SUPREME COURT OF QUEENSLAND

CITATION:	*HW v LO* [2000] QCA 377
PARTIES:	**HW** (applicant/applicant) **v** **LO** (respondent/respondent)
FILE NO/S:	Appeal No 3016 of 2000 DC No 115 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	15 September 2000
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2000
JUDGES:	de Jersey CJ, McMurdo P and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Application for leave to appeal, and the appeal allowed with costs to be assessed.** **2. Order made in the District Court on 6 March 2000 set aside and the matter remitted to the District Court for further hearing and determination in accordance with these reasons.** **3. Respondent granted an indemnity certificate under s 15 *Appeal Costs Fund Act* 1973.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND – application for criminal compensation – respondent convicted of five counts of rape and one count of indecent dealing with circumstances of aggravation committed over six year period – whether offences arose out of "one course of conduct" under s 663B *Criminal Code* – consideration of correct maximum "prescribed amount" – where material relied on by the applicant fails to address the individual or cumulative consequences of each offence – where material relied on by

the applicant not in admissible form - where material relied on by the applicant does not sufficiently identify date of offence for the purpose of calculation of compensation.

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – APPEAL COSTS FUND – where indemnity certificate granted under *Appeal Costs Fund Act* 1973

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – IN GENERAL AND RIGHT OF APPEAL – WHEN APPEAL LIES – jurisdictional limit – whether leave is necessary to appeal from a District Court order for criminal compensation

Appeal Costs Fund Act 1973, s 15, s 16
Criminal Offence Victims Act 1995, s 26(3), s 46
Criminal Code, s 663A, s 663AA, s 663B
Criminal Code Amendment Act 1984
Criminal Code and Justices Act Amendment Act 1975
District Court Act 1967, s 118(2)

Aetna Cas and Sur Co v Industrial Commission 127 Colo 225, referred to
Chong v Chong [1999] QCA 314; Appeal No 11658 of 1998, 13 August 1999, distinguished.
Dyer v Dyer 166 PaSuper 520, referred to
Gordon v R (1982) 41 ALR 64, referred to
Maher v Woodman & Anor [1999] QCA 233; Appeal No 6654 of 1998, 22 June 1999, applied
McClintock v Jones (1995) 79 A CrimR 238, referred to
Ozcam as next friend of Tamcelik v Tamcelik Appeal No 269 of 1995, 18 October 1996
Paric v John Holland (Constructions) Pty Ltd (1985) 62 ALR 85, referred to
Ramsay v Watson (1961) 108 CLR 642, referred to
R v Bridge and Madams; ex parte Larkin [1989] 1 QdR 554, distinguished
Whyte v Robinson [2000] QCA 99; Appeal No 7292 of 1999, 28 March 2000, distinguished

COUNSEL: C E Hampson QC, with A J Kimmins, for the applicant
No appearance for the respondent

SOLICITORS: McLaughlins Solicitors for the applicant
No appearance for the respondent

[1] **de JERSEY CJ:** Part 3 of the *Criminal Offence Victims Act* 1995, the current legislation dealing with compensation for victims of criminal offences, did not apply to this case because these offences were all committed prior to its

commencement – the last in 1981. See s 46. Chapter 65A of the *Criminal Code* consequently applied, as if not repealed (s 46(2)). Because those *Code* provisions will continue to regulate applications for compensation in respect of pre 1995 offences, and experience suggests there may still be many of them, there is nevertheless particular utility in now elucidating the point of construction.

[2] The learned District Court Judge was asked to order the payment of compensation under s 663B of the *Code* (within Chapter 65A) in respect of six indictable offences committed over a period of six to seven years.

[3] The offences were committed on distinct occasions, separated substantially in time and place, with the nature of the acts constituting the offences exhibiting some variety. The judge took the view that all offences nevertheless "arose out of " only the one "course of conduct". On that basis, if correct, the judge was limited to awarding no more than "the prescribed amount" by way of compensation. The "prescribed amount" is the statutorily limited maximum amount of compensation which may be awarded for injury consequent upon an offence (s 663B(1)). (I return to the question of amount.)

