

# SUPREME COURT OF QUEENSLAND

CITATION: *Owen v The Minister for Justice and Attorney-General*  
[2003] QSC 271

PARTIES: **GARETH DEAN OWEN**  
(applicant)  
v  
**THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL**  
(respondent)

FILE NO/S: SC No 7419 of 2002

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 21 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 27 June 2003

JUDGE: McMurdo J

ORDER: **1. The decision of the respondent made on 27 May 2002 is set aside.**  
**2. The matter is remitted to the Minister for further consideration according to law.**

CATCHWORDS: ADMINISTRATIVE DECISION – JUDICIAL REVIEW - where applicant sought an *ex gratia* payment under s 33 *Criminal Offence Victims Act* because of sexual offences committed against him – where applicant tried and found not guilty of murder or manslaughter of perpetrator of sexual offences – where evidence applicant suffering from adjustment disorder as a consequence of sexual offences – where evidence applicant suffering post traumatic stress disorder after the killing of the perpetrator – where applicant contends the killing of the perpetrator a consequence of the sexual offences - where applicant awarded compensation only for the adjustment disorder – where respondent accepted recommendation applicant could not be compensated pursuant to s 19(2)(b) Act for suffering sustained subsequent to perpetrator’s “unlawful” killing – whether respondent erred in considering section 19(2)(b)

*Criminal Offence Victims Act* 1995 (Qld), s 33, s 39  
*Criminal Offence Victims Regulation* 1995 (Qld), s 1A, s 1A(2), s 2A

*R v Attwell ex parte Jullie* [2002] 2 Qd R 367, cited

*R v Kazakoff ex parte Ferguson* [2001] 2 Qd R 320, applied

COUNSEL: A J Kimmins for the applicant  
M D Hinson SC for the respondent

SOLICITORS: McLaughlins for the applicant  
Crown Solicitor for the respondent

- [1] **McMURDO J:** The applicant sought an *ex gratia* payment under s 33 of the *Criminal Offence Victims Act 1995* (“the Act”). The respondent as the delegate of the Governor in Council<sup>1</sup> approved the payment of an amount of \$7,500. This is an application to review that decision. The applicant seeks orders for the variation of the Minister’s decision to substitute an amount of \$75,000 as the approved payment.
- [2] The applicant was born on 17 December 1982. He had a difficult childhood which included learning difficulties attributed to Attention Deficit Disorder. In early 1999 as a result of arguments with his parents the applicant left home. He took up residence in a house occupied by a man called Wilson. Thereafter he was frequently sexually abused by Wilson. The applicant complained to police on 7 July 1999, but no police action was then taken. On or about 15 August 1999, Wilson again attempted to sexually assault the applicant, and during the course of the ensuing struggle, the applicant struck Wilson with an axe and a concrete block. Wilson sustained a serious head injury which killed him. The applicant was tried for Wilson’s murder. The jury found him not guilty of murder or manslaughter and he was discharged.
- [3] He applied for compensation for injuries suffered because of sexual offences committed by Wilson. Because Wilson had not been convicted of any of those offences, the application for compensation had to be made in reliance upon s 33. The situations in which s 33 applies are set out in s 33(1) as follows:

“(1) This section applies to anyone who has suffered injury because of any of the following acts committed against the person:

- (a) an act for which someone has been tried on indictment for a personal offence, but found not guilty because the charged person was of unsound mind when doing the act;
- (b) an act for which someone would have been tried on indictment for a personal offence, but for the fact that the person:
  - (i) has been found to have been suffering from unsoundness of mind when doing the act, or not fit for trial, under the *Mental Health Act 2000*, chapter 7, part 6;21 or
  - (ii) is not criminally responsible for the act because the person was under 10 years when doing the act;

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<sup>1</sup> Section 39

- (c) a personal offence for which someone would have been tried on indictment, but for the fact that the person cannot be identified or found after appropriate inquiry and search.”

The application was made upon the basis that it was within paragraph (c), which has been accepted by the Minister in both his decision and his response to these proceedings.

