[1996] QCA 328

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 266 of 1995

Brisbane

Before Macrossan CJ
Fitzgerald P
Davies JA

[W v. M]

BETWEEN:

W

(Applicant) Appellant

AND:

M

(Defendant) Respondent

REASONS FOR JUDGMENT - THE CHIEF JUSTICE

Judgment delivered 06/09/1996.

Compensation for injury suffered by the appellant was assessed by the judge below at $20,000. The assessment was made on the basis that the statutory maximum referred to in s.663AA(1) of the *Criminal Code* was applicable to her injury. That provision was part of a statutory scheme of compensation for criminal injury contained in chapter 65A of the *Code* in force at times relevant for the appellant's claim. New provisions have been introduced (see *Criminal_Offence Victims Act* 1995 but transitional provisions (see s.46) have preserved the application in the appellant's case of the Code.

At the proceedings below there was considerable evidence that the appellant had suffered a severe psychiatric illness as a result of her father's continuing sexual mistreatment of her when she was a young girl, this behaviour being concentrated in the early years of the 1980s decade. Although there were references to the father's having committed numerous offences upon the appellant during a continuing course of conduct, only three offences were represented by convictions. There were two offences of incest and one of indecent dealing all taking place on dates unknown within periods extending from 13 December 1979 to 31 December 1982.

The evidence connected the appellant's psychiatric illness with the whole course of her father's conduct and not just the three offences for which he was convicted, but no question presently arises whether the compensation assessed was, on that account, in any way excessive as "compensation for injury suffered ... by reason of the offence or offences of which the offender (was) convicted", this being relevant wording appearing in s.663B(1). The question for decision on this appeal is whether the judge wrongly found the quantum of the appellant's claim to be restricted by the limitation found in s.663AA(1) which was in these terms:

> "The prescribed amount for the purposes of this Chapter in the case of mental shock or nervous shock is $20,000."

The matter has to be determined by giving consideration to these provisions in Chapter 65A:

> "663A. In this Chapter -
>
> `injury' means bodily harm and includes pregnancy, mental shock and nervous shock; ...
>
> `prescribed amount' means -
>
> (a) (reference is here made to an instance which is not relevant for present purposes.)
>
> (b) in all other cases save those that are the subject of particular reference in section 663AA, the amount for the time being specified in ... (the reference is then to a provision of the *Workers' Compensation Act 1916* which, it is accepted, specified a sum of $72,680)."

Then followed s.663AA of which subsection (1) has already been quoted and s.663B(1) which provided for the possibility of Court ordered compensation in terms from which a somewhat fuller quotation can be given:

> "Where a person is convicted on indictment of any indictable offence relating to the person of any person ... the Court ... may, in addition to any other sentence or order it may make, order the person to pay to the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by the person by reason of the offence or offences of which the offender is convicted."

The language of the definition of "injury" may not at first glance appear apt to achieve universally broad coverage of all physical and mental injuries and illnesses particularly perhaps because of the use of the qualifier "bodily" applied to harm, and the use of the word "shock" in the context of mental disturbance. Further consideration, however, is persuasive that the use of the phrases "mental shock" and "nervous shock" (the separate issue of pregnancy can be put to one side) was not meant to introduce a narrowing component but simply reflected a use of phrases which have had a long currency in the law. Perhaps those phrases may be close to outliving their usefulness, but it can be accepted that in the present case they were intended to refer to a wide and well-understood category. As Wootten J. observed in *R v. Fraser* [1975] 2 N.S.W.L.R. 521 at 525-526 the terms "mental shock and nervous shock" are not words of narrow technical meaning and have long been used interchangeably in the law of tort to include any mental or psychological disturbance. He concluded that the phrase "bodily harm" in a New South Wales statute, which in this respect was similarly phrased, would have been sufficient to include mental and nervous shock, even if those components had not been specifically included in addition. Wootten J's further suggestion that the words in the definition of "injury" namely, "mental shock and nervous shock" were intended to embrace psychiatric illness has a good deal to recommend it.

