

SUPREME COURT OF QUEENSLAND

CITATION: *Gilders v Keen* [2010] QSC 110

PARTIES: **JAMES NOEL VERDUN GILDERS**
(applicant)

v

TAUKIRI KEEN
(respondent)

FILE NO/S: 12973 of 2009

DIVISION: Trial Division

PROCEEDING: Application for criminal compensation

ORIGINATING COURT: Supreme Court

DELIVERED ON: 8 April 2010

DELIVERED AT: Brisbane

HEARING DATE: 9 April 2010

JUDGE: A Lyons J

ORDER: **Order that the respondent pay the applicant by way of compensation pursuant to the *Criminal Offence Victims Act 1995 (Qld)*, the sum of \$58,500.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CRIMINAL INJURIES COMPENSATION – QUEENSLAND - where the respondent was convicted of one count of attempted murder of the applicant - where the applicant suffered physical and psychological injuries - whether compensation should be awarded.

*Criminal Offence Victims Act 1995 *Qld)*

Dooley v Ward [2001] 2 Qd R 436
Boulter v Bradford [2009] QDC 80
Wren v Gaulai [2008] QCA 148

COUNSEL: R. Christopherson for the applicant
No appearance for the defendant

SOLICITORS: Nathan Lawyers for the applicant

A LYONS J:

Introduction

- [1] This is an application for criminal compensation pursuant to the *Criminal Offence Victims Act 1995* (Qld).
- [2] The respondent did not appear at the hearing.
- [3] The respondent pleaded guilty on 27 August 2007 to one count of attempted murder of the applicant on 2 October 2005. On 27 August 2007 he was sentenced to a period of imprisonment of 9 years with a parole eligibility date fixed at 19 July 2010.

Background

- [4] The applicant was 16 years of age at the time of the attack. He had previously met the respondent through the respondent's brother and they became very good friends prior to the offence. They had not physically fought before the night of 2 October 2005. On that night the two men met other mutual friends on a train to Brisbane following the respondent's release from prison. Ultimately the applicant, respondent and a man named Shannon travelled to the old Boggo Road prison and spent half an hour there after jumping a series of fences. Just before leaving the old prison the respondent stabbed the applicant in the neck twice and the stomach three times, he then hit him in the back of the neck causing him to slip forward. As he fell forward, his head hit a rock on the ground. The respondent then picked up a bigger rock and dropped it on his head, the respondent continued by bending down and stabbing him in the top-right side of his head, and then dropped another big rock on his head. This second rock forced his jaw into the other rock, which broke his jaw. After a verbal exchange the respondent stopped the assault and the applicant made his way to the Park Road Station, where he called for assistance.
- [5] The applicant describes the injuries in the following terms
 - '...stabbed me twice in the neck of my left side,'
 - '...stabbed me in the stomach three times'
 - '...punched me'
 - '...stabbed me against in my abdomen and back'
 - '...hit me in the back of the neck'
 - '...stomped his foot against my head...'
 - '.....pick up a large rock bigger than a baseball, andro pit on my head.'
 - '...bent down and stabbed me in the top right side of my head.'
 - '...then dropped another big rock on my head.'
 - '... kicked me in the jaw with his foot.'
 - '...stabbed me again.'

Injuries – physical

- [6] The injuries to the applicant included:
- (a) 10cm laceration to the scalp
 - (b) Abrasion on right side of jaw
 - (c) Laceration to right shoulder blade
 - (d) Cervical tenderness
 - (e) Fractured left mandible
 - (f) Extra-cranial Haematoma overlying the left frontal and temporal bones
 - (g) 1cm long and 5 cm deep stab wound to left side of the neck
 - (h) Stab wounds to the left shoulder and abdomen
 - (i) Intraoral scarring
 - (j) 5cm scar to neck
 - (k) Scar to scalp

Injuries – psychological

- [7] Dr Barbara McGuire, psychiatrist, assessed the applicant in relation to the present claim on 20 October 2008. In her report of 27 October 2008 Dr McGuire states that the applicant has Post Traumatic Stress Disorder (PTSD) which is severe and which is demonstrated by his nightmares, flashbacks, avoidant behaviour, irritability and intrusive recollections of the incident. She also reports that his PTSD has been present since the offence and is unlikely to improve unless he engages in counselling.
- [8] Dr McGuire stated in her report that whilst the applicant exhibited a conduct disorder prior to the incident the incident itself has made a material and significant effect upon his symptoms. She also reports that the applicant exhibits antisocial traits.

The assessment of compensation

- [9] There is no doubt that the applicant is entitled to compensation under the now repealed *Criminal Offence Victims Act 1995* (Qld), s 24. The scheme maximum is \$75,000. The application was filed on 10 November 2009 and the applicant's claim continues pursuant to the transitional provisions..
- [10] Compensation is assessed by reference to a maximum amount and s 25 of the Act outlines the method of assessing compensation as follows:
- “What amount may be required to be paid under a compensation order**
- (1) In making a compensation order, a court is limited to ordering the payment of an amount decided under this section.

