s12(b) is read within the context of the Act as a whole.

[14] The appellant challenged this interpretation of s12(b) of the Act. It was submitted that s12(b) did not necessarily preclude the issuing of an assistance certificate even if the commission of the offence had not been reported to a member of the police force at all. If it was the intention of the legislature that reporting be a pre-requisite to the issue of an assistance

certificate then, it was submitted, this could have been readily achieved by the use of plain words. For example the section could have provided that the Court shall not issue an assistance certificate "where the commission of the offence was not reported to a member of the police force".

[15] Further it was submitted that the words used are clear in their meaning. Firstly, s12(b) requires a determination of what is a reasonable time after the commission of the offence within which the matter should have been reported to a member of the police force. Secondly, the section called for an enquiry as to whether the matter was reported within that reasonable time. Thirdly, if it was not so reported, an inquiry should be undertaken as to why the matter was not reported within that time. Finally, the Court was called upon to decide whether it was satisfied that circumstances existed which prevented the reporting of the commission of the offence within a reasonable time. It was submitted that the section is not concerned with why the matter was not reported later than a reasonable time or, if such be the case, why it was not reported at all.

[16] If the interpretation proposed by the appellant be correct then consideration must be given to the effect of s12(c) of the Act. That subsection provides that the Court shall not issue an assistance certificate where an applicant has failed to assist the Police Force in the investigation or prosecution of the offence. The submission of the appellant was that s12(c) must be considered in light of s12(b) which, according to the appellant's submission, contemplates the prospect that there would be no report and therefore no

investigation or prosecution of an offence. If that be the case, it was said, there can be no failure to assist the Police Force by the applicant when the offence is not reported at all. This submission ignores the structure of s12 which prevents the Court from issuing an assistance certificate where any one of the circumstances described in sub-sections (a) to (e) is present. Those circumstances are not expressed to be in any way dependent upon or qualified by any other. They each stand alone. There is no warrant for reading down sub-section (c) because of sub-section (b).

[17] Alternatively the appellant submitted that the meaning of the section is not clear and various interpretations are open. In those circumstances a purposive approach should be taken in determining the meaning of the section. The legislation is remedial and should be read in a way beneficial towards applicants.

[18] In the respondent's submission the interpretation of s12(b) pressed by the appellant would render s12(c) of the Act nugatory in certain circumstances. If it is the situation that an assistance certificate can be issued even where no report of the commission of the offence was made then, in such a case, s12(c) would have no work to do.

[19] The respondent submits that where there is no report then the application ought to be dismissed. This interpretation "flows from the ordinary and natural meaning of the words" in the section and is consistent with the intention of the legislature that limited assistance be given to victims of

criminal conduct. Whilst the Act is remedial sub-sections 12(b) and (c), along with the other sub-sections of s12, set “boundaries to the benevolence which the Act distributes”: *Schmidt v South Australia* (1985) 37 SASR 570 at 573. The boundaries created by those sub-sections include that offences must be reported to a member of the Police Force by someone, whether or not the applicant or victim, and the applicant or victim must assist in the efforts to bring the offender to justice. The requirement for a report and the investigation of such a report provides the opportunity for the offender to be convicted and for any monies paid by the Territory under the scheme to be recovered pursuant to s21 of the Act.

[20] Section 12(b) of the *Crimes (Victim's Assistance) Act* (the Act) provides that the Court shall not issue an assistance certificate "where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence". On the plain reading of the subsection, it provides for a period in relation to which a failure to report the offence is to be considered beginning with the date of the commission of the offence and ending at a time which is a reasonable time thereafter (which we will call "the relevant period"). The subsection has nothing to say about whether or not the offence is reported at some later time. Consequently, the enquiry as to whether circumstances existed which prevented the reporting of the offence, is limited to the relevant period and it is irrelevant to that enquiry that there

was no report at all and that circumstances existed or did not exist, which prevented the reporting of the offence after the relevant period.