[4] Whether the learned judge was correct depends on how one defines "course of conduct" for the purposes of that section. A broad definition, generally covering acts of sexual abuse by the respondent committed upon the children of his de facto wife, would justify his conclusion. But the *Code* provisions contemplated a somewhat more particular approach. (The more recent *Criminal Offence Victims Act* employs different formulae – "injury suffered from a substantially single incident, whether consisting of 1 or more than 1 personal offence", and "a substantially single state of injury suffered from a series of incidents of personal offences" – s 26(3).)

[5] In determining whether courses of conduct are "closely related", those *Code* provisions invite analysis of the relationship between pieces of conduct, by reference to their nature and the periods of time separating them. Subsection (1) refers to "the one course of conduct or closely related courses of conduct". Subsection (1A) requires that in determining "whether courses of conduct are closely related", "regard shall be had, in addition to any other relevant matter, to the acts or omissions constituting the courses of conduct and the times of the doing of the acts or the making of the omissions, one in relation to another". This would assume, without expressly saying so, the existence of a relationship in time and subject matter between or among the events going to make up a course of conduct, and even though the provision focuses directly on courses of conduct inter se.

[6] (Reference to "course(s) of conduct" was first introduced into the Code provisions by the *Criminal Code Amendment Act* 1984. Following the 1999 convictions of the respondent, the applications for compensation fell to be determined by the scheme then delineated – by the *Criminal Offence Victims Act* 1995 but for its transitional provision s 46(2) which, because of the times at which these injuries were suffered, directs the court back to the Chapter 65A Code provisions, but in their form as at the hearing of the applications, subject to the specific limitations on amount to which I refer below.)

[7] Assaying a definition of "course of conduct" for purposes of s 663B, the words

connote in this context a succession or series of acts (or omissions) which, because of a sufficiently close interrelation, whether by nature, time, place or otherwise, display, in aggregation, an identifiable overall pattern. The American cases provide assistance, pointing to the need for an element of continuity (*Dyer v Dyer* 166 PaSuper 520) and regularity (*Aetna Cas. and Sur Co v Industrial Commission* 127 Colo 225).

[8] It goes without saying that one cannot be prescriptive of the requisite extent of relationship. One obviously cannot, for example, specify a maximum duration for any separate course of conduct. Given a high level of regularity and consistency in the time, place and nature of the acts, a course of conduct might persist over days, weeks, months. But even with similar acts, substantial separation in time would ordinarily exclude their being regarded as arising out of the same course of conduct or closely related courses of conduct. (These observations are consistent with the approach which has been taken by a number of Judges of the District Court.)

[9] The events involved in these offences were too far distinct and separated in time and place to warrant the conclusion that they arose out of the same course of conduct. They arose out of the same relationship affected by "guilty passion" on the part of the respondent. But that was not enough to establish a "course of conduct" sufficiently precise and limited for the purposes of the provision.

[10] It was necessary therefore for the learned judge to assess compensation in respect of six sets of offences. I deal later with the question whether the evidence presented by the appellant was such as to allow His Honour to make the necessary assessments. It is convenient first to consider what were the relevant "prescribed amounts".

[11] The learned judge proceeded on the basis that he could award up to $20,000 for nervous shock. On the approach he took, he awarded that sum, with an additional $15,000 in respect of the appellant's unwanted pregnancy, eventually aborted, arising from the rape involved in count 14. But in that respect, in which counsel before the judge apparently agreed, the judge erred.

[12] Prior to the commencement of the *Criminal Code Amendment Act* 1984 (on 1 July 1984), s 663A defined "prescribed amount" as follows:

> "prescribed amount" –
>
> (a) where the offence in connexion with which the case arises is committed before the commencement of *The Criminal Code and the Justices Act Amendment Act* 1975, two thousand dollars;
>
> (b) in all other cases, five thousand dollars."

