

PARTIES: FRANK ARTHUR A'HANG

v

SOLICITOR FOR THE NORTHERN
TERRITORY

and

MIKE FOSTER
ZADDOCK JOHNSON
DUANE FRASER
DEREK FOSTER

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: JA 24/02 (20206131)

DELIVERED: 12 June 2003

HEARING DATES: 24 March 2003

JUDGMENT OF: THOMAS J

CATCHWORDS:

LIMITATION OF ACTIONS – general – whether exceptional circumstances apply – extension granted as no prejudice to the respondent

DAMAGES - crimes compensation - appeal from decision of magistrate – whether magistrate erred by failing to make an assessment of compensation for the psychological injury suffered by the appellant – whether quantum awards manifestly inadequate

Crimes (Victims Assistance) Act 1989 (NT) s 13(2)

Local Court Act 1998 (NT) s 19(2)

Moran v McMahon (1985) 3 NSWLR 700; *LMP v Collins & The Northern Territory of Australia* (1993) FLR 289; *Miller v Jennings* (1954) 92 CLR 190, applied;

Rigby v Solicitor for the Northern Territory (1991) 105 FLR 48; *Hansen v The Northern Territory of Australia & Richard Kennedy* (1994) considered.

REPRESENTATION:

Counsel:

Appellant:	R Morely
1 st Respondent:	A Phyllis
2 nd Respondents:	No Attendance

Solicitors:

Appellant:	Morgan Buckley
1 st Respondent:	Povey Stirk
2 nd Respondents:	No Attendance

Judgment category classification:	C
Judgment ID Number:	tho200322
Number of pages:	16

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

A'Hang v Solicitor for the Northern Territory & Ors [2003] NTSC 69
No. JA 24/02 (20206131)

BETWEEN:

FRANK ARTHUR A'HANG
Appellant

AND:

**SOLICITOR FOR THE NORTHERN
TERRITORY**
First Respondent

AND:

**MIKE FOSTER
ZADDOCK JOHNSON
DUANE FRASER
DEREK FOSTER**
Second Respondents

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 12 June 2003)

- [1] This is an appeal from a decision of the then Deputy Chief Magistrate with respect to four separate claims under the Crimes (Victims Assistance) Act relating to four separate crimes in which the appellant was the victim and suffered injury.

- [2] The application for Leave to Appeal and the Notice of Appeal is dated 17 April 2002. It is four days outside the 28 day time limit prescribed by s 19(1)(a) of the Local Court Act. The decision of the Deputy Chief Magistrate was delivered on 15 March 2002.
- [3] The appellant relies on s 19(2) of the Local Court Act, or alternately s 44 of the Limitation Act. The respondent opposes the extension of time.
- [4] Section 19(2) of the Local Court Act provides as follows:
- “(2) The Supreme Court may grant leave under subsection (1)(b) and the appellant may proceed with the appeal if the Supreme Court –
- (a) is of the opinion that the failure to institute the appeal within the period referred to in subsection (1)(a) was due to exceptional circumstances; and
- (b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.”
- [5] The application for Leave to Appeal was supported by an affidavit of Benjamin Cornish sworn 17 April 2002. This affidavit deposes to the fact that the award of compensation made to the appellant had not been paid within the 28 day period and the misunderstanding held by the appellant he would have to wait till the conclusion of the appeal before he received any award of compensation.
- [6] It is the submission made by Ms Morley on behalf of the appellant that as the award of compensation was not paid to him within the 28 day period he had no funds to lodge in his solicitor’s trust account to pay for his appeal.

- [7] On the hearing of the application, the Court heard submissions as to the appellant's financial circumstances, his expectation that the amount of compensation ordered in his favour would be paid to him within 28 days and his inability to make arrangements for the fees to support an appeal.
- [8] I accept that the appellant was at the time in impecunious circumstances that he had a genuine belief he would receive the compensation awarded to him within 28 days of the decision awarding compensation in his favour and his misunderstanding as to the effects of lodging an appeal on his receiving the compensation awarded.
- [9] The delay in this matter was a delay of four days. The Northern Territory does not claim that it suffered any prejudice due to this delay.
- [10] In these circumstances I would grant the application for Leave to Appeal and extend the time for filing the appeal to the date shown on the Notice of Appeal being 17 April 2002.
- [11] The background to these claims have been summarised by Ms Ruth Morley, counsel for the appellant, in her written submissions to the Court. This background summary is not in contention and I set it out as follows:

“1. The applicant instituted four separate claims pursuant to the Crimes (Victims Assistance) Act, relating to four separate crimes wherein he was the victim and suffered injury. Briefly summarised they are as follows:

(a). On 6 January 1997 he was assaulted by Mike Foster at the Goldfield Hotel whilst the applicant was in the course of his duty as a police officer. He was thrown on to the edge of a pool table and

injured his ribs. He was off work for a period of six weeks and suffered ongoing physical and emotional injuries.

