NT of A v Dean [2005] NTSC 66

	IN THE MATTER OF AN APPEAL UNDER THE LOCAL COURT ACT
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA
	v
	GARY ROY DEAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	LA16/05 (20115735)
DELIVERED:	10 October 2005
HEARING DATES:	30 August and 20 September 2005
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant:	G Clift
Respondent:	J McCormack

Solicitors:

Appellant:	Halfpennys
Respondent:	John McCormack

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

NT of A v Dean [2005] NTSC 66
No. LA16/05 (20115735)

IN THE MATTER of an appeal under the LOCAL COURT ACT

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

GARY ROY DEAN
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 10 October 2005)

[1] This is an appeal under s 19 of the Local Court Act from a decision of a magistrate pursuant to the Crimes (Victims Assistance) Act.

[2] On 15 April 2005 the learned stipendiary magistrate delivered written reasons for his decision to award damages to the respondent Gary Dean for injuries he received when assaulted by Dave McKinnon.

[3] It is not in dispute that on 12 October 2000, Mr McKinnon assaulted Mr Dean. Mr McKinnon punched, kicked and kneed Mr Dean and hit him

with a bar stool. On 14 October 2002, Mr McKinnon was convicted and sentenced for the assault with two circumstances of aggravation:

1) that Gary Dean suffered bodily harm.

2) that Gary Dean was threatened with an offensive weapon, namely a bar stool.

As a result of the assault, Mr Dean suffered injuries.

[4] Mr McKinnon was convicted and sentenced to three months imprisonment. He was released forthwith on a suspended sentence. The operational period was fixed at 12 months.

[5] There is no challenge to the finding of the learned stipendiary magistrate that Mr Dean is a "victim" within the meaning of the Act, that he is the victim of an "offence" within the meaning of the Act and that he suffered "injury" within the meaning of the Act.

[6] The basis of the appeal involves an interpretation of s 10 of the Crimes (Victims Assistance) Act which involves a consideration of the conduct of the victim in assessing the amount of damages to be awarded.

[7] The relevant facts that form the background to this matter are somewhat convoluted and are set out in affidavits of Catherine Louise Spurr sworn 23 June 2005 and supporting annexures and the findings of the learned stipendiary magistrate which are not subject to challenge. I have summarised them as follows:

[8] As at 10 October 2000, Gary Dean was employed by Paspaley Pearls as a gardener/handyman. During his days off he was staying at the house of J who was the girlfriend of Dave McKinnon. Shortly after 5.30 pm on 10 October 2000, Mr McKinnon arrived at J's home. He found her sitting at the end of the table sobbing and saying that Gary had raped her. She had already informed a neighbour about what had occurred. Mr Dean had left the premises. Mr McKinnon immediately telephoned the police and tried to calm J down.

[9] Subsequently, Mr Dean was charged with the rape of J. The actual charge being that Gary Dean had sexual intercourse with J without her consent, contrary to s 192 of the Criminal Code. Mr Dean pleaded not guilty to the charge. Mr Dean admitted intercourse but denied lack of consent. This charge went to trial before a judge and jury on 2 - 5 September 2002. Mr Dean was acquitted of the charge of rape.

[10] The learned stipendiary magistrate reviewed the taped record of interview between police and Mr Dean following the allegation of rape. He also read the statement made to police by J alleging she had been raped by Mr Dean.

[11] His Honour then stated in paragraphs 15 and 16 of his reasons for judgment as follows:

> "15. Consideration of all of the surrounding material bearing first, upon the long standing non-sexual friendship between Mr Dean and J, secondly upon Mr Dean's unprecedented purchase of a necklace for J, and thirdly upon Mr Dean's flight immediately after the accusation was made against him tends to evoke

doubts about the reliability of his account, of the event, and to add weight to J's. The material bearing on the previous day or two, however, makes it pretty clear just how much alcohol Mr Dean and J had drunk, how little sleep they had probably had, and consequently, how unreliable their perceptions may have been at the time of the event and how unreliable their memories after it. I am not surprised that Mr Dean felt some guilt, vis a vis Mr McKinnon, having at the least, having drunkenly taken advantage of Mr McKinnon's drunken girlfriend. Mr Dean seems to have understood – approved even – Mr McKinnon's being angry with him in either event.

