SHERIFF APPEAL COURT

[2019] SAC (Crim) 9
SAC/2019-000209/AP

Sheriff Principal M M Stephen QC
Sheriff P J Braid
Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

JOHN JOSEPH McLELLAN

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: Dean of Faculty: John Pryde & Co Edinburgh for McCarrys, Solicitors, Glasgow
Respondent: Kearney, AD; Crown Agent

3 September 2019

[1] The appellant was sentenced at Glasgow Sheriff Court on 19 March 2019 in respect of three offences, all on one summary complaint, committed on 1 February 2018 at an address in Glasgow and also at Glasgow Royal Infirmary. These are:-

> "(001) on 1st February 2018 at 35 Calvay Crescent, Glasgow you JOHN JOSEPH MCLELLAN did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did

act in an aggressive manner towards Alexander Jones, a Paramedic acting in the course of his employment, c/o the Police Service of Scotland, repeatedly shout and swear at him and threaten him with violence;

CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010

(002) on 1st February 2018 at 35 Calvay Crescent you JOHN JOSEPH MCLELLAN did assault Alexander Jones, a Paramedic acting in the course of his employment, c/o the Police Service of Scotland and did spit on his body
(003) on 1st February at Glasgow Royal Infirmary, 84 Castle Street, Glasgow you JOHN JOSEPH MCLELLAN did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear and alarm in that you did shout and swear at police officers, direct sexual and sectarian comments towards them and struggle violently with them;

CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and it will be proved in terms of Section 74 of the Criminal Justice (Scotland) Act 2003 that the aforesaid offence was aggravated by religious prejudice."

[2] The summary sheriff imposed a *cumulo* sentence of a community payback order (CPO) with the following requirements: an offender supervision requirement for a period of two years; a compensation requirement totalling £6,000; and an unpaid work requirement of 150 hours, discounted from 200 hours due to the timing of the plea at the intermediate diet, to be completed within 12 months. The compensation requirement of £6,000 is made up of compensation of £1,500 to each of the two female police officers who are the complainers in charge 3. The sheriff also ordered that a compensation payment be made to the paramedic involved in charges 1 and 2 of £3,000.

[3] In his note of appeal the appellant argues that the amount of compensation is excessive in all the circumstances of the case. This appeal was granted leave at the first sift to the extent of considering the question of discount in relation to the compensation requirement, though a point not raised in the note of appeal. The first sift appeal sheriff observed that "there appears to be no decided case law on this point and the position may

not be the same in relation to a compensation requirement within a package of CPO measures and a distinct compensation order which would be unlikely to attract discount because it is a compensatory award".

[4] As the question of discount is not raised in the note of appeal the sheriff's reasoning on this is limited to his postscript at paragraph 22 of his report which is in the following terms:

> "22. Whilst it does not form part of the grounds of appeal, I would take this opportunity to point out that I did not modify the amount of compensation for the timing of the plea. This was because I took the view that it was inappropriate to do so in the case of a compensation order. Whilst it is a matter for your Lordships, in reflecting on the terms of section 196 of the 1995 Act I can see now that a modification to the sum imposed may have been appropriate in the circumstances."

[5] The issue which this court now requires to determine is whether the compensation requirement made by the sheriff in imposing a CPO is susceptible to discount and, if so, to the same level of discount as other parts of the sentence, such as the hours of unpaid work which attracted a discount of 25% (although it should be noted that the period of the supervision requirement was not discounted to any extent, a point to which we shall return).

[6] When this appeal called for a hearing before two appeal sheriffs on 22 May 2019, Mr Findlater, advocate appeared for the appellant and adopted his written submissions. It was argued on behalf of the appellant that a compensation requirement made as part of a community payback order is habile to the application of discount in terms of section 196 of the Criminal Procedure (Scotland) Act 1995 ("the 1995Act"). In this case the compensation requirement was imposed as part of a community payback order in terms of sections 227A and 227H of the 1995 Act. Section 227D provides:

> "(1) Where a community payback order is imposed on an offender, the order is to be taken for all purposes to be a sentence imposed on the offender."

