

25/04; [2004] VSC 252

SUPREME COURT OF VICTORIA

DURA CONSTRUCTIONS (AUST) PTY LTD v DOVIGI

Williams J

30 March, 20 July 2004

OCCUPATIONAL HEALTH AND SAFETY – COMPENSATION – WORKER INJURED IN FALL WHILST EMPLOYED – EMPLOYER SUBSEQUENTLY CONVICTED OF OFFENCES – APPLICATION BY WORKER FOR COMPENSATION FOR PAIN AND SUFFERING – APPLICATION GRANTED – MAGISTRATE DECLINED TO TAKE INTO ACCOUNT ANY CONTRIBUTORY NEGLIGENCE ON THE PART OF THE WORKER – STATUTORY INTERPRETATION – WHETHER MAGISTRATE IN ERROR: SENTENCING ACT 1991, S85B.

The purpose of s85B of the *Sentencing Act* 1991 ('Act') is to provide access to compensation without the need for civil proceedings. However, this purpose should be viewed in light of its statutory context as well with reference to the relevant authorities. Taking into account what may be described as the sentencing objectives of the Act and the retention of any available common law rights to the extent that they remain unsatisfied, the contributory negligence or fault of the victim might be a relevant factor to be taken into account in the exercise of either or both of the threshold discretion as to the making of an award and the subsequent determination of its amount, depending upon the nature of the common law relief available to the victim. Accordingly, a magistrate was in error in interpreting s85B of the Act as precluding him from taking into account the worker's contributory negligence or fault as a relevant factor.

WILLIAMS J:

1. The appellant has brought this appeal under s109 of the *Magistrates' Court Act* 1989 from an order made on 30 October 2003 by Mr Cashmore M in the Magistrates' Court at Melbourne.
2. On 7 May 2002 the appellant had been convicted of the offences under s21(1) of the *Occupational Health and Safety Act* 1985 and fined the aggregate sum of \$25,000. On 30 October 2003 the learned Magistrate ordered under s85B of the *Sentencing Act* 1991 that the appellant pay compensation to the respondent in the sum of \$200,000 for pain and suffering experienced as a direct result of the appellant's offences.

The Questions of Law

3. On 27 November 2003 Master Wheeler formulated the following questions of law to be raised by the appeal from the compensation order:

“(a) In exercising the discretion conferred by s85B of the *Sentencing Act* 1991, did the Magistrate err in law by failing to have regard to the Respondent's own fault (and/or contributory negligence) in the incident causative of the Respondent's pain and suffering?

(b) Was the award made (in the amount of \$200,000) so excessive that no reasonable Magistrate, acting in accordance with the statutory power, could have made it”

4. The appellant only proceeded with the appeal in relation to the question of law raised in paragraph (a), foreshadowing the possibility of a referral of the question of assessment back to the Magistrates' Court if the appeal were successful.

Preliminary point – the nature of the order under s85B. [After dealing with this preliminary point, Williams J continued] ...

The material before the Court

14. The appellant relied upon the affidavits sworn in support of the appeal by Lachlan Nguyen of its solicitors on 26 November 2003 and 11 December 2003, respectively. The affidavits recorded background facts which were not contentious and are set out below.

Background

15. The respondent had been employed by the appellant as a concreter from 1 July 1999. He had been working in that capacity at a construction site at Genazzano College in Kew, Victoria, when he was injured in a fall from the third floor of a building on 26 August 1999. He had stepped over a wall onto what he described in his Victim Impact Statement as a “linkway” between two buildings, shortly before falling some 10 metres to the ground. The learned Magistrate had made findings that the respondent “did know it was dangerous when he went over the wall and stood on the platform with no guard rail and was doing that at a height”.

16. The appellant was found to have contravened s21(1) by failing to meet the requirements of s21(2)(c) and (e) of the *Occupational Health and Safety Act* 1985. Its conviction of offences under s21(1) had followed.

17. S21 relevantly provided:

“21. Duties of Employers

(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.

(2) Without in any way limiting the generality of sub-s (1), an employer contravenes that sub-section if the employer fails— ...

(c) to maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to health; ...

(e) to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health.”

The legislative history of s85B

18. S85B of the *Sentencing Act* 1991 was inserted by the *Victims of Crime Assistance (Amendment) Act* 2000 and came into operation on 1 January 2001. The immediate precursor to s85B was s86(1) of the *Sentencing Act* 1991 which, after its amendment by the *Victims of Compensation Act* 1996, entitled a victim to compensation for pain and suffering from an offender.

19. The legislative history of s86(1) and of criminal injuries compensation in Victoria was set out by Ashley J in *Bentley v Furlan*^[6] in which his Honour held that the making of a compensation order under s86(1), as it then stood, was not an award of common law damages and was not precluded by the operation of s93(1) of the *Transport Accident Act* 1986.

