SUPREME COURT OF QUEENSLAND

CITATION:	*Ryan v Brazier* [2011] QCA 107
PARTIES:	**WADE MICHAEL RYAN** (applicant) **v** **JAY BRAZIER** (respondent)
FILE NO/S:	Appeal No 12314 of 2010 DC No 117 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	27 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2011
JUDGES:	Muir JA, Margaret Wilson AJA and Atkinson J Separate reasons for judgment of each member of the Court, Muir JA and Margaret Wilson AJA concurring as to the orders made, Atkinson J dissenting in part
ORDERS:	**1. The application for leave to appeal be granted.** **2. The appeal be allowed to the extent set out in sub-paragraph (3) hereof.** **3. Paragraph 2 of the order made on 15 October 2010 in the proceedings be varied by deleting therefrom "and the Respondent Wade Ryan, be jointly and separately liable to".** **4. The respondent pay the applicant's costs of and incidental to this appeal to be assessed on the standard basis.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – CRIMINAL INJURIES COMPENSATION – QUEENSLAND – where applicant was convicted of unlawfully assaulting the respondent – where Pember was convicted of unlawfully assaulting the respondent and doing him bodily harm – where respondent suffered mental and nervous shock – where primary judge found Pember and the applicant to be jointly and separately liable to pay compensation for the mental and nervous shock suffered by the respondent – where respondent submitted that liability arose because Pember and the applicant's conduct was part of a "melee" of offending – where the physical injuries suffered by the respondent were

caused by Pember – whether the applicant's conduct "directly and materially contributed" to the respondent's mental condition – whether the primary judge erred in so finding – whether leave to appeal should be granted

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY – HEARSAY – GENERALLY – where a psychologist's report containing the respondent's version of events was admitted into evidence at trial without objection – where the version of events contained in the psychologist's report was inconsistent with the respondent's direct account of events in his contemporaneous police statement and later affidavit – where the psychologist did not distinguish between the two offences and their impact on the respondent – whether the psychologist's report should have been admitted – whether the primary judge should have had regard to such evidence

Criminal Offence Victims Act 1995 (Qld), s 24, s 25, s 26 (repealed)

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, considered
Pollock v Wellington (1996) 15 WAR 1, considered
SAY v AZ; ex parte A-G (Qld) [2007] 2 Qd R 363; [2006] QCA 462, cited

COUNSEL: S Seth (*sol*) for the applicant
S A Lynch for the respondent

SOLICITORS: Seth Solicitors for the applicant
Clewett Lawyers for the respondent

[1] **MUIR JA: Introduction**
The applicant Wade Ryan applies for leave to appeal against an order of a judge of the District Court made on 15 October 2010 that:

> "The Respondent, Luke Mathew Pember and the Respondent, Wade Ryan, be jointly and separately liable to pay to the applicant, Jay Brazier, the amount of $5,250 by way of Criminal Compensation pursuant to Section 24 of the Criminal Offence Victims Act 1995."

[2] Before considering the grounds of the appeal and the arguments to be relied on to support those grounds should the application for leave to appeal succeed, it is desirable to state the relevant facts before the primary judge. Mr Pember was convicted on his plea of guilty of unlawfully assaulting the respondent doing him bodily harm on 5 May 2007. The applicant was convicted on the same day of having unlawfully assaulted the respondent and of having unlawfully assaulted Brett Henry and doing him bodily harm when in company.

The evidence before the primary judge

[3] The applicant and Pember were drinking at the Calamvale Hotel on 4 May 2007 when the applicant took exception to some conduct of the respondent, either real or imagined. The respondent was with a group of males. Pember and the applicant were with another group which included females. The respondent's group left the

hotel and went to a nearby McDonalds. The applicant approached a member of the respondent's group, Henry, and asked about the whereabouts of the respondent. Henry told him that the respondent had gone home. One of the applicant's friends then came into McDonalds and informed the applicant that the respondent was outside. The applicant and a group of his friends confronted the respondent who described what then happened in an affidavit affirmed by him on 20 July 2010.

