SUPREME COURT OF QUEENSLAND

CITATION:	*LDM v FDW* [2008] QSC 259
PARTIES:	**LDM** (applicant) **v** **FDW** (respondent)
FILE NO:	No 13 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application for Criminal Compensation
ORIGINATING COURT:	Supreme Court, Maryborough
DELIVERED ON:	24 October 2008
DELIVERED AT:	Maryborough
HEARING DATE:	17 October 2008
JUDGE:	Lyons J
ORDER:	**The application is dismissed.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – ORDERS FOR COMPENSATION, REPARATION, RESTITUTION, FORFEITURE AND OTHER MATTERS RELATING TO DISPOSAL OF PROPERTY – COMPENSATION – QUEENSLAND – the applicant seeks criminal compensation from the respondent, her former husband, after he attempted to unlawfully kill their two sons – there was domestic violence during the marriage – the applicant suffered mental or nervous shock – there was more than one cause of injury – whether the respondent's behaviour directly or indirectly contributed to the injury – whether the applicant is an 'applicant' pursuant to s 19 of the *Criminal Offence Victims Act* 1995 (Qld)

Criminal Offence Victims Act 1995 (Qld), s 5, s 9, s 10, s 19, s 20, s 21, s 24, s 25

Pettingill v Minister for Justice & Attorney-General [2003] QSC 385, cited
R v Callaghan and Fleming, ex parte Power [1986] 1 Qd R 457, cited
R v Kazakoff; ex parte Ferguson [2000] QSC 156; [2001] 2 Qd R 320, cited

SAY v AZ ex parte A-G (Qld) [2000] QCA 462, applied

COUNSEL: PJ Pagliorino (sol.) for the applicant
No appearance for the respondent

SOLICITORS: Carswell & Co Solicitors for the applicant
No appearance for the respondent

LYONS J:

[1] In April 2005 the respondent took his two sons then aged five and four and put them in his car. He took them to buy a garden hose, then drove them to a secluded area and attached the hose to the exhaust of the vehicle. He subsequently started the ignition of the vehicle and set about killing himself and the boys by carbon monoxide poisoning. After a period of time however, he turned off the engine and then took the children to hospital for medical help.[1] Whilst the children were exposed to carbon monoxide for an extended period, they have survived. The long term effects of the poisoning, however, are not known. It is clear that whilst LDM was not present at the time the respondent locked himself and his sons in the car, she was clearly affected by the respondent's actions.

[2] On 12 September 2005, the respondent pleaded guilty to two counts of attempting to unlawfully kill his sons. In respect of each count he was sentenced to imprisonment for five years, with a recommendation for post-prison community based release after serving 18 months. One hundred and fifty-seven days of pre-sentence custody were declared as time served under the sentence.

[3] In his sentencing remarks Justice Byrne, the learned sentencing judge, said:[2]

> "You had expected that you and the children would go to sleep and die. One of the children called out in pain, complaining of a difficulty with his stomach. Whether that woke you up or not is by the way. What it appears to have done is to have caused you to stop the car engine and to take the children for medical help. In this sense, it may be said that, eventually, although probably after the engine had been running and the children exposed to carbon monoxide for quite some time, you desisted. As a result, the children have survived; and their age is such is they have no understanding of what you had in mind for them.
>
> There are considerations which matter significantly in the sentence which ought to be imposed. The most significant, apart from you having desisted so that the children survived, is your early pleas of guilty."

[4] LDM is the former spouse of the respondent and on 21 April 2006 she filed an application pursuant to the *Criminal Offence Victims Act* 1995 (Qld) ("the COVA"). Although served with the application, the respondent did not appear on the hearing of the application.

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1 Sentencing remarks, Byrne J, 12 September 2005, p 1.

2 Sentencing remarks, Byrne J, 12 September 2005, p 3, ll 20-50.

[5] Section 24 of the COVA provides:

> "**Court may make an order compensating someone injured by personal offence**
>
> (1) This section applies if someone (the *convicted person*)—
>
> (a) is convicted on indictment of a personal offence; or
>
> (b) is convicted on indictment and a personal offence is taken into account on sentence.
>
> (2) The person against whom the personal offence is committed may apply to the court before which the person is convicted for an order that the convicted person pay compensation to the applicant for the injury suffered by the applicant because of the offence.
>
> (3) The court may make an order (a *compensation order*) for an amount to be paid by the convicted person to the applicant because of the injury."

[6] LDM is clearly a victim of the offence by virtue of s 5 of the Act which provides:

> "**Who is a victim under the declaration**
>
> A *victim* is a person who has suffered harm from a violation of the State's criminal laws—
>
> (a) because a crime is committed that involves violence committed against the person in a direct way; or
>
> (b) because the person is a member of the immediate family of, or is a dependant of, a victim mentioned in paragraph (a); or
>
> (c) because the person has directly suffered the harm in intervening to help a victim mentioned in paragraph (a)."

[7] It is also clear that the applicant suffered no physical injuries as a consequence of the events and the basis of her claim is therefore one of "mental or nervous shock". However, as I have indicated the applicant was not present at the time the offences were committed against her sons and s 24 provides that, "…the person against whom the personal offence is committed may apply to the court." The essential question, therefore, that arises is whether a victim has a right to compensation. I will return to this issue later as it is necessary to understand the background behind LDM's claim. The offences took place against a background of a marital break-up. The applicant married the respondent in 2000 and the marriage ended in 2002. It was a very violent relationship and domestic violence orders were placed on the respondent on more than one occasion.

[8] The psychologist Kay Morgan has prepared three reports dated 14 February 2006, 16 July 2007, and 7 October 2008 in relation to this application.

