

SUPREME COURT OF QUEENSLAND

CITATION: *Johnson v Bancroft* [2004] QCA 253

PARTIES: **TODD EDWARD JOHNSON**
(applicant/applicant)
v
SAMUEL MARK ROBERT BANCROFT
(respondent/respondent)

FILE NO/S: Appeal No 3787 of 2004
DC No 157 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Toowoomba

DELIVERED ON: 30 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 25 May 2004

JUDGES: Williams JA and Chesterman and Atkinson JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Grant leave to appeal**
2. Allow the appeal
3. Order that compensation in the sum of \$27,412.50 be paid to the applicant by the respondent
4. Order the respondent pay the applicant's costs of the application and appeal 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 – where applicant was stabbed by respondent – where respondent convicted of doing grievous bodily harm to applicant and of unlawfully wounding another complainant – where applicant applied for criminal compensation – where learned primary judge awarded sum of \$19,500 – where learned primary judge assessed applicant's contribution at 33 1/3 per cent – whether this assessment of contribution was manifestly excessive – whether assessment of quantum was inadequate

Criminal Offence Victims Act 1995 (Qld), s 19, s 25

Hockley v Sowden [2000] QCA 9; Appeal No 10317 of 1999, 3 February 2000, cited

Hohn v King [2004] QCA 254, Appeal No 3738 of 2004, 30 July 2004, referred to

R v Kazakoff; ex parte Ferguson [2001] 2 Qd R 320, cited

COUNSEL: D R Davies for the applicant
The respondent appeared on his own behalf
J A Fraser for the Attorney-General (Qld) as amicus curiae

SOLICITORS: Groom & Lavers (Oakey) for the applicant
The respondent appeared on his own behalf
Crown Law for the Attorney-General (Qld) as amicus curiae

- [1] **WILLIAMS JA:** The background facts relevant to this application for leave to appeal are fully set out in the reasons for judgment of Atkinson J which I have had the advantage of reading; there is no need for me to repeat those facts.
- [2] I will also not repeat in this judgment my views on the general applicability of s 19 and s 25(7) of the *Criminal Offence Victims Act* 1995 (“the Act”) which I articulated in my reasons for judgment in *Hohn v King* delivered contemporaneously with these reasons.
- [3] Particularly given that the respondent went back into the unit to obtain a knife and chased the applicant down the street before deliberately stabbing him twice I am of the view that the respondent’s criminal conduct heavily outweighed any influence the applicant’s intoxicated condition had in causing the incident. No criminal conduct on the part of the applicant directly contributed to the commission of the offence. It was the respondent who escalated the confrontation which initially occurred inside the unit to the stage where the applicant was stabbed in the street.
- [4] In those circumstances I am of the view that a 15% reduction in compensation on the ground that behaviour of the applicant (intoxication) contributed to the injury would be the maximum justified by the circumstances. The reasoning of the learned judge at first instance appears to have been affected by extraneous considerations in arriving at a reduction of one third.
- [5] I agree with all that Atkinson J has said with regard to quantum. Again the learned judge at first instance appears to have been affected by extraneous considerations, particularly in relation to the psychiatric evidence, in assessing quantum.
- [6] The orders of the court should therefore be:
1. Grant leave to appeal;
 2. Allow the appeal;
 3. Order that compensation in the sum of \$27,412.50 be paid to the applicant by the respondent;
 4. Order the respondent pay the applicant’s costs of the application and appeal to be assessed.

- [7] **CHESTERMAN J:** I have had the advantage of reading the judgment prepared by Atkinson J and the concurring judgment by Williams JA. I agree with their Honours and with the orders proposed by Atkinson J.
- [8] **ATKINSON J:** The applicant, Todd Johnson, was stabbed by the respondent, Samuel Bancroft, on 17 January 2003. On 21 January 2004, on the third day of trial, Mr Bancroft pleaded guilty to one count of doing grievous bodily harm to the applicant and one count of unlawfully wounding a second complainant. He was sentenced to six years' imprisonment on count 1, and three years' imprisonment on count 2, to be served concurrently. An application for criminal compensation was made by Mr Johnson which was heard on 1 April 2004. \$19,500 was assessed by the primary judge as the compensation payable to the applicant under the *Criminal Offence Victims Act* (COVA). The applicant has sought leave to appeal that decision.
- [9] The application for leave to appeal was made pursuant to s 118 (3) of the *District Court Act* 1967 (Qld). Leave was sought on the basis that the overall result was so unjust as to require this court's intervention.¹ It was argued that the injustice arose because the assessment of the contribution of the applicant to his injuries was manifestly excessive and the overall award was plainly unjust. Whether or not the award was inadequate requires an examination of the circumstances in which the injury was inflicted, the extent of the injury and the relevant legislation.

