

SUPREME COURT OF QUEENSLAND

CITATION: *Coconut v Footscray* [2002] QSC 370

PARTIES: **WARREN MICHAEL COCONUT**
(applicant)
v
LESLIE JOHN FOOTSCRAY
(respondent)

FILE NO/S: SC 6570 of 2001

DIVISION: Trial Division

PROCEEDING: Application for Criminal Compensation

ORIGINATING
COURT: Brisbane

DELIVERED ON: 13 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 14 August 2001, 27 October 2002

JUDGE: Philippides J

ORDERS: **1. That the respondent pay to the applicant the sum of \$121,005 by way of compensation for injuries suffered by the applicant by reason of the offence for which the respondent was convicted on 1 May 1992;**
2. That the amount awarded to the applicant be paid by the respondent to the Public Trustee whose receipt for such money shall be sufficient discharge;
3. That the applicant's costs be taxed as between solicitor and own client unless otherwise authorised or agreed to by the Public Trustee;
4. That the Public Trustee pay to the solicitor for the applicant the said taxed or authorised costs on a solicitor own client basis out of any moneys received from the respondent, or any other person, pursuant to this order;
5. That the Public Trustee hold the balance of such moneys as a separate trust fund on trust for the applicant.

CATCHWORDS: CRIMINAL LAW – COMPENSATION – where respondent convicted of grievous bodily harm – where applicant struck repeatedly on the head – where applicant suffered severe head injuries – where applicant sought compensation for pain and suffering and nervous shock – where compensation assessed under s 66B(3) of the *Criminal Code* – assessment of amount to be paid – where earlier assault contributed to injuries – whether compensation can be apportioned between assaults – whether applicant contributed to own injuries.

Criminal Code (Qld), Chapter 65A, s 663A, s 663A(b), s 663AA, s 663AA(1),(2) and (3), s 663B(1) and s 663B(2)

Criminal Offence Victims Act 1995, Part III, s 46(2)

Limitation of Actions Act 1974, s 5, s 10(1)(d)

Workers' Compensation Act 1916, s 14(1)(C), s 14(1)(C)(a)

WorkCover Queensland Act 1996, s 167, s 167(1)

WorkCover Queensland Regulation 1997, Schedule 2

Dunbar v Carapellotti & Anor [2001] QSC 101, SC No 2418 of 1995, 9/04/01, considered

Ford v Ford DC No 1634 of 2002, 3/5/02, considered

Hedge v Suncorp Insurance & Finance Appeal No 4911 of 1996, 7/11/97, considered

Hendry v Llorente [2001] 2 Qd R 415, cited

Jacob v Roberts [2002] QCA 87, Appeal No 10194 of 2001, 21/03/02, cited

Josiah v Patterson SC No 19846 of 1999, 10/12/99, considered

McClintock v Jones (1995) 79 A Crim R 238, cited

Mott v Boggan & Fire and All Risks Insurance Co Ltd [1998] QSC 265, SC No 1209 of 1989, 12/11/98, considered

R v Chong; ex parte Chong [2001] 2 Qd R 301, cited

R v Tiltman; ex parte Dawe [1995] QSC 345, SC No 324 of 1995, 22/06/95, applied

Schelker v McColl Appeal No 9412 of 1996, 21/10/97, considered

Whyte v Robinson [2000] QCA 99, Appeal No 7292 of 1999, 28/03/00, considered

COUNSEL: A J Kimmins for the applicant
No appearance for the respondent

SOLICITORS: T Bailey for the applicant
No appearance for the respondent

- [1] **Philippides J:** On 20 July 2001, Warren Michael Coconut (“the applicant”) filed an application seeking compensation pursuant to s 663B(1) of the *Criminal Code* (Qld) (“the Code”) for injuries he sustained as a result of the offence of grievous bodily harm committed on 16 February 1991 for which the respondent was convicted and sentenced on 1 May 1992.
- [2] The criminal compensation scheme applicable to injuries sustained as a result of the commission of a criminal offence prior to 18 December 1995 is governed by Chapter 65A of the Code. The present offence was committed prior to the commencement of Part III of the *Criminal Offence Victims Act* 1995. Chapter 65A of the Code therefore applies, as if not repealed: see s 46(2) *Criminal Offence Victims Act* 1995.
- [3] Section 663B(1) of the Code provides:

“Where a person is convicted on indictment of any indictable offence relating to the person of any person or of more than one indictable offence relating to the person of any person (whether in respect of one indictment or more than one indictment) arising out of the one course of conduct or closely related courses of conduct of that person so convicted, the court, on the application by or on behalf of the person aggrieved by the offence or offences may, in addition to any other sentence or order it may make, order the person to pay to the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by the person by reason of the offence or offences of which the offender is convicted.”

