Northern Territory of Australia v CR [2007] NTSC 29

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v CR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 3 of 2006 to LA 11 of 2006
DELIVERED:	3 May 2007
HEARING DATES:	28 March and 2 April 2007
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	LOCAL COURT, 16 and 17 February 2006

CATCHWORDS:

CRIMINAL INJURIES COMPENSATION

Criminal Injuries Compensation – appeal – assessment of damages – relevant principles – multiple applications – series of offences causing injuries – method of assessing damages – individual and global awards – whether economic loss can be awarded as a global sum – award of maximum amount not automatic following certain offences – extent to which victim contributed to the injury – appeal dismissed – cross-appeal regarding contribution to injury allowed.

Crimes (Victims Assistance) Act 1983 (NT), s 5, s 8, s 9, s 10, s 11 and s 14; *Local Court Act*, s 19.

Semple v Williams (1990) 156 LSJS 40; *LMP v Collins* (1993) 112 FLR 289; *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52; *Northern Territory of Australia v Dean* (2006) 17 NTLR 178, applied.

Lanyon v Northern Territory of Australia and Staker [2002] NTSC 6; *Towers v Northern Territory of Australia* (unreported Local Court No 9417216 delivered 8 September 1995); *Allmich v Northern Territory of Australia and Long* (unreported Local Court No 9705343 delivered 11 February 2000), distinguished.

Watts v Rake (1960) 108 CLR 158; *Peach v Bird* (2006) 17 NTLR 230; referred to.

REPRESENTATION:

Counsel:

Appellant:	I Morris
Respondent:	D Alderman

Solicitors:

Appellant:	Hunt and Hunt
Respondent:	Piper's

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v CR [2007] NTSC 29
No. LA 3 of 2006 to LA 11 of 2006

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

CR
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 3 May 2007)

Introduction

[1] This is an appeal against amounts awarded in Assistance Certificates ("certificates") issued by a Magistrate to the respondent pursuant to the Crimes (Victims Assistance) Act ("the Act"). The appeal is limited to a question of law: s 19 Local Court Act. The appellant asserted that the learned Magistrate erred in law in his method of assessing the amounts awarded in the certificates.

[2] The respondent cross appeals against orders by the Magistrate reducing two of the awards on the basis that the victim's conduct contributed to the victim's injury: s 10(2) of the Act. The respondent submitted that an error

of law occurred because there was no evidence to support a finding of contribution. In addition the respondent contended that if the appellant's appeal is successful, on a re-assessment this Court should increase the award for loss of earning capacity.

Facts

[3] The respondent was born on 14 June 1983. In August 2001 at the young age of 15 years, the respondent entered a relationship with Shane Hartree ("the offender") who was then aged 18 years. Initially the offender was gentle and loving, but after a relatively short time he became physically and emotionally abusive.

[4] In December 2001 the respondent was sent to the Gold Coast by her parents where she stayed with a member of the family. The respondent and the offender spoke on the telephone every day and, after about two weeks, the offender persuaded the respondent to return to Darwin and live with him.

[5] Within about a week of the respondent's return the offender displayed irrational jealousy and became abusive. For the next two years the relationship was marked by repeated physical violence perpetrated by the offender against the respondent. Unfortunately, the violence, domination, humiliation and degradation brought by the offender against the respondent is all too familiar to Judges who have sat in the criminal court.

[6] The respondent filed fourteen claims for certificates. After consolidation of claims and settlement of two claims, the Magistrate was presented with nine

claims based on twelve offences of violence, including sexual violence, committed by the offender against the respondent between January and December 2002. Those offences did not represent all the acts of violence committed by the offender against the respondent, but the claims for certificates were based only upon each of the offences and the injury said to have been caused by those individual offences.

[7] The offender was charged with ten of the twelve offences. Each was an offence of unlawful assault accompanied by circumstances of aggravation. A convenient summary of the facts of each offence is found in the Crown facts presented to the learned sentencing Judge. These facts were in the material provided to the Magistrate as evidence supporting the claims (where necessary additional facts placed before the Magistrate have been added):

> "**Count 1 – On or about 10 January 2002** (Application 20406177)
>
> On the evening of 9 January 2001 [the victim] and the offender had argued. At about 1:00am on the morning of 10 January 2001, [the victim] decided to physically leave the offender who was asleep at the house at the Leanyer Sewerage Ponds. She told the offender's sister, Beverley Hartree, that she was leaving, packed her bag and walked to the gate of the property, which was 2 to 3 hundred metres away. Once there, [the victim] realised that she had left her mobile phone behind and went back to retrieve it. By this time the offender had woken up and was angry with [the victim] for trying to leave him. The offender rang his ex-girlfriend, Dianna Nilsson, on the phone, which was attached to the wall, and spoke to her in front of [the victim]. He demanded to know where [the victim] had been and accused her of having been away from the house for hours and of sleeping with other men. [The victim] denied being away for more than 10 minutes. She was upset that the offender was talking to his ex-girlfriend in front of her so she hung up the phone.

At this time the offender hit [the victim] forcefully across the side of the face with the phone. He then grabbed [the victim] by her hair and bashed her head against the wall. The offender punched [the victim] between the eyes causing a 2cm laceration on the bridge of her nose. He then slapped [the victim], grabbed her hair and punched her in the nose and lip area. He also punched her in the stomach. The laceration was bleeding. [The victim] ran into Beverley's room to get help. The offender continued to abuse and swear at [the victim] and asked her where her suitcase was. The victim told him it was at the gate. The offender told his sister to go with [the victim] to retrieve the suitcase. [The victim] was bleeding and in a lot of pain. On the way to retrieve the suitcase [the victim] passed out for a period. When she returned to the house, the offender took [the victim] into the bathroom and attempted to clean the blood from her face. He said he was sorry, that he loved her and that he wouldn't do it again.

That night the victim slept in the caravan next to the offender. He told her never to try and run away again. In the morning, after the offender's father had left for work, the offender took the victim to hospital. She initially told the triage nurse that the laceration to her forehead had been caused after a fall from a bike. Dr Ngo then saw and treated her. With some encouragement, [the victim] told the doctor that the offender had assaulted her the night before. She complained of blurred vision and bruising and a loss of consciousness for about 2 minutes. Dr Ngo observed and treated a 2cm laceration, nose midline, septal haematoma. The laceration did not require stitching. She administered panadeine for pain relief and advised [the victim] to remain at the hospital for observation given her loss of consciousness, but the victim did not do so as the offender came and picked her up. [The victim] was sore and bruised for several days after the assault.

[In an affidavit of 27 September 2004 the respondent said these events occurred on 4 January 2002. The date is not of significance.]

Count 2 – On or about 14 January 2002 (Application 20406180)

On 14 January 2002 [the victim] was listening to music in the offender's family home. The offender came home from work. He was drunk and angry because he believed [the victim] had been out. He grabbed [the victim] by the arm and said 'Who the fuck have you been touching'. The offender started hitting [the victim] in the face with open hands and fists. He grabbed her hair, picked her up by the

neck, dragged her across the room and threw her against the wall. The offender said 'Why do you make me so fucking angry'. [The victim] said 'I didn't do anything wrong'. He then said 'I'm sorry, I can't control myself'. During the course of the assault the offender re-opened the laceration between the victim's eyes. It bled again.

The following day [the victim] went to Casuarina Shopping Square. She ran into Dianna Nilsson who observed the open wound between [the victim's] eyes and the bridge of her nose. Dianna asked what had happened and [the victim] told her that the offender had bashed her. [The victim] went back to Dianna's house and stayed the night. Dianna's brother, Allan Maloney, also enquired as to how [the victim] received the injury and [the victim] told him that the offender had hit her.

The following morning Allan Maloney reported the matter to the police (recorded as 15/1/02 at 8:38am). Senior Constable Kate MacMichael of the Domestic Violence Unit attended and observed the injury to [the victim] but [the victim] declined to make a complaint.

[The victim] was in pain, experienced headaches and suffered bruising as a result of the assault. She had to take painkillers for several days afterwards.

As a result of the assaults (the subject of counts 1 and 2) [the victim] has a visible scar on the top of her nose which is about 2cm in length."

[Application 20406180 based upon count 2 was consolidated with Application 20406182. The latter application related to an additional offence committed on 14 January 2002. Immediately preceding the events described in count 2, as part of challenging the respondent about being out with another male, the offender grabbed the respondent by her arm and inserted his fingers into the respondent's vagina, without her consent, saying that he was able to "tell" if she

had recently had sexual intercourse or not. The respondent unsuccessfully endeavoured to prevent the offender from inserting his fingers.]

"**Count 4 – On 28 January 2002** (Application 20406183)

At about 1am on the morning of 28 January 2002, [the victim] was outside McDonalds in Smith Street, Darwin with her friend Kym Sondergard. She gave first aid assistance to a person who had been assaulted (time and date established by record of phone call to police). Kym and [the victim] subsequently split up. [The victim] was extremely upset and was acting somewhat hysterically on the footpath in front of Rorke's Drift.

The offender was with friends, Greg Williams, Andrew Eillersen and Macey Smith in Greg William's car. They were driving past Rorke's Drift when the offender spotted [the victim] and told Greg to pull up in Knuckey Street, in front of Red Rooster. The offender got out of the car, walked to [the victim], grabbed her and dragged her back to the car. The offender told [the victim] to get into the car and tried to push her in. [The victim] grabbed the roof in an attempt to stop herself from being pushed. The offender slapped [the victim's] face and she fell to the ground near the bin. The offender kicked her with his steel capped boots. The offender grabbed her and pushed her into the car. [The victim] told the offender she did not want to go with him, and the offender slapped her and told her to shut up. Under the direction of the offender, Greg Williams drove [the victim] and the offender to the offender's home and dropped them off. [The victim] was crying and hysterical during the trip saying she did not want to go to the offender's home but wanted to go to her parent's home. The witnesses in the car corroborate this.