[7] It was further submitted that a compensation requirement as part of a CPO is distinct from a compensation order which is governed by section 249 of the 1995 Act. A compensation order is a sentence only for the purpose of any appeal or review (section 250(3)). Where the court is minded to impose a community payback order and also to order compensation this has to be effected by way of a compensation requirement in terms of section 227H. It is not competent for the court to make a compensation order under section 249 where it imposes a CPO under section 227A of the 1995 Act (section 249(2) (ab)). A CPO is a sentence and therefore falls to be treated as such when the court is interpreting section 196 which is concerned with what the court requires to take into account "in determining what sentence to pass on……an offender who has pled guilty to an offence." In this case the appellant pled guilty at the intermediate diet. Accordingly, the court requires to take the stage in the proceedings at which the offender indicated his intention to plead guilty into account in passing sentence. It follows that the court should have approached the compensation requirement in the same or similar manner to the approach taken to the hours of unpaid work. We were referred to *Gemmell* v *HM Advocate* 2012 JC 223 and *Wilson* v *PF Aberdeen* 2019 JC 1.

[8] Having considered the submissions for the appellant we decided that the appeal raised questions of more general importance and wider application beyond the facts of this case:- namely, whether a compensation requirement as part of the CPO should be treated any differently from a compensation order made in terms of section 249 of the 1995 Act and whether, in circumstances where the sentencing court considers it appropriate to apply discount following a plea of guilty, it should apply that discount to any compensation requirement of a CPO. We continued the appeal for a bench of three appeal sheriffs to hear

the appeal and to decide whether to pronounce an opinion in terms of section 189(7) of the 1995 Act. The respondent was invited to lodge written submissions.

[9] When the appeal called before us for a hearing on 2 July 2019 the appellant was represented by the Dean of Faculty. He founded his submission on the distinction between a compensation requirement as part of a CPO and a compensation order. A compensation order was not a sentence, by virtue of section 250(3) of the 1995 Act, and did not require to be discounted. However, a CPO was a sentence. Further, if discount was appropriate, then all parts of that sentence must be discounted by the same percentage or fraction. He relied upon the case of *Gemmell and Others* v *HMA Advocate* 2012 JC 223, the five judge decision which set out what the sentencer's approach to section 196(1) of the 1995 Act ought to be. The sentencer should determine the headline sentence and then when considering discount the utilitarian value of the plea was the sole determining factor. In particular the Dean referred to paragraphs [37], [53], [55] and [56] of Lord Gill's opinion in *Gemmell*. The same considerations as to the utilitarian value apply to the different elements of any sentence. The object of compensation is of no relevance, as the sole criterion when determining discount is not the sentencing purpose but the utilitarian value. There were limited exceptions to this principle, the most notable being an extended sentence, which is not subject to discount, being imposed for public protection. The case of *Wilson* (*supra*) serves to emphasise the proper construction of section 196(1) where sentencing for a particular offence involves the imposition of various penalties. Although this is not a road traffic case the *dicta* in *Wilson* apply *mutatis mutandis*. The Lord Justice General at paragraph [18] concluded that "There will normally be no rational basis for selecting different rates of discount for different parts". The court in *Wilson* specifically rejected the notion that the sentencer can operate a

discriminating approach in road traffic cases. The Lord Justice General at paragraphs [20] and [21] states:

> "For the reasons given above a "discriminating" approach to discount, in so far as this is taken to mean the application of different discounts to different parts in the one sentence is not normally legitimate.
>
> As a generality whether to discount a sentence and at what rate, remain matters for the discretion of the judge at first instance (Gemmell v HMA, Lord Justice Clerk (Gill), paragraph [29]). However, discretion is not the equivalent of caprice or whim. It requires to be exercised in accordance with the recognised principles (ibid para [32]; Saini v Harrower, Lord Justice Clerk (Dorrian), delivering the Opinion of the Court, at para [5]). There may be some merit in the idea that sentencers should be given an overriding discretion to disapply, or reduce the rate of, any discount in relation to the selection of penalty points for the period of disqualification. This is based on a notion that the nature of the imposition of points or disqualification from driving has a different purpose from a fine or imprisonment. The idea was rejected by all the judges in Gemmell; each agreeing with the application of the same, or approximately the same, rates of discount for the fines and the penalty points for the road traffic cases."