20. The purpose of the amendment of the *Sentencing Act* 1991 to include *inter alia* s85B was set out in s1(b) of the *Victims of Crime Assistance (Amendment) Act* 2000 as follows:

“1. Purposes.

The main purposes of this Act are— ...

(b) to amend the *Sentencing Act* 1991 to reform the process by which victims may recover compensation from defendants in criminal proceedings without having to commence civil proceedings.”

21. The *Victims of Crime Assistance (Amendment) Act* 2000 inserted s85B as part of a new Subdivision 1 of Division 2 of Part 4 of the *Sentencing Act* 1991. The new sub-division comprised s85A - s85M. It was common ground that the provisions of s85B were applicable in this case under the transitional provisions inserted by s20 of the amending act.

22. S85A - s85M were at relevant times in the following form:

“85A. Definitions

(1) In this Subdivision—

“compensation order” means an order under section 85B(1);

“injury” means—

(a) actual physical bodily harm; or

(b) mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock; or

(c) pregnancy; or

(d) grief, distress or trauma or other significant adverse effect; or

(e) any combination of matters referred to in paragraphs (a), (b), (c) and (d) arising from an

offence—
but does not include injury arising from loss of or damage to property;

... (2) Reference in this Subdivision to the victim of an offence must be construed having regard to the definition of “injury” in sub-section (11).

85B. Compensation order

(1) If a court—

- (a) finds a person guilty of an offence; or
- (b) convicts a person of an offence—

it may, on the application of a person who has suffered any injury as a direct result of the offence, order the offender to pay compensation of such amount as the court thinks fit for any matter referred to in paragraphs (a) to (d) of sub-section (2).

(2) A compensation order may be made up of amounts—

- (a) for pain and suffering experienced by the victim as a direct result of the offence;
- (b) for some or all of any expenses actually incurred, or reasonably likely to be incurred, by the victim for reasonable counselling services as a direct result of the offence;
- (c) for some or all of any medical expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence;
- (d) for some or all of any other expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence, not including any expense arising from loss of or damage to property.

(3) In sub-section (2) “offence” includes, in relation to a person who has been found guilty or convicted of an offence that was treated by the court as a representative or sample count, any other occurrence of the same offence involved in the course of conduct of which the count charged was representative or a sample. (4) In making a compensation order the court may direct that the compensation be paid by instalments and that in default of payment of any one instalment the whole of the compensation remaining unpaid shall become due and payable.

85C. Application for compensation order

(1) An application for a compensation order—

- (a) must be made within 12 months after the offender is found guilty, or convicted, of the offence; and
- (b) may be made—
 - (i) by the victim; or
 - (ii) on the victim’s behalf by any person other than the offender if the victim is a child or is incapable of making the application by reason of injury, disease, senility, illness or physical or mental impairment; or
 - (iii) on the victim’s behalf—
 - (A) if the sentencing court was a court other than the Magistrates’ Court, by the Director of Public Prosecutions; or
 - (B) if the sentencing court was the Magistrates’ Court, by the Director of Public Prosecutions, the informant or police prosecutor.

(2) Nothing in sub-section (1)(b)(iii) requires the Director of Public Prosecutions or the informant or police prosecutor (as the case requires) to make an application on behalf of a victim.

85D. Extension of time for making application

(1) A court may, on the application of a person who wishes to apply for a compensation order, extend the time within which an application for a compensation order may be made if it is of the opinion that it is in the interests of justice to do so.

(2) A court may extend time under sub-section (1) before or after the time expires and whether or not an application for an extension is made before the time expires.

(3) A court must not extend time under sub-section (1) without giving the offender a reasonable opportunity to be heard on the matter.

85E. Proceeding on an application

(1) In a proceeding on an application for a compensation order a party— (a) may appear personally; or (b) may be represented by—

- (i) a legal practitioner; or
- (ii) with the leave of the court, by any other person.

(2)

85F. Court must not refuse to hear and determine application except in certain circumstances

... .

85G. Evidence

- (1) On an application for a compensation order—
- (a) the victim or the offender may give evidence or may call another person to give evidence in relation to the application; and
 - (b) the victim, offender or other person who gives evidence may be cross-examined and re-examined; and
 - (c) a finding of any fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact; and
 - (d) the finding may be proved by production of a document under the seal of the court from which the finding appears; and

- (2) A court must not make a compensation order without giving the offender a reasonable opportunity to be heard on the application for the order.

85H. Court may take financial circumstances of offender into account

- (1) If a court decides to make a compensation order, it may, in determining the amount and method of payment of the compensation, take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.

- (2) A court is not prevented from making a compensation order only because it has been unable to find out the financial circumstances of the offender.

85I. Court must reduce compensation by amount of any award under *Victims of Crime Assistance Act 1996*

If a court decides to make a compensation order, it must reduce the amount of the compensation by the amount of any award made to the victim under the *Victims of Crime Assistance Act 1996* for the expense or other matter for which compensation is being sought under this Subdivision.

