

DISTRICT COURT OF QUEENSLAND

CITATION: *Eyears v Tooley* [2012] QDC 101

PARTIES: **ALLAN JAMES EYEARS**
(Applicant)

V

JEFFERY TOOLEY
(Respondent)

FILE NO/S: 27/2010

DIVISION: Civil

PROCEEDING: Application for Criminal Compensation

ORIGINATING COURT: Beenleigh

DELIVERED ON: 23 March 2012

DELIVERED AT: Beenleigh

HEARING DATE: 22 November 2011

JUDGE: Dearden DCJ

ORDER: **The respondent, Jeffery Tooley, pay the applicant, Allan James Eyears, the sum of \$31, 500.**

CATCHWORDS: Application – criminal compensation – assault occasioning bodily harm – facial fractures – bruising/lacerations – mental or nervous shock

LEGISLATION: *Criminal Offence Victims Act 1995*
Victims of Crime Assistance Act 2009

CASES: *Paterson v Chand & Chand* [2008] QDC 214
Riddle v Coffey [2002] QCA 337
R v Ward; ex parte Dooley [2001] 2 Qd R 436
RMC v NAC [2009] QSC 149
Ferguson v Kazakoff [2001] 2 Qd R 320
Pearson v Estate of Mark Stasenes (Deceased) [2011] QDC 226
Michael v Christensen [2010] QDC 157
WHG v LJC [2010] QDC 395

COUNSEL: PJ Trout for the applicant

The respondent appeared self represented
 SOLICITORS: Burns Law for the applicant
 The respondent appeared self represented

Introduction

- [1] The respondent, Jeffery Tooley, pleaded guilty in the Beenleigh District Court on 13 May 2008 to one count of assault occasioning bodily harm, while armed, in respect of the applicant, Allan James Eyears. The respondent was sentenced by me to 18 months imprisonment, wholly suspended, with an operational period of three years.

Facts

- [2] The respondent, whose father had been assaulted by the applicant on an earlier occasion, attended at the applicant's workplace at Brown's Plains on 22 February 2007 and threw a rock at the applicant which hit him in the head. The rock caused a depressed fracture at the front of the applicant's skull which required the insertion of a plate.¹

Injuries

- [3] The applicant was initially admitted to the Logan Hospital, on 22 February 2007 and then transferred to the Princess Alexandra Hospital. On examination at the Princess Alexandra Hospital, "he was noted to have a full thickness laceration on his forehead (bone exposed) and a depressed skull fracture involving his frontal sinus. [The applicant] underwent a computerised tomography scan of his face and skull which revealed a depression of the outer table of the frontal sinus. The injury was compound which meant that the fracture had communication with the outside environment."²
- [4] "[The applicant] underwent a surgical procedure on 23/2/2007 to repair the frontal bone fracture which involved the placement of titanium plates and screws. [The applicant] was not noted to suffer from any ongoing neurological disturbance, and had no nausea or disorientation, which would be signs of a neurological disturbance. [The applicant] was discharged on 23/2/2007 after a period of observation."³
- [5] Dr Tan notes that the applicant was reviewed in outpatients on 28 February 2007 and was well, but failed to turn up for the six week post-operative review and two other subsequent appointments. Dr Tan noted that "the prognosis of this injury is good, as the post-operative x-rays show good reduction of the fracture." Dr Tan indicated that "the bone healing time would be approximately six weeks duration."⁴

The Law

- [6] This is an application for compensation pursuant to s. 24 of the *Criminal Offence Victims Act 1995 (COVA)*, as repealed by the *Victims of Crime Assistance Act 2009 (VOCAA)*, which commenced on 1 December 2009.

¹ Exhibit B, affidavit of Allan James Eyears sworn 25 January 2010.

² Exhibit A, affidavit of Eileen Tan sworn 8 June 2011.

³ Exhibit A, affidavit of Eileen Tan sworn 8 June 2011.

⁴ Exhibit A, affidavit of Eileen Tan sworn 8 June 2011.

- [7] The application in this matter was filed on 27 January 2010, within the applicable transitional time limit provided for by VOCAA ss. 154 and 155. The application was filed within the applicable time limit pursuant to COVA s. 40(1).
- [8] I refer to and adopt my exposition of the relevant applicable law under COVA as set out in paragraph 6 of *Paterson v Chand & Chand* [2008] QDC 214.