It would be a strange objective if the statute were intended to cover and provide for compensation for mental shock and nervous shock in some narrow and specialised category of mental consequence following a precipitating event and yet exclude the wider category of

psychiatric illnesses. The observations of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 at 418 show the broad and, over time, broadening sense which the law attributes to the expression, "nervous shock". However, assuming a willingness to give a wide interpretation to "mental shock and nervous shock" as a phrase considered in the abstract, leaves for close attention the possibility of some modification of its meaning when used in a context where there are references also to "bodily harm" and "injury".

There are strong reasons for thinking that the phrase "bodily harm" should receive a wide interpretation and not be restricted to "harm to the skin, flesh and bones of the victim", a narrow meaning which the English Court of Appeal rejected in *R v. Chan-Fook* [1994] 1 W.L.R. 689 at 695. In that case it was suggested that a person's body "includes all parts of his body, including his organs, his nervous system and his brain", so that "bodily injury" may "include injury to any of those parts of his body responsible for his mental and other faculties", with the consequence that "bodily harm" is capable of including psychiatric injury although not mere emotions such as fear or distress. The validity of those observations should be recognised in attributing appropriate meaning to "bodily harm" in the definition in s.663A. Of course, the fact that the phrase "mental shock and nervous shock" occurs as an element included in the concept of "injury" and perhaps in "bodily harm" and also the customary use of the phrase in legal contexts, shows that it is meant to refer to an adverse mental condition which is induced and not just to the external agency which operates to induce it. Another thing which is clear, is that "injury" will not include damage to property.

A broad meaning should be attributed to "mental shock and nervous shock" in s.663A and that meaning should be carried over without modification to the same phrase which appears in s.663AA(1). The phrase should be construed as including the full range of psychiatric illnesses whether or not they would, in the absence of the phrase in the definition of "injury", have been taken to be included within "bodily harm". The point is that they have been expressly included as a particular category of "bodily harm" and there is no sufficient reason for construing the category in a way which excludes some or all psychiatric illnesses leaving

them to be included only under "bodily harm". The effect of the specific reference is to confirm that mental illnesses are included in the definition of "injury" and while also included in "bodily harm" amount to a particular category of it.

The result is that the prescribed amount and limit of compensation will be $20,000 for psychiatric illnesses which otherwise qualify within the category of "injury suffered ... by reason of the offence or offences for which the offender is convicted" in the words of s.663B(1). There would be no justification, in my view, for adopting the interpretation that a psychiatric illness can be regarded as falling wholly or partly outside the scope of "mental shock and nervous shock" but yet within the meaning of "bodily harm" so that the s.663AA(1) limitation does not apply to it. That essentially was the appellant's argument and it should be rejected.

The appeal should be dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 266 of 1995

Brisbane

Before Macrossan C.J.
Fitzgerald P.
Davies J.A.

BETWEEN:

W

(Applicant) Appellant

AND:

M

(Respondent) Respondent

REASONS FOR JUDGMENT - FITZGERALD P.

The circumstances giving rise to this appeal and the material statutory provisions[1] are substantially set out in the reasons for judgment of Davies J.A. However, I propose to expand upon the appellant's condition "by reason of" the three offences of which the respondent has been convicted and the extended period of sexual abuse, including at least 20 offences of incest, which the appellant suffered from the respondent.

Shortly stated, the appellant suffers from a severe psychiatric illness "by reason of" the sexual abuse to which she was subjected by the respondent. At least the major symptoms of that illness did not emerge until after the abuse had ceased and the appellant had married, as she did in 1990.

In mid-1992 the appellant consulted a general practitioner and, on her second visit, she presented a range of somatic symptoms, including fatigue, breathlessness and hyperaesthesia (or excessive physical sensibility) on the left forearm. Later that year, she experienced a flare-up of acne. Early in 1993, because of her problems in coping, the appellant was referred to a psychiatrist, whose opinion is referred to below. Towards the end of 1993, the appellant's depression was such that she commenced to harm herself, had constant thoughts of self-harm, and required hospitalisation. On 18 January 1994, the appellant, while in Belmont Hospital, harmed herself and her wound required suturing. A number of similar incidents later occurred in the Belmont Hospital and, on six occasions between 23 December 1993 and 20 December 1994, the appellant required attention for self-induced lacerations at Wynnum Hospital. On a number of other occasions, her general practitioner repaired lacerations. Meanwhile, on 21 February 1994, the appellant took an overdose of amitriptyline, and was admitted to the Princess Alexandra Hospital. She subsequently gave birth to her second child and thereafter has been in hospital on a number of further occasions. Altogether there have been about 20 occasions of self-mutilation and a number of drug overdoses, including two which her psychiatrist considered "significant".

