Northern Territory of Australia v AB [2010] NTCA 6

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v AB
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 3 of 2010 (20939565)
DELIVERED:	17 AUGUST 2010
HEARING DATES:	21, 22 JULY 2010
JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND BLOKLAND JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

CIVIL LAW – APPEAL – APPEAL AGAINST ANSWERS TO QUESTIONS OF LAW REFERRED

Victims of Crime Assistance Act – Principles to apply in determining award of assistance – assessor not to apply common law principles of assessment of damages – maximum award in Sch 3 Pt 1 not reserved for worst possible act or injury – s 5(3) interpretation of "series of related criminal acts" – meaning of criminal acts that "occur over a period of time" – consideration of other violent acts or injuries in series in determining range of award – appeal allowed.

Victims of Crime Assistance Act 2006 (NT), s 3, s 5, s 7, s 9, s 10, s 11, s 12, s 23 s 24, s 25, s 31, s 32, s 33; s 34, s 35, s 36, s 38 and s 54; *Victims of Crime Assistance Regulations 2007* (NT) reg 4, reg 5, reg 6,

reg 8, reg 9, reg 10, reg 14, reg 15, reg 16, reg 18 and reg 29; *Crimes Compensation Act 1982* (NT) s 5, s 7 and s 15; *Crimes (Victims Assistance) Act 1983* s 7, s 9 and s 13; *Criminal Injuries (Compensation) Ordinance 1975* (NT)

Woodruffe v Northern Territory of Australia (2000) 10 NTLR 52; *Rigby v Solicitor for the Northern Territory* (1991) 105 FLR 48; *S v Turner* (1979) 1 NTR 17; *R v Forsythe* [1972] 2 NSWLR 951, cited.

REPRESENTATION:

Counsel:

Appellant:	S Brownhill
Respondent:	G Clift

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent:	Central Australian Aboriginal Family Legal Unit Aboriginal Corporation

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

Northern Territory of Australia v AB [2010] NTCA 6
No. AP3 of 2010 (20939565)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

AB
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 17 August 2010)

Martin (BR) CJ:

Introduction

[1] This is an appeal against answers given by a Judge to questions stated to the Supreme Court under the *Victims of Crime Assistance Act* ("the Act"). The questions reserved, and the facts stated in the reservation upon which the questions were based, were as follows:[1]

> "1. The applicant sustained injuries as a result of violent acts, namely:

[1] The answers to each question are inserted in brackets.

(a) 13 June 2007:

- Severe contusions and abrasions to her body
- Deep laceration to right scalp area – 5cm in length
- Deep laceration to right buttock – 3cm in length
- Broken tooth

(b) 25 July 2007:

- Fractured left clavicle

(c) 7 October 2007:

- Fractured mandible
- Fractured nasal bone
- Defensive wounds (bruising and cuts) to her arms
- Bruising and cuts to both legs and abdomen

2. The applicant was the victim of a compensable violent act on 7 October 2007, namely sexual intercourse without consent where a factor of aggravation applies to the offence. The said factor of aggravation being the use and threat of an offensive weapon during the offence.

3. The offender, Rodney Eric John Barnes Junior, was charged with unlawfully causing serious harm contrary to s 181 of the Criminal Code and two charges of sexual intercourse without consent contrary to s 192(3) of the Criminal Code. The offender was sentenced on 15 August 2008 to 12 years imprisonment. Justice Southwood found (at 767) that the appellant '*suffered significant emotional trauma, a loss of self-esteem, and from time to time she suffers from depression'.*

4. The applicant has made a claim for sexual assault as a compensable violent act, pursuant to s 7 of the *Victims of Crime Assistance Act* and Regulation 4 of the *Victims of Crime Assistance Regulations*.

5. In determining an award within a range in Schedule 3 of the regulations:

(a) does the assessor apply common law principles in determining an award without regard to the maximum award within Schedule 3:

[**Answer – yes**]

(b) if the answer to (a) is no, does the assessor reserve the maximum for worst possible act or injury;

[**Answer – not applicable**]

(c) if the answer to (b) is yes, what principles does the assessor apply for determining an award within the range for an act or injury other than the worst possible act or injury;

[**Answer – not applicable**]

(d) if the answer to (b) is no, what principles does the assessor apply to determine an award within the range for any act or injury;

[**Answer – not applicable**]

6. Are the criminal acts committed against the appellant on 13 June, 25 July and 7 October 2007 a single violent act for the purposes of s 5. If the answer is yes, and one of those violent acts is a compensable violent act, should the other violent acts or injuries in the series and their effects be taken into account in determining where in the range in Schedule 3 the award should be made.

[**Answers – no and not applicable**]

7. Does s 25 prevent the appellant from obtaining an assessment for psychological or psychiatric disorder as part of the award. If no, is the assessor required to obtain a written medical report as to the disorder under s 35, or is the applicant required to provide such a written report.

[**Answers – no and neither the assessor nor the applicant has an obligation to obtain such a report**]

[2] The appellant advances two grounds of appeal. First that the learned Judge erred in answering question 5(a) in the affirmative. The appellant contends that the standard amount of award specified in Sch 3, Pt 1 of the Regulations is a range that amounts to a graduated scale reserving the highest amount for the worst injury or act and requiring that the award be determined by reference to the upper and lower ends of the scale having regard to the degree, duration and severity of the injury or act.

[3] Secondly, the appellant submits that the learned Judge erred in answering question 6 in the negative and in determining that the criminal acts committed on 13 June, 25 July and 7 October 2007 did not constitute "a single violent act" for the purposes of s 5 of the Act.

[4] For the reasons that follow, in my opinion the first ground of appeal succeeds and the answer to question 5(a) is "No". The second ground of appeal is also made out. The criminal acts on 13 June, 25 July and 7 October 2007 are a "single violent act" for the purposes of s 5. The answers I propose should be given are set out in para [112] of these reasons.

Statutory Scheme – Eligibility for award of financial assistance

[5] The Act establishes schemes "to provide victims of violent acts with counselling and with financial assistance…".[2] The objects of the Act are set

[2] Introduction to the Act.

out in s 3. They include recovery of monies from offenders and establishing a fund for the schemes implemented by the Act. From the perspective of victims, the objects are identified as follows:

> "(a) to assist the rehabilitation of victims of violent acts by implementing schemes to provide counselling and financial assistance for financial loss and compensable violent acts and compensable injuries; …"

[6] Section 23 of the Act establishes "The Victims Financial Assistance Scheme".

[7] The Act identifies different categories of victim for the purposes of identifying entitlement to assistance. The appellant is a "primary victim" being a person against whom a violent act was committed and who suffered an injury as a direct result of the violent act.[3]

[8] Section 10 provides that a primary victim of a "violent act" is eligible for counselling, financial assistance for financial loss and an "award" of financial assistance under Pt 4, Div 4 of the Act. "Violent act" is defined in s 5. In substance it is a criminal act prescribed by regulation, or "a series of such related criminal acts", or a criminal act or series of related criminal acts that directly results in injury or death. A "criminal act" is an act or omission that constitutes a criminal offence.

[9] The eligibility of a primary victim for an "award" of financial assistance is governed by s 10(4):

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[3] *Victims of Crime Assistance Act 2006* (NT), s 9. The other categories of victim are "secondary" (s 11), "family" (s 13) and "related" (s 15).

"(4) A primary victim of a violent act is eligible to apply for an award for:

(a) if the violent act is a compensable violent act:

(i) the mere commission of the violent act; or

(ii) one or more compensable injuries suffered as a direct result of the violent act; or

(b) otherwise – one or more compensable injuries suffered as a direct result of the violent act."

[10] In essence, s 10(4) provides that the primary victim is eligible for an award in two situations. First, if the violent act to which the primary victim was subjected was a "compensable violent act". A primary victim of a "compensable violent act" is eligible for an award either by reason of the mere commission of the compensable violent act or because one or more "compensable injuries" is sustained as a direct result of that act.