Although this appeal does not relate to road traffic offences the authorities of *Gemmell* and *Wilson* taken together scotch the notion of there being a different discount or no discount depending on the purpose of the sentence imposed. All parts of a sentence should attract the same discount. This applies equally to the present case where discount was applied to the unpaid work but not to the compensation requirement. The sheriff erred in not applying the same discount to the compensation requirement.

[10] The Dean of Faculty did not seek to make any submission as to the nature of compensation, nor seek to draw any distinction between a pure financial penalty (an example given was compensation for a broken window) compared with a 'solatium' type award for injury or distress caused by the offender's actings. The Dean did not suggest that the sheriff was not entitled to make a compensation requirement; instead the appeal was directed to discount only. Finally, he did not wish to comment on the observation made by

the court that the supervision requirement had not been discounted, stating merely that the non-discounting of the supervision requirement did not form part of his argument.

[11] The advocate depute adopted the written submissions. Two questions of law arise - firstly whether a sentencing court considering discount for the stage the guilty plea is made requires to apply discount to a compensation requirement imposed as part of a community payback order? The second question relates to whether a compensation requirement imposed as part of a community payback order should be treated differently from a free standing compensation order.

[12] As to the first question, it was submitted that, as with extended sentences, compensation requirements and 'free standing' compensation orders are governed by their own special provisions. They serve a particular purpose distinct from other sentencing options. A compensation requirement or order is restorative rather than punitive or deterrent or rehabilitative. As its purpose is to compensate the complainer for a loss, be that for damage to or loss of property, or intangible in the form of personal injury, alarm and distress, it is in a unique position in sentencing terms in that it is imposed solely in order to address a specific loss on the part of the complainer or victim. If it is considered appropriate to impose either a compensation requirement or order, the sentencing court requires to take into account the offender's means; however, previous convictions or the lack of previous convictions would appear to have no bearing on the calculation of compensation, especially compensation relating to damage or pure financial loss. In that sense compensation differs from other sentences. The advocate depute referred to *Robertson* v *Lees* 1992 SCCR 545 and *Landsborough* v *McLellan* 1997 SCCR 464.

[13] On the second question it was submitted that both a compensation requirement and a compensation order fell to be regarded in a different light from other elements of a

sentence which might otherwise be subject to discount. However, although compensation orders and CPOs incorporating a compensation requirement are governed by different provisions in the 1995 Act, nevertheless section 227H of the 1995 Act explicitly renders certain of the provisions relating to compensation orders (in sections 249-253 of the 1995 Act) applicable to compensation requirements in a community payback order. These include *inter alia* the permitted level of compensation (the prescribed sum); subsequent review and adjustment; the requirement to take account of the offender's means and the effect of any compensation on damages in the course of civil proceedings. It was submitted that both community payback orders and compensation orders are treated as sentences (sections 227D(1) and 250(3)).

[14] The advocate depute proposed that the stage of the plea of guilty should not result in the discounting of any compensation element imposed by the sentencing court regardless of whether the court requires compensation to be paid as part of a community payback order or as a free standing compensation order. Accordingly, we were invited to refuse the appeal.

Decision

Background facts

[15] The background to these offences is that the appellant was significantly under the influence of alcohol on 1 February 2018 when police and paramedics were called to an address in Baillieston, Glasgow due to reports of a male shouting and swearing, kicking doors and lying on the ground. When police arrived they recognised that the assistance of a paramedic was required as the appellant was lying on the ground severely intoxicated and initially thought to be unconscious. When the appellant was being escorted to the