> "15. I was sitting outside when I noticed [the applicant] coming towards me with about seven other males. They crowded around and started yelling and wanting to fight.
>
> 16. A friend of mine came out of McDonalds and tried to settle things down. I thought that he had succeeded until I was hit in the right eye. I did not see who hit me and I fell to the ground and do not recall any thing (sic) further after that.
>
> 17. The next thing that I recall was when I tried to stand up and I could see a fight going on a short distance from me. I recall a female security guard came over and sat me down.
>
> 18. I was feeling very disorientated…"

[4] In a statement given to a police officer on 5 May 2007, the respondent gave an account generally consistent with the one quoted above:

> "15. I got a Cheese burger and went outside and sat down in the car park to eat it. The next thing I saw was the bloke with the shaved head and grey top came walking through the car park towards me. It looked like he had even more mates with him. I recall there was about eight of them all up. I also remember the girl from the night club was there.
>
> 16. They were all crowded around me and some of them were yelling out something like "Come on let's go." This to me meant that they wanted to fight me. One of them I think it was the one with the olive skin said something like "Come on mate just one on one we won't step in we promise. Then they all started laughing. I believed at that time that I was going to get a hiding by more than one of them.
>
> 17. Then I recall that Joe had come out of McDonalds and he was trying to settle things down. I thought that he had settled things down and that it was all over.
>
> 18. I was talking to the bloke with the shaved head and I then remember someone in the crowd hitting me in the right eye. I didn't see who it was. I went down and I don't recall anything after that.
>
> 19. The next thing I remember is I tried to stand up and I could see a fight going a short distance from me. I then stumbled backwards and I think a female security guard named Liz grabbed me and sat me down.
>
> 20. I was groggy and I had a splitting headache. I could feel a great deal of pressure in my right eye socket and my nose was bleeding."

[5] The applicant's solicitor told the primary judge that after Pember had struck the respondent "what my client has done is he's come in with half a kick which was fended off by his legs."

Defence counsel's submissions at the sentencing hearing

[6] In the sentencing hearing before Forde DCJ on 1 October 2008, the applicant's counsel stated the following facts which were not contradicted by the prosecution. The applicant, with his group of about four males and two females, confronted the respondent in the McDonalds' carpark. The confrontation was recorded on a security camera. The applicant can be seen pointing and arguing with the respondent who was standing with his three male companions. Two male security officers were standing between the two groups. Henry, the respondent's friend, said at the committal hearing that by this time the applicant had seemed to have lost his bluster.

[7] Pember then delivered what was described by the primary judge as a "king-hit" to the side of the respondent's head. Henry went to assist by moving towards Pember who, together with three or four males in his group, chased after Henry who fell or was knocked to the ground and was there punched and kicked. The applicant walked back over to the respondent, who was in a seated position trying to get back on to his feet, and threw a punch at him which failed to connect. The applicant was then seized by a security guard.

[8] The prosecutor had earlier given a different interpretation of the CCTV footage. She informed the sentencing judge:

> "Ryan can be seen in relation to the common assault coming from the group with Henry on the ground and approaching Brazier as Brazier tries to sit up. Again it's unclear whether he connects or whether Brazier moves back as he then kicks his leg out in a blocking motion."

[9] When informing the sentencing judge of the content of a statement the applicant had given to police the prosecutor said:

> "He watched the surveillance footage in the interview and said he didn't hit Brazier and thought that Brazier had jumped back as he went towards him."

The sentencing remarks

[10] In his sentencing remarks, Forde DCJ said:

> "Your counsel put a version of events about your role in this case and referred to a comment by the witness at the committal that you had lost your bluster by the time your co-accused had king-hit [the respondent], however you persisted thereafter and were part of a gang which attacked Mr Henry. You were throwing punches although it is said that none proved to have connected. The fact is you were part of a group that resulted in him suffering a fractured jaw."

Nothing was said about the applicant's common assault on the respondent. It is implicit in this that the applicant was sentenced on the basis that he did not actually strike the respondent or, if he did, the respondent was not injured in any way. If the sentencing judge had intended to sentence on any other basis, he would have been obliged to make a determination as to the true state of the facts and to have informed the parties that there was a factual issue which he proposed to resolve.

