

SUPREME COURT OF QUEENSLAND

CITATION: *Lewis v Williams* [2005] QCA 314

PARTIES: **JAMIE LEWIS**
(applicant/appellant)
v
OWEN MARK WILLIAMS
(respondent)

FILE NOS: Appeal No 4065 of 2005
DC No 76 of 2005

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 26 August 2005

DELIVERED AT: Brisbane

HEARING DATE: 9 August 2005

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

ORDERS: (a) **Allow the application for leave to appeal;**
(b) **Allow the appeal;**
(c) **Vary the order appealed from by substituting the amount of \$22,500 for the amount of \$30,000.**

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 – where appellant was convicted of unlawful assault causing bodily harm – where the prosecution had filed a nolle prosequi on charge of doing grievous bodily harm – where respondent victim lost his sense of smell as a result of the assault – where the respondent victim was granted criminal compensation under the *Criminal Offence Victims Act 1995* – whether filing of nolle prosequi prevented respondent victim from claiming compensation for loss of sense of smell – whether loss of sense of smell is a compensable injury – whether quantum of compensation awarded was excessive

Civil Liability Regulation 2003 (Qld)
Criminal Code Act 1899 (Qld), s 663B
Criminal Offence Victims Act 1995 (Qld), s 19, s 20, s 21, s 23, s 24

R v Bennet; ex parte Facer [2001] QCA 395; [2002] 2 Qd R 295, distinguished
Re Rogers, unreported, Helman J, SC No 6086 of 1997, 13 November 1998, followed

COUNSEL: A W Collins for the applicant/appellant
 S T Farrell for the respondent

SOLICITORS: Bevan & Griffin for the applicant/appellant
 Connolly Suthers for the respondent

- [1] **McPHERSON JA:** I agree with the orders proposed by Wilson J and with the reasons of her Honour, which I have had the advantage of reading.
- [2] An application for an order for compensation under the *Criminal Offence Victims Act 1995* is authorised by s 24(2) of the Act if, so far as material here, someone is in terms of s 24(1) convicted on an indictment of a personal offence, meaning an indictable offence committed against the person: s 21. The appellant was convicted at trial on an indictment of assaulting the respondent and doing him bodily harm. This was after the Crown prosecutor at the trial had entered *nolle prosequi* on a charge of having done grievous bodily harm to the respondent. The reason for taking that course may have been, we were informed, because loss of a sense of smell does not amount to grievous bodily harm within the meaning of the definition of that expression in the *Criminal Code*.
- [3] For the appellant, Mr Collins of counsel submitted that loss of the sense of smell was not a form or particular of bodily harm at all, and that the respondent was bound by the action of the prosecutor in refraining from pursuing the grievous bodily harm charge. As I have said, I agree with the reasons of Wilson J for taking a different view of the relevance of the prosecutor's decision.
- [4] Section 24(2) confers on the person against whom the personal offence is committed the right to apply to the Court for an order that the convicted person pay compensation to the applicant "for the injury suffered by the applicant because of the offence"; and s 24(3) authorises the making of a compensation order for an amount to be paid by the convicted person to the applicant "because of the injury".
- [5] It might perhaps be arguable that the "injury" in s 24(3) for which the compensation order was made refers to the "injury" in s 24(2) "suffered by the applicant because of the offence"; and that the words "because of the offence" may have a limiting effect on the circumstances in which a compensation order under the section may be made by confining it to the personal offence of which in s 23(1) the offender is convicted. But if it is arguable, it was not a submission advanced by Mr Collins on this appeal, which was confined to the matters set out in and dealt with in the reasons of Wilson J. I therefore need not discuss the question any further.

[6] **JERRARD JA:** In this appeal, I have read, and respectfully agree with, the reasons and orders proposed by Wilson J. I add the following remarks in response to Mr Collins’ argument for the appellant that because the charge of grievous bodily harm was withdrawn, it was not open to the learned judge to compensate Mr Lewis for loss of a sense of smell consequent upon the shearing of the olfactory nerves, because to do so would compensate Mr Williams for an injury constituting an offence of which Mr Lewis had not been convicted.