Circumstances of the offence giving rise to the application

- [10] At the time of the offence on 17 January 2003, Todd Johnson was an 18 year old apprentice baker, living at home with his mother, father and older brother, Luke. A number of his friends came over to his house that evening and they drank together. The group of friends decided to go to what the judge referred to as an open-invitation party in Gentle Street, Toowoomba. By then the applicant had been drinking heavily and had taken an ecstasy tablet.
- [11] Upon his arrival at the party, the applicant noticed that a young girl was being bashed on the lawn in front of the unit by a number of people and that a number of other people were standing around watching and laughing at her. When the applicant and his friends walked over to that group, the bashing stopped and he heard someone say, "Pick the slut up and take her inside".
- [12] The applicant went into the unit with his brother and friend, the second complainant, to play some music. One of the people at the party yelled some abuse at the applicant's brother and then the respondent, Samuel Bancroft, tried to kick his brother. The applicant went over to where his brother was and told the respondent in no uncertain terms that they did not wish to fight. The respondent then tried to kick him. The respondent was not someone he knew previously.
- [13] The applicant ran out of the unit and the respondent chased him. The applicant continued running. The respondent tried to kick him on a number of occasions but missed. At one point, the respondent stumbled and the applicant punched him but then turned to walk away. A fight ensued in the street outside the unit involving 20 or 30 people. Unbeknownst to the applicant, the respondent went back to his nearby

¹ See *Hockley v Sowden* [2000] QCA 9 at 7 per Pincus JA.

unit and armed himself with a knife. As the learned sentencing judge found, the respondent “caused [the fight] to escalate in a serious, worrying, cowardly and somewhat vicious way.” The respondent deliberately stabbed the applicant on at least two occasions with some force. Unlike his attacker, the applicant was unarmed.

- [14] The applicant ran away as he and his friends were pelted with bottles and fence palings. He noticed blood coming out of his side and after assistance from an off-duty police officer, he was taken to hospital feeling frightened, faint and fearful he might die. The medical evidence before the judge in the hearing of the application for criminal compensation was that Mr Johnson went to Toowoomba Hospital in great pain and with difficulty in breathing.

The applicant’s injuries

- [15] Mr Johnson was admitted to hospital and was found to have sustained two stab wounds to the left chest which were life threatening. He required fluid resuscitation in the emergency department. He had generalised peritonitis, a small left pneumothorax on chest x-ray, and a CT scan of his abdomen and pelvis revealed a haemopneumothorax. There was evidence of air and blood in his abdominal cavity. Surgery revealed he had a penetrating laceration of the left chest wall, a laceration through the left diaphragm, a laceration through the interior wall of the stomach with an exit point in the fundus with active bleeding from his short gastric vessels, approximately 3.5 litres of intraperitoneal blood and approximately 0.5 litre left haemothorax. He remained in intensive care overnight and was discharged from hospital after a week on 24 January 2003.
- [16] On 7 February 2003, Mr Johnson returned to the emergency department at the hospital and was found to have a large collection of empyema (or pus) in his left posterior chest. The empyema was drained using an intercostal catheter and approximately 500ml was drained from his pleural cavity over three days. He was subsequently discharged on 11 February 2003.
- [17] Mr Johnson returned to work eight weeks after the assault but suffered a number of chest infections which prevented him from working from time to time. He lost weight and after months of poor health, he consulted a general practitioner who immediately admitted him to hospital from where he was transferred to Prince Charles Hospital. By then he had lost his job because of his absences which resulted from his injury, which was particularly unfortunate as he was in the fourth and final year of his apprenticeship. He has not since been able to find an employer with whom to complete his apprenticeship.
- [18] Mr Johnson was admitted to the Prince Charles Hospital on 29 July 2003 where he stayed until 5 August. Chest x-rays showed he had a fluid-filled cavity on the left side and had again developed an abscess around the lung. On 30 July 2003 he was taken to theatre and a left thoracotomy was performed and 1.5 litres of thick green pus was aspirated. The cavity was cleaned out with antiseptic solution and all fluid material was removed and an intercostal tube was placed in position. He remained in hospital on intravenous antibiotics until he was discharged on 5 August 2003 with the intercostal tube which was continuing to drain his chest still in place. The intercostal tube was not removed until 28 August 2003.