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[1] Chapter 65A of the Criminal Code has since been replaced by the *Criminal Offence Victims Act* 1995.

According to her psychiatrist, the appellant, lacks self-worth ("... the most destructive of the effects of childhood abuse"), which disturbs all inter-personal relationships. Her drug overdoses and self-inflicted cuts to her limbs are related to her lack of self-worth and depression and other intrusive events. She suffers recurrent nightmares and flashbacks of her abuse experience, which increase in intensity with stress, and is rarely free from mental preoccupation with her abuse. Further, she continues to fear her father as she did in childhood and adolescence, fears for the safety of her family and spends most of her time locked in her home, is constantly on guard against possible threat and is vulnerable to anxiety and at times panic in public and/or crowded places. She experiences frequent dissociative episodes which are experienced by her by living life in a daze, and, although she looks and acts unremarkably, her ability to interact with others and experience the emotions associated with such interactions is severely reduced. Under conditions of high stress, dissociation also results in her adoption of withdrawal behaviours typical of earlier life stages, such as curling up in bed and hiding. These episodes are distressing for the appellant and reduce her quality of life severely, by limiting her inter-personal recreational, vocational and family experiences. She feels very inadequate as a wife and mother and has little concept of her own psychological needs; her relationships, even positive ones, are profoundly unbalanced by her view of herself as undeserving of care. Suicidal and self-harming ideations are present for a large proportion of the time. Although she has stopped self-harming and has a little more balance in her life, she is on a substantial medication regime. She will continue to require treatment and medication, which is only partially helpful in alleviating her depression. Although it is likely that she will have increasing periods of stability where she will not require any psychiatric treatment and she will be able to return to the workforce in one to two years, it is also likely that she will require more intensive treatment, including possible hospitalisation, at times of crisis and/or stress.

Whether or not the appellant suffered physical pain or physical injury (in the limited sense) during the offences of which the respondent has been convicted, she has certainly suffered

physical pain and physical injury (in that limited sense) since that period; for example, by her self-mutilation and drug overdoses. However, that was not the real basis for the appellant's claim. Stripped to its essentials, her case is that her psychiatric illness is a "bodily injury which interferes with health or comfort" (Code, s. 1, definition of "bodily harm"), and is more than "mental shock and nervous shock" (Code, s. 663A); hence, it is argued for the appellant, she is not limited to the amount of compensation prescribed for mental shock and nervous shock, i.e., $20,000.00 (Code, s. 663AA(1)). Further, since her "bodily injury" is not one for which another provision is specific in the *Workers Compensation Act* 1990, she is entitled to the maximum amount specified, i.e., $72,680.00. It is important to record that it was not disputed that, if her appeal fails, the appellant is entitled to retain the compensation of $20,000.00 which she was awarded by the primary judge for "nervous shock and mental shock", with the implicit acceptance that the appellant's illness was "suffered by reason" of the offences of which the respondent was convicted, notwithstanding that those offences formed only part of a pattern of sexual abuse by the respondent which caused the appellant's psychiatric condition.

Although his Honour was careful to confine his decision to the facts of that case, the judgment of McPherson J. (as his Honour then was) in *R. v. Bridge and Madams; ex p Larkin* [1989] 1 Qd.R. 554 is against the appellant. It was there pointed out that s. 663B of the Code can "scarcely be considered a masterpiece of concise drafting", although his Honour thought its meaning "sufficiently clear" (p. 557). I find the provision more troublesome. In part, my difficulty stems from the notion that "shock" seems to be treated by the section as the ultimate consequence "suffered ... by reason of" an offence, whereas, as Brennan J. (as his Honour was) pointed out in *Jaensch v. Coffey* (1984) 155 C.L.R. 549, 566-567, shock caused by an act (whether criminal or tortious or lawful) can induce or cause the further consequence of psychiatric illness.[2] Indeed, it is not obvious to me, one way or the other, whether or not shock provides a necessary connection between an act and psychiatric illness which it causes.

