SUPREME COURT OF QUEENSLAND

CITATION:	*Re JI v AV* [2001] QCA 510
PARTIES:	**JI** (applicant) **v** **AV** (respondent)
FILE NO:	Appeal No 6491 of 2001 DC No 2711 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 November 2001
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2001
JUDGES:	Williams JA, Chesterman and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal granted. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO THE DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND – where the applicant was raped in her home – where the applicant was 86 years old – where s 1A *Criminal Offence Victims Regulation* 1995 provides for compensation to victims of sexual offences who suffer adverse impacts – where s 1A *Criminal Offence Victims Regulation* 1995 operates to the extent to which the impacts are not otherwise an injury under s 20 *Criminal Offence Victims Act* 1995 – whether all injuries sustained in sexual offence should be considered an adverse impact under the *Criminal Offence Victims Regulation* 1995 STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – WORDS TO BE GIVEN THEIR LITERAL AND GRAMMATICAL MEANING *Criminal Code Amendment Act* 1968 (Qld)

Criminal Offence Victims Act 1995 (Qld) s 7 s 20, s 22, s 24, s 25, s 36
Criminal Offence Victims Regulation 1995 (Qld) s 1A, s 2, s 2A

Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436, cited
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, cited
Bergin v White; ex parte Bergin [1956] St R Qd 432, cited
Bropho v Western Australia (1990) 171 CLR 1, cited
Buckland v Estate of Kennedy [2000] QSC 337, SC No 2488 of 2000, 2 October 2000, cited
Catlow v Accident Compensation Commission (1989) 167 CLR 543, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, followed
Codd v Codd [2000] QDC, DC No 1558 of 2000, 24 May 2000, cited
Cole v Director-General of Department of Youth and Community Services (1987) 7 NSWLR 541, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1980 – 1981) 147 CLR 297, cited
Dooley v Ward [2000] QCA 493, CA No 8093 of 2000, 1 December 2000, referred to
Ferguson v Kazakoff [2000] QSC 156, SC No 8834 of 1999, 6 June 2000, cited
Houston v Toby [1996] QDC, DC No 29 of 1996, 6 December 1996, cited
Hoy v Dunbar [2000] QDC, DC No 1557 of 2000, 5 May 2000, cited
Jones v Thompson [2001] QDC, DC No 4905 of 2000, 29 January 2001, cited
Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404, cited
Lester v Ahmed [2000] QDC, DC No 1618 of 2000, 12 May 2000, cited
M R v Webb [2001] QCA 113, CA No 4166 of 2000, 27 March 2001, referred to
MAJ v KM [2000] QCA 410, CA No 6042 of 2000, 6 October 2000, cited
Mills v Meeking (1990) 169 CLR 214, followed
Morris v Soper [2001] QDC, DC No 1184 of 2000, 21 June 2001, cited
Newby v Mullins [2000] QDC, DC No 242 of 2000, 31 January 2000, cited
Pambula District Hospital v Herriman (1988) 14 NSWLR 387, followed

Pinner v Everett [1969] 1 WLR 1266, cited
R v Daniel; ex parte Raymond [1998] QDC, DC No 5101 of 1998, 4 December 1998, cited
R v Di Fiori; ex parte Anthony [1999] QDC, DC No 3107 of 1999, 24 August 1999, cited
R v Gilchrist; ex parte Hall [1999] QDC, DC No 1434 of 1999, 25 May 1999, cited
R v Hagaen; ex parte Townsend [1998] QDC, DC No 3305 of 1998, 10 August 1998, cited
R v Peacock; ex parte Homer [1999] QDC, DC No 2945 of 1999, 14 September 1999, cited
R v Sainty [1979] Qd R 19, referred to
R v Tiltman; ex parte Dawe [1995] QSC, SC No 324 of 1995, 22 June 1995, cited
Ryan v Ziebarth [2001] QDC 57, DC No 13 of 2001, 6 April 2001, referred to
Sanderson v Kajewski [2000] QSC 270, SC No 5114 of 2000, 12 July 2000, cited
Steven v Atwell [2001] QDC, DC No 2710 of 2001, 20 June 2001, cited
Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231, cited
The Commonwealth v Baume (1905) 2 CLR 405, cited
Thompson v Goold & Co [1910] AC 409, referred to
Thompson v Judge Byrne (1999) 196 CLR 141, followed
Whyte v Robinson [2000] QCA 99, CA No 7292 of 1999, 28 March 2000, cited

COUNSEL: Mr S Hamlyn-Harris for the applicant
Mr W Isdale for the Attorney-General amicus curiae

SOLICITORS: Legal Aid Queensland for the applicant
Crown Law for the Attorney-General amicus curiae

[1] **WILLIAMS JA:** The background to this appeal is fully set out in the reasons for judgment of Chesterman J which I have had the advantage of reading. I agree with all that he has said therein and with the orders he proposes.

[2] Essentially the problem becomes one of statutory construction. Regulation 1A of the *Criminal Offence Victims Regulation* 1995 must be read in harmony with ss 20, 22, 24 and 25 of the *Criminal Offence Victims Act* 1995. Harmonisation is achieved by giving full force and effect to the words in reg 1A "to the extent to which the impacts are not otherwise an injury under section 20". That makes it clear that where a condition with respect to which the victim seeks compensation is caught by the definition of "injury" in s 20 of the Act, compensation must be awarded by reference to the "compensation table" referred to in s 20. It is only if the condition is not covered by the definition of "injury" that compensation may be awarded through reliance on reg 1A.