[21] We note that in fact Bailey J reached the same conclusion. At par [18] of his Honour's judgment he said:

> The proviso refers to the Local Court being satisfied that circumstances "existed" which prevented the reporting of the offence. The obvious question is: when must such circumstances have existed? I consider that the only practical and sensible answer to that question is: that the Local Court must be satisfied that circumstances existed which prevented the reporting of the offence during the period that the Local Court has assessed to be a reasonable time for reporting of the offence.

[22] This construction of the relevant provisions is supported by the approach taken to a similar question of construction considered by the High Court in *Murray v Baxter and Others* (1914) 18 CLR 622. In that case, the *Workmen's Compensation Act 1910 (NSW)* s12 required that:

> Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable...unless the proceedings...have been commenced within six months from the occurrence of the accident causing the injury, or, in the case of death, within six months from the time of death; Provided that...
>
> (b) the failure to commence proceedings within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from New South Wales, or other reasonable cause.

It was submitted that the plaintiff's excuse had to cover the whole period up to the date the action was commenced. The majority, Isaacs and Gavan Duffy JJ, said at 632-33:

> To sustain that, it was necessary to contend, and learned counsel did contend, that "the failure" secondly mentioned in paragraph (b) of sec. 12 meant "the failure to commence proceedings before their actual commencement". But that is an impossible construction of the words of that paragraph, unless we proceed to virtually legislate. "The failure" secondly mentioned refers to "the failure" just previously mentioned, and that is "the failure to commence proceedings within the period above specified". You cannot imply a period where one is expressly "specified". The "period above specified" for the commencement of an action is expressly stated to be "within six months from the time of the death"; and "within" does not include a period "beyond". The Act distinctly states and limits within fixed termini a condition precedent; it permits that condition to be excused; if it is excused its effect ceases, and if we were to extend the limits specified we should be creating a different condition.

[23] Nevertheless, Bailey J concluded that there must be a report to the police at some time, and as that had not occurred, the application must fail. We confess to be unable to follow the reasoning upon which this conclusion is based.

[24] To sustain the conclusion arrived at by Bailey J, it would be necessary to contend that the words "unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence" meant during the whole period of time prior to the issue of the assistance certificate. But the period when the failure to give notice is relevant, having been specified, it is impossible to imply a different period. The Act having expressed the failure to give notice within fixed *termini*, and permitting that failure to be excused, once excused, the provision ceases to have effect.

[25] Bailey J's reasoning rested in part upon the consideration that when s12(b) is read in the context of s12(c), which also bars recovery where the applicant

or the victim has failed to assist the Police Force in the investigation or prosecution of the offence, s12(c) would be *otiose* in a case where no report had ever been made to the Police. This can not be accepted for the reasons set out in par [16] above.

[26] It should also be remembered that, first, the Act does not envisage failure to give notice being occasioned by the victim alone: see *Geiszler v Northern Territory of Australia & Anor* (unreported, Court of Appeal (NT) 3 April 1996) per Angel J at p5). No doubt this was deliberately left open because, *inter alia*, the victim may be dead or the victim or the applicant may be a child or may be unconscious or otherwise incapable of managing his or her affairs, thus providing circumstances explaining the failure by the victim before the certificate is issued. In this respect, it is noted that ss5(1), 5(2) and 5(2A) of the Act require an application to be brought within twelve months after the date of the offence, even if the applicant is a person under disability (s5(4)), although s5(3) permits an extension of time to be given. As the application is brought against the Crown (s7) and is to be served upon the Solicitor for the Northern Territory (s6(1)(a)) it is always open to the defendant to report the matter to the Police as soon as it becomes aware of it. An investigation could then occur and, if it did, the applicant would still be required, in order to obtain a certificate, to assist the Police in any investigation then undertaken. There is no requirement that s12(c) applies only in the period before proceedings are commenced, or before the date of the hearing. Section 12(c) is therefore not otiose.