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[2] See also *Spence v. Percy* [1992] 2 Qd.R. 299.

However, the appellant's present claim does not depend on medical science but on the legislative intent manifested by the material statutory provisions. Chapter 65A was inserted into the Code in 1968 (Act No. 44, s. 4), and its provisions, so far as presently relevant, reflect enactments elsewhere. The decision of Wootten J. in *R. v. Fraser* [1975] 2 N.S.W.L.R. 521 concerning s. 437 of the *Crimes Act*, 1900, (N.S.W.), provides a convenient starting point.

Fraser had raped his victim, who claimed compensation. She did "... not claim that she has any physical injury in the narrow sense of the term, but bases her claim on mental or nervous shock; in other words, on psychological injury" (p. 523); the assumption implicit in that passage was justified by the earlier decision of the New South Wales Court of Appeal in *R. v. Forsythe* [1972] 2 N.S.W.L.R. 951. At pp. 525-526, Wootten J. continued in *Fraser*:

> "Under s. 437(4) of the *Crimes Act* and s. 2 of the *Criminal Injuries Compensation Act*, injury 'means bodily harm and includes pregnancy, mental shock and nervous shock'. In my opinion, these words are intended to embrace all forms of personal injury, whether physical or psychological. The words 'bodily harm', even when accompanied by the adjective 'actual', are themselves understood to include any hurt or injury calculated to interfere with the health or comfort of the victim. They have been specifically held to include an injury to the victim's state of mind: *R. v. Miller* [[1954] 2 All E.R. 529], and they would, in my view, be adequate to include mental and nervous shock and pregnancy even without their express inclusion. The terms 'mental shock and nervous shock' are not words of narrow technical meaning; they have long been used interchangeably in the law of tort to include any mental or psychological disturbance: Cf. *Dulieu v. White & Sons* [[1901] 2 K.B. 669, at p. 672]. The express addition of the words in the definition of 'injury' was doubtless designed to ensure that the judicial hesitancy to take nervous and mental shock into account, which characterized the development of the law of tort, should not affect the administration of this section. 'Pregnancy' may have been expressly mentioned to anticipate any argument that, as a natural bodily process, it was not 'harm'. In short, it seems to me that under this section compensation for injury can be just as comprehensive as damages for personal injury in the law of torts: Cf. *Re Poore; Re Scully* [(1973) 6 S.A.S.R. 308]; *R. v. Allsop* [[1972] Q.W.N. 34]; contra *R. v. Turner* [[1972] Q.W.N. 46]. Regard may be had to the probabilities as to the future effects of injury: *R. v. Wright* [[1971] Qd.R. 153, at p. 157]. ..."

A few days later, judgment was delivered in *The Applicant v. Larkin, Withnell and Wilkinson* (1976) W.A.R. 199. There, the applicant, who had been assaulted and raped by a number of men, sought compensation under s. 4 of the *Criminal Injuries (Compensation) Act*, 1970, (W.A.).

Wickham J. said at p. 201:

> "In this instance the applicant suffered some, although not serious, bodily harm and her claim for compensation is based mainly on mental and nervous shock.
>
> The legislation is for the purpose of doing some measure of justice in a summary way to the victim of a crime without the formality of an action: see *R v Bowen* (1969) 90 WN (NSW) 82, per Reynolds J at 83; any order made is not punitive in character *R v Allsopp* [1972] QWN 34, per Hoare J at p 80, and is a form of compensation *sui generis R v Forsythe* [1972] 2 NSWLR 951, per Jacobs J at 953. At the same time this Court is of course confined by the limitations prescribed by the statute and I think that the term 'mental shock and nervous shock' is a compound phrase adopted from the law of tort and as used in such cases as *Owens v. Liverpool Corporation* [1939] 1 KB 394; [1938] 4 All ER 727, and *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1 at 27; [1957] 1 All ER 583 at 596, in which latter case Devlin J, as he then was, said when referring to a case of fright from an elephant: 'I am satisfied that the shock must have been considerable. I should like to award him a most substantial sum under this head but I am satisfied that I cannot do so except to the extremely limited extent that the shock resulted in physical or mental harm. I think that that is clearly the effect of the authorities. When the word shock is used in them it is not in the sense of a mental reaction but in a medical sense as the equivalent of nervous shock', and His Honour went on to refer to this as a form of ill health. I think that this is what is meant by the words in this statute and that fright, humiliation or anguish are therefore necessarily excluded, although that is not to say that such mental reactions might not be the cause of or otherwise aggravate a demonstrated physical condition or throw light on the possible intensity or duration of it: cf *Mt Isa Mines Ltd v Pusey* (1970) 45 ALJR 88, per Windeyer J at 92.
>
> Quite apart from any medical considerations it would indeed be surprising to the layman if the applicant in this case had not suffered serious mental and nervous shock in the legal sense and was likely in a greater or less degree to continue to do so for a long while, even bearing in mind that of mental trauma time and circumstance may be the great healer.
>
> It is clear enough that the applicant suffered mental and nervous shock in the legal sense. The next day she was described by a doctor as sobbing and upset. ..."