[7] Section 19(1) of the Act relevantly reads:

“This part establishes a scheme for the payment of compensation to a person the ‘**applicant**’ –

(a) for injury suffered by the applicant caused by a personal offence committed against the applicant;”

A “personal offence” is defined by s 21 to mean an indictable offence committed against the person of someone; and s 24 reads as follows:

“This section applies if someone (the “**convicted person**”) –

(a) is convicted on indictment of a personal offence; or

(b) is convicted on indictment and a personal offence is taken into account on sentence.

(2) The person against whom the personal offence is committed may apply to the court before which the person is convicted for an order that the convicted person pay compensation to the applicant for the injury suffered by the applicant because of the offence.

(3) The court may make an order (“a **compensation order**”) for an amount to be paid by the convicted person to the applicant because of the injury.”

[8] Section 19(1)(a) does not specifically restrict the scheme for payment of compensation to compensation for the injury suffered by an applicant caused by a personal offence committed against the applicant, which offence itself is constituted by the doing of that injury. It requires only that there be an injury suffered by the applicant, caused by a personal offence committed against the applicant. Mr Williams suffered bodily injury caused by an indictable offence of assault occasioning bodily harm committed against him. Mr Lewis was convicted on indictment of that personal offence; and as it happens, the learned sentencing judge specifically remarked that he was taking into account on sentence the fact that Mr Williams had suffered a loss of his sense of smell.¹

¹ The learned judge did not explicitly so state in his sentencing remarks, referring instead to the fact that Mr Williams believed that he had lost his sense of smell because of the assault, although that was not established unequivocally; the learned judge stated during the hearing of the compensation application (it was the same judge) that he had taken the view on sentence that there was a distinct prospect that the loss of smell was ascribable to the incident. Counsel for Mr Lewis accepted that the learned judge intended to convey that he had taken the loss of sense of smell into account when passing sentence.

- [9] Section 24(2) gives Mr Williams the right to apply to the court for an order that Mr Lewis pay compensation for the injury Mr Williams suffered “because of the offence”. I understood, perhaps wrongly, that Mr Collins submitted, in effect, that that limited the compensation the court could order to an injury Mr Williams suffered which was constituted by the circumstances of the offence of which Mr Lewis was convicted; but that section too is not so restricted in its terms. What is required is proof to the satisfaction of the judge making the order, pursuant to the standard of proof prescribed by s 30 of the Act, that the injury for which compensation is sought was suffered because of the commission of the personal offence of which the respondent had been convicted on indictment, or which personal offence was taken into account on sentence when the respondent was convicted on indictment. Both the circumstances specified in s 24 applied to Mr Lewis.
- [10] As to the amount ordered, I agree with what Wilson J has written.
- [11] **WILSON J:** This is an application for leave to appeal against an award of criminal compensation in favour of the respondent.
- [12] The appellant was charged with having unlawfully done grievous bodily harm to the respondent, or alternatively, with having unlawfully assaulted the respondent and done him bodily harm. The prosecution entered a nolle prosequi on the first charge, and a jury found the appellant guilty of the alternative charge.
- [13] On 21 April 2004 the appellant was fined \$1,500. The respondent subsequently applied for criminal compensation under the *Criminal Offence Victims Act 1995*, and on 22 April 2005 compensation was assessed in the sum of \$30,000.

The assault

- [14] The respondent was a 19 year old soldier when the incident occurred on 3 September 2000. He had been drinking with friends at a hotel in Townsville. At about 1.00 am he left the hotel in a generally intoxicated state with a male friend and two females. They were heading for a taxi rank when they heard voices behind them, apparently directed to the females. There had been a relationship between one of the females and one of the males who was calling out. The respondent’s male friend went to one of the other males and explained that the girls did not want to speak to them. The respondent saw that the situation was getting out of hand and walked back to cool matters down. He was “king hit” by the appellant, which caused him to fall backwards hitting his head on the bitumen.