ambulance he became verbally abusive to the paramedic and both police officers. He was warned about his conduct but continued to direct abuse at the emergency services personnel using rather disgusting, hostile and aggressive language. When in the ambulance he spat at the paramedic and his spittle landed on the complainer's forearm. He was arrested but due to his severely intoxicated state was taken to Glasgow Royal Infirmary. On arrival there he was lashing out and resisting attempts to assist him. Within the Accident and Emergency Department he shouted comments of a vile sexual and sectarian nature towards the female police officers. The hospital was busy with other patients who were either being assessed or waiting. After being checked by medical staff he was taken to Aitkenhead Road Police Station still in an extremely intoxicated and aggressive state. Due to the appellant's dreadful language and behaviour towards the police officers and paramedic the sheriff was entitled to take the view that a custodial sentence was merited. An assault by spitting is a disgusting act designed to demean and humiliate the victim. It is rightly regarded as serious criminal behaviour when directed at any person but especially those attending to assist. The vile comments and language used in the Accident and Emergency Department towards the female police officers, in our opinion, require a particularly vulgar and nasty frame of mind to think of such language far less utter the words. The appellant has a record including analogous offending. He was due to begin a well paid job working offshore and would be earning approximately £3,000 net per month. It is against that background that the sheriff considered imposing a non-custodial disposal with the associated requirement for financial compensation to be made to the police officers and paramedic. This was made as part of a package of measures under the umbrella of a community payback order, which has several distinct sentencing purposes. The purpose of the supervision requirement is to rehabilitate the appellant by requiring him to address his offending behaviour, whereas the primary

purpose of the unpaid work requirement is to punish him in addition to requiring him to give something back to the community. The purpose of the compensation requirement is to compensate the complainers.

[16] The issues we have to determine do not, however, relate to the headline sentence imposed by the sheriff. Instead, the questions of law relate to whether the sentencing court requires to apply discount to a compensation requirement as part of a community payback order imposed by the sheriff as a cumulo disposal on the three charges. The second issue is whether a compensation requirement imposed as part of the CPO is distinct from and therefore should be treated differently from a compensation order imposed in terms of section 249 of the 1995 Act. That is often referred to as a 'standalone order' - despite the terms of section 249(1) which provide for such an order being made instead of or in addition to dealing with an offender in any other way – but it cannot be imposed along with a CPO, or when discharging absolutely or deferring sentence (section 249(2)).

Compensation requirements (as part of the CPO) and compensation orders – are they distinct?

[17] Sections 227A-227ZN of the 1995 Act make provision for CPOs. The court may impose a CPO on an offender instead of imposing a sentence of imprisonment and, instead of or as well as, imposing a fine (section 227A(4)). Section 227A(2) defines a community payback order as an order imposing one or more of the requirements listed from (a) to (i). The community payback order must include at least one of these requirements. In this case the CPO imposed the requirements set out in 227A(2)(a) – (c) being:

(a) an offender supervision requirement
(b) a compensation requirement and
(c) an unpaid work or other activity requirement.

However, the sentencing court has available other requirements as appropriate including a drug and alcohol treatment requirement; a mental health treatment requirement; a residence requirement whereby the offender remains at a particular location. These are but some of the CPO components available to the sentencing court. Before the court may impose a CPO it must have obtained and, importantly, taken account of a report from the local authority on the offender and his circumstances, commonly referred to as a criminal justice social work report. It is not necessary to obtain a report where the only requirement is for a level one unpaid work order in terms of section 227A (4) or if the order is to be made on a fine defaulter. The report informs the court not only about the offender and his circumstances but provides recommendations as to the desirability of supervision and the availability of rehabilitative measures such as treatment orders together with the suitability of the offender for punitive orders such as unpaid work. The supervision requirement itself has a rehabilitative effect and the author of the report will often make a recommendation as to the required duration of the period of supervision in order to achieve the optimal beneficial effect of the order, whether or not combined with other requirements. The importance of an offender supervision requirement is obvious from section 227G. Section 227G(2) requires the court to impose an offender supervision requirement as part of a CPO firstly, if the offender is under 18 years of age, or if the court proposes to impose any of the other requirements in the menu provided in section 227A(2) other than an unpaid work or other activity requirement. Thus, the only requirement of a CPO which can be imposed without also imposing a supervision requirement is an unpaid work or other activity requirement. Therefore, an offender supervision requirement is a necessary accompaniment to a compensation requirement and in terms of section 227H(4) the offender must complete

payment of the compensation either within 18 months or within two months of the end of the supervision requirement whichever comes soonest.