Count 5 – Between 8 February 2002 and 11 February 2002 (Application 20406376)

[The victim] was in the lounge room of the offender's family home in Leanyer. The offender became angry with the victim and hit the side of the victim's head hard with the heel of his hand causing pain to her inner ear. [The victim] was unable to stand without feeling dizzy for several days and presented to Dr Duthie on 11 February 2002 complaining of dizziness following a blow to the head.

Count 6 – On 2 August 2002 (Application 20406379)

Shortly after the offender was released from prison [the victim] was walking in the street with a girlfriend, Kym Sondergard. The offender drove past and they went with him in his car to Casuarina Beach and Buffalo Creek. [The victim] was telling the offender how much she loved him and the offender was calling [the victim] a slut. They stopped near the Ampol in Jingili and Kym got out of the car. The offender punched [the victim] in the face. Kym got back into the car and they drove to Harry Chan Avenue, outside the doors of the CSJ. Kym got out of the car. The offender and [the victim] were still arguing. [The victim] was attempting to give the offender a book of letters she had written for him while he was in gaol. [The victim] was crying and pleading with the offender, telling him how much she loved him. The offender did not want to have anything to do with [the victim].

Outside the Court of Summary Jurisdiction the offender told [the victim] to get out of the car. [The victim] refused and the offender threw her shoe and belongings into the bushes. Kym went to retrieve these items. [The victim] punched and smashed the offender's windscreen. The offender then punched [the victim] in the face and pushed her forcefully out of the car causing her to fall into the gutter. She received grazing to her side. [The victim] again attempted to give the book of letters to the offender but the offender threw them out of the car. [The victim] then put the book under the passenger seat of the car and the offender drove off.

On 10 August 2002 [the victim] was admitted to Cowdy Ward at the Royal Darwin Hospital for self-harming and stress. She received psychiatric treatment and counselling as an in-patient for approximately 2 weeks.

On 2 September 2002 [the victim] made a statement of complaint to police. On 18 September 2002 a Non-violence Domestic Violence Order was granted for a period of 6 months without the consent of either the offender or [the victim].

By this time the victim was living in her own flat at Nightcliff which her parents had assisted her to set up. Shortly after moving in the victim and the offender resumed their relationship.

Count 7 – On 24 October 2002 (Application 20406174)

On 24 October 2002, the offender and [the victim] were arguing in her unit at Nightcliff. The offender punched [the victim] in the face. The offender gave [the victim] a baseball bat, which he kept by their bed, and told her to hit him with it by the time he counted to 5 or he would hit her. [The victim] was terrified and on the count of 5 made a half hearted swing at the offender. The offender took the bat off [the victim] and told her that she should have knocked him out while she had the chance. The offender then struck [the victim] over the back of her head with the bat. [The victim] fell to the bed and blacked out. When she came to she had difficulty seeing and cried out to the offender that she could not see. [The victim] felt blood in her hair, on her face and on her clothes. The offender said he was sorry and took [the victim] to his car. She was bleeding profusely.

The offender told her that he did not want to go to gaol. Because the injury to the back of [the victim's] head was obviously serious the offender and [the victim] concocted a story to avoid him getting into trouble with the police. [The victim] was still in love the offender at this time. The story was that unknown females had bashed her with a baseball bat on the beach. The offender and [the victim] began driving to the hospital but then returned to the unit. The offender collected the baseball bat and blood soaked linen from the flat. The offender drove [the victim] to the hospital and they disposed of the linen and bat in the hospital grounds.

[The victim] attended at Accident and Emergency where Dr Stephanie Hyams treated her. Dr Hyams observed a large open wound to the back right upper head. The wound was cleaned and irrigated. The wound was very deep and bone was visible. The doctor explored the injury digitally to determine if the skull was fractured. No fractures were detected. Six stitches were inserted into the wound. [The victim] was advised to remain at the hospital for observation given the serious nature of the injury but she left with the offender. [The victim] did not say the offender had inflicted the injury, she relayed the concocted story to the hospital staff. The offender remained with the victim during the examination.

On 30 November [the victim] reported the incident to Constable Christopher Smith and her father, … after the incident outlined in Count 12. On 30 November 2002 she showed them the area where the linen and bat had been secreted but the items were not able to be located in the dark. [The victim's father] returned to the area shown

to him (an area near the hospital incinerator) the following morning and located the items. He reported the matter to police and Acting Sergeant Garry Johnston attended and seized the items.

On 29 October 2002 the victim attended at Dr Annie Wells's surgery to have her stitches removed. She told Dr Wells that the offender had hit her with a baseball bat. Dr Wells was very concerned for the victim's welfare and reported the injury to the victim's counsellor Melinda Hazel. She made an appointment to see the victim on 1 November 2002 to remove the stitches, as they were not ready to come out. Melinda Hazel visited the victim at her flat and observed the injury to the back of the victim's head and multiple bruising, and swelling to the victim's face. The victim told her that the offender had caused the injury with the baseball bat. Melinda told the victim she was going to report the matter to the police, which she did.

Count 8 – Between 28 October and 1 November 2002 (Application 20406165)

One night during the intervening period of seeing Dr Wells, [the victim] had been at the beach drinking and passed out. She came home later than she had intended. The offender accused her of sleeping around. The offender punched [the victim] in the face and her nose started bleeding. The offender punched [the victim] in her right ear causing her extreme pain. The complainant vomited from the pain and the shock.

[The victim] presented to Dr Wells on 1 November 2002 as a result of the blow to her ear. Dr Wells observed blood and swelling in the victim's eardrum and detected a perforated eardrum. The victim lost her hearing in this ear for several days due to the perforations. She has some hearing loss in this ear as a result of the assault."

[Application 20406165 based upon count 8 was consolidated with Application 20406166. The latter application related to events that occurred following the assault charged in count 8. After that assault the offender said words to the effect, "You want to act like a slut, …, I'll fucking treat you like one" and, with soap on his penis, forced

the respondent to her knees and made her perform oral sex on him by inserting his penis in her mouth.

In an affidavit dated 17 May 2005 the respondent stated that her nose was bleeding and she screamed at the offender to stop. She was in so much pain that she vomited over the offender's penis and legs and was choking on the vomit. The offender continued to push the respondent's face onto his penis.]

"**Count 15 – On 30 November 2002** (Application 20406169)

On 30 November 2002 [the victim] was at a house drinking with friends including Megan Ellis, Kyahane Rata and a boy she had just met that evening, Nathan De Leeuw. [The victim] learned from phone calls that the offender was with his ex-girlfriend, Dianna Nilsson. [The victim] was intoxicated and became angry and upset by this because the offender had telephoned her to say he was out of town. She went with her friends, looking for the offender. At about 10.30pm they entered Planet Tenpin and [the victim] saw the offender, Dianna Nilsson, Kim Hartree and others in the pool table area.

[The victim] confronted the offender and said she would tell the police everything. She was swearing and yelling at the offender. Kim Hartree grabbed [the victim] by the throat and started to strangle her. Dianna Nilsson hit [the victim] over the head with a pool cue. The offender then approached [the victim] and king hit her to the back of her head. [The victim] fell to the ground.

Nathan De Leeuw was standing next to the pinball machine. He heard a commotion and saw the two girls fighting [the victim]. He then saw the offender walk up to [the victim] and punch her with a right hook into the back of her head and [the victim] hit the ground. The offender then walked over to Nathan and punched him hard a few times in the face and mouth knocking him to the ground. The offender lifted his foot to stomp on Nathan's face but Nathan rolled to the side and stood up. Nathan then punched the offender in the face. Management and security intervened and required [the victim]

to leave the premises. Nathan assisted them in removing [the victim].

[The victim] left with Nathan. They saw cars drive past which contained the offender and his friends. They were afraid and [the victim] rang '000' on her mobile. [The victim] then rang her dad who collected [the victim] and Nathan and took them back to [the victim's] flat. Police attended and complaints were made. [The victim] had bruising and a headache from the punch to her head. Nathan suffered extensive bruising, swelling and pain to his left cheek and jaw area. He could not close his mouth for several weeks and was unable to chew and swallow food for several days. He had difficulty eating for some time.

After this incident the victim and the offender continued to see each other. The police told [the victim] that on 3 December 2002 they intended on interviewing the offender about the incidents. [The victim] was still in love with the offender at this time. She told him that the police would be attending.

Count 13 – On or about 2 December 2002 (Application 20406170)

On the evening of 2 December 2002 the offender knew that police were intending to interview/arrest him the next day. [The victim] was with the offender's sister drinking. The offender collected [the victim] in his car and took her to Buffalo Creek. The offender told [the victim] to get out of the car and to take her clothes off. She did this. The offender told [the victim] that he was going to kill her and that he had a shovel in the back of the car. [The victim] backed away. The offender then told [the victim] that he was joking and told her to get dressed."

[Application 20406170 based upon the events charged in count 13

was consolidated with Application 20406172. The latter application

related to the events charged in count 14.]

Count 14 – On or about 2 December 2002 (Application 20406172)

Shortly afterwards, the offender forced [the victim] to return to his home in his car. He accused her of being filthy alleging she had sex

with other men and forced her to wash herself in the shower. While [the victim] was showering the offender threatened to break the beer bottle he was drinking from and cut her with it.

On 3 December 2003 the police attended at the offender's residence and arrested him in relation to these matters. He was taken to the Peter McAuley Centre but refused to answer any questions when interviewed.

The matter proceeded as an oral committal on 23 and 24 December 2002 and 6, 7 and 10 January 2003. The offender has been remanded in custody since 31 December 2002."

