



Victims Services
Justice & Attorney General

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Our Reference: **136517**

Your Reference: 14881403

2 February, 2010

Fosters Lawyers
PO Box 350
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ENTERED
RECEIVED
4 FEB 2010
BY:

Dear Sir/Madam,

RE: DIRK NIEROP

I refer to the appeal in the above matter.

The Tribunal Magistrate determined this appeal on 1 February 2010. A copy of the decision is attached.

Please note that professional costs and disbursements awarded by the assessor at the first instance have previously been paid.

The Victims Support Line provides information, referral and support to victims of crime. For emotional support and information on how to access other groups and services that may assist please contact the Victims Support Line on (02) 8688 5400 or 1800 633 063 (freecall).

Should you have any enquiries you can contact us by telephone on (02) 8688 5511, freecall 1800 069 054 or TTY (02) 8688 5575 (for clients who have a hearing impairment).

Yours faithfully,

Mahashini Krishna
Registrar, VCT
agvctjal

Compensation and Counselling (applications)
Restitution, Subpoenas and Appeals
Victims of Crime Bureau
Accounts

Fax 02 8688 9630
Fax 02 8688 9634
Fax 02 8688 9631
Fax 02 8688 9633

Victim Support Line
Tel 02 8688 5400
Freecall 1800 633 063
TTY 02 8688 5575

Family and Friends of Missing Persons Unit
Tel 02 8688 5423 | Freecall 1800 227 772
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www.lawlink.nsw.gov.au/missingpersons

**IN THE VICTIMS COMPENSATION TRIBUNAL
AT PARRAMATTA**

In the appeal of: DIRK DOUGLAS NEIROP

File No. 136517



1 February 2010

1. This is an appeal against the determination of a Compensation Assessor made on 29 June 2009. Notice of Determination was forwarded to the appellant's solicitors on 30 June 2009. The Assessor was satisfied that the appellant had established an "act of violence" as defined by s.5(1) of the **Victims Support and Rehabilitation Act, 1996** (hereinafter referred to as "the Act").
2. The Assessor was not satisfied that the appellant had established compensable injury and for that reason the application was dismissed.
3. The Notice of Appeal was filed on 14 September 2009 within the 3 month period allowed for the filing of an appeal under s.36 of the Act. Fosters Lawyers acted for the appellant on the application before the Assessor and on the appeal.

Grounds of Appeal

4. The Notice of Appeal set out the following grounds;
 - (1) **The Compensation Assessor erred in fact and in law in dismissing the appellant's application for victim's compensation.**
 - (2) **The Compensation Assessor erred in fact and in law in failing to find that the appellant suffered the compensable injury of psychological injury Category 2.**
5. The appellant's solicitors set out particulars and submissions in support of the appeal. I have considered them carefully and I have taken them into account.

Determination by Tribunal

6. The appellant has not applied for the appeal to proceed by way of hearing and I am satisfied that the matter can be properly determined without a hearing (s.38(2)).

7. **S.38(3)** of the Act provides that the appeal from a determination of a Compensation Assessor is to be determined **“on the evidence and material provided to the Assessor”**. I have read and considered the whole of the evidence before the Assessor. I have taken it all into account even though I might not refer specifically to all the evidence and material in this judgment.

Act of Violence

8. I base this summary of the events of the night on the remarks on sentence of His Honour Judge Finnane in the District Court on 3 May 2007 when sentencing the appellant on a charge of assault occasioning actual bodily harm upon the perpetrator. I believe they are the version of facts most favourable to the appellant. On 9 April 2006 the appellant was the chief security guard on duty at the Surf Rock Hotel at Collaroy. There were 5 other security guards. The appellant asked a lady, the wife of the perpetrator, to leave the premises. CCTV footage showed him walking off the dance floor with her. The perpetrator approached the appellant. In very strong language he ordered the appellant to take his hands off his wife. The perpetrator's friend, Fraser, became most upset and violent and was ordered to leave. He left. The appellant and the other security agents requested the perpetrator to leave. His Honour Judge Finnane found beyond reasonable doubt that the perpetrator struck the appellant and another security guard. The judge was satisfied that the perpetrator's blow caused some harm to the appellant's jaw. The two security men tried to control the perpetrator. A barman tried to assist but the situation then turned into a general melee. The Judge was satisfied that during that melee the appellant struck the perpetrator causing injury to his jaw. The appellant and the other security guard attempted to control the perpetrator and they were joined by the barman who tried to assist. As a result the perpetrator and the barman fell down some stairs and the perpetrator suffered a fracture to his jaw and other injuries when his head connected with a jar as a result of that fall. The Judge found that subsequently the appellant and the perpetrator were involved in throwing further punches at each other. The appellant hit the perpetrator and caused some injury but not the serious injury which the perpetrator had previously suffered.
9. The appellant was charged with maliciously inflict grievous bodily harm to the perpetrator. The appellant was found not guilty of that charge by the jury. The appellant was found guilty of assaulting the perpetrator in the company of persons unknown thereby occasioning actual bodily harm.
10. His Honour Judge Finnane was satisfied that the appellant was convicted because after he had been assaulted he had used more force than was reasonably necessary. He found that the excessive force was used in the heat of the

moment and not done coldly and carefully. He found that it was not a carefully thought out attack. He dismissed the charge pursuant to **s.10** of the **Crimes Act**.