[18] Section 227H(5) sets out further provisions applying to compensation orders which apply to a compensation requirement as if the references in them to a compensation order also include a compensation requirement. It appears to us that Parliament, in enacting section 14 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act), which inserted sections 227A to 227ZN of the 1995 Act, intended that a compensation requirement as part of a CPO should have the same or similar effect to a compensation order imposed by virtue of section 249 of the 1995 Act (the so called standalone order). The 2010 Act also made certain amendments to the statutory regime for compensation orders (sections 249 to 253 of the 1995 Act). The policy memorandum accompanying the bill states that the policy objective of the amendments to the legislative provisions surrounding compensation orders is "to improve the courts' flexibility to award compensation thus helping victims of crime achieve greater satisfaction". The amendments had the effect of widening the circumstances in which the court might make compensation orders "by making it more straight forward for the courts to award financial compensation back to the victims of crime for any personal injury, loss or damage caused directly or indirectly; or alarm or distress caused directly to the victim resulting from that offence or any other offence which is taken into consideration by the court in determining sentence." The particular amendments which widen the scope of the compensation order are also applied to compensation requirements by virtue of section 227H(2) and (5). For example, section 251(1A) allows the court to review the compensation order at any time before it has been fully complied with and gives the court the power to increase the order if materially new information about the means of the offender becomes available or the offender's financial circumstances have improved. This

provision applies equally to a compensation requirement by virtue of section 227H(5)(c). The 2010 Act inserted new subsections (3A), (3B) and (3C) into section 249 allowing respectively in certain circumstances a compensation order to be made in cases where a road accident had been caused by an uninsured driver; where a compensation order is made following damage to a stolen vehicle or an accident with an uninsured driver. Compensation may include the cost of the loss of preferential insurance rates. Section 249(3C) provides that a compensation order may be made in respect of loss suffered as a result of bereavement and funeral expenses in connection with a person's death except if it was the result of a road accident. These provisions apply *mutatis mutandis* to compensation requirements. Importantly section 227H(2) equiparates 'the matter' for which the offender must make compensation to 'a relevant person' in a compensation requirement with the making of a compensation order under section 249. The meaning or definition of 'relevant matter' and 'relevant person' is common to both.

[19] A CPO is to be taken for all purposes to be a sentence imposed on the offender (section 227D(1)). On the other hand, a compensation order is only a sentence for the purpose of any appeal or review (section 250(3)). Counsel for the appellant suggested that this was an important distinction. However, we do not agree. We likewise accept that a compensation order made in terms of section 249 of the 1995 Act is an order made by the court designed to compensate a victim. Nevertheless, in our opinion any such distinction makes no difference to the question of discount as section 196(1) applies "in determining what sentence to a pass on or what other disposal or order to make in relation to an offender"(our emphasis). Thus section 196(1) applies to both a sentence and an order made in relation an offender. The distinction is illusory. Overall, having analysed the provisions governing CPOs and compensation orders we conclude that any differences are more

apparent than real and they fall to be treated in the same manner when construing whether they are susceptible to discount.

Discount

[20] Section 196(1) of the 1995 Act is in the following terms:-

> "(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account –
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which that indication was given."

[21] The court in *Gemmell* (*supra*) heard seven conjoined appeals which raised important questions of principle and practice on sentencing discount. In his opinion the Lord Justice Clerk (Gill) analysed the development of sentencing discount; interpreted section 196 and set out principles for sentencing courts to follow. In general terms, whether or not to discount a sentence or the level of discount to apply remain within the discretion of the judge at first instance. However, that discretion ought to be exercised in accordance with recognised principles and therefore the sentencer's discretion is not wholly unfettered. In *Wilson*, a case involving sentencing for road traffic offences, the Lord Justice General confirmed that section 196 applied equally to all elements of a sentence (such as fines, penalty points and disqualification) and repeated that the court in *Gemmell* had determined that the only factor relevant to discount is the utilitarian value of the plea. If discount is to be applied to a sentence the level of that reduction should be uniform across each element or component of the sentence, the court observing that the application of these principles would lead to certainty and predictability (para [21]). Such considerations outweigh other considerations such as flexibility. The concept of discounting is based on pragmatism rather

than principle. It is concerned with saving time and cost for the administration of justice, parties and witnesses. The Lord Justice Clerk (Gill) in *Gemmell* describes it thus, at para [34]:

> "It is not based on any high moral principle relating to the offence, the offender or the victim. On the contrary, it involves the court's passing a sentence that, in its considered judgment, is less than offence truly warrants. It is a statutory encouragement of early pleas."