[11] Section 10(4) gives the primary victim of a compensable violent act a choice. The application for an award is to be based either on the mere commission of the violent act or the sustaining of a compensable injury as a result of the compensable violent act. An applicant is not able to double up in the sense of seeking an award based on the mere commission of the compensable violent act plus an award for the sustaining of a compensable injury. However, if the application is based upon the mere commission of the compensable violent act, s 32(2) permits the application to include a description of injuries resulting from the compensable violent act.

[12] A "compensable violent act" is a criminal act prescribed by regulation or a series of such related criminal acts.[4] The criminal acts prescribed by regulation as compensable violent acts are the offences specified in Sch 1 to the *Victims of Crime Assistance Regulations* ("the Regulations").[5] The offences in Sch 1 are all offences of a sexual nature and are divided into three categories of ascending seriousness. Each offence specified in Sch 1 is a "compensable violent act".

[13] The second situation in which a primary victim is entitled to an "award" involves violent acts, that is, criminal acts constituting a criminal offence that are not prescribed as "compensable violent acts". A primary victim of such other violent act is eligible for an award if the primary victim suffers a "compensable injury" as a direct result of the violent act. A "compensable injury" is an injury prescribed by regulation and such prescribed injuries are listed in Pt 2 of Sch 3 to the Regulations.[6]

[14] Extracting the relevant features of the scheme governing the eligibility of a primary victim for an award is a somewhat tortuous process, but in summary those features are as follows:

- The Act creates a scheme pursuant to which different categories of victims are entitled to counselling, financial assistance for financial loss and financial assistance by way of award as a consequence of

[4] *Victims of Crime Assistance Act 2006* (NT), s 7(1) applying s 5(1)(a).
[5] *Victims of Crime Assistance Regulations 2007* (NT), reg 4 and reg 14.
[6] Or a similar injury to the prescribed injury that has caused symptoms or disability lasting for at least six weeks; *Victims of Crime Assistance Act 2006* (NT), s 7(2) and *Victims of Crime Assistance Regulations 2007* (NT), reg 16.

having been subjected to the commission of a criminal offence (rather than speaking of the victim being the subject of a criminal offence, the Act speaks of the commission of a violent act).

- The appellant is a "primary victim" because she was directly subjected to the violent act and suffered an injury as a direct result of the violent act.

- A primary victim is entitled to an award of financial assistance, regardless of any financial loss, in three situations:

  (i) if subjected to a criminal offence prescribed as a "compensable violent act", regardless of whether injury was caused or not; or

  (ii) if a "compensable injury" is sustained as a direct result of the compensable violent act; or

  (iii) if the criminal offence is not prescribed as a "compensable violent act", by reason of sustaining a compensable injury as a direct result of the offence.

- Offences specified in Sch 1 to the Regulations are prescribed as "compensable violent acts" and are graded into three categories of sexual offences of ascending seriousness.

- Compensable injuries are those injuries specified in Pt 2, Sch 3 of the Regulations, and similar injuries causing symptoms or disability lasting at least six weeks.

[15] As to other categories of victims, the Act also makes provision for counselling and financial assistance to victims identified as secondary, family and related victims. Speaking generally, all such victims may be eligible for financial assistance in respect of financial losses, but only a secondary victim is eligible for an "award" of financial assistance. Such award may only be made if the secondary victim suffers a compensable injury. A secondary victim is a person who was present at the scene of a violent act and who suffers an injury as a direct result of witnessing the violent act.[7] A secondary victim is eligible for an award of financial assistance for "compensable injury" suffered as a direct result of witnessing or becoming aware of the violent act.

[16] In addition to eligibility for an award based on a compensable violent act or a specified compensable injury, provision is made in the Regulations for awards to victims of "domestic violence injuries". Such injuries are defined as injuries suffered as a consequence of a violent act involving a "pattern of abuse" committed by an offender with whom the victim is in a domestic relationship, or suffered as a result of a violent act of unlawful stalking in

[7] *Victims of Crime Assistance Act 2006* (NT), s 11 which also includes as a secondary victim specified persons, such as a child or parent or a primary victim, who suffer injury as a direct result of subsequently becoming aware of the violent act.

contravention of a domestic violence order or a combination of such violent acts.[8]

[17] Unlike compensable injuries, domestic violence injuries are not defined by reference to the list of specific injuries set out in Sch 3. They are simply "injuries" sustained in a particular way and in the particular circumstances identified in reg 5. They must be sustained as a consequence of a violent act involving a "pattern of abuse" and a violent act involves a pattern of abuse for these purposes if:

> "(a) the violent act is a series of 3 or more related criminal acts that occur over a period of time; and
>
> (b) the acts are committed against the same victim by the same offender."[9]

[18] What is meant in reg 6 by the expression "a period of time" is discussed later in these reasons in relation to question 6 and the use of the same expression in s 5(3)(b)(ii) of the Act.

Procedure - Assessors

[19] An eligible victim is not entitled to apply for more than one award for "the same violent act".[10] Time limits are specified for the making of applications and an applicant is required to identify whether the applicant is a primary, secondary or family victim. Regulations 8 – 10 specify the information that an applicant must provide in and with the application.

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[8] *Victims of Crime Assistance Regulations 2007* (NT), reg 5.
[9] *Victims of Crime Assistance Regulations 2007* (NT), reg 6.
[10] *Victims of Crime Assistance Act 2006* (NT), s 25(2).

[20] An application for financial assistance and/or an award is made to the Director of the Crime Victims Services Unit ("the Director") established under the *Victims of Crime Rights and Services Act*. The Director is required to refer the application to an assessor for decision under Pt 4, Div 4 of the Act.[11]

[21] Assessors are appointed by the Minister under the Act and must be admitted to practise as a legal practitioner of the High Court or Supreme Court of a State or Territory.[12] The powers of assessors are limited to those powers "necessary or convenient for performing the functions of office".[13]

[22] Assessors are required to decide applications in accordance with the Act.[14] They are empowered to defer decisions and obtain further information, such as requiring an applicant to undergo an examination by a medical practitioner.[15] Section 35(2) provides that a person who examines an applicant must provide a written report to the assessor. If an applicant refuses or fails to undergo the examination, an assessor may refuse to award financial assistance.[16] These powers of requiring examination and declining to award assistance if an applicant refuses to undergo an examination apply only if the claim is based upon a compensable injury.[17] No such power

[11] *Victims of Crime Assistance Act 2006* (NT), s 33.
[12] *Victims of Crime Assistance Act 2006* (NT), s 24(2).
[13] *Victims of Crime Assistance Act 2006* (NT), s 24(4).
[14] *Victims of Crime Assistance Act 2006* (NT), s 34(1).
[15] *Victims of Crime Assistance Act 2006* (NT), s 35(1).
[16] *Victims of Crime Assistance Act 2006* (NT), s 35(4).
[17] *Victims of Crime Assistance Act 2006* (NT), s 35(5).

exists if the claim is based solely on the commission of a compensable violent act.

[23] Section 36 provides that an assessor may obtain information and undertake enquiries considered necessary to make a proper decision. This includes requiring persons other than an applicant to provide information or documents relevant to the application.[18] If an applicant refuses or fails to provide information or documents sought by an assessor, the assessor may decide not to award financial assistance.[19] Other persons must not, without reasonable excuse, "contravene" the requirements of a notice for further information or documents given by the assessor to such persons.[20] A penalty of 20 penalty units is specified for a natural person who contravenes the requirements of a notice and 100 penalty units for a body corporate.

Amounts Payable

[24] As to the amount an assessor may award, Div 4 of the Act contains provisions specifying the maximum financial assistance that may be given to the various categories of victims and circumstances in which an award may be reduced or financial assistance refused. In respect of a primary victim, the maximum award of financial assistance is determined by s 38(1):

> "(1) The maximum financial assistance that may be awarded to a primary victim of a violent act is $40,000, even if the victim's financial loss and the standard amount for the compensable

[18] *Victims of Crime Assistance Act 2006* (NT), s 36(4).
[19] *Victims of Crime Assistance Act 2006* (NT), s 36(3).
[20] *Victims of Crime Assistance Act 2006* (NT), s 36(5).

violent act or the victim's compensable injuries exceed $40,000."