(b). On 10 September 1997, the applicant was again in the course of his employment as a police officer when in the course of arresting an offender, Zaddock Johnston assaulted him by punching him several times in the face, head and lower back and rib area. Subsequently he went to Tennant Creek Hospital where his pain, particularly that in his back area, was worse.

(c). On 19 November 1997 the applicant was again in the Goldfields Hotel, and was endeavouring to remove from those premises an intoxicated patron being Duane Fraser when Mr Fraser punched the applicant in the right side of the face causing him to fall to the floor unconscious. He suffered redness and swelling and pain to his face for which he took Panadol and later went to Tennant Creek Hospital.

(d). On 27 November 1997 the applicant was again on duty and was endeavouring to arrest one Derrick Foster. The applicant was assaulted by Foster which caused him to fall to the ground hitting his face and shoulder on the bitumen and suffer abrasions to the right side of his face, knees and arms and swelling and soreness around the right eye and shoulder. He was taken to the Tennant Creek Hospital, and suffered permanent scarring to his face and a baggy right eye where the skin seems to hang.”

[12] The four applications were heard in the Local Court sitting at Alice Springs.

The Deputy Chief Magistrate delivered judgment on 15 March 2002 and made the following awards of compensation:

- 1) Injury of 6 January 1997. The learned Deputy Chief Magistrate declined to make an award for mental distress on the basis that the appellant had already been compensated for this condition by an award of \$19,279.11 under the Work Health Act for a permanent psychiatric impairment.

For pain and suffering with respect to the fractured rib the appellant was awarded \$1500.

- 2) Injury of 10 September 1997. The appellant was awarded compensation in the amount of \$4,000.
- 3) Injury of 19 November 1997. The appellant was awarded a certificate of compensation under the Crimes (Victims Assistance) Act in the sum of \$300.
- 4) Injury of 27 November 1997. The appellant was awarded a compensation certificate in the amount of \$2,500.

[13] The Grounds of Appeal as set out in the Notice of Appeal are as follows:

- “1. The Learned Stipendiary Magistrate erred by:
- 1.1 Failing to make an assessment of compensation for the psychological injury suffered by the Applicant with regard to each individual claim.
 - 1.2 That the quantum awarded in Application for Assistance number 9825625 was manifestly inadequate.
 - 1.3 That the quantum awarded in Application for Assistance number 9727818 was manifestly inadequate.
 - 1.4 That the quantum awarded in Application for Assistance number 9819208 was manifestly inadequate.
 - 1.5 That the quantum awarded in Application for Assistance number 9825917 was manifestly inadequate.”

[14] I will deal with each of these grounds.

1.1 Failing to make an assessment of compensation for the psychological injury suffered by the applicant with regard to each individual claim.

[15] With respect to each of the Grounds of Appeal they are brought pursuant to s 19 of the Local Court Act of the Northern Territory .

[16] The appeal is limited to a question of law. To succeed on the appeal, the appellant must demonstrate an error of law. I apply the principle expressed by Priestly Justices Act in *Moran v McMahon* (1985) 3 NSWLR 700 at 718:

“Because it is firmly established that interference by a court of appeal with an assessment of damages made by a judge sitting without a jury can be justified only upon a basis analogous to that upon which such court will interfere with the exercise of a discretion conferred upon a single judge, it will be convenient to state the grounds which, generally speaking will justify the court in interfering with such an assessment. These may be summarised as follows:

1. If the judge has acted upon a wrong principle; or
2. If he has given weight to extraneous or irrelevant matters; or
3. If he has failed to give weight to relevant matters; or
4. If he has erred in his finding as to any fact upon which his estimate of the amount of damages is founded in whole or in part, or
5. If, notwithstanding that the precise nature of the error is not discoverable, the result is so unreasonable or plainly unjust that the court will infer that an error has been made.”