11. I am satisfied on the evidence that the appellant suffered an injury to his jaw. I am satisfied that that was as a result of the initial punch by the perpetrator. The punch would have amounted to a criminal assault. I am satisfied that the appellant has established an act of violence pursuant to **s.5(1)(a)(b)** and **(c)** of the Act. In relation to that assault I have considered **s.24** and **s.30** of the Act and I am satisfied that there is no reason to make any order detrimental to the appellant pursuant to those sections.

Compensable Injury

12. The appellant seeks compensation for the compensable injury of Category 2 chronic psychological or psychiatric disorder that is severely disabling with a standard range of compensation of \$30,000 to \$50,000. The appellant relies on the psychological report of clinical psychologist K. P. Powell dated 19 December 2007. There are a number of difficulties facing the appellant's application for compensation

(i) No Finding of Psychological Disorder

13. Clinical Psychologist Powell found that he was unable to make a diagnosis of post traumatic stress disorder (see page 7 of the report). He did not find the appellant to be suffering from any recognized psychological disorder. He found that the appellant has "**indeed suffered severe psychological harm**" but in my view without a finding of a known recognized psychological or psychiatric disorder the appellant's application cannot succeed.

(ii) Severely Disabling

14. Even if the psychologist had diagnosed the appellant with a recognized psychological disorder, the appellant would only be able to succeed on his claim for compensation if he established that such psychological disorder is severely disabling.
15. The words "severely disabling" should be given their ordinary meaning. In the Macquarie Concise Dictionary "severe" in connection with an illness has the meaning of "grave". "Disabling" has the meaning "to weaken or destroy the capability of; cripple; incapacitate".

The word "disabling" is not defined in the Act. There has been considerable discussion as to the meaning of the word in the context of the Act. Some help is

obtained from the Second Reading Speech in Parliament. When introducing the new compensable injury of “psychological or psychiatric disorder” into the Victims Compensation Bill the Minister Mr Dyer stated;

“The new injury category will require diagnosis of a long term psychological injury which results in severe impairment of the person’s ability to function in their usual day to day activities.”
(Hansard 11.12.1998).

The appellant has to prove that the disorders have resulted in severe impairment to his ability to function in his day to day activities. The impairment has to be more than mild or moderate. It has to be such as to be considered severely or seriously incapacitating or disabling.

16. Psychologist Powell used the Global Assessment of Functioning (GAF) scale to consider the appellant’s psychological, social and occupational functioning prior and after the act of violence. The psychologist established that the appellant before the act of violence recorded a rating of 80 to 90 with a descriptor of “absent or minimal symptoms good functioning in all areas, interested and involved in a wide range of activities, social effective, generally satisfied with life no more than everyday problems or concerns (an occasional argument with family members).” After the act of violence the appellant scored a rating of 51 to 60 with a descriptor “moderate symptoms (e.g. flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational or school functioning (example few friends, conflict with peers or co-workers).” Whilst the difference in rating is considerable the rating after the act of violence is not consistent with a finding that the appellant’s loss of functioning is seriously disabling. Indeed the psychologist’s report indicates that the appellant, who is extremely fit and proud of his physical fitness, is now only able to work 90 hours per week based on a 12 hour day. Being able to work for that period in the difficult and at times physically demanding job of a security guard is certainly not consistent with someone who suffers a psychological disorder that is severely disabling. The appellant is not able to succeed on his claim on this basis.

Psychological Injury not direct result of the assault

17. **S.14** of the Act provides that the statutory compensation for which a victim of an act of violence is eligible comprises compensation for compensable injuries received by the victim **as a direct result of the act of violence.**

18. I am satisfied on the basis of the psychologist's report that the appellant contends that it was a gross injustice that he was charged by the police 7 days after the event with 2 serious criminal charges and had to undergo the worry, trauma and disgrace of a trial before a jury which apparently went for several days. The psychologist's report indicates that he has opened a web page known as website nswpolicestate.com. I am satisfied that he has become obsessed with what he sees as the unfair actions of the police. The psychologist reported, **"The matter has clearly consumed him and he regards himself as somewhat of a martyr."**
19. I am satisfied that all of those considerations, symptoms, problems and disabilities flow not from the blow on the jaw which constitutes the act of violence but the aftermath involving the charging by police and subsequent court proceeding with their associated publicity, anguish and concern. I am not satisfied that the appellant has established that those matters are a direct result of the actual act of violence. I am satisfied for that reason that the appellant is unable to succeed for a Category 2 chronic psychological or psychiatric disorder that is severely disabling.
20. There is some evidence which would indicate that the appellant suffered a dislocated jaw with a standard rate of compensation of \$4,800. Even if I was to find that injury proved (and there is no direct medical evidence) the appellant would not be entitled to compensation as the compensation payable is below the threshold of \$7,500 provided for in s.20 of the Act.
21. On appeal the appellant sought that various prescribed expenses be paid pursuant to the VAS scheme provided for in s.14A of the Act. Applications for payment under s.14A of the Act can only be made in relation to acts of violence which occurred after 14 February 2007.

22. I make the following orders;

- (1) **The appeal is dismissed.**
- (2) **The Compensation Assessor's determination is confirmed.**
- (3) **No order is made as to the costs of the appeal.**


Chairperson, Victims Compensation Tribunal