- (2) A compensation order may only order the payment to the applicant of a total amount of not more than the prescribed amount (the *scheme maximum*).
- (3) If more than 1 amount is payable under subsections (4) to (6), the amounts must be added together, and, if the total is more than the scheme maximum, only the scheme maximum may be ordered to be paid.
- (4) In deciding the amount that should be ordered to be paid for an injury specified in the compensation table, the court is limited to making an order for—
 - (a) if there is only 1 percentage listed opposite the injury—an amount up to the amount that is the listed percentage of the scheme maximum; or
 - (b) if there is a range of percentages listed opposite the injury—an amount that is within the listed range of percentages of the scheme maximum.
- (5) In deciding the amount that should be ordered to be paid for an injury specified under a regulation, the court is limited to making an order for the prescribed amount.
- (6) In deciding the amount that should be ordered to be paid for an injury to which subsections (4) and (5) do not apply, the court must decide the amount by—
 - (a) comparing the injury with injuries to which subsections (4) and (5) apply; and
 - (b) having regard to the amounts that may be ordered to be paid for those injuries.
- (7) In deciding whether an amount, or what amount, should be ordered to be paid for an injury, the court must have regard to everything relevant, including, for example, any behaviour of the applicant that directly or indirectly contributed to the injury.
- (8) A decision on the amount that should be ordered to be paid under a compensation order—
 - (a) does not involve applying principles used to decide common law damages for personal injuries; and
 - (b) is to be decided by applying the principles mentioned in section 22(3) and (4).”

[11] The decision of *Dooley v Ward*¹ set out the method for assessing criminal compensation. It is clear that the assessment for compensation should proceed under the Act by scaling within the ranges set out in Schedule 1 of the Act and

¹ [2001] 2 Qd R 436 at [5].

that the method of fixing the appropriate level of compensation is by assessing the seriousness of a particular injury in comparison with the ‘most serious’ case in respect of each category of injury.

“In our opinion the proper method is to fix the compensation for say severe mental or nervous shock at the appropriate place in the range 20 per cent to 34 per cent of the scheme maximum, which is done by considering how serious the shock is in comparison with the most serious case, which must be compensated by an award of a maximum 34 per cent. This illustrates the point that the compensation table has no relationship to what would be awarded as damages in tort; a crime victim permanently institutionalised by the psychological results of an assault could, on that account get no more than \$25,000.”

[12] It is clear that for each injury claimed the court characterises the injury according to the categories listed in the compensation table and then the court has regard to the relative seriousness of the injury, to arrive at a percentage which is within the specified range. The amount of compensation is then calculated by applying the appropriate percentage to the scheme maximum, which is \$75,000.

[13] It is also clear that where it is practical to do so the Court should make separate assessments under each applicable item whilst avoid duplication unless that is impractical.² Furthermore in *Wren v Gaulai*³ Fraser JA stated

“if an injury that is best described in one item is instead assessed together with another injury under another item in order to avoid duplication it may therefore be necessary to make an adjustment to cater for differences between the ranges or maxima for each item.”

Schedule Items

[14] The following schedule items are relevant:

- (a) Item 2 – Bruising/laceration etc. (severe) 3%-5%
- (b) Item 8 – Facial fracture (severe) 20%-30%
- (c) Item 9 – Fractured skull/head injury (no brain damage) 5%-15%
- (d) Item 26 – Gun shot/stab wound (severe) 15%-40%
- (e) Item 27 – Facial disfigurement
- (f) Item 32 – Mental or nervous shock (severe)

Bruising/laceration- Item 2:

[15] Counsel for the applicant submits that considering the multiple lacerations and abrasions suffered, as outlined above, the applicant should be awarded the highest percentage, or 5% of the scheme maximum in relation to item 2.

² *Wren v Gaulai* [2008] QCA 148 at [24]

³ [2008] QCA 148 -at [29]

- [16] There is no doubt that the applicant suffered a bleeding laceration over the back of the head, an abrasion to the jaw, a laceration to the right shoulder blade as well as cervical tenderness. I consider that those lacerations and that bruising should be assessed under this item as they are not being otherwise assessed under another item. Whilst those injuries are of concern I do not consider they are so serious or are of such a nature that they should be awarded the scheme maximum of 5%. I consider an award of 3% is more appropriate. This equates to \$2,250.