[27] Bailey J relied upon the observation of Bollen J in *Schmidt v South Australia* (1985) 37 SASR 570 at 573 that s12 sets "boundaries to the benevolence which the Act distributes". Implicit in this line of reasoning, and the conclusion drawn that s12(b) requires a report of the commission of the offence to be made to a member of the police force before a victim can avail himself or herself of the assistance provided by the Act, is that compliance with s12(b) is a condition precedent to recovery. *Schmidt* was disapproved by the majority in *Geiszler*, and is not an authority in relation to the *Crimes (Victim's Assistance) Act* for the reasons discussed by Angel J at pp4-5 and by Mildren J at p17. In particular, *Geiszler* decided that compliance with s12(b) is not a condition precedent to recovery; the onus of raising the statutory bar rests on the defendant. Consequently, the respondent had the onus of establishing, by calling evidence, or by eliciting evidence from the appellant and her witnesses, what was a reasonable time in all the circumstances and the fact that no report to the Police was made within that time: see *Geiszler, supra; Kinsella v Solicitor for the Northern Territory* (1997) 138 FLR 213. The learned Magistrate made no finding as to what was a reasonable time after the offence within which the matter had to be reported. Absent such a finding, strictly speaking, a consideration of the proviso to s12(b) did not arise. More to the point, no evidence whatsoever was called by either party before the learned Magistrate in relation to that question, a situation which is identical to the situation which arose in *Geiszler*. Consequently, in the absence of evidence, the appellant was

entitled to succeed on the point: see *Geiszler* at pp3, 9 and 17; *Kinsella* at p220.

[28] The construction contended for by the appellant bespeaks a purposive approach to be given to s12(b) *viz*., to restrict claims within the "boundaries to the benevolence which the Act distributes". Reliance was placed upon the fact that an early report facilitates investigation by the Police, followed by prosecution in appropriate circumstances and that, if there is a conviction, recovery can be made (at least in some cases) under s21 of the Act. All this is also very true of those cases where there is no report to the Police within a reasonable time and is a relevant factor in considering what is a reasonable time: see *Geiszler, supra,* at pp16-17. However, the approach in our respectful opinion, is erroneous. Section 62A of the *Interpretation Act* provides:

> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressely stated in the Act or not) is to be prefered to a construction that does not promote the purpose or object.

The purpose or object underlying the Act is to provide compensation to victims of crime. The preamble to the Act is that it is "An Act to provide assistance to certain persons injured or who suffer grief as a result of criminal acts". The Act is remedial and therefore should be construed beneficially, although excepting provisions in a remedial Act do not necessarily have to be given a liberal interpretation: *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521 at 524. Nevertheless, a

provision such as s12(b) which permits a person to be excused from his failure to give notice within a reasonable time, is a beneficial provision and should be construed accordingly: *Khoury (M & S) v Government Insurance Office of NSW* (1984) 54 ALR 639 at 649-50 per Mason, Brennan, Deane & Dawson JJ. The words in the proviso to s12(b) must therefore be given a construction so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open. This approach is not confined to cases of ambiguity: *Pearce and Geddes, Statutory Interpretation in Australia,* 4th Edn., para [9.2]. As we have attempted to demonstrate, the construction which we consider to be the true construction to s12(b) promotes both the purpose underlying the Act and gives to the appellant the most complete remedy consistent with the actual language employed and to which its words are fairly open. The respondent's construction, on the other hand, does not.

[29] It might have been argued that as no report was made at all and as the proceedings were not even commenced until 1997, an inference could be drawn that the matter was not reported within a reasonable time because of the very lengthy delay involved. That may be so, but the question of what is a reasonable time still had to be addressed in order to fix the relevant period for the appellant's excuse to be considered. (The time bar fixed by s5(1) was apparently not raised in the Court below. As there may have been reasons for this not known to us - for instance, it may have been dealt with at a preliminary hearing - we do not draw any inferences adverse to the

respondent in this regard.) If there had been a finding as to the relevant period, the appellant would have needed to establish that her excuse operated throughout that period. As the respondent failed to establish the relevant period, the appellant was entitled to succeed.

[30] We do not consider that it is appropriate to refer to the Second Reading Speech in this case, but in any event, the Minister's statement that s12(b) is inserted to provide that an assistance certificate cannot be issued "where the offence has not been reported to the Police (except in "exceptional circumstances")" is not only an inaccurate summary of the subsection, but ambiguous. It is equally open to the construction that if exceptional circumstances exist, there need not be a report to the Police at all.