[3] There is an element of artificiality about the way in which criminal compensation is calculated, but that is a necessary consequence of applying the legislation. Where

an injury is sustained the compensation must be calculated by referring to the percentages in the table and the court has no discretion to do otherwise.

[4] As I have said, I agree with the orders proposed by Chesterman J.

[5] **CHESTERMAN J:** The applicant seeks leave to appeal against the judgment of McGill DCJ given in Brisbane on 20 June 2001 by which the respondent was ordered to pay the applicant $13,500 pursuant to the *Criminal Offence Victims Act* 1995 ("the Act"). The applicant is 89 years of age. When she was 86, on 16 January 1999, the respondent broke into her house and raped her. On 16 March 2000 he pleaded guilty to one count of breaking and entering with intent to commit an indictable offence and one count of rape. He was sentenced to seven years imprisonment for the first offence and life imprisonment for the second.

[6] The applicant suffered both psychiatric and physical injuries from the assault upon her. An application for compensation in accordance with the Act resulted in the order I have mentioned. The applicant contends that the award is inadequate. The application for leave to appeal is predicated upon the submission that McGill DCJ misconstrued the Act's provisions. The applicant contends that on its proper construction the appropriate award of compensation would have been about $20,000 more than it was.

[7] The application raises an important point and one which arises frequently in the District Court. For that reason the court notified the parties that it would treat the application as the hearing of the appeal and invited the Attorney-General to be represented and to address submissions to the court. Mr Isdale appeared for that purpose. Materials were supplied to the court to allow it to reassess compensation in the event the appeal was successful.

[8] It was accepted that if McGill DCJ's opinion on the meaning of the Act were correct the amount of compensation he ordered was appropriate.

[9] By s 24 of the Act if someone is convicted on indictment of a personal offence the person against whom the offence was committed may apply to the court before whom the offender was convicted for an order that he pay compensation "for the injury suffered by the applicant because of the offence".

By s 20 "injury" is defined to mean

> " . . . bodily injury, mental or nervous shock, pregnancy or any injury specified in the compensation table or prescribed under a regulation."

On 18 December 1997 the Governor in Council amended the *Criminal Offence Victims Regulation* 1995 ("the Regulation") by inserting ss 1A and 2A. They provide:

> "**1A. (1)** For section 20 of the Act, 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, is prescribed as an injury.

> **(2)** An **"adverse impact"** of a sexual offence includes the following –
>
> (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.
>
> **(3)** In this section –
> **"sexual offence"** means a personal offence of a sexual nature.
>
> **2A.** The prescribed amount for section 25(5) of the Act for an injury mentioned in section 1A is an amount equal to an amount not less than 1% but not more than 100% of the scheme maximum.[1]"

[10] By s 25 of the Act a court assessing compensation may not order more than the prescribed amount, which is presently $75,000. Schedule 1 to the Act consists of a compensation table in which are set out various descriptions of injury to each of which is ascribed a percentage or a range of percentages of the "scheme maximum" of $75,000. Items 31, 32, and 33 in the table are, respectively,

> "31. Mental or nervous shock (minor) . . . 2% - 10%.
> 32. Mental or nervous shock (moderate) . . . 10% - 20%
> 33. Mental or nervous shock (severe) . . . 20% - 34%"

[11] A person injured by a criminal offence may, obviously, suffer more than one of the injuries set out in the compensation table. In such a case the amount of compensation referable to each injury is ascertained by reference to the applicable percentages of the maximum amount. These amounts are then added together, but if the total so derived "is more than the scheme maximum, only the scheme maximum may be ordered to be paid".

[12] By s 25(4) when a court decides what amount of compensation should be awarded for injuries specified in the compensation table it may not allow more than the percentage of the scheme maximum which appears in the table with respect to the injury or each injury. By s 25(5) in deciding the amount to be paid for an injury specified under a regulation, the court is limited to making an order for the amount prescribed by the regulation.

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[1] Under the Act, section 22(4), the maximum amount of compensation provided under the Act, Part 3 is reserved for the most serious cases and the amounts provided in other cases are intended to be scaled according to their seriousness.

For the injury defined in s 1A of the Regulation the prescribed amount is $75,000. For mental or nervous shock the amount that can be awarded pursuant to s 20 in the compensation table varies between $1,500 and $25,500.

[13] As a consequence of the rape the applicant became anxious and fearful. She had lived alone since the death of her husband in 1984. She no longer felt confident that she could maintain such an independent lifestyle. She suffered sleep disturbance and became "terribly frightened" at night. She moved from Greenslopes to West End. She was diagnosed by Professor Byrne, psychiatrist, as suffering from an adjustment disorder with anxiety which was initially of moderate severity but had partially resolved. The applicant has developed progressive dementia and now suffers marked deficiencies in memory and cognition. In a year or two her adjustment disorder will be overtaken by her worsening dementia.

[14] The learned District Court judge assessed compensation under three heads:

- Bruising and laceration for which he allowed $750.
- Mental or nervous shock in the form of the adjustment disorder with anxiety for which he allowed $7,500.
- Adverse impacts of the rape assessed pursuant to s 1A of the Regulation for which he allowed $5,250.

[15] The applicant's point is that the adjustment disorder should have been included as an "adverse impact" for which an assessment pursuant to s 1A of the Regulation should have been made. The maximum amount would thus have been $75,000. By treating the disorder as mental or nervous shock his Honour was limited to assessing no more than the greatest of the percentages listed opposite that injury in the compensation table, ie 34 per cent of $75,000, $25,500.