The Criminal Code and the Justices Act Amendment Act 1975 commenced on 1 July 1975.

[13] Following the enactment of the *Criminal Code Amendment Act* 1984, which as I have said commenced on 1 July 1984, "prescribed amount" was defined in this way:

> "prescribed amount" means –

> (a) where injury in connection with which an application is made was suffered before the commencement of the *Criminal Code Amendment Act* 1984 - $5000;
>
> (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 section 14(1)(C)(a) of the *Workers' Compensation Act* 1916 as varied from time to time pursuant to section 14E of that Act."

[14] Those provisions, for the first time, in s 663AA(1), set a "prescribed amount" for "mental shock or nervous shock", of $20,000.

[15] The text of section 663AA follows:

> "(1) The prescribed amount for the purposes of this Chapter in the case of mental shock or nervous shock is $20,000.
>
> (2) Where injury in connexion with which an application is made in accordance with this Chapter is the same or substantially the same as an injury specified in the table set forth in section 14(1)(C) of the *Workers' Compensation Act* 1916-1983, the prescribed amount for the purposes of this Chapter in respect of such injury is the maximum amount that may be paid as compensation under the said Act in respect of the injury so specified.
>
> (3) Where injury in connexion with which an application is made in accordance with this Chapter consists of more injuries than one, the prescribed amount in respect thereof for the purposes of this Chapter is the amount for the time being specified in section 14(1)(C)(a) of the *Workers' Compensation Act* 1916-1983 as varied from time to time pursuant to section 14E of that Act.
>
> (4) Subsections (1), (2) and (3) are subject to provision (a) of the meaning of the term "prescribed amount" in section 663A."

[16] Reference was made during argument to *R v Chong, ex parte Chong* [1999] QCA 314, Appeal No 11658 of 1998, 13 August 1999. The Court there determined that the above references to s 14(1)(C) of the *Workers' Compensation Act* 1916 are to be read as s 167 of the *WorkCover Queensland Act* 1996 and Schedule 2 of the *WorkCover Queensland Regulation* 1997. *Chong* was subsequently applied in *R v Robinson, ex parte Whyte* [2000] QCA 99, Appeal No 7292 of 1999, 28 March 2000. Neither *Chong* nor *Whyte* was however concerned with the issue involved in this appeal. In each of those cases, the injuries were suffered after the commencement of the 1984 Amendment Act.

[17] Those decisions related quite specifically only to the scale to be utilised at the time of assessment of compensation where the scale had been modified subsequently to the time of the offence. Determining upon the approach mentioned above, the Court in *Chong* was influenced among other things by provisions of the *Acts Interpretation Act*.

[18] All of the instant offences and injuries pre-dated the 1 July 1984 commencement date of the *Criminal Code Amendment Act* 1984. They spanned the period 1975 to 1981. Presumably, on the available information, the injuries arose proximately to the offences, although their consequences may later have worsened.

[19] It presumably follows, for all claims save possibly that relating to count 4, that the relevant "prescribed amount" was $5,000, not $20,000 as assumed by the learned judge. I note the President says she is content to adopt my reasons for that conclusion.

[20] I independently use the word "presumably" only because of the slight reservation expressed in the last sentence of the preceding paragraph.

[21] The amount in relation to count 4 depends on whether the offence was committed before or after 1 July 1975. The material before the judge, and this court, was no more particular than its having occurred when the appellant was nine years old, which covers the period of 12 months commencing 31 December 1974. If the offence was committed before 1 July 1975, the relevant maximum is $2,000; if after that date, $5,000. This aspect will have to be clarified at the further hearing.