[8] In addition to the nine claims to which I have referred, the Magistrate was also informed of the circumstances of the two claims that had been consolidated and settled for the maximum amount payable under the Act, namely, $25,000. Those claims were based upon the events surrounding count 10 charged against the offender:

"**Count 10 – On 19 November 2002** (Application 20406167)

In the early hours of the morning of 19 November 2002, following an earlier dispute in front of Kim Hartree and Andrew Eillersen, the offender returned to [the victim's] flat in Nightcliff. [The victim] had run away and hidden in the park across the road as she was scared of the offender. The offender went looking for [the victim] and while he was out she snuck back into her flat and locked the door. At about 2am the offender returned, cried at [the victim's] window that he was sorry and begged her to let him in. [The victim] opened the door and was punched in the face. As the offender was locking the door [the victim] ran to another room and called '000' on her mobile phone. [The victim] dropped the phone. The offender kicked [the victim] under her chin with his boot on, pulled her hair and hit her. He then questioned her whereabouts and accused her of having sex with 'Marcus mob'. The argument, assault and [the victim's] screams are recorded on an audio tape of this '000' call. Towards the end of the recording the offender demanded to see the complainant's phone. [The victim] had hidden the phone behind the television. She hung up '000' when the offender demanded to see it

> because she was frightened the offender would kill her if he saw that she had rung the police.
>
> The '000' call was received in Adelaide and relayed to NT Police Communications. Two police cars attended at [the victim's] flat in Nightcliff at about 2.45am. The members insisted on speaking to [the victim] who did not make a complaint. The offender was present."

[9] Application 20406167 based on count 10 was consolidated with Application 20406168. The latter application related to a sexual assault that occurred on the same occasion as the events in count 10. According to the affidavit of the respondent dated 17 May 2005, during the events that were the subject of count 10, the offender kept ranting about the respondent's "little boyfriends being fuckin girls" and kept going on about a friend called Marcus. The offender got onto the bed alongside the respondent and told her to suck his nipple. This was a practice of the offender when he wanted to be aroused. The respondent said no, but after being threatened with the offender's fist, she complied. The offender then told the respondent to bend over and she cried in response, "No Shane leave me alone". The offender became angry and accused the respondent of having sex with "the Marcus mob" yet not being prepared to have it with him. The offender tore the respondent's pants off, spat on his hands, rubbed something on the respondent's anus and, in the words of the respondent, "shoved his penis very forcefully into my vagina, and quickly pulled it out and immediately forced into my anus". The respondent screamed, but the offender yelled at

her to shut up and “take it like a slut”. In her affidavit the respondent stated that she felt “so degraded”.

[10] As I have said, the Crown facts are a convenient summary of the bare facts of each offence. A reading of the respondent’s affidavits placed before the Magistrate conveys a fuller picture of the extent of the violence, humiliation and manipulation.

Proceedings before the Magistrate

[11] The Magistrate was provided with a large volume of written material which the parties agreed comprised the evidence upon which the Magistrate was required to determine the applications for certificates. That material included the affidavits of the respondent and her father as well as medical reports concerning the mental state of the respondent. The Magistrate adjourned the hearing to consider that material. Later the same day his Honour heard submissions and came to a decision.

[12] Following submissions, the Magistrate immediately delivered brief extempore reasons identifying his essential findings. Those reasons were as follows:

> “In my view, the evidence establishes that the applicant was between the years of 15 and 17 and I accept the use of the words ‘whilst in her formative years’, that you used in the submissions, Mr Priestley. Whilst in those formative years, was subject to a series of criminal offences perpetrated on her of a violent, horrendous, degrading, humiliating, terrifying, violent and brutal violence that has left her with mental distress flowing from those offences and injuries such that they have become injuries themselves.

And I base that finding on the expert records of Dr Kenny and Dr George. And she has chronic post traumatic stress disorder and development of borderline personality disorders relating to highly traumatic events suffered by her within the context of her damaging and sadistic relationship.

In my view it would be artificial in the extreme for me to attempt to sever the extremely traumatic criminal offences from other experiences suffered by her during her relationship with the offender. There are enough offences in today's application to constitute the definition of 'sadistic relationship' as used by Dr George, in my view.

Then I go on to Dr Kenny who says at page 10 when he sets out what was wrong with her,

> 'I am of the view that we have no alternative but to see this whole symptom complex as reactive to this dreadful relationship in which she was visciously assaulted, threatened, seduced, cajoled, put down etcetera'.

It would be equally just too artificial to attempt to sever that symptom complex as being caused by things that happened in the relationship separate to the offences before me today.

What has been put before me today and not argued against in terms of a liability at least, that is to say in terms of them actually happening and I do find the offences as set out in the application, consolidated as required and requested this morning and not cavilled with, occurred including those that occurred that he didn't plead guilty to and which were set out, they're sexual offences.

And I have got no hesitation in making a finding that her mental problems and her present state has flowed from the brutal attacks on her that constitute the offences that I have found to have occurred.

George goes on to say, 'Her prognosis is certainly guarded and she will require ongoing support'. The cost of such treatment is impossible to assess. Not only do I find it impossible, but as I have said, I am not certain at all that she would avail herself of and has the discipline to avail herself of regular psychiatric visitation or consultation. And in the absence of evidence to that inference I have

drawn from all of the material, I am not prepared to make an award in respect of that.

It's one thing to say that a 54 year-old is mentally distressed in the middle-to-old age of her life or his life and at that age, our ability to spring back, I apprehend, is not as good as when we were younger. It is another thing to look at and be optimistic about resilient teenagers and in my view, a reasonable award for future general damages or non-economic loss really would be in the range of around $60,000.

Actual expenses as agreed at $5000. Loss of earning capacity I assess at $10,000. I decline to award future medical expenses for the reasons already enunciated. That's $75,000. Divide that by 10, it's $7,500."

[13] The Magistrate then indicated a view as to the amounts to be awarded with respect to each individual application and adjourned to the following day for orders to be completed. At the outset of the resumed hearing, his Honour added to his reasons in the following terms:

"It appeared to me that it was agreed between the parties that in respect of those claims that [the applicant] was a victim as defined under the Act. I certainly hold it to be the case. In each of those claims it was – appeared to be common ground that in each of those cases there was an offence committed by one Hartree against her within the meaning of the Act.

It appeared to be common ground that in respect of the claims that an injury had flowed from the offence in order to make [the applicant] a victim. Of course what was not common ground was quantum and whether or not an appropriate award should be effectively discounted for contribution. There was also an argument mounted at one stage that psychiatric injuries and other causes besides trauma flowing from the offences.

…

… I've already given reasons for my decision in relation to the s 10 argument but I just repeat that I have a lot of sympathy for Bailey J dicta about people who voluntarily put themselves in a position and remain in a position where they're likely to be harmed but I don't apprehend his dicta to apply to a 15 year-old girl, an immature, silly young girl not unusually rebellious and disobedient and wilful with emotions running high, not fully in control, as we all know young people to be, of those emotions and their sexual appetites and desires.

That description of that girl is one of the reasons I limited her conduct where she has voluntarily put herself in harm's way, as it were, in the manner I did yesterday. Yesterday I took as a starting point an amount of money that I would have thought appropriate in each individual case so long as they stayed an individual case for the pain and suffering, instant terror and fear and the other matters mentioned in s 12 flowing from the specific incident.

I then considered that an extra amount was appropriate as the combined cumulative effect of the sadistic behaviour by this man as evidenced by the offences, in my view resulted in the traumatic significant and rather great damage to this young lady's psyche as evidenced by George's and Kenny's reports.

I said glibly yesterday that of course young people are resilient. Upon mature reflection, I don't run away from that description but I can see why the doctors, at least one of them, are not sure she'll ever recover from what occurred to her at the hands of this man. I can see why she's ended up a fragile person and that's even accepting a smattering of opinion that she's manipulative. Indeed one gets the opinion from McLaren she's not particularly likeable. Well, it's the feeling but it doesn't matter. She's been harmed in a seriously gross way as Kenny opines.

In my view it would be, as I said yesterday, highly artificial to look at damages with a view to trying to find out what proportion of that damage flowed from the acts perpetrated on her by Hartree in terms of these claims and any other acts by him and degradation and humiliation during the relationship. The acts as evidenced – as I found in evidence yesterday – those offences, in my view, are more than enough for her to end up the way she is. That's the only other thread of reasoning I wanted to add to yesterday's ex tempore decision-making."

Approach to Assessment

[14] Counsel for the respondent presented the Magistrate with a written outline of submissions. The outline briefly summarised the facts of each offence and specified an amount that counsel suggested was an appropriate award for injury caused by each individual offence. The outline noted that such amounts should be supplemented by "*LMP v Collins*" damages to be apportioned between the ten applications. The outline identified the *LMP v Collins* damages as for "Long Term Pain and Suffering, Mental Distress, Loss of Amenities (s 9(e)(f) and (g))."

[15] During oral submissions, the Magistrate identified the approach advanced by the respondent as putting aside "the psychiatric damage which you distribute between most of the applications" and placing a quantum on other injuries caused by each of the assaults. Counsel for the respondent agreed with his Honour's suggestion and identified the injuries other than "psychiatric damage" in the following terms:

> "Pain and suffering, mental distress and the loss of amenities of life flowing directly from that application. *When that pain ceases, when that mental distress ceases, that's the end of the extent of that claim* and I guess I've alluded to it in my submissions. What I'm essentially doing is assessing it as a common law claim would be assessed and you deal with past general damages and the future general damages. … ." (my emphasis)

[16] In the discussion that followed, it is clear that the Magistrate put aside the psychiatric "damage" ("psychiatric injury") which his Honour was being encouraged to assess in a global way in accordance with the decision of

Kearney J in *LMP v Collins* (1993) 112 FLR 289. Counsel for the appellant did not challenge this approach. A careful reading of the transcript discloses that on more than one occasion the Magistrate specifically identified the individual awards, conveniently referred to as "primary awards", as not including awards for psychiatric injury.