[25] Directions as to the amounts to be awarded are found only in the Regulations. Section 7(3) provides that the Regulations "must prescribe a standard amount of financial assistance as the award for a compensable violent act and a compensable injury". Further, subs (4) provides that the standard amount "may be a specified amount or an amount within a specified range". The power to make regulations for these purposes is found in s 69 of the Act.

[26] Part 4 of the Regulations is headed "Compensable Violent Acts and Injuries and Standard Amounts". The standard amount for a compensable violent act is specified in Pt 1 of Sch 3 and depends on the category of the compensable violent act:[21]

> "The standard amount for a compensable violent act is:
>
> (a) for a category 1 compensable violent act – an amount between $7 500 and $10 000; or
>
> (b) for a category 2 compensable violent act – an amount between $10 000 and $25 000; or
>
> (c) for a category 3 compensable violent act – an amount between $25 000 and $40 000."

[27] Very broadly, the ascending scale of the standard amount from category 1 to category 3 is based upon an ascending scale of seriousness of criminal

[21] *Victims of Crime Assistance Regulations 2007* (NT), reg 14(4). The categories of compensable violent acts (offences) are set out in Sch 1.

conduct.[22] In addition, as I have said, the offences specified in the categories as compensable violent acts are offences of a sexual nature. Other violent acts causing compensable injury are not limited to sexual offences.

[28] As mentioned, a primary victim of a compensable violent act is eligible for award solely by reason of being a victim of such an act. Injury flowing from the compensable violent act is not required, but an application may include a description of injuries caused by the compensable violent act. If an application based upon a compensable violent act includes a description of injuries resulting from the compensable violent act, there is nothing in the Act to suggest that the injuries must be compensable injuries of the type specified in Sch 3. Section 32(2) speaks only of an application based on a compensable violent act including a description of "injuries" resulting from the violent act.

[29] What then of the situation if a primary victim suffers compensable injury as a consequence of a violent act that is not prescribed as a compensable violent act? That is, what of the victim who suffers injury as a consequence of a criminal offence that is not one of the offences listed in Sch 1? In contrast to the range available to an assessor for the victim of a compensable violent act, the amounts payable are specified in the lengthy list of injuries found in Pt 2 of Sch 3. With the exception of the entries "domestic violence injuries" (range: $7,500 - $10,000) and "psychological or psychiatric

[22] The offences in each category are set out in Sch 1.

disorder" (ranges: category 1 $7,500 - $15,000 and category 2 $25,000 - $40,000), a standard amount of financial assistance is specified for each particular injury. Those standard amounts range from $2,000 for a wrist sprain or minor ligament damage with full recovery to $40,000 for particularly severe injuries such as loss of limbs, loss of eye or "permanent" and "extremely serious" brain damage.

[30] If a compensable injury is not listed in Pt 2 of Sch 3, the standard amount for such injury is the "standard amount that may be awarded for the most similar compensable injury".[23]

[31] As mentioned, within the list of compensable injuries are included "domestic violence injuries" and "psychological or psychiatric disorder" and a range of standard amounts is specified for each of those injuries. The range with respect to domestic violence injuries is small ($7,500 - $10,000) and there is no guidance in the Act or Regulations as to how an assessor is to assess where particular domestic violence injuries fall within the range.

[32] As to a psychological or psychiatric disorder, two ranges of standard amounts are provided within two categories.[24] Determination of the appropriate category is governed by reg 15. In order to qualify in either category, the disorder must be "a recognisable psychological or psychiatric disorder". Such a disorder falls within category 1 if it is "moderately

[23] *Victims of Crime Assistance Regulations 2007* (NT), reg 16(3)(b).
[24] Category 1: $7,500 - $15,000; Category 2: $25,000 - $40,000.

disabling and chronic" and is suffered as a direct result of an offence against the *Criminal Code* specified in Sch 2 of the Regulations.[25]

[33] A disorder qualifies as a category 2 disorder if it is "severely disabling and chronic".[26] It is not a requirement that such a disorder is suffered as a direct result of an offence specified in any regulation or schedule.

[34] As to a determination by an assessor as to whether a disorder is "moderately" or "severely" disabling and chronic, it appears likely that the legislature had in mind that an assessor would obtain expert evidence concerning this issue. Regulation 10(2)(b) provides that if the application relates to compensable injury by way of category 1 or 2 psychological or psychiatric disorder, the application must be accompanied by "a written report about the applicant's condition". In addition, if the report accompanying the application is made by a person who is not an "approved examiner", and the assessor considers the report does not give sufficient information about the applicant's condition, the assessor may require the victim to undergo an examination by an approved examiner.[27]

[35] Regulation 18 deals with the situation in which a victim has suffered more than one injury as a result of the same violent act. A direction is given that the standard amount that may be awarded for all the injuries is the total of the following amounts:

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[25] *Victims of Crime Assistance Regulations 2007* (NT), reg 15(1)(b).
[26] *Victims of Crime Assistance Regulations 2007* (NT), reg 15(2).
[27] *Victims of Crime Assistance Regulations 2007* (NT), reg 29 and *Victims of Crime Assistance Act 2006* (NT), s 35.

"(a) the standard amount for the victim's most serious injury;

(b) 30% of the standard amount for the victim's second most serious injury;

(c) if there are more than 2 injuries -15% of the standard amount for the victim's third most serious injury."

[36] Regulation 18(4) restricts the award to calculations based on the three most serious injuries with the exception that it does not apply in relation to an award for domestic violence injuries.

[37] As to other categories of victims, only a secondary victim is capable of being eligible for an award for a compensable injury sustained as a direct result of witnessing or becoming aware of the violent act.[28] In this way the scheme of awards based on "compensable violent acts" is limited to primary victims.

Tightly circumscribed regime

[38] This overview of the principal provisions concerned with assessment of the amount payable for a compensable violent act or a compensable injury is sufficient to demonstrate that assessors are provided with a tightly circumscribed regime within which assessments are to be made. First, s 38(1) prescribes an overall limit of financial assistance that may be awarded.

[28] *Victims of Crime Assistance Act 2006* (NT), s 12(4).

[39] Secondly, where a range of award is provided, the exercise of a discretion by the assessor is quite limited:

- Each category of compensable violent act is defined by reference to specific criminal offences specified in Sch 1. The particular offence defines the category into which the compensable violent act falls.

- The ranges of standard amounts within each category of compensable violent act are significant but not large.

- Only a small range from $7,500 to $10,000 is provided for domestic violence injury.

- Two ranges are provided in Pt 2 of Sch 3 for psychological or psychiatric disorders and they are identified as category 1 or category 2. The determination as to the appropriate category for a psychological or psychiatric disorder is controlled by the criteria in reg 15 and leaves little room for the exercise of a discretion.

[40] Thirdly, in respect of compensable injuries other than domestic violence injuries and psychological or psychiatric disorders, a specific amount is identified for each particular injury and there is no discretion vested in the assessor to award any other amount.

[41] Finally, a specific formula is provided for the situation where a victim suffers more than one injury as a result of the same violent act.

Question 5(a)

[42] It is in the context of this particular statutory scheme that question 5(a) asks whether, in assessing the amount to be awarded within the ranges specified in Pts 1 and 2 of Sch 3, common law principles are to be applied without regard to the maximum specified for the particular range. The reasons of the learned sentencing Judge note that both counsel agreed that the answer to the question was "yes". In this Court, the appellant challenges that answer.