His Honour went on to describe the applicant's condition in terms which demonstrated psychological or psychiatric illness which is comparable to the appellant's condition, even if less severe.

In *Battista v. Cooper* (1976) 14 S.A.S.R. 225, the Full Court of South Australia answered a number of questions related to s. 4 of the *Criminal Injuries Compensation Act*, 1969, (S.A.). The applicants were the widow and children of a man killed, in the presence of his wife, in an armed hold-up. One question, answered in the affirmative, was whether "... emotional upset, with consequent ill effects, is injury for the purposes of s. 4 ...". At p. 227, Bray C.J., with whom Jacobs and King JJ. agreed, said:

> "'Injury' is defined in s. 3 of the Act as follows: "'injury' means physical or mental injury sustained by any person, and includes pregnancy, mental shock and nervous shock."
>
> I think the intention of the definition is to equate (with the possible exception of pregnancy) the sort of physical or mental injury for which compensation may be recovered under the Act with the sort of physical or mental injury for which damages may be recovered at common law. There is a familiar distinction between mere sorrow and grief which cause emotional distress and no more and something which causes in addition some sort of physical, mental or psychological trauma with consequential effect on physical or mental or psychological health. This distinction may ultimately, with the development of science, turn out to be an unreal one. It may be found that all emotional distress produces some effect on physical or mental health. For the present it is to be treated as a real distinction. As it was put by Lord Denning in *Hinz v. Berry* [[1970] 2 Q.B. 40, at p. 42]:
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> > 'In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.'
>
> Lord Pearson in the same case at p. 44 said with reference to the plaintiff in that case: 'There is a recognizable psychiatric illness.' See also *Benson v. Lee* [[1972] V.R. 879, at pp. 880-881].
>
> I would answer the third question by saying, 'Yes, if the emotional upset results in actual injury to physical or mental health.'. ..."

See also *Re Gage and Bird* (1978) 19 S.A.S.R. 239; *In re Gollan* (1979) 21 S.A.S.R. 79; *Delaney v. Celon* (1980) 24 S.A.S.R. 443; and *T. v. South Australia* (1992) 59 S.A.S.R. 278.

The same approach has been adopted in the Northern Territory in relation to ss. 2 and 3 of the

Criminal Injuries (Compensation) Ordinance, 1976, (N.T.), which included similar definitions to those found in the State enactments.

Decisions on the meaning of "bodily harm" and "health" (in the definition of "grievous bodily harm" - as well as "bodily harm") in the Codes of Western Australia and this State do not lessen the appellant's obstacles, and perhaps add to them: see, for example, *Scatchard v. R.* (1987) 27 A.Crim.R. 136, and *Tranby* [1992] 1 Qd.R. 432.