The findings of the primary judge

[11] The primary judge referred to a finding of Forde DCJ that the applicant was "part of a group that were looking for trouble". Her Honour referred to a report of Rachelle

Hampson, a psychologist, dated 10 April 2010 and implicitly accepted Ms Hampson's opinion that the respondent had experienced "a degree of mental and nervous shock as a result of [the] attack on him", which shock lay "within the minor range". The primary judge then found:

> "[16] The applicant is entitled to compensation assessed in accordance with the Compensation Table which is Schedule 1 to the Act as follows:-
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> | | |
> |---|---|
> | Item 1 Bruising around his left eye (minor) 2% | $1,500. |
> | Item 7 Facial fracture (moderate) 17%-20% | $15,000. |
> | Item 31 Mental or nervous shock (minor) 7% | $5,250. |
> | Total | $21,750." |

There was no challenge to this finding.

[12] The primary judge's reasons for finding the applicant partly responsible for the mental or nervous shock suffered by the respondent were:

> "[18] The major injury suffered by the applicant was that incurred as a result of the blow delivered by Pember. Ryan was not dealt with as a party to the offence committed by Pember. I have not been provided with a transcript of the submissions made at sentence. But on the material before me there is no evidence of any physical injury suffered by the applicant which can be directly attributable to Ryan. However, given the comment made by the sentencing judge that Ryan was "part of a group that was looking for trouble", it is not unreasonable to hold that he made a "direct and material" contribution to the mental and nervous shock suffered by the applicant because of the offences. Ryan's involvement was more than simply being present during the incident. He took an active part (both verbally and physically) in the incident.
>
> [19] In the circumstances of this case, whilst it was the respondent, Pember, who delivered the blow to the applicant it seems clear from the remarks made by the sentencing judge that both respondents approached the applicant with the intent of doing him some violence, and in the circumstances, the respondents should be jointly and separately liable for the compensation for the mental and nervous shock suffered by the applicant. It is not possible, and neither would it be reasonable to attempt to apportion the mental and nervous shock suffered by the applicant between the two respondents. Accordingly, I order that the respondent Pember pay to the applicant the sum of $16,500 and the respondents Pember and Ryan be jointly and separately liable to pay the applicant the sum of $5250 by way of criminal compensation."

The evidence of Ms Hampson

[13] Ms Hampson's report noted that she had had an extended interview with the respondent on 5 February 2010. The report contained the following account of the

subject incident, presumably recording what Ms Hampson had been told by the respondent:

> "8. Mr Brazier then went into McDonalds and ordered a burger. He came outside to his friends to eat his food. Mr Ryan again approached him with a group of males. He said there were now more men in this group numbering approximately eight. He remembers a male at the front of the group who he now knows to be Mr Pember. Mr Brazier remembers saying to them with his hands in the air in an expression of confusion and frustration, 'what's the go?'
>
> 9. Mr Brazier had been seated and the group of men surrounded him and then he stood up. Mr Ryan pushed him. Mr Pember then hit him from the other direction on the left side of his face. Mr Brazier fell to the ground and was kicked and punched. He said, "by what seemed like all of them". He got to his feet but was hit and knocked to the ground again. By this stage his friend Rhett intervened attempting to help Mr Brazier but this group then also assaulted him. Mr Brazier remembers strangers breaking the fight up.
>
> 10. He remembers McDonalds security staff being there but not directly intervening.
>
> …
> 11. Mr Brazier's verbal report of the incident was consistent with his written statement to police."

[14] What Ms Hampson recorded was not in fact consistent with the respondent's written statement to police. In the latter, and in his affidavit, he does not allege any physical contact with or threat by the applicant before being punched in the head. Nor does he say he got up and was knocked down again or allege any other attacks on him at any other time by the applicant, Pember or any other member of their group. The account given to Ms Hampson is also inconsistent with the earlier version of events in that the former omits the statement that, in effect, the respondent was rendered unconscious by an unexpected blow and had only a vague recollection thereafter of seeing persons fighting some distance away. Additionally, Miss Hampson's account fails to mention the waning of the tensions between the two groups by the time the respondent was punched or any temporary loss of consciousness on his part.