Hearing

- [9] The matter came on for hearing before me on 22 November 2011. Mr Trout of counsel, appeared on behalf of the applicant, and the respondent, Jeffery Tooley, appeared self represented. I made orders permitting both Mr Trout (on behalf of the applicant), and the respondent, to file further material. The material filed by the respondent, which is in the form of unsworn letters addressed to the court by the respondent, the respondent's father, and a number of other persons, contains information which is neither admissible on, nor relevant to, the criminal compensation proceedings and appears designed to ventilate various ongoing and contentious matters between the applicant's family and the respondent's family. In the circumstances, although that material, together with a folder of documents (which appears equally irrelevant) has been filed in these proceedings, I have placed no weight on their contents.

Compensation

- [10] Mr Trout, who appears for the applicant, seeks compensation as follows:-

- (1) Item 1 – Bruising/laceration etc minor/moderate – 1%-3%**
(2) Item 2 – Bruising/laceration etc (severe) – 3%-5%

- [11] Mr Trout relies on paragraph 42 of the applicant's police statement in which he refers to "one small cut and a scratch" on his left forearm and "a bruise under my left upper arm". Unfortunately, the applicant's police statement has not been exhibited to an affidavit, nor tendered in these proceedings, so apart from the reference to these injuries at paragraph 14 of the applicant's outline of submissions⁵, there is nothing on the material before me in these criminal compensation proceedings to identify the nature of any such injuries, and whether they were part of the material placed before me as sentencing judge.
- [12] The difficulty that arises in respect of those injuries is further compounded by the absence on the sentencing file of Exhibits 1-5. Exhibit 2 is noted in the file exhibit list as "Facts and Medical Info". Presumably copies of such documents could have been obtained from the Director of Public Prosecution, but the applicant does not appear to have done so. As the Court of Appeal indicated very clearly in *Riddle v Coffey* [2002] QCA 337, in assessing criminal compensation, the primary judge is required to have regard to the factual basis upon which the respondent was sentenced.⁶ In the circumstances, I am not in a position to make any award pursuant to Item 1 for the small cut, scratch and bruise on the applicant's left arm.
- [13] The applicant also seeks an order for the bruising referred to in paragraph 11 of his affidavit, in these terms: "Because of the bruising around my face I could not see for

⁵ Exhibit 1.

⁶ *Riddle v Coffey* [2002] QCA 337 per McMurdo P, paragraph 3.

a week”.⁷ With respect, I consider that the 5% which the applicant seeks under Item 2 for this particular aspect of his injuries is, in fact, an aspect of the relevant assessment applicable for the fractured skull suffered by the applicant (Item 9). Accordingly I make no award pursuant to Item 2.

(3) Item 9 – Fractured skull/head injury (no brain damage) – 5%-15%

- [14] The applicant suffered a full thickness laceration to the bone on his forehead and a depressed skull fracture, which required a surgical procedure to repair the frontal bone fracture by the placement of titanium plates and screws.⁸
- [15] The applicant attests to being able to feel the plate in his forehead with his fingers, and states that he has been advised that the plate could move and may require further operations.⁹ The applicant further attests that a bump on his forehead can cause pain.¹⁰
- [16] The submission on behalf of the applicant is that this is “an extremely serious injury” and that the maximum award should be made pursuant to Item 9 i.e. 15% of the scheme.
- [17] As the Court of Appeal indicated in *R v Ward; ex parte Dooley* [2001] 2 Qd R 436, the appropriate method is to reserve an assessment at the top of any range for any particular item, only for the “most serious” case in that item range.¹¹
- [18] Although I consider this to be a serious skull fracture, given the requirement for surgery and the insertion of a plate, in my view an assessment at 12% of the scheme maximum appropriately recognises the nature of the injury and the medical consequences. Accordingly, I award 12% (\$9,000) pursuant to Item 9.

(4) Item 28 – Facial disfigurement or bodily scarring (severe) – 10%-30%

- [19] The applicant, as noted above, received a full thickness laceration to his forehead exposing the bone. The scar from this injury remains obvious in the series of photographs taken on 6 December 2011 at the applicant’s solicitor’s office.¹²
- [20] It is submitted that this scarring, which (unsurprisingly) causes the applicant embarrassment,¹³ should be assessed at 21% of the scheme maximum. I substantially accept that submission and I consider that an appropriate award, recognising the nature and ongoing seriousness of the scarring, would be an award at 20% of the scheme maximum (\$15,000).