Injuries

- [15] The respondent was unconscious for about 5-10 minutes before an ambulance arrived and took him to hospital. The next morning he was taken by Army ambulance to the Lavarack Barracks Medical Centre where he was examined and released later that day.
- [16] The respondent had a cut to the left of his upper lip, a swollen lip and gums. He also had a laceration on the back of his head.

- [17] Following his discharge from the Lavarack Barracks Medical Centre the respondent suffered headaches, nausea and dizziness. He was readmitted on 7 September for 2 nights, when x-rays and a CT scan were performed: these did not show any significant abnormality.

Scarring

- [18] The respondent has a permanent scar on his upper lip, which causes him some embarrassment. He also has a scar on the back of his head, but that is covered by hair and does not trouble him.

Loss of sense of smell

- [19] About 1½ weeks after the assault, the respondent noticed that he had lost his sense of smell in both nostrils. An MRI brain scan was performed on 16 October 2000, and reported to be normal.
- [20] The respondent has not recovered his sense of smell.
- [21] Dr Jon Reimers, a neurologist, provided a written report to the respondent's solicitors and was called to give oral evidence. In his written report he described the respondent's loss of the sense of smell as a direct result of his head injury. In his oral evidence he explained the mechanism by which someone may lose his sense of smell in a head injury. The olfactory nerves connect small receptors in the nasal cavity to the brain. The nerve fibres pass through the cribriform plate (a bone separating the brain from the nasal cavity) and into olfactory bulbs which lie on the under surface of the anterior part of the frontal lobes of the brain. In the course of a head injury the brain may shift inside the skull shearing these nerve fibres as they travel through the cribriform plate, resulting in loss of the sense of smell. People who have had minor head injuries can lose their sense of smell: it is often related to the way they fall or the particular part of the head they strike.
- [22] According to Dr Reimers, the majority of people with mild head injury causing loss of the sense of smell have normal CT scans and MRI scans. There is no way of verifying the accuracy of purely subjective sensory testing. Most people who lose their sense of smell also lose their sense of taste, but not all of them do. (The respondent's sense of taste was not said to have been lost or impaired.)
- [23] Dr Reimers did not place any significance on the fact that the respondent did not notice his loss of the sense of smell until about 1½ weeks after the assault. He observed that he had had other problems from the head injury (headaches, nausea and dizziness). Needless to say, he could not exclude the possibility of some intervening event, but there was no evidence of such.
- [24] The respondent has had difficulty dealing with his loss of the sense of smell. Some time after the assault he married. He finds that he is dependent on his wife and others for smelling things such as food or whether the dogs need bathing. They hope to have children, but he will be unable to smell his newborn children, or to use his sense of smell to protect them from things such as smoke or gas leaks. In his work in the Army he is exposed to lithium batteries which have the potential to leak dangerous gases: he is at risk of inadvertent inhalation of such gases. He had hoped to become a firefighter, but will not be able to do so because he has no sense of smell.

- [25] Dr Reimers said that the extent of the impairment of functioning resulting from loss of the sense of smell depends on the person's particular occupation. In terms of day to day functioning he considered it very small – 1-2 %.

Psychological injury

- [26] Since the assault the respondent is anxious around people and he has become socially withdrawn. He suffers from depression. He is self-conscious about the scarring. He has ruminations about the attack. According to Mr Gerry Wenzel, a psychologist who assessed him, he has a chronic adjustment disorder with depression. Mr Wenzel said -

“It was apparent during his assessment that as Mr Williams focussed on the impact of his injury that he is prone to become depressed and teary. The range of symptoms he reported during the assessment reflected a mild to possibly moderate level of depression with his usual range of symptoms reflecting feelings of sadness, pessimism about his future, a loss of confidence, self criticalness, persistent agitation, a loss of interest in people and events, indecisiveness and heightened irritability. He also tends to withdraw from social contact when his depression feelings become worse with the symptomatology reflecting an increase to a possible moderate level of depression at those times.”