[15] In the latter part of her report, Ms Hampson refers from time to time to "this assault" or "the assault".[1] The heading above paragraphs 25 to 32 inclusive reads "Impact of Mr Ryan and Mr Pember's assault on Mr Brazier." It seems that Ms Hampson treated "the assault" or "this assault" as the whole of the incident in which the respondent was struck by Pember and allegedly struck, or was struck at by, others including the applicant.

[16] In diagnosing "mental or nervous shock" and in the tests employed by her for the purposes of making her diagnosis, Ms Hampson made no apparent attempt to determine the cause of that condition. It does not appear from the evidence that she considered whether the cause was the violent blow struck by Pember and the significant physical injury which resulted from it or whether there were other contributing factors, such as the group confrontation and fear of being attacked or

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1 Paragraphs [4], [16], [18], [19], [22], [23], [27], [28], [32], [37], [39] and [43] therein.

injured. Her approach, in effect, appeared to be that: certain things happened to the respondent; he then experienced nervous shock; the nervous shock was therefore caused by all of those things.

[17] Ms Hampson's conclusions in respect of the nervous shock sustained by the respondent were as follows:

> "47. It is therefore my conclusion that [the respondent] has experienced a degree of mental and nervous shock as a result of this attack on him. I am of the view that this impact is in the minor range (approximately 7%) (Item 33 in Schedule 1 of *Criminal Offence Victims Act* - 1995). I conclude this on the basis that [the respondent];
>
> • experienced an acute traumatic event comparatively rated as "severe" (Axis IV),
>
> • experienced a mild to moderate level of subjective distress that has mainly dissipated in the last two years.
>
> • had a "mild to moderate" level of difficulty in his general functioning initially after the assault (Axis V - G.A.F.)
>
> • some of his symptoms are still present 2 years after the attack."

The proceedings at first instance

[18] At first instance, the parties were represented by their respective solicitors. A transcript of the proceedings before Forde DCJ was not available, but the parties intimated that they were ready to proceed without it. It was submitted on behalf of the applicant, by reference to the sentencing remarks, that the physical injury to the respondent had been inflicted by Pember and not the applicant, and that, consequently, it could not be shown that any conduct on the part of the applicant "directly and materially contributed to the injury" alleged by the respondent.

Relevant statutory provisions

[19] The relevant provisions of the *Criminal Offence Victims Act* 1995 (Qld)[2] ("the Act") are set out below:

> "**24 Court may make an order compensating someone injured by personal offence**
>
> (1) This section applies if someone (the *convicted person*)—
>
> (a) is convicted on indictment of a personal offence
>
> …
>
> (2) The person against whom the personal offence is committed may apply to the court before which the person is convicted for an order that the convicted person pay compensation to the applicant for the injury suffered by the applicant because of the offence.
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> …
>
> **25 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.

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[2] Repealed with effect from 1 December 2009 by *Victims of Crime Assistance Act* 2009 (Qld).

…

(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.

…

26 When single or multiple compensation orders may be made

(1) The purpose of this section is to ensure that, for applications, harm that substantially should be treated as a single state of injury is treated as a single injury, even though it may consist of more than 1 injury or be caused by more than 1 incident.

(2) The objective is to ensure that the way in which incidents of personal offences happen or personal offences are prosecuted does not cause—

(a) inequity of treatment between applicants; or

(b) an unjustifiable multiplicity of applications to the State under division 3 about substantially the same harm.

(3) Subject to subsections (7) and (8), only 1 compensation order may be made in favour of an applicant because of—

(a) injury suffered from a substantially single incident, whether consisting of 1 or more than 1 personal offence; or

(b) a substantially single state of injury suffered from a series of incidents of personal offences.

(4) In deciding whether an applicant has suffered a substantially single state of injury, the court may have regard to the following—

(a) the applicant's injuries;

(b) the time over which the injuries were caused;

(c) the similarity of, or connection between, the injuries;

(d) the similarity of, or connection between, the events that caused the injury;

(e) anything else that is relevant.

(5) A single compensation order may be made against more than 1 convicted person.