[43] In reaching her conclusion that an assessor is required to apply common law principles when determining an award within a range prescribed in Sch 3, the Judge relied upon authorities determined under previous legislation providing for payments of compensation to victims of crime. Her Honour referred to the decision of Muirhead J in *S v Turner*,[29] a decision under the *Criminal Injuries (Compensation) Ordinance 1975*, and to his Honour's approval of this passage from the decision of Reynolds JA in *R v Forsythe*:[30]

> "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 …"

[44] The Judge then cited the following passage from the judgment of Muirhead J:[31]

[29] (1979) 1 NTR 17.
[30] [1972] 2 NSWLR 951 at 955.
[31] *S v Turner* (1979) 1 NTR 17 at 23.

> "*R v Forsythe*, *supra*, is authority for the well established proposition that the sum of $4,000 represents a jurisdictional limit, not the top of the scale, not the appropriate sum for the worst injuries. …"

[45] The Judge then referred to a decision of Angel J in *Rigby v Solicitor for the Northern Territory*,[32] which her Honour noted was a decision under the former *Crimes (Victims Assistance) Act*. Angel J referred to the *Crimes Compensation Act 1982* notwithstanding that a change of name had earlier occurred and the *Crimes Compensation Act* had become the *Crimes (Victims Assistance) Act 1982*.[33]

[46] The particular passage from the judgment of Angel J upon which the Judge relied was as follows:[34]

> "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 s 13 - $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 NTR 40 at 41, the cases cited therein and *R v Forsythe* [1972] 2 NSWLR 951; *R v McDonald* [1979] 1 NSWLR 451."

History of Legislation

[47] The difficulty in the application of these and other older authorities to the current statutory scheme is apparent when the terms of the various schemes are compared. Muirhead J made his decision under the *Criminal Injuries (Compensation) Ordinance 1975* which provided that where a person had

[32] (1991) 105 FLR 48.
[33] *Crimes Compensation Amendment Act 1989* which came into operation on 1 August 1990.
[34] *Rigby v Solicitor for the Northern Territory* (1991) 105 FLR 48 at 49.

suffered injury as a result of a criminal offence, the court in which the offender was convicted could:

> "order that a sum, not exceeding 4,000 dollars, be paid to [the victim] out of the property or earnings of the person convicted, *by way of compensation for the injury sustained by reason of the offence*." (my emphasis)

[48] The terms of the legislation in *Forsythe* were similar. Upon conviction for a felony or misdemeanour, the court was empowered to direct that a sum not exceeding $2,000 be paid out of the property of the offender to a victim "by way of compensation for injury, or loss, sustained through, or by reason of, such felony or misdemeanour".

[49] On 28 January 1983 the *Criminal Injuries (Compensation) Ordinance 1975* was replaced by the *Crimes Compensation Act 1982* which was expressed as an Act "to provide compensation for injury as a result of a criminal act". A victim was able to apply to the Local Court "for a compensation certificate in respect of the injury suffered" as a result of an offence.[35] The Crown and the offender were parties to the application and the court determined the procedure to be followed.[36] The court was not bound by the rules of evidence.[37]

[50] Section 9 was headed "Principles For Assessment Of Compensation" and the relevant provisions of s 9 for present purposes were expressed in the following terms:

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[35] *Crimes Compensation Act 1982* (NT), s 5(1).
[36] *Crimes Compensation Act 1982* (NT), s 7 and s 15.
[37] *Crimes Compensation Act 1982* (NT) s 15(3).

> "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;
>
> (h) loss of expectation of life by the victim;
>
> …"

[51] When the name of the *Crimes Compensation Act 1982* was changed in 1990 to the *Crimes (Victims Assistance) Act*, amendments were made which, generally speaking, removed reference to "compensation" and replaced it with the concept of "assistance". The object of the *Crimes (Victims Assistance) Act* was expressed as "to provide assistance to certain persons injured or who suffer grief as a result of criminal acts". The right of a victim to apply for a "compensation certificate" was replaced by a right to apply for an "assistance certificate". In other important respects, however, the scheme was unchanged. The application was still made to a court and the principles by which the court determined the amount of an assistance certificate were unaltered. In particular, although s 9 of the repealed Act was replaced by a new s 9 headed "Principles for assessment of assistance", the new s 9 retained the same discretion in the court to "include an amount

in respect of" the common law heads of damage previously contained in s 9 of the repealed Act which are set out in para [50] of these reasons.

[52] It was in the context of the continuation of the court-based compensation scheme containing a specific connection to the common law heads of damage that Angel J expressed his views in *Rigby*. The change of name from compensation to assistance did not alter the fundamental nature of the scheme.

[53] After amendments in 2002 which are not of relevance to this discussion, the *Crimes (Victims Assistance) Act* was the immediate predecessor to the current Act under which this reference is to be determined. As I have said, notwithstanding a change of terminology from compensation to assistance, the applications were still determined by a court applying the same principles centred on the common law. No range of standard amounts or specified amounts for particular injuries appeared in the previous schemes. The jurisdictional limit was fixed by s 13 of the *Crimes (Victims Assistance) Act* which specified that an assistance certificate could not exceed $25,000.

[54] The reason for the change in concept from compensation to assistance is not obvious from the terms of the legislation. However, some assistance is gained from the remarks made by the Attorney-General during the Second Reading Speech upon the introduction of the renaming in 1990. Having noted that the Territory could not fully compensate victims of crime, the Attorney-General explained the deletion of reference to compensation and

the substitution of assistance as being "simply reflective of all that government can do – at least at this time". Most of the Second Reading Speech was devoted to an explanation of the new provisions providing for levies to be imposed on offenders and the financing of the scheme.

[55] There was nothing in the *Crimes (Victims Assistance) Act* to suggest a legislative intention to change the essential nature and purpose of the scheme. In 2000 in the decision of *Woodruffe v Northern Territory of Australia*,[38] the Court of Appeal spoke of the purpose or object underlying that scheme as the provision of "compensation to victims of crime".

Current Scheme

[56] Against the background of the court-based compensatory statutory scheme that had been in operation since the mid 1970s, substantial changes of significance were made when the current scheme was introduced in 2006. Under the current scheme, the assessment of amounts of financial assistance is no longer in the hands of a court. It resides with legally trained assessors. There is no court process involved. There is no provision for an adversarial type process. An assessor gathers information and makes a determination in accordance with the Act.

[57] The previous connection between assessments and common law heads of damage has been deleted. There is no longer any reference to awarding amounts for pain and suffering, mental distress, loss of amenities of life or

[38] (2000) 10 NTLR 52 at 62.

loss of expectation of life. The Act does not specify any factors to be taken into account by assessors. Apart from domestic violence injuries and psychological and psychiatric disorders, in respect of compensable injuries, once an assessor determines that a particular injury exists, the amount to be awarded is fixed by the Regulations. In these instances the assessor makes a finding of fact and is left with no discretion as to the amount to be awarded. If the claim is based on a compensable violent act, the assessor is given a limited discretion within the range specified for the particular category of compensable violent act. In this situation the Act is silent as to how the assessor is to determine the amount payable within the relevant range.

[58] In substance, a court based litigation type scheme of compensation has been replaced by an administrative scheme of assessment of financial assistance in accordance with the strict guidelines in the Act. While the purpose of an award may generally be described as compensatory in the sense that it provides monetary compensation for those who are victims of crime and are injured as a consequence of criminal offences, it is not a compensation scheme in the way in which the previous schemes were schemes for compensation to be assessed by a court. It is a scheme that provides for assessments of facts and payments of specified amounts based on those facts. In only limited circumstances does an assessor possess a discretion as to the amount to be awarded within a specified range.