16. Had Mr McKinnon returned to J's house before Mr Dean made his escape on 10 October 2000, and responded to J's accusation by assaulting Mr Dean, that would have been one thing and Mr Dean's conduct, whether ungallant or criminal, would, in my opinion, have been properly characterised as conduct contributing (to a lesser or greater degree) to the commission of the crime against him. But that is not what happened. …"

[12] The learned stipendiary magistrate then reviewed the respective accounts of the assault that occurred on 12 October 2000 as given by Mr Dean and Mr McKinnon and stated in his reasons for judgment as follows:

"19. The two accounts coincide in many respects. Significantly, both have it that Mr Dean was in the bar before Mr McKinnon arrived. It cannot be suggested therefore that Mr Dean had gone looking for trouble. Also significantly, there is no suggestion that anything Mr Dean then did or said was of a nature calculated to inflame Mr McKinnon's ire (which was already fairly hot). In Mr Dean's account his words were apologetic. In Mr McKinnon's account there were no words. (I note that in Mr Dean's interview with police on 13 October, he claimed to have said apologetic words – see above).

20. It seems to me that the "conduct of the victim" spoken on in s 10(1) of the Act, seen in the light of the phrasing of s 10(2) "the victim's conduct contributed to the injury or death of the victim", entails a fair degree of proximity, especially temporal proximity, between the conduct of the victim, on the one hand, and the injury or death, on the other. Such proximity would certainly be lacking between the conduct of a paedophile, on the one hand, and the beatings administered to him by fellow prisoners after his conviction and imprisonment, on the other.

Similarly, proximity would be lacking in the case of a spearing administered after due consideration as "payback" according to aboriginal custom or law. It seems to me that the necessary proximity is lacking in the present case. Things might be different if Mr Dean, knowing that Mr McKinnon was very angry with him, had gone looking for him in order to try to pacify him. That might be conduct as stupid as the conduct of the unsuccessful claimant in the *Re Manson and Criminal Injuries Compensation Board* (1989) 68 OR (2d) in which, at p 117 Campbell J said:

> 'In this case the appellant ought to have foreseen the probable consequence of twice inciting a further dispute with an armed man who had just put a gun to his head and threatened to blow his head off. The appellant got an injury of the type that any reasonable prudent person should have foreseen, that he should have foreseen.'

21. Here the case is very different. Not only did Mr Dean not go looking for trouble, and not only did he not incite it. Additionally, the first contact between him and Mr McKinnon went off peaceably enough. It was only after Mr McKinnon's return from the toilet that he boiled over and attacked Mr Dean without warning. In my judgment, even if I were persuaded that Mr Dean had raped J two days before – even if he had been found guilty of that rape – his crime would not in these circumstances be characterised as conduct contributing to his injury."

[13] The appellant filed a notice of appeal. The appellant appeals from the following parts of the decision of Mr Wallace SM on 15 April 2005:

"1. The determination by the Learned Magistrate that conduct on the part of the Respondent in respect of "j" did not have the character of contributory conduct for the purposes of Section 10 of the Crimes (Victims Assistance) Act.

2. The determination by the Learned Magistrate that it was unnecessary and/or undesirable to characterise conduct on the part of the Respondent in respect of "j" as criminal nature in considering the application of Section 10 of the Crimes (Victims Assistance) Act in the circumstances of that conduct."

GROUNDS:

1. The Learned Magistrate erred in law in determining that conduct on the part of the Respondent in respect of "j" could only be relevant for the purposes of Section 10 of the Crimes (Victims Assistance) Act if the same was immediately temporally proximate to the assault occasioned upon him.

2. The Learned Magistrate erred in law in failing to determine whether or not conduct on the part of the Respondent in respect of "j" was criminal in nature, contrary to Section 10 of the Crimes (Victims Assistance) Act.

3. The Learned Magistrate erred in law in issuing a certificate of assistance to the Respondent in the circumstances of findings by him as to conduct of the Respondent in respect of "j" and in the circumstances of findings by him as regards the factual matrix surrounding the assault occasioned upon the Respondent, contrary to Section 10 of the Crimes (Victims Assistance) Act.

4. Alternatively, the Learned Magistrate erred in law in not reducing the amount of assistance specified in the certificate of assistance issued to the Respondent on account of conduct on the part of the Respondent in respect of "j" contributory to the assault occasioned upon him, contrary to Section 10 of the Crimes (Victims Assistance) Act."

[14] The appellant seeks an order that the appeal be allowed and consequential orders.

