SUPREME COURT OF QUEENSLAND

CITATION:	*HV v LN* [2000] QCA 472
PARTIES:	**HV** (applicant/appellant) **v** **LN** (respondent/respondent)
FILE NO/S:	Appeal No 8149 of 2000 DC No 278 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 November 2000
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2000
JUDGES:	Pincus and Thomas JJA, Byrne J Separate reasons for judgment of each member of the court, each concurring as to the orders made.
ORDER:	**Application for extension of time granted. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND - claim for compensation for nervous shock or adverse impact suffered as a consequence of offence of maintaining an unlawful relationship of a sexual nature – where particulars of offence committed over period both before and after *Criminal Offence Victims Compensation Act* 1995 – whether whole of injury compensible under *Criminal Offence Victims Compensation Act* 1995 - necessary to apportion effects attributed to period before *Criminal Offence Victims Compensation Act* 1995 took effect and period after it took effect and award appropriate compensation in respect of each period *Criminal Offence Victims Compensation Act* 1995 (Qld), s 22(3), s 22(4), s 24(2) , s 25(8), s 46 *Criminal Code* (Qld), chapter 65A (repealed)

Chong v Chong [1999] QCA 314, CA No 11658 of 1998, 13 August 1999, considered
J L W (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237, cited
Morrow v Kilmartin DC No 214 of 2000, 4 September 2000, disapproved
R v Cod; ex parte Cod DC No 1558 of 2000, 24 May 2000, disapproved
R v Gough; ex parte Bushnell Townsville DC No 41 of 1998, 5 March 1998, approved
R v Ianculescu [2000] 2 Qd R 521, distinguished
R v Jones; ex parte McClintock [1996] 1 Qd R 524, cited
R v Tiltman ex parte Dawe SC No 324 of 1995, 22 June 1995, considered
Ray Teese Pty Ltd v Syntex Australia Limited [1998] 1 Qd R 104, cited
Whyte v Robinson [2000] QCA 99, CA No 7292 of 1999, 28 March 2000, considered

COUNSEL: P S Hardcastle for the applicant/appellant
No appearance for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
No appearance for the respondent

[1] **PINCUS JA:** I agree with Thomas JA.

[2] **THOMAS JA:** This is an application for extension of time for the filing of a notice of appeal. Subject to the extension being granted it was requested that the hearing of the application be taken as the hearing of the appeal.

[3] In the proceeding before his Honour and in the application heard by this court there was no appearance by the respondent.

[4] The application was filed 13 days late. The explanation offered for the delay is alleged difficulty in obtaining a copy of Hoath DCJ's reasons for judgment. The explanation is not very convincing, and it cannot be said that a good or satisfactory explanation has been made. However it is desirable that consideration be given to whether there appears to be any error in the judgment against which the applicant desires to appeal.

[5] The point at issue is whether Hoath DCJ erred in assessing compensation for injuries suffered by the applicant by reason of offences of which the respondent was convicted on 7 July 1999.

[6] On 7 July 1999 the respondent was convicted of maintaining an unlawful relationship of a sexual nature with a child, and of four other particular counts in the nature of indecent acts. The offences were committed between 31 December 1991 and 1 April 1997. The charge of maintaining an unlawful relationship involved numerous occasions of sexual activity mainly in the nature of mutual masturbation and fellatio. The activity occurred when the applicant, who is an intellectually impaired person, was aged between 10 and 15. No physical injury was caused, and

the claim for compensation was based upon nervous shock or the adverse impact of the sexual offences.

[7] The *Criminal Offence Victims Act* 1995 came into effect on 18 December 1995, which was in the latter part of the period over which the offending conduct occurred. Difficulties in determining the level of compensation to which an injured person is entitled in such a situation have already been encountered in various cases in the District Court, and diverging approaches may be seen on the part of the judges.

[8] It is quite clear that the legislature intended that the new regime introduced under the *Criminal Offence Victims Act* 1995 should apply only to injuries suffered as the result of offences committed after the commencement date of that Act. Section 46 relevantly provides:

> "**Application of Act to previous acts and to subsequent acts and events**
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> 46.(1) Part 3 does not apply to injury suffered by anyone because of an act done before the commencement.
>
> (2) If the *Criminal Code*, chapter 65A would have applied to an injury mentioned in subsection (1) if the chapter had not been omitted, the chapter applies to the injury as if the chapter had not been omitted.
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> (3) Part 3 applies only –
> (a) for applications under s 24 – to injury suffered because of a personal offence mentioned in s 24(1) that happens after the commencement; and
> (b) for applications under s 33 – to injury suffered because of an act or personal offence mentioned in s 33(1) that happens after the commencement; and
> (c) …
> (d) …
> (e) …"

(The present matter involved an application under s 24).

