THOMPSON v HANNON & ANOR

Supreme Court of the Northern Territory of Australia

Martin J.

7, 13 & 29 September 1988

CRIMINAL INJURIES COMPENSATION - Practice & Procedure - Compensation order - Against offender - Penalty provision - s. 393 Criminal Code - Whether application for order by victim permissable - Whether victim has right of appearance on sentence of accused to apply for order - Criminal Code, s. 393

CRIMINAL INJURIES COMPENSATION - Compensation Order - Discretion to order - Provision under s. 393 Criminal Code - Exercise of discretion - Circumstances justifying - Criminal Code s. 393

SENTENCING - Penalties - Criminal Injuries Compensation Order - Nature and purpose of order - Means by which evidence as to quantum to be put before Court - Criminal Code ss. 388, 393

CRIMINAL LAW - Practice & Procedure - Sentencing - Criminal Injuries Compensation Order - Who may apply - Criminal Code, s. 393

Cases followed:

Re Australian Broadcasting Tribunal; ex parte Hardiman (1980) 29 ALR 289
Fagan v Crime Compensation Tribunal (1982) 42 ALR 511
R v Braham [1977] VR 104
R v Bowen (1969) 90 WN (Part 1) NSW 82
R v Kneeshaw [1975] 1 QB 57
Bond v Chief Constable of Kent [1983] 1 All ER 456
R v Miller [1976] Crim LR 694
R v Vivian [1979] 1 All ER 48

Cases not applied:

Boyce v Paddington Borough Council [1903] 1 Ch 109

Cases considered:

R v McDonald [1979] 1 NSWLR 451
Grzybowicz v Smiljanic [1980] 1 NSWLR 627
R v C [1982] 1 NSWLR 675
R v Civoniceva [1983] 2 Qd R 633

Cases referred to:

Patterson v Veitch (1958) 58 SR (NSW) 287
Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391
R v Stieler [1983] 2 Qd R 573

Counsel for plaintiff	:	C McDonald
Solicitor for plaintiff	:	Solicitor for the NT
Counsel for first defendant	:	D Farquhar
Solicitor for first defendant	:	Poveys
Counsel for second defendant	:	K Parish
Solicitor for second defendant	:	McCormack & Co

mar880045

mar880045

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 570 of 1988

BETWEEN:

ALAN WILLIAM PETER THOMPSON
Plaintiff

AND:

JAMES FITZGERALD HANNON
First Defendant

AND:

DAVID DEBENHAM
Second Defendant

CORAM: MARTIN J.

REASONS FOR JUDGMENT
(Delivered 29 September 1988)

The question is, who has the right or, by leave, the opportunity to place evidence before a Court in relation to compensation for injury to a person by reason of the commission of an offence, under s. 393 of the Criminal Code.

There also arises an issue as to the circumstances in which a Court should exercise its discretion to make an order that such compensation be paid.

That an order for payment of compensation is one of the options available to a Court, on considering the appropriate penalty to be imposed on an offender, is demonstrated by the wording of section 393(1). The whole section reads:

"ORDERS FOR RESTITUTION AND COMPENSATION

(1) Where in relation to an offence against the person or relating to property the accused person is convicted of that offence, acquitted of it on the ground of voluntary intoxication in the circumstances set out in section 383 or has it taken into account by the court as provided by section 396 the court may, in addition to any other penalty to which that person is liable, order that that person -

(a) pay compensation for injury suffered by any person, whether the victim against whose person the offence was committed or another, by reason of the commission of the offence;

(b) make restitution of property in relation to which the offence was committed; or

(c) pay compensation for damage, loss or destruction occasioned to property in relation to which the offence was committed or to property of the victim in the course of the commission of the offence against his person.

(2) The order may stipulate -

(a) the amount to be paid by way of restitution or compensation;

(b) the person to whom the restitution is to be made or the compensation is to be paid;

(c) a time within which the restitution is to be made or the compensation is to be paid; and

(d) the manner in which the restitution is to be made or the compensation is to be paid.

(3) The court may further order that, upon his failure to comply in all respects with the order, the offender may be imprisoned -

(a) in the case of an order made by the Supreme Court, for a term not exceeding 12 months; or

(b) otherwise, for a term not exceeding 6 months,

but so that any term of imprisonment fixed pursuant to this section shall not be itself or together with any other term of imprisonment imposed upon the offender extend for a term longer than the longest term for which a person might be sentenced with respect to the offence charged or taken into account.