In *Wilson* the Lord Justice General (Carloway) referred to the pragmatic nature of discounting. At paragraph [19] he observes:

> "There may be an element of inconsistency in the imposition of sentencing for similar offences, but that again is the general effect of discounting. It is a pragmatic feature designed to improve the efficiency of the justice system. It must be applied in a consistent fashion."

At that juncture in *Wilson* the court is dealing with the construction of section 196 with specific reference to sentencing in road traffic cases having concluded at para [18] that the provision applies to both a fine and other parts of the sentence. As all are penalties they should be discounted at the same rate:

> "Other than in exceptional cases, such as when statutory minimums apply, or a discount is otherwise impracticable, the rate of discount should be uniform across all parts of the sentence. Any differential would require to be fully reasoned in the event of a challenge….there will normally be no rational basis for selecting different rates of discount for different parts."

Wilson along with *Gallagher* v *Procurator Fiscal Glasgow* [2018] HCJAC 51, as "sons of *Gemmell"*, in large measure bring the reported decisions on discounting up to date.

[22] The advocate depute contended that the purpose of any compensation requirement or indeed compensation order is restorative rather than punitive, deterrent or rehabilitative. The Dean maintained that *Gemmell* had emphasised that all parts of a sentence fell to be discounted [paras 53-55]. Lest there be any doubt about that the High Court in *Wilson* (*supra*) restated that principle in unequivocal terms at paras [18] and [19]. In *Wilson* the court specifically rejected any discriminatory approach to discount based 'on the notion that

the nature of the imposition points or disqualification from driving had a different purpose from a fine or imprisonment' [para 21]. This court therefore, required to follow these binding authorities.

[23] We do not consider that compensation, however awarded, falls readily into the categories of sentence considered in either *Gemmell* or *Wilson*. The court did not require to consider whether compensation fell to be discounted. In *Landsborough* v *McGlennan* (*supra*) the High Court considered the nature and character of a compensation order. It concluded that it should not be regarded in the same way as a fine when considering the appropriate repayment period, the Lord Justice General (Rodger) observing:- "What a compensation order is designed to do is to make restitution to the person who has suffered". *Landsborough* affirms not only the distinction between a fine as a penalty and compensation as restitution but also the priority to be given to compensation and its payment. The primacy to be given to payment of compensation is also seen in section 250(1) and (2) of the 1995 Act. Section 250(1A), inserted by the 2010 Act, is noteworthy. It permits the court to consider increasing the amount payable under a compensation order at any time before a compensation order has been complied with (or fully complied with). Section 251 of the Criminal Procedure (Scotland) Act 1995, to which we have already alluded in passing, provides: –

> (1A) On the application of the prosecutor at any time before a compensation order has been complied with (or fully complied with), the court may increase the amount payable under the compensation order if it is satisfied that the person against whom it was made –
>
> (a) because of the availability of materially different information about financial circumstances, has more means than were made known to the court when the order was made, or
>
> (b) because of a material change of financial circumstances, has more means than the person had then."

[24] The 'relevant matters' for which compensation may be awarded have been extended (by virtue of section 49 the Criminal Proceedings etc (Reform) (Sc) Act 2007) to include alarm or distress (cf. *Brown* v *Laing* 2004 SLT 646 and *Smillie* v *Wilson* 1990 SLT 582). A compensation order may be made in respect of funeral expenses (section 249(3C)) amongst other losses. Section 249(1B) extends the ambit of 'relevant person' beyond the victim 'to a person who is liable for funeral expenses in respect of a death (except where arising from a road traffic accident). These examples underline Parliament's objective to help victims of crime achieve greater satisfaction (Policy Memorandum to the Criminal Justice and Licensing Bill).