On the basis of the guidelines set out in the *Civil Liability Regulation 2003*, the respondent has a Psychiatric Impairment Rating Scale rating of 1%. Such a rating has no direct application under the *Criminal Offence Victims Act*, although it is some indication of the comparative severity of his impairment. Mr Wenzel recommended cognitive behaviour therapy for the depression and adjustment counselling in relation to his self image concerns. He recommended 10 sessions of 1 hour each, at \$176 per session.

Points taken on appeal

- [27] Counsel for the appellant submitted –
- (a) that the respondent was bound by the action of the prosecution in entering a nolle prosequi on the charge of unlawfully doing grievous bodily harm: he submitted that the loss of the sense of smell formed no part of the prosecution case on the alternative charge, and that accordingly the respondent could not bring an application for criminal compensation for it;
 - (b) that loss of the sense of smell is not a compensable injury under the *Criminal Offence Victims Act*;
 - (c) that the quantum of compensation assessed was excessive.

Effect of prosecution's entering nolle prosequi

- [28] Counsel for the appellant relied on the decision in *R v Bennett; ex parte Facer* [2002] 2 Qd R 295 in support of the first submission. In that case criminal compensation had been awarded for injuries suffered in relation to the offence of grievous bodily harm. Self-defence had been raised at the criminal trial, but the jury had determined that issue against the defendants. In his sentencing remarks the trial

judge had ruled out self-defence and said that the defendants were the initiators of the attack. At the hearing of the criminal compensation hearing the defendants sought to rely on material going to self-defence and on material going to contribution (as to which see s 25(7)). The primary judge disallowed the material going to self-defence because it was inconsistent with the jury's verdict, and disallowed the evidence said to go to contribution because it was too remote to be relevant. The rulings were upheld on appeal. Philippides J, who delivered the leading judgment, adopted this passage from the judgment of Helman J in *Re Rogers* (13 November 1998; 6086 of 1997), a case decided on the former s 663B of the *Criminal Code* -

“The question then arises whether the applicant was guilty of ‘behaviour ... which directly or indirectly contributed to the injury suffered by [him]’ within the meaning of those words in s 663B(2). The applicant’s account of the incident which gave rise to the charge is more favourable to him than was the understanding of the facts on which I sentenced the respondent. Since, however, this application is ancillary to the proceedings before me on 11 April 1995 it is not open to me to proceed now on a view of the incident different from that which I took then: see *Re Hondros* [1973] W.A.R.1. In that case, Jackson CJ said at p 3 that, in considering an application for compensation after a trial, it seemed clear to him that he must act on his view of the testimony given at the trial because the relevant Act did not contemplate that an issue such as the one I am referring to should be relitigated on the compensation application. He referred to *R v Bowen* (1969) 90 WN (Pt. 1) (NSW) 82. The same principle applies in my view to a compensation application which follows the sentencing of an offender. I took the view on sentencing the respondent that the applicant had been behaving in a threatening way towards him and that as a consequence he was fearful of the applicant. In those circumstances it is clear that the applicant’s behaviour led to the commission of the offence ...”

Her Honour went on -

“In considering an application for compensation, evidence cannot be permitted to be adduced which is inconsistent with the jury’s verdict in the criminal trial. In certain circumstances, where the jury’s verdict leaves open a number of possibilities as to the evidence, the sentencing judge may be required to form his own view of the evidence for sentencing purposes, provided it is not inconsistent with the jury’s verdict. In the criminal compensation hearing, the judge should take a view of the evidence consistent with that taken at sentencing; to do otherwise would result in unfairness and would be incongruous. However, since at a criminal trial the evidence must be restricted to what is relevant to the charges, there may be evidence not led at the criminal trial, which is relevant as a result of s 25(7) of the Act to the issue of contribution. Thus, although additional evidence may be adduced at the compensation hearing, evidence which is inconsistent with the jury’s verdict or the view taken of the evidence on sentencing should not be permitted. This accords with principle and flows from the fact that the compensation proceeding is ancillary to the criminal trial.”

