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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 1717 of 2002

JOHN RICHARD WARD	Applicant
and	
DANIEL JOSEPH McGARVEY	First Respondent
and	
MARK IAN STEVENS	Second Respondent

BRISBANE

..DATE 24/05/2002

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: The applicant John Richard Ward seeks compensation from the respondents Daniel Joseph McGarvey and Mark Ian Stevens pursuant to section 663B of the Criminal Code for injuries suffered by him by virtue of offences committed by the respondents against him. I should say something about the question of service at the outset.

The applicant's solicitors instructed a process server to serve the respondents late last year but after the usual efforts, including inquiries of the Queensland and New South Wales Corrective Services, was unable to do so. The solicitors arranged for property searches both in respect of real property and motor vehicle registration without success.

In February this year application was made to dispense with service of the application and supporting material on the respondents because of these difficulties. The matter came before me on the 27th of February when I made orders on an application filed that day for substituted service. The applicant, through his solicitors, has complied with the requirements of that order for substituted service which took the form of public notices in the Courier-Mail newspaper and The Australian newspaper. There has been no response to those notices.

Turning, then, to the circumstances of the offence. The applicant was attacked by the first respondent, who was accompanied by the second respondent, in his caravan at

night at Gailes on the 21st of September 1994. The second respondent pleaded guilty to burglary and assault occasioning bodily harm on the 26th of April 1995. His guilt was by virtue of section 8 of the Criminal Code. The first respondent pleaded not guilty on the first day of his trial on the 26th of April 1995 and when re-arraigned on the morning of the second day, pleaded guilty to one count of burglary and one count of wounding with intent to do grievous bodily harm.

The second respondent had been in custody for seven months. He had accompanied the first respondent into the applicant's caravan expecting some standover tactics but no physical violence and left before it was carried out. He was not further punished.

The first respondent was sentenced to two years' imprisonment for the burglary and six years' imprisonment with respect to the wounding with intent. He was recommended for parole after serving two and a half years of that sentence and 238 days in presentence custody was declared to be time already served under the sentence. Both men had previous criminal histories.

The applicant was 34 at the time of the offence and resided in a caravan at the Gailes Caravan Park at Goodna. He was related to the managers of the park. He was awakened in the night by the light being turned on and heard his name called. The light was turned off. He felt a sharp pain in

his chest and what he thought to be blood running down his chest and stomach. He was lying in his bed and thereafter felt blows to his chest, neck and head. He was aware that he was being stabbed and subsequently lapsed into unconsciousness. When he awoke he made his way out of his caravan and was seen by some of his neighbours in an injured and bloodied state. He was taken by ambulance to the Princess Alexandra Hospital.

On admission he was found to have nine clear stab wounds and a significant left periorbital haemotoma. Photographs demonstrate the extent of the damage to his face. The deeper stab wounds included: one four centimetres in length on the right-hand side palm between the fourth and fifth metacarpal heads; three stab wounds to the left shoulder, including a three-centimetre wound posterior to the deltoid, a second two-centimetre wound inferolaterally to the acromion and the third on the posterolateral aspect to the arm which was about two centimetres in length; there were two two-centimetre wounds over the anterior aspect of the bicep of the right arm; there was a two-centimetre wound on the ulna subcutaneous border of the left forearm; there was a three-centimetre infraclavicular wound in the right chest which initially was thought to have penetrated into the pleural cavity; a two-centimetre wound was in the posterior aspect of his neck on the left side.

All of these wounds were found to have penetrated deeply beyond the skin into the deeper fat and muscle layers. The

surgical registrar commented:

> "Remarkably there was no significant injury to either vessels or nerves noted at the time of surgery, however, this was purely by chance."

An explanation was offered for this attack by the respondents. The first respondent and his de facto wife were residents at the caravan park and there was some suggestion from the de facto's youngest child aged about four that the applicant had indecently dealt with the child. The matter was discussed with the second respondent, also a resident of the caravan park and his family. They were all drinking alcohol freely and smoking cones of marijuana.

It seems that the first respondent, a man who at the time, and I noted him in the Court, weighed about 24 stone and was well over six feet, decided that he would scare the applicant into confessing that he had molested the child and persuaded the second respondent to accompany him to the applicant's caravan.

The applicant gave evidence on sentence. He was a small, thin man whom, one might conclude, being confronted by a man of the size of the first respondent may very well have been terrorised. However, in the event, he did not see who stabbed him.

The second respondent dissuaded the first respondent from taking a large fishing knife with him to the applicant's

caravan.

When the first respondent started physically attacking the applicant in his bed, the second respondent sought to calm him down and then left.

After these events, the first respondent told several witnesses that he thought he had stabbed the applicant about a hundred times and that he had killed him. He maintained his justification for this conduct because of the perceived wrong by the applicant.

