PARTIES:	KINSELLA, Patrick David
	v
	SOLICITOR FOR THE NORTHERN TERRITORY
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING APPELLATE JURISDICTION
FILE NO:	AP10 OF 1996
DELIVERED:	11 April 1997
HEARING DATES:	3 March 1997
JUDGMENT OF:	MARTIN CJ, KEARNEY & PREISTLEY JJ

CATCHWORDS:

Criminal Law - Jurisdiction, practice and procedure - Judgment and punishment - Orders for compensation, reparation, restitution, forfeiture and other matters relating to disposal of property - Compensation - Northern Territory - Crimes (Victims Assistance) Act - Application for extension of time to file and serve notice of appeal - Failure by lower courts to interpret Act in accordance with correct construction as determined by Court of Appeal - Such failure an error of law.

Crimes (Victims Assistance) Act 1982 (NT), ss5(1),7,12 & 12(b)
Supreme Court Act 1979 (NT), s51
Local Court Act 1989 (NT), s19
Supreme Court Rules 1987 (NT) rr85.01,85.12 & 85.12(2)

Geiszler v NT of Australia & Anor, Northern Territory Court of Appeal, Kearney, Angel & Mildren JJ, 3 April 1996, applied.

Criminal Law - Jurisdiction, practice and procedure - Judgment and punishment - Orders for compensation, reparation, restitution, forfeiture and other matters relating to disposal of property - Compensation - Northern Territory - Crimes (Victims Assistance) Act - Application for extension of time to file and serve notice of

appeal - Extension of time only for 'special reasons' - Meaning of 'special reasons' - Inability to pursue appeal by reason of lack of funds - Inference drawn that wished to appeal - Relevant that appeal would succeed if allowed to appeal, on basis of construction question.

Crimes (Victims Assistance) Act 1982 (NT).
Supreme Court Rules 1987 (NT), r85.12(2).

Jess v Scott (1986) 12 FLR 187, applied.
Martin v The Nominal Defendant (1954) 74 WN (NSW) 121, referred to.

Criminal Law - Jurisdiction, practice and procedure - Judgment and punishment - Orders for compensation, reparation, restitution, forfeiture and other matters relating to disposal of property - Compensation - Northern Territory - Crimes (Victims Assistance) Act - Construction of s12(b) - Not for applicant to show commission of the offence was reported within a reasonable time but that for the Northern Territory to show it was not - How reasonableness to be assessed.

Crimes (Victims Assistance) Act (1982) NT.

*Geiszler v NT of Australia & Ano*r , Northern Territory Court of Appeal, Kearney, Angel & Mildren JJ, 3 April 1996, considered.

REPRESENTATION:

Counsel:

Appellant:	Mr G Algie
Respondent:	Mr D Lisson

Solicitors:

Appellant:	Morgan Buckley
Respondent:	Solicitor for the NT

Judgment category classification:	B
Number of pages:	15

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

No. AP 10 OF 1996

BETWEEN:

PATRICK DAVID KINSELLA
Appellant

AND:

SOLICITOR FOR THE NORTHERN TERRITORY
Respondent

CORAM: MARTIN CJ, KEARNEY AND PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 11 April 1997)

THE COURT:

This is an application for an extension of time to file and serve notice of appeal against a judgment of Angel J. The respondent to the application is described in the application as Solicitor for the Northern Territory. No objection was raised to this description by the Crown, but we note that s 7 of the Crimes (Victims Assistance) Act 1982 (NT), with which these proceedings are concerned, makes it clear that the proper party was the Northern Territory.

The application has features which make it desirable to set out the circumstances of the case in a little detail.

The applicant, Mr P.B. Kinsella, was, on the night of 18 January 1994, working as a security guard at the Alice Springs Hospital. In the words of the applicant, what happened then was that:

> "*... there was some screaming going on towards the front entrance of the hospital, there was a lady with a broken bottle who was fighting with another Aboriginal lady, ... My understanding of what was happening, one was attacking the other. I approached these ladies with the intent to disarm her and she lunged at me with the bottle. I stepped back, caught my heel and fell hitting my side on the kerb.*"

The incident resulted in quite serious back injuries to the applicant. It was discovered that he had a very large L4/5 disc protrusion, which was operated on on 7 April 1994 when a large disc fragment was removed.