[16] The learned judge adopted the approach to the interrelationship between s 1A of the Regulation and s 20 of the Act advanced by Robertson DCJ in *Ryan v Ziebarth* [2001] QDC 57. McGill DCJ said:

> "The regulation covers a wide range of adverse impacts expressly but it is drafted in terms that any adverse impacts of a sexual offence suffered by an applicant is capable of constituting an injury for the purpose of . . . the Act.
>
> The consequences of rape can be many and varied and can be . . . very serious and it was no doubt with the view to reflecting that situation and a concern that these were matters not adequately reflected in the formulation of the current schedule . . . this regulation was introduced. It was intended to ensure . . . the Court would not be unduly confined by a narrow definition of injury from ensuring (that) compensation was available . . .
>
> Nevertheless . . . it is necessary to exclude from consideration . . . of matters covered by the regulation, matters which are otherwise an injury under the legislation and therefore already covered by it. Therefore it is necessary to exclude from consideration the . . . mental or nervous shock . . . Otherwise there would be an element of double compensation."

[17] It is the approach explicit in the last passage quoted that is the subject of the present appeal. The applicant points out that on the view of s 1A taken by the judge below "only adverse impacts which 'are not otherwise an injury under s 20' . . . constitute 'an injury mentioned in' reg 1A", and argues that "this is a very literal reading of reg 1A(1) which clearly does not reflect the intention of the regulation making authority."

[18] The submission is that all the adverse impacts of a sexual offence should be treated as an injury described in s 1A for which the maximum compensation is $75,000. This approach, it is said, should be followed even if the impacts, or some of them, amount to mental or nervous shock. Instead the approach to the legislation taken by the learned judge was to determine whether the applicant suffered mental or nervous shock as a consequence of the sexual offence. Having found she did, compensation was assessed for shock by reference to the compensation table. He then turned to consider whether there were adverse impacts other than mental or nervous shock. There were, and compensation was fixed for those impacts from which were excluded mental and nervous shock.

[19] The applicant submits that the amendments to the Regulation were intended to increase compensation payable to victims of sexual offences and that the construction of the Act and Regulation adopted by the learned judge would not produce that result in cases where adverse impacts constitute or include mental or nervous shock which, ordinarily, would be the more serious cases. It is also pointed out that the adverse impacts listed in s 1A(2) of the Regulation include one condition which will always, one would think, amount to mental or nervous shock. That is Item (c), post traumatic stress disorder which, being a psychiatric disorder, would always qualify for the designation. I do not think any of the other listed impacts are in that category. There is a well recognised distinction between disease and injury. Some of the other impacts may, depending on their severity, amount to mental or nervous shock, but that is of no consequence for present purposes. To return to Item (c), it is said that its inclusion indicates that the adverse impacts which are to be assessed for compensation pursuant to the Regulation must include mental or nervous shock.

[20] The difficulty for the applicant appears in the phrase "to the extent to which the impacts are not otherwise an injury under section 20". There can be no doubt about its meaning. Adverse impacts of a sexual offence are an injury and are to be assessed for compensation pursuant to the Regulation unless they amount to an injury under s 20, in which case they fall outside the scope of the Regulation and are to be assessed under the Act. This follows from the phrase. Impacts are an injury for the purposes of the Regulation *to the extent* that the impacts are not an injury under s 20. They will be such an injury if they are mental or nervous shock. I cannot see any escape from this conclusion. The consequence is not that less seriously affected victims of sexual offences will receive more by way of compensation than the more seriously affected whose claims will be assessed under s 20. That is a theoretical possibility but it is one likely to be avoided in practice by the court heeding the caution found in s 22(3) of the Act, that compensation is intended to help an applicant but is not intended to reflect the compensation to which an applicant would have been entitled by way of damages at common law. Furthermore by s 22(4) of the Act compensation in cases other than the most serious is to be fixed as a proportion of the maximum allowable amount.

[21] It may be said in parenthesis that the exercise in restraint called for by s 25(6) of the Act will have no application. That subsection provides that:

> "In deciding the amount that should be ordered . . . for an injury to which subsections (4) and (5) do not apply, the court must decide the amount by -
>
> (a) comparing the injury with injuries to which subsections (4) and (5) apply; and
>
> (b) having regard to the amounts that may be ordered . . for those injuries."

Subsection (6) is not applicable because the assessment of compensation pursuant to the Regulation is one to which subs (5) does apply because the injuries (adverse impacts) are specified under the Regulation which also prescribed a maximum amount for it.

[22] This construction of the Regulation means that post traumatic stress disorder can only be an adverse impact where it does not amount to mental or nervous shock which will rarely, if ever, be the case. That, however, does not have the effect that the scheme for compensation found in s 1A is unworkable, or even absurd. It means only that that one impact will probably always be assessed under the Act rather than the Regulation. This consequence is not enough to give the words "to the extent to which the impacts are not otherwise an injury" a meaning other than their plain one. Section 1A will still have substantial scope to operate. It makes compensation available to victims of sexual offences for a greater variety of consequences than was available under s 20.

[23] The construction contended for by the applicant will produce an odd, and indeed, an unintended result. An applicant who suffers adverse impacts which amount to mental or nervous shock from the offence will be compensated twice in respect of the same set of symptoms. The impacts will be an injury under s 20 and a separate injury under s 1A. The courts have consistently construed the Act as not giving rise to that result. See for example *M.R. v Webb* [2001] QCA 113.