(4) The order may give such directions as the court may think fit as to enforcement of any such sentence of imprisonment including a direction that the offender shall appear -

(a) at some future sittings of the court; or

(b) when called upon by notice,

to show cause why the sentence of imprisonment should not be executed on account of his failure to comply with the order.

(5) Upon application made by or on behalf of the offender the court that made the order may extend the time stipulated in the order within which the restitution was to be made or the compensation paid and thereupon the order shall be construed as if the time so extended were the time stipulated in the order.

(6) Where time stipulated in an order is extended upon application made by or on behalf of an offender who by the order is required to appear at a sittings of the court on a date certain or at a sittings of the court commencing on a date certain, the court that extends the time may vary the date certain, if the case requires it, and thereupon the order shall be construed as if the date certain so varied were the date certain specified in the order.

(7) If the offender fails to appear as required by the order of the court, the court may issue a warrant directed to all police officers to arrest the offender and to bring him before the court to show cause in accordance with the order.

(8) Where compensation is ordered to be paid by instalments and default is made in payment of any one instalment, the same proceedings may be taken as if the original order had directed the payment

in one amount of all the instalments then remaining unpaid and default had been made therein.

(9) Restitution and payments by way of compensation shall, if the court orders, be made in the first instance to the sheriff or an under-sheriff or a clerk of the court.

(10) This section does not affect the right of any person to bring and maintain any civil action except that anything done or paid pursuant to the provisions hereof shall be taken into account in any award of damages.

(11) In this section, "offender" includes a person acquitted of an offence on the ground of voluntary intoxication in the circumstances set out in section 383 and a person who has an offence taken into account as provided by section 396 and, in such circumstances, any reference to an offence that has been committed or to the commission of an offence shall be read as a reference to the offence charged or taken into account."

That section appears in Part X of the Code under the heading "Division 1 - Sentencing Powers". Even disregarding the heading, the plain words of s. 393 show that the powers therein contained relate to penalty. Section 393 (1) expressly states that the orders which might be made are "in addition to any other penalty" to which a person, who falls within the description of persons contained therein, is liable.

It seems to me that the word "penalty" is of wider import than a sentence by way of imprisonment or fine. In this context it includes, at least, an order to pay costs as envisaged in s. 383, by a person acquitted on the grounds of voluntary intoxication.

The plaintiff was a Sergeant of Police who, by information, charged Martin James for that he on 14 October 1986, at Darwin, did unlawfully assault David Debenham, a member of the public service acting in the execution of his duties, contrary to Section 188 (2)(b) of the Criminal Code. The matter proceeded summarily and he is liable to imprisonment for 2 years. Upon the hearing, which has not concluded, the prosecutor and James were each represented by counsel. On 8 July 1988 the first defendant, a Stipendiary Magistrate, found the offence proven. No issue arises as to that finding. Counsel for the informant addressed the Court as to penalty during which he pointed to the nature of the assault and its consequences. I make no findings in that regard, of course, but counsel alluded to the victim having been, prior to the assault, blind in one eye and as a consequence of the assault his skin being torn, his blood being spilt at numerous places on his face and head, including his right ear, and his neck. The accused had apparently, struck the victim and bitten him. The victim attended at hospital to be treated for his injuries. Counsel said that the effect of the assault was to alter the victim's life "quite radically" in that he stopped work as a welfare worker and underwent psychiatric treatment. He was said to have been laid off by his employer and was incapable of performing his duties. Upon closing his submission counsel for the informant submitted that the penalty should be "serious". He did not refer to the Court's power to make

an order for compensation for the injury suffered by Mr Debenham.

Counsel for James then addressed the Court in mitigation. Amongst other things he submitted that there was no independent expert evidence as to the effect which the assault was alleged to have had on the victim's life. He mentioned that there was some evidence from the victim but invited the Court not to consider it as having any aggravating effect on penalty. He later referred to there being no independent evidence of the alleged psychological injuries.