Although the applicant in cross-examination on sentence said he had been charged with an offence against the child, there was no evidence before me that it had proceeded to a conviction and there is nothing in the material on this application to throw any further light on that matter.

The applicant was discharged from hospital on the 25th of September 1994 and was followed up at surgical outpatients. The applicant was born on the 19th of November 1959. He deposes that the wounds took approximately two months to heal fully as stitches were required to most of them. In his recent affidavit he describes the wounds as extremely painful and that he had to have them bandaged and redressed daily. He deposes that the contusion from his head injury took about one month to heal.

His ongoing physical problems are restricted movement in his

right arm and shoulder, and pain at the base of his neck and an unpleasant clicking sensation in that area. He experiences some difficulty in straightening the fingers of his right hand.

The applicant deposes to feeling embarrassed because of the scars on his body. He maintains that he has not had a relationship with a woman since the assault because he feels that his body looks ugly and that dissuades him from attempting to form an intimate relationship.

Of more significance are his ongoing psychological problems. Since the attack he relives the assault in nightmares, flashbacks and hallucinations and experiences shaking and rapid heartbeat. He does not sleep well and feels constantly depressed and hopeless about his situation. He deposes that he avoids people socially and feels lonely. He becomes irritable and loses his temper easily. He is constantly vigilant and becomes distressed if he sees anyone who resembles his attackers. He further maintains that he has become an alcoholic since the attack and drinks about a cask of wine every three days. He has been unemployed since the attack.

The applicant consulted Dr Edwin Young, a psychiatrist, on the 17th of October 2001. Doctor Young has prepared a report dated the 12th of November 2001. His diagnosis is that the applicant suffers from post-traumatic stress disorder of a severe degree which still subsists seven years after the attack. It is Dr Young's opinion that there were no predisposing factors present before the attack. He concludes that it is unlikely that there will be more than mild improvement to his condition in the foreseeable future.

Dr Young assessed the applicant as being genuine and truthful and in the low average range of intelligence. He believed that the applicant would benefit from anti-depressant medication with a cost for two years of $530 together with about 20 counselling sessions over two years with a psychiatrist at a cost of $2,740 and about 10 session of cognitive behavioural therapy with a psychologist at a cost of $1,300.

The applicant told Dr Young that he had had steady work after leaving school at 15 having finished grade 8, that work being in various capacities, finishing after about eight to ten years of steady employment as a cleaner when that job came to an end. He was unable to get employment after that time and did a little work for his relation at the caravan park. He has since then been unable to obtain work and has been on a disability support pension since the stabbing.

As is apparent, there is considerable delay by the applicant in bringing his application for compensation. There is no explanation on the material as to its cause, although before me today Mr Barry, his counsel, has told me that he took instructions from the applicant and it is simply the case that the applicant was not informed of his entitlement to make an application for compensation at the conclusion of the criminal hearing and he became aware of that entitlement only in the latter part of last year when he attended upon his present solicitors. Mr Barry has undertaken to obtain an affidavit to that effect from the applicant. I also note that in paragraph 20 of his affidavit he deposes that he has been so affected from the assault that he has had little or no contact with the outside world and rarely visits friends. There is, of course, no time limit for making an application under the provisions of the Criminal Code which have since been repealed and replaced by the Criminal Offence Victims Act 1995 which came into force effectively from the 18th of December 1995 and which does impose time limits. However, it is clear that it was intended by the legislature that applications should be brought promptly.

In R v Chong ex parte Chong (2001) 2 Qd R 301, the Court of Appeal, considering an application brought pursuant to section 663B in respect of injuries sustained in 1990 but for which the application was not filed until 1998, concluded that the provisions of the Limitation of Actions Act 1974 applied and that a limitation period of six years

was applicable. As the Chief Justice pointed out, referring to Ronex Properties Limited v. John Laing Construction Limited (1983) QB 398, 404, time limitation provisions operate to "bar the remedy and not the right" and operate only if distinctly relied upon. Here there has been an order for substituted service so that there is no opposition to an order being made by virtue of the lapse of more than six years from the date of conviction of the respondents. In Chong the respondent had died and there was no personal representative to take the point. As the Court held, it is a matter which the Minister may take into account if an application is made pursuant to section 663D to the Governor in Council for an ex gratia payment.

There are otherwise no matters before me which would operate against making an order. It seems likely, not only because of the failure to identify any assets within the State of Queensland, but also because of the past criminal history, particularly of the first respondent, that there are no assets upon which the applicant could levy judgment.

I propose to make an order, leaving it to the Minister to decline to recommend an ex gratia payment to the Governor in Council if he sees fit on the ground of delay.

As has been mentioned, chapter 65A of the Criminal Code was repealed in 1995, but by section 46 of the Criminal Offences Victims Act 1995 chapter 65A of the Code applies to an injury which was suffered by a person because of an act done

before the commencement of the 1995 Act as if it had not been repealed.