- [4] Although served with the application, the respondent did not appear on the hearing of the application.
- [5] The offence occurred some 11 years ago. While no time limitation is specified in s 663B(1) of the Code, the application being characterized as “an action to recover a sum recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture” within the meaning of s 5 and s 10(1)(d) of the *Limitation of Actions Act* 1974, a 6 year limitation period would normally apply (see *R v Chong; ex parte Chong* [2001] Qd R 301). The applicant states that he was unaware that he could bring an application until recently before the application was brought. The question of application of the *Limitation of Actions Act* 1974 is not a matter for the Court to raise: see *Jacob v Roberts* [2002] QCA 87, 21/03/02. Accordingly, I proceed to assess the applicant’s entitlement under the Code.

Background

- [6] The applicant was born on 4 April 1970 and was aged 20 at the date of the offence. He is now aged 32.
- [7] In 1987, the applicant suffered severe head injuries as a result of another assault, during which he was struck repeatedly on the head with tent poles by his brother and his father. This earlier assault forms the basis of a separate application for criminal compensation. It is, however, of relevance to this application, because it is necessary to assess which of the applicant’s injuries are attributable to the 1991 incident.
- [8] In his affidavit sworn 28 June 2001, the applicant states:
- “13. After the assault by my Father and Brother I was assaulted again by another person called Leslie Footscray. I was badly hurt again by him, but I cannot remember any of it and so I cannot tell the Court about what happened.
14. ... the injuries I received upon which I can presently comment are as follows:
- (a) Severe head injuries;
- (b) Scarred head;
- (c) Scarred back;
- (d) Scarred ear;
- (e) Partial deafness;

- (f) Post-Traumatic Stress;
- (g) Further injuries from the second attack by Leslie Footscray.”

- [9] The circumstances of the 1991 offence, with which the present application is concerned, were as follows. On the evening of 16 February 1991, a male person by the name of Stewart Convent was observed pushing the applicant around outside a house in Kwokanum Street, South Weipa, Queensland. According to the witness, William Peinkinna, the applicant could not speak very well and was a bit slow in learning due to being hit on the head a number of years before. Both males appeared to be drunk and they started punching each other.
- [10] The respondent was then observed to run out from behind a bush in that locality and grab the applicant around the neck. The applicant attempted to shrug the respondent off. The respondent would not let go and it appeared to others present that the respondent was going to choke the applicant. The respondent and Convent then ran off beside the house. The respondent returned with a long piece of wood which was approximately 4 metres long and about 8 centimetres square. The respondent then swung the wood at the applicant striking him in the stomach. The blow was of such force that it knocked the applicant over. The applicant then got back up and the respondent struck him around the head causing him to fall over again. The applicant got back up and attempted to run away but the respondent chased him and struck him in the head with the wood again. The applicant then fell down on to his back and did not move. The respondent then commenced to jab the applicant in the chest area with the wood. He did this approximately five times and it appeared to a witness present that the jabs were very hard. Eventually the respondent dropped the wood and ran away.
- [11] Witnesses then attended upon the applicant and observed that he was bleeding from both ears and was unconscious. The applicant was taken to the local hospital, but due to the state of his injuries was air lifted out by the Royal Flying Doctors Service.