[15] In his written outline of submissions, Mr Clift on behalf of the appellant, states as follows with respect to Ground 1 of the appeal:

> "At paragraphs 16 and 20 of his Reasons for Decision, the Learned Magistrate determined that the only conduct of the Respondent relevant to the exercise of his discretion pursuant to Section 10 of the Act was conduct that was immediately temporally proximate to the assault occasioned upon him by McKinnon. This amounted to a misdirection by the Learned Magistrate of himself as to the appropriate test to be applied. In no way did the Learned Magistrate apply a commonsense test of causation as regards the connection between the conduct of the Respondent toward "J" on the one hand

and the assault occasioned upon him by McKinnon on the other. In doing so, the Learned Magistrate acted on a wrong principle and failed to give any weight to relevant matters. That amounted to an error of law. That error of law vitiated the Learned Magistrate's decision."

[16] Section 10 of the Crimes (Victims Assistance) Act provides as follows:

> " (1) In considering an application for assistance, and in assessing the amount of assistance to be specified in an assistance certificate, the Court shall have regard to the conduct of the victim and to any other matters it considers relevant.
>
> (2) Where the Court, on having regard under subsection (1) to the conduct of the victim, is satisfied that the victim's conduct contributed to the injury or death of the victim it shall reduce the amount of assistance specified in the assistance certificate by such amount as it considers appropriate in all the circumstances."

[17] This section has been the subject of judicial consideration in *Lanyon v Northern Territory of Australia* (2002) 166 FLR 189. Bailey J dismissed an appeal from a magistrate who had refused an application for assistance on the basis of the behaviour of the applicant "victim". Bailey J said at 194:

> "It is apparent that s 10 of the Act grants a large measure of discretion to the Local Court. Counsel referred me to a number of cases in other jurisdictions where unlawful conduct on the part of a victim has not been held to entirely exclude a grant of assistance or compensation (eg *South Australia v Nguyen* (1991) 57 SASR 252; *South Australia v Richards* (1997) 69 SASR 263; *R v McDonald* (1979) NSWLR 451). It is not necessary for present purposes to consider such cases in detail. I think it is clear that the Act does not contemplate that unlawful conduct on the part of a victim will necessarily act as a complete bar to an award of assistance. If the Legislature had intended such a result, no doubt such a provision would have been included in s 12 of the Act (which prescribes certain circumstances where an assistance certificate is not to be issued). Whether or not a victim's unlawful conduct will preclude any assistance or reduce the amount of assistance must be a matter of fact and degree to be determined in light of the particular circumstances of a case by applying a common-sense test of

> causation. No doubt there are circumstances where it would be inappropriate to make a reduction in the amount to be specified in an assistance certificate despite some unlawful conduct on the part of the victim. These would be cases where the unlawfulness of the victim's conduct made no substantial contribution to the injury suffered by the victim. On the other hand, there may be circumstances where the victim's conduct so contributed to his injury that the amount of assistance to be awarded should be reduced substantially or eliminated entirely."

[18] I have been referred to a number of authorities from the Supreme Court of South Australia. I note that s 7(9) of the Criminal Injuries Compensation Act 1978 (SA) was amended in 1993 and is worded somewhat differently to s 10 of the Northern Territory Crimes (Victims Assistance) Act. The equivalent provision in South Australia is s 7(9) which reads as follows:

> "(9) In determining an application for, and the quantum of, compensation, the court must have regard to –
>
> (a) any conduct on the part of the victim (whether or not forming part of the circumstances immediately surrounding the offence or injury) that contributed, directly or indirectly, to the commission of the offence, or to the injury to the victim; and
>
> (b) such other circumstances as it considers relevant."

[19] For this reason, I consider that the South Australian authorities, decided after the 1993 Amendment, are of limited assistance on the issue of whether or not the learned stipendiary magistrate was correct to confine the conduct of the victim, Gary Dean, to conduct that was temporally proximate to the assault occasioned upon him by Mr McKinnon.

[20] I note that in the matter of *South Australia v Richards & Ors* (1997) 69 SASR 263, the conduct on the part of the victim that gave rise to

consideration by the court was in fact immediately temporally proximate to the offence committed upon the applicant victim.

