

# SUPREME COURT OF QUEENSLAND

CITATION: *Nguyen v Dang* [2002] QSC 234

PARTIES: **QUANG DANG NGUYEN**  
(applicant)  
v  
**QUAN VAN DANG**  
(respondent)

FILE NO/S: SC 2404 of 2001

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 16 August 2002

DELIVERED AT: Brisbane

HEARING DATE: 19 April 2001, 9 July 2002, 13 August 2002

JUDGE: White J

ORDER: **1. The respondent Quan Van Dang pay to Quang Dang Nguyen the sum of \$72,680 by way of compensation for injury suffered by him by reason of the offence of unlawful wounding with intent to cause grievous bodily harm of which the said Quan Van Dang was convicted on 2 February 1996.**

**2. The respondent pay the applicant's costs of and incidental to the application to be assessed.**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND – application for compensation under the Criminal Code – where explanation for delay in bringing application satisfactory – assessment of quantum for compensation

*Criminal Code*, Ch 65A, s 663AA  
*Criminal Offence Victims Act* 1995, s 22(4)  
*R v Jones, ex parte McClintock* (1996) 1 Qd R 524

COUNSEL: Mr R Morgan for the applicant

SOLICITORS: MacGillivrays for the applicant  
No appearance by the respondent

- [1] The applicant was seriously assaulted by the respondent and seeks compensation from him pursuant to Chapter 65A of the *Criminal Code*. Although that Chapter of the *Code* was repealed by the *Criminal Offence Victims Act* 1995 which, relevantly, came into force on 18 December 1995, nonetheless it continues to apply to applications for compensation for personal injury if the criminal act causing the injury occurred before the commencement of the later Act, s 46 *Criminal Offence Victims Act*. That is the case here.
- [2] The respondent was charged with attempted murder and unlawful wounding with intent to cause grievous bodily harm of the applicant arising out of an incident at the applicant's home at Darra on the evening of 4 August 1994.
- [3] The respondent was acquitted by a jury of attempted murder and found guilty of unlawful wounding with intent to cause grievous bodily harm on 2 February 1996. He was sentenced by me on 5 February to imprisonment for four and a half years to be suspended after sixteen months on condition that he not commit another offence punishable by imprisonment for five years.
- [4] The applicant sustained his injuries when he was stabbed by the respondent twice in the chest with a knife.
- [5] There are two preliminary matters to consider:
  - the very long delay in bringing these proceedings; and
  - service on the respondent.
- [6] There is no limitation period in Chapter 65A of the *Code* but it may be inferred from the wording that when provision for compensation was introduced it was expected that an application would be made at the time of sentence or shortly thereafter. By contrast the *Criminal Offence Victims Act* imposes, by s 40, a three year time limit on adult applicants with time running from the end of the convicted person's trial. Since making an order for compensation is discretionary, delay not satisfactorily explained in respect of an application brought pursuant to Ch 65A may result in an order being refused.
- [7] The applicant has offered an explanation for the delay which demonstrates that it largely rests with his former solicitors. In early April 1995, some eight months after the assault, the applicant, who is not fluent in English, sought advice from a firm of solicitors at the Gold Coast about his entitlement to compensation. He signed documents and paid money into the solicitors' trust account. Although he has deposed to the progress of the matter from his point of view, a more complete chronology may be obtained from the affidavit of Mr Gregory Young, his present solicitor, who has set out the steps taken by the former solicitors after perusing the applicant's file when it was finally released to the applicant.
- [8] In short, whilst there was some reasonable activity on the applicant's behalf during 1996, nothing occurred from 7 February 1997 until a brief was prepared for

counsel's advice on 4 February 1998. That advice was not received until July 1998. The applicant gave a detailed statement that month to a Vietnamese solicitor in the formers solicitors' employ but in November the solicitors explained to him that parts of his statement had been lost with the cessation in their employment of the Vietnamese solicitor.