At the conclusion of that address, counsel for the informant informed the Court that a Mr Keely represented the victim "on a private class" and that "he seeks to make an application .... under s. 393 of the Code for compensation". He added "It would be circumspect to hear that prior to passing penalty. The Crown doesn't make that application, but an application will be made." Counsel for the informant, at that stage, apparently did not consider that the proposed procedure was irregular or not within the Court's jurisdiction.

Counsel for the accused was taken by surprise. He said it was not "the appropriate time" for such an application to be entertained, drew attention to evidentiary

problems and submitted that if it was to be made it should be by separate proceedings. He also referred to compensation involving an assessment, which he submitted should be dealt with separately.

Mr Keeley was an articled clerk and sought leave to appear before the Court on behalf of the victim. Ultimately His Worship declined that leave but in the meantime there was some further discussion between the Court and the clerk. I do not think I should pay any regard to what passed between them. Counsel for the accused was given further opportunity to address the Court and submitted that if an application for compensation was to be made it should have been made clear from the start of the proceedings and be dealt with during the proceedings. He opposed any ajournment and drew attention to the provision of s. 393 to the effect that the only sanction for non-payment of compensation ordered to be paid was imprisonment, and that the victim was not precluded from seeking compensation by other courses.

On that day, His Worship, noting that the victim wished to apply for compensation, adjourned the matter, not for that reason, but to consider penalty on the basis of what had been previously put to him by counsel. Addressing the articled clerk, he said "That may afford your principal some time to come and make this application ....". Further consideration was adjourned to 11 July.

The transcript of the proceedings on 11 July is incomplete. At the commencement appears "(Portion of this tape not recorded)". It was not sought to supplement the deficiency.

Whether counsel for the informant appeared is not disclosed, but the transcript does not show that he addressed the Court. Counsel for the victim sought leave to appear on his behalf to make an application for compensation. He pointed out that in the absence of a prosecutor making an application, then unless the victim was otherwise represented, no submission would be made in that regard. Reference was made to s. 388(3) of the Code which provides:

> "The Court may before passing sentence, receive such information as it thinks fit in order to inform itself as to the proper sentence to be passed."

Counsel for the accused then again objected to the application being made by other than the prosecutor. In essence, he submitted that the proceedings were criminal and it was not proper for solicitors representing a victim to become involved to pursue a civil remedy and obtain criminal sanctions against the accused. He again pointed out that in his view the evidence had been concluded so far as the prosecutor was concerned and reminded His Worship that any

order for compensation was a penalty. During the course of argument, after counsel for the accused raised the difficulties which could attend upon the making of an assessment of damages as a civil proceeding at the end of criminal proceedings, His Worship observed "It's something to be avoided if it's going to be complicated, I'm quite sure, and they can fall back on their other remedies."

Counsel for the victim then addressed His Worship further on the effect of s. 393, stressing that it must have work to do, and inviting the Court, as an alternative to permitting him to appear, to direct the prosecutor to provide information as to the injuries sustained, so that the Court would be in a position to decide whether to apply s. 393, and to further adjourn to enable that to be done.

His Worship then decided that he could permit the appearance of a legal representative of the victim, at that stage, notwithstanding that the prosecutor did not wish to make any application on his behalf. However, he indicated that other issues may need to be argued and decided as to the operation of s. 393, and general non-conclusive discussion ensued between him and counsel for the victim. The learned magistrate asked the counsel, "At what stage are you going to be at in the next few weeks to indicate to the court what your global figure for compensation would be?"; and later, "So the problem is where can we all adjourn to if

you wish an adjournment so that you can calculate this figure and present it to the court?". Counsel indicated that although he had a figure in mind he did not understand that the amount to be awarded would be full compensation, but by way of penalty and to express society's concerns.

His Worship then again reiterated that he allowed counsel for the victim to appear and that the question of compensation could be considered and weighed against such other penalty as he might impose.

I find that the learned Stipendiary Magistrate purported to grant leave to counsel for the victim to appear before him to apply for an order that the accused pay compensation to the victim.

The Court then adjourned until 29 July.

The reason for the apparent uncertainty as to the meaning and operation of s. 393, the matters which might bear upon the exercise of the Court's discretion, the evidence upon which any such order might be based and how, when and by whom the issue might be raised, is explicable on the basis that that was the first time compensation for personal injury had been raised in that Court, or this, since the commencement of the Code, on 1 January 1984. I was informed that it was not unusual for the section to be

applied in relation to restitution of money or goods and compensation for damage, loss or destruction of goods. There have been no cases decided on appeal in this Court involving orders of that type.