[24] The applicant submitted that the words in question, "to the extent to which the impacts are not otherwise an injury under section 20" were "merely intended to ensure that adverse impacts which might not otherwise constitute an "injury" under s 20 were the subject of compensation". This does no more than state the result which the applicant desires. The applicant does not explain how the words are to be read so as to produce that result. Indeed the submission underscores the point that the Regulation was concerned to provide compensation for injuries that were not already compensable ie pursuant to the Act. It does so by creating a new category of injury, but one which excluded the existing categories, those found in s 20.

[25] Neither construction of the Act produces an entirely harmonious result. However the presence in s 1A of the phrase "to the extent to which . . . impacts are not otherwise an injury under section 20" present an insuperable difficulty for the applicant. It is only by doing great violence to the phrase, by ignoring the words altogether, or giving them a meaning directly contrary to what they say, that the Regulation will operate as the applicant contends it should. To achieve the applicant's object the whole phrase must be notionally excised from the Regulation

or, contrary to what the words expressly say, they must be read as meaning "whether or not the impacts are an injury under s 20".

[26] In my opinion the court is not entitled to rewrite legislation to such a radical extent. It is clear that in construing legislation the courts "are not at liberty to consider any word or sentence as superfluous or insignificant. All words . . . must be given some meaning and effect . . .". See *Statutory Interpretation in Australia* 4th ed by Pearce & Geddes p 35 and *The Commonwealth v Baume* (1905) 2 CLR 405 at 414. It is, as Lord Mersey pointed out in *Thompson v Goold & Co* [1910] AC 409 at 420, a "strong thing" to add words to a section. It is an even stronger thing to give to words, the meaning of which is plain, a meaning which they do not have and one which is hostile to their plain meaning.

[27] The applicant's submission is not made out by asserting that the intention of Executive Council will be thwarted by giving the phrase its natural meaning. As Gibbs CJ pointed out in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304:

> "It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say."

At 305 his Honour pointed out:

> "The danger that lies in departing from the ordinary meaning of unambiguous provisions is that it may degrade into mere judicial criticism of the propriety of the acts of the Legislature . . . it may leave judges to put their own ideas of justice or social policy in place of the words of the statute."

Stephen J sounded the same caution. His Honour wrote (310):

> "Statute law, the direct product of the legislature, is perhaps the least appropriate field of all in which to indulge in judicial law-making. The corner of that field occupied by closely drafted statutes of high complexity should be particularly uninviting to the judicial law-maker. It provides the very antithesis of those occasional legislative measures which lay down only general principles and invite the courts to supply the details. It can never be enough to justify judicial intervention that what has been enacted may seem to a court to lead to an irrational result."

[28] The result achieved by s 1A according to the plain meaning of the words used is not irrational. If it does not allow the victims of sexual offences to be treated as generously as Executive Council thinks appropriate the Regulation can be amended. That task is not a difficult one. It is not, however, one for the courts.

[29] In my opinion the applicant should be given leave to appeal but the appeal should be dismissed. There should be no order as to costs.

[30] **ATKINSON J**: I have had the advantage of reading the reasons for judgment of Chesterman J. I agree with the order he proposes for the reasons which follow.

[31] Crime is regarded in our legal system as quite different from a civil wrong. Although both may have the effect of causing terrible injury to an individual, a criminal offence is primarily characterised as a crime against the State. It is the State which prosecutes the alleged offender on behalf of all citizens and not just the victim. The courts have the important role of ensuring that any person accused of a criminal offence has a fair trial conducted according to law. Unfortunately, this led historically to the focus of the criminal law not being on the victim's needs and rights. Usually victims were not compensated for their losses unless they commenced separate civil proceedings, often futile because of the lack of financial resources of the convicted person to meet any judgment.

[32] In the field of civil wrongs, public policy has intervened to ensure that persons injured at work and in motor vehicle accidents have access to compulsory insurance funds so that those injured, particularly by another's negligence, can be compensated for their losses. Social reform has been slower to recognise the need to compensate victims of crime.

[33] Nineteenth century reformers, such as Jeremy Bentham,[2] recognised the theoretical justification for schemes to compensate victims. Bentham described such compensation as satisfaction, a remedy for the prevention and repair of crime in addition to preventive, suppressive and penal remedies. It was not, however, until 1968, that the legislature in Queensland moved to create a modest compensation scheme for victims of crime through the *Criminal Code Amendment Act* 1968, which added Chapter LXVA to the *Criminal Code*. This provided for a maximum of $2,000 compensation for "a person aggrieved" by an indictable offence of which the offender had been convicted. An amendment in 1975 raised the maximum amount of compensation, which could be awarded under Chapter LXVA of the *Criminal Code*, to $5,000. In 1984, a further amendment of the relevant chapter of the *Criminal Code* linked the quantum of compensation to amounts that would be paid under the *Workers Compensation Act* 1916 for similar injuries. Unsurprisingly, difficulties arose as the injuries suffered as a result of crime are very often dissimilar to those suffered at work.

[34] Meanwhile, there were strong judicial statements with regard to the imperative need to assist victims of crime. In *R v Sainty*,[3] Demack J frankly criticised the inadequacies of the victim compensation provisions of the *Criminal Code*:

> "It seems to me clear beyond argument that the community has an obligation towards victims of crime … [The victim's] middle age has been blighted by acts of frightening brutality in respect of which he is entirely blameless. It would be a monstrous thing if the community's only interest in him were as a witness to secure a conviction. Yet, victims of crime would be forgiven for thinking that they are no more than necessary evils in the majestic administration of the criminal law."