Section 5(1) of the Crimes (Victims Assistance) Act (the CVA Act) entitles a person injured as the result of the commission of an offence by another person, within twelve months after the date of the offence, to apply to a court for an assistance certificate in respect of the injury.

Section 12 of the CVA Act provides:

> "*The Court shall not issue an assistance certificate –*
>
> *(a) where it is not satisfied, on the balance of probabilities, that the person whom the applicant claims was injured or killed was a victim within the meaning of this Act:*
>
> *(b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless [the Court] is satisfied that circumstances*

existed which prevented the reporting of the commission of the offence;

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

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

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

The applicant reported the incident of 18 January 1994 to a member of the Police Force on 20 May 1994. On 24 August 1994 the applicant's solicitor, Mr A.J. Morgan, filed an application for an assistance certificate pursuant to s 5(1) of the CVA Act in the Local Court at Alice Springs. The application form had a section requiring details concerning the report of the incident to the police. Against the heading "Reason for Delay" the answer was:

"*At the time of the incident the applicant did not believe it to be serious. The injury deteriorated necessitating surgery in Adelaide on 7/4/94.”*

The application was heard and decided by Ms C. H. Deland SM on 25 October 1995. She found the applicant had suffered injuries as the result of the commission of an offence upon him as he claimed but that the matter had not been reported to a member of the Police Force within a reasonable time after the commission of the offence. Accordingly she held she could not issue an assistance certificate.

Pursuant to s 19 of the Local Court Act 1989 (NT) the applicant appealed from the magistrate's decision. Such an appeal is limited to questions of law. The appeal was heard by Angel J who held that the appellant had failed to demonstrate a material error of law. He dismissed the appeal on 24 November 1995.

Pursuant to s 51 of the Supreme Court Act 1979 (NT) it was open to the applicant to appeal to this court against Angel J's decision. The time limit for exercising this right of appeal was twenty-eight days, (r 85.12 of the Supreme Court Rules 1987 (NT)). The twenty-eight days ran from the "*material date*" defined in r 85.01. Rule 85.12(2) permits a Judge "*for special reasons"* to give leave to file and serve a notice of appeal "*at any time*".

No notice of appeal was filed within the stipulated time. The application for an extension of time was filed on 5 June 1996. In an affidavit supporting the application Mr Morgan said that on the day after the delivery of judgment by Angel J, counsel who had appeared before him for Mr Kinsella advised that unless there was a change in the interpretation of the relevant sections of the CVA Act an appeal to this court was not warranted. In an affidavit by the applicant, he said:

> *"After the Appeal my Solicitor advised that he was of the view that an Appeal to this Honourable Court had merit however, such an Appeal would mean this Honourable Court overturning the Decisions of both Ms Deland SM and Justice Angel. We discussed the cost repercussions of such an Appeal. I was advised the costs of the Appeal before Justice Angel that I had to pay the Solicitor for the Northern Territory were about $3,000.00. I was simply not in a position to risk incurring further costs in this Honourable Court should the Appeal be unsuccessful along with those costs already incurred on the Appeal before Justice Angel. Also my Solicitor and my Barrister could not afford to continue my case without payment, given the risks involved."*

The advice to Mr Kinsella was given in light of the decision of Thomas J in *Geiszler v Northern Territory of Australia* (unreported) delivered on 31 March 1995. In the course of argument before Angel J this decision was relied on by the respondent. At the time *Geiszler* was under appeal. It was argued on 19 December 1995 before Kearney, Angel and Mildren JJ. Judgment was delivered on 3 April 1996. The court upheld the appeal and remitted the case to the Local Court for a further hearing.

In his affidavit Mr Morgan recounted how he became aware of the reversal of *Geiszler* at the beginning of May 1996, how he came to the view that the law in relation to s 12 of the CVA Act had been modified, how he notified Mr Kinsella of his opinion, how he indicated to Mr Kinsella that he and counsel would now be prepared to carry appeal proceedings on without first being put in funds by Mr Kinsella and how he received instructions from Mr Kinsella to make the application for extension of time which was filed on 5 June 1996.

The respondent opposed the application; however, in written submissions outlining the arguments against the granting of an extension, the respondent said that if an extension were granted, "*The respondent does not oppose the first order sought in the applicant's Notice of Appeal ie that the appeal be allowed*." In the course of oral submissions counsel for the respondent was asked to make clear the precise effect of this concession and agreed that a correct statement of his position was that Angel J

> "*was in error in his view as to what the correct approach was to determining what is a reasonable time ... having made that concession, the respondent doesn't go so far to say that, if the*

correct test had been applied, then it would have been held that the applicant was within time."