[17] As to compensation for psychiatric injury, the Magistrate was invited to arrive at a global figure and divide that global figure by the number of applications to arrive at ten individual awards to be ascribed to each claim. These awards are conveniently referred to as "global awards". The division by ten was to occur notwithstanding that in three claims the primary award had already reached the maximum of $25,000 and the individual global award ascribed to each claim could not be added to the maximum. Counsel for the appellant did not suggest that such an approach was in error.

[18] On the appeal, counsel for the appellant suggested it is not clear from the reasons of the Magistrate precisely what injuries were reflected in the primary and global awards. I do not agree.

[19] The reasons of the Magistrate are to be read in the light of the way in which the case was presented to him and in view of the submissions to which I have referred. The reasons of the Magistrate are not worded perfectly. However, as Olsson J said in *Semple v Williams* (1990) 156 LSJS 40, Magistrates frequently work under considerable pressure and are often compelled to give brief oral extempore reasons. Olsson J observed that for

this reason it is both unrealistic and inappropriate to attempt to dismember such extempore reasons. It is necessary to take a broad view of the reasons and to "ascertain the essential thrust of the reasoning processes applied, without being unduly critical of the precise modes of expression used or according them a degree of definitiveness which was never intended". Olsson J added (40-41):

> "… Moreover, in the normal course, it is to be expected both that there may be paragraphs within the reasons which could well have been more happily expressed and also that all relevant issues arising on the evidence will probably not be plumbed to their depths or specifically addressed at all".

[20] The remarks of Olsson J were approved by the Court of Appeal in *Peach v Bird* (2006) 17 NTLR 230. Those remarks are applicable to the reasons under consideration.

[21] In my opinion, it is tolerably clear from the conduct of the case and the reasons of the Magistrate that in assessing the individual amounts to be awarded in each certificate by way of "primary award", his Honour considered injury such as bodily harm, mental shock, pain and suffering and mental distress arising from each offence, but short of psychiatric injury. The psychiatric injury which his Honour left aside was a "mental injury" for the purposes of the Act and was described by his Honour as "chronic post traumatic stress disorder and development of borderline personality disorders".

[22] As to the psychiatric injury, the Magistrate was faced with an injury to which each offence had contributed to an unidentified extent. His Honour was of the view that it would be "artificial in the extreme" to endeavour to identify the contribution of an individual offence to the psychiatric injury and to ascribe an award for that injury attributable to each individual offence. I agree with that view. His Honour determined that a total award of $60,000 was appropriate for the psychiatric injury, which his Honour described as "future general damages or non-economic loss". To this amount the Magistrate added agreed actual expenses of $5,000 and $10,000 as representing damages for the respondent's loss of earning capacity. Again, it appears that his Honour correctly considered it was artificial, and probably impossible, to identify the contribution of each individual offence to the loss of earning capacity.

[23] Having reached a total of $75,000, the Magistrate divided that amount by ten being the number of individual applications, including the settled application, to arrive at a "global award" of $7,500 to be ascribed to each individual application. Having already awarded the maximum of $25,000 on each of two applications, and a third application having been settled for the maximum of $25,000, his Honour added the global award of $7,500 to each of the remaining seven primary awards.

[24] After reaching a total for each claim by adding the primary and global awards together, pursuant to s 10 the Magistrate then deducted a percentage

in respect of each of three applications for what he determined was the contribution of the respondent to the injury claimed in those applications.

[25] The awards and deductions are summarised in the schedule accompanying these reasons.

Statutory Scheme and Principles

[26] The Act creates a scheme "to provide assistance to certain persons injured or who suffer grief as a result of criminal acts". Pursuant to s 5 a person who is injured (or dies) ("the victim") as a result of the commission of an offence by another person may apply to a court for a certificate in respect of the injury suffered by the victim as a result of "that" offence. The court may issue a certificate which shall certify that in respect of an application under s 5, the Territory shall pay to the victim an amount specified in the certificate by way of assistance for the injury suffered by the victim: s 8.

[27] In substance, the scheme provides for payment of compensation to victims of crime for injuries sustained by victims as a result of criminal offences. "Injury" is defined in s 4 as meaning "bodily harm, mental injury, pregnancy, mental shock or nervous shock", but excludes injury arising from the loss of or damage to property flowing from the commission of an offence relating to that property. Section 9 provides that in assessing the amount of assistance the court may include an amount in respect of matters specified in s 9 including pain and suffering, mental distress and loss of amenities of life.

[28] As was pointed out by the Court of Appeal in *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at 64[34], a certificate is to be issued in respect of "the" injury suffered by the victim as a result of "that" offence. The Court said:

> "… It is clear that the legislature does not intend that assistance certificates will provide financial assistance to victims in relation to matters that are not able to be identified as *the injury* specifically related to a particular offence."

[29] The restriction of the certificate to the particular injury suffered as a result of the specific offence creates a problem in the circumstances under consideration where a series of offences, combined with other matters extraneous to the offences, contributed to the injury. In *LMP v Collins* (1993) 112 FLR 289, Kearney J noted that the Act assumes that an injury can be attributed to a particular offence and does not expressly deal with the situation "where a series of offences outside the scope of s 14(2) [now s 14(b) and (c)] result in a single injury responsibility (for) which cannot be apportioned other than arbitrarily between the different offences in the series". His Honour continued (309 - 310):

> "The task of the learned Magistrate was to assess compensation for the injury disclosed by the evidence … . This was in fact the aggregate injury from the three offences. In such a case the only practicable course open to her Worship was to assess the amount to be certified for that injury under the heads of damage relied on, and allocate that amount on an arbitrary basis equally between the three offences. …"

[30] The approach of Kearney J was approved in *Woodruffe* where eight applications for certificates were based on incidents occurring over a period of approximately five years. The Court described the incidents as part of an ongoing course of conduct by the offender against the victim which were "representative samples of numerous assaults committed by the offender upon the [victim] over a period of some 10 years" (at 54). The Magistrate had awarded a global entitlement and arbitrarily allocated the amount awarded between the six successful applications. In discussing the difficulty faced by the Magistrate, the Court made the following observations (63[32]):

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

[31] The Court noted the observations of the Judge from whom the appeal had been brought to the Court of Appeal that the global approach in the circumstances under consideration dictated that the total sum representing full compensation for the injury might need to be discounted because of the influence of extraneous factors. The Judge had said (66[38]):

> "Accordingly in a case such as the present, the Local Court, while in adopting a 'global approach' to assessment of assistance might start with 'a total sum which represents full compensation' for the respondent's injuries, (it) would need to take into account the evidence that the psychological damage to the respondent was the result of not only the offences for which assistance certificates were successfully sought, but was contributed to by other offences committed by the offender against the respondent. Depending upon the available evidence, this might call for a substantial, or even very substantial, discount from the starting point of 'full compensation' notwithstanding the remedial nature of the Act."

[32] Having referred to the observations of the Judge, the Court found that the Magistrate appeared not to have adopted the approach identified by the Judge and observed that it was not clear from his reasons whether the global figure related to the whole of the psychological damage suffered or only "that arising from the particular injuries from the particular offences in relation to which assistance certificates had issued". The Court continued (66[39]):

> "… There was no discussion of the contribution to the condition of the appellant of the incidents in relation to which no certificate had issued or as to how the global figure was reached bearing those incidents in mind. Whilst it is not possible in the circumstances of matters such as this to carry out the task of assessment with precision it must be made clear from the reasoning process that relevant factors were considered and irrelevant factors were not considered. The task of assessment should then be approached in a 'broad and commonsense' way."

[33] The Court then added a qualification to the approach identified by the Judge from whom the appeal had been brought (66[40] and [41]):

> "However, the correct approach is not necessarily to arrive at a total figure for the whole of the damage sustained at the hands of the perpetrator, and then to discount it to allow for that proportion of the

psychological injury that was caused for the offences not the subject of the application, although in this particular case, given the state of the evidence, this may be appropriate. *It may be that a finding would be open on the evidence that the particular offences the subject of the application, are separately or together sufficient to cause the psychological injuries the appellant ultimately sustained after the first assault in June 1991 and that an award, or awards, can be made on that basis, bearing in mind two considerations.* The first is that, to the extent that the appellant was already predisposed to psychological injury prior to then, the respondent must take the victim as she is found, but is still only liable to the extent that the injuries for which the respondent is liable made the condition worse: see *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 49 ALJR 233.

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

> '… can be disentangled and one or more traced to causes in which the injuries (she) sustained through the (offences) play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the (offences) as a contributory cause (per Dixon CJ, at 160).'

See also *Purkess v Crittenden* (1965) 114 CLR 164 at 168, where Barwick CJ, Kitto and Taylor JJ explained that if the plaintiff in a negligence case has established a *prima facie* case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence to show that the plaintiff's incapacity is wholly or partly due to some pre-existing condition rests with the defendant and in the absence of such evidence, if the plaintiff's evidence is accepted, the plaintiff will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality. Although their Honours did not specifically address intervening causes in that case, clearly the same principles would apply. Their Honours also went on to observe that the evidence must, if accepted, establish with some reasonable measure of precision what the pre-existing condition was, and what its future development and progress would be likely to be and the same, no doubt, would apply to intervening causes. It may be that the intervening assaults had only transient effects. Of course, the defendant need not lead evidence itself to establish these facts: it can rely upon evidence elicited through the applicant's witnesses. …" (my emphasis)

Ground 1 – Magistrate's Methodology

[34] The appellant's primary attack was upon the Magistrate's method of assessing damages by first determining a primary award and then fixing a global award for the psychiatric injury. Counsel was initially inclined to argue that it was an error of principle to combine these different methods of assessment in order to reach a total award. However, ultimately counsel contended that while the Magistrate was entitled to approach the matter in any way his Honour saw fit, by combining the methods his Honour had erred in principle because he had not discounted the awards to reflect the overlapping of injuries relevant to both the primary and global awards.