[35] In 1995, the question of compensation for victims of crime was dealt with in a separate, stand-alone statute, the *Criminal Offence Victims Act* (COVA), which

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2 Principles of Penal Law, Part 1, Chapters VI – XI, in "*The Works of Jeremy Bentham, Part II*", Edinburgh, William Tait, 1838.

3 [1979] Qd R 19 at 20.

came into effect on 18 December 1995. It was clearly influenced by the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by resolution of the General Assembly of the United Nations in 1985 (the UN resolution).[4] Clause 8 of the UN resolution provides for the payment of compensation by offenders to victims of crime. It says:

> "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights."

The role of governments is recognised in Clauses 12 and 13 which provide:

> "12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
>
> (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
>
> (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
>
> 13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. …"

[36] Compensation is only one of the matters which COVA addresses.[5] Part 3 establishes a scheme for the payment of compensation to a person –

> "(a) for injury suffered by the applicant caused by a personal offence committed against the applicant; or
>
> (b) for the death of someone on whom the applicant was dependant, caused in circumstances constituting murder or manslaughter; or
>
> (c) for funeral or other expenses from the death of the member of the applicant's family, caused in circumstances constituting murder or manslaughter; or
>
> (d) for injury suffered when helping a police officer to make an arrest or prevent an offence."

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4 See COVA, s 4(1).

5 For criticism of the unenforceability of the inspirational principles set out in Part 2 of COVA see S Currie and S Kift, "*Women Surviving as Victims in the Criminal Justice System in Queensland*" (1999) 15 QUTLJ 57 at 59 – 62.

[37] Division 2 of Part 3 of COVA deals with how an applicant for compensation may make an application to the court before which an offender is convicted, for an order that the convicted person pay compensation to the applicant for the injuries suffered by the applicant because of the offence. If the offender does not pay, then an applicant may make an application for the State to pay all or part of the amount to the applicant.

[38] The quantum of compensation payable is not, however, designed to truly compensate the victim for the offence suffered. Section 22(3) of COVA specifically provides:

> "Compensation provided to an applicant under this part is intended to help the applicant and is not intended to reflect the compensation to which the applicant may be entitled under common law or otherwise."

Uncannily, this reflects the criticism made by Bentham in 1838:[6]

> "Laws have every where been imperfect upon this point. On the side of punishment, excess has been little dreaded: on the side of satisfaction, little trouble has been taken as to deficiency. Punishment, an evil which when in excess, is purely mischievous, is scattered with a lavish hand; whilst satisfaction, which altogether produces good, is given in grudging parsimony."[7]

[39] The amount of compensation is limited to the maximum set out in COVA which is reserved for the most serious cases and the amounts awarded in other cases are intended to be scaled according to their seriousness.[8] The quantum of compensation must be scaled against the maximum amount that can be awarded for that type of injury, not the scheme maximum. In *R v Ward, ex parte Dooley*[9] the court gave an example of how this might work in practice:

> "The result appears to be that for severe mental and nervous shock, one of the categories in issue here, the court has to consider what is an appropriate figure, having regard to the range of 20 per cent to 34 per cent provided. Nervous shock which is severe but not of the "most serious" kind must be put at the appropriate place in the range of 20 per cent to 34 per cent, regarding the 34 per cent as "reserved for the most serious cases". Similarly, severe "bruising/laceration etc", for which a range of 3 per cent to 5 per cent is set, must be assessed on the basis that the 5% is "reserved for the most serious cases".
>
> A complication of this scheme is that it contemplates that one has to think of the "most serious" sort of "minor/moderate" instance of "bruising/laceration etc"; that seems an odd concept. But it is, in our respectful opinion, reasonably clear that the scaling according to seriousness referred to in s 22(4) must be intended to be scaling

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6 (supra) at 372.

7 In this case, the offender received life imprisonment while the victim received compensation of only $13,500.

8 See *R v Ward, ex parte Dooley* [2001] QdR 436.

9 (supra) at 438 [6] – [7].

> within the ranges set out in the compensation table, rather than scaling within the range of 0% to 100% of the scheme maximum, now $75,000. This view is consistent with the approach taken in *Sanderson v Kajewski*[10] and *Buckland v Estate of Kennedy*.[11]"

[40] Compensation may be awarded under COVA to a person against whom a personal offence has been committed for the injury suffered. "Injury" is defined in s 20 as:

> "bodily injury, mental or nervous shock, pregnancy or any injury specified in the compensation table or prescribed under a regulation."

[41] The injuries in the compensation table range from the least serious, being minor bruising or laceration to the most serious, being paraplegia/quadriplegia. Mental or nervous shock also appears as an injury in the compensation table. For each injury, the percentage of the scheme maximum that may be awarded is prescribed. Up to three per cent of the scheme maximum, for example, may be awarded for minor or moderate bruising or laceration. The maximum of one hundred per cent may be awarded for loss of vision in both eyes or paraplegia/quadriplegia. Mental or nervous shock is divided into three categories: minor, moderate and severe, for which the percentage of the scheme maximum that may be awarded is 2%-10%, 10%-20% and 20%-34% respectively. The scheme maximum is at present $75,000.00.[12]

[42] Certain deficiencies in the legislation gave rise to judicial, academic and media criticism. In 1996 and 1997, District Court judges were critical of the failure to recognise rape or the impact on a victim of sexual assault in the Compensation Table.[13] The local newspaper ran a number of articles critical of the awards made under COVA and in particular awards made to women and children who were the victims of sexual offences.[14]

[43] A number of academic commentators have voiced similar criticisms. Eola Barnett, in "*Criminal Offence Victims Act 1995 (Qld) – Some Observations*",[15] criticised the emphasis in the Compensation Table on visible injuries. Ms Barnett said that the table failed to adequately address appropriate compensation for sexual offences where physical injuries may not be obvious. She criticised the limits placed on

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10 [2000] QSC 270, SC No 5114 of 2000, 12 July 2000, Thomas JA.