The respondent's concession was made in light of this court's decision in *Geiszler*. It seems desirable to consider what legal issues were decided in that case.

The applicant in *Geiszler* had suffered an injury on 16 May 1993. The incident causing the injury was reported to police on 20 July 1993. The Northern Territory sought an order that the claim in the Local Court be struck out for failure to report the offence to a member of the Police Force within a reasonable time. The magistrate upheld this application and held that s 12(b) of the CVA Act required him to refuse to issue an assistance certificate.

The sole ground of appeal pursued by the appellant before Thomas J was that the magistrate had had no evidence before him about the essential matter on which he based his decision, which was that the late reporting of the matter to the police prejudiced the police inquiries. Thomas J said that she considered that the magistrate had been quite justified in drawing inferences from the fact of delay, and without further evidence, to the effect that delay made it difficult for police to investigate the allegation properly. She adopted what had been said by Bollen J in *Schmidt v South Australia* (1985) 37 SASR 570 to the effect that the delay (in that case of about six months) in reporting of itself obviously hindered police investigation and was therefore unreasonable. She concluded the magistrate had made no error in law and dismissed the appeal.

In the opinions delivered in the appeal from Thomas J in *Geiszler*, the facts and arguments were set out in most detail in that of Mildren J. He noted that

the substantial ground of appeal was that Thomas J's conclusion that there was no error of law in the magistrate's findings of unreasonable delay when those findings were based on a finding of prejudice to police inquiries for which there was admittedly no evidence, was itself wrong in law.

Mildren J considered this ground of appeal by reference to the arguments raised against it by the first respondent, the Northern Territory. He summarised these as being (a) there were facts upon which the inference of unreasonable delay was able to be drawn by the magistrate, (b) Thomas J was right in concluding that it was axiomatic that the delay would prejudice police inquiries, and (c) the burden of proof rested upon the appellant before the magistrate to show that there had been a report made to the police within reasonable time, and therefore the onus fell upon the appellant to show that there was no prejudice to the police inquiries.

The argument (c) involved the idea that if there had been no evidence that delay was prejudicial to police inquiries, it would follow that the appellant must necessarily have failed, for failing to discharge part of the burden of proof resting upon him.

Mildren J thought that all three of these arguments failed. As to argument (a), in his opinion there was no evidence before the magistrate permitting the inference of unreasonable delay.

As to argument (b), he was of the view that lapse of time of itself could not in the absence of evidence be said *necessarily* to prejudice an investigation; it must always be a question of fact and degree. To the extent that Bollen J's

judgment in *Schmidt* was authority to the contrary, he was of the view it ought not to be followed.

As to argument (c), he was of the view that although s 12(a) of the CVA Act might impose a burden of proof upon an applicant under the Act, it did not necessarily follow that the onus was the same in respect of any of the other matters in s 12. In his opinion the burden of proving the offence was not reported within a reasonable time rested with the first respondent.

In regard to this last point, it might be possible to argue that Mildren J's conclusion was directed to the specific situation which had arisen in that case; that is, that it was the first respondent (the Northern Territory) which was applying before the magistrate for an order striking out the application for an assistance certificate on the s 12(b) ground, and that the first respondent, as the moving party, would have to show at least a prima facie case of unreasonable delay. However, the reasoning relied upon by Mildren J in support of his conclusion on the onus question is quite general and is based on his construction of s 12. His conclusion seems to have been based on the general proposition that the party asserting there had been unreasonable delay within s 12(b) bore the onus of establishing it.

Kearney J reached his conclusion that the appeal should be upheld on different grounds from Mildren J. He appears to have agreed with Mildren J that there had been no evidence before the magistrate from which it could be inferred that a proper police investigation had no longer been practicable at the time when the incident was reported. He thus agreed with Mildren J that the first respondent's argument (a) failed.

Kearney J agreed only in part with Mildren J's view on the first respondent's argument (b). He was of opinion that there could be cases where the lapse of time before the making of the required report might in itself suffice to establish that the allegation could no longer be properly investigated. He gave the example of the "*almost six months*" which had elapsed in *Schmidt* . However, he did not think the period in *Geiszler* was of sufficient length to justify such an inference in all the circumstances of the case. It was on this that he based his decision, saying that the magistrate's decision concerning "*reasonable time*" had not been supported by any evidence and had thus been erroneous in law.

