

SUPREME COURT OF QUEENSLAND

CITATION: *M.R. v Webb* [2001] QCA 113

PARTIES: **M.R.**
(appellant)
v
WEBB, Eric Malcolm
(respondent)

FILE NOS: Appeal No 4166 of 2000
DC No 1109 of 2000

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 27 March 2001

DELIVERED AT: Brisbane

HEARING DATE: 6 March 2001

JUDGES: McPherson and Williams JJA, Wilson J
Separate reasons for judgment of each member of the Court, each concurring as to the order made.

ORDER: **Appeal dismissed**

CATCHWORDS: CRIMINAL LAW-ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY-COMPENSATION-QUEENSLAND-
Compensation for child victim of sexual offence-whether award manifestly inadequate-whether award should be made for physical injuries-whether compensation should be assessed under heading "totality of adverse impacts of sexual offence" rather than mental or nervous shock

Criminal Offence Victims Act 1995 (Qld), s 19, s 20, s 22(4)
Criminal Offence Victims Amendment Regulation (No 1) 1997 (Qld)

Dooley v Ward [2000] QCA 493, Appeal No 8093 of 2000 1 December 2000, applied.

Kepple v Lafragua, District Court Brisbane 1101/99, Healy DCJ, 9 April 1999, considered.

Sanderson v Kajewski [2000] QSC 270, 12 July 2000, considered.

Whyte v Robinson [2000] QCA 99, Appeal No 7292 of 1999, 28 March 2000, applied.

COUNSEL: A J Rafter for the appellant
No appearance for the respondent

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

- [1] **McPHERSON JA:** I have read the reasons of Wilson J. I agree with them. The appeal should be dismissed.
- [2] **WILLIAMS JA:** For the reasons given by Wilson J, I agree that the appeal should be dismissed.
- [3] **WILSON J:** This is an appeal, pursuant to leave given by the Court of Appeal on 30 May 2000, against an award of criminal compensation made by a District Court judge.
- [4] The appellant was born on 5 August 1992. When she was aged 5 years her maternal grandfather (who was then aged 74) unlawfully and indecently dealt with her by digitally penetrating her vagina. On 9 June 1998 he pleaded guilty to the charge and was sentenced to 1 year's imprisonment, wholly suspended, with an operational period of 2 years.
- [5] Subsequently an application for criminal compensation was made, and on 14 April 2000 compensation was assessed in the sum of \$15,000.00, being the top end of the range applicable to moderate mental or nervous shock.
- [6] The appeal has been brought on three broad grounds –
 - (a) that the compensation should have been assessed under the heading “totality of adverse impacts of sexual offence” rather than mental or nervous shock;
 - (b) that there ought to have been an award for physical injuries;
 - (c) that the award was manifestly inadequate.
- [7] The *Criminal Offence Victims Act* 1995 (Qld) provides a scheme for the payment of compensation for injury caused by an indictable offence committed against the person of the applicant (s 19). “Injury” is defined in s 20 as bodily injury, mental or nervous shock, pregnancy or any injuries specified in the compensation table, which is a schedule to the Act, or prescribed under a regulation.
- [8] Compensation under the Act is intended to assist the applicant, but not to reflect the compensation to which he or she might be entitled under the common law or otherwise. The court may not award a total of more than the “scheme maximum”, which is \$75,000.00. Various categories of injuries and degrees of severity are set

out in the compensation table. With respect to each, there is a range, expressed as percentages of the scheme maximum, within which compensation may be awarded. See *Dooley v Ward* [2000] QCA 493, 1 December 2000. Section 22 (4) provides –

“(4) The maximum amount of compensation provided under this part is reserved for the most serious cases and the amounts provided in other cases are intended to be scaled according to their seriousness.”

- [9] The appellant’s maternal grandfather came to stay with her family for a time. Her mother observed a change in her behaviour. Her eating habits deteriorated; she seemed to want to sit next to her grandfather; on one occasion she was upset when she was expected to kiss him goodnight; she was seen scratching her genital area which was red and tender. Initially she denied that her grandfather had touched her but then she admitted, “He touches me on my belly, back, legs and willy.” Her mother took her to the Royal Children’s Hospital. On examination she had a widened diameter of the vaginal introitus with some reddening of the labia minora on the right side, consistent with repeated digital penetration of the vagina on more than two occasions.