- [19] By 10 September 2003 his chest x-ray was much improved and he was putting on weight. The thoracic surgeon who saw him at the Prince Charles Hospital, Dr Kevin Matar, said that Mr Johnson would be left with scarring of the lung but that, given his youth, he was likely to recover well from his physical injuries and he would not be predisposed to future problems or inhibited from doing whatever he wished to do.
- [20] Although he has substantially recovered from his physical injuries the applicant has, perhaps unsurprisingly, been left with psychological sequelae. A thorough, detailed, very professional report has been prepared as to those matters by Ian Goldsmith, a psychologist from Toowoomba. The learned trial judge accepted the psychologist's diagnosis of post-traumatic stress disorder but did so after a confusing attack on another psychologist whose opinion was not before the court. Such an irrelevant excursus into the failings of an unidentified psychologist who had nothing at all to do with this application is unwarranted and unwise; likely to cause confusion in those listening to an *ex tempore* judgment; and may have helped to fuel a sense of grievance with the reasons being given.
- [21] The report details the psychological effects of the assault on the applicant. Immediately after his injury he was very frightened. His fear continued when he was first released from hospital and left alone during which time he was plagued with thoughts that someone was going to come and cause him harm. It was a couple of months before he would venture out of the house on his own even to the corner store and then he took his dogs with him to protect him. Although his fear has diminished over time he still is hyper-vigilant about being attacked when he is in public.
- [22] Initially he had nightmares every night about what had occurred but these nightmares had reduced at the time of the hearing of the application to approximately once a month. In the months after the assault he would often call out in his sleep. He has continued to have great difficulty sleeping and he has got worse rather than improved.
- [23] He avoids crowds, has only been to the city once since the assault upon him and on that occasion only because he was best man at a wedding and was with many friends and other adults. He remains fearful of being assaulted particularly by friends of the respondent who have threatened him.
- [24] The psychologist reports that Mr Johnson's mother said that his personality had changed somewhat from being a happy-go-lucky, cheerful, cheeky, friendly and trusting young man to someone who has lost his confidence and is more inclined to be angry and to become frustrated and more argumentative than he was previously.
- [25] Mr Johnson's leisure activities have been seriously affected. He was an accomplished competition skateboarder and won the Toowoomba competition five years in a row; however he has not been able to continue with his competitive skateboarding.
- [26] More importantly, he has been unable to find an employer who will support him to finish his apprenticeship and now does only casual work at a bakery. Having to attend the bakery in the early hours of the morning made him rather apprehensive.

- [27] His psychologist's opinion was that Mr Johnson's symptoms conformed to the conventional diagnosis of post-traumatic stress disorder. He was also of the view that Mr Johnson had experienced a depressive episode as a result of the acute psychological stressor of being stabbed. Having regard to the decision of Thomas J in *R v Kazakoff; ex parte Ferguson*², Mr Goldsmith was of the opinion that Mr Johnson had experienced a degree of mental and nervous shock as a result of the assault and that the impact was in the moderate range in accordance with item 32 in schedule 1 of COVA. That range is 10 to 20 per cent of the scheme maximum.