Ground 2

[31] The second ground of appeal related to the method of assessment of the amount of assistance to be provided in respect of the totality of the applications. As his Honour observed the learned Magistrate assessed a global entitlement for the appellant at $80,000. He then arbitrarily allocated that $80,000 between the six successful applications attributing the sum of $13,500 to each of five of them and the sum of $12,500 to the sixth. Arithmetical necessity rather than any difference between the offences dictated the sixth sum.

[32] It must be said that determining the correct approach to assessing amounts payable by way of assistance in circumstances such as these is difficult

indeed. In this case the learned Magistrate was confronted by a series of assaults in relation to each of which he decided to issue an assistance certificate. In addition there were many other assaults and incidents of misconduct by the offender against the appellant where no application for an assistance certificate had been made. Those assaults and that misconduct were part of the abuse, both physical and mental, which was heaped upon the appellant over a period of many years. The cause or causes of the condition of the applicant at the date of assessment were complex and obscure. They involved the interaction of many incidents producing a single indivisible result. The part played by each incident in producing that result is not able to be determined.

[33] At common law if such harm had resulted from the conduct of more than one tortfeasor then each would be liable for the whole of the damage suffered. "The resulting harm (to which both contributed) being indivisible each will be answerable for all the damage". That situation is to be contrasted with the situation in which each of the tortfeasors causes part of the total damage and it is practically feasible to split the aggregate loss between them. In such a case each will ordinarily be liable for that portion of the damage for which he is separately responsible. See the discussion by Professor Fleming in *The Law of Torts* (ninth edition) at pages 229-230.

[34] Although it has been held that common law principles have application to the assessment of the statutory assistance provided under the *Crimes (Victims Assistance) Act* (eg in *Rigby v Solicitor for the Northern Territory*

(1991) 105 FLR 48 at 51; *LMP v Collins* (1993) 112 FLR 289 at 309; *R v McDonald* (1979) 1 NSWLR 451 at 458) that observation cannot override a clear expression of legislative intent to be found in the Act. The common law principles of causation and assessment of damages provide no more than a guide to the operation of the statutory scheme of assistance established by the Act. The processes of the statutory scheme are to be governed by the terms of the Act including the provisions of s9, which sets out the applicable principles for assessment of assistance, and s13, which imposes limits upon the amount of assistance available. Further, s5 of the Act is precise in its language in relation to matters that give rise to an entitlement to an assistance certificate. It permits the issue of "an assistance certificate in respect of *the* injury suffered by (the victim) as a result of *that* offence" (emphasis added). It is clear that the legislature does not intend that assistance certificates will provide financial assistance to victims in relation to matters that are not able to be identified as *the injury* specifically related to a particular offence.

[35] Both Bailey J and the learned Magistrate adopted observations made by Kearney J in *LMP v Collins (supra)*. Kearney J was there dealing with applications arising out of three incidents of rape where the offences were not committed simultaneously or consecutively and the offenders were not acting in concert. Kearney J adopted the observations of Master Hogan in *Application for Criminal Injuries Compensation No. 69 of 1989* (1991) 103 FLR 297. In that case the Master of the Supreme Court of the Australian

Capital Territory was dealing with a matter in which indecent assaults had been committed upon the applicant by her brother and also by her father. There was evidence that some of the offences committed by the father had not been the subject of criminal charges. In some respects the circumstances of the case were not dissimilar to those in the present matter. In his judgement (at 307) Kearney J referred to the following passage from the judgement of Master Hogan (103 FLR at 300):

> 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. It is the totality of the conduct over a number of years that has led to her present state.
>
> The task of apportioning her damage to the separate incidents is indeed a difficult one, and impossible to carry out with any pretence at 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.

[36] Having reviewed various authorities Kearney J then made the following observations (at 309):

> 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) result 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. This was in fact the aggregate injury from the three 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 three offences.

[37] In the present matter Bailey J noted that the situation was even more complex than that dealt with in *LMP v Collins* (supra) in that:

> … evidence of the respondent's psychological injury suggested that it was the product of the respondent's long relationship with the offender, rather than attributable to any particular offence which was subject of an application under the Act. Clearly in a case such as the present, where the respondent was in a de facto relationship with the offender for seven years (and their interaction continued over a period of nearly 10 years), it would be impossible to identify the contribution of any single offence which was the subject of a successful application under the Act to the respondent's overall psychological injury.