- [9] In January 1999 the former solicitors sought certain documents from the police about the assault. A year later the applicant sought his file but this was refused and not recovered until May 2000 after a bill of costs had been delivered and then paid. Thereafter the applicant's present solicitors have been expeditious in arranging appointments with specialists, the final report from whom was received in February 2001.
- [10] The application came before me on 19 April 2001. The respondent had been unable to be served but I was not persuaded that the evidence revealed that avenues which might prove successful had been explored given that there was some "second hand" information that the respondent had been seen in the local area. This proved illusory. After extensive inquiries there was some suggestion that the respondent may have returned to Vietnam. An application for substituted service was made on 9 July 2002. The order made that day has been complied with and the application was finally able to be completed on 13 August.
- [11] It may fairly be concluded that, lengthy though the delay has been, the applicant, hampered as he is by language difficulties, has done his best. There is no demonstrated prejudice to the respondent who is unlikely to be found in any event to satisfy any order.
- [12] The approach to the calculation of the quantum of compensation under s 663B of the *Code* was, as a matter of practice, based upon the approach which a court might take to the assessment of damages in a civil action for damage for personal injury, fettered only by a ceiling on the amount which might be ordered. The quantum of the amount was the maximum specified in the workers' compensation legislation current at the time of the offence. This approach was endorsed by the majority of the Court of Appeal (Fitzgerald P and Davies JA) in *R v Jones, ex parte McClintock* [1996] 1 Qd R 524.
- [13] As a consequence not only must there be an assessment of an applicant's pain and suffering but also an assessment of any economic loss suffered as a result of the injury. The majority in *McClintock* specifically found that the maximum amount was not reserved for the most serious cases. The converse is enshrined in s 22(4) of the *Criminal Victims Act*. The maximum amount for physical injury is \$72,680, *Queensland Government Industrial Gazette* 20 May 1994. The maximum amount for psychiatric or psychological injury is \$20,000, s 663AA *Criminal Code*.
- [14] I turn, then, to the circumstances of the assault. The respondent, a member of the Brisbane Vietnamese community, believing, erroneously, that his wife, also Vietnamese, who had disappeared leaving him with their seven week old baby and no family support, was being harboured by the applicant and his family. He

attended at the applicant's home on the evening of 4 August 1994 in a state of agitation. It emerged at the trial that the respondent had come looking for his wife on other occasions at the applicant's home.

- [15] The applicant came outside to tell the respondent that his wife was not in the house. He was immediately attacked by the respondent who stabbed him twice in the chest with a knife saying as he did so that he would kill the applicant. The applicant did not immediately appreciate that he had been stabbed. He attempted to run away from the respondent but fell down and the respondent tackled him again. The applicant pushed his attacker away and again heard him threaten to kill him. He was able to escape down the street. The respondent started after him but then got into his car and in due course drove away. In the meantime, the applicant became aware of shortness of breath and noticed blood on his clothes. He hid until the respondent had finally gone. He was helped inside by his wife and a young woman (not the respondent's missing wife) present in the home. His wife's limited knowledge of English meant that it took some time before the police and ambulance services were able to understand the address. The applicant was much weakened and believed that he was about to die as his wife was unable to be understood by the emergency services and he retained this belief for some days.
- [16] Although the respondent raised the issue of self defence in his police interview given after he was found at the Mater Hospital with his baby, the jury, by their verdict, rejected this account of what happened. The respondent did not give evidence at the trial. There was no behaviour on the part of the applicant which directly or indirectly contributed to the injuries suffered by him so as to affect any order which might be made as provided for in s 663B(2) of the *Code*.
- [17] When sentencing the respondent the information conveyed to the court by the prosecutor was that the applicant had made an excellent recovery. The applicant gave evidence at the trial but it was confined to the attack and its circumstances. It appears that that conclusion was far too sanguine and, for whatever reason, the serious consequences of the attack for the applicant were not made known to the court at sentence. The applicant is thirty-four and has two children now aged ten and five. His marriage has come to an end largely due to the stresses associated with loss of work, loss of savings and his high levels of anxiety, but he and his wife still share their accommodation.
- [18] The applicant was admitted to the Princess Alexandra Hospital after the attack. The applicant's right chest wound was about three centimetres in length extending into the pleural space causing pneumothorax. The second stab wound was on the left side of the chest and was about two centimetres in length. This wound penetrated through the thoracic cavity and appeared to extend into the pericardial space. The applicant had bilateral intercostal catheters inserted and was admitted to the intensive care unit for monitoring. Over the next few days the drains were removed from his lungs and he was gently mobilised. Chest x-rays revealed that both lungs had fully inflated.