- [10] In a victim impact statement made on 16 June 1998 the appellant’s mother said that the appellant found it hard to trust people; that she was easily upset; that the appellant and her mother had been isolated from their family and shunned by their neighbours; and that the appellant’s parents had separated. In an affidavit made on 26 June 1999 the mother spoke of the appellant having bad dreams, of being afraid of being taken from the family, of having eating disorders, of not liking men and of being quiet and withdrawn.

- [11] Professor Barry Nurcombe, a consultant psychiatrist, assessed the appellant on 15 April 1999 (when she was aged 6 ½). He expressed the following opinions and recommendations:-
 - “1. The sexual molestation has resulted, in [the appellant], in a moderate to severe degree of emotional disturbance characterized by anxiety, depression, perfectionism, deterioration in school performance, and separation anxiety. The child has difficulty in trusting other people and is fearful that, if she complains about mistreatment, she will lose her parents. Her fear of losing her parents is directly related to the threats directed at her by her maternal grandfather when he molested her.

 - 2. Following the disclosure of sexual molestation, the family have been in turmoil. [The appellant’s mother] blames herself. Her husband has been unable to allay her distress. The parental relationship has severely deteriorated. The couple have separated on one occasion and are uncertain whether their marriage will endure. As a direct result of the separation, [the appellant’s father] attempted suicide.

 - 3. [The appellant] has suffered directly as a result of rejection by other children on the ground that she was sexually molested. She has also

suffered indirectly as a result of the disturbance in the parental relationship.

4. As a result of the sexual molestation, [the appellant] is socially inhibited, cautious in her relationships, and fearful of losing her parents.
 5. [The appellant] and her parents urgently need counselling. It is also possible that [the appellant] will need further counselling when she reaches adolescence.
 6. I would estimate that currently, she and her family require 50 sessions of counselling at \$160.00 per session. When [the appellant] reaches adolescence, she will need 25 sessions of counselling at \$160.00 per session.”
- [12] The primary judge did not attempt to (and could not, on the evidence before him) determine the extent, if any, to which the appellant’s parents’ marital problems had been caused by disclosure of the offence. I note that during the sentencing proceedings the respondent’s counsel asserted that there had been problems in the marriage before this incident. Of course, compensation may be awarded only for injury proved to have been suffered by an applicant in consequence of an offence committed against the applicant.
- [13] The appellant’s counsel submitted that the award of \$15,000 was about half of what it should have been. However, this court will not reopen an award unless some error of principle is demonstrated or unless it is shown to have been manifestly inadequate.
- [14] The potentially relevant heads in the compensation table were as follows –

1. Bruising/laceration etc	minor/moderate	1% - 3%	\$750 - \$2,250
2. Bruising/laceration etc	severe	3% - 5%	\$2,250 - \$3,750
31. Mental or nervous shock	minor	2% - 10%	\$1,500 - \$7,500
32. Mental or nervous shock	moderate	10% - 20%	\$7,500 - \$15,000
33. Mental or nervous shock	severe	20% - 34%	\$15,000 - \$25,500

A further head was recognised by the *Criminal Offence Victims Amendment Regulation (No 1)* 1997 (Qld), which came into effect on 18 December 1997. (That regulation is applicable to this appeal because the compensation had to be assessed in accordance with

legislation in force at the date of the assessment: *Whyte v Robinson* [2000] QCA 99, 28 March 2000.) The further head of compensation is “the totality of the adverse impacts of a sexual offence suffered by a person to the extent to which the impacts are not otherwise an injury under section 20”. The maximum which may be awarded for this injury is \$75,000.00. An “adverse impact” includes:-

- “(a) a sense of violation;
- (b) reduced self worth or perception;
- (c) post-traumatic stress disorder;
- (d) disease;
- (e) lost or reduced physical immunity;
- (f) lost or reduced physical capacity (including the capacity to have children), whether temporary or permanent;
- (g) increased fear or increased feelings of insecurity;
- (h) adverse effect of the reaction of others;
- (i) adverse impact on lawful sexual relations;
- (j) adverse impact on feelings;
- (k) anything the court considers is an adverse impact of a sexual offence.”