- [29] At the time he sentenced the appellant, the primary judge said –
 “The injuries which are established unequivocally do not include at this time that the loss of smell or restricted employment opportunities are a direct result of what took place. It is clear, however, that as a consequence of your conduct on this night and the absence of a sense of smell within a relatively short time afterward following a head injury has led the complainant to believe, possibly capable of support by medical evidence, that his loss of smell is directly associated and the restricted employment opportunities are also related. At least so far as the victim is concerned, he is of the opinion that these consequences have directly flowed from this totally unnecessary assault upon him.”

A year later, when he decided the criminal compensation application, His Honour said –

“I was the trial Judge in relation to the matter and at the time of sentence from the evidence given by the applicant, particularly having regard to the extent of his head injury, I thought there was a distinct prospect that the loss of sense of smell was ascribable to the incident in question. There was no other apparent explanation. Dr Reimers who has provided a report and given evidence before me is of the opinion that there is a nexus between the incident and the loss of sense of smell. It has been submitted that since there was the loss of sense of smell had not been unequivocally established as being related to any blow or falls at the time of the incident at the time of sentence then no account can be taken of it at this time in the context of awarding compensation.

I have been referred to authority but I think that the circumstances in this case are somewhat different when the clear prospect of the disability to which I have been referring being caused in the incident was within contemplation and I think it inappropriate that further evidence on this aspect of the matter should not be inappropriate to take a view that additional evidence in this context should not be received for the purpose of this application.”

- [30] Part 3 of the *Criminal Offence Victims Act* establishes a scheme for the payment of compensation to a person who suffers injury caused by a personal offence committed against him: s 19(1)(a). “Injury” and “personal offence” are defined in ss 20 and 21 as follows –

“20 Meaning of ‘injury’

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

21 Meaning of ‘personal offence’

A ‘personal offence’ is an indictable offence committed against the person of someone.”

- [31] Section 24 provides –

“24 Court may make an order compensating someone injured by personal offence

- (1) This section applies if someone (the "convicted person")—
- (a) is convicted on indictment of a personal offence; or
 - (b) is convicted on indictment and a personal offence is taken into account on sentence.
- (2) The person against whom the personal offence is committed may apply to the court before which the person is convicted for an order that the convicted person pay compensation to the applicant for the injury suffered by the applicant because of the offence.
- (3) The court may make an order (a "compensation order") for an amount to be paid by the convicted person to the applicant because of the injury.”

- [32] Unlike the evidence sought to be led in *R v Bennet; ex parte Facer*, the evidence of loss of the sense of smell is not inconsistent with evidence at the trial or the view taken on sentencing. Rather it is additional evidence of a sequela of the offence of assault occasioning bodily harm. The shearing of the olfactory nerves was an “injury” within s 20 of the *Criminal Offence Victims Act*, as well as “bodily harm” within the meaning of in the *Criminal Code*. Assault occasioning bodily harm is a “personal offence” within the meaning of s 21 of the *Criminal Offence Victims Act*, and it was open to the primary judge to infer that the shearing of the olfactory nerves was an “injury suffered by the [respondent] because of the offence”: s 24(2).
- [33] In short, the action of the prosecution in entering a nolle prosequi in relation to the grievous bodily harm charge did not preclude the respondent from recovering compensation for the loss of his sense of smell.