11 [2000] QSC 337, SC No 2488 of 2000, 2 October 2000, Ambrose J.

12 *Criminal Offence Victims Regulation* 1995 (COVA Regulation), s 2.

13 *Houston v Toby* [1996] QDC, DC No 29 of 1996, 6 December 1996, O'Sullivan DCJ; A West, "*Sexually transmitted disease as a bodily injury*" (1997) 18 The Queensland Lawyer 82; S Currie and S Kift, "*Add Victims and Stir? Or change the recipe? Achieving Justice for Victims of Crime in Queensland*" (1999) 6 JCULR 78 at 98.

14 T Koch, "*State accused of Bastardry in Wake of Horrific Rapes*", The Courier Mail, 7 November 1997, pp 1-2; S Monk, "*A Matter of Justice*", The Courier Mail, 7 November 1997, p 15; T Koch, "*Victims told State has Final Say on Payouts*", The Courier Mail, 8 November 1997, p 7; W Sanderson, "*Lawyers hit Payout Cuts*", The Courier Mail, 8 November 1997, p 7; T Koch, "*No Justice as Victims persecuted*", The Courier Mail, 8 November 1997, p 9; T Koch, "*Bash Victim's Fight for Award*", The Courier Mail, 15 November 1997, p 8; T Koch, "*ATSIC spurns Pay-out Help for Crime Victims*", The Courier Mail, 15 November 1997, p 8; T Koch, "*Victim's Aid Pledge a Hollow Farce*", The Courier Mail, 15 November 1997, p 23.

15 (1996) 12 QUTLJ 88 at 98.

compensation for mental or nervous shock, which is the basis upon which compensation for sexual offences is often calculated, as inadequate.

[44] The Queensland Law Society's magazine "Proctor", in its edition of December 1997,[16] published an article critical of a number of aspects of COVA, particularly in the area of sexual offences against women. Garkawe and Hocking observed:

> "Perhaps the clearest inadequacy of COVA lies in its failure to recognise women's harms, in particular the effects of rape (or sexual assault) on its victims. Much has been written in modern times concerning these effects, such as the trauma, the feelings of bodily invasion, the loss of trust, privacy and self esteem, and the problems rape causes to present and future intimate relationships – the list goes on. In recognition of this, many victimologists consider sexual assault to be the second worst crime in terms of effects on the victim (the worst being murder). It thus seems extraordinary that rape (or sexual assault) is not located in the Compensation Table, and has hence to be assessed in relation to comparison with other injuries. This is clearly inadequate – to simply assume that the harm rape or sexual assault causes can be compared to other forms of assault ignores the whole body of literature on this subject."

[45] The article went on to compare COVA with the New South Wales legislation. In the *Victims Compensation Act* (NSW) 1987, sexual assault was specifically recognised in the Compensable Injuries Table. This Act has been repealed by the *Victims Support and Rehabilitation Act* (NSW) 1996 but compensable injuries still include sexual offences which are divided into three categories to reflect degrees of seriousness of the offence.

[46] The definition of "injury" in s 20 of COVA was expanded by regulation on 18 December 1997 to add ss 1A and 2A to the COVA Regulation. Because the amendment was made by subordinate legislation[17] there are none of the usual extrinsic materials that can be used to aid in interpretation of the statute.[18] However, it is safe to assume that the amendment was in response to the public criticism, to which I have referred, of the compensation scheme with respect to victims of sexual offences.[19] Robertson DCJ was of that view in *Ryan v Ziebarth*,[20] where he referred to the haste in which the amendments to the Regulation were promulgated. The judgments, academic writings and newspaper articles clearly identify the mischief which the amendment to the COVA Regulation addressed.

[47] The sections of the COVA Regulation show the unfortunate effect of their being drafted in haste. As well as specifying certain adverse effects of sexual offences, s 1A of the COVA Regulation has a catch-all clause, s 1A(2)(k), to cover all adverse impacts of sexual offences. Its tabulation of the adverse impacts of sexual offences, together with this catch-all clause, suggests that s 1A is intended to be

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16 S Garkawe and BA Hocking, "*Rape Victim Treatment highlights the Inadequacies of Crime Compensation in Queensland*" (1997) Proctor 16 at 16 – 17.

17 Notification of Subordinate Legislation No 488, Queensland Government Gazette No 98, 19 December 1997, p 1772.

18 *Acts Interpretation Act* 1954 (Qld), s 14B.

19 See *Whyte v Robinson* [2000] QCA 99, CA No 7292 of 1999, 28 March 2000.

20 [2001] QDC 057, DC No 13 of 2001, 6 April 2001 at [12].

comprehensive with regard to sexual offences. However, the section in its terms appears to exclude injuries already covered by s 20, which suggests that it was intended to be complementary to s 20 and not comprehensive.

[48] Section 1A of the COVA Regulation provides:

> "**1A.** **(1)** For section 20 of the Act, 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, is prescribed as an injury.
>
> **(2)** An **"adverse impact"** of a sexual offence includes the following –
>
> (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.
>
> **(3)** In this section--
>
> **"sexual offence"** means a personal offence of a sexual nature."