[17] The learned Deputy Chief Magistrate found that with respect to the claim arising from the injury on 6 January 1997 this was the primary cause of the psychological problem which the applicant was suffering. Counsel for the appellant concedes this finding was open to her Worship on the evidence.

[18] Her Worship also found that the appellant suffered a fractured rib, that he was off work for six weeks, that he was treated at the hospital nine times and that he had made a complete recovery by 6 May 1997. It is conceded on behalf of the appellant that this finding was probably open on the evidence.

[19] It is the submission on behalf of the appellant that the learned Deputy Chief Magistrate had an obligation to make an assessment without reference to any statutory limitations which operate only as a ceiling for the amount which can be specified in a certificate. It is the argument on behalf of the appellant that her Worship failed to make any assessment at all for the psychological injury and that this amounts to an error at law.

[20] Counsel for the appellant referred to the decision of Angel J in *Rigby v Solicitor for the Northern Territory* (1991) 105 FLR 48 in support of the submission that an assessment of damages under the Crimes (Victims Assistance) Act should be made on the same basis as damages would be awarded were the action to be one arising in tort at common law. Reference was also made to the decision of Kearney J in *LMP v Collins & The Northern Territory of Australia* (1993) 112 FLR 289 in support of the proposition that the statutory limit of \$25,000 operated only as a ceiling for the amount which can be specified in the certificate, not as the top of a graduated or artificial scale.

[21] In her reasons for decision, the learned Deputy Chief Magistrate noted at par 54:

“Mr A’Hang was awarded \$19,279.11 under the Work Health Act for a permanent psychiatric impairment”.

[22] The reasons for decision further state (par 65):

“As I consider he has already been compensated for the mental distress I do not consider it appropriate to make an award under that heading.”

[23] The learned Deputy Chief Magistrate then proceeded to make an award for pain and suffering with respect to the fractured rib in the sum of \$1500.

[24] It is the submission by Ms Phyllis, counsel for the respondent, that it is implicit from her reasons that the learned Deputy Chief Magistrate considered an assessment of compensation for psychological injury and has come to the conclusion that the amount of \$19,279.11 which the appellant received as compensation for a permanent psychiatric impairment from his work health insurer, is equal to or more than the common law assessment of mental distress and loss of amenities of life.

[25] I am not able to accept the submission on behalf of the respondent on this issue. I agree with the submission made on behalf of the appellant. On reading the reasons for judgment of the learned Deputy Chief Magistrate, I find that no common law assessment was made, which is a requirement of the Crimes (Victims Assistance) Act. Secondly, having failed to make a common law assessment, her Worship then did not consider by what amount it would be appropriate to reduce the amount to be specified in the certificate because of the payment made under the Work Health Act.

[26] I agree with the submission made on behalf of the appellant that this constitutes an error of law and that I should then proceed to assess the claim for damages for psychiatric injury on common law principles.

- [27] With respect to the assessment of \$1500 for fractured ribs, that is also within the claim for damages arising from the injuries inflicted on 6 January 1997, I have come to the conclusion that this amount is, on its face, manifestly inadequate.
- [28] In coming to this conclusion I have had regard to the decision of Mildren J in *Hansen v The Northern Territory of Australia & Richard Kennedy* (1994) NTSC delivered on 18 May 1994. There is a strong presumption in favour of the correctness of the decision appealed from. The Court of Appeal must be satisfied the decision is clearly wrong before it will interfere with an assessment of a judge or magistrate sitting alone.
- [29] I shall now proceed to make an assessment of damages at common law in respect of the psychiatric injury and the fractured ribs.
- [30] The evidence in support of these claims is set out in the affidavit of Frank Arthur A'Hang sworn on 6 August 2001 and supporting medical reports.
- [31] A summary of the circumstances of the incident which occurred on 6 January 1997 have been set out in par 11 of these reasons for judgment.
- [32] As a result of the assault the appellant suffered severe pain around his ribs, a sore back and bruising. At the Tennant Creek Hospital he had a chest X-ray, was given Panadol and discharged. The pain continued and on 11 January Mr A'Hang returned to the Tennant Creek Hospital. Following a further X-ray he was informed he had a fractured rib.