If the decisions referred to are to be followed, the appellant must fail. The considerations in favour of following those decisions, which indicate a consistent line of authority for more than 20 years, are strong. A number of State appellate courts have acted on the same basis, giving an apparently settled construction to similar statutory provisions; in the absence of sufficiently compelling reasons to the contrary, this Court should not depart from that construction: see, e.g., *Trans Pacific Investment Corporation Pty Ltd v. Rusty Rees Pty Ltd* (1995) 129 A.L.R. 326; *Thompson v. Hill* (C.A. 40314 and 40322 of 1995, N.S.W. Court of Appeal, unreported, 21 December 1995). On the other hand, it might be thought that the case against the appellant has, to some extent at least, been assumed rather than decided in the cases referred to, and her suffering is grossly undercompensated by the maximum award permissible for "mental shock and nervous shock".

I do not think that the appellant's claim can be resolved against her on the basis that the word "includes" is used in the definition of "injury" in s. 663A of the Code. "Includes" is a word of variable import;[3] if all or any of the matters which a statutory definition provides are to be

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[3] Various meanings have been attributed to the word "includes" according to the context in which the word is used: See D.C. Pearce and R.S. Geddes, *Statutory Interpretation of Australia*, 4th ed., Butterworths: Australia, 1996 at pp. 186-190 and J.B. Saunders *Words and Phrases Legally Defined*, 3rd ed., Butterworths: London, 1988 at pp. 411 & 412.
The following are additional references to texts in which variable meanings have been identified: J.S. James, *Stroud's Judicial Dictionary of Words and Phrases*, Vol. 3, 5th ed., Sweet & Maxwell Ltd: London, 1986 at p. 1263; A.I. MacAdam and T.M. Smith, *Statutes*, 3rd ed., Butterworths: Australia, 1993 at pp. 198-202; S. Magrath, *Australian Legal Words and Phrases*, Volume 2, Butterworths: Australia at p.198; J.D. Gardner, *The Encyclopaedia of Words and Phrases Legal Maxims Canada*, Volume 2, 4th ed., Carswell (Thomas Professional Publishing): Ontario, Canada at pp. 1-48 to 1-49 of the text and at pp. 2-47 to 2-48 of the cumulative text; *Words and Phrases*, Volume 20A, West Publishing Co.: United States of America at pp. 65-69 of the cumulative annual pocket parts and pp.144-157 of the permanent edition and to the cases cited in each of the above texts.

included would not otherwise be within the natural meaning of the word, expression or phrase defined, the use of "includes" obviously has an expansive effect, but, in my opinion, it does not follow from the use of the word "includes", even in association with one matter that would not otherwise be within the meaning of "injury" - here it is suggested that "pregnancy" is outside the ordinary meaning of "injury" - that all matters which are said to be included, e.g., "mental shock and nervous shock", would otherwise be outside the statutory meaning of "injury". In any event, whether or not that is so seems to me immaterial. The appellant's case is that her psychiatric illness is not adequately described as "nervous shock and mental shock"; it encompasses, but is more than "nervous shock and mental shock". The questions are whether that is so and, if so, whether the appellant's psychiatric illness is a "bodily injury which interferes with health or comfort". If any implication is to be drawn from the circumstance that such a bodily injury "includes" nervous shock and mental shock it is that a psychiatric illness which encompasses but is more than such "shock" is also a "bodily injury which interferes with health and comfort".

Modern authority clearly supports a conclusion that psychiatric illness is a bodily injury: see *R. v. Mwai* (1995) 3 N.Z.L.R. 149 and cases cited. See also *Deeble v. Nott* (1941) 65 C.L.R. 104, 113ff, per Williams J., with whom Rich A.C.J. agreed. The critical question is whether the appellant's psychiatric illness is "nervous shock" and/or "mental shock" in the sense in which those terms are used in s. 663A of the Code.

The cases to which reference was earlier made, especially *Fraser* and *Larkin*, drew on the law of tort for the meanings of "nervous shock" and "mental shock"; in *Fraser*, Wootten J. said at p. 525 that the two terms "... have long been used interchangeably in the law of tort ...", and none of the cases mentioned sought to distinguish between them. More recent authority indicates that they are "inaccurate and inappropriate" descriptions of psychiatric illness such as that suffered by the appellant: see *R. v. Chan-Fook* [1994] 1 W.L.R. 689, 696 and cases cited. Further, *Chan-Fook*, *Mwai* and cases cited demonstrate that such illness is a "bodily injury which interferes with health or comfort": see, for example, *Chan-Fook* at pp. 695-696 and *Mwai* at p. 155.