The principles to be applied are in accordance with the ordinary principles of damages for personal injury in civil cases, R v. Jones ex parte McClintock [1996] 1 Qd R 524. An upper limit for compensation is prescribed by reference to the relevant Workers' Compensation legislation in force at the time when the application is heard. See Whyte v. Robinson [2000] QCA 99. Where an injury is substantially the same or analogous to one specified in Schedule 2 of the WorkCover Regulation 1997, then the maximum amount is the amount payable in respect of that injury as specified under that regulation.

The relevant legislation is the WorkCover Act 1996 and the maximum amount expressed in section 167(1) is $150,000.

Section 663A of the Criminal Code provides that "injury" includes mental shock and nervous shock. Section 663AA provides a statutory limit of $20,000 for compensation for nervous shock.

Where an offence has been committed by joint offenders the Court of Appeal held in R v. Grahame ex parte Freeman [2001] 2 Qd R 406 that where compensation is sought pursuant to section 663B of the Criminal Code the total amount of compensation was to be assessed in accordance with the ordinary principles of assessment of damages in civil cases,

the comparative degrees of responsibility of the respective joint offenders should then be assessed and their respective shares of the compensation calculated accordingly. If the amount calculated exceeds the prescribed amount, then only that maximum amount might be ordered against any offender.

I turn now to the assessment of the damages. Although not elaborate, the account of the applicant's pre-offence history both in his own affidavit and as related to Dr Young would suggest that he suffered from no physical disability which would have prevented him from being gainfully employed. Dr Young specifically found that there were no predisposing factors in respect of the psychological deficits which he has experienced since the attack.

There can be no doubt that this was a terrifying attack. The photographs, as I have mentioned, demonstrate the quantity of blood lost by the applicant and the strength of the attack. It was surprising, indeed, that there was no vital organ involved.

The applicant's post-traumatic stress disorder symptoms set out in detail in Dr Young's report as well as in the applicant's affidavit demonstrate an ongoing serious disability.

The acceptance by Dr Young of the applicant's psychological symptoms and their effect upon him means that this is a man with serious deficits who leads a lonely life permeated with

anxiety and fear.

I would assess damages for nervous shock at $30,000. The applicant requires treatment which may assist, but will certainly not resolve this condition, in the form of medication, counselling and therapy in the amount of $4,470 which on personal injury compensation principles would be allowed.

The initial pain and suffering associated with the stab wounds and assault to his face resolved substantially after about two months. There is some ongoing discomfort associated with some of these wound sites. In my view $25,000 would represent the personal injury compensation component for this assessment. To a large extent the loss of amenities of life are reflected in the psychiatric damage rather than in his physical injury.

The applicant is unable to engage in permanent or even part-time employment since the attack. Dr Young concludes that he will never return to full-time work and has almost no prospect of returning to part-time work assessed at up to eight hours a week.

There is no evidence as to what income the applicant earned when he was in employment in his various capacities. He was out of work at the time of the attack. It is not apparent that he was seriously looking for work at that time. However, it is appropriate to conclude that he would have

obtained employment of some kind, but it is also appropriate to conclude that his future may very well have been punctuated by increasing periods of unemployment. Accordingly, a global figure as contended for is the appropriate way to compensate him and doing the best I can I assess that in the figure of $25,000.

In reaching these figures I have been assisted by a number of comparable personal injury decisions attached to counsel's outline of submissions.

The total assessment of the damages is $84,470.

Since the second respondent at no time thought that he was engaged in an enterprise which would involve a physical assault on the applicant and bearing in mind that he dissuaded the first respondent from taking the dangerous weapon with him, that he attempted to calm him down and left promptly when the violence started, he should be responsible only for a relatively small amount of the compensation. However, it should also be borne in mind that the first respondent was a very large man. They had both been drinking. The grievance, real or imagined, was highly emotional and could well have got out of hand. I conclude that the second respondent should compensate the applicant to the extent of $10,000.

The amount then which the first respondent should compensate the applicant on personal injury terms is $74,470. However,

the maximum amount for nervous shock, as I have said, is $20,000 and so the notional amount on personal injury assessment terms of $34,470 must be reduced by the amount of $14,470. There was no conduct on the part of the applicant which would disentitle him to an award or cause the amount of that award to be reduced.

Accordingly, the order is that Daniel Joseph McGarvey, being a person convicted on indictment of indictable offences related to Richard John Ward, pay to Richard John Ward the amount of $60,000 by way of compensation for injuries suffered by the said Richard John Ward by reason of the offences of which Daniel Joseph McGarvey was convicted.

I further order that Mark Ian Stevens, being the person convicted on indictment of indictable offences relating to Richard John Ward, pay to Richard John Ward the amount of $10,000 by way of compensation for injuries suffered by the said Richard John Ward by reason of the offences of which Mark Ian Stevens was convicted.