[21] In the matter of *South Australia v Nguyen & Tran* (1991) 58 A Crim R 261, the court found that the conduct of Nguyen some 16 months after the offence in which he had been found to be a victim, was irrelevant to his claim for compensation. The court did find that his conduct at the time when he was injured as a consequence of an offence committed by Tran, was such as to reduce the amount of the award payable to Nguyen by 50 per cent. At that time the relevant South Australian provision read:

> "[9] In determining an application for and the quantum of compensation the court must have regard to –
>
> [a] any conduct on the part of the victim that contributed directly or indirectly to the commission of the offence or to the injury to the victim; and
>
> [b] such other circumstances as it considers relevant."

[22] The principle that a reduction can be made from the amount awarded to a victim, on the basis of the conduct of the victim, was applied by the Court of Appeal in South Australia in the matter of *South Australia v Abdel-Ghani* (1997) 93 A Crim R 259 at page 265-266:

> "The extent to which the Court ought to reduce the quantum of compensation, by reason of the conduct of the victim, is a matter of judgment upon which minds will reasonably differ. The process of determining the appropriate reduction is much like a consideration of the extent to which damages ought to be reduced for contributory negligence. It is a matter of judgment after a consideration of the whole circumstances and in particular in the light of the conduct of the victim that contributed to his or her injury. Whilst it is the victim's conduct which has to be considered, that conduct must be

> considered in the whole matrix of facts which involves a consideration of the conduct of the person who has committed the offence.
>
> Because the exercise involves a judgment upon which reasonable minds will differ, the circumstances in which this Court will intervene to vary a judgment, where that judgment has been arrived at without any error of principle or misapprehension of the facts, will be rare."

[23] This case was decided by the Court of Appeal in South Australia in May 1997. The relevant provision of the Criminal Injuries Compensation Act 1978 at that time was s 7(9) as amended in 1993. See also *Bond & Ors v Australian Broadcasting Tribunal* (1989) 89 ALR 185.

[24] Section 7(9) had been amended in 1993 to include the words – "(whether or not forming part of the circumstances immediately surrounding the offence or injury)". These words do not appear in the equivalent legislation in the Northern Territory namely s 10 of the Crimes (Victims Assistance) Act.

[25] Counsel for the appellant contends the learned stipendiary magistrate failed to apply a commonsense test of causation as regards the connection between the conduct of the respondent towards J on the one hand and the assault occasioned upon him by Mr McKinnon on the other hand.

[26] The learned magistrate had before him an affidavit of J annexing a statement made by her and a record of interview between police and Mr Dean. He had a transcript of the committal and a transcript of the trial. The respondent had been acquitted on the charge of rape. The only issue at his trial for this offence was the issue of consent. The jury may have acquitted Mr Dean

because the Crown had failed to prove lack of consent beyond reasonable doubt. Alternately, the jury could have acquitted Mr Dean because they rejected the version of J that there was no consent. At the hearing of the claim by Mr Dean for damages under the Crimes (Victims Assistance) Act, the appellant did not seek to cross examine Mr Dean about his conduct with respect to J. The appellant had a right to apply to do this under s 17 of the Crimes (Victims Assistance) Act which provides as follows:

> " (1) A fact to be proved by an applicant in proceedings under this Act shall be sufficiently proved where it is proved on the balance of probabilities.
>
> (2) In proceedings under this Act, the Court may receive in evidence any transcript of evidence in proceedings in any other court, and may draw any conclusions of fact therefrom that it considers proper.
>
> (3) In proceedings under this Act, all evidence other than the evidence referred to in subsection (4) is to be given by affidavit.
>
> (4) Evidence included in a sworn statement, a medical report, or any other report relevant to the victim's injury, filed at the Court in accordance with rules or practice directions referred to in section 15(1) or with an order of the Court, is not required to be given by affidavit, whether filed –
>
> (a) before or after the commencement of this subsection; or
>
> (b) in accordance with rules or practice directions in force before or after the commencement of the Crimes (Victims Assistance) Rules.
>
> (5) Subsection (4) does not prevent a report referred to in that subsection from being given by affidavit.
>
> (6) A party may cross-examine the deponent of an affidavit, or the person who made a statement or report referred to in subsection (4), only with the leave of the Court."

[27] The learned stipendiary magistrate found that the jury verdict did not act as an issue estoppel to a subsequent finding in a civil jurisdiction on the balance of probabilities. The decision by the learned stipendiary magistrate was that it was not appropriate in this case. Given the state of the evidence with respect to the allegation of rape, I consider it was a commonsense exercise of the magistrate's discretion to decline to undertake the exercise of attempting to decide whether an offence was proved on the balance of probabilities.