Were it not for *Fraser* and the cases to like effect, the appellant would be entitled to succeed.

The case against her is based on those decisions and the proposition, which has considerable force, that the terms "nervous shock" and "mental shock" should be construed in the sense in which they were understood in 1968 when Chapter 65A was inserted into the Code. The case for the appellant is that such considerations should not prevail to unjustly deprive her of the compensation to which she is entitled according to the correct construction of the material statutory provisions. Although the competing considerations are delicately balanced, I have concluded that the appellant is entitled to succeed. I would accordingly allow the appeal, substitute the sum of $72,680.00 for the amount awarded below, and order the respondent to pay the appellant's taxed costs, including any reserved costs, of and incidental to the proceeding and this appeal.

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Brisbane

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BETWEEN:

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(Defendant) Respondent

Macrossan C.J.
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Davies J.A.

Judgment delivered 06/09/1996

Separate reasons for judgment of each member of the Court; Macrossan C.J. and Davies J.A.

concurring as to the order; Fitzgerald P. dissenting.

APPEAL DISMISSED

CATCHWORDS: **CRIMINAL - Criminal Injuries Compensation - Ch. LXVA *Criminal Code* (Qld) - meaning of "injury" within s.663A *Criminal Code* (Qld) - meaning of "bodily harm" within s.1 *Criminal Code* (Qld) - meaning of "mental shock and nervous shock" within s.663A *Criminal Code* (Qld) - whether "mental or nervous shock" encompasses psychiatric injury.**

Counsel: Mr. P. Murphy for the appellant
No appearance by or on behalf of the respondent

Solicitors: Robertson O'Gorman for the appellant
No appearance by or on behalf of the respondent

Hearing Date: 7 May 1996

IN THE COURT OF APPEAL

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Davies J.A.

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BETWEEN:

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(Applicant) Appellant

AND:

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(Defendant) Respondent

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered the 6th day of September 1996

This is an appeal by leave granted on 7 May against an order of a District Court Judge that M pay to the applicant $20,000 compensation for injuries suffered by her by reason of an offence of which M was convicted on 6 March 1995. On that day M was convicted on his own plea of three offences, two of carnal knowledge of the appellant who was his daughter and one of indecent dealing with her when she was under 16 years of age. The order was made pursuant to Chapter LXVA of the *Criminal Code*. The appellant contends that the learned District Court Judge wrongly held himself to be limited, by s.663AA(1) of the *Criminal Code*, in the amount which he could order M to pay.

The scheme of Chapter LXVA is relevantly as follows. Section 663B(1) provides that where a person convicted on indictment of an indictable offence relating to the person, or of more than one such indictable offence arising out of one course of conduct or closely related courses of conduct, the court may, on the application of the person aggrieved, order him to pay to the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by reason of the offence or offences. "Injury" is defined in s.663A to mean "bodily harm and includes pregnancy, mental shock and nervous shock" and "bodily harm" is defined in s.1 to mean "any bodily injury which interferes with health or comfort". The "prescribed amount" in the case of mental shock or nervous shock is $20,000: s.663AA(1). In respect of all injuries which are not mental shock or nervous shock the prescribed amount is the amount specified in the *Workers' Compensation Act*. The maximum amount specified for any injury at the relevant time was $72,680.

Section 663C provides that the person in whose favour an order for payment is made may apply to the Minister for payment from Consolidated Revenue and that is, no doubt, what often if not usually occurs. It is therefore surprising that in applications and appeals such as this, the Minister is not represented and that they are determined ex parte. That is what occurred here.

The appellant contends that the learned District Court Judge was wrong in concluding, as he did, that the only injury suffered by her by reason of the offences was mental shock or nervous shock and consequently in limiting the amount of compensation by reference to s.663AA(1) to $20,000. She submits that, by reason of the offences of which M was convicted, she suffered injury other than or as well as mental shock or nervous shock and for that reason the prescribed amount was not so limited. That was so only if, by reason of the above offences, the appellant suffered bodily harm, that is bodily injury which interfered with her health or comfort.