As to the first respondent's argument (c) he said that it had been accepted before the magistrate that the onus was on the first respondent, the Northern Territory, as the applicant before the magistrate for the 'strike out' order, to establish there had not been a s 12(b) report within a reasonable time. He approached the appeal on that footing without further discussion of the construction question.

Angel J also came to the conclusion that the appeal should be upheld on grounds somewhat different from those of Mildren J. He accepted that the circumstances giving rise to the appeal were fully set out in Mildren J's reasons. He agreed with Mildren J as to the first respondent's argument (a).

Angel J did not agree with Mildren J in regard to argument (b); on this his view was substantially the same as that of Kearney J, although because of the difference of the statutory provision upon which the decision in *Schmidt* was based from s 12 of the CVA Act, he did not think that what had been said by Bollen J in *Schmidt* was of any assistance in the application of s 12(b).

Angel J evidently considered, like Mildren J, that in the appeal the first respondent was relying on argument (c) as noted by Mildren J. Like Mildren J he also approached that argument as one to be decided in the appeal. He examined the question of construction of s 12(b) accordingly. Although Angel J does not say so in so many words, his discussion of the construction of s 12 in our opinion shows relatively clearly that he agreed with Mildren J that the provision placed no onus of proof on an applicant under the CVA Act.

It thus appears that both Angel J and Mildren J regarded the question of where the onus lay under s 12(b) as a material issue for decision in the appeal. If the first respondent's contention that the onus had lain on Mr Geiszler before the magistrate were correct then one of two positions would have followed. The first would have been simply that the appeal would be dismissed. The other would be more complicated; if the first respondent had conceded before the magistrate that it bore the onus, then depending upon a detailed examination of what had passed before the magistrate, it may have been open to the appellant to argue that a different position on the onus point could not be taken up on the appeal. However, the conclusion separately reached by Angel J and Mildren J on the point meant that these further matters did not have to be considered.

We conclude therefore that the s 12(b) onus point was relied on by the first respondent in the appeal, was a material point in the appeal, and was decided as such by Angel and Mildren JJ. It follows that, to the extent that *Geiszler* construed s 12(b) in this court, that construction became the correct construction of s 12(b), binding on lower courts. By reason of the theory of precedent by which Australian courts below the level of the High Court are governed and the rejection

in Australian law of any theory of prospective rulings and overrulings, this means that the appellate interpretation of s 12(b) in *Geiszler* must be taken as having been the right interpretation of that provision both at the time of the magistrate's decision and when Angel J heard the appeal from her at the end of 1995. Neither of them decided the case by reference to this correct interpretation and thus each erred in law.

This situation was one of the principal factors on which the applicant based his application for an extension of time to appeal. Another principal factor was that although he had been advised he had good prospects on appeal from Angel J, he could not afford to bring an appeal. His legal representatives, although they had been prepared to appear for him to that time without payment, were no longer prepared to do so. Despite the advice of good appeal prospects, the then standing decision of Thomas J in *Geiszler* was a sufficient obstacle to their continuing to act without payment. The applicant was thus simply unable to pursue an appeal which, we infer, he wished to do.

In opposing the application for extension the respondent relied upon what was said to be a policy point; that is that the court ought not as a matter of policy extend time for appeal on the basis that after expiry of the time for appeal fixed by the rules there has been some judicial decision which casts a different light on a prospective appellant's prospects for success in such appeal. It was quite forcefully argued that if time were to be extended in cases such as the present there would be great difficulty in ever formulating any useful guidelines for discriminating between the cases in which an extension of time would and would not be granted.

Although there is a good deal to be said for this argument, it faces a basic problem in that although r 85.12(2) only permits a judge to extend time "*for special reasons"* there is no definition of "*special reasons*" and the power is one which a judge can exercise "*at any time*".