[15] It was submitted that the primary judge erred in failing to make any award for physical injuries, and that he should have allowed \$1,500.00 for bruising/laceration etc. in the minor/moderate category. There was no evidence of physical injuries beyond those found when she was first taken to the Royal Children’s Hospital, and no evidence of any ongoing or permanent physical injuries. The maximum which may be allowed for bruising/laceration etc. is 5% of the scheme maximum, ie \$3,750.00. That would be for the most serious category of such injuries. Here the physical injuries were very minor, and at common law might not sound in any more than nominal damages. Of course, the compensation table bears no relationship to what might be awarded as damages in tort; usually the compensation is a lot less than might be expected at common law. See *Dooley v Ward* para [5]. I consider that on the facts of this case it was within the primary judge’s discretion not to make an award under this head.

[16] The principal submission on appeal was that the judge erred in awarding compensation under the heading “mental or nervous shock” rather than the heading “totality of adverse impacts of sexual offence.” I have set out the ranges within which he could have made an award under either head. I am not persuaded that the appellant was denied compensation for elements of her emotional condition because the primary judge adopted the mental or nervous shock rubric. It is often the case that an applicant’s injury could be categorised under more than one head in the compensation table. Of course an applicant is *prima facie* entitled to compensation for all the component parts of his or her overall condition resulting from the offence, but the court must be careful to avoid compensating for the same component under more than one head and so overcompensating the victim. Professor Nurcombe identified an emotional disturbance, which was not mental or nervous shock in the sense of a diagnosed psychiatric illness. However, the courts have not interpreted mental or nervous shock in the compensation table as requiring such a diagnosed psychiatric illness; indeed in the days before the introduction of the *Criminal Offence Victims Amendment Regulation (No 1)* 1997 (Qld), awards

were regularly made under that head for emotional disturbance falling short of such a diagnosis.

- [17] The real issue is whether the award of compensation was manifestly inadequate.
- [18] In *Kepple v Lafragua*, District Court Brisbane 1101/99, Healy DCJ, 9 April 1999, the respondent was convicted of indecently dealing with a girl under 12. She suffered an acute stress disorder with the symptoms lasting under 1 month. It was not a full blown post-traumatic stress disorder. It had chronic mild sequelae. It was described by the doctor as moderate nervous shock. She was allowed compensation of \$30,000.00. Although the judgment does not reveal under what head the compensation was assessed, it must have been as the totality of adverse impacts of the sexual offence, since the maximum allowable for nervous shock is \$25,500.00. That award was generous, especially compared with the subsequent decision in *Sanderson v Kajewski* [2000] QSC 270, 12 July 2000. There the respondent was convicted of indecently dealing with and having carnal knowledge of a girl then aged 14. He was aged 22 and the husband of the girl's cousin. He took advantage of her when she was sick from overindulgence in alcohol and marijuana. Compensation was assessed 4 ½ years later. She had suffered a post-traumatic stress disorder. For the first 12 months she had coped reasonably well but thereafter she had gone downhill and had various symptoms for about 2 ½ years before some improvement. The judge was not satisfied that the incident was the sole cause of all of her present problems (which included an offence of dishonesty, substance abuse and promiscuity), although he accepted that it played a major part. He allowed compensation of \$35,000.00.
- [19] Compared with *Kajewski*, the \$30,000.00 for which the appellant's counsel contended in the present case could not be justified. The appellant is still very young: at the time of the assessment she was aged 7 ½. On the evidence, her problems were due in part to her parents' marital problems. What the primary judge allowed was about 60% of the maximum allowable for mental or nervous shock, or 20% of the maximum allowable for the totality of the adverse impacts of a sexual offence. It has not been shown that there were aspects of her condition for which she was denied compensation. While the award was low, it was not so low as to be manifestly inadequate.
- [20] I would dismiss the appeal.

Order:

Appeal dismissed