Medical Evidence

- [12] Dr Craig, a musculoskeletal physician, provided a report dated 5 March 2001, in which he discussed the applicant’s injuries and treatment:

“[The applicant] sustained a depressed left parietal skull fracture and underlying extradural haematoma, confirmed on CT scan. [He] was admitted to Weipa Hospital prior to transfer to Cairns Base Hospital on 17 February 1991. He was then electively paralysed and intubated for transfer to Townsville General Hospital that same day, where the skull fracture was elevated and extradural haematoma drained. Post-operatively, he remained in intensive care for 2 days, was later transferred to the ward, and discharged back to Cairns based hospital on 25 February 1991. He was reviewed there by the speech therapist who detected moderate to severe expressive and receptive dysphasia. A physiotherapy assessment detected hypertonia on the right side of the body with decreased coordination of the right upper limb.

...

When I saw him on 30 November 2000 he claimed that following his 1991 assault, he lost the use of his right arm, with symptoms of hypertonia in the hand manifesting as a “closed fist”. Clinically, I found expressive and receptive dysphasia and right-sided hypertonia consistent with the findings of the therapists in 1991.

...

There was also a recent history of hearing voices and self-mutilation, suggesting an emerging psychosis. It is difficult to say whether this is related to his serious head injuries, to his alcohol consumption, both, or unrelated to either.

In summary, this 30-year-old man is the victim of a serious, life-threatening assault and is left with permanent disability and impairment in the right side of the body and possibly an organic brain syndrome.”

- [13] In relation to the applicant’s psychiatric problems, consultant psychiatrist, Dr Curtis, prepared a report dated 23 April 2001, wherein he noted “severe psychological stressors notably were consequent upon the subject crime of 1991” and that “the brain injury of 1991 was as serious and severe as that of 1987”. Dr Curtis noted that the nervous shock as a result of the 1991 incident was severe, as it was in 1987. Dr Curtis also noted that the defects consequent upon the 1987 assault were duplicated and aggravated to an unknown degree.

The Effect of the Assault in 1987

- [14] There is some difficulty in distinguishing the causes of the applicant’s injuries as between the present assault and the earlier assault in 1987.
- [15] Dr Altman, neurosurgical registrar with the Townsville General Hospital in his report of 25 March 1991 observed that the applicant may have been hit over the head over his previous injury site and noted that difficulty would arise in determining how many of the applicant’s deficits were “due to the second injury and how many were due to the first injury from which he did not ever fully recover”.
- [16] Dr Craig, musculoskeletal physician, in his report dated 5 March 2001, commented on the earlier assault upon the applicant:

“There was also a history of prior admission to Townsville general hospital in 1988, following another assault, in which he sustained a depressed skull fracture of the left temporal parietal bone with an intracerebral parietal bleed on the left side. Craniotomy and evacuation of haematoma was performed and he was left with a mild residual right limb weakness.

...

It is now impossible to determine how much each assault has contributed to his current impairment.” (emphasis added)

- [17] Dr Curtis provided a report dated 15 May 2002 in which he attempted to apportion the causes of the applicant’s injuries between the two separate assaults. Dr Curtis was also of the view that “the 1991 injury might replicate ... the effects of the

[1987] injury”. However, he noted in his report that the assault in 1987 involved haemorrhage and death of cerebral tissue within the brain itself, while the 1991 assault resulted in a haemorrhage which was external to the brain. Dr Curtis was of the view that the 1987 incident was “much more severe in its effects short-term and long-term than the 1991 injury” and suggested an apportionment of 3:1 or 2:1 for the 1987 assault : 1991 assault.