[59] This view of the current statutory scheme as a scheme of administrative assessment of financial assistance is confirmed when regard is had to the

Second Reading Speech of the Attorney-General when introducing the legislation in March 2006. The Attorney-General described the previous scheme under the *Crimes (Victims Assistance) Act* as providing a "court-based compensation scheme". Referring to assessment of awards under the old scheme for non-economic loss such as pain and suffering, the Attorney-General said:

> "They are assessed by the local court on common law principles for the assessment of damages in personal injury cases. Almost all victims require to be and are legally represented, resulting, on current figures, in around 40 % of the costs of the scheme being spent on the legal costs …"

[60] Against that background, the Second Reading Speech described the Act as establishing "a new administrative assessment scheme for the provision of financial assistance to victims of violent crime". The following statements were also made:

> "These proposed reforms are largely based on recommendations made by the Crimes Victim Advisory Committee or CVAC. …
>
> …
>
> The reforms represent the second stage of a process that began in 2002 with amendments to the *Crimes (Victims Assistance) Act* based largely on recommendations made by CVAC in a 1997 report. While the 2002 amendments have resulted in improvements to the scheme by simplifying the compensation process reducing the amount of money spent on legal costs and speeding up the assessment process, *it is still an adversarial process that can be slow and intimidating for victims.* After the 2002 reforms were put in place, a further consultation process was undertaken to further improve the system.

In November 2002, a discussion paper was released seeking general community comment on possibilities for improved assistance and support for victims. The responses to these papers were consistent with the wider recommendations made by CVAC in its 1997 report *relating to the establishment of an administrative and counselling scheme. The submissions received also showed an overwhelming support for claims for assistance to be assessed by a tribunal or administrative process rather than through a court process.*

…

The first of these bills, The Victims of Crimes Assistance Bill 2006, repeals and replaces the *Crimes (Victims Assistance) Act, and establishes a new administrative assessment scheme for the provision of financial assistance to victims of violent crime.*

…

The Victims of Crime Assistance Bill 2006, repeals the *Crimes (Victims Assistance) Act* which provides the current court-based compensation scheme for personal injuries, known as the CVA scheme.

At present … awards can be comprised of both economic loss – for example, medical expenses and loss of earnings – and non-economic loss – for example, pain and suffering. *They are assessed by the Local Court on common law principles for the assessment of damages in personal injury cases.* Almost all victims require to be and are legally represented

…

It is proposed to abandon the current litigation-based scheme and *adopt a scheme for administrative assessment of financial assistance* for personal injuries resulting from a crime. …

…

Compensation for the injury itself will be determined by a table of compensable injuries which will specify set amounts for specific injuries. …

…

Final decisions as to the eligibility and assessment of awards will be made by legally trained assessors on an administrative basis.

…

The third type of assistance available is in relation to the actual injury to be known as a compensable injury. The amount of financial assistance for compensable injuries will be determined according to a table prescribed by the regulations that will list compensable injuries and specify the amount payable for each injury. The use of a table will assist in ensuring applications are dealt with as quickly as possible and ensure consistency of the amount of assistance. It will also provide greater transparency to the process and more certainty for applicants.

A significant aspect of the table is that it is proposed that sexual assault victims will no longer need to prove a specific injury. They will only need to establish that the relevant assault or assaults have taken place. This will reduce the stress of such victims as they will no longer have to go through the indignity of proving the assault and their injury, the impact of the injury and that they have actually suffered from the assault. It is proposed that there will be three levels of compensation for sexual assault victims depending on the seriousness of the offence including such things as whether there was violence involved, whether there was more than one offender or if there was actual intercourse.

Assistance for compensable injuries must reach a standard amount that is to be prescribed by regulations. … In effect the standard amount will set a threshold of $7500 in relation to compensable injuries for which financial assistance for compensable injuries is payable. The standard amount can be met by a combination of one or more compensable injuries.

…

The provision of a threshold amount is also consistent with the policy taken in respect of several personal injury claims that was introduced by *Personal Injuries (Liabilities and Damages) Act 2003* as part of the national process of tort law reform. …" (my emphasis)

[61] There is a further matter of significance. Under the repealed scheme, the parties to the proceedings before the court were the applicant and the Territory.[39] The parties were entitled to be legally represented. In the current scheme, there are no "parties". The applicant serves an application on the Director and an assessor gathers information, but neither the Territory nor the offender are given notice of the application. Nor is the Territory or the offender involved in any way unless the assessor determines that it is necessary to obtain information from them.

[62] In addition, under the current scheme, although an applicant may be represented by a legal practitioner in making an application, the legal practitioner is specifically prevented from recovering from the applicant any costs except reasonable disbursements.[40] Section 54(3) provides that the legal practitioner's disbursements do not include counsel's fees. Further, the Territory is not liable to pay any costs incurred by a person or legal practitioner in connection with an application for financial assistance.[41]

[63] The change in provisions relating to legal representation was the subject of explanation by the Attorney-General in the Second Reading Speech:

> "*One of the consequences of introducing an administrative scheme is to move away from legal representation for applicants*. Some concern has been raised at the removal of the right to payment of legal costs in relation to an application, amounts to victims losing their right of legal representation. However, the application process will be simplified to such an extent that legal assistance will not be

[39] *Crimes (Victims Assistance) Act 1983* (NT), s 7.
[40] *Victims of Crime Assistance Act 2006* (NT), s 54(2).
[41] *Victims of Crime Assistance Act 2006* (NT), s 54(4).

> necessary. Legal representation is not necessary where a fair and transparent compensation process exists. In the event that a victim is dissatisfied with the decision of an assessor or the director, he or she can appeal to the local court under the provisions of division 6 of part 4. Legal costs will be payable on that appeal where the appellant is successful. *The existence of appeal rights and the scrutiny of decisions by a court ensures the soundness of the administrative process.*" (my emphasis)

[64] The absence of an opposing party or contradictor of any type, coupled with the effective removal of legal representation, brought about a major change of significance. The adversarial type process was totally abandoned by the current scheme. If assessors are required to apply common law principles in the sense of awarding an amount for common law heads of damage, they would be put in the position of not only making enquiries, but also of testing claims by applicants concerning factors such as pain and suffering and loss of amenities of life. In such a situation, the task of the assessor would be complex and the assessor would be deprived of appropriate assistance. An applicant would be bereft of assistance in identifying and establishing common law heads of damage that might be relevant to the assessment. Such consequences are contrary to the evident purposes of the current scheme of simplicity and efficiency.

Question 5(a) – Conclusion

[65] In abandoning the court-based compensation scheme in favour of the administrative scheme of assessment outlined in these reasons, the Legislature evinced an intention to abandon assessments based upon common law principles. Further, the application of common law principles

to the administrative scheme would undermine the evident intention of creating an efficient, administrative process that avoids the inefficiencies of the adversarial process which almost inevitably accompanies the application of common law principles. It is a scheme based upon determination as to the existence of an injury for which a specified amount is payable or, in limited circumstances, a determination as to the existence of a particular type of violent act and the severity of the injury or injuries caused by that act. In my view, however, the Legislature did not intend that an assessor should embark upon an assessment of common law heads of damage such as pain and suffering in order to determine an amount payable in respect of such heads of damage and, therefore, where in a range the particular injury sits.

[66] This view of the scheme is confirmed upon a consideration of the underlying basis of a claim for an award in which a range of award is available to the assessor.

[67] Only two ranges do not relate to awards for compensable violent acts - domestic violence injuries and psychological or psychiatric disorders. As I have said, if a primary victim of a compensable violent act seeks an award based on the injury suffered as a direct result of that violent act, the amount awarded will be fixed by reference to the amount specified for such injury in Pt 2 of Sch 3. No question of a range arises except in the circumstances of domestic violence injuries and psychological or psychiatric disorders.

[68] It is when the claim is based upon the "mere commission" of the compensable violence act that the assessor is faced with determining where an award should sit in the range applicable for the relevant category specified in Pt 2 of Sch 3. For these awards, the underlying eligibility for the award is being the primary victim of a compensable violent act, that is, being the primary victim of a sexual crime specified in Sch 1.

[69] In these instances, the award is not based on injury sustained. It is an award by way of assistance because the victim has been subjected to a particular crime. Assessment of common law heads of damage such as pain and suffering and loss of amenities of life is irrelevant. The only sensible way of determining where the claim sits in the range of a standard amount is by reference to the seriousness of the particular crime.