[22] It therefore fell to the learned judge to assess compensation in respect of six sets of offences, up to the applicable maximum amounts. That was not done by the judge, and it is unfortunately not possible for this court now, proceeding regularly, to make any new overall assessment. That is because the relevant evidence is presently lacking – evidence, admissible as such, of the effect on the complainant of each set of offences, such as would have enabled the judge, or would enable this Court, to approach the issue in the manner held appropriate for this particular legislation, that is, "in accordance with the ordinary principles of assessment of damages for personal injury in civil cases" (*R v Jones, ex parte McClintock* [1996] 1 QdR 524, 527). (One notes that the *Criminal Offence Victims Act*, s 25(8)(a) proscribes such an approach to applications falling within its purview.)

[23] The evidence from the appellant herself presently comprises her statement to the police dated 20 October 1998, and sufficiently verified by her sworn affidavit, in which she recounts the factual circumstances of the offences, together with a three page undated handwritten victim impact statement prepared for the purposes of the sentencing of the respondent, which occurred on 20 August 1999. In that latter statement, the truth of which has <u>not</u> been expressly verified on oath (cf para 5 appellant's affidavit), the appellant covers the overall effect upon her of the respondent's offences – that is, as if one course of conduct. She speaks of her loneliness, fear, humiliation and torment. Apart from its not having been verified upon oath, what is lacking, in addition, is any account of the effect upon the appellant of the respective offences.

[24] One hesitates to propose a course which would put the appellant through the further trauma which will arise from the preparation of more detailed material for presentation to the court. It is however plain that, proceeding regularly in accordance with law, the court must be provided with her properly sworn, admissible account, so far as she can recall, of the respective, and progressive, effect upon her of these offences. Only then will a judge be able, confidently and responsibly, to assess the particular compensation warranted for the effect upon the

appellant of the respective offences.

[25] While it may be tempting to say that the extent of nervous shock, being the "injury" referable to each rape, and compensation for the pregnancy (also defined as "injury" under s 663A), should warrant in each case an award of at least $5,000, that would, in the absence of properly presented admissible evidence, involve taking an approach which would be both irregular and too global.

[26] There is also the contrast possibly to be drawn between the rapes on the one hand, and the indecent dealing. It may on reflection be considered that the touching of the vagina in count 4, when the appellant was eight or nine years old, should properly lead to an award, in respect of that offence, of a lesser amount. There is presently no evidence at all of any particular effect upon the appellant of that offence. There also remains unresolved whether that offence was committed before or after 1 July 1975.

[27] It may be that the appellant's present recollection would not extend to filling all of these gaps, and the primary judge was sceptical whether such detail could be provided. But the prospect of the appellant's being able to do so must be explored, and the resultant position put plainly before the court, even if, in the end, for lack of detailed evidence, the issue must, if in some respects, be left to inference. (The further hearing should most appropriately take place in the District Court.)

[28] It is, as I say, regrettable that the matter should have to be remitted for further hearing, because of the risk of further trauma to the appellant. That that must occur is, however, the consequence of inadequate presentation before the primary judge. Notwithstanding the request for separate awards in respect of the discrete offences, the evidence of effect on the appellant put before His Honour – questions of admissibility aside - related to the aggregation of offences, and that was simply not appropriate.

[29] There were further patent and serious inadequacies in the material put before the District Court. For example, the truth of the factual account basing the psychiatrist's report was not verified by the appellant (cf. para 6 her affidavit). The factual basis of a psychiatrist's opinion must be established by admissible evidence (*Ramsay v Watson* (1961) 108 CLR 642; *Gordon v R* (1982) 41 ALR 64; *Paric v John Holland (Constructions) Pty Ltd* (1985) 62 ALR 85, 87).

[30] In addition, the expert's report should in such a case be exhibited to an affidavit sworn by the expert himself (and not, say, the applicant (as here) or the applicant's solicitor). Otherwise, the expert opinion, itself being no more than a piece of hearsay, will – as in this case at the moment - be inadmissible. How can such a view, presented as here, be tested by cross-examination? To answer that respondents generally do not appear on the hearing of these applications simply emphasises the importance of proceeding properly. The possibility of the judge's wishing to question the medical specialist also should not be ignored.