85J. Court to give reasons for its decision

- (1) On deciding to grant or refuse an application for a compensation order or to refuse to hear and determine such an application, the court must—

- (a) state in writing the reasons for its decision; and
- (b) cause those reasons to be entered in the records of the court.

- (2) The failure of a court to comply with sub-section (1) does not invalidate the decision made by it on the application.

85K. Costs of proceeding

Despite any rule of law or practice to the contrary or any provision to the contrary made by or under any other Act, each party to a proceeding under this Subdivision must bear their own costs of the proceeding unless the court otherwise determines.

85L. Right to bring civil proceedings unaffected

Nothing in this Subdivision takes away from, or affects, the right of any person to recover damages for any expense or other matter so far as it is not satisfied by payment or recovery of compensation under this Subdivision.

85M. Enforcement of order Subject to section 30 of the *Confiscation Act 1997*.

A compensation order, including costs ordered to be paid by the offender on the proceeding for that order, must be taken to be a judgment debt due by the offender to the person in whose favour the order is made and payment of any amount remaining unpaid under the order may be enforced in the court by which it was made."

The Magistrate's reasons

23. A copy of the transcript of the hearing of the application for compensation under s85B was exhibit "LN-4" to the 26 November 2003 Nguyen affidavit. Unfortunately, significant sections of the learned Magistrate's reasons for decision were unable to be transcribed and his words were recorded as being "indistinct". As a result, I will not quote the transcript of the reasons. Nevertheless, it would appear that his Worship interpreted s85B as precluding him from taking the respondent's contributory negligence or fault into account in the exercise of his discretion and that, accordingly, he refused to do so.

24. His Worship noted the absence of any express reference to fault or contributory negligence of the victim and remarked that the legislature had had the opportunity to include provision reducing an award for that reason. He said that he should not read an interpretation which "blurs the intention of parliament" into what he regarded as clear and unambiguous statutory language.

The appellant's submissions

25. Senior counsel for the appellant noted that s85B gave the court a discretion as to whether a compensation order should be made at all and a further discretion as to the amount of any compensation. He said that the Magistrate had erred in considering that the contributory negligence or fault of the respondent was not a matter relevant to the exercise of his discretion to award such compensation as he thought fit for pain and suffering, submitting that the relevant authorities required it to be taken into account in the assessment of compensation.

26. Senior counsel for the appellant argued that authorities dealing with cognate legislation had interpreted it as providing a quick or convenient procedure in summary form to enable recovery of compensation from an offender without the necessity of commencing separate civil proceedings.

27. He conceded that it could not have been argued that the pain and suffering experienced by the respondent was not "a direct result" of the offence. Nevertheless he contended that a victim of crime whose contributory negligence or fault would operate to reduce any damages available at common law ought not receive the windfall of a greater amount by way of compensation under s85B. Whilst such a result might appear beneficial to victims, it could result in their unequal treatment, because those victims whose claims could not be dealt with expeditiously might be confined to the civil process in the exercise of the threshold discretion under s85B. They would be disadvantaged by comparison with those whose claims could be quickly disposed of by the sentencing court and who might obtain larger amounts by way of compensation.

28. Further, an offender whose rehabilitation might be impeded to some extent by any award would be penalised by an order to pay more by way of compensation than the amount of common law damages for which he would be liable.

29. The appellant sought to support its arguments on the basis of the statutory purpose of s85B and an analysis of relevant authorities.

The respondent's submissions

30. Senior counsel for the respondent replied that no error had been made by the learned Magistrate in refusing to have regard to contributory negligence or fault on the part of the victim causative of his pain and suffering.

31. He relied upon the absence of any provision in s85A-s85M of the *Sentencing Act* 1991 to the effect of that found in s54 of the *Victims of Crime Assistance Act* 1996 requiring the Victims of Crime Assistance Tribunal to have regard to the character, behaviour or attitude of the applicant victim in the exercise of its discretions as to the making of an award or the quantum of compensation payable by the State.

32. He argued that the fault of a victim was irrelevant to a determination of an award of compensation in respect of pain and suffering occurring as "a direct result" of an offence, in the absence of any express statutory reference to any other contributing factor. He submitted that the form of words employed would not have been used if Parliament had intended otherwise.

33. Senior counsel for the respondent submitted that the legislature had failed to avail itself of either of its two opportunities to make such an express reference: when amending s86(1) by the *Victims of Crime Assistance Act* 1996 to include an entitlement to compensation for pain and suffering or when inserting ss85A-s85M by the *Victims of Crime Assistance (Amendment) Act* 2000.

34. He argued that s85A - s85M constituted "virtually a code" of detailed provisions governing the making of orders. This, in his submission, militated against the success of any attempt to graft on provisions from the apportionment legislation relating to contributory negligence. He argued that the Court should not usurp the function of the legislature by filling perceived gaps in legislation under the guise of interpretation, relying upon the words of Stephen J in *Marshall v Watson*^[7].