(5) Item 32 – Mental or Nervous Shock (moderate) – 10%-20%

- [21] The report of Ms Jacqueline Yoxall¹⁴ concludes that the applicant presented to Ms Yoxall with “sub-clinical symptoms of anxiety, hypervigilance and mood

⁷ Paragraph 11, affidavit of Allan James Eyears sworn 25 January 2010.

⁸ Exhibit A, p. 1, affidavit of Eileen Tan sworn 8 June 2011.

⁹ Affidavit of Allan James Eyears sworn 25 January 2010, paragraph 12.

¹⁰ Affidavit of Allan James Eyears sworn 25 January 2010, paragraph 14.

¹¹ *R v Ward; ex parte Dooley* [2001] 2 Qd R 436, paragraph 5.

¹² Exhibit CIN 4, affidavit of Craig Newport sworn 12 December 2011.

¹³ Affidavit of Allan James Eyears sworn 25 January 2010, paragraph 10.

¹⁴ Exhibit A, affidavit of Jacqueline Yoxall sworn 12 July 2011.

disturbance as a consequence of the assault committed upon him by [the respondent] on 22 February 2007.”¹⁵

- [22] Ms Yoxall noted that the applicant also suffered “sub-clinical symptoms of anxiety, intrusive memories and mood disturbance consequent to the more recent experience [unrelated to this criminal compensation application] of trauma (motor vehicle accident resulting in the death of a child) in November 2009.”¹⁶
- [23] The opinion Ms Yoxall expresses is that “it would seem possible that [the applicant] did suffer a mild adjustment disorder with mixed anxiety and depressed mood, in the initial months following the assault by [the respondent], but this condition has now resolved. [The applicant] did not seek assessment or intervention for the symptoms [the applicant] experienced at that time.”¹⁷
- [24] Mr Trout, in an additional Outline of Submissions for the applicant filed on 15 December 2011, argues that the “mild adjustment disorder with mixed anxiety and depressed mood” referred to by Ms Yoxall amounts to “nervous shock” as that term is utilised in COVA. The submissions by Mr Trout frankly canvass the apparent conflict between the decision of Byrne J in *RMC v NAC* [2009] QSC 149, and Thomas JA in *Ferguson v Kazakoff* [2001] 2 Qd R 320. I recently addressed this matter in my decision in *Pearson v Estate of Mark Stasenes (Deceased)* [2011] QDC 226 at paragraph 13, and concluded that the approach propounded by both McGill DCJ in *Michael v Christensen* [2010] QDC 157 and Irwin DCJ in *WHG v LJC* [2010] QDC 395 was the appropriate way to deal with the assessment of “mental or nervous shock” as that term is used in COVA, namely that the term is “not confined to a recognisable psychiatric illness or disorder.”¹⁸
- [25] Accordingly, it is necessary to make an assessment of an “injury” which falls within the rubric of “mental or nervous shock” but (at its highest) is a condition that Ms Yoxall considers “possible” the applicant suffered “in the initial months following the assault by the respondent” although that condition has subsequently resolved.
- [26] In those circumstances, I consider that an appropriate assessment is not the figure of 20% contended for by the applicant’s counsel¹⁹, but rather an assessment at the bottom of the Item 32 range, namely 10% of the scheme maximum (\$7,500).

Contribution

- [27] I do not consider that the applicant contributed in any way, direct or indirect, to his own injuries²⁰, although he, on a separate earlier occasion, assaulted the respondent’s father, which apparently prompted a revenge attack by the respondent. There should, therefore, be no reduction for contribution.

¹⁵ Exhibit A, p. 20, affidavit of Jacqueline Yoxall sworn 12 July 2011.

¹⁶ Exhibit A, p. 20, affidavit of Jacqueline Yoxall sworn 12 July 2011.

¹⁷ Exhibit A, p. 20, affidavit of Jacqueline Yoxall sworn 12 July 2011.

¹⁸ *Pearson v Estate of Mark Stasenes (Deceased)* [2011] QDC 226, paragraph 13.

¹⁹ Additional outline of submissions for the applicant (filed 15 December 2011), paragraph 7.

²⁰ COVA s. 25(7).

Order

[28] I order that the respondent, Jeffery Tooley, pay the applicant, Allan James Eyears, the sum of \$31,500.