[31] Applications of this character are usually heard in the absence of an active contradictor. It is therefore especially important that evidence of sufficient extent be put before the Court, and in proper form.

[32] I use this opportunity to add a more general observation. With a justifiably enhanced focus on the victims of criminal conduct, increasing public awareness of the relevant compensation scheme, and executive acknowledgement of the need to make payments to victims where court orders are not satisfied by respondents, these applications appear, unsurprisingly, to be brought these days more frequently.

[33] This particular case illustrates the way the applications can founder, in the absence of adversarial challenge where necessary. A number of recent cases heard on appeal suggests the applications are sometimes mounted with insufficient attention to important matters of details – such as the admissibility of evidence and issues of statutory construction.

[34] Invariably respondents do not appear upon the hearings of the applications. Under the current scheme, substantial amounts may be ordered, with correspondingly substantial possible debits against Consolidated Revenue.

[35] There is good reason to consider the desirability, in the public interest, of establishing a "public interest monitor" facility to assist the courts in relation to these hearings, similar to what currently obtains in relation to surveillance and covert search warrant applications (cf s 159 *Police Powers and Responsibilities Act* 2000).

[36] The application for leave to appeal, and the appeal, should be allowed, with costs to be assessed. The order made in the District Court on 6 March 2000 should be set aside and the matter remitted to the District Court for further hearing and determination in accordance with these reasons.

[37] I would, additionally, grant the respondent an indemnity certificate under s 15 *Appeal Costs Fund Act* 1973. (The appeal will have succeeded on a question of law, and the respondent may be taken to have applied (s 15(1)) for a certificate with a view to ensuring the successful appellant's costs are paid: see s 16(2).)

[38] **McMURDO P**: This is an application for leave to appeal under s 118(2) *District Court Act* 1967 from an order of a District Court judge at Southport on 6 March 2000 awarding criminal compensation of $35,000 to the applicant.

[39] Counsel for the applicant did not argue that the applicant had an appeal as of right but claimed that in respect of each of the six charges of which the respondent was convicted, $20,000 by way of damages for mental or nervous shock could and should have been awarded, making a total award of $135,000. Whilst the amount awarded by the primary judge ($35,000) did not equal or exceed the Magistrates Court jurisdictional limit of $50,000, if the applicant's contention that an award of $20,000 for mental or nervous shock was able to be awarded for each offence is correct, then it is arguable that there is a live contention that there should be a judgment for more than $50,000 and therefore a prima facie right of appeal under s 118(2)(b) *District Court Act* 1967: see *Woodman v Maher*.[1] However, in *R v Tamcelik, ex parte Ozcam*[2] this Court held, noting the point was not argued, that leave is necessary to appeal from a District Court order for criminal compensation.

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1 [2001] 1 QdR 106.

2 [1998] 1 QdR 330.

In the absence of full argument on that point, I am content to follow the *Ozcam* approach and treat this matter as one requiring leave to appeal.

[40] The respondent, who had been served with all relevant material, chose neither to appear nor to contest the application which was argued as an appeal on its merits in this Court.

[41] As the Chief Justice has pointed out, the material before the primary judge was deficient in that the applicant did not swear to the truth of what she told her psychiatrist, Dr Murphy. Nor was Dr Murphy's evidence in sworn form, although I note it is common in personal injuries cases for medical reports to be tendered by consent; this approach is also commonly taken in applications of this sort when the material is not disputed because generally the applications are not defended. The primary judge was here content to deal with the application on the material before him and, of course, the applicant makes no complaint about that but judges should remember that, despite the natural sympathy felt for victims of crime, applications for criminal compensation must be lawfully established by admissible evidence especially as these applications are usually undefended, frequently involve substantial orders against respondents and the payment of compensation is often ultimately met from consolidated revenue.