[9] It can be seen from s 46(2) that injury caused by any offence committed before 18 December 1995 remains compensable under the terms of the repealed chapter 65A[1] of the *Criminal Code*. The difficulty occasioned by a continuing offence which spans both periods does not seem to have been adverted to by those responsible for the legislation. Even in relation to a series of separate sexual offences, some of which are committed before 18 December 1995 and some after, some District Court judges have expressed difficulty in awarding separate compensation for what was described in *Morrow v Kilmartin* as "a single state of injury as a result of all of the offences".[2] In that case Robertson DCJ awarded compensation based upon the

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1 See Code ss 663A to 663E.

2 *Morrow v Kilmartin* DC No 214 of 2000, 4 September 2000.

combined effect of eight counts of sexual offences, although some of the offences had been committed before 18 December 1995.

[10] A similar approach was taken by McGill SC DCJ with respect to the consequences of an attempted rape committed upon an applicant when she was quite young, and of two sexual assaults committed upon her much later when she was 23. His Honour thought it "somewhat artificial to treat the applicant as having two separate injuries",[3] although one might think that this should not have presented insuperable difficulties in those circumstances. On the other hand, in *R v Gough ex parte Bushell*[4], a case involving stalking between 1993 and 1997, Wall DCJ assessed compensation under both Acts by means of an apportionment reflecting the time period during which the offending occurred under each Act. Hoath DCJ took a similar approach in the present matter.

[11] The essential assessment of Hoath DCJ in the present matter was concisely expressed as follows:

> "It would be appropriate to attribute 75% of the applicant's injury as occurring during the currency of the *Criminal Code* provisions, and 25% as occurring under the *Criminal Offence Victims Act*. Accordingly, the applicant's entitlement is the sum of 75% of $20,000 and 25% of $40,000. That gives a total of $25,000."

It is common ground that under chapter 65A of the Code ("the Code scheme") the maximum prescribed amount for an injury in the nature of nervous shock was and is $20,000 and that the Workers Compensation scale has no application to an assessment of this kind. The $40,000 figure was his Honour's assessment of the compensation that he would have assessed in favour of the applicant under the *Criminal Offence Victims Act* had he been entitled to take into account the criminal acts over the whole period 1991 to 1997.

[12] It is necessary to consider whether two decisions in this court, *R v Chong, ex parte Chong*[5] and *R v Robinson, ex parte Whyte*[6] provide any assistance in resolving the present problem, some reliance having been placed upon the latter case by counsel for the applicant, Mr Hardcastle. *Chong* was concerned with an assessment of compensation under the Code scheme. One issue which fell to be determined was the date at which the scale prescribed as the maximum amount that might be awarded[7] was to be regarded as applicable. As the prescribed maximum under that scheme was the amount specified in a section of the *Workers' Compensation Act* 1916 as varied from time to time, and as this has been interpreted to include the amount prescribed under replacement legislation including the *WorkCover Queensland Regulation* 1997, it can be seen that very different results would follow according to whether reference to the scale was to be made as at the time of commission of the crime, the date of conviction, the date when the application is

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3 Per McGill SC DCJ in *R v Cod ex parte Cod* DC No 1558 of 2000, 24 May 2000.
4 Townsville DC No 41 of 1998, 5 March 1998.
5 [2001] 2 Qd R 301.
6 [2000] QCA 99; Appeal No 7292 of 1999, 28 March 2000.
7 See s 663A and s 663AA.

determined or some other time. *Chong* held that the scale to be referred to was that which was in force at the date when the application for compensation is determined.

[13] *Whyte* was concerned with a crime committed in 1997 and an assessment made in late 1999. It was concerned with an assessment under the *Criminal Offence Victims Act* 1995. Under the original 1995 regulation under that Act, the compensation available in respect of an injury caused by a sexual offence was to be assessed on principles less favourable than those prescribed by an amendment regulation that came into force on 19 December 1997. In conformity with the approach taken in *Chong*, the court decided that the provisions to which reference should be made for the purposes of such an assessment were those existing as at the date of the assessment.

[14] I do not think that either of these cases bears upon the question which is raised here, namely the correct approach to assessing compensation for the consequences of acts some of which occurred before 18 December 1995 and some after.