- [4] The alleged offences by Wilson include that offence upon the occasion of the fight which killed him. The evidence presented to the Minister was to the effect that, by the time of the incident on 15 August 1999, the applicant suffered an adjustment disorder with mixed disturbance of emotions and conduct as a result of Wilson’s behaviour, but that after the events of that day, the applicant suffered a post traumatic stress disorder. This evidence was accepted by the Minister and the effect of his decision was that the applicant should be compensated for the adjustment disorder and not for the post traumatic stress disorder. This distinction is one basis of the challenge to his decision.
- [5] Where an application for payment is made under s 33, the State may pay all or part of that requested, up to the amount that could have been ordered to be paid for a compensation order if the offender had been convicted upon indictment. Accordingly, this application had to be assessed by reference to provisions such as sections 9, 20 and 25. The Minister decided that the adjustment disorder was an injury in the nature of “mental or nervous shock (minor)”, for which Item 31 of Schedule 1 of the Act provided for a maximum payment of \$7,500, which was the sum he then approved. In his statement of reasons, the Minister acknowledged that the applicant had suffered “as a result of the sexual assaults and the subsequent events involving the death of the offender and the (applicant’s ) trial”, but he said that “the legislation states that compensation can only be given for the injuries suffered as a result of a personal indictable offence, namely the sexual assaults”. According to the applicant’s claim, the killing of Wilson was a consequence of Wilson’s sexual assaults prior to and on the day in question, and that accordingly, the Minister should have approved the payment for an injury assessed as a more serious mental or nervous shock constituted by his post traumatic disorder.
- [6] The Minister was briefed with an extensive submission by an officer of the Criminal Injury Compensation Unit of his Department. After a thorough discussion of the psychologists’ reports supporting the claim, the submission discussed the applicant’s acquittal of the murder of Wilson in these terms:

“Applicant charged with the murder of the Offender

The applicant is claiming compensation for a number of sexual offences allegedly committed against him by Noel James Wilson. The applicant was indecently dealt with upon a number of occasions eventually resulting in the applicant striking Mr Wilson over the head with an axe. Mr Wilson subsequently passed away. The applicant was charged with murder and was acquitted at trial in the Supreme Court Brisbane.

The Office of the Director Public Prosecutions has advised that inquiries were made with the Crown Prosecutor who conducted the

trial of the applicant (Owen) for the murder of the alleged offender (Wilson). The Prosecutor has advised that self-defence was run at the trial. Furthermore, the brief of evidence on the murder file included a copy of the statement made by Owen to police about the alleged assaults upon him by Wilson and a statement from the police officer who took that statement from Owen. These documents supported the applicant's assertion that he had (prior to the murder) reported the alleged offences to police."

Under the heading "discretionary considerations" the submission continued:

#### "Eligibility for Compensation

Section 19(1)(a) of the Criminal Offence Victims Act 1995 states that a payment of compensation is available to a person "for injury suffered by the applicant caused by a personal offence committed against the applicant".

Section 19(2) of the Criminal Offence Victims Act 1995 states:

"The part does not allow anyone to apply to a court or to the State for the payment of an amount for –

(b) an unlawful killing to which the applicant was a party".

The evidence to hand indicates that the applicant initially reported the sexual assaults committed upon him by Mr Wilson to the Queensland Police Service in July 1999. The Police did not action the complaint. The medical reports indicate that the applicant suffered an Adjustment Disorder as a result of these offences.

The offender again attempted to sexually assault the applicant in August 1999. The applicant in an attempt to protect himself, fatally wounded the offender. As a result of these actions and the subsequent court hearing, the applicant was diagnosed as suffering from PTSD and Tourette's Disorder.

The above quoted provision allows the applicant to claim compensation for the sexual offences only. The suffering sustained by the applicant subsequent to the unlawful killing of the offender cannot be considered, under the legislation, for compensation.

#### Mental or Nervous Shock

The solicitor for the applicant has submitted that the applicant should be compensated for the entirety of his psychological injury, including the effects of the fatal wounding of the offender and the subsequent court case. However the medical reports to hand indicate that, as a result of the sexual offences; the applicant suffered from an Adjustment Disorder. As a result of injuring and subsequently death

of the offender and the court hearing, the applicant was diagnosed as suffering from PTSD and Tourette's Disorder.