- [19] The surgical registrar noted that the applicant's injuries were, without treatment, life threatening due either to respiratory failure from the collapse of one or both lungs or either of the wounds could have developed into a tension pneumothorax.
- [20] Following discharge on 11 August 1994 the applicant consulted with Dr Hoa Nguyen at Darra on 14 August complaining of chest pain on movement and deep respiration, that he could not sleep at night, that he had nightmares often and palpitations. His wound was healing although still tender and the applicant demonstrated no shortness of breath. He consulted Dr Nguyen on 27 August because of loss of sleep, feeling stressful, fear of trivial things and nightmares. His wound was healing although was productive of slight pain. He was given a second course of sedatives and analgesics.
- [21] The applicant returned to work at Boral Bricks after six weeks. He had been employed there as a machine operator continuously for more than six years prior to the assault earning a steady income with ample overtime. When he returned to work he went on light duties. He could not perform any heavy work due to shortness of breath and was unable to work overtime. When Dr Trevor Myers performed lung function tests in June 2000 the applicant had only two-thirds lung capacity. The applicant ceased work at Boral in early 1995. He had expected to remain there indefinitely but for his injuries.
- [22] In early 1995 and on a number of occasions thereafter the applicant consulted with Dr Nguyen for symptoms of insomnia based on anxiety associated with the assault. He was prescribed medication.
- [23] In an attempt to earn income and do work within his physical capability the applicant opened a restaurant in 1995 where he worked as chef. It closed after 11 months with extensive financial losses. His wife operated a garment manufacturing business from home and the applicant worked in that business and continues to do so.

### *Quantum*

- [24] The applicant suffered life threatening injuries. Dr Trevor Myers, a consultant physician, said that the applicant would have suffered severe pain and fear and that it was likely that the applicant would suffer discomfort indefinitely. The wounds and treatment left unsightly scars which Dr Harris, a plastic surgeon, described as a permanent. The applicant is embarrassed by them.
- [25] More serious in its consequences than his physical injuries has been the applicant's psychological sequelae. He deposes in para 16 of his affidavit:
- “a. I had trouble sleeping for months after the assault and was required to take sleeping tablets;

- b. I felt very unsafe in my own home and I placed it up for sale. I also asked a family friend to move in with us until the house was sold;
- c. My biggest fear was that it took so long for my wife to call for help, as my wife's english [sic] was poor at the time. I could have died as my wife to tried [sic] to give the address many times;
- d. I do not trust anyone anymore as I am concerned that they will turn on my family;
- e. I have also changed jobs as a result of the assault. I had difficulties with the heavy work I was doing at Boral and had to stay on light duties as I suffered from a shortness of breath;
- f. I still cannot take a big breath when I go swimming;
- g. I avoid going to the beach as I am embarrassed by my scars. My youngest son has no knowledge of the assault. My eldest son who is aware of the assault, generally questions me about the man that stabbed me and often asks whether he will come back. These comments and questions upset me greatly;
- h. I often feel hot for no reason and have trouble breathing when my temperature rises;
- i. I feel as if my life has never been the same since the assault. I was forced into early retirement and my restaurant venture failed;
- j. I moved house earlier than I planned and I retired earlier than I had planned and this has put a big burden on my family. My marriage has also broken down which I attribute to the assault."

[26] The applicant consulted with Dr P Mulholland, a psychiatrist, in November 2000. Dr Mullholland concluded

"Quang Nguyen is now a 34 year old man who over six years ago was the victim of a stabbing assault which could easily have killed him. He developed a PTSD [post traumatic stress disorder] after the assault. That has gradually resolved itself without treatment and the current and recent situation is that he is left with chronic mild residual features of same but the current and recent extent of psychological severity is not such as to warrant a formal diagnosis of psychiatric disorder.

It goes without saying that for about two years after the assault he experienced a significant degree of emotional pain and suffering.

Due to a complex series of circumstances which relate back to this assault he suffered a financial disaster and his marriage broke down.

He has not had any psychiatric treatment although with the benefit of hindsight he would have been advantaged if he had had same over that two year period after the assault. He does not need any psychiatric treatment at the present time.

In terms of the compensation table of The Criminal Offence Victims' Act 1995 he suffered a mental or nervous shock of moderate degree towards the top end of that range, that is being approximately 15-20 percent."