(6) If a single compensation order is made against more than 1 convicted person, the order may provide for—

(a) separate liability of a convicted person scaled according to the person's direct and material contribution to the injury; or

(b) joint liability of more than 1 convicted person for an amount payable under the order; or

(c) both the separate liability mentioned in paragraph (a) for an amount and joint liability for the amount.

> (7) Without limiting subsection (5), if each of more than 1 convicted person directly and materially contributed to injury mentioned in subsection (3)(a) and (b), a court may make a compensation order against each of more than 1 of the convicted persons.
>
> (8) If compensation orders are made against more than 1 convicted person under subsection (7)—
>
> (a) the total amount payable under all the orders must not be more than the scheme maximum; and
>
> (b) the orders—
>
> (i) must provide for separate liability for each of the convicted persons for an amount scaled according to the convicted person's contribution to the injury; and
>
> (ii) may also provide for joint liability of more than 1 convicted person for an amount for which a convicted person is separately liable."

The applicant's contentions

[20] The applicant's contentions may be summarised as follows. Compensation can be awarded only if the Court is satisfied that s 24 of the Act applies. Before s 24 can apply, a causal link must be established between the claimant's injury and the offence committed by the offender. For an injury to be compensable, "it is sufficient to show that the offending behaviour materially contributed to it".[3]

[21] There was no causal link between the common assault on the respondent, of which the applicant was convicted, and the mental or nervous shock suffered by the respondent. The only physical injury sustained by the respondent resulted from the blow struck by Pember. The applicant was not Pember's co-accused and there is no evidence that the applicant's involvement directly or materially contributed to the respondent's mental or nervous shock.

[22] Additionally, the applicant cannot be said to have participated in the assault which "directly and materially contributed to the respondent's injury", hence the respondent cannot be jointly and severally liable.[4] Alternatively, if it is found that the applicant's conduct "directly and materially contributed" to the respondent's injuries, an apportionment should be effected pursuant to s 25(7) of the Act.

Consideration

[23] The application for compensation was for an order that "[t]he [applicant] pay the [respondent] such sum by way of compensation as may be determined by [the Court] under section 24 of the Criminal Offence Victims Act for injuries sustained as a result of offences which led to the conviction of [the applicant] on 1 October upon Indictment for the offences of unlawful assault and assault occasioning bodily harm whilst in company on or about 23 April 2007."

[24] The primary judge held, inferentially, by reference to Forde DCJ's observations in his sentencing remarks, that the applicant was "part of a group that was looking for trouble", and that the applicant had "made a 'direct and material' contribution to the

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3 *SAY v AZ; ex parte A-G (Qld)* [2006] QCA 462 at [19].

4 See *Criminal Offence Victims Act* (Qld) 1995, s 26(5) and (6).

mental and nervous shock suffered by the [respondent] because of the offences [ie, the applicant's and Pember's separate assaults]". Her Honour then further addressed the issue of how the applicant's conduct bore on the respondent's injury stating:

> "[The applicant's] involvement was more than simply being present during the incident. He took an active part (both verbally and physically) in the incident."

[25] The primary judge also deduced from the sentencing remarks that the applicant and Pember approached the respondent "with the intent of doing him some violence" and concluded that "in the circumstances, [the applicant and Pember] should be jointly and separately liable for the compensation for the mental and nervous shock suffered by the [respondent]."

[26] The respondent's sworn evidence on the compensation application did not mention fear or concern about a mob attack and nor did his account to Ms Hampson. The respondent swore that he thought that a friend of his had succeeded in settling "things down" until he was felled by a blow which he did not see coming. The next thing he recalled was trying to stand up, seeing a fight going on a short distance from him and a security guard coming to his assistance. That evidence accords with the respondent's contemporaneous statement to police. The evidence, apart from the contents of the report, was to the effect that the respondent was not aware of the blow aimed at him by the applicant or that any other member of the applicant's group, apart from Pember, had attacked him. The sentencing remarks also offer little support for the conclusion that the applicant was in some way causative of the attack on the respondent by Pember. In those remarks, reference was made to evidence at the committal that the applicant had lost his bluster by the time of Pember's blow.