The plaintiff seeks the following relief:

"1. The plaintiff seeks an order in the nature of Certiorari pursuant to Order 56 against the Defendant having allowed the application pursuant to Section 393 (1)(a) of the Criminal Code to be made by a third party not a party to the proceedings. The Plaintiff maintains that, as informant, it was for the Magistrate or the Plaintiff and no other to make such application, and that in the absence of the Magistrate moving of his own motion under Section 393, or such application by the Plaintiff, the Defendant had no jurisdiction to entertain such application and his decision to give the third party leave to appear ought to be quashed.

2. The Plaintiff seeks an order in the nature of Prohibition to prevent the Defendant from proceeding to hear an application by or on behalf of a third party David Debenham for compensation under Section 393 of the Criminal Code.

3. Alternatively, if the third party has standing under Section 393 of the Criminal Code that the learned Stipendiary Magistrate hear and determine the matter in accordance with law."

Upon the hearing before me I ordered that the victim, David Debenham be joined as a defendant. He was represented by counsel. The accused, Martin James, appeared in person. Since counsel for the plaintiff had indicated that his argument was likely to be directed so as to protect

Mr James' interests, and since Mr James was unable to arrange representation, (notwithstanding an adjournment to enable him to endeavour to do so) I declined to join him as a plaintiff. The first defendant, the learned Stipendiary Magistrate, was represented by counsel who indicated that his client undertook to be bound by the findings and order of the Court, as is usually the case. However he remained during the course of the proceedings so that he might offer any such assistance as the Court might require.

It is not ordinarily appropriate for a tribunal to appear to contest curial proceedings brought by one of the parties before it where there has been a contest between those parties (Re Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 29 ALR 289 at 304). But in some circumstances it may be desirable that the tribunal should appear by counsel to make such submissions as it thinks are calculated to assist the Court, and in an appropriate case, to argue against the applicant's or plaintiff's case (per Brennan J in Fagan v Crime Compensation Tribunal (1982) 42 ALR 511 at 523). The latter protagonist step was not taken here. Counsel for the tribunal, the leaned Magistrate, simply seeking to assist this Court on a matter upon which there was admittedly no authority in this jurisdiction, and to point to difficulties which the Court of Summary Jurisdiction, at least, might face in relation to peripheral issues to those raised here. Counsel for the plaintiff, the

informant below, was instructed by the solicitor for the Northern Territory and counsel appeared for the second defendant, who admittedly was not a party in the Court of Summary Jurisdiction, but who, I think can be properly equated with being a party for these purposes. He was on the other side of the record in this Court and had a real interest in opposing the orders sought. A Court could not refuse to hear a party properly joined, but if a tribunal goes beyond what is ordinarily appropriate, it may suffer a consequence as to costs (see Brennan J. in Fagan at p. 524).

Parties were thus joined on each side of the record who had opposing interests; counsel for the plaintiff to argue for the orders sought and counsel for the second defendant to oppose the making of those orders and uphold the order of the learned Magistrate giving his client the opportunity to appear by a legal representative of his choice to seek an order that the accused pay compensation for the injury suffered by the victim by reason of the commission of the offence.

The Code came into operation on 1 January 1984. Legislation relating to compensation for injury arising from criminal offences have long been known to the law. It is therefor instructive to consider some such provisions, as there were prior to that commencement, elsewhere in Australia.

As to New South Wales, the authorities are, I consider, best collected together and considered in R v McDonald [1979] 1 NSWLR 451 (Court of Criminal Appeal), Grzybowicz v Smiljanic [1980] 1 NSWLR 627 (Court of Appeal) and in R v C [1982] 1 NSWLR 675 (O'Brien C.J. of the Criminal Division).

The relevant statutory provisions in force in 1979 are set out at p. 455 and 456 of McDonald's Case in the judgment of Street C.J. as follows:

> ""(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.
>
> (2) A direction given under subsection (1) shall specify the sum, if any, to be paid by way of compensation for injury and the sum, if any, to be paid by way of compensation for loss.
>
> (3) In determining whether or not to give a direction pursuant to subsection (1), the Court or Judge shall have regard to any behaviour of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by him, and to such other circumstances as it or he considers relevant (including whether the aggrieved person is or was a relative of the convicted person or was, at the time of the commission of the felony or misdemeanour, or any other offence taken into account pursuant to section 447B in passing sentence for such felony or misdemeanour, living with the convicted person

as his wife or her husband or as a member of the convicted person's household) and shall also have regard to the provisions of the Criminal Injuries Compensation Act, 1967."