[28] The consequence of this is that the learned magistrate then had to decide whether the conduct of Mr Dean, that did not amount to a criminal offence, contributed to his own injury. The learned magistrate found that conduct amounted to "at the least having drunkenly taken advantage of Mr McKinnon's drunken girlfriend". This was in circumstances where the learned stipendiary magistrate had also found, with respect to the alleged rape, "how unreliable their perceptions may have been at the time of the event and how unreliable their memories after it". It was this conduct that the learned magistrate found had to be temporally proximate to the assault upon him to be considered as contributing to his own injury. This conduct was not temporally proximate, it had occurred two days prior to the assault upon him by Mr McKinnon.

[29] I do not consider the learned stipendiary magistrate misdirected himself or applied a wrong principle of law when he determined, in the particular circumstances of this case, that the only conduct of the respondent relevant

to the exercise of his discretion pursuant to s 10 of the Act was conduct that was immediately temporally proximate to the assault occasioned upon him by Mr McKinnon.

Ground 2

[30] It was further argued by Mr Clift, counsel for the appellant, that in declining to determine and characterise the actions of the respondent towards J as criminal or unlawful, in circumstances where it was open on the evidence before him to make such a determination and characterisation, was an error of law.

[31] I do not agree with this submission. The learned stipendiary magistrate quoted at some length from an affidavit sworn by Mr McKinnon dated 21 June 2004. The learned magistrate accepted that Mr McKinnon's motive for assaulting Mr Dean was his belief that Mr Dean had raped J on 10 October 2000, two days before the assault.

[32] The learned magistrate acknowledged that the Northern Territory of Australia was not estopped from raising the question again, "… being a (slightly) different party from the Queen, in whose name the indictment against Mr Dean was laid."

[33] In his reasons for decision, the magistrate referred to s 12(f) of the Crimes (Victims Assistance) Act. He noted that this section was not relevant to his consideration as Mr Dean's injury did not occur during the commission of a

crime committed by him but occurred two days after the conduct that was the subject of a criminal allegation. His Honour referred to a judgment of his in *Briscoe & Ors v The Northern Territory of Australia & O'Bryan* an unreported judgment dated 27 October 1999 (9905503, 9904405 and 9905506) which dealt with the issue of what it means to prove the commission of a criminal offence on the balance of probabilities.

[34] The learned magistrate noted that s 10 required him to have regard to "the conduct of the victim". He concluded that in a case like the present one, it is was better to avoid characterising such conduct as a criminal offence. That was a discretionary decision open to the magistrate on the facts and circumstances of this case. I do not consider that in declining to characterise the conduct, in terms of whether it amounts to a criminal offence, he fell into error.

Grounds 3 and 4

[35] Mr Clift, counsel for the appellant, submits that the learned magistrate failed to give any weight to his findings as regards to the conduct of the respondent towards J. Mr Clift referred to paragraphs 16 – 19 of the magistrate's reasons for decision (part of which have been reproduced above). It was argued on behalf of the appellant that those findings were capable at law of constituting conduct on the part of the respondent in the nature of provocation offered by the respondent to Mr McKinnon, being causative of the assault occasioned upon him by Mr McKinnon. It is the

submission for the appellant that in failing to so find the learned magistrate's decision is vitiated by errors of law.

[36] I accept the proposition put forward on behalf of the appellant that whether or not a victim's conduct will preclude any assistance or reduce the amount of assistance is a matter of fact and degree to be determined in light of the particular circumstances of the case by applying a commonsense test of causation – see *Lanyon v Northern Territory of Australia & Anor* (supra), *South Australia v Nguyen & Anor* (supra) and *Young v Northern Territory of Australia & Gutsche* [2004] NTSC 16 delivered 2 April 2004, per Martin (BR) CJ at paragraph 42.

[37] I also accept it is sufficient if the Court finds blameworthy or culpable conduct or other relevant matters worthy of censure – see *Phillips v The State of SA and Lock* [2000] SADC 104 per Burley J at paragraph 20:

> "In this matter I also have to take into account the submission of the first defendant that the conduct of the plaintiff contributed to the commission of the offence. The approach to be taken to this aspect of the assessment is succinctly summarised in Lunn, Criminal Law, South Australia, para 12030.9A. I think, with respect, that the guiding principle is accurately stated where the learned author says:
>
> > 'Damages will be reduced where provocative, annoying or abusive conduct of the victim, which is blameworthy and culpable, but not merely a little imprudent or foolish, contributed to the injury: *Brown v Ween* (1979) 21 SASR 72; *Scarman v McGilveray* (1983) 109 LSJS 106; *Bradley v Ashman* (1983) 107 LSJS 359; *Galvin v Brown* (1983) 108 LSJS 454; *Raven v Helps* (1986) 126 LSJS 157.'"