Facial fracture (severe)-Item 8:

- [17] The statement of Dr Mohammed Monsour of the Princess Alexandra Hospital⁴ details the fracture to the applicant's left lower jaw bone which was fixated by surgery involving titanium plates, wiring and screws. These plates require future surgery and cause the applicant continuing dental problems and pain. The injury also prevents the applicant from enlisting in the Army which he states was a lifelong desire.
- [18] There is no doubt that the fracture of the lower jaw bone which has required plates, wiring and screws is causing significant ongoing problems for the applicant. He has continuing pain, difficulty chewing as well as a deranged bite. He is also concerned in relation to the further surgery on his jaw. He states

“My teeth are rotting because of the loose plates in my jaw. My teeth can't be removed until my jaw is fixed. My dentist says that there isn't anything they can do until the plates in my jaw are removed and my jaw is completely fixed. My jaw hasn't stopped aching, it aches constantly and causes me to wake at night disturbing my sleep. I am still being prescribed Panadeine forte for pain relief for my jaw and teeth....I might need to have a permanent metal wire put into my jaw to hold it in place.”

- [19] Counsel for the applicant submits that the case of *Boulter v Bradford*⁵ is comparable. In that decision similar facial injuries resulted in an award of 25% of the scheme maximum under Item 8. Counsel submits in this case an award of 20% is appropriate.
- [20] I consider that given the extent of the injuries, as well as the significant ongoing difficulties experienced by the applicant that an award of 20% is appropriate which is an amount of \$15,000.
- [21] **Fractured skull/head injury (no brain damage)-Item 9:**
- [22] The respondent dropped two rocks and stomped on the applicant's head during the offence, this resulted in haematoma over the left frontal area of his head, as outlined by Dr Donal Buchanan in his statement of 11 January 2007.

⁴ Exhibit JNG-4 to the affidavit of James Noel Verdun Gilders.
⁵ [2009] QDC 80.

- [23] The applicant seeks the minimum 5% under Item 9 which I consider is appropriate. This is an amount of \$3,750.

Gun shot/stab wound (severe)-Item 26:

- [24] The applicant was stabbed around 7 times to the neck, head, abdomen and back. He claims the neck wound was a result of the respondent stabbing him with a screw driver.
- [25] Dr Buchanan states that exploratory surgery revealed that the neck wound travelled behind a major neck vein (the internal jugular vein) behind one of the major nerves (the phrenic nerve) and into the muscles surrounding the vertebrae. It is clear however that no vital structures were damaged and it was not life threatening. The injury subsequently settled without any specific treatment. The solicitor for the applicant submits that a 20% award is appropriate under Item 26. I consider this figure is the appropriate figure given the number of wounds even though they were not life threatening.
- [26] This is an amount of \$15,000.

Facial disfigurement-Item 27

- [27] The offence and injuries outlined above have resulted in scarring to the applicant's neck, and scalp. The statement of Dr Matthew Hawthorne adds that he also suffers from intraoral scarring from surgical access sites. Whilst the applicant seeks an award of 7% under Item 27 for minor/moderate scarring (2%-10%), having viewed the photos and read the medical reports I consider that the scarring is more towards minor end of the scale rather than the moderate end and that 5% is more appropriate. This is an amount of \$3,750.

Mental or nervous shock (severe)-Item 33:

- [28] Based on Dr McGuire's report outlining the applicant's PTSD and related symptoms, referred to above, and on the fact that he continues to suffer, the applicant seeks an award of 25% of the scheme maximum under Item 33 (20%-34%).
- [29] There is no doubt that the applicant has been diagnosed with severe post traumatic stress disorder. During the attack the respondent asked the applicant "are you dead yet?" The applicant states that at the time he thought he "was going to die. I realised I had to get away, but was too terrified to retaliate or make sudden movements. I recall being extremely shocked and afraid for my life". He also indicates that he is still frightened to leave his house and often feels paranoid and believes that he is being watched or pursued. He has panic attacks as well as flashbacks when he sees scissors or sharp implements. He has lost 7 kilograms and is considered to be underweight. Dr McGuire noted he had an "exaggerated startle reflex".
- [30] The applicant's solicitor argues that although Dr McGuire refers to the applicant having a pre-existing conduct disorder which appears to be ADHD, the award should not be reduced as she also states that the incident itself had a significant effect upon the symptoms. In my view the ADHD would not have

had a significant impact on the severity of his current psychiatric disorder. I consider that given the current diagnosis of severe PTSD an award of 25% under Item 33 is appropriate which is an amount of \$18,750.

Conclusion

[31] In the circumstances, I assess the applicant's entitlement to compensation as follows:

- (a) Item 2 – Bruising/laceration etc. (severe) 3% - \$2,250
- (b) Item 8 – Facial fracture (severe) 20% - \$15,000
- (c) Item 9 – Fractured skull/head injury (no brain damage) 5% - \$3,750
- (d) Item 26 – Gun shot/stab wound (severe) 20% - \$15,000
- (e) Item 27 – Facial disfigurement 5% - \$3,750
- (f) Item 32 – Mental or nervous shock (severe) 25% - \$18,750

ORDER

I therefore order that the respondent pay the applicant by way of compensation pursuant to the *Criminal Offence Victims Act 1995 (Qld)*, the sum of \$58,500.