[15] Under the Code scheme, the courts applied principles derived from the common law in the assessment of damages for personal injury.[8] However such principles have been expressly excluded from assessments that are to be made under the *Criminal Offence Victims Act*.[9] Mr Hardcastle sought to place reliance upon certain observations by Lee J in a case in which his Honour assessed compensation under the Code scheme.[10] The applicant in that case suffered a condition that was caused by a combination of offences of which the respondent had been convicted and offences against the same victim which had been taken into account under s 189 of the *Penalties and Sentences Act* 1992, although the offender was not convicted of those additional offences. Lee J considered that, "Unless the respondent is able to separate the effects of the compensible and non-compensible conduct on the applicant with some reasonable measure of precision, the applicant is entitled to have his compensation assessed on the whole injury." With respect, I do not think that this affords an answer to the present problem. In the first place, it is a little unrealistic to speak of the respondent separating out such effects in a jurisdiction where the proceedings are nearly always ex parte. Secondly and more pertinently, in the present context it would be contrary to s 46 of the *Criminal Offence Victims Act* to fail to allow a proper discount for the consequences of criminal acts of the respondent committed before 18 December 1995. The fact that the assessment of damage or compensation may be difficult or necessarily imprecise has never been regarded as a reason for the court failing to make the best assessment it can in the circumstances. No doubt there may be instances in which the claimant's proof of loss is so vague or incomplete that an assessment is not reasonably possible[11]; but this is not such a case.

[16] The scheme of s 46 is to preserve rights accrued before the given date and to confine compensation under the new Act to the consequences of criminal activity after that date. An applicant does not lose either right. The applicant's accrued

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8 *R v Jones ex parte McClintock* [1996] 1 Qd R 524.

9 *Criminal Offence Victims Act* s 22(3) and s 25(8).

10 *R v Tiltman ex parte Dawe*, SC No 324 of 1995, 22 June 1995.

11 cf *Ray Teese Pty Ltd v Syntex Australia Limited* [1998] 1 Qd R 104; *J L W (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237.

rights under the earlier regime cannot conveniently be swept aside to enable a single assessment to be made under the *Criminal Offence Victims Act*.

[17] In the present situation I consider that an applicant is entitled to an assessment in respect of each period and that the courts must do the best they can in ascribing appropriate compensation in respect of each period. Where there is a combined effect that is difficult to dissect, the most sensible way to proceed is to attempt to apportion between the effects attributed to each period and if no better suggestion appears, the length of the respective periods over which the offending conduct occurred may be used. In some cases medical evidence may show that the early offences had already produced a serious condition so that the later offences would be regarded as having merely caused minor aggravation of an already established condition, in which case the greater part of the overall consequences would be properly ascribed to the earlier offending conduct, or vice versa. I do not think it beyond the ingenuity or expertise of the courts to make such assessments to meet the particular requirements of particular cases.

[18] Other solutions to this problem might of course be suggested. But in my view the essential right conferred upon an applicant by the *Criminal Offence Victims Act* is to require a convicted person to pay compensation "for the injury suffered by the applicant because of the offence",[12] and a respondent's liability under that Act is limited to injury suffered as the result of offences committed after the commencement of the Act.[13] The offence in question does not literally satisfy that requirement. In the context however of a compensatory scheme it is not necessary to take an "all or nothing" approach, that is to say by fitting the consequences of the offence as governed entirely by one statutory regime or the other. The position is distinguishable in a number of respects to that in *R v Ianculescu*[14] in which Cullinane J (with whom Ambrose J agreed) concluded that a continuous offence committed partly after the introduction of the part 9A amendments to the *Penalties and Sentences Act* 1992 rendered the offender liable to be dealt with under those provisions. The other member of the court in that case (Pincus JA) did not find it necessary to deal with that question. Inter alia, s 46(1) of the *Criminal Offence Victims Act* expressly excludes compensation for injury suffered because of an *act done* (as distinct from an offence committed) before commencement. In my view the present legislation excludes compensation for such acts and confers a civil remedy limited to the consequences of criminal acts done after the commencement of the Act.

[19] I have concluded that the approach taken by Hoath DCJ in the present matter was essentially correct. His Honour correctly applied *R v Robinson, ex parte Whyte*[15] by giving the applicant the benefit of the 1997 regulation which was in force at the date of the assessment; his Honour also correctly confined that assessment to the consequences of the criminal acts after 18 December 1995; and his Honour also correctly gave the applicant the benefit of the assessment to which he was entitled under part 65A of the *Criminal Code* in respect of criminal acts preceding that date.

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12 *Criminal Offence Victims Act* s 24(2).
13 Ibid s 46.
14 [2000] 2 Qd R 521.
15 Above.

[20] A second point was raised in the application, namely the contention that the $40,000 assessed by his Honour as the figure which he would have assessed had the entire condition of the applicant been able to be assessed under the present legislation, was inadequate. It was submitted that $75,000 should have been assessed. Under the *Criminal Offence Victims Act* the scheme maximum of $75,000[16] is reserved for the most serious cases.[17] It is clear that the consequences to the applicant fall well short of the worst case scenario that is essential for the scheme maximum of $75,000. It is impossible to say that his Honour erred in this particular quantification.

[21] In the circumstances I would grant the extension of time but would dismiss the appeal.

[22] **BYRNE J:** I agree with Thomas JA.

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16 As prescribed under the *Criminal Offence Victims Regulation* 1995 as amended.

17 *Criminal Offence Victims Act* s 22(4).