[70] In a claim based on the mere commission of the compensable violent act, that is, based solely upon the commission of a sexual crime, if an applicant includes a description of injury sustained as a consequence of that act (crime), the claim remains based upon the seriousness of that act (crime) and the injuries are relevant to an assessment of where that particular act (crime) sits in the scale of seriousness. The claim is not a claim for compensation because of the injuries sustained. To the extent that an assessment of the injury might involve an assessment of a factor such as the pain and suffering caused by the injury, the purpose of the assessment is not to allow an amount for pain and suffering. It is to determine the overall seriousness of

the injury which in turn influences the seriousness of the crime under consideration.

[71] A determination of an award based on an assessment of the seriousness of the particular crime to which the victim was subjected brings into question whether an assessor is required to differentiate between offences in a particular category by reason of matters such as their apparent base seriousness or maximum penalties under the *Criminal Code*. In my opinion such a differentiation is not required and it would be impracticable to approach an award based on such differentiation.

[72] Using category 1 as an example, it is impossible to compare a supposed base seriousness of the offences within category 1 because they are committed in an infinite variety of circumstances. An offence carrying a lower maximum penalty might, in some circumstances, be a more serious offence than another offence carrying a larger maximum penalty. An offence of assault accompanied by the circumstances of aggravation that the victim suffers harm; the victim is under 16 and the offender is an adult; and the victim is indecently assaulted; carries a maximum penalty of five years. An offence of gross indecency on a child under 16 carries a maximum penalty of 16 years. Within the small range of $7,500 to $10,000 provided for category 1, an assessor would be presented with an impossible task in endeavouring to differentiate the starting point within the range depending upon the base seriousness or maximum penalty applicable for each offence within category 1.

[73] In my opinion, for the purposes of the assistance scheme, the Legislature has seen fit to identify a range of sexual offences (compensable violent acts) as falling within a particular category. The legislature must be taken to have intended that, for these purposes, the criminal offences within a particular category are to be treated equally in terms of their base level of seriousness for the purposes of the range of standard amount. There is no room for considering the relative seriousness of the individual offences specified within category 1. For each offence nominated in category 1, an offence at the lowest end of the scale of seriousness for offences of that particular type attracts an award at the bottom of the range. For each offence in category 1, an offence in the worst category of offences of the particular type under consideration attracts an award at the top of the range.

[74] In the case of domestic violence injuries, the financial assistance is being provided because the victim has suffered a pattern of abuse within a domestic relationship at the hands of the same offender or has suffered a violent act of stalking in contravention of a domestic violence order. It is the suffering of the injuries in the context of the domestic relationship, or from stalking in breach of a domestic violence order, that entitles the victim to an award. Inevitably, an assessment of the seriousness of the injuries is required and this might involve assessing a factor such as the degree of pain and suffering, but the award is not for the individual injuries in the way that at common law an amount is allowed for individual injuries and their

consequences. It is an award based on the total package of injuries sustained as a consequence of a pattern of abuse over a period of time.

[75] Psychological or psychiatric disorders attract two ranges identified as categories 1 and 2 which relate to disorders that are moderately disabling and chronic or severely disabling and chronic. As I have said, it appears that the Legislature contemplates that an assessor will have assistance from an appropriate expert in determining which category applies to an applicant's disorder. Again, an assessment of what was previously a common law head of damage such as loss of amenities of life might be involved, but not in the sense that an amount is being allowed for that common law head of damage. The award is based upon the categorisation of the particular disorder and a determination as to where the applicant's disorder sits in the range of seriousness of the relevant category of disorder.

[76] For these reasons, in my view the answer to question 5(a) is "no".

Question 5(b)

[77] On the basis that the answer to question 5(a) is "no", question 5(b) asks whether the assessor reserves the maximum of a range for the "worst possible act or injury". In my opinion, if the question is read literally, the answer is "no". An assessor is not required to reserve the maximum of a range for the worst possible act or injury imaginable in the same way as a sentencing court does not reserve the maximum sentence for the worst crime

imaginable. Almost inevitably, even when considering the most heinous of crimes, it is possible to conjure up worse circumstances.

[78] In respect of an award sought for the mere commission of the compensable violent act, an assessor is required to determine where a particular crime sits in the scale of seriousness for crimes of the type under consideration. The maximum of the range is reserved for those crimes properly classified as falling within the worst category of crimes of that type.

[79] Within Sch 3, a range is provided with respect to domestic violence injuries and psychological or psychiatric disorders. Hence question 5(b) must be answered with respect to these ranges.

[80] In relation to a category 1 psychological or psychiatric disorder, it is inappropriate to ask an assessor to contemplate the worst possible "moderately disabling and chronic" disorder. A practical and workable solution is needed. In my view this is provided by requiring the assessor to determine whether a moderately disabling and chronic disorder sits at the very top of the range of such disorders, beyond which the disorder would properly be characterised as severely disabling and chronic and would move into category 2. It is this type of disorder which would attract the maximum award available for the range of a category 1 disorder.

[81] In respect of a category 2 psychological or psychiatric disorder which must be "severely disabling and chronic", again in my opinion it is not appropriate to require an assessor to conjure up the circumstances of the

worst possible “severely disabling and chronic” disorder. Rather, a determination is required as to whether the particular disorder fits within a general description of the worst category of such disorders, in which event it will attract the maximum of the range.

[82] As to domestic violence injuries and where a particular group of such injuries falls within the small range of $7,500 - $10,000 in my opinion the Legislature did not contemplate an assessor being required to determine whether a package of injuries suffered as a result of a pattern of abuse occurring over a period of time should be categorised in the way in which an individual offence can be categorised as sitting at a particular level in a scale of seriousness. The award is made because the victim has suffered injuries in particular circumstances over a period of time. If the injuries are serious enough, a claim would be based upon suffering a compensable injury rather than the amorphous grouping of “domestic violence injuries”. The provision for domestic violence injuries appears to contemplate a collection of injuries that either individually or in combination would not attract more than $10,000 under the table of compensable injuries. Domestic violence injuries must be more than transient or trifling, but they need not be serious and they need not be specified as compensable injuries in Pt 2 of Sch 3.

[83] In my view, the best practical solution is for an assessor to have regard to the nature of the individual injuries and their totality and, by reference to amounts payable for compensable injuries of the same or similar type, to award an amount that appears to be just and equitable within the applicable

range. For example, at the bottom of the range might be a collection of bruises from a few instances of violence that resolved quickly. Further up the range might be similar repeated bruising sustained in more attacks of violence committed over a longer period. If the injuries include specific compensable injuries set out in Pt 2 of Sch 3, generally speaking the amount specified for such injuries would be included in assessing the award.

[84] Having answered question 5(b), it is appropriate to make a general observation about the ranges of standard amounts specified in Sch 3. Speaking generally, those ranges are relatively narrow. They apply to awards of financial assistance arising from the commission of crimes covering a very broad range of seriousness. In these circumstances, when assessors are required to determine where in a range an award should be made based upon where an offence sits in the scale of seriousness, or where injuries sit in a scale of seriousness, fine distinctions as to the level of seriousness are not appropriate. A broad brush approach is both necessary and appropriate.

Question 5(c) and 5(d)

[85] Question 5(c) is not applicable and question 5(d) has been answered in the discussion with respect to questions 5(a) and 5(b).

Question 6

[86] Question 6 asks whether the crimes committed against the appellant on 13 June, 25 July and 7 October 2007 comprised a “single violent act” for the

purposes of s 5 of the Act. The Judge answered this question in the negative. If they comprise a single violent act, the appellant is only entitled to a single award. No doubt for economic considerations, the Act has endeavoured to draw a line between separate acts of violence entitling the primary victim to separate and independent awards and those acts of violence that should be treated as a single act of violence entitling the victim to a single award only. In essence the question involves determining how and where the Legislature has chosen to draw the line.