Before turning to the facts of the present case it is convenient to consider the legal effect of the definitions of "injury" in s.663A and of "bodily harm" in s.1. The addition of a phrase such as "and includes pregnancy, mental shock and nervous shock" to a term such as "bodily harm" in a definition generally indicates a legislative intention to add the meanings which follow the word "includes" to the natural meaning of the word defined, those meanings not otherwise being within the natural meaning[4]. That seems clearly to be so with respect to pregnancy which would not ordinarily be thought of as an injury. If, as would seem to follow, mental shock and nervous shock are not otherwise intended by the legislature to be within the meaning of "injury", that meaning otherwise in this definition must be confined to physical injury. The definition of "bodily harm" in s.1 as "bodily injury" cannot affect that construction.[5] And the additional words "which interferes with health or comfort" do not extend the meaning of the latter term; on the contrary they limit it.[6] It is therefore necessary to decide whether, by reason of any offence of which M was convicted, the appellant suffered physical injury.

The only evidence of the conduct constituting these offences came from the statement of the prosecutor at the sentence hearing. The first carnal knowledge offence occurred when the

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4 *Sherritt Gordon Mines Ltd. v. F.C.T.* (1976) 10 A.L.R. 441 at 455; Pearce and Geddes: *Statutory Interpretation in Australia*, 4th ed. (Butterworths 1996) at [6.36].

5 But for the inclusory definition, neither the meaning of "injury" nor that of "bodily harm" might be so confined: *R. v. Chan-Fook* [1994] 2 All E.R. 552; *R. v. Mwai* [1995] 3 N.Z.L.R. 149 at 153-155.

6 *Scatchard* (1987) 27 A.Crim.R. 136.

appellant was 13 or 14. She was resting on a Sunday afternoon with her sisters who shared a bedroom with her. They were asleep. M entered the bedroom, removed her underclothing and his own shorts, pulled his underpants down to his knees, knelt beside the bed, turned her around so that she was facing him and commenced to have sexual intercourse with her. This was interrupted when someone else came to the door of the bedroom.

The second carnal knowledge offence occurred when the appellant was in Grade 8 in 1980. Again M came into her bedroom when her sisters were asleep. He then took her underwear off and took his own underwear off, placed what she described as a red party balloon on his penis and had intercourse with her.

The offence of indecent dealing occurred when the appellant was 14 years of age either in Grade 9 or Grade 10. On this occasion M placed his finger in her vagina. It was accepted for the purpose of sentence that this did not cause the appellant pain.

There was no suggestion that either of the acts of sexual intercourse caused the appellant pain and it should be mentioned that the incidents with which M was charged and to which he pleaded guilty occurred in the course of a history of sexual abuse of the appellant which commenced when she was eight. Though it is likely that when M first commenced to have sexual intercourse with the appellant he would have caused her physical injury there is no evidence that the first of the offences of carnal knowledge of which M was convicted was the first occasion on which he had intercourse with the appellant, which occurred on more than 20 occasions, or that on any of the occasions on which the offences were committed M applied force to the appellant. There was therefore no evidence of physical injury to the appellant on the occasion of the commission of any of these offences. M's course of sexual abuse of the appellant which, as I have said, commenced many years before the commission of the offences of which he was convicted, had very serious psychological consequences for her. These are detailed in some medical reports which were tendered on the application below and which were before us. There can be no doubt that if the appellant's psychological disabilities, in consequence of the appalling conduct of her father, were being assessed as

damages in consequence of a tortious injury, the damages would far exceed the amount to which the learned District Court Judge held himself to be limited by s.663AA(1). Unfortunately for the appellant that kind of assessment does not arise here. The question here depends on the construction of the definition of "injury" in s.663A and its application to the somewhat limited facts stated above.

So construed and applied to those facts there was no evidence of injury on the occasion of any of the above offences. The possibility that the absence of evidence of injury on any of those occasions may have been because of the long course of sexual abuse to which M subjected the appellant before the first of these offences was committed makes this case one deserving of the utmost sympathy. But it cannot affect the application of the statutory provision to the limited facts stated above.

It is not necessary in this appeal to consider whether, as the learned primary Judge concluded, the appellant suffered an injury which consisted of nervous or mental shock. It was accepted on both sides that if the appeal failed the judgment below should stand.

The appeal must therefore be dismissed.