35. Senior counsel for the respondent submitted that the principles relating to contributory negligence at common law related to its operation as a defence, whereas the apportionment legislation abolished the common law defence and provided a statutory basis for reducing damages

where there was fault on the part of the injured party. Thus the Court was not simply being asked to apply common law principles to the construction of s85B.

36. Senior counsel for the respondent contended that the importation of notions of contributory negligence or fault would result in a separate hearing of some duration involving complexity not envisaged by the legislative code in s85A - s85M. Further, he relied upon the absence from the process established by s85A - s85M of provision for the representation of the victim or the calling of evidence on the victim's behalf.

37. He submitted that the construction of s85B for which the appellant contended would not be consistent with the legislative purposes of the section and was not supported by the relevant authorities.

The statutory purpose argument

38. Senior counsel for the respondent generally submitted that the legislation was beneficial and that, accordingly, the interpretation favourable to the victim urged by his client should be adopted.

39. Senior counsel for the appellant responded that, whilst it was undoubtedly true to say that the legislation was beneficial and remedial, the question in issue was as to the nature of the benefit or remedy afforded. He referred to what was said by Heydon J dealing with the interpretation of a section of the *Victims Support and Rehabilitation Act 1996* (NSW) in *Victims Compensation Fund Corporation v Brown*^[8]:

"To begin consideration of issues of construction by positing that a "liberal", "broad", or "narrow" construction will be given tends to obscure the essential question, that of determining the meaning the relevant words used require. Although the purpose of the Act is beneficial, it does not follow that recovery is contemplated for every act of violence or every consequence that could be described as an injury.... It is difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of the legislative language."^[9]

40. The respondent relied upon the following description of the purpose of the amendment of the *Sentencing Act 1991* by the Attorney-General in his second reading speech^[10]:

"Where an offender has been found guilty of a crime, important facts about the offender's actions and liability are already before the court. This provides the court with an opportunity to assess the victim's compensation claim soon after the offender has been sentenced. This procedural economy provides victims with a speedy and low cost option for seeking recompense without having to resort to civil proceedings. This bill proposes to facilitate such actions by improving the process for victims to obtain compensation directly from the offender."

41. S35(a) of the *Interpretation of Legislation Act 1984* provides that legislation should be interpreted so as to give effect to its purpose or object. The statutory context may be taken into account in determining that purpose or object under s35 (b)(i) as may reports of parliamentary proceedings under s35(b)(ii).

42. In *Hookham v R*^[11] Deane, Dawson and Gaudron JJ considered the ambit of s21B(1)(c) of the *Crimes Act 1914* (Cth) which provided for an order to be made against a person convicted of a Commonwealth offence:

"(c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence."

43. Their Honours said at 461:

"It is ... appropriate to point out that in the context where the Parliament has not expressly identified the considerations to be taken into account in making an order for reparation under s 21B, a trial judge would be excluded from taking account of an offender's personal circumstances and means only if, and to the extent that, 'the subject matter and the scope and purpose' of the relevant statutory provisions enable it to be said that those particular considerations were 'definitely extraneous to any objects the legislature could have had in view': *R v Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd* [1979] HCA 62; (1979) 144 CLR 45 at p49; (1979-80) 27 ALR 321; (1979) 54 ALJR 94."

44. In *R v Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd*, the High Court stated the relevant principle at 50:

“The general rule is that a discretion expressed without any qualification is unconfined except in so far as it is affected by limitations to be derived from the context and scope and purpose of the statute.”

45. The stated statutory purpose of the insertion of s85B was to provide access to compensation without the need for civil proceedings. Although it has been held that an award under s86(1) the purpose of such compensation is compensatory rather than punitive,^[12] in my view, it is nevertheless significant that s85B is found amongst the provisions of sentencing legislation.

46. The *Sentencing Act* 1991 states its purposes in s1. They include the objective of ensuring that offenders are only punished to the extent justified by the nature and gravity of their offences and their culpability and degrees of responsibility for their offences^[13] as well as that of ensuring that “victims of crime receive adequate compensation and restitution”^[14]. Its provisions set out sentencing guidelines as “governing principles” in s5(1) .

47. In *Bentley v Furlan*^[15] Ashley J distinguished between the rationales for common law damages and no-fault compensation for personal injury on the one hand and awards of criminal injuries compensation on the other when he said:

[21] The purpose of common law damages is to provide fair and reasonable compensation for the hurt which has been suffered. The purpose of no-fault compensation is, without need for proof of negligence, to provide benefits for economic and non-economic hurt to the extent that their payment can be responsibly funded. In neither case is an award discretionary.