[25] In these circumstances we do not consider that it is rational to conclude that section 196(1) ought to apply to any order or requirement which has as its purpose restitution. Compensation is intended to make amends to a victim for financial loss or injury. That is the objective of the sentencing court when requiring an offender make financial recompense. In effect, the criminal court is endowed with a mechanism for awarding to the victim of a crime that which he or she could receive in a civil action for damages. It would appear to fly in the face of that, and to contradict the apparent intention of Parliament to extend the opportunities for the court to make a compensation order or requirement, were the court then required to reduce the award to a lesser sum. Section 250(1A), discussed above, appears to us to reflect the legislature's objective that a person against whom a compensation order or requirement is made ought to make full recompense to the victim and may be required to pay more than originally assessed if his means and circumstances improve. That provision does not sit easily with discounting. If the effect of legislative changes is to bring funeral expenses within the ambit of a compensation order or CPO it is illogical to diminish that effect by ordering that only a proportion of the outlay

ought to be paid, depriving the relative of full and proper recompense. Another example is that of the window broken in an act of vandalism. The loss to the victim is readily known once the glazier's bill is presented. If the court intends to compensate the householder for the loss, three quarters of the outlay is scant satisfaction for the victim and fails to meet the court's purpose and objective when awarding compensation. Of course, this appeal is concerned with a compensation requirement in the nature of 'solatium' assessed by the sheriff in light of the facts and circumstances available to him. It is the sheriff's assessment of loss for alarm or distress rather than pure financial loss. We see no reason to make any distinction between the two types of loss. The 'outlay' is readily ascertainable; the solatium type is awarded as the court considers appropriate in the circumstances. Both awards are amenable to challenge on appeal particularly so the solatium award if it is considered to be excessive.

[26] We have some general observations as to discount. Not all sentences can or ought to be discounted. It is accepted that extended sentences are not amenable to discount. They are "an exception to the general principle of sentence discounting" (*Gemmell* paras [66] and [67]). Statutory minimum sentences cannot be discounted (*Gemmell* para [68] and *Wilson* [19]). It occurs to us that discount is not and ought not to be applied to the length of the supervision requirement of a CPO nor to the duration of a treatment or similar order. These requirements are imposed following consideration of the statutory pre-sentence report and are based on advice given by a criminal justice social worker familiar with the treatment resources available and the optimum term required to achieve the rehabilitative purpose. It would undermine the purpose and the rationale of the CPO to then shorten the recommended term by discounting. The application of rationality in sentencing is necessary, particularly with a CPO where there may be several requirements depending on

the offender's problems and the availability of resources in the community best assessed in the pre-sentence report. That leads to the natural and rational conclusion that such requirements should not be discounted. We are not aware of cases where it has been suggested otherwise.

[27] Finally, we wish to mention the question of public confidence in the criminal justice system and the credibility of sentences. In *Gemmell* Lord Gill devoted a section to this topic - one of the risks of sentence discounting (paras [74] – [77]). If compensation was to be subject to discounting we would have a real concern that victims of crime would quite rightly be aggrieved at the outcome and this would lead victims and therefore the public to lose confidence in the sentencing process and our system of criminal justice. The integrity of restitution would be undermined. The objectives expressed in the Policy Memorandum would not be met. The victim of vandalism would have difficulty understanding why the court's intention to require an offender to make payment of the glazier's bill translates into a mere contribution; likewise (perhaps more so) to the receipt by a bereaved relative of only a proportion of the funeral expenses. The risk to public confidence is obvious and real. However, we consider the risk to justice is greater. For these reasons we have come to the conclusion that a compensation requirement of a CPO is essentially the same in character and extent as a compensation order and that neither ought to be subject to discounting in terms of section 196(1) of the 1995 Act. Accordingly, we refuse the appeal and affirm the sentence imposed by the summary sheriff in Glasgow.

[28] As we have reached the conclusion that section 196(1) ought not to apply to any compensation order or a compensation requirement as part of a community payback order, we propose to issue this opinion in terms of section 189(7) of the 1995 Act as it will apply in any case where the court orders that compensation be paid.