[49] Section 2A of the COVA Regulation provides that 100 per cent of the scheme maximum may be awarded for an injury mentioned in s 1A of the COVA Regulation.

[50] After the amendments to the COVA Regulations, academic commentators continued to criticise the scheme in COVA for compensation of victims of sexual

offences. In December 1998, Hocking and Manville again criticised COVA in the following terms:[21]

> "In Queensland, a deficiency lies in the limits placed on compensation for mental or nervous shock, and it is precisely this form of compensation that many victims of sexual assault or sexual offences will claim."

However, judges started awarding compensation to victims of sexual assaults in accordance with the maximum available pursuant to s 2A of the COVA Regulation rather than under the rubric of mental or nervous shock in the compensation table.[22]

[51] What is the correct approach to statutory interpretation in this case? Both at common law[23] and by statute[24] a purposive approach is preferred to a strictly literal[25] approach to legislation. Section 14A(1) of the *Acts Interpretation Act* 1954 provides:

> "In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

"Act" is defined in s 7 to include statutory instruments, such as the COVA Regulation here under consideration. "Purpose" is defined in s 36 to include a "policy objective".

[52] The purpose of a statute may be gathered from the historical context and background to the statute. As Samuels JA observed in *Pambula District Hospital v Herriman*:[26]

> "it has always been open to the court to have regard to the historical setting of a statute and by that means to ascertain what the object of the legislature was."

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21 BA Hocking and LL Manville, *"Nervous Shock and Psychiatric Injury Arising out of Accidents and in Criminal Compensation*" (1995) Proctor 22 at 25.

22 *R v Hagaen; ex parte Townsend* [1998] QDC, DC No 3305 of 1998, 10 August 1998, Healy DCJ; *R v Daniel; ex parte Raymond* [1998] QDC, DC No 5101 of 1998, 4 December 1998, Healy DCJ; *R v Gilchrist; ex parte Hall* [1999] QDC, DC No 1434 of 1999, 25 May 1999, Forde DCJ; *R v Di Fiori; ex parte Anthony* [1999] QDC, DC No 3107 of 1999, 24 August 1999, Brabazon DCJ; *R v Peacock; ex parte Homer* [1999] QDC, DC No 2945 of 1999, 14 September 1999, Forde DCJ; *Newby v Mullins* [2000] QDC, DC No 242 of 2000, 31 January 2000, McLauchlan DCJ; *Hoy v Dunbar* [2000] QDC, DC No 1557 of 2000, 5 May 2000, Boulton DCJ; *Lester v Ahmed* [2000] QDC, DC No 1618 of 2000, 12 May 2000, Boulton DCJ; *Codd v Codd* [2000] QDC, DC No 1558 of 2000, 24 May 2000, McGill DCJ; *Jones v Thompson* [2001] QDC, DC No 4905 of 2000, 29 January 2001, McGill DCJ; *Morris v Soper* [2001] QDC, DC No 1184 of 2000, 21 June 2001, O'Brien DCJ.

23 *Bergin v White, ex parte Bergin* [1956] St R Qd 432 at 441 – 442; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 234; [1978] 1 All ER 948 at 951; *Cole v Director-General of Department of Youth and Community* Servies (1987) 7 NSWLR 541 at 542; *Mills v Meeking* (1990) 169 CLR 214 at 235.

24 *Acts Interpretation Act* 1901 (Cth) s 15AA, *Interpretation* Act 1987 (NSW) s 33; *Interpretation of Legislation Act* 1984 (Vic) s 35(a); *Acts Interpretation Act* 1954 (Qld) s 14A; *Acts Interpretation Act* 1915 (SA) s 22; *Interpretation Act* 1984 (WA) s 18; *Acts Interpretation Act* 1931 (Tas) s 8A; *Interpretation Act* 1967 (ACT) s 11A; *Interpretation Act* (NT) s 62A.

25 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161 – 162.

26 (1988) 14 NSWLR 387 at 410.

[53] The High Court explained this approach now taken to legislation in *CIC Insurance Ltd v Bankstown Football Club Ltd*:[27]

> "… the modern approach to statutory construction (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means … , one may discern the statute was intended to remedy.[28]"

At the same time, it is the language used in a statute that is critical to its interpretation.

[54] The proper approach to interpretation of the actual words used in a statute was set out by the High Court in *Mills v Meeking*:[29]

> "If the language of a statute is ambiguous or uncertain, a risk of injustice will bear upon the construction to be given to words used. But, if the language is not ambiguous or uncertain, a court will apply its ordinary and grammatical meaning unless to do so will give the statute an operation which obviously was not intended: see generally *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*;[30] also *Catlow v Accident Compensation Commission*.[31]"

[55] In the High Court's reconsideration of the correctness of *Mills v Meeking* in *Thompson v Judge Byrne*,[32] in which the authority of *Mills v Meeking* was upheld, Gaudron J held:[33]

> "It is a fundamental rule of construction that, where the words of a statute are clear, they should be given their natural and ordinary meaning unless that would result in absurdity, conflict with some other provision of the statute or lead to a 'result which cannot reasonably be supposed to have been the intention of the legislature.'[34]"

[56] If ss 1A and 2A of the COVA Regulation were meant to be a comprehensive provision for the payment of statutory compensation for the victims of sexual offences, then in its terms it fails to give effect to that intention. The problem which immediately arises in giving effect to that apparent intention is found in the words in subs (1), "to the extent to which the impacts are not otherwise an injury under section 20." This suggests that if the injury is already covered by s 20 of

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27 (1997) 187 CLR 384 at 408.