[35] In my opinion, there is no principle that requires the Magistrate to adopt one method of assessment or the other. Where an injury is plainly the result of a single offence, it is appropriate to assess the award on the individual basis. However, in accordance with the authorities of *LMP v Collins* and *Woodruffe*, where a single injury is caused by a series of offences and it is impracticable or impossible to attribute the injury to an individual offence or to identify the level of contribution of each individual offence to the injury, the appropriate course is to award a global sum and arbitrarily allocate that amount equally between the individual offences in each certificate. Neither *LMP v Collins* nor *Woodruffe* deal with the situation of multiple injuries, some of which can be ascribed to individual offences while others cannot.

[36] Similarly, the authorities do not purport to lay down a principle that one approach or the other must be followed. The task of the court is to assess an appropriate award according to the injury or injuries caused to the victim by the offence. Where both physical and mental injuries are involved, and the contribution of each offence to the mental injury cannot be identified, there is no error of principle in reaching a total award by first identifying individual amounts for the physical injuries caused by each offence and then adopting a global approach with respect to the mental injury. It is a commonsense and practical way of arriving at an appropriate award.

[37] As to the suggestion of an overlapping of injuries between the primary and global awards, that is, the suggestion that the same injuries have been taken into account twice thereby creating, in effect, a double dipping, in the situation facing the Magistrate there was a need to be careful to avoid such overlapping. In my view, however, there is no basis for concluding that the Magistrate erred in this regard. The psychiatric injury, namely, chronic post traumatic stress disorder and borderline personality disorder, was a different injury from the mental shock, pain and suffering and mental distress caused to the respondent by each offence and for which the Magistrate was in a position to fix a primary award. There was not, as counsel for the appellant contended, an award repetitively for the same injury.

Failure to Discount

[38] The appellant submitted that the Magistrate fell into error in failing to discount the global award by reason of two factors. First, there was a failure to discount in order to reflect the contribution of extraneous factors to the psychiatric injury. Secondly, his Honour failed to discount the global award in recognition of the contribution of the offences in respect of which the maximum amount of $25,000 was awarded as a primary award. As those offences were the major contributors to the psychiatric injury, and the maximum having been reached, their contribution to the mental injury should have resulted in a discount of the global award.

[39] As occurred in *Woodruffe*, the respondent was subjected to a course of physical and mental abuse which involved numerous incidents of misconduct in respect of which no application for a certificate was made. Those incidents, and the overall effect of the violent and dysfunctional relationship, were contributing causes to the psychiatric injury. In those circumstances, the appellant submitted that the Magistrate made the same error as the Magistrate in *Woodruffe* in not discounting the full award by reason of the contribution of factors extraneous to the offences that were the subject of the certificates.

[40] During submissions, the Magistrate indicated that if he found the existence of “psychiatric damage” emanating from the relationship, it would be very hard to determine a percentage contribution by the offences that were the subject of the claims and a percentage contribution from other aspects of the

relationship that were not the subject of the assistance claims. His Honour observed that it "may be" that there was sufficient evidence that the offences were responsible for the "post traumatic problems". Counsel for the respondent urged his Honour to reach that finding while counsel for the appellant emphasised that as unpalatable as it might be, the respondent could not be compensated for injury flowing from the destructive aspects of the relationship other than the offences that were the subject of each claim.

[41] The reasons of the Magistrate demonstrate that his Honour was alert to the evidence of Dr Kenny that the "whole symptom complex" was "reactive to this dreadful relationship in which she was viciously assaulted, threatened, seduced, cajoled, put down etc". His Honour recognised that it was "artificial" to attempt to differentiate between the contributions made to the symptom complex by events occurring in the relationship as opposed to the offences that were the subject of the certificates. Having recognised this difficulty, his Honour made a finding that the psychiatric injury was caused by the offences that were the subject of the assistance certificate. His Honour said:

> "And I have got no hesitation in making a finding that her mental problems and her present state has flowed from the brutal attacks on her that constitute the offences that I have found to have occurred".

[42] In addition to those remarks, in adding to his reasons when the hearing resumed the next day, the Magistrate said:

> "I then considered that an extra amount was appropriate as the combined cumulative effect of the sadistic behaviour by this man as evidenced by the offences, in my view resulted in the traumatic significant and rather great damage to this young lady's psyche as evidenced by George's and Kenny's reports.
>
> …
>
> In my view it would be, as I said yesterday, highly artificial to look at damages with a view to trying to find out what proportion of that damage flowed from the acts perpetrated on her by Hartree in terms of these claims and any other acts by him and degradation and humiliation during the relationship. *The acts as evidenced – as I found in evidence yesterday – those offences, in my view, are more than enough for her to end up the way she is*. …" (my emphasis).

[43] It is plain from the Magistrate's reasons that his Honour found that the particular offences which were the subject of the certificates were, in combination, sufficient to cause the psychiatric injury and did cause that injury. If there was no evidence to support that finding, an error of law would have occurred. The question whether the evidence was capable of supporting that finding is a question of law.

[44] In my opinion, the evidence was capable of supporting the Magistrate's finding. The individual offences were violent, humiliating and degrading. By the offences, the respondent was physically injured, put in fear and traumatised. Dr Kenny observed that the most terrifying experience occurred on 2 December 2002. That incident was the subject of count 13 and Application 20406170. This was the occasion when the offender drove the respondent to Buffalo Creek, made her remove her clothes, told her he

had a shovel in the car and said he was going to kill her. Dr Kenny reported that the respondent was so terrified that she wet herself.

[45] As the Court of Appeal pointed out in *Woodruffe*, there may be cases in which the correct approach to a global award does not necessarily require a discounting of the total global award to reflect the contribution to the injury of offences that are not the subject of the applications or other extraneous factors. The Court noted that a finding may be open on the evidence that the particular offences which are the subject of the applications, either separately or together, were sufficient to cause the injury and an award can be made on that basis. The Court added that if the evidence is capable of supporting an award on that basis, the burden will fall upon the Crown to disentangle the causes and exclude the operation of the offences as a cause: *Watts v Rake* (1960) 108 CLR 158.

[46] The evidence being capable of supporting the Magistrate's finding that the offences which were the subject of the applications caused the psychiatric injury, and no evidence being led to disentangle the causes and exclude the operation of the offences in the applications as a contributing cause, it was open to the Magistrate to make a global award without discounting that award by reason of the contribution of extraneous matters such as the relationship as a whole and offences that were not the subject of any application.

[47] I turn to the second aspect of the failure to discount. This concerns the contribution to the mental injury of the three major incidents that resulted in maximum awards of $25,000 based on injuries other than the psychiatric injury.

[48] Apart from the evidence of Dr Kenny that the events of 2 December 2002 were the most terrifying experience for the respondent, there was no evidence from which it was possible to discern the extent of the contribution of each offence to the psychiatric injury. Counsel for the appellant submitted that as a matter of commonsense the court should find that the offences which resulted in maximum awards were the major contributing factors. While that proposition is superficially attractive, it carries with it the danger of assumption that the sexual crimes had greater impact than the other violence associated with the remaining offences. Given the extent of the violence and obvious humiliation involved in the other offences, I am not prepared to make that assumption.

[49] Putting aside the three claims in respect of which the maximum of $25,000 had been reached with the primary award, there were seven claims based upon acts of considerable violence which occurred between 10 January and 30 November 2002. The Magistrate was not asked to determine whether, independently of the offences that gave rise to the three maximum awards, the offences that were the subject of the seven remaining claims were sufficient to cause the psychiatric injury. Nor was his Honour asked to discount the global award by reason of the contribution to the psychiatric

injury of the violence represented in the three claims for which the maximum of $25,000 was awarded. Counsel for the appellant acquiesced in the approach taken by the Magistrate of reaching a global award for the psychiatric injury and dividing that amount by the ten claims, including the settled claim.

[50] The respondent established that the offences for which claims were made caused the psychiatric injury. No doubt each offence contributed, but no evidence was led to establish the extent of the contribution made by each offence. The appellant did not seek to disentangle the causes and there was no basis in the evidence for the Magistrate to safely draw a conclusion as to the respective degrees of contribution. In these circumstances, the Magistrate followed the appropriate course and he did so with the agreement of the appellant. In my opinion it cannot be said that the Magistrate erred in law.

[51] As to the suggestion of "double dipping", on the assumption that a global award and division between the claims in accordance with *LMP v Collins* and *Woodruffe* is appropriate, the fact that the maximum has been reached with a primary award does not result in double dipping. The division having occurred by ten thereby including the three maximum claims, the individual global awards of $7,500 were not added to the claims in which the maximum had already been reached. If the division had only been by seven, the individual global awards would have been greater and it might have been argued with some force that the respondent was getting a second benefit

from the contribution of the remaining three claims to the psychiatric injury. In dividing by ten, on one view it could be said that each of the seven global awards has been discounted by reason of the contribution of the remaining three claims to the psychiatric injury.

Amount of Global Award

[52] The appellant does not challenge the primary awards. As to the global award of $60,000 for mental injury, the appellant submitted that the Magistrate made an excessive award. However, there was evidence capable of supporting such an award and the complaint that the award is excessive does not involve a question of law. In addition, in my opinion the Magistrate arrived at an appropriate figure.