[87] In s 5(4) the Legislature has specified that a "series of related criminal acts" constitutes "a single violent act".[42] The only direct guidance provided as to the meaning of "a series of related criminal acts" is found in s 5(3):

> "(3) A series of related criminal acts occurs if:
>
> (a) 2 or more criminal acts are committed against the same person; and
>
> (b) 2 or more of those acts:
>
> (i) occur at approximately the same time; or
>
> (ii) occur over a period of time and are committed by the same person or group of persons; or
>
> (iii) share another common factor."

[88] As I have said it is not difficult to conclude that economic considerations have driven this particular limitation found in s 5. There is no assistance in

[42] *Victims of Crime Assistance Act 2006* (NT), s 5(1) and (4).

the Second Reading Speech in this regard, but the explanatory statement accompanying the introduction of the Act confirms this view:

> "… Sub-clause (4) puts beyond doubt that a series of related criminal acts constitutes a single violent act under the Bill. This means that a victim of a series of related criminal acts is only eligible for one payment of assistance in relation to that series of acts. Currently the scheme under the *Crimes (Victims Assistance) Act* does not include such a limitation. However, this has been exploited in the past with victims making multiple applications in relation to each single occurrence. This approach cannot be sustained with the limited funds available to Government to fund the scheme and it may ultimately impact on the ability to assist all victims appropriately. Nor does this current approach allow the decision maker to properly consider the totality of the offences against the victim. This limitation will ensure that the limited pool of funds available under the financial assistance scheme is distributed in a fair and sensible manner to the full range of victims in the Territory. The maximum amount available under the scheme has been increased from $25,000 to $40,000 in recognition of the fact that this limitation has been included in the reformed scheme. …"

Facts

[89] The criminal acts committed against the appellant on 13 June, 25 July and 7 October 2007 were all committed by the same offender with whom the appellant was living in a domestic relationship. The Judge summarised the facts of each occasion as follows: [43]

> [2] On 13 June 2007 [the offender] assaulted [the appellant] with a curtain rod. As a result she sustained severe lacerations to her head, arms and body resulting in substantial blood loss, several broken teeth, swelling and bruising to her face and head and severe bruising to her lower back. [The offender] was arrested and charged with aggravated assault.

[43] These descriptions are taken from the chronology handed up by the appellant with the consent of the respondent.

[3] On 25 July 2007 [the appellant] was again assaulted by [the offender]. This time he fractured her left clavicle as a result of which she had to wear a sling for six weeks.

[4] On 7 October 2007 [the offender] was drunk. During the day, he followed [the appellant]. That night he entered the house where she was staying, dragged her outside, bashed her severely with fists and a stick over an extended period of time, verbally abused her and raped her twice. She suffered extensive physical injuries including multiple abrasions and lacerations to her scalp and face, a fractured jaw and multiple bruises and abrasions over her body."

Reasoning of learned Judge

[90] The Judge correctly identified the essential question as whether the June, July and October assaults occurred "over a period of time" within the meaning of s 5(3)(b)(ii). It was not contended before her Honour that the acts occurred at approximately the same time or shared another common factor sufficiently to bring them within s 5(3)(b)(iii). Her Honour's view was summarised in the following passage of her reasons:

"[68] In my view, the only sensible meaning that can be given to the phrase is that the criminal acts must be continuing, in the sense that they form part of a single episode of offending. If the offending unambiguously ceases, and is followed by a period of time in which no offending occurs, then the criminal acts do not occur "over a period of time". In that case, there would be three relevant periods of time – "a period of time" during which the first criminal act occurs, followed by a period of time during which no criminal acts occur, followed by "a period of time" during which a second criminal act occurs.

[69] Where, as here, there was a criminal act committed in June 2007, separated by about a month from the second criminal act committed in July 2007, separated by about three months from the third series of criminal acts on 7 October 2007, the three sets of criminal acts were not committed "over a period of

> time" within the meaning of s 5(3)(b)(ii); rather there were three separate periods of time during which the criminal acts were committed and three separate "violent acts" for the purposes of the Act. The answer to question 5, therefore, is 'no'."

Appellant's contentions

[91] The appellant drew attention to the ordinary and natural meaning of the words "a period of time", namely, "a course or extent of time"; "an indefinite portion of time, of history, or of some continuous process, as life".[44] Based on that ordinary meaning, it was contended that s 5 requires only that two or more criminal acts were committed by the same person against the same person "between one particular point in time and another particular point in time".

[92] The appellant submitted that as no limitation is expressed in s 5(3) as to the length or extent of "a period of time" as that expression is used in s 5(3)(b)(ii), the Judge erred in implying a limitation that the acts must form part of a "single episode of offending". Counsel contended that such a view is inconsistent with the scheme, particularly when regard is had to the scheme for domestic violence injuries arising out of a pattern of abuse found in regs 5 and 6. In particular, reg 6 provides that a pattern of abuse occurs if "the violent act is a series of 3 or more related criminal acts that occur over a period of time …". In the context of the contrast between acts occurring at approximately the same time and acts occurring "over a period of time", the expression is a broad expression and "expansive" in its

[44] *The Shorter Oxford English Dictionary* (3rd Ed, 1944).

operation rather than limiting. The only limitation is the requirement that the acts be committed by the same person or group of persons.

Discussion

[93] There is nothing in the context in which the expression "over a period of time" that contradicts the appellant's contention that the ordinary and natural meaning of the words should be applied. That ordinary meaning does not import any limitation to the expression. A number of features of s 5, considered in the context of the scheme in its entirety, lead me to the view that the Judge erred in this regard.

[94] First, the structure of the Act provides the outer boundaries for "a period of time". Subject to the discretion of the Director to accept a late application, an application for an award must be made within two years of the compensable violent act or the injury to which the application relates.[45] The outer limit is then achieved through the operation of s 5(6) which provides that if financial assistance has been awarded for a criminal act, and an assessor has given notice of the award to the Director, a subsequent criminal act is not related to the criminal act in respect of which the assessor has given notice of the award.

[95] Secondly, the Legislature has drawn a distinction between acts which occur "at approximately the same time" and those which occur "over a period of time". If the acts occur at approximately the same time, they need only be

[45] *Victims of Crime Assistance Act 2006* (NT), s 31(1) and (2).

two or more criminal acts and there is no requirement that they be committed by the same person or group of persons. On the other hand, if they occur over a period of time, it is a requirement that they be committed by the same person or group of persons.

[96] Thirdly, and importantly, s 5(3) contemplates that a series of criminal acts might amount to a single violent act if they "share another common factor",[46] that is, if they share a common factor other than occurrence at approximately the same time or occurrence over a period of time having been committed by the same person or a group of persons. If the criminal acts share a common factor sufficient to render those acts a series of related criminal acts for these purposes, there is no time period within which or over which the criminal acts must be committed in order to amount to a series. All that is required is the existence of a common factor shared between the criminal acts.

[97] If, regardless of the period over which the criminal acts are committed, the existence of a common factor can be sufficient to render multiple criminal acts a series and, therefore, a single violent act for these purposes, there does not appear to be any sound reason why the Legislature would have intended the expression "over a period of time" to have been anything other than expansive and open ended.

[46] *Victims of Crime Assistance Act 2006* (NT), s 5(3)(b)(iii).

[98] There is a further feature of the legislation which supports the appellant's contentions. The expression "period of time" is also used in reg 6 which defines "pattern of abuse" for the purposes of domestic violence injuries. A violent act involves such a pattern if it is committed against the same victim by the same offender and "is a series of three or more related criminal acts that occur over a period of time …". In essence, provided the injuries are more than transient or trifling, a victim who has suffered a pattern of abuse over a period of time while living in a domestic relationship is entitled to recover an award of financial assistance by reason of suffering one or more injuries during the pattern of abuse. The range of award specified in the compensable injuries table found in Pt 2 of Sch 3 is $7,500 - $10,000.