Section 437A (2) provides that a direction for the payment of compensation under s. 437(1) shall not affect the right of the aggreived person to bring civil proceedings, but that any civil judgment shall not be entered without leave, where the whole or part of the compensation directed under s. 437(1) or an amount under ss. 3 and 5 of the Criminal Injuries Compensation Act, 1967 has been paid.

Section 457 provides that, where a direction for compensation has been made pursuant to s. 437, the Clerk of the Peace shall, on request, issue to the aggrieved person a certificate specifying the unpaid amount of any sum directed to be paid. Section 457(3) provides: "An aggrieved person may file in the District Court at Sydney a certificate issued to him under subsection (1), and thereupon the registrar shall enter judgment in favour of the aggrieved person against the offender specified in the certificate for the amount specified in the certificate as having not been paid and any fees payable to the registrar in respect of the certificate."

Section 3 of the Criminal Injuries Compensation Act authorizes an aggrieved person, in respect of whom payment of compensation has been directed under s. 437, to apply for payment of that sum to him from consolidated revenue. Section 5 requires the Treasurer to pay the amount, if he considers that course justified. Section 7 (2) and (3) are in the following terms: "(2) Where judgment has been entered in favour of an aggrieved person under section 457(3) of the Crimes Act 1900 in respect of a direction made under section 437(1) of that Act, and a payment has been made to the aggrieved person pursuant to section 5(2) in respect of that direction, the Under Secretary may file a notice specifying the date and amount of the payment in the District Court at Sydney, and thereupon the registrar of the District Court for Sydney shall -

(a) reduce the amount of the judgment by the amount specified in the notice; and

(b) enter judgment in favour of the Under Secretary, against the offender against whom judgment in favour of the aggrieved person was

entered, for the amount specified in the notice.

(3) The Under Secretary shall pay to the Consolidated Revenue Fund any money recovered by him pursuant to this section.""

His Honour goes on to summarize the statutory scheme "as entitling the victim of a crime to apply to the court of trial for a direction that he or she receive compensation up to $4,000 ....". His Honour there refers to "the statutory scheme" being, I take it, a reference to the combined effect of the operation of the Crimes Act and Criminal Injuries Compensation Act. At p. 457 the learned Chief Justice says, "The aggrieved person is expressly given the status to apply to the court of trial, or a judge thereof, for a direction for the payment of compensation". O'Brien C.J. observed in R v C at p. 686 that that statement is only explicable by reference to s. 4 of the Criminal Injuries Compensation Act by which a person aggrieved by an offence of which an accused person is acquitted, is nevertheless expressly given the status to apply to the court of trial for the grant of a certificate. There is nothing in s. 437 of the Crimes Act that expressly gives an aggrieved person the status to apply to the court of trial, or a judge thereof, for a direction for the payment of compensation.

Whatever may have been in the mind of Street C.J., it is clear upon consideration of the New South Wales cases that whether an aggrieved person had standing to apply for compensation under the Crimes Act was at least doubtful.

In Grzybowicz v Smiljanic, the appellant victim had made an application, some years after the offender was convicted, which was treated as an application under s. 437 of the Crimes Act. His solicitors categorised the application as "his claim for compensation" (p. 624) Reynolds J.A. at p. 630 said "It is somewhat difficult to understand, having regard to the legislation, what was meant by "his claim for compensation"". Commencing at paragraph (21) on p. 633 and continuing to the end of his reasons for judgment, Hutley J.A. reviewed the legislation and the practices which had developed (not discouraged by the Crown) of applications for compensation being made by aggrieved persons, and the authorities touching upon the statutory provisions. He concluded at p. 635 in paragraph (31) "It follows, in my opinion, that there has been no proper application to the Court on the part of the applicant, and the only proper applicant on his behalf is the Crown." In arriving at this conclusion, His Honour relied on what was said by Walsh J. in Patterson v Veitch, unreservedly endorsed by the Full Court, ((1958) 58 SR (NSW) 287): "An order may be made under s. 437 without any application for such an order having been made by the injured person, and