Grounds 2 and 3 – Exemplary/Aggravated Damages

[53] These grounds assert that the Magistrate failed to exclude from the awards amounts properly regarded as awards for aggravated, exemplary or punitive damages. Section 11(a) of the Act excludes any amount by way of such damages.

[54] The appellant relied upon references by the Magistrate in his reasons to the "sadistic relationship" and "sadistic behaviour" of the appellant. In my opinion, however, neither those references nor any other remarks of his Honour suggest that his Honour was including aggravated, exemplary or punitive damages in the awards. The first reference to the "sadistic relationship" was simply a reference to the nature of the relationship. His

Honour was referring to the psychiatric injury "relating to highly traumatic events" suffered in the context of the sadistic relationship.

[55] The second passage was a reference to a global award for psychiatric injury caused by the "combined cumulative effect of the sadistic behaviour" by the offender "as evidenced by the offences". The Magistrate was referring to the behaviour of the appellant in the commission of the relevant offences which he regarded, and reasonably so, as sadistic behaviour.

[56] These grounds of appeal are not made out.

Ground 4 – Loss of Earning Capacity

[57] Section 9 of the Act provides that the court may award an amount in respect of pecuniary loss sustained as a result of total or partial incapacity for work. The Magistrate made an allowance of $10,000.00. The appellant submitted that there was no evidence capable of supporting a conclusion that by reason of injury the respondent had suffered a loss of earning capacity.

[58] The respondent attended local state schools until the age of 15 and passed year 9. She did well in English, but not in other subjects. Overall she gained only average marks. The respondent left home at the start of year 10 and stayed with friends without discussing this move with her parents. She was mixing with a rebellious group. After leaving school the respondent did little formal work and her life was described by a psychiatrist, Dr McLaren, as one of "more or less remitting movement and disturbance". For three months after leaving school the respondent was unemployed.

[59] In a victim impact statement dated 7 July 2003, the respondent stated that she had spent the previous six months in therapy in a psychiatric hospital interstate. She spoke of finding it difficult to lead a normal life and said she was unable to concentrate. At that time she was not ready to start work. The respondent said that her therapist believed that it could be a couple of years before she could be capable of commencing work. She had been informed by the medical practitioners that it was too difficult for her to undertake employment because of her "lack of concentration, anxiety attacks and flash backs".

[60] By November 2004 the respondent was working. She told Dr McLaren that she was working shifts which disturbed her sleep. The respondent was sleeping a lot by day and working at night but, apart from work, she was not undertaking other organised activity. The respondent told Dr McLaren that she had little interest in other matters and her motivation varied quite a lot. In the words of the respondent to Dr McLaren, "I get these big ideas that I can do things, then I get depressed and don't go out and I feel bad."

[61] Dr McLaren gave a description of the respondent's mental state, appearance and behaviour which strongly suggests that the respondent was not a good candidate for employment in other than unskilled circumstances. In Dr McLaren's view, as at November 2004 the respondent showed evidence of a mild and variable minor or neurotic type of depression which was highly reactive to her circumstances. She demonstrated an intense, personality-based irritability. Dr McLaren concluded that the only

psychological symptoms from which the respondent was suffering at that time were consistent with an impulsive and self righteous personality disorder which was in evidence prior to meeting the offender. However, Dr McLaren stated that the provisional diagnosis of personality disorder could not be dismissed.

[62] The Magistrate preferred the evidence of Dr Kenny who saw the respondent in January 2006. In Dr Kenny's view the respondent had been quite depressed with post-traumatic stress disorder. Dr Kenny stated that it was "quite clear" that the respondent was unfit for employment "for quite a significant period of time" during 2003 and 2004. He noted that during 2005 that the respondent had started working in a bar on somewhat reduced hours which was helpful to her. Dr Kenny continued:

> "… It is to be hoped that the passage of more time and resolution of legal matters associated with this - and *perhaps* with a move out of the Northern Territory – her ability to cope with employment will be increased.
>
> But we also have to add in the fact that this young woman's education has been dramatically affected by this terrible relationship and that of course acts against her employment. It is very difficult indeed to put this in terms of percentage terms. I think it's probably reasonable to regard her at this stage of capable of some fifty percent employment and I think that comment applies since she started working in hotels sometime during last year."

[63] As to the future and how long the respondent's working capacity would be reduced, Dr Kenny said he could only "guess" because it depended upon the

respondent's response to treatment, whether she furthers her education and what sort of employment she seeks.

[64] In my opinion the evidence was capable of supporting a conclusion that the respondent had suffered a diminution in her earning capacity. As a consequence of her psychiatric injury, the respondent had been unable to work for a significant period. At the time of the hearing before the Magistrate in February 2006, the respondent was working reduced hours and, in Dr Kenny's opinion, was capable of only about 50% employment. The respondent was depressed and suffering from a post traumatic stress disorder. It was appropriate to include an amount in the award to compensate the respondent for pecuniary loss as a result of her loss of earning capacity or, to use the expression in s 9, the pecuniary loss as a result of the respondent's "partial incapacity for work".

[65] The Magistrate considered the respondent as an individual and assessed her capacity for employment. Necessarily, in the absence of specific evidence directed to the issue of loss, the Magistrate was required to work with the meagre material available to him. However the authorities well demonstrate that the lack of specific evidence of loss does not prevent the court from making an award.

[66] The award of $10,000 was a modest figure. Even if it was thought to be generous to the respondent, such generosity would not amount to an error of law. There was evidence capable of supporting both the loss of earning

capacity and the assessment reached by the Magistrate. No error of law occurred. This ground of appeal is not made out.

[67] The issue of the respondent's loss of earning capacity is the subject of ground 3 of the cross-appeal. As I have said, counsel indicated this ground would be pursued only if the appeal was allowed and the awards were to be re-assessed. This approach is appropriate as this ground could not otherwise succeed.

Ground 5 – Economic Loss – Global Sum

[68] Ground 5 complains that the Magistrate erred in law by awarding an amount for economic loss as a global sum without reference to the separate injuries. In my view this complaint is without substance. It was impossible for the Magistrate to isolate the individual contribution of each specific offence to the injuries that were responsible for the loss of earning capacity. The global approach was the only sensible way of dealing with the loss of earning capacity.

Grounds 8 and 9

[69] Grounds 8 and 9 concern observations by the Magistrate to the effect that a victim of a crime of rape was inevitably entitled to the maximum award of $25,000. To the extent that the Magistrate suggested that the award of the maximum was automatic for such a crime, that observation was incorrect. Each case must be assessed according to its own particular circumstances and the injuries sustained, regardless of the nature of the crime. However,

counsel for the appellant frankly acknowledged that the appellant was not suggesting that the awards of $25,000 for those crimes were excessive or that this Court should interfere with those awards. In those circumstances the error by the Magistrate was of no significance.

Ground 7 and Cross Appeal - Contribution

[70] The Magistrate reduced the awards on three certificates because his Honour was satisfied that the respondent's conduct contributed to her injuries on each occasion. The appellant complains that the Magistrate erred in failing also to reduce the award in Application number 20406169 based on the offence charged in count 15. By cross-appeal the respondent complains that his Honour erred in law in determining on two of the three applications that the respondent's conduct contributed to her injuries.

[71] As to the respondent's conduct in connection with the offence charged in count 15, counsel for the appellant reminded the Magistrate that the respondent went looking for the offender and instigated the events by confronting the offender. It was the respondent who first swore and yelled at the offender. She told the offender she would tell the police everything.

[72] After discounting the award based upon the offence in count 6 by 50% in view of the contribution of the respondent, the Magistrate briefly expressed his reasons for not reducing the award based on the offence charged in count 15 in the following terms:

> "… Now, I'm not going to reduce, despite it being pressed upon me that I should make a similar discount for the Planet Nightcliff king-hit because she went and somehow put herself there to get it and it started a bit of an argument with others, I don't think that that behaviour short of unlawfulness by her is something that she could be said to be asking for to be king-hit, dropped to the ground and I don't intend to reduce that at all by specific contribution there. …"

[73] The Magistrate did not misapprehend the evidence. Nor is there any basis for a conclusion that his Honour applied an incorrect test of law. It would have been open to his Honour to find the existence of contribution and reduce the award, but it was equally open to his Honour to exercise his discretion against reducing the award.

[74] There is considerable force in the view that, as a matter of law, the evidence established that the victim's conduct contributed to her injury. However, notwithstanding the wording of s 10(2) that in the event of a finding of contribution the court "shall" reduce the amount of assistance, the court is given a discretion to reduce the amount "by such amount as it considers appropriate in all the circumstances". The Magistrate was plainly of the view that whatever contribution the respondent made to the altercation, she did not ask to get "king hit" from behind. It was that blow which caused the injury. In those circumstances it was a reasonable exercise of the discretion not to reduce the amount of assistance and this Court should not interfere with that decision even if it is of the view that, technically speaking, contribution existed.

[75] As to the cross-appeal, the two deductions about which the respondent complains were each of 25%. The deductions were applied to the awards based upon the offences charged in counts 1 and 2. Those offences occurred on 10 and 14 January 2002 soon after the respondent returned from Queensland and resumed her relationship with the offender.

[76] The Magistrate appears to have based his decision upon the view that the respondent's conduct in returning from Queensland and resuming the relationship was, in itself, sufficient to amount to contribution to the injuries sustained on 10 and 14 January 2002. Counsel for the appellant had submitted that all awards should be reduced because the respondent had contributed to her injuries by, in effect, knowingly putting herself in harm's way. Counsel contended that it would be contrary to public policy not to reduce the awards in those circumstances. The Magistrate referred to this proposition as the "global argument" and rejected it. In rejecting that argument, his Honour referred to the young age of the respondent and to her "enthralment" and emotions in the context of the offender's domination and control of the respondent's emotions.