- [27] There is no doubt that this was a terrifying and life threatening attack. The applicant, who was a diligent husband and father and hardworking member of the community, was devastated by this unprovoked assault. He has struggled back to economic independence but has lost his marriage, much of his quality of life and incurred significant financial losses.
- [28] For the physical pain and suffering and loss of the amenities of life past and future the applicant, on common law principles, should be awarded \$35,000.
- [29] The applicant has suffered psychiatric and psychological consequences of the assault. Assisted by Dr Mulholland's estimate of moderate nervous shock (even though the *Criminal Offence Victims Act* is not applicable), I would award the applicant \$12,000.
- [30] The applicant has suffered economic loss which it is difficult to quantify. He is a hard worker and has the capacity to earn income from a different kind of work than that which he was doing at the time of the attack and which he expected to continue to do into the future.
- [31] There is conflicting and confusing evidence from the applicant based, it would seem, on communication problems and also a misunderstanding of what losses could be claimed on a civil personal injury assessment basis. The applicant's solicitors have obtained copies of his tax returns and letters of assessment from the tax office and these are likely to be the most accurate way of approaching this part of the calculation. The applicant's tax return for the financial year prior to injury shows income after tax of \$35,520 but there is no assessment notice. The 1993 year shows income after tax of \$33,104. His income after tax for the 1995 financial year from his assessment notice is \$36,247. Without details about rates of pay and overtime at Boral it is not possible to see any loss of income while at Boral on light duties.
- [32] The restaurant operated at a loss reflected in the tax return and tax office correspondence for 1996. The applicant's 1997 income tax return shows a net income before tax of \$19,156 while the 1998 return shows his taxable income to be

\$33,385. His taxable income in 1999 was \$46,568 and in 2000 it had dropped to \$29,664. What is needed for a proper assessment of economic loss are rates from 1995 to the present for employees at Boral, at least as a starting point. Even then the applicant's own records are not sufficiently comprehensive to make a real comparison. Very broadly, the losses look to be approximately \$35,000 for the past based on an incremental increase (which I have made arbitrarily) at Boral. I propose to nominate what can only be described as a global figure doing the best I can on the figures provided. I propose to allow an amount of \$45,000 for the past and for future loss of earning capacity.

### *Special Damages*

- [33] The applicant has expended funds on medical and other expenses. Those vouched for amount to \$321.76 which is allowed. He has been rendered assistance with lawn mowing for which he deposes he paid \$12 a session on 26 visits amounting to \$312. The total for special damage is \$633.76 which is allowed.
- [34] There is a claim for gratuitous assistance given by Mrs Linda Ridgeway who moved into the applicant's home following the attack and stayed for two years. She assisted by driving the applicant's wife as needed to help in the business. The applicant was also grateful for her presence because she could speak English. The amount of assistance which Mrs Ridgeway gave has not been quantified. The daily driving of the applicant's wife related to the business, and seems to be an expense of the jointly operated business. On the state of the evidence it is not possible to make any assessment of the quantum of the claim for gratuitous assistance.
- [35] The amounts assessed applying the principles for assessment of damages for personal injury are:

Description	\$
Pain and suffering and loss of the amenities of life, past and future	35,000.00
Psychiatric damage	12,000.00
Past loss of wages and future loss of earning capacity	45,000.00
Special damages	633.76
Interest on general damages at 2% per annum for 8 years (\$30,000 attributed to the past)	4,800.00
Interest on past loss of income at 5% per annum for 8 years	14,000.00
Interest on special damages at 5% per annum for 8 years	253.51
<b>TOTAL:</b>	<b>\$111,687.27</b>

- [36] The total is \$111,687.27. That exceeds the statutory limit of \$72,680 and accordingly that is the amount which ought to be awarded to the applicant as compensation for the injuries which he sustained. The legislation is silent on the question of costs. The *Code* operates in the criminal jurisdiction where costs are as provided for in *The Criminal Practice Rules*. However, the approach is to be as on an assessment in a civil action and in *R v Jones, ex parte McClintock* (1996) 1 Qd R 524 costs were awarded below and it was not said, wrongly, per Fitzgerald P at 528. They are not part of the compensation amount but there is otherwise no basis for not

making an order that the respondent pay the applicant's costs of and incidental to the application to be assessed.

- [37] The order is that Quan Van Dang pay to Quang Dang Nguyen the sum of \$72,680 by way of compensation for injury suffered by him by reason of the offence of unlawful wounding with intent to cause grievous bodily harm of which the said Quan Van Dang was convicted on 2 February 1996.