The judgment at first instance

- [28] On 1 April 2004 the learned trial judge heard and determined the applicant's claim for criminal compensation. His Honour held that the applicant suffered injuries of some seriousness as a result of the stabbing. His Honour then observed that the amendments to the *Criminal Code* in 1969 to enable a victim of an offence of violence to be compensated for injuries from such criminal assault had in mind "the Simon Pure³ sweet innocent victim, say, a young lady walking down a street at night who was suddenly attacked and injured; with another example being the child victim of sexual assault, child molestation, and such like." For the reasons given in *Hohn v King*, this does not set out the statutory intent revealed by the legislation.
- [29] His Honour referred to the applicant's voluntary ingestion of alcohol, combined with the voluntary ingestion of an ecstasy tablet and his voluntary involvement in prior fighting. His Honour referred to s 25(7) of COVA and said that, particularly in the background of the whole history and intent of the legislation, the contribution of the applicant should be more than nominal and assessed his contribution at 33 1/3 per cent. This was precisely the same reduction which the learned judge assessed in the compensation application in *Hohn v King* heard later on the same day in spite of the very different circumstances of each which suggested that his Honour did not exercise his discretion independently in each case.
- [30] When it came to assessing the individual injuries, the learned trial judge looked at the scars on the front of Mr Johnson's chest, near the rib area and on the back and quantified them at eight per cent. With regard to the chest and abdominal injuries, at 20 per cent; and for nervous and mental shock, after a long digression, as I have mentioned, about his dissatisfaction with another psychologist who had nothing to do with this case, his Honour accepted that the applicant's condition came within mental or nervous shock and assessed it at 11 per cent. The quantum was

² *R v Kazakoff; ex parte Ferguson* [2000] QSC 156; [2001] 2 Qd R 320.

³ The reference to Simon Pure in an *ex tempore* judgment is rather unusual. The term comes from the name of a character in an early 18th century play by Susanna Centlivre, *A Bold Stroke for a Wife*, which included a satire on Quaker hypocrisy personified by the figure of Obadiah Prim, a guardian of the heroine in the play. The heroine's suitor, Colonel Fainwell, manages to convince Prim that he is Simon Pure, a Puritan visiting from Virginia. The real Simon Pure is mocked and humiliated as an imposter.

The Oxford English dictionary gives as the meanings of Simon Pure "the real, genuine, or authentic person or thing." As an adjective it means "real, genuine, and authentic. Also, pure, unadulterated; honest, upright." On the other hand, American dictionaries such as the American Heritage Dictionary of the English Language gives the alternative meanings of "genuinely and thoroughly pure" or "superficially or hypocritically virtuous."

It may be questioned whether a term from such an obscure literary reference with an ambiguous meaning is an appropriate term to use in an *ex tempore* judgment of this kind.

provisionally assessed therefore at \$29,250 which, after reduction by one-third, was \$19,500.

- [31] An application of the criteria set out in para [105] of *Hohn v King* to the question of contribution under s 25(7) of COVA suggests that a contribution of one-third was manifestly excessive. The applicant was not committing any criminal offence which led to his attack. He attended an open invitation party and left after aggression was offered to him and his brother. He threw a punch in the course of escaping the situation and was one of a number of people involved in a melee in the street but, unlike his assailant, was unarmed. He was much younger than his attacker and intoxicated. The applicant was viciously stabbed when he was trying to escape by a man who started the fight. In those circumstances, it does not appear that a reduction of more than 15 per cent was warranted.
- [32] As to the quantum awarded, his Honour's assessment of the scarring was based on his personal observation. I would not disturb the award of eight per cent of the scheme maximum which puts it towards the high end of the range for moderate bodily scarring. The award of 20 per cent for the back/chest injury meant that it is just below mid-way in the severe category. Again, this should not be disturbed. His Honour was asked by counsel for the applicant to award compensation for mental or nervous shock at 15 per cent, in the middle of the moderate range. His Honour assessed it at 11 per cent which does not reflect the seriousness of the psychological injury suffered and therefore is outside the range of the proper exercise of the judge's discretion. An award of 15 per cent is much closer to the effect of the reliable psychological evidence.
- [33] I would allow the appeal to the extent of replacing the contribution of 33 1/3 per cent with a reduction of 15 per cent and replacing the award of 11 per cent of the scheme maximum for nervous and mental shock with 15 per cent. The award of compensation should be assessed at \$27,412.50 rather than \$19,500.

Orders

1. Application for leave to appeal allowed;
2. Appeal allowed;
3. Order that the respondent, Samuel Bancroft, pay the applicant \$27,412.50 compensation.