The legislation allows the applicant to be compensated only for the effects of a personal offence against him, namely the sexual assault committed by the offender. As such it is recommended that the applicant only be compensated for the psychological effects of the sexual assaults, ie his Adjustment Disorder."

[7] The Minister's statement of reasons show that he accepted both the reasoning and ultimate effect of this recommendation. The Minister's findings of fact include the following:

- “3. On or about 15 August 1999, Mr Wilson again attempted to sexually assault the applicant. Mr Wilson chased the applicant. The applicant eventually struck Mr Wilson in the head with an axe. Mr Wilson subsequently passed away.
4. The applicant was charged with murder and was acquitted at trial in the Supreme Court Brisbane.
5. The Office of the Director Public Prosecutions advised that inquiries were made with the Crown Prosecutor who conducted the trial of the applicant (Owen) for the murder of the alleged offender (Wilson). The Prosecutor advised that self-defence was run at the trial. Furthermore, the brief of evidence on the murder file included a copy of the statement made by Owen to police about the alleged assaults upon him by Wilson and a statement from the police officer who took that statement from Owen. These documents supported the applicant's assertion that he had (prior to the murder) reported the alleged offences to police.”

The Minister's stated reasons then included the following passages:

- “1. The applicant sustained an Adjustment Disorder as a result of the sexual offences committed against him. As a result of the death of the offender and the subsequent murder trial, the applicant developed Post-traumatic Stress Disorder and Tourette's Syndrome.

Section 19(1)(a) of the *Criminal Offence Victims Act 1995* states that a person may claim compensation for injury suffered by the applicant caused by a personal offence committed against the applicant.

Section 21 of the *Criminal Offence Victims Act 1995* defines a personal offence as an indictable offence committed against the person of someone.

It is acknowledged that the applicant suffered adversely as a result of the sexual assaults and the subsequent events

involving the death of the offender and the trial. However the legislation states that compensation can only be given for the injury suffered as a result of a personal indictable offence, namely the sexual assaults.

...

In arriving at my decision I considered the following provisions of the *Criminal Offence Victims Act 1995*:

1. Section 19(1)(a) which states an applicant may claim compensation:

*For injury suffered by the applicant caused by a personal offence committed against the applicant.*

2. Section 19(2)(b) which states that a person cannot claim compensation for:

*An unlawful killing to which the applicant was a party.”*

- [8] A critical and difficult decision for the Minister was whether by reference to s 19(1)(a) the applicant’s post traumatic disorder was an injury “caused by” offences committed against him. According to the Departmental submission the answer to that question was dictated by s 19(2). Section 19 provides as follows:

**“19 Scheme for compensation for injury, death and expenses from indictable offence**

(1) This part establishes a scheme for the payment of compensation to a person (the “applicant”):

- (a) for injury suffered by the applicant caused by a personal offence committed against the applicant; or
- (b) for the death of someone on whom the applicant was dependent, caused in circumstances constituting murder or manslaughter; or
- (c) for funeral or other expenses from the death of a member of the applicant’s family, caused in circumstances constituting murder or manslaughter; or
- (d) for injury suffered when helping a police officer to make an arrest or prevent an offence.

(2) The part does not allow anyone to apply to a court or to the State for the payment of an amount for –

- (a) injury caused to the applicant by an offence to which the applicant was a party; or
- (b) an unlawful killing to which the applicant was a party.”

- [9] The Departmental submission appears to have characterised this as a case of “the unlawful killing” of Wilson, from which it was said that the payment of compensation was precluded by s 19(2)(b). In the Minister’s reasons, there is no

express reference to an unlawful killing, but the Minister does say that he considered s 19(2)(b). At least on one view, the Minister's reasons would indicate that he saw the case as one within that provision. That view is fortified by reading his statement of reasons with the Departmental recommendations.