[22] The rationale of criminal injuries compensation has been explained in cases where it has been payable out of the public purse. It has been said to be socially and morally desirable to compensate the victims of crimes of violence. Compensation is seen as 'a tangible expression of the State's sympathy and concern for those who, through no fault of their own, suffer unjustifiable invasions of their personal integrity'. See *H v. Crimes Compensation Tribunal* [1997] 1 VR 608 at 614; (1996) 89 A Crim R 97 citing Davies, *Compensation for Criminal Injuries in Australia: A Proposal for Change in Queensland* (1991) 3 Bond LR 1 at 4.”

48. Ashley J went on to say that the rationale for compensation legislation had not changed because the burden of payment under s86(1) fell on the offender rather than upon the state which could no longer afford it.^[16]

49. Cummins J in *Cheryl Anne Gregory and Hank Stawega v Geoffrey Leonard Gregory*^[17] pointed out the tension between the objective of compensating the victim and sentencing purposes such as that of the rehabilitation of the offender by the avoidance of the imposition of a crushing financial burden.

50. Whilst the compensation of the victim is a stated purpose of the *Sentencing Act* 1991 and the rationale for the award of criminal injuries compensation must be kept in mind, the provisions of the statutory scheme established by s85A-s85M and s86 indicate, in my opinion, that the legislature was concerned to ensure that the rehabilitation of the offender should not be adversely affected by an award of compensation. Thus the legislative scheme includes s85H and s86(2), providing that the financial circumstances of the offender and the nature of the burden payment will impose may be taken into account in ordering compensation. Further the position of the victim is protected under s5L and s86(10), respectively, which expressly provide that the victim's rights to civil redress are to be retained unaffected to the extent to which compensation does not satisfy entitlements.

The authorities

51. It was common ground that the relevant authorities established that the principles relating to the assessment of damages at common law are applicable to the assessment of compensation under s85B: *R v McDonald*^[18]; *Cheryl Anne Gregory and Hank Stawega v Geoffrey Leonard Gregory*^[19] and *DPP v Esso Australia Pty Ltd*^[20]. As is apparent, it was the issue of the applicability of statutory contributory negligence principles which was contentious.

R v Braham

52. In *R v Braham*^[21] the Full Court of the Victorian Supreme Court provided guidance as to the approach to be taken to the exercise of the discretion to award compensation.

53. The Full Court in *Braham* was considering the ambit of the now repealed s546 of the *Crimes Act* 1958 which provided for an order against a convicted offender for payment of compensation for the loss or destruction of property through or by means of an offence. It was held that the court had discretion both as to the making of an order and the fixing of the amount.^[22] The Full Court acknowledged the undesirability of trying to regulate the exercise of a discretion when the considerations governing its exercise had not been stated in the legislation. However, it went on to express the opinion that it should be stated that:

“... it would be a proper exercise of the discretion to refuse to make an order where there was involved a complicated or extensive investigation into the conditions of its exercise or the circumstances to be regarded in exercising it. For example, if there were required to be undertaken a complicated or extensive inquiry in order to ascertain whether there had been a loss or destruction of or damage to property, or in order to ascertain whether it or a part of it had arisen through or by means of the offence, or in order to determine what the value was of the property lost, destroyed or damaged, that would be a consideration proper to be regarded as a ground for refusing to make an order and leaving the matter to other processes. ... We would adopt the view taken of the operation of the related English provision that the machinery of a compensation order is intended for clear and simple cases since the civil rights of the victim remain: *R v Kneeshaw* [1975] QB 57, at p60.”^[23]

54. *Braham* was followed in *R v Landolt*^[24]. In that case Phillips CJ and Vincent J agreed with Hampel J who held that, if it appeared to a court dealing with a compensation application under s86(1) that there was a real issue as to liability or quantum to be determined, requiring examination of witnesses, that issue should be left to the ordinary procedures of a civil court^[25].

55. In the context of an argument that the applicant offender might be deprived of his statutory right to contribution from his co-offender, the Full Court in *R v Braham* also relevantly observed^[26]:

“We would hesitate to say that, if the effect of making an order under the section were to deprive the applicant of rights he would have if the victim were left to his ordinary civil remedies, this would not be a ground for refusing an order. But we are not satisfied that any such deprivation would follow in this case”

R v McDonald

56. The appellant relied upon the decision of the New South Wales Court of Criminal Appeal in *R v McDonald*^[27] in which the operation of s437 of the *Crimes Act* 1900 (NSW) was considered. S437 (1) provided:

“S437(1) Where a person is convicted of any felony or misdemeanour the Court in which he was tried, or any Judge thereof, may, on such conviction or at any time thereafter, direct that a sum not exceeding \$4,000 be paid out of the property of the offender to any aggrieved person, by way of compensation for injury, or loss, sustained through, or by reason of, such felony or misdemeanour or any other offence taken into account pursuant to section 447B in passing sentence for such felony or misdemeanour.”

57. The direction under s437 resulted in civil liability enforceable by either the victim or the state if the victim had sought payment of the compensation from the consolidated revenue under parallel legislation.