[42] The material before this Court was also deficient. The Certificate of Conviction dated 15 September 1999 contained in the record book was not consistent with the sentencing judge's remarks nor the facts relied upon by the applicant. Inquiries of the District Court Southport revealed that an amended Certificate of Conviction was issued on 6 March 2000. It is disappointing and unsatisfactory that the applicant's solicitors made this serious error in preparing the record book; the error was not corrected during oral argument. The respondent was in fact convicted on indictment on 20 August 1999 of five counts of rape and one count of indecent treatment of a girl under 17 between 1975 and 1981 with circumstances of aggravation.

[43] I agree with the Chief Justice's suggestion that the courts and ultimately the executive and the public may be assisted by an independent legal representative in applications of this sort.

[44] In determining the criminal compensation application the learned primary judge awarded $15,000 for the applicant's physical injury of pregnancy and noted that the applicant had:

> "... suffered severe mental and nervous shock as a result of this series of incidents which included a number of offences of rape. There's no doubt that under the normal principles of compensation she would be entitled to well in excess of the maximum allowable for mental and nervous shock under the legislation, which is $20,000. However, in the circumstances I think her claim for damages for mental and nervous shock should be confined to the maximum $20,000."

[45] His Honour found that the offences arose out of "the one course of conduct" under s 663B *Criminal Code* and therefore the total amount of damages for mental and

nervous shock able to be awarded for the combination of the six offences must be limited to $20,000.

[46] On 18 December 1995, Part 3 *Criminal Offence Victims Act* 1995, a new scheme of criminal compensation, came into operation; as these offences occurred before 1995, the criminal compensation scheme set out in Chapter 65A *Criminal Code* applies: see s 46 *Criminal Offence Victims Act* 1995.

[47] Section 663B, Chapter 65A *Criminal Code* relevantly provides:

> "(1) Where a person is convicted on indictment of any indictable offence relating to the person of any person or of more than one indictable offence relating to the person of any person (whether in respect of one indictment or more than one indictment) *arising out of the one course of conduct or closely related courses of conduct of that person so convicted*, the court on the application by or on behalf of the person aggrieved by the offence or offences, 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.
> (1A) *For the purpose of determining whether courses of conduct are closely related, regard shall be had, in addition to any other relevant matter, to the acts or omissions constituting the courses of conduct and the times of the doing of the acts or the making of the omissions, one in relation to another*." (my emphasis)

[48] The words in emphasis were added in an amendment to Chapter 65A which became operational on 1 July 1984.

[49] Following other amendments made at that time, s 663A *Criminal Code* provided that "injury" means "bodily harm and includes pregnancy, mental shock and nervous shock". The "prescribed amount" for an injury of mental or nervous shock is $20,000: see s 663AA(1) *Criminal Code* but under s 663A "prescribed amount" means "(a) where injury in connexion with which an application is made was suffered before the commencement of the *Criminal Code Amendment Act* 1984, $5,000".[3] Until 1 July 1975, "prescribed amount" under the prior s 663B was "a sum not exceeding $2,000 by way of compensation for injury …".

[50] This apparent dichotomy between s 663AA(1) and s 663A(a) was not addressed in the applicant's oral or written argument as the applicant relied on this Court's finding in *R v Chong, ex parte Chong*[4] that, despite s 663A(a) the relevant time for determination of the "prescribed amount" is the date of the judge's order, not the date of injury. *Chong* was followed in *R v Robinson, ex parte Whyte*.[5]

[51] I am content to adopt the Chief Justice's analysis of *Chong* and *Whyte* and accept that those cases relate only to the appropriate scale of compensation to be applied to injuries which occurred after 1 July 1984. The clear words of s 663A(a) and s

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[3] See *Criminal Code and Justice Act Amendment Act* 1975 which commenced on 1 July 1975. Prior to that date, s 663B *Criminal Code* allowed a court to award to an applicant.