- [10] There are two difficulties with the suggested operation of s 19(2)(b) in this case. The first is that it appears to require a finding that Wilson's death involved an unlawful killing. No express finding to that effect was made. In principle, the Minister was not precluded by the jury's verdict from making that finding. But in the present case it is clear that the Minister has not attempted to form his own assessment of the applicant's case of self defence and nor was he obliged to do so.
- [11] A further difficulty is that s 19(2)(b) does not appear to apply in a case such as this, even assuming an unlawful killing. The applicant's claim was not for payment for an unlawful killing, but for his own injury. Section 19(2) provides for circumstances in which s 19(1) is not to apply. Within s 19(1) there is reference to compensation either for an applicant's injury, or for the death of someone on whom the applicant was dependent or who was a member of the applicant's family. Section 19(2)(b) seems to refer to an unlawful killing resulting in a death for which compensation might otherwise be payable according to s 19(1). Because the applicant was not dependent on Wilson, or a member of his family, he could not have claimed compensation for Wilson's death. Section 19(2)(b) seems intended to make it clear that a dependant or family member who was a party to an unlawful killing cannot claim compensation for the death. Accordingly, upon its proper interpretation s 19(2)(b) would not apply to this claim, as was conceded by Mr Hinson SC. Had the Minister found that the applicant had unlawfully killed Wilson, the finding would have put paid to a right to compensation for the post traumatic stress disorder, not because of s 19(2), but because the applicant's own offence of murder or manslaughter would break the chain of causation required by s 19(1)(a), and because it would be contrary to the objectives and proper operation of this Act to pay someone for the consequences of his own crime.
- [12] A case can be envisaged where the Minister would have not only the fact of the applicant's acquittal but also evidence compelling a positive finding of self defence. In such a case, arguably there could be a causal connection between the deceased's conduct and the applicant's mental injury which would entitle him to compensation as was sought in this case. Alternatively, a case could arise where it is impracticable for the Minister to assess the applicant's culpability, in which event that uncertainty would itself be a relevant consideration adverse to the claim for an *ex gratia* payment.
- [13] In the present case, because the Minister has apparently reasoned according to the Departmental recommendation, to the effect that the claim for compensation was affected by s 19(2), in my view the Minister has erred so as to make his decision susceptible to review. In essence, the error was in determining this application upon the basis that the claim for the injury of post traumatic stress disorder was precluded by law, pursuant to s 19(2)(b). The application should have been considered without reference to that provision. The question which should have been considered was whether that injury was relevantly caused by Wilson's criminal conduct. There is a causal connection here in a "but for" sense, but whether the connection is sufficient is to be decided by the Minister by reference to matters of policy and value judgment in the context of the objects of this legislation. The

appropriate order of review is for the matter to go back to the Minister for further consideration in accordance with these reasons.

- [14] The applicant also contends that the Minister should have assessed compensation upon the basis that he suffered an injury or injuries within s 1A and s 2A of the *Criminal Offence Victims Regulation* 1995 (“the Regulation”). The psychologists’ reports refer to symptoms within some of those which are specified as involving an adverse impact of a sexual offence within s 1A(2). Having regard to *R v Attwell, ex parte Jullie* [2002] 2 Qd R 367, the applicant concedes that his injury or injuries by way of “mental or nervous shock” are not to be assessed by reference to the Regulation. But it is submitted that he suffers in some respects, involving feelings of fear and disgust, which are distinct from his adjustment disorder or post traumatic stress disorder, so that these are outside any condition within the expression “mental or nervous shock”. The proper interpretation of that expression within this Act was explained by Thomas JA, sitting as a single judge in *R v Kazakoff, ex parte Ferguson* [2001] 2 Qd R 320, with which I respectfully agree. At p 325, Thomas JA said:

“It is extremely difficult to define the point at which mental consequences to a claimant from a crime become compensable as “mental or nervous shock”. I consider however, that if nothing more is shown than fear, fright, unpleasant memories or anger towards an offender, or a combination of such reactions, the claimant has not shown that he or she suffered nervous shock.”

In the present case, however, something more was shown, and as I read the psychologists’ reports, and their references to symptoms such as fear, the symptoms are regarded as part of the disorders which are acknowledged to involve mental or nervous shock. That is how the Minister has understood them, and whether or not he was correct in doing so, that did not involve some reviewable error. It was a question of fact for the Minister to decide as to whether there was some distinct symptom beyond the injury or injuries characterised as mental or nervous shock. This basis for attacking the decision therefore fails.

- [15] The result is that the decision of the respondent made on 27 May 2002 will be set aside and the matter will be referred to the Minister for further consideration according to these reasons.