58. S437(3) entitled the court “[i]n determining whether or not to [make a compensation direction]” to have regard to the conduct of the victim contributing to the injury or loss to be compensated. In *obiter dicta* Street CJ expressed the view, urged by the appellant in this case, that the principles governing the assessment of compensatory damages were applicable to the determination of the quantum of compensation. His Honour said at 460-2:

“I am of opinion, as I have stated earlier, that the ordinary principles of assessing damages are to be applied when determining compensation under s437. I include within the meaning of ordinary principles such rules as by statute or otherwise are currently applied in an ordinary common law claim for damages. In effect the approach to quantum in a compensation hearing is similar in all respects (except as to punitive damages) to that ordinarily taken in a damages action at law. For example,

if the victim in a culpable driving case be a pedestrian guilty of contributory negligence, then the compensation directed to be paid would be adjusted in the same way as in a civil damages claim. The adjustment would flow not from s437(3); it would flow from the application of the current statute law governing such damages. A failure by the victim to mitigate his loss could limit the quantum of the compensation to be paid to him. Again, this would not be due to s437(3), but to ordinary principles of damages. ... Concern for the victim and procedural informality must not be permitted to affect in the slightest degree the right of the person convicted to have his liability assessed at no more than the true measure of compensation."

59. Begg and Lee JJ in *McDonald* concurred with the view of the Chief Justice in relation to the operation of s437(3). Each also accepted the relevance of the behaviour of the victim to the assessment of the quantum of compensation. Begg J said, at 468:

"But, notwithstanding the construction of the section, I desire to make it quite clear that I do not think that consideration of an aggrieved person's conduct before, at the time of, or after the commission of the crime must always be excluded as a matter of law, when the quantum of compensation is being considered. For example, there could be cases where as a matter of physical causation, the conduct of the aggrieved person antecedent to or subsequent to the criminal act does contribute to the overall effect of the injury."

60. After stating his view in relation to s437(3), Lee J said, at 473:

"I would point out, however, that this conclusion does not necessarily mean that the 'behaviour of the aggrieved person' will be irrelevant to the assessment of the compensation. Each case must be decided on its own facts and the circumstances of the crime may have a relevance to the assessment of the compensation in one case and not in another."

61. Senior counsel for the respondent sought to counter the appellant's argument based on *McDonald* by submitting that the *obiter dicta* comments of the Chief Justice were inconsistent with what had been previously said by the Court of Appeal in *R v Forsythe*^[28] in relation to s473. I note at this point that I am not persuaded by this argument and that *McDonald* has been followed in New South Wales in relation to the operation of s437(3) in *R v Field*^[29], *Re Application of Foster*^[30] and *R v MacGowan*^[31].

62. Indeed, subsequently, in *R v MacGowan*^[32], the Court of Criminal Appeal followed *McDonald*, holding that s437(3) required the consideration of the conduct of the victim of an assault occasioning actual bodily harm when determining the threshold question as to whether an award of compensation should be made. The trial judge in *MacGowan* had reduced the amount of compensation by reference to the conduct of the victim, after asking the threshold question, and then, following the *dicta* in *McDonald*, had reduced the compensation by half. The Court of Criminal Appeal did not criticise this approach and went on to state that:

"[t]he 50-50 assessment was within the range of options open to his Honour. Indeed it could well be said it was favourable to the appellant."^[33]

63. The Court of Criminal Appeal in NSW again considered s437 in *Re Rose*^[34], holding that the amount of compensation which might be directed under s437 of the *Crimes Act* 1990 (NSW) was confined to the amount of common law damages awarded in a previous action in relation to the tortious conduct involved in the crime. The trial judge had held that the pre-existing common law judgment was an irrelevant consideration to the statutory award of compensation. The majority of the members of the Court of Criminal Appeal disagreed.^[35] Street CJ referred to the summary nature of an award under s437 which, according to Jacobs P in *R v Forsythe*^[36], was a form of compensation *sui generis* and not a civil claim. The Chief Justice said of the offender's statutory liability to compensate the victim:

"I can see no adequate basis for concluding that the legislature intended to enlarge that ultimate liability beyond the limit of a properly quantified determination of common law damages. How, I ask rhetorically, is such an enlarged amount to be determined, given that it is not to be constrained by common law rules for determining damages? Is the extra amount an added punishment? That view is in the teeth of all the decided cases. If it is not an added punishment, on what jurisprudential basis can an offender be fixed with liability that is not cognisable in ordinary personal injury compensation? These underlying considerations point strongly against allowing a s437 direction to exceed a common law determination."^[37]

64. At 512, Street CJ adopted a description of s437 by the court in *R v Bowen*^[38] as:

“... a provision of a very summary nature of doing some measure of justice to the victim of a crime without the delay, expense and formality of a civil action for, for example, assault, trespass or conversion.”