[27] Ms Hampson, as I noted earlier, did not attempt to determine the cause or causes of the respondent's nervous shock. She merely attributed the respondent's symptoms to "the assault", which appears to be a reference to the incident involving the respondent, Pember, the applicant, and other members of the two groups as described by the respondent to Ms Hampson. That account, as explained earlier, was inconsistent with the respondent's statement to police and his affidavit evidence.

[28] The primary judge did not appear to act directly on the version of events set out in Ms Hampson's report, which was not referred to in her reasons. None of the contents of the report was objected to and the hearsay account of what happened in the course of the subject incident is thus in evidence. In my view, however, the hearsay account should be rejected to the extent that it is inconsistent with the contemporaneous police statement and the respondent's sworn evidence. To the extent of the inconsistencies, it is apparent that the version provided to Ms Hampson was not derived from the respondent's own recollection, the limitations of which were made plain in his statement and affidavit.

[29] Both the affidavit and the statement contain the respondent's direct account of events and the statement, because of its contemporaneity, is likely to be more accurate than later accounts. The affidavit, which contains the respondent's sworn evidence, is consistent with the statement.

[30] The version of the facts relied on by Ms Hampson perhaps explains why she saw no need to consider separately whether the applicant's conduct in relation to his assault

on the respondent had played a role in causing the respondent to suffer nervous shock. This, I think, reveals two evidentiary deficiencies in the report. The first, and perhaps the most obvious problem, is that its conclusions are likely to have been affected by an erroneous appreciation of the facts. The other deficiency is that it does not expose the author's reasons for the critical conclusion that the respondent suffered nervous shock "as a result of this attack on him".

[31] The failure to expose the reasons makes it impossible to determine their validity. If Ms Hampson simply assumed that the applicant's blow, which was not shown to have connected and which did not appear to have registered with the respondent, made a material contribution to the onset of the respondent's nervous shock, any such assumption was unjustifiable. In light of Pember's blow and its severe consequences, it was far from self evident that the conduct constituting the applicant's offence played a material role in the development of the respondent's mental condition.

[32] The hearsay statements concerning the subject incident in the report were inadmissible but, as the report went into evidence without objection, problems of inadmissibility were overcome. I have already discussed the effect of the hearsay evidence. As for the expert opinion evidence, the court remained under an obligation to determine the worth, if any, of the opinions expressed in the report,[5] despite the report's admission into evidence. In *Makita (Australia) Pty Ltd v Sprowles*, Heydon JA[6] referred with approval to the observation of Anderson J in *Pollock v Wellington*[7] that:

> "A court ought not to act on an opinion, the basis for which is not explained by the witness expressing it … [u]nless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to its reliability, the opinion can carry no weight."

[33] The primary judge's reasons accepted Ms Hampson's opinions without criticism or qualification. This observation implies no criticism of the primary judge. The report was not challenged in any way by the applicant's legal representative and its contents were not the subject of any analysis in the course of argument. However, as has just been explained, the report, which was one of the foundations of the primary judge's conclusions, had no probative value in critical respects.

[34] In my respectful opinion, the primary judge's reasoning on causation, in paragraphs 18 and 19 of her reasons, takes an overly generalised approach to the facts. The sentencing remarks on which her Honour relies were not intended to provide findings of fact sufficient for the purposes of a compensation hearing. The observation about the applicant being part of a group that was looking for trouble was correct, in a broad sense, but it did not deal with the change in the applicant's conduct (the revival of his martial spirit occurred after Henry moved to assist the respondent), or the evidence that the respondent was unaware of any attack on him after Pember's blow was struck.

[35] Counsel for the respondent, who argued his client's case fully and effectively, submitted that the respondent had "suffered a substantially single state of injury" to

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5 See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 733, 734.

6 (2001) 52 NSWLR 705 at 741.

7 (1996) 15 WAR 1 at 3-4.

which both the applicant and Pember had materially contributed. He submitted that it was contrary to the spirit of the legislation and to the way in which it had been construed in District Court decisions to attempt to break up a "melee" of the nature of the subject incident into its component parts. Once this approach was taken, he argued, it could be seen that the applicant naturally contributed to the respondent's nervous impairment.