[99] Unless a different interpretation is given to "a period of time" used in reg 6 from that which is applicable to its use in s 5, it is not difficult to imagine circumstances in which the construction applied by the Judge will work injustice to a victim and defeat the purposes of the scheme with respect to domestic violence injuries. A victim of domestic violence often suffers relatively minor injuries on multiple occasions of violence in domestic circumstances, being injuries which would not qualify as a compensable injury under Pt 2 of Sch 3. The intention of the Legislature is that in respect of these repeated and separate occasions of violence, a victim is eligible for an award for domestic violence injuries notwithstanding that, individually, the injuries do not amount to a compensable injury. The ruling of the trial Judge would mean, for example, that such injuries suffered through violence

on a Monday could not be considered in conjunction with injuries suffered on a separate occasion of violence occurring on Tuesday because they would not be committed over a period of time. If the victim was restricted to claiming for each separate occasion, the victim might not be entitled to any award because the injury sustained on each occasion did not amount to compensable injury and one occasion cannot qualify as "domestic violence injuries" because it does not involve a pattern of abuse over a period of time.

[100] In my view, in the absence of good reason to take a contrary view, as the Act and Regulations were introduced as a package which brought into operation a new scheme of financial assistance for victims of crime, a consistent interpretation should be adopted. In addition, the view I have taken with regard to the meaning of "a period of time" in s 5, if applied to reg 6, would best serve the purposes of the Act and Regulations. This is the interpretation to be preferred.

[101] The first part of question 6 asks whether the criminal acts committed against the appellant on 13 June, 25 July and 7 October 2007 were a single violent act for the purposes of s 5. For the reasons I have given, in my view the answer to that part of question 6 is "yes".

[102] A positive answer having been given to the first part of question 6, the second part of question 6 asks a further question; if one of the violent acts committed on 13 June, 25 July and 7 October 2007 is a compensable violent

act, should the other violent acts or injuries in the series and their effects be taken into account in determining where in the range in Sch 3 the award should be made? My answer is yes, but reaching that answer involves working out a practical solution caused by the legislative mixing of different concepts.

[103] In overlaying the scheme with a prescription that in defined circumstances multiple acts, that is multiple crimes, committed against the same victim are to be treated as a single act/crime for the purposes of assessing the amount payable by way of an award or for compensable injury, the Legislature has created somewhat of a problem, particularly when the application is for an award based upon the commission of a compensable violent act. If the application is based on sustaining compensable injuries on multiple occasions which, through the operation of s 5, are treated as a single violent act, reg 18 will apply and prescribe the manner in which an assessor is to calculate the amount to be awarded. Notwithstanding that the injuries were sustained on separate occasions over a period of time, s 5(4) deems that the multiple acts constitute a "single violent act" and, therefore, for the purposes of reg 18 the injuries are the result of "the same violent act".

[104] Similar assistance is not found in the Act or the Regulations when the claim is based upon multiple compensable violent acts committed over a period of time or a combination of multiple compensable acts and other acts causing injuries. The concept of an award based on the commission of a compensable violent act is different from an award for a compensable

injury. Different methodologies apply to the calculation of an award as opposed to a fixed amount for a compensable injury. Notwithstanding these differences, for practical and economic reasons of avoiding multiple claims and the costs thereof, the Legislature has chosen to combine the concepts for the purposes of making a single award when multiple acts/crimes fit the criteria found in s 5 for a "single violent act".

[105] Having combined different concepts, the Legislature has provided no guidance as to how an assessor is to assess multiple compensable violent acts or to combine the different methodologies applicable when compensable violent acts are combined with injuries sustained on different occasions. Either the court is required to make an award for multiple compensable violent acts, or an award based on both multiple compensable violent acts and multiple compensable injuries. In this situation the court must do what it can in the most practical and fair manner to carry out the expressed intention of the Legislature and to determine the appropriate method of assessing a single award for multiple acts and injuries that the Legislature treats as a single violent act.

[106] As I have said, the principle underlying the award is financial assistance based on the commission of a compensable violent act to assist the victim who has been the subject of a sexual offence. Where, for economic reasons, the Legislature has determined that a victim of multiple and separate sexual offences should only be entitled to make one application and receive one award, in my view there is no reason why the assessor should not have

regard to all the offences and injuries sustained for the purposes of determining the award. This includes injuries caused by criminal acts other than sexual offences that are caught by s 5. To do otherwise would be to ignore the existence of the multiplicity of criminal acts and injuries and to unfairly penalise the victim. There is nothing in the terms of the legislation which would support an inference that the Legislature intended not only to limit a victim to a single application, but to limit the award to one of a number of compensable violent acts and to ignore both other such acts and injuries caused by other criminal acts.

[107] If an application relates to multiple compensable violent acts only, with or without injuries from those acts, the assessor will start in the highest category appropriate for the particular acts, assess the seriousness of each act and determine where, in the scale of seriousness, the combination of acts/crimes places the total criminal conduct and fix the award accordingly. If injuries from occasions of other violent acts are involved, the assessor will have regard to those injuries in determining the objective seriousness of the total criminal conduct. For example, considered alone, a single rape might sit in the middle of the range, but considered in conjunction with other sexual offences committed on other occasions, it might be elevated higher up the range. Similarly, the presence of injuries from other criminal acts might result in an elevation. The key to this approach is to recognise that multiple acts are treated as a single violent act which means that all acts

and injuries are combined for the purposes of assessing seriousness and a position in the range of award.

[108] For these reasons, in my opinion the answer to the second part of question 6 is "yes".

Another common factor

[109] The reasons I have given provide the answers to the various questions, but there is an additional issue that was raised during the course of submissions concerning the interpretation of s 5(3). It relates to the meaning of "another common factor" in s 5(3)(b)(iii). Notwithstanding that counsel before the Judge abandoned a submission that the acts against the appellant committed on 13 June, 25 July and 7 October 2007 shared a common factor for the purposes of s 5, counsel for the appellant sought to argue that such a common factor existed. In essence it was submitted that as the offender and the appellant were in a domestic relationship and the criminal acts were "incidents of domestic violence" in the context of that relationship, it was submitted that the acts share a common factor by reason of sharing a common purpose, namely, "the assertion of dominance and power by force by one party to the relationship over the other".

[110] The submission of the appellant extended to the proposition that in the context of a domestic relationship a single slap or punch by a male person to a female person necessarily amounts to an assertion of dominance and power over the female person. Counsel was even minded to suggest that the same

might be true if the roles were reversed. In my view, counsel took a step too far. No such broad assumption can be applied regardless of the circumstances of the particular case. No doubt it is true that in many domestic relationships violence by one partner to another is an attempt to assert dominance and control by force, but each episode of violence must be judged according to its own particular circumstances and in the context of the relationship in its entirety.

[111] Even if the underlying motive for acts of violence committed over a period of time is the assertion of dominance and control, I doubt that the commonality of the underlying motive on each occasion is sufficient in itself to qualify as "another common factor" for the purposes of s 5(3)(b)(iii). It seems more likely that the Legislature had in mind a common factor in the immediate circumstances surrounding the commission of each occasion of violence in the domestic context, but it is unnecessary to reach a concluded view. Whether the existence of the motive, in conjunction with other factors, might qualify is a matter that will need to be considered in an appropriate case. In the matter under consideration, not only is it unnecessary to decide this question, but the Court is not in a position to do so because the Court does not possess the necessary evidence or facts for this purpose.

[112] For these reasons, in my opinion the questions should be answered as follows:

Question 5(a) No.

Question 5(b) No.

Question 5(c) Not applicable.

Question 5(d): The principles to be applied are those identified in paras [65] – [84] of these reasons.

Question 6:

(i) Yes.

(ii) Yes.

Riley J:

[113] I agree.

Blokland J:

[114] I agree the questions should be answered as set out in the judgment of the Chief Justice for the reasons given by him.