[4] [1999] QCA 314, Appeal No 4658 of 1998, 13 August 1999.

[5] [2000] QCA 99, Appeal No 729 of 1999, 28 March 2000.

663AA(4) support the conclusion that the scheme provides that compensation for injuries suffered before 1 July 1984 cannot exceed $5,000. Similarly, compensation for injuries suffered before 1 July 1975 cannot exceed $2,000.

[52] The amount of compensation awarded by the primary judge for the physical injury of the pregnancy of $15,000 therefore exceeded the statutory maximum prescribed amount of $5,000.

[53] Another difficulty for the appellant is that it is unclear whether the first offence in time of which the respondent was convicted, indecent dealing, and the resulting injuries occurred before 1 July 1975; if so, compensation for that offence will be limited to $2,000.

[54] The applicant submits that under s 663B *Criminal Code*, she was entitled to an award of the maximum prescribed amount for nervous and mental shock for injuries suffered as a result of the respondent's convictions because no two counts arose out of the same course of conduct or closely related courses of conduct.

[55] This will be largely a question of fact in each case and some attention must be given to the disturbing facts of this case. The first offence (count 4 on the indictment), indecent dealing, was committed on an unknown date in 1975 when the applicant was eight or nine years old. The respondent, the applicant's step-father, was alone with her in the backyard where the respondent lit a fire; he offered the applicant a cigarette, put his hands inside her pants and rubbed her vagina; he then kissed her on the mouth; she told him to stop and went inside the house.

[56] The first offence of rape (count 5 on the indictment) occurred in 1977 when the applicant was 11 years old and the family was living in a caravan park. The applicant was ill and home alone in the caravan with the respondent; he took her into his bed, removed her nightie and raped her, thrusting his penis in and out of her vagina until ejaculation. She was fearful and intimidated by the respondent who threatened to tell her mother if she refused him.

[57] In 1978 when the family was living at the Gold Coast the respondent drove to Brisbane with the applicant to pick up his natural children for the school holidays. On the way he pulled into a car park and performed oral sex on her; he then forced his penis into her mouth before committing the second offence of rape (count 8 on the indictment); on this occasion he did not ejaculate.

[58] Later that year after the school holidays he returned his natural children to Brisbane and again stopped at a car park and attempted to rape her. She resisted and the respondent slapped her face. He then raped her (count 9 on the indictment) and ejaculated inside her.

[59] The evidence of uncharged acts was that the respondent raped the applicant a couple of times a month until she was 16 years old; she was scared of the respondent who made threats that he would tell her mother if she did not comply.

[60] In 1981 when the applicant was 15 years old and in grade 10 at high school, the respondent raped her (count 14 on the indictment) and this resulted in pregnancy. The respondent told the applicant's mother that the applicant was pregnant and her

pregnancy was terminated. The applicant told her mother she had been raped by the respondent on one occasion but did not detail the history of sexual abuse to which she had been subjected. The applicant's mother then forced the respondent to leave the family home and the respondent took an apartment nearby.

[61] The final offence occurred later in 1981 when the respondent picked up the applicant in his car whilst she was on her way to school. He took her to his flat where he raped her (count 15 on the indictment) and forced her to pose for nude photographs.

[62] In some cases it will be a relatively straightforward matter to determine whether offences arise out of one course of conduct or a closely related course of conduct: see for example *R v Bridge and Madams; ex parte Larkin*[6] where the applicant was abducted, taken to the basement of a flat, raped by Bridge and indecently assaulted by Madams and then released later that same evening near where she had been first detained; McPherson J (as he then was) noted that:

> "Those acts represented a single course of conduct by both respondents, or at least courses of conduct that were closely related in terms of their planning, execution, and time. It follows that only one order against each respondent for payment of a compensatory sum not exceeding the prescribed amount of $20,000 may be made against him for the mental or nervous shock suffered by the applicant by reason of the commission of all three offences of which each of them has been convicted." (557).