65. Senior counsel for the respondent sought to distinguish *McDonald* on the basis of the differing New South Wales statutory provisions under consideration. He went on to argue that, although *McDonald* had been followed in Victoria, there was no warrant for the application of the *dicta* of Street CJ. He referred to the decision of Cummins J in *Cheryl Anne Gregory and Hank Stawega v Geoffrey Leonard Gregory*^[39] in which reference was made to *McDonald* as authority for the applicability of “common law criteria” in relation to an application for compensation under s86(1) of the *Sentencing Act 1991*.^[40] He submitted that it was questionable whether Cummins J had accepted all that had been said by Street CJ and argued that his Honour was referring only to the court taking account in the assessment of compensation such matters as the age of the victim, the level of pain and suffering and the effects on expectation of life and disfiguration. He relied upon the fact that Cummins J had not expressly referred to the reduction of compensation by the apportionment legislation.

66. Senior counsel for the respondent cited *South Australia v Abdel-Ghani*^[41], *Re Cadman*^[42] and *Jansen v Assessor for Criminal Injuries (No. 2)*^[43]; cases in which courts in other jurisdictions had taken into account the conduct of the applicant victim when assessing compensation, applying express statutory provisions entitling them to do so^[44], without reference to common law principles relating to contributory negligence. He argued that such an approach supported his argument that those principles had no place in the operation of s85B. He also referred to the decision of the Court of Appeal in *R v Criminal Injuries Compensation Board: ex parte Ince*^[45] concerning the interpretation of paragraph 17 of the *Criminal Injuries Compensation Scheme 1964 (Revised) 1969* (UK).

The relevance of contributory negligence or fault to intentional torts

67. Whilst contributory negligence or fault is relevant to the assessment of damages in an action for negligence by the operation of the *Wrongs Act 1958* and its equivalents, it has been held that the contributory negligence of the victim may be taken into account in the assessment of exemplary damages, but will not reduce compensatory damages in relation to the intentional tort of battery: *Fontin v Katapodis*^[46]; *Horkin v North Melbourne Football Social Club*^[47].

68. The different issue of the availability of the defence of contributory negligence or fault in an action for conversion was considered by Ormiston J (as his Honour then was) in *Australian Guarantee Corporation Ltd v Commissioner of the State Bank of Victoria*^[48]. His Honour took the view that the weight of authority and the opinion of text writers suggested that the defence was not available in cases of intentional torts except in the case of a claim for negligent injury.^[49] In *State of NSW v Riley*^[50] the New South Wales Court of Appeal held that the defence of contributory negligence was available in relation to the unintended consequences of an action for trespass where some direct interference had been established.^[51]

69. I note that, nevertheless, in *R v MacGowan*, the Court of Criminal Appeal in New South Wales upheld the trial judge’s reduction of compensation on the basis of the *dicta* in *McDonald* and the contributory negligence of the victim. Neither the High Court’s decision in *Fontin v Katapodis* nor the issue of the relevance of the concept of contributory negligence to an assessment of compensatory damages in relation to an intentional tort was addressed.

The option available to the respondent

70. S28 of the *Occupational Health and Safety Act 1985* provides that contravention of s21 does not give rise to civil liability, leaving the respondent the option of proceedings at common law.

71. It was argued by the respondent that principles relating to contributory negligence or fault were inapplicable to an award of compensation if the respondent either did not intend to commence proceedings at common law or was precluded from doing so.

Conclusions

72. The legislative power under s85B is couched in wide terms. The stated statutory purpose is that of providing ready access to compensation by the offender without the need to commence civil proceedings. However this object should be viewed in light of its statutory context as well as with reference to the relevant authorities.

73. Taking into account what may be described as the sentencing objectives of the *Sentencing Act* 1991 and the retention of any available common law rights to the extent that they remain unsatisfied, I am persuaded that the contributory negligence or fault of the victim might be a relevant factor to be taken into account in the exercise of either or both of the threshold discretion as to the making of an award and the subsequent determination of its amount, depending upon the nature of the common law relief available to the victim.

74. I am persuaded by the appellant's submissions that it would not accord with the legislative purposes in relation either to the compensation of victims or the sentencing of offenders that a greater benefit would be available to those victims whose claims could be processed expeditiously than to others whose cases would require more time. Such a result would appear quite unjust: penalising some victims and some offenders. On the other hand, the rights of any victim entitled to a greater amount of compensation at common law are preserved.

75. In my view, the relevant authorities support an interpretation of s85B which allows the contributory negligence or fault of the victim to be taken into account as a relevant factor, where appropriate, in light of the nature of the common law relief which might be available to the victim.

76. In this case, if he had not been otherwise precluded from commencing proceedings, the respondent's common law entitlements might have been regarded as having included damages for negligence on the part of the appellant, in relation to which any contributory negligence or fault on his part might have been considered relevant. I am not persuaded by the respondent's submissions in so far as they assert that the unavailability of an action in damages would necessarily render irrelevant the victim's negligence or fault, notwithstanding the nature of the common law remedy which might have been pursued in the absence of some legislative or other barrier.