[77] In contrast to his rejection of the "global argument", during submissions by the appellant as to contribution to injuries sustained on 10 and 14 January 2002, his Honour indicated he was attracted to the argument that the respondent's conduct in coming all the way back from Queensland after having time to consider her situation and being geographically removed might result in "some contribution". Counsel for the appellant submitted to

his Honour that the respondent had contributed by her conduct in "putting herself in the situation … with full knowledge of this young man's propensity …".

[78] The Magistrate found that the respondent's conduct in voluntarily returning from Brisbane and resuming the relationship with the offender contributed to the injuries sustained on 10 and 14 January 2002 and determined that the assistance on each application would be reduced by 25%. His Honour gave the following reasons for his conclusion:

> "We come back to the early January matters. I accept that she was immature. That he still – and I find that she was immature and still under some degree of control and domination by him by way of daily telephone calls. For all that, I don't find anything that suggests that she was not of normal intelligence and awareness and a state of awareness for a 15 year-old.
>
> And in my view, given the geographical separation and the counselling and advices from the parents and others, to come back the way she did was more than just immature and stupid but was, given her state of awareness of what he was capable of, behaviour that I should take into account in the early stages of her coming back whilst she was still under the influence of the separation and the advices that I infer she was.
>
> As it got further into January and into the further months, she would be back – my view, I infer, would be back into the total cess-pit that she had left beforehand and unable to behave in a way that I think should be held against her as they do, for the first early part of January when she decided to come back.
>
> …
>
> Then we come to the January bits and pieces. I do hold as against her that her behaviour was culpable enough, not in a criminal sense, but culpable enough despite her age to be – for me to look at

reducing by way of contribution. Not the 28th though. I think the early ones and the 12th and 14th. So that's what I'm now looking at if that helps you … .

…

… [t]he first one. She's come back and put herself right in the cess-pit again and given all that I'm may be made aware of her, the 25% reduction which was asked for and which I had already put on my piece of paper would appear appropriate. That's where you asked for $12,000. You've said that I shouldn't have reduced it to $7500 and I still do consider that.

…

Here she is, gone away for rehabilitation, gone away out of the cess-pit, she's not that – she's not a 10 year-old, she's got some intelligence, some education, she's had the advices from friends and family. Yes, she still lives under some emotional domination by way of daily telephone calls but she comes back, in my view, soon after without any full control back in the cess-pit but the 12th and 14th, for reasons I've already given, I think I ought to reduce by 25%.

…

Now in terms of contribution, for reasons already given, I don't intend to make a global discount. She did not – she was not in a situation to do much about what was going on, given her age, her state of emotional immaturity, her infatuation by this young man who used and abused her both mentally and physically. And just because she was unable in herself to disassociate completely with him, given her knowledge of him is not enough, sensibly I think, to consider her behaviour so culpable as to discount on a global basis an award for – under this Act.

It might be for some mature adult lady who remains in a domestic violence relationship – a domestic relationship of violence who has options. Even then, despite my very high regard for Bailey J, it might be said for a lot of those adult women, they haven't got many or any options anyway. And they are enthralled by love, support for children and other factors to stay. But I'm not here to comment any further on that.

> For reasons already enunciated, I do intend to reduce for her unlawful behaviour and silly attempts at thrusting letters down the throat of this monster outside the court, whatever the appropriate award I intend to reduce by 50%. In my view, whatever the influence of this young man was, such that I shouldn't discount any award because of her conduct in associating with him. Such reasons are not so apparent for her coming straight back and getting back into, to use the word I used before, into the cess-pit of the relationship.
>
> And in that early week or so when she came back, in my view she was still living under the influence of the warnings and advises of friends and family and counsellors in Queensland, who I infer would have told her to break the relationship up. Such that voluntarily coming back and putting herself in a situation of re-association with him does fall within that kind of behaviour that contributed to the injuries that flowed on the 12th and 14th. And I intend to reduce what is an appropriate award by 25% for the injuries claimed in respect for those two dates."

[79] In the course of his reasons, the Magistrate referred to "counselling and advices from the parents and others" and to the respondent immediately on her return continuing to be "under the influence of the separation and the advices that I infer she was". Presumably his Honour was inferring that the respondent received counselling and advice against returning and resuming the relationship and that the separation, in itself, was an "influence" against resuming the relationship. Later in his reasons his Honour referred to the respondent going away "for rehabilitation" and again mentioned the respondent receiving advice from friends and family.

[80] It appears that the Magistrate reasoned that on her return from Queensland the respondent was "still living under the influence of the warnings and advices of friends and family and counsellors in Queensland, who I infer

would have told her to break the relationship up". His Honour was of the view, however, that after the initial period which included the offences of 10 and 14 January 2002, the influence of the separation and prior advice had waned and the respondent was back under the domination and control of the offender such that by thereafter remaining in the relationship she was not contributing to her own injuries.

[81] In my opinion, the evidence was not capable of supporting a conclusion that, for the purposes of s 10, the conduct of the respondent in returning from Brisbane and resuming the relationship with the offender "contributed" to the injuries she sustained as a result of the offences committed on 10 and 14 January 2002.

Evidence

[82] The most detailed description of the initial stages of the relationship is found in the statutory declaration of the respondent dated 2 September 2002:

> "I have been in a relationship with Shane HARTREE as boyfriend and girlfriend since about August/September 2001. I was 15 years old and Shane was 18 years old when we first met. I would stay with Shane for weeks at a time at his parents house at Leanyer Pond in Leanyer. His parents, Martin and Thaclea HARTREE, are the caretakers of the Leanyer Pond.
>
> Shane was real sweet to me at first and wouldn't even swear in front of me. Shane even used to say to me, 'If anyone ever touched you, I would kill them.' Then he changed and started crying over his ex-girlfriend, Dianna NILSEN, who was 15 years old at the time. After a few weeks he became jealous of other people and would say to me, 'What, you want to go there so you can fuck your flings, you stupid little slut.' Other times he'd say to me, 'I'd give you up for a carton of beer.' He used to hold my arm and make me stay with him while

he talked to Dianna over the phone about how much he loves her and wants her to have his baby.

I'd ask him, 'Why are you hurting me?'

Shane would say, 'I only do it, because I love you. No-one will love you like I love you. They're just gonna use you and won't be there in the morning when you wake up. You want to get smart, you wanna play fucking games. Let's play games, [the victim], come on.'

Shane would play mind games and tease me, so I'd end up crying and then he'd tease me even more. I felt confused and helpless.

I gave up school for Shane, gave up my friends, my family and 10 years of dancing just so I could be with him. He wouldn't let me be with anyone else without him being there. He used to scare me by saying he would kill my parents and stuff like that.

At first I had sex with Shane, because I loved him and didn't want to lose him. If I didn't he'd threaten to leave me and say, 'Fine then. I'll go get it somewhere else.' He would say to me that he wanted me to have his baby and how he'd look after me. That was when he was nice, but then he would just snap and swear at me and abuse me again. I felt trapped and he wouldn't let me go anywhere without him. I was afraid to leave him in fear of him hurting me.

All through our relationship Shane would come home from work and check for footprints outside the house to see if I had left the house, check the redial on the phone to see who rang in or out and he'd say to his Mum, 'Did she leave the house today, go anywhere or ring anyone?' He was paranoid about me leaving him and would not let me be or talk to anyone. He quite often grabbed my arm when he came home and forced either one or two of his fingers insider my vagina or touch the outside of my vagina and then smell his fingers. He checked me that way all the time.

He said things to me like, 'Come here you little cunt.' 'Come here! Come here [the victim]!'

I said things like, 'No.' and 'Fuck off. I'm sick of playing your stupid little games.' 'Do what I tell you when I tell you to.' And then he'd check my vagina that way to see if I'd been with anyone. I never stopped him from doing this to me, because I was scared of him getting angry and hurting me. It was easier to let him do it than fight him.

I told him, 'I haven't gone anywhere or been with anyone.' He had convinced himself I had been having sex with someone. This sort of thing happened nearly every day that he had been out and I was left at home.

On the 1st of December 2001, my parents sent me to the Gold Coast to live with my Auntie Debbie WAGSTAFF, to start a new life for a month and a bit. I spoke to Shane on the phone every day and he eventually talked me into coming back to Darwin to him. I used money sent to me for Christmas to fly back to Darwin a couple of weeks after arriving in the Gold Coast. That night I went and stayed with Shane in the caravan at his parents house at Leanyer Pond."

[83] In an affidavit of 27 September 2004, the respondent added to the description of the relationship:

"In the beginning the relationship between Shane and myself was really good. He would not even swear in front of me. Shane would tell me that if anyone else ever touched me, he would kill them. I did not think that Shane was violent or that he meant what he said. I thought that it was just his way of telling me how much he loved me. But after a while he became morbid about his ex girl friend called Dianna Nilsen. I believe that Dianna was 15 years old too.

…

He began to say very frequently that I was so ugly that I should put a bag over my head. When I asked him why he said these things that hurt me so much he would tell me that he only said them because he loved me. He would say 'No one will ever love you as much as I love you. They will just use you and will not be there in the morning when you wake up.' Then what he was saying would make him angry and he would continue and say 'You want to get smart, you want to play fucking games: OK then [the victim] lets play games.

Come on.' What Shane meant was mind games and this involved him teasing me about me being jealous of Dianna, being ugly and no one loved me, being so ugly that I had to wear the bag over my head to the point where I would break down and cry. Then he would laugh and tease me even more.

On 1st December 2001 my parents sent me to the Gold Coast to stay with my aunt. I spoke to Shane on the telephone every day. He eventually persuaded me to return to Darwin and him. I used money that had been sent to me as a Christmas gift to fly back to Darwin and that night I stayed with Shane in the caravan at his parent's residence at Leanyer Pond. I had effectively only been absent from Darwin for about two weeks."