28 *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315.

29 (supra) at 223.

30 (1981) 147 CLR 297 at 304 – 305, 320 – 321.

31 (1989) 167 CLR 543 at 549 – 552.

32 (1999) 196 CLR 141.

33 (supra) at 158.

34 *Pinner v Everett* [1969] 1 WLR 1266 at 1273; [1969] 3 All ER 257 at 258, per Lord Reid. See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (supra) at 310 – 311, per Stephen J; at 320 – 321, per Mason and Wilson JJ; at 334, per Aickin J (dissenting); *Bropho v Western Australia* (1990) 171 CLR 1 at 20, per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, citing with approval the statement of the purposive approach by McHugh JA (as he then was) in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423.

COVA, the injury must be assessed under that section. It is only when the injury is, or includes, an injury that is not an injury under s 20, that s 1A of the COVA Regulation has any effect. At first blush, this might not seem to be an absurd or manifestly unjust result. Victims of sexual offences who do not suffer bodily injury, mental or nervous shock or pregnancy or any of the injuries specified in the compensation table, would nevertheless be able to make a claim for the adverse impacts of the sexual offence from which they suffer.

[57] Many of the specified adverse effects in s 1A fall squarely within the definition of injury in s 20 of bodily injury or nervous or mental shock. It has been accepted, for example, that "post-traumatic stress disorder", found in s 1A(2)(c) of the COVA Regulation, is within the definition of mental or nervous shock.[35] It follows that post traumatic stress disorder, for example, is said to be compensable under s 20 and under s 1A.[36] The same could be said of many of the specified adverse effects in s 1A and the definition of injury in s 20. The only way of avoiding such an interpretation is by the construction given to the section by the trial judge, ie that its purpose is to avoid double compensation by providing that if the injury is one that falls within s 20, as bodily injury, mental or nervous shock, pregnancy or injury specified in the compensation table, then it should be compensated according to that section. Only additional adverse effects of sexual offences fall to be compensated under s 1A of the COVA Regulation.

[58] An apparent injustice, however, arises from this interpretation. The maximum compensation available for a person who suffers from mental or nervous shock as a result of that offence is only $25,500, whereas the maximum compensation available for other adverse impacts not amounting to mental or nervous shock, such as adverse impact on feelings, is $75,000. Victims of sexual offences suffering the most serious mental or nervous shock could therefore only be awarded the maximum of $25,500.

[59] The courts have interpreted mental or nervous shock in the compensation table broadly. It does not require a diagnosed psychiatric illness.[37] As Thomas JA held in *Ferguson v Kazakoff*,[38] compensation for mental or nervous shock is not limited to cases where there is a diagnosable mental disorder or psychiatric illness resulting from the criminal offence, although it must be more than fear, fright, unpleasant memories or anger, or other adverse impact on feelings.

[60] Victims suffering adverse effects not amounting to bodily injury or even mental or nervous shock must have their compensation scaled against a maximum of $75,000.

[61] It follows that if the interpretation contended for the respondent is correct, a person with a less serious injury, such as hurt feelings, would be entitled to have his or her

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35 *MAJ v KM* [2000] QCA 410, CA No 6042 of 2000, 6 October 2000, at [13]; *Whyte v Robinson* (supra); *R v Tiltman; ex parte Dawe* [1995] QSC, SC No 324 of 1995, 22 June 1995, Lee J.

36 The divergence of opinion on how to compensate victims of sexual offences for post-traumatic stress disorder can be seen in a number of District Court decisions: *R v Hagaen; ex parte Townsend* (supra); R *v Daniel; ex parte Raymond* (supra); *R v Gilchrist; ex parte Hall* (supra); *R v Di Fiori; ex parte Anthony* (supra); *R v Peacock; ex parte Homer* (supra); *Newby v Mullins* (supra); *Hoy v Dunbar* (supra); *Lester v Ahmed* (supra); *Codd v Codd* (supra); *Jones v Thompson* (supra); *Morris v Soper* (supra); *Steven v Atwell* [2001] QDC, DC No 2710 of 2001, 20 June 2001, McGill DCJ.

37 *MR v Webb* [2001] QCA 113, CA No 4166 of 2000, 27 March 2001, at [16].

38 [2000] QSC 156, SC No 8834 of 1999, 6 June 2000, at [21].

compensation assessed against a higher maximum than a person with a similar but more serious injury, such as an anxiety disorder, which is within the definition of mental or nervous shock.

[62] All of the adverse effects of a sexual offence not otherwise an injury under s 20, constitute an injury prescribed under a regulation. Having been prescribed in s 1A of the COVA regulation, they become a bodily injury under s 20 as they are an "injury … prescribed under a regulation". The phrase in s 1A of the COVA Regulation "to the extent to which the impacts are not otherwise an injury under section 20" must have been inserted to avoid double compensation for the same injury.[39] If it is so limited, then an applicant must be compensated for the mental or nervous shock suffered under s 20 of COVA and not s 1A of the COVA Regulation, with the entirely unsatisfactory consequence that a person with a less serious injury may receive more compensation than a person with a more serious injury.

[63] I agree, therefore, with orders proposed by Chesterman J in his reasons. It need hardly be added that the result is in my view most unsatisfactory. It seems beyond argument that victims of sexual offences should be adequately compensated for the adverse effects of those offences and the statutory scheme should be amended to overcome the problem identified in these reasons.

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39 *MR v Webb* (supra) at [16].