the injured person is clearly not a party to the proceedings in which such an order is made ..."; His Honour cast doubt upon what was said by Street C.J. in McDonald's Case (see above) and criticised the practice which had grown up, but left open the possibility of a court permitting representation of a person aggrieved by solicitor or counsel appearing as amicus curiae (pointing to the limitations on that role referred to in Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391)). At paragraph (29) he said, "I am unable to see how this right of audience arises without express statutory authority. The right of appearance of a victim in criminal proceedings conducted by the Crown is unknown to me".

This and other cases were extensively reviewed by O'Brien C.J. in R v C but His Honour did not, I think, come to a concluded view as to the position prior to 1967, but did hold that as a result of provisions of the Criminal Injuries Compensation Act, of that year, an aggrieved person may make an application under s. 437 of the Crimes Act.

There is no such legislative scheme in the Northern Territory. The provisions of the Code and of the Crimes Compensation Act 1982 (NT) stand independently of each other. They are not interconnected in any way.

The doubts which arose in New South Wales as to the standing of a person aggrieved was dealt with by the legislature when it revised s. 437 in 1984, and as part of the new scheme expressly provided for a direction to be given by a Court of its own motion or upon application by the aggrieved person (s. 437(4)).

There are distinct differences between the New South Wales and Territory legislation. The order for compensation under s. 437 of the Crimes Act may be enforced as a judgment (s. 457). That is not the case here; the person for whose benefit an order for compensation is made is given no such right and the ultimate sanction for failure to comply with such an order is imprisonment by order of the Court. In the Territory the order for compensation is "in addition to any other penalty"; it is not so categorised in New South Wales. In that State the direction may be given after conviction and by any Judge of the Court; here neither procedure appears to be open (except in so far as it may be said that sentence or penalty follows conviction). There is a monetary limit in New South Wales and none in the Territory.

These distinctions lead me tentatively to the view that whatever doubts may have arisen in New South Wales as to the standing of the person aggrieved to apply for a direction, those doubts are to be resolved against a person

for whose benefit a compensation order might be made in the Territory.

The Territory legislation is much closer to that of Queensland. Section 685A of that State's Code was introduced in 1975 and is as follows:

> "685A. Orders for restitution and compensation. (1) Upon the conviction on indictment or summarily of any person of an offence relating to property or against the person of another, the Court or justices may, in addition to any other penalty to which the offender is liable, order that the offender -
>
> (a) make restitution of property in relation to which the offence was committed;
>
> (b) pay compensation for damages, loss or destruction occasioned to property in relation to which the offence was committed or to property of the victim in the course of commission of the offence against his person;
>
> (c) pay compensation for injury suffered by any person (whether the victim against whose person the offence was committed or another) by reason of the commission of the offence.
>
> (2) An order made pursuant to subsection (1) may stipulate -
>
> (a) the amount to be made by way of restitution or compensation;
>
> (b) the person to whom the restitution is to be made or the compensation is to be paid;
>
> (c) a time within which the restitution is to be made or the compensation is to be paid.
>
> (d) the manner in which the restitution is to be made or the compensation is to be paid.
>
> (3) At the time when an order is made pursuant to subsection (1) the Court or justices may further order that, upon his failure to comply in all

respects with the order, the offender be imprisoned with hard labour -

(a) in the case of an order made upon conviction or indictment, for a term not exceeding twelve months;

(b) in the case of an order made upon conviction summarily, for a term not exceeding six months.

(4) Upon application made by or no behalf of the offender, the Court or justices who made an order pursuant to subsection (1) or a Court or justices of like jurisdiction may extend the time stipulated in the order within which the restitution was to be made or the compensation paid and thereupon the order shall be construed as if the time as so extended were the time stipulated in the order.

(5) In an order made pursuant to subsection (3) the Court or justices may give such directions as it or they may think fit as to enforcement of the sentence of imprisonment therein ordered including a direction that the offender shall appear -

(a) at some future Sittings of the Court or justices or of a Court or justices of like jurisdiction; or

(b) when called upon by notice in the prescribed form,

to show cause why the sentence of imprisonment should not be executed on account of his failure to comply with the order.