Whether loss of sense of smell is a compensable injury

- [34] Compensation under the Act is intended to assist the victim, but not to reflect the compensation to which he might be entitled under the common law or otherwise: s22. The Court is limited to ordering an amount decided under s 25. It may not award a total of more than the “scheme maximum”, which is \$75,000. 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 a percentage of the scheme maximum, within which compensation may be awarded. The categories include the following –

Injury	Percentage of scheme maximum
9. Fractured skull/head injury (no brain damage)	5%-15%
10. Fractured skull (brain damage – minor/moderate)	10%-25%

11.	Fractured skull (brain damage – severe)	25%-100%
29.	Loss of vision (one eye)	70%
30.	Loss of vision (both eyes)	100%
35.	Loss of hearing (1 ear)	2%-20%
36.	Loss of hearing (both ears)	4%-50%

There is no item “loss of sense of smell”.

- [35] Criminal compensation proceedings are civil proceedings in which the applicable standard of proof is “on the balance of probabilities”: s 30. It was open to His Honour to infer from the evidence of Dr Reimers that the respondent’s olfactory nerves had been sheared in the course of sustaining a head injury, and that the loss of his sense of smell was a consequence of the shearing of those nerves. Further, in the absence of evidence of any intervening event, it was open to him to find that the shearing of those nerves occurred in the assault, even though the respondent did not notice the loss of his sense of smell until 1½ weeks after the assault.
- [36] Counsel for the appellant’s submission that loss of the sense of smell is not compensable ought not be accepted. The respondent sustained a head injury – in particular, his olfactory nerves were shattered, resulting in loss of the sense of smell. In my view it was a compensable head injury under item 9 – “fractured skull/head injury (no brain damage)”, for which 5-15 % of the scheme maximum might have been awarded. I think that the primary judge erred in assessing the compensation for this injury under item 10, which is “fractured skull (brain damage – minor/moderate)”, for which 10-25 % of the scheme maximum may be allowed, given that the respondent sustained neither a fractured skull nor brain damage.

Quantum

- [37] The primary judge assessed compensation in the amount of \$30,000-00 as follows –

<i>Item no</i>	<i>Injury</i>	<i>Range</i>	<i>% Allowed</i>	<i>Amount allowed</i>
10	Fractured skull (brain damage – minor/moderate)	10-25%	20%	\$15,000
27	Facial disfigurement of bodily scarring (minor/moderate)	2-10%	5%	\$3,750
32	Mental or nervous shock (moderate)	10-20%	15%	\$11,250
	Total			\$30,000

- [38] As I have said, I think he erred in assessing compensation for the loss of the sense of smell under item 10. Compensation should have been assessed under item 9, where the range is 5-15 % of the scheme maximum. I would allow 15% or \$11,250.

[39] In my view the assessment of compensation for the facial scarring is unexceptionable.

[40] In assessing compensation where there are claims for physical injuries and for mental or nervous shock, care needs to be taken not to overcompensate by allowing for the psychological effects of the injuries under more than 1 head. Here the respondent's physical injuries (the shearing of his olfactory nerves resulting in the loss of his sense of smell and the laceration to his lip resulting in scarring) should be compensated under items 9 and 27 respectively, and the discrete psychological injury (a chronic adjustment disorder with depression) should be compensated as mental or nervous shock. Having regard to the comparatively minor nature of the psychological impairment, I think the assessment under item 32 cannot be justified. I would assess the compensation under item 31 (mental or nervous shock – minor), where the range is 2-10% of the scheme maximum. I would allow 10% of the scheme maximum (\$7,500).

[41] In summary, I consider that the assessment was excessive. I would allow the following –

<i>Item no</i>	<i>Injury</i>	<i>% Allowed</i>	<i>Amount allowed</i>
9	Fractured skull/head injury (no brain damage)	15%	\$11,250
27	Facial disfigurement or bodily scarring (minor/moderate)	5%	\$3,750
31	Mental or nervous shock (minor)	10%	\$7,500
	Total	30%	\$22,500

[42] I would make the following orders:

- (a) allow the application for leave to appeal;
- (b) allow the appeal;
- (c) vary the order appealed from by substituting the amount of \$22,500 for the amount of \$30,000.