[36] Obviously, each claim for compensation under the Act must be decided by reference to its particular facts. In this case, it is quite apparent that Pember's blow and its physical consequences may, in itself, have given rise to a condition of the nature of that claimed by the respondent. It is not obvious to a lay person, or perhaps even to a psychiatrist or psychologist, that the applicant's offending conduct would probably have caused or materially contributed to the relevant injury. Any determination in this regard required the evaluation of appropriate expert evidence. The expert evidence in this case had no probative value in critical respects. In failing to have regard to relevant factual considerations, and in giving the report a probative value which it could not bear, the primary judge erred.

[37] In my respectful opinion, the evidence, such as it was, did not establish that the respondent suffered nervous shock because of the applicant's assault on him, and the primary judge erred in finding to the contrary.

[38] There is another difficulty with the decision under appeal. Although the evidence discloses that the applicant was the initiator of the animosity towards the respondent displayed at the hotel, and subsequently in the McDonalds' carpark by the respondent's group, I am unable to accept that the finding of joint equal liability was justified, even if it had been open to the primary judge to order the applicant to pay compensation for the respondent's nervous shock. On the respondent's own version of the facts, in his statement and affidavit, the blow by Pember was unexpected. It was struck at a time when the applicant had ceased, temporarily at least, to behave aggressively and the evidence does not establish that the applicant had reason to believe or ought reasonably to have expected that Pember would punch the respondent in the head in the way he did.

[39] Although it was the applicant who, in a loose sense, set events in train, the injuries inflicted by Pember's blow and their consequences were plainly the most substantial causes of both the nervous shock and its severity. The respondent had not lived a sheltered life. He worked as a kitchen hand and cleaner after leaving university and Ms Hampson's report does not suggest that the respondent had any relevant pre-existing vulnerability or pre-disposition. There is no suggestion in the evidence of the respondent's experiencing fear, terror or any other emotion prior to Pember's assault on him. Nor is there any evidence of when the respondent became aware that the applicant had tried to strike him as he attempted to stand up, or whether conduct of the applicant, or in which the applicant participated, had any bearing on the respondent's mental state. If the applicant's and Pember's contributions to the subject injury were to be apportioned, equal joint and several liability, in my view, was hardly appropriate.

Conclusion

[40] Leave to appeal should be granted. Errors in the reasoning at first instance have been exposed and it would be unjust to the applicant if the decision were to stand. Counsel for the respondent submitted that if his submissions were not accepted the matter should be remitted to the primary judge for determination on the proper facts.

That course, which would necessitate a further determination on different facts, would offend the principle favouring finality in litigation and would be undesirable having regard to the amount in issue in the proceedings.

[41] In my view, this would be a proper case in which to grant the respondent an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) should the respondent make application in that regard.[8]

Order

[42] For the above reasons, I would order that:

(1) The application for leave to appeal be granted;

(2) The appeal be allowed to the extent set out in sub-paragraph (3) hereof;

(3) Paragraph 2 of the order made on 15 October 2010 in the proceedings be varied by deleting therefrom "and the Respondent Wade Ryan, be jointly and separately liable to";

(4) The respondent pay the applicant's costs of and incidental to this appeal to be assessed on the standard basis.

[43] **MARGARET WILSON AJA**: I agree with the orders proposed by Muir JA, for the reasons given by his Honour. Further, I agree with his Honour that this would be a proper case in which to grant the respondent an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) should the respondent make application in that regard.

[44] **ATKINSON J:** I have had the advantage of reading the judgment of Muir JA. I agree with his Honour's reasons and proposed orders apart from one matter.

[45] I would order that the matter should be remitted to the District Court for determination on the proper facts, being the facts on which the applicant was sentenced, together with evidence of a psychologist based on those facts. Although the amount in issue is objectively speaking, relatively small, it nevertheless probably represents a significant amount to the parties involved. Furthermore the award of compensation to a victim of crime represents more than money's worth. I would therefore add a further order:

(5) The matter be remitted to the District Court for determination.

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[8] *MBA v AAE* [2008] QCA 187; *MAV v ABA* [2007] QCA 380; *R v Jones, ex parte Zaicov* [2002] 2 Qd R 303; [2001] QCA 442.