Cases of the present kind constantly give rise to collisions between on one hand the desire for finality of litigation and for enabling successful parties to know where they stand, and on the other hand a similarly strong desire to see that justice is done in a particular case. What must be considered when there is a collision between these two objectives in a particular case has been discussed many times by courts of authority. One such discussion, which covers the ground in convenient and persuasive form, appears in *Jess v Scott* (1986) 12 FCR 187, a decision by the Federal Court on Order 52, r 15(2) of its Rules, which is in almost identical form to r 85.12(2). That court, after surveying the relevant grounds and considerations, in the course of which they gave particular attention to what had been said by Walsh J in *Martin v The Nominal Defendant* (1954) 74 WN (NSW) 121 at 125, came to the following conclusion:

> *"It should not be overlooked that r 15(2) enables leave to be given 'at any time'; the 'special reasons' relevant to such a power cannot but describe an elastic test, suitable for application across a range of situations, from an oversight of a day to a neglect persisted in during a prolonged period. It would require something very persuasive indeed to justify a grant of leave after, for example, a year; equally, it may be said, something much less significant might justify leave where a party is a few days late. 'Special reasons' must be understood in a sense capable of accommodating both types of situation. It is an expression describing a flexible discretionary power, but one requiring a case to be made upon grounds sufficient to justify a departure, in the particular circumstances, from the ordinary rule prescribing a period within which an appeal must be filed and served.*

> *As Walsh J emphasised, [in Martin], a discretion to relax the requirement of general rules should not itself become entangled in a web of rules spun out of the Court's discretionary decisions. The tendency in some of the decisions we have discussed to regard a particular factor considered previously, in the light of other circumstances, as requiring the same effect to be given to it in the different situation before a court on a later occasion is a temptation which a court should resist. Decisions are not authorities upon the facts but upon principles; the facts must be regarded as unique to the particular case." (at 195-6*)

In applying the approach in Jess to the facts of the present case, two of the matters relied on by the applicant have already been mentioned: one, that the applicant's case was not decided either by the magistrate or Angel J in accordance with the correct construction of s 12(b); the other, that the applicant was prevented from pursuing an appeal against Angel J's decision because of lack of funds. Additionally, it seems to us to be relevant that if the applicant were to be allowed to appeal, then on the basis of matters we have already discussed, he would succeed in the appeal. This result would follow from this court's earlier decision in *Geiszler*. It also seems to us to be relevant that the respondent, by its concession, in substance recognises the effect of *Geiszler* as requiring the upholding of the appeal if an extension of time were granted to the applicant.

The only matter relied on by the respondent in opposition to the granting of an extension of time is the policy point which we have already described.

A further consideration is that if the court decides to extend the time, then the attitude of the respondent means that the court should immediately proceed to deal with the appeal, and in doing so, should in our opinion, for reasons already

given, uphold it. This would result in the court ordering the matter to be reheard in the Local Court.

At this point we wish to add to what was said in *Geiszler* about the construction of s 12(b). The structure of that provision in our view itself strongly suggests the conclusion reached by Angel and Mildren JJ. The proviso enabling an applicant to produce evidence of circumstances preventing the applicant from reporting the commission of the offence (before it was reported) demonstrates that it is not for the applicant to show that the commission of the offence was reported within a reasonable time but that it is for the Northern Territory to show that it was not. Reasonableness is to be assessed taking into account circumstances other than the reason for the delay in reporting, which may be permitted to override a finding that the time after the commission of the offence within which it was reported was unreasonable. What is "*reasonable*" must be looked at from the perspective of the police receiving a report and the time it is received. The factors which may be relevant in deciding the point are not for this court presently to decide.

When the matter comes again before the Local Court, the s 12(b) issue will fall to be dealt with by reference to the construction of the provision as established by this case. Should the respondent so wish, proper examination may then be made of the question whether the delay by the applicant in reporting the incident that caused the injury had in fact caused any prejudice to police investigation of the incident. Material before this court suggests that although the incident was not reported to a member of the Police Force until 20 May 1994, contemporaneous or near contemporaneous records, concerned for example with a

Work Health Act claim, came into existence. It is not possible for this court to form any view of how a new trial would turn out, but it would seem that there may be a live factual issue on the s 12(b) question which has not, to date, been either fully explored or, of more immediate relevance, explored by reference to the correct construction of s 12(b).

Taking the various matters we have mentioned into account, we think the appropriate way to exercise discretion in the present application is for the court to grant an extension of time and consequentially to order that the appeal be upheld, the judgments of Angel J and Ms Deland SM set aside, the matter be remitted to and heard in the Local Court, the costs of the appeals to Angel J and to this court be borne by the respondent and the costs of the first hearing in the Local Court to abide the event of the further hearing.