[84] Additional evidence came from the victim impact statement of the respondent's father and the medical practitioners. The relevant part of the father's victim impact statement was as follows:

"I first became aware of [the victim's] relationship with Shane Hartree in late 2001. I was not happy with the relationship due to her young age. She left school in May 2001, halfway through grade 10 leaving home at the same time. We did not know why but her personality had started to change. I was unaware she already knew Shane and that he was having an impact on her thinking. She was living with friends at different places and I tried to keep a check on where and how she was. I cannot remember when she moved into Hartree's place but recall her bringing him around home on one occasion to meet us.

By October 2001 I knew there was something wrong and that the relationship was not as I believed it should have been. Our daughter was becoming more withdrawn and I believe we were losing any influence we still had with her. We saw less and less of her until she returned home in October after an incident with Hartree where they split. They soon got back together again and the relationship was often on and off throughout.

Throughout the relationship I kept seeing my daughter with different cuts, bruises, scrapes, wounds, black eyes, stitches and I was aware she was lying to me about how she received them. I became more and more concerned with my daughter's welfare and became

> increasingly concerned with what was happening. I couldn't talk sense into [the victim] about any of this as she believed Shane would get better as he agreed to counselling and they loved each other."

[85] Specifically as to the time in Brisbane, the respondent described her emotional state in an affidavit dated 17 May 2005:

> "Our relationship was on and off. He broke my heart but no matter what he did to me and all the hurt he put me through I didn't give up on him. I just kept on going, ignoring all the warnings and even attempting to kill myself. My parents sent me to the Gold Coast in December 2000 but I did not cope. I forgot all the terrible things Shane had done and only remembered the good. He and I would talk every night on the telephone. I would walk 8 kilometres to a phone box to call him until I got a sim card. Shane kept telling me that he needed me and that I had to come back to him in Darwin. I ran away from my family who love me more than anything to return to Darwin to be with Shane."

[86] Dr Kenny commented that "clearly" the respondent fell in love with the offender "and became infatuated with him, despite the early warnings of his aggression". As to the early stages of the relationship, Dr Kenny said:

> "In the early stages he was very possessive of her and very restrictive of her activities. (Even though from the point of view of an outsider we would have to concede that this represents problems in the relationships, I think many, especially immature young women would see that as a statement of how much the individual loves them)."

[87] Speaking generally of the respondent's motivation to stay in the relationship, Dr Kenny stated:

> "She was motivated to stay in the relationship by the fact that she believed she loved him and believed that, despite his violence toward her, he loved her and that he could change. In addition she was desperately fearful of him.

> How many stories are there in literature that are not very different? How many stories do we hear from otherwise well adjusted women that are very similar?
>
> The point I am making here is that this man's behaviour was clearly designed to tie her into the relationship by disqualifying her and discrediting her and then stating he loved her – and by threatening her and her family if she didn't conform to his wishes, et cetera."

[88] Dr McLaren also spoke of a relevant incident that occurred during the New Year period 2001-2002:

> "Over the New Year period of 2001-02, there was a major disturbance when she witnessed one of the assailant's former girlfriends stab herself because of his relationship with her. She said: 'There was blood everywhere, he was playing mind games with both of us.' Without prompting, she then gave a long and vastly detailed description of his behaviour, how he controlled and manipulated her every waking moment, how they argued, separated, reconciled and argued again. A few weeks after the stabbing incident, he apparently hit her and cut her head. Later he threw her out but she threatened suicide and got back with him."

[89] It is apparent from the affidavits of the respondent that the violence, threats, humiliation and degradation began soon after the respondent returned from Brisbane. Both prior to and after the respondent's trip to Brisbane the offender was manipulating and controlling an emotional child who was infatuated with him and believed he loved her and would change. There was no evidence that the respondent received formal counselling while in Brisbane and the Magistrate erred in that respect. It was probably a reasonable inference to find that family and friends would have been advising the respondent not to resume the relationship, but given the respondent's mental state it is not surprising that she succumbed to the

offender's requests that she return to Darwin and resume the relationship. As Dr Kenny put it:

> "How many stories are there in literature that are not very different? How many stories do we hear from otherwise well adjusted women that are very similar?"

[90] The circumstances of the respondent placing herself in harm's way are far removed from the circumstances of cases in which courts have awarded contribution because a victim has voluntarily undertaken a risk by entering a dangerous situation. In *Lanyon v NTA and Staker* [2002] NTSC 6, the victim was a drug dealer who was confronted with an addicted client obviously suffering from withdrawal symptoms. The victim allowed the offender into the victim's room for the purpose of negotiating a drug deal with the offender knowing that the offender was both a drug abuser and desperate for an immediate dose of the drug. As the Judge noted, the victim "had a weapon to hand to deal with just the type of situation which arose …". ([29]).

[91] In *Lanyon*, not surprisingly, both the Magistrate and the Judge on appeal found that the victim was entirely the author of his own misfortune. The Judge also noted that the general public would undoubtedly be "outraged" if a drug dealer was assisted by the grant of public funds "for injuries received in the course of a drug deal gone sour".

[92] Similarly, the circumstances under consideration are far removed from those types of cases where the victim knowingly and voluntarily becomes involved

in a fight: *Towers v NTA* (unreported Local Court No 9417216 delivered 8 September 1995). The circumstances are also markedly different from the voluntary and provocative conduct of the victim in *Allmich v NTA and Long* (unreported Local Court No 9705343 delivered 11 February 2000) where the victim entered the premises of the offender against the wishes of the offender and intervened in a dispute between the offender and another person. In addition, the victim was abusive and during the dispute armed himself with a baseball bat. As the Magistrate noted, in bringing the bat into the premises the victim had elected to "live by the sword" and was hurt in the process. The victim's beating arose directly out of his own unlawful conduct.

Principles

[93] Section 10 of the Act is in the following terms:

> "10. **Behaviour of victim, &c., to be taken into account**
>
> (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."

[94] The Court of Appeal had occasion to consider the operation of s 10 in *Northern Territory of Australian v Dean* (2006) 17 NTLR 178. The victim

was assaulted by the offender while sitting in a bar and without offering any provocation toward the offender. It appears that the victim had engaged in an act of sexual intercourse two days earlier with the girlfriend of the offender and had attended at the bar knowing that the offender was likely to be at the bar. The Court was of the view that both the Magistrate at first instance and the Judge on appeal were correct in finding that the victim's conduct in attending at the bar did not contribute to his injury for the purposes of s 10.

[95] In separate judgments, both Mildren J and Southwood J pointed out that in order for a victim's conduct to have "contributed" to the victim's injury, a causal link between the conduct and the injury is required. Southwood J said (186 [42]):

> "… *The ordinary meaning of 'contributed to' is to play a part in bringing about the injury* sustained by the victim of crime or the death of the victim *or to have a part in producing the injury* sustained by the victim of crime or the death of the victim. It is necessary for a respondent who relies on s 10(2) *to establish a causal relationship between the relevant conduct of the victim and the injury or death*. It is not necessary for a respondent who relies on s 10(2) of the Act to establish that the victim's conduct was the sole cause of the victim's injuries. Whether a victim's conduct contributed to the injury sustained by a victim is a matter of fact and degree to be determined in light of the particular facts and circumstances of a case and by the court exercising commonsense …". (my emphasis)

[96] In the circumstances under consideration in *NTA v Dean*, both Mildren J and Southwood J regarded the victim's conduct in previously having sexual intercourse with the offender's girlfriend and in attending at the hotel as a *causa sine qua non*, that is, an incident in the history of the events which

preceded the relevant event, but not as causally connected in the relevant sense for the purposes of s 10(2). The same can be said of the conduct of the respondent in returning to the relationship with the offender. That conduct, in itself, was not causally linked to the subsequent assaults and, for the purposes of s 10(2), did not "play a part in bringing about the injury sustained" by the respondent.

[97] The respondent was an emotionally vulnerable 15 year old child who was infatuated with the offender and under his control. It would be contrary to public policy and the scheme of the Act to construe s 10 as applying to the circumstances under consideration.

[98] For these reasons, in my opinion the evidence was not capable in law of supporting a finding that the conduct of the respondent contributed to the injuries she sustained at the hands of the offender on 10 and 14 January 2002. The Magistrate erred in law and the cross-appeal against the award of 25% contribution in respect of those certificates must succeed.

[99] The appeal is dismissed.

[100] The cross-appeal is allowed to the following extent:

(i) In respect of application 20406177 the order of the Magistrate allowing 25% reduction and awarding $11,250 is set aside. In substitution there will be an order granting a certificate in the amount of $14,500.

(ii) In respect of consolidated claims 20406180 and 20406182, the order of the Magistrate allowing 25% deduction and awarding $16,875 is set aside. In substitution I order the assistance certificate be granted in the amount of $22,500.

Application/Offence	Primary Award	Global Award	Section 10	Award
20406177 – Count 1	$7,000	$7,500	25%	$11,250
20406180 consolidated with 20406182 – Count 2	$15,000	$7,500	25%	$16,875
20406183 – Count 4	$7,500	$7,500		$15,000
20406376 – Count 5	$2,500	$7,500		$10,000
20406379 – Count 6	$5,000	$7,500	50%	$6,250
20406174 – Count 7	$15,000	$7,500		$22,500
20406165 consolidated with 20406166 – Count 8	$25,000			$25,000
20406167 consolidated with 20406168 – Count 10 (settled)	$25,000			$25,000 (settled)
20406169 – Count 15	$2,500	$7,500		$10,000
20406170 consolidated with 20406172 – Counts 13 and 14	$25,000			$25,000
TOTAL AWARD				$166,875