Assessment of Compensation

- [18] Compensation is to be assessed in accordance with the ordinary principles of assessment of damages for personal injury in civil cases and economic loss is recoverable. However, there is an upper limit applicable in all circumstances. That amount should be awarded if it is less than the compensation assessed: see *McClintock v Jones* (1995) 79 A Crim R 238 per Fitzgerald P at 242.
- [19] The prescribed amount or upper limit is relevantly specified by s 663A and s 663AA of the Code to be:
- (a) where an injury suffered by reason of the offence is the same or substantially the same as an injury specified in the table set forth in s 14(1)(C) of the *Workers' Compensation Act* 1916, the amount specified for that injury in the table: see s 663AA(2) of the Code;
 - (b) where it is not the same or substantially the same, the amount specified in s 14(1)(C)(a) of the *Workers' Compensation Act* 1916, as varied: see s 663A(b) of the Code;
 - (c) where there are more injuries than one, the amount specified in s 14(1)(C)(a) of the *Workers' Compensation Act* 1916 as varied: s 663AA(3) of the Code; and
 - (d) in the case of mental or nervous shock it is \$20,000: see s 663AA(1) of the Code.
- [20] The references to s 14(1)(C) of the *Workers' Compensation Act* 1916 are to be read as s 167 of the *WorkCover Queensland Act* 1996 and Schedule 2 of the *WorkCover Queensland Regulation* 1997: see *Hendry v Llorente* [2001] 2 Qd R 415; *Whyte v Robinson* [2000] QCA 99, 28/03/99.
- [21] It was submitted by counsel for the applicant that the effect of s 663AA(1) of the Code is merely to limit compensation for the “mental or nervous shock” component to \$20,000 and not to impose a \$20,000 cap on the total amount of compensation, if a claim for “mental or nervous shock” is made in conjunction with other physical injuries. Although, in the latter case, it was submitted the total award, including the component for “mental and nervous shock” can not exceed the prescribed amount.¹ The upper limit or prescribed amount is the amount stated in s 167(1) of the *WorkCover Act* 1996, being \$121,005.

¹ Counsel relied on *R v Farrell; Ex parte Farrell* SC No 2985 and 2196 of 1992, unreported, 13 July 1992 per Mackenzie J; and *Re MJ Hudson* SC No 358 of 1992, unreported, 26 August 1992 per Shepherdson J. *R v Bridge and Madams; Ex parte Larkin* [1989] 1 Qd R 554 was said to be distinguishable, because in the circumstances of that case, compensation for suffering, loss of amenities, loss of earnings, past or future, arose only out of the nervous or mental shock, which was the form of injury suffered.

[22] In considering what compensation should be made, regard must be had to the following claims:

- (a) general damages including:
 - (i) deafness in left ear;
 - (ii) blood clot on brain;
 - (iii) palsy of right hand;
 - (iv) temporary loss of speech;
 - (v) fractured skull;
 - (vi) mild right lower leg weakness;
 - (vii) brain damage.
- (b) nervous shock;
- (c) pain, suffering and loss of amenities

[23] It is appropriate to award a global figure for pain, suffering and loss of amenities of life. There is no claim for special damages (the applicant being treated under the Public Health System) or future out of pocket expenses. I make no allowance for economic loss, nor for any *Griffith v Kerkemeyer* component. On behalf of the applicant it was submitted that an award of \$121,005 would be appropriate in relation to the 1991 assault.

[24] Counsel has referred to a number of quantum cases as a guide in this case, in particular:

1. *Ford v Ford* DC No 1634 of 2002, 3/5/02, where the respondent struck the applicant in the head with a hammer, resulting in a permanent depression in the skull with a neurological sequelae and nervous shock. An award of \$100,000 was made.
2. *Josiah v Patterson* SC No 19846 of 1999, 10/12/99, which concerned two separate offences, the first a rape with severe injuries to the genitalia area as well as severe head injuries, and the second being an unlawful wounding where the respondent severely beat the applicant around the head with an iron tool until she was unconscious. The applicant was shown to suffer from an organic brain defect with an allied organic personality problem. An award of the maximum amount of \$121,000 was made in respect of each offence.
3. *Hedge v Suncorp Insurance & Finance* Appeal No 4911 of 1996, 7/11/997, where as a result of a motor vehicle accident the plaintiff suffered severe brain damage, leaving the plaintiff with persistent physical and mental disability, including a gross speech defect, clumsiness of hand movements, impaired balance, difficulty in swallowing, and right-sided weakness affecting the face, arm and leg due to damage to the left hemisphere of the brain. An assessment of \$150,000 was made in respect of pain and suffering and loss of amenities.