[38] I agree that it is not necessary for the Court to find unlawful conduct on the part of the victim and/or unlawfulness in respect of "other matters it considers relevant" although unlawfulness will weigh more heavily in the exercise of the discretion to preclude assistance or reduce the amount of such assistance.

[39] The learned magistrate has a discretion under s 10 of the Act to reduce the amount of compensation to be awarded. In the particular circumstances of this case, I consider such discretion was judicially exercised and I am not persuaded that there was an error of law such that the appeal should be allowed.

[40] For these reasons I dismiss the appeal.

[41] I now turn to deal with the notice of contention filed on behalf of the respondent.

Notice of Contention

[42] Mr McCormack, counsel for the respondent, contended that the acquittal of the respondent by a jury on 5 September 2002 on a charge of rape, created an estoppel, preventing the appellant from attempting to rely upon the said allegation.

[43] The learned magistrate did not find the acquittal of Mr Dean acted as an estoppel. The learned stipendiary magistrate stated in his reasons for decision "I am of the opinion that the Northern Territory of Australia, the

first respondent herein, is not estopped from raising the question being a (slightly) different party from the Queen, in whose name the indictment against Mr Dean was laid".

[44] I agree with the submission by Mr Clift on behalf of the appellant, that an acquittal on a criminal charge does not act as an issue estoppel in civil proceedings.

[45] This principle is supported by a number of authorities. In *Helton v Allen* (1940) 63 CLR 691 the High Court was considering an appeal from a jury finding that on the balance of probabilities the defendant unlawfully killed the testatrix. The defendant had previously been acquitted on a charge of murdering the testatrix per Dixon, Evatt and McTiernan JJ at 710:

> "… His acquittal cannot operate as an estoppel. The plaintiff in the present proceedings is not bound by it as decisive of his innocence. Nor indeed do we think that it would be admissible against her as an evidentiary fact. In *Helsham v. Blackwood* ((1851) 11 C.B. 111) an argument of counsel will be found which collects the authorities in support of the proposition that in civil proceedings one party is not estopped by a judgment of acquittal of the other from showing that he was guilty of the crime of which he was arraigned. …"

[46] In *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, the Court of Appeal in New South Wales was considering an appeal from the Health Care Complaints Commission against orders made by the medical tribunal in disciplinary proceedings against the respondent medical practitioner. Gleeson CJ, Meagher and Handley JJ applied the principle established in *Helton v Allen* (supra) and stated at 635:

> "Thus an acquittal does not bar civil proceedings against the accused arising out of the same facts …".

[47] The court noted that there was no identity of parties, one being the Director of Public Prosecutions against the medical practitioner and the other the Health Care Complaints Commission. The court went further to say that even if the parties were the same there is still no res judicata estoppel. This was because the difference in the onus of proof prevents the issues being the same – see also *River v Rivers & Ors* (2002) 84 SASR 426.

[48] For the reasons already canvassed in the appeal, I find that the learned stipendiary magistrate was correct to find that no issue estoppel existed as a consequence of the respondent's acquittal on the charge of rape. I consider the learned stipendiary magistrate was also correct in the circumstances of this case to decline to embark upon the exercise of whether it was proved on the balance of probabilities.

[49] This matter was listed before the Court on appeal on 30 August and 20 September 2005. On the first day of the hearing I queried the position of Dave McKinnon in these proceedings. Mr McKinnon did not appear and was not represented on the appeal.

[50] I accept the matters set out in the affidavit of Catherine Louise Spurr sworn 20 September 2005. I accept that Mr McKinnon is aware of these appeal proceedings before the Court and does not wish to attend or participate in the appeal.

[51] Accordingly, I am satisfied it is appropriate to conclude the appeal without further notification to him.

[52] I confirm the order I make in this matter is that the appeal be dismissed.

[53] On the basis that the appeal has been dismissed, I make an order that the monies paid into Court, which is presently subject to a stay order made by Justice Angel on 30 June 2005, be paid out to the respondent Gary Dean by payment to the Trust Account of John McCormack, within seven days from today.

[54] Leave to apply on the question of costs if there is no agreement between the parties on the costs issue.

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