Where time stipulated in an order is extended upon application made by or on behalf of an offender who by the order is required to appear at a Sittings of a Court or justices on a date certain or at a Sittings of a Court or justices commencing on a date certain the Court that extends or justices who extend the time may vary the date certain, if the case requires it, and thereupon the order shall be construed as if the date certain as so varied were the date certain specified in the order.

(6) If the offender fails to appear as required by the order a Judge of the Court or justice may issue a warrant directed to all police officers to arrest the offender and to bring him before the Court of justices or a Court or justices of like jurisdiction to show cause in accordance with the order.

(7) Where pursuant to this section compensation is ordered to be paid by instalments and default is made in the payment of any one instalment, the same proceedings may be taken as if the original order had directed the payment in one sum of all the instalments then remaining unpaid and default had been made therein.

(8) Restitution and payments by way of compensation ordered to be made pursuant to this section shall, if the Court orders or the justices order, be made in the first instance to the sheriff or an under sheriff or, as the case requires, a clerk of the court.

(9) This section is in addition to and not in derogation of or substitution for any other provision of this Code relating to the making of restitution or the payment of compensation."

It will be noted that an order for compensation for injury is in addition to any other penalty; there is no limitation as to the amount which might be so ordered, and the sanction for failure to meet the terms of the order is imprisonment.

That provision is to be contrasted with s. 663B of the Queensland Code, which provides for an order for the payment of compensation to a person aggrieved upon application by or on behalf of that person; the compensation is not to exceed a prescribed amount; the order is not to be taken to be part of a sentence and the order may be enforced by the person aggrieved as if it were a judgment of the Court.

The area of operation of those Queensland provisions and the differences between them were considered by the Court of Criminal Appeal (Andrews A.C.J., Connolly and Carter J.J.) in R v Civoniceva [1983] 2 Qd.R 633. The respondent had been summarily convicted of assault. The magistrate imposed a fine of $250 and adjourned for further consideration the question of whether he should in addition make an order under s. 685A. The Attorney General appealed on the ground that sentence was inadequate and insufficient. The respondent contended that the appeal was premature, the full measure of punishment not having been determined.

At p. 634, Connolly J. (with whom the Acting Chief Justice agreed) in drawing attention to differences between s. 663B and 685A said, inter alia of s. 685A, "the application need not be made by or on behalf of the person aggrieved." That is not authority for the proposition that an aggrieved person is not entitled to make an application on his or her own behalf and goes no further than what Walsh J. had to say at the beginning of the passage earlier cited from His Honour's reasons in Patterson v Veitch. In passing, I note that the words "person aggrieved" do not appear in s. 685A. At p. 635 His Honour referred to an order under that section as being made "in the exercise of one of its additional sentencing options" (a proposition of law approved a few days later by the same Court constituted by three other Judges in R v Stieler [1983] 2 Qd R 573).

However, at p. 637, Carter J. said, "An order that the convicted person pay compensation for a personal injury to another person under s. 685A does not require an application by or on behalf of the injured person" and went on, "Indeed the section does not permit such a person to ask that such an order be made. It is entirely a matter within the discretion of the Court or justices and may be made irrespective of whether such an order is sought or not. If sought it would only be sought by the prosecutor."

It is apparent that the several jurisdictions in Australia have chosen to deal with the provision of compensation for injury as a result of a criminal act in different ways, no doubt taking into account existing legislation when implementing important changes with respect to the subject. Reference has been made to the method by which the States of New South Wales and Queensland approached the matter. So far as I am aware there was no statutory scheme in the Territory giving effect to the desire to see victims of crime compensated prior to the Criminal Injuries (Compensation) Ordinance 1976, which was repealed by the Crimes Compensation Act in 1982. That Act substituted a new scheme to that provided for under the Ordinance. It was, of course, in operation when the Criminal Code commenced. The legislature must be assumed to have taken it into account in enacting s. 393 of the Code.

It enables a person who is injured as the result of the commission of an offence, to apply to the Local Court for a compensation certificate. Clearly the victim is a party to that application. I need not go into detail regarding that legislation but in some respects it is similar to the provisions in New South Wales and Queensland; for example, s. 10 compares with s. 473(3) of the Crimes Act (NSW) and s. 663B(2) of the Criminal Code (Qld), and the Minister may pay the amount specified in the compensation certificate (Qd Code s. 663C and as to New South Wales position see above). There is in all cases a limit on the amount which might be the subject of the order or certificate.