[25] In addition, I note the following quantum cases:

1. *Mott v Boggan & Fire and All Risks Insurance Co Ltd* [1998] QSC 265, SC No 1209 of 1989, 12/11/98, where the plaintiff suffered severe head injuries

- in a motor vehicle accident, which left him unable to walk, crawl or talk. Pain and suffering and loss of amenities was assessed as \$100,000.
2. *Schelker v McColl* Appeal No 9412 of 1996, 21/10/97, where the plaintiff suffered head injury with a depressed right parietal skull fracture with underlying extradural haematoma and cerebral contusions, as well as right brachial plexus injury, fractured right humerus and abdominal injuries. General damages of \$80,000 were awarded.
 3. *Dunbar v Carapellotti & Anor* [2001] QSC 101, SC No 2418 of 1995, 9/04/01, where the plaintiff suffered severe head injuries when struck by a car, involving multiple intracerebral shearing haemorrhages of the deep right hemisphere, diffuse cerebral oedema, a fracture of the left radial head, fracture of the right superior pubic ramus and fracture of the right mandible. He was in a coma for approximately 5 months and suffered permanent serious neurological impairment. He was left with an inability to communicate verbally for more than a year, limited short and long term memory, severe slurring dysarthria, very little use of the right arm and weakness in both legs. General damages were assessed at \$200,000.
- [26] Assessment in this case is made more difficult because of the complicating factor of the earlier attack in 1987. Counsel referred me to the decision of Lee J in *R v Tiltman; ex parte Dawe* [1995] QSC 345, SC No 324 of 1995, 22/6/95, which concerned assessment in the context where a single indivisible injury results from two offences. In that case, Lee J held that:

“if ... the offences of which the respondent was convicted made a material contribution to the applicant’s injury then, unless the respondent is able to separate the effects of the compensable and non-compensable conduct on the applicant with some reasonable measure of precision, the applicant is entitled to have his compensation assessed in respect of his whole injury.”

- [27] There is in this case some medical evidence as to the appropriate apportionment to be made in respect of the 1987 and 1991 offences in that Dr Curtis suggested an apportionment of 3:1 or 2:1. However, I note that Dr Craig considered it impossible to determine how much each assault had contributed to the applicant’s current impairment. Accordingly, in this case, I find that the approach taken by Lee J in *R v Tiltman; ex parte Dawe* (supra) is applicable. The applicant is entitled to have his compensation assessed in respect of his whole injury.
- [28] The appropriate compensation payable in this case in respect of the applicant’s injuries, according to the principles of assessment of damages for personal injuries, is \$160,000. That exceeds the prescribed amount and accordingly, I order that the amount of \$121,005 be paid as compensation.

Contribution by the Applicant

- [29] According to s 66B(2) of the Code, the court must have regard to any behaviour of the applicant which directly or indirectly contributed to his injury. There is some evidence that the applicant may have contributed to his injuries in this case.
- [30] In the oral submissions made at sentencing, counsel for the respondent referred to the respondent’s record of interview with police in which the respondent stated he

had been hit by the applicant “all over”. Counsel submitted that the respondent had been hit by the applicant and had feared for his safety, which had led to the introduction of the piece of timber. However, the learned sentencing judge made no findings on this particular issue.

- [31] The evidence of witnesses is inconsistent with the applicant having provoked the assault. In his statement to police, Stuart Convent states as follows:

“I remember having an argument with [the applicant]. It was late at night. [The respondent] came and grabbed [the applicant] from behind. [The respondent] then let go of [the applicant] and went to the side of the house and get that bit of wood and then hit [the applicant] with it.”

- [32] This version of events is consistent with the statements given by William Peinkinna and Wayne Hall. In the circumstances, no reduction for contribution is warranted.

The Award

- [33] The respondent is therefore ordered to pay the amount of \$121,005. Given the applicant’s disabilities, it is appropriate that an order be made that the Public Trustee administer this sum.

- [34] I therefore order that:

1. The respondent pay to the applicant the sum of \$121,005 by way of compensation for injuries suffered by the applicant by reason of the offence for which the respondent was convicted on 1 May 1992;
2. The amount awarded to the applicant be paid by the respondent to the Public Trustee whose receipt for such money shall be sufficient discharge;
3. The applicant’s costs be taxed as between solicitor and own client unless otherwise authorised or agreed to by the Public Trustee;
4. The Public Trustee pay to the solicitor for the applicant the said taxed or authorised costs on a solicitor own client basis out of any moneys received from the respondents, or any other person, pursuant to this order;
5. The Public Trustee hold the balance of such moneys as a separate trust fund on trust for the applicant.