[38] The complaint before Bailey J was that in assessing damages the learned Magistrate had failed to take into account or to take sufficient account of the evidence that there were numerous offences committed by the offender against the victim which were not the subject of applications for assistance certificates and which contributed to her condition. Bailey J agreed that was so. He said that despite the learned Magistrate identifying the need to limit assistance certificates to the particular injury arising from a particular offence he failed to do so. He said:

> Accordingly in a case such as the present, the Local Court, while in adopting a "global approach" to assessment of assistance might start with "a total sum which represents full compensation" for the respondent's injuries, (it) would need to take into account the evidence that the psychological damage to the respondent was the

> result of not only the offences for which assistance certificates were successfully sought, but was contributed to by other offences committed by the offender against the respondent. Depending upon the available evidence, this might call for a substantial, or even very substantial, discount from the starting point of "full compensation" notwithstanding the remedial nature of the Act.

[39] The learned Magistrate appears not to have adopted this approach. It is not clear from his reasons whether the "global" figure he fixed upon related to the whole of the psychological damage suffered by the appellant or only that arising from the particular injuries from the particular offences in relation to which assistance certificates had issued. There was no discussion of the contribution to the condition of the appellant of the incidents in relation to which no certificate had issued or as to how the global figure was reached bearing those incidents in mind. Whilst it is not possible in the circumstances of matters such as this to carry out the task of assessment with precision it must be made clear from the reasoning process that relevant factors were considered and irrelevant factors were not considered. The task of assessment should then be approached in a "broad and commonsense" way.

[40] However, the correct approach is not necessarily to arrive at a total figure for the whole of the damage sustained at the hands of the perpetrator, and then to discount it to allow for that proportion of the psychological injury that was caused for the offences not the subject of the application, although in this particular case, given the state of the evidence, this may be appropriate. It may be that a finding would be open on the evidence that the

particular offences the subject of the application, are separately or together sufficient to cause the psychological injuries the appellant ultimately sustained after the first assault in June 1991 and that an award, or awards, can be made on that basis, bearing in mind two considerations. The first is that, to the extent that the appellant was already predisposed to psychological injury prior to then, the respondent must take the victim as she is found, but is still only liable to the extent that the injuries for which the respondent is liable made the condition worse: see *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd & Another* (1975) 49 ALJR 233.

[41] The second is the principle discussed in *Watts v Rake* (1960) 108 CLR 158, that if the disabilities of the appellant:

> ...can be disentangled and one or more traced to causes in which the injuries (she) sustained through the (offences) play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the (offences) as a contributory cause. (per Dixon CJ, at p160).

See also *Purkess v Crittenden* (1965) 114 CLR 164 at 168, where Barwick CJ, Kitto and Taylor JJ explained that if the plaintiff in a negligence case has established a *prima facie* case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence to show that the plaintiff's incapacity is wholly or partly due to some pre-existing condition rests with the defendant and in the absence of such evidence, if the plaintiff's evidence is accepted, the plaintiff will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-

existing abnormality. Although their Honours did not specifically address intervening causes in that case, clearly the same principles would apply. Their Honours also went on to observe that the evidence must, if accepted, establish with some reasonable measure of precision what the pre-existing condition was, and what its future development and progress would be likely to be and the same, no doubt, would apply to intervening causes. It may be that the intervening assaults had only transient effects. Of course, the defendant need not lead evidence itself to establish these facts: it can rely upon evidence elicited through the applicant's witnesses. The difficulty for the appellant in the present case is that it is not clear from the learned Magistrate's reasons how he approached his overall global assessment, because the findings he made are inadequate. The appeal on this ground must be dismissed.

Conclusion

[42] We would allow the appeal in relation to application No. 9708707 and order that an assistance certificate be awarded for such sum as the Local Court considers just, but would otherwise dismiss the appeal. As the appeal was only partly successful, we would order that each party pay their own costs of the appeal to this Court and in the Court below.