It is common knowledge that the Territory Code was developed for enactment bearing in mind the Queensland Code and the decisions thereon. There are many points of departure, but the similarities between s. 685A and s. 393 remain, and accordingly, though by no means bound by them, I consider that due consideration and appropriate weight should be given to decisions and reasons for decisions of the Judges and the Supreme Court of that State, especially on appeal. Those decisions may be of assistance to Courts in the Territory on other issues which may arise for determination under s. 393 of the Code.

There is no relevant distinction to be drawn from the use of the word "penalty" as opposed to "sentence" in the opening words of s. 393(1). As explained earlier, "penalty" includes what is usually referred to as "sentence", but goes beyond that to embrace, for example, an order for costs under s. 383. An order for compensation or restitution as envisaged in s. 393(1) is thus another form of penalty or sentence which might be ordered in the discretion of the court. As it is designed to provide compensation to the victim for injury or loss suffered as a result of the offence, it is not, I consider, to be regarded as punishment of the offender, or used for that purpose (R v Braham [1977] VR 104 at 108). There are two discretions, the first whether to make such an order, the second as to the amount. As to the first, it is to be exercised as part of the sentencing or penalty fixing process. That decision is taken as part of the curial process in the criminal jurisdiction, and in that the victim of the offence should play no part. It is a matter for determination upon consideration of such submissions as may be properly put by the prosecutor and the offender, or of the Court's own motion.

If the "victim", which word embraces a person who was not a person against whom the offence was committed (s. 393(1)(a)), was entitled to intervene as a party in respect of compensation or restitution, a whole new set of

considerations would necessarily arise, for example, as to appeal.

The Crimes Compensation Act and the common law (s. 393(10) of the Criminal Code) provide remedies for the victims of crime. There is no good reason why the "victim" should as well play a part in the sentencing process in the criminal justice system. The Code does not expressly provide for it and it does not appear by necessary implications.

Nor do I think that a victim ought to be made a party upon the grounds that the assessment of compensation presents difficult legal or factual problems in this particular case. Indeed if such be the position it may afford a good reason for refusing to exercise the discretion to make a compensation order. Notwithstanding the distinctions between the New South Wales and Territory legislation, s. 393 of the Code is "of a very summary nature of doing some measure of justice to the victims of crime without the delay, expense and formality of a civil action for, for example, assault, trespass or conversion " (per Reynold J. in R v Bowen (1969) 90 WN (Pt.1) NSW 82 at 84, approved in McDonald's Case at p. 462). Furthermore, a compensation order "is intended for clear and simple cases" (R v Kneeshaw [1975] 1 QB 57 at 60, adopted in R v Braham at 110); "the court should approach the matter in a broad

commonsense way and should not allow itself to become enmeshed in the refined questions of causation which can sometimes arise in claims for damages ..." (Bond v Chief Constable of Kent [1983] 1 All ER 456 per McCullough J at 459); "an order should only be made when the legal position was quite clear" (R v Miller [1976] Crim LR 694 cited with approval in R v Vivian [1979] 1 All ER 48 at 50).

Counsel for the second defendant also relied upon s. 388 of the Code, enabling the sentencing court, before passing sentence, to receive such information as it thinks proper to inform itself as to the proper sentence to be passed. This says nothing about from whom the information may be received and does not assist the plaintiff. Any information which a victim wishes to have placed before a court going to quantum of a prospective compensation order, if not already given in evidence upon the trial (or where there has been a plea of guilty), can be provided to the prosecutor.

The rule in Boyce v Paddington Borough Council [1903] 1 Ch 109, has no application to the question.

The learned magistrate has permitted the second defendant to appear before the Court of Summary Jurisdiction in his own right, to make an application for compensation under s. 393 of the Code. For the reasons given I am

satisfied that the second defendant has not, nor can, or should he be afforded by leave or otherwise, standing to do so. The error is an error of law and it goes to the court's jurisdiction.

Order that the decision of the learned magistrate be quashed and that he be prohibited from hearing, or further hearing any application by the second defendant for compensation under s. 393 of the Criminal Code.