- [33] Mr A'Hang was off work for six weeks during this time he was in considerable pain. He returned to the hospital a further seven times for treatment.
- [34] In his report dated 12 May 1997, Dr Tim Baker confirms Mr A'Hang sustained a fracture of his 10th rib and that he had attended the Tennant Creek Hospital nine times between 6 January and 13 February 1997. He was assessed as being unfit for work between 1 January and 17 February 2003.
- [35] At an assessment made on 6 May 2003, Mr A'Hang was found to have made a complete recovery and was suffering no long term effects of his injury. This report was referring specifically to Mr A'Hang's fractured 10th rib.
- [36] Mr A'Hang consulted psychologist Michael Tyrrell who prepared a report dated 20 March 1998 in which he states in the final paragraphs of this report:

“However, based on the history provided, the assault of 5 January 1997 triggered the initial acute PTSD symptoms and related pain syndrome within the first three months; it must be held responsible in some part for his current depressive syndrome, with his associated sense of loss of ability, confidence, impaired primary relationship, anxiety and despair about his health given his age and good fitness up until the assault, his now exacerbated chronic back condition and his related loss of quality of life.

Mr A'Hang needs professional therapy and perhaps follow-up medical treatment for his current condition.

Without a total approach to his treatment he is at high risk of becoming progressively less functional, which could have disastrous impact on his well being which will further jeopardise his career and his safety in his job.”

[37] Mr A'Hang attested to feeling increasingly "cranky and irritable". He stopped having sex with his wife. He felt increasingly unhappy, suffered from lack of energy and increased his consumption of alcohol. Mr A'Hang consulted a psychiatrist, Dr Jackson, who prepared a number of reports dated 3 July 1998, 21 December 1998 and 26 February 1999 which I have now read.

[38] In his report dated 21 December 1998, Dr Jackson stated under the heading "Opinion":

"In essence, I see no reason to change the opinions I expressed in my report of 3 July 1998.

That is, this man has suffered a mental injury in the form of a Major Depressive Illness that is the consequence of the assault that occurred on 6 January 1997. His mental injury is now in the form of a chronic depressive illness, with a stable mild to moderate psychiatric impairment.

.....

It is my opinion that the assault of 6 January 1997 was of singular importance as a causative factor of this factor of this man's subsequent and continuing mental injury in the form of a major depressive illness. ..."

[39] In his report dated 26 February 1999, Dr Jackson stated:

"... I assess Mr A'Hang, at the time of my examination of 7 December 1998, as having 15% (which is also Class 2) psychiatric impairment."

[40] On the basis of this evidence, I would assess the damages for the psychiatric injury in the amount of \$45,000.00.

[41] I am then required to have regard to the provisions of s 13(2) of the Crimes (Victims Assistance) Act which provides as follows:

“(2) In assessing the amount to be specified in an assistance certificate the Court shall have regard to the amount of any payment received by or payable to the victim or a dependant of the victim for the injury or death of the victim caused by the commission of the offence including the amount of any payment received or payable –

- (a) by way of compensation or damages from the offender or any person on behalf of the offender;
- (aa) by way of private medical insurance benefit; or
- (b) under –
 - (i) the *Motor Accidents (Compensation) Act*;
 - (ii) the *Work Health Act*; or
 - (iii) a law of the Commonwealth, a State or another Territory of the Commonwealth relating to the payment of compensation to an employee in respect of death or injury resulting from an accident in or in connection with the employee's employment,

and the Court shall reduce the amount so specified in the assistance certificate by such amount as it considers appropriate in the circumstances.”

[42] Mr A’Hang received an amount of \$19,279.11 under the Work Health Act for a permanent psychiatric injury. I consider this amount should be deducted from the amount of the damages assessed for the purpose of the Crimes (Victims Assistance) Act. This leaves a balance of \$25,270.89.

[43] I assess the damages, in respect of the injury being the fractured rib, in the amount of \$3,000.00.