77. As ready access to compensation is the stated purpose for the insertion of s85B and, accordingly, it would seem inappropriate for any complex analysis of common law liability to be required of the court making, in effect, a summary compensation order under the section. Nevertheless "doing some measure of justice to the victim" in a broad summary way would result in the victim's conduct being one of the relevant matters able to be taken into account where deemed appropriate in the exercise of the court's discretions under s85B.

78. Ultimately, I agree with the submissions of senior counsel for the appellant to the effect that the discretion under s85B is a live one, to be tailored to the circumstances, and that the behaviour of the victim is one of the circumstances which may be relevant in some cases.

79. In my view, the learned Magistrate's reasons indicate that he erred in law by interpreting s85B as precluding him from taking into account the respondent's contributory negligence or fault as a relevant factor and basing his refusal to do so on that interpretation.

80. Accordingly, question (a) posed by the Master on 27 November 2003 will be answered: Yes.

[6] [1999] VSC 481; [1999] 3 VR 63; (1999) 30 MVR 241.

[7] [1972] HCA 27; (1972) 124 CLR 640 at 649; [1972] ALR 641; 46 ALJR 339.

[8] [2003] HCA 54; (2003) 201 ALR 260; (2003) 77 ALJR 1797.

[9] *Ibid* at 1804.

[10] *Hansard* 26 May 2000.

[11] [1994] HCA 52; (1994) 181 CLR 450; 75 A Crim R 588; 29 ATR 1.

[12] *DPP v Parsons (Robert Clive)* [2000] VSC 327; see also *R v Rose* [1987] 10 NSWLR 509 at 515 per Street CJ.

[13] s1 (d) (iv) (A) and (B).

[14] s1 (i).

[15] [1999] VSC 481; [1999] 3 VR 63 at 67; (1999) 30 MVR 241.

[16] *Ibid* at [23]-[24].

- [17] [2000] VSC 190 at [28]-[29]; 112 A Crim R 19.
- [18] (1979) 1 NSWLR 451 at 458 per Street CJ.
- [19] [2000] VSC 190; 112 A Crim R 19.
- [20] [2001] VSC 401; 126 A Crim R 13.
- [21] [1977] VicRp 11; [1977] VR 104.
- [22] [1977] VicRp 11; [1977] VR 104 at 108 per Young CJ, Gowans and Harris JJ.
- [23] Ibid at 110.
- [24] Unreported Supreme Court of Victoria Court of Criminal Appeal, 19 November 1992.
- [25] Ibid at p6.
- [26] Ibid at 113.
- [27] [1979] 1 NSWLR 451.
- [28] [1972] 2 NSWLR 951.
- [29] [1982] 1 NSWLR 488.
- [30] [1982] 2 NSWLR 481.
- [31] [1984] 3 NSWLR 440.
- [32] [1984] 3 NSWLR 440.
- [33] Ibid at 446.
- [34] (1987) 10 NSWLR 509; (1987) 31 A Crim R 52;.
- [35] Street CJ and Slattery CJ at CL, Kirby P dissenting.
- [36] [1972] 2 NSWLR 951 at 953.
- [37] Ibid at 513.
- [38] (1969) 90 WN (Pt 1) (NSW) 82 at 84.
- [39] [2000] VSC 190; 112 A Crim R 19.
- [40] Ibid at [29].
- [41] (1997) 93 A Crim R 259.
- [42] (1989) 39 A Crim R 390.
- [43] (1997) 17 SR (WA) 145.
- [44] s7(9) of the *Criminal Injuries Compensation Act 1978* (SA) in *AbdelGhani*; s15(1) of the *Criminal Injuries Compensation Ordinance 1983* (ACT) in *Re Cadman*; and s25 of the *Criminal Injuries Compensation Act 1985* (WA) in *Jansen v Assessor for Criminal Injuries (No. 2)*.
- [45] (1973) 3 All ER 808; [1973] 1 WLR 1334.
- [46] [1962] HCA 63; (1962) 108 CLR 177; [1963] ALR 582; 36 ALJR 283.
- [47] [1983] VicRp 12; [1983] 1 VR 153 at 166 per Brooking J.
- [48] [1989] VicRp 57; [1989] VR 617; [1989] Aust Torts Reports 80-229.
- [49] Ibid at 638.
- [50] [2003] NSWCA 208; (2003) 57 NSWLR 496.
- [51] Ibid at 523 per Hodgson JA.

APPEARANCES: For the appellant Dura Constructions (Aust) Pty Ltd: Mr G Uren, QC and Ms S Manova, counsel. Ebsworth & Ebsworth, solicitors. For the respondent Dovigi: Mr J Kennan SC and Mr N Horner, counsel. Slater & Gordon, solicitors.