[63] The facts of this case are not in that category. Each charge was constituted by distinct and separate acts on occasions clearly separated in time, place and circumstance; the six offences were committed sometimes years apart and over a six year period. Although the respondent perpetrated regular sexual abuse upon the applicant over a lengthy period, it is the conviction for the six offences that, upon application, leads to an order for compensation. Each offence in this case is completely distinct in time, place and detail and cannot fairly be said to arise out of the one course of conduct or closely related courses of conduct.

[64] The learned primary judge therefore erred in concluding to the contrary; he was required to make orders for compensation for injury which the applicant proved she had suffered by reason of each offence, up to the statutory maximum award, in respect of each offence.

[65] The next issue, then, is whether it is possible for this Court on the material before it to adequately assess damages using the correct maximum prescribed amounts; the advantage in doing so is to save the applicant further costs, inconvenience and trauma.

[66] An ordinary person subjected to such protracted sexual abuse as that endured by the applicant at the hands of the respondent may well suffer resulting serious long-term or permanent consequences. The applicant seems to be an extraordinary woman and has the good fortune to have a supportive partner; together, it seems, they have forged a happy family and working life for themselves. The applicant has made

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6 [1989] 1 Qd R 554.

every effort to put these horrific episodes behind her. Psychiatrist Dr Stephen Murphy, in an unsworn report, notes that the offences have nonetheless taken their toll upon the applicant; she has lessened self-esteem and suffers from feelings of guilt and shame. She is frightened that if she receives treatment she will regress in the same way as her sister who is also a sexual abuse victim of the respondent. However, she recognises that she needs the treatment recommended by Dr Murphy of weekly sessions for up to five years at $160 per session, amounting to approximately $40,000. It will inevitably be very painful for her to relive the nightmares of her past in order to finally deal with it; no matter how successful her treatment, her abuse at the hands of the respondent may well have some permanent detrimental impact upon her.

[67] Whilst the respondent, who did not appear on the application, did not challenge any of the material, as the Chief Justice points out, the applicant did not swear to the truth of what she told Dr Murphy and nor was Dr Murphy's evidence in sworn form. Were that the only difficulty, in the absence of objection I would be disposed to assess compensation on that material which does not here seem to be in dispute. But the evidence before the primary court and this Court did not adequately address the consequences of each offence upon the applicant, either separately or cumulatively; those consequences must be considered if an order for criminal compensation is to be made in respect of each offence. Nor did the material address whether the injuries were suffered before or after 1 July 1975 (as to count 4) and before or after 1 July 1984 as to the remaining counts.

[68] The applicant is now 35 years old. She has lived with the effect of the respondent's sexual abuse since she was eight or nine. It may well be that each offence, both alone and cumulatively, has had such an effect upon her that the appropriate maximum prescribed amount for mental and nervous shock should be awarded for each offence; but that cannot be determined on the inadequate material before this Court and the primary court. Regrettably, the matter must be remitted to the District Court at Southport for further hearing and determination.

Summary

[69] (a) The maximum amount able to be awarded for injuries suffered before 1 July 1975 was $2,000 and before 1 July 1984, $5,000.

(b) The material relied on by the appellant did not address the individual or cumulative consequences on the appellant of each offence.

(c) The material did not address the relevant time when injury resulting from each offence was suffered.

(d) Not all material relied upon was in admissible form.

(e) The offences in this case did not arise out of the one course of conduct or closely related courses of conduct.

[70] I would grant the application for leave to appeal, allow the appeal with costs to be assessed, vacate the order made in the District Court at Southport on 6 March 2000 and remit the matter to that Court for rehearing. I agree with the Chief Justice that

it is appropriate to grant the respondent an indemnity certificate under s 15 *Appeal Costs Fund Act* 1973.

[71] **MUIR J:** I have had the advantage of reading the Chief Justice's reasons for judgment. I agree with those reasons and with the orders he proposes.