- [44] This makes a total of \$28,270.89 in respect of the claim under the Crimes (Victims Assistance) Act for the injuries suffered in the assault committed upon Mr A'Hang on 6 January 1997.
- [45] This amount exceeds the limitation on the amount which can be specified in an assistance certificate in respect of an application for an assistance certificate under s 5(1) of the Crimes (Victims Assistance) Act. The limit as specified in s 13(1)(a) is \$25,000.00.
- [46] Accordingly, the amount specified in the assistance certificate in respect of the claim for injuries arising out of the incident on 6 January 1997 is \$25,000.00.
- [47] With respect to the second claim arising on 10 September 1997, Ms Morley, counsel for the appellant, submits that on the magistrate's findings as to the consequences of this injury, the award of \$4,000.00 was manifestly inadequate.
- [48] The submission by Ms Phyllis, on behalf of the respondent, is that the award of damages is an exercise of discretion and that the awards are not manifestly inadequate.
- [49] I was referred to the decision of *Miller v Jennings* (1954) 92 CLR 190 at 197 where Dixon CJ and Kitto J found that in deciding whether an award was manifestly inadequate the question was whether the compensation assessed

is so inadequate as to be beyond the limits of what a sound discretionary judgment could possibly adopt.

[50] In her reasons for decision, the learned Deputy Chief Magistrate made the following findings with respect to the injury suffered by the applicant on 10 September 1997, at p 15:

- “67. Claim 9819208: With respect to the injury suffered by the applicant on 10 September 1997 (claim 9819208) I am satisfied this assault substantially aggravated the applicant’s pre-existing back condition and resulted in severe pain to the back and legs. Even though it is possible the fracture of the screw in his back occurred in January, he appears to have suffered minimal pain to the back between January and September.
68. This assault appeared to have caused pain to the applicant’s back and I accept therefore there should be an award with respect to this incident for pain and suffering. There would also have been pain as a result of the blows to the head but this does not appear to have been of lengthy duration.
69. The applicant regularly takes painkillers for his back.
70. I am satisfied that pain continued for some time. As at August 2001 he notes he had pain which was made worse by walking, sitting and standing for long periods. He avoids bending lifting or carrying heavy objects and takes about six tablets a day to minimise the pain.
71. With respect to this matter I consider a certificate in the amount of \$4 000 is appropriate.”

[51] Applying the principle in *Miller v Jennings* (supra) and *Hanson v The Northern Territory of Australia* (supra), I have come to the conclusion the award of \$4,000 is manifestly inadequate. I would assess the common law damages in the amount of \$8,000.

[52] With respect to claim 9825625 in respect of injury arising on 19 November 1995, her Worship made the following findings in her reasons for decision (p 15):

- “72. Claim 9825625: The applicant was punched to the side of the face and knocked out. This resulted in his face being red and swollen. He took panadeine and went to bed.
73. There would appear to have been no long-term effect of this and basically headache and tenderness were the only result.
74. With respect to this matter there will be a certificate signed for \$300.”

[53] Counsel for the appellant submits that applying common law principles this award is manifestly inadequate, particularly in view of the fact the appellant was knocked unconscious. I agree with this submission. I would assess damages in the amount of \$1,500.

[54] With respect to the fourth and final claim, the learned Deputy Chief Magistrate made the following findings (p 15):

- “75. Claim 9825917: 27 November 1997 assault. The applicant was pushed and fell to the ground hitting his face and shoulders on the bitumen.
76. He suffered abrasions to the face, knees and arms and had swelling to his eye and shoulder.
77. He suffers permanent scarring to his face and a ‘baggy’ right eye. The scarring is fairly minor and although described by Mr Jackson as ‘unsightly’ does not appear to be a great deal of concern to Mr A’Hang. It does not appear to be [a] matter which he has dwelt on when speaking to Mr Jackson or Mr Tyrell.
78. With respect to that matter I consider a certificate should be signed in the amount of \$2 500.”

[55] With respect to this award, I agree that the amount awarded was low.

However, I have concluded the award was not so inadequate as to justify this Court reviewing the learned Deputy Chief Magistrate's assessment.

[56] Accordingly, I would dismiss the appeal in respect of this claim.

[57] I summarise the orders I make as follows:

1. **Claim No. 9727818:** The appeal is allowed. I issue an assistance certificate in the amount of twenty five thousand dollars (\$25,000.00).
2. **Claim No. 9819208:** The appeal is allowed. I issue an assistance certificate in the amount of eight thousand dollars (\$8,000.00).
3. **Claim No. 9525625:** The appeal is allowed. I issue an assistance certificate in the amount of one thousand five hundred dollars (\$1,500.00).
4. **Claim No. 9825917:** The appeal is dismissed. I confirm that assistance certificate issued in the amount of two thousand five hundred dollars (\$2,500.00).

[58] I grant leave for the parties to apply on the question of costs.