[9] The applicant told the psychologist that the respondent had threatened and abused her and the children on many occasions. On one occasion one of the boys was belted so badly that his backside was "blue" and the other boy was hit so severely that his mouth bled. After their separation in 2002 there was an occasion when the respondent took the boys and would not allow the applicant to see them for five weeks. A Family Court order was then obtained, placing the residency of the boys in the care of the applicant. A children's representative was also appointed by the court and the respondent was allowed fortnightly visits with his sons.

[10] When the respondent was charged with drug offences, including possession of cannabis and amphetamines, the child representative suspended his contact with his sons. Access arrangements were then altered to allow access provided the respondent's parents supervised the visits. On the day of the offences the children were taken by the applicant to the boys' grandparents' home at 8.30 am, where both grandparents assured the applicant they would supervise the children. At 12.30 pm, the applicant received a phone call from the Hervey Bay Hospital stating that something had happened to the children and requesting her attendance.

[11] When she arrived at the hospital she saw police cars and the respondent's car as well as an ambulance and became "very scared". A nurse was waiting in reception who then assured her that the children were fine. The applicant experienced enormous relief and was taken to see the boys and it would appear that the boys looked "okay", although the younger boy was drowsy. The applicant was told what had happened to the boys, including the information that the respondent had given the children sleeping tablets. The boys were subsequently discharged during the afternoon but were returned for more observations later in the day.

The reports of the psychologist Kay Morgan

[12] In her report dated 14 February 2006, the psychologist stated:[3]

> "**Diagnostic formulation**
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> 33. [LDM] presented with a number of symptoms including anxiety, extremely high fearfulness, withdrawn behaviours, high stress levels, intrusive thoughts and impaired sleep, concentration, energy, motivation, and decision making abilities. [LDM] said that her symptoms developed gradually, and their frequency and severity varied depending on her relationship with [FDW]. However, her symptoms became increasingly severe after the attempt on her sons' lives.
>
> 34. From a psychological perspective, and based on the evidence presented at interview, [LDM] has symptoms consistent with an Adjustment Disorder with Anxious mood: Chronic.
>
> 35. [LDM's] symptoms fulfil the criteria for an Adjustment disorder as delineated by the Diagnostic and Statistical Manual IV (DSM IV) thus:
>
> A. *The development of emotional or behavioural symptoms in response to an identifiable stressor(es) occurring within 3 months of the stressor(es).*
>
> [LDM] reported symptoms occurring after the incidents described in this report.
>
> B. *These symptoms or behaviours are clinically significant as evidenced by either of the following:*
>
> *1. Marked distress that is in excess of what would be expected from exposure to the stressor.*
>
> [LDM] described extreme stress and fearfulness for both her safety and the safety of her sons.

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[3] Exhibit "KM2" to the affidavit of Kay Morgan, filed 21 April 2006.

> *2. Significant impairment in social or occupational (academic) functioning.*
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> [LDM] reported the cumulative effect of exposure to a traumatic event (the attempt on her sons' lives) as well as a history of a violent relationship with her husband, resulted in significant impairment in her social and occupational functioning.
>
> C. *The stress related disturbance does not meet the criteria for another specific Axis 1 and is not merely an exacerbation of a pre-existing Axis I or Axis II disorder.*
>
> [LDM] did not report symptoms consistent with the existence or pre-existence of another Axis 1 or Axis 2 disorder.
>
> …[LDM] reported that neither the stressors nor the consequences of the stressors have been resolved.
>
> 36. This diagnosis remains current, and no condition has been identified as being resolved. A pre-existing condition to this diagnosis was the domestic abuse in [LDM's] life prior to the attempt.
>
> **Prognosis**
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> 37. Prognosis for [LDM] remains guarded because of the danger inherent in the attack on the boys, because of her grave fears for herself and her sons' safety, and partly because some of her symptoms are of several years' duration.
>
> 38. [LDM] will suffer some of the effects of the trauma for the rest of her life. However, her somatic symptoms may reduce somewhat over the next 18 months.
>
> 39. However, [LDM's] condition is neither stationary nor stable, and she remains vulnerable to further trauma."

[13] A further report of the psychologist was prepared on 16 July 2007. In that report the psychologist stated that the applicant had frequent flashbacks to traumatic incidents in her relationship with the respondent and that she was experiencing depression and high stress levels. The applicant told the psychologist that she last saw her husband in court for their property settlement and that he had lost it in court and blamed everything on her and said, "…you are the reason I am in this suit."[4] He was then in the maximum security section in prison. It would appear that the respondent at that point had not been released on parole and the applicant had been advised that she would receive a short period of notice when he did become eligible for parole.

[14] The applicant told the psychologist that she had made arrangements to relocate when the respondent was released. She described "…living in a state of continual vigilance, fear and stress"[5] and stated that her sleep was broken even with

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4 Exhibit "KM1" to the affidavit of Kay Morgan, filed 8 October 2008.

5 Exhibit "KM1" to the affidavit of Kay Morgan, filed 8 October 2008.

medication, mainly due to her fears of the respondent abducting the children or killing herself and/or the children. She had daily flashbacks when she relived the time that he had abducted the boys. She said that she attempted to show a calm face to her children, even though her stress levels were extremely high.

[15] At that stage the applicant also expressed fears about how the children would adjust to a new life, and was extremely regretful that she was being forced to leave her home and an area where she had friends and a lot of support. The applicant also advised that there had been a court case when the respondent's parents had applied for contact with the boys, however, a ruling was made that neither the respondent nor his parents were to have contact with the children. The applicant, however, expressed fears that the respondent would not abide by this decision.

[16] The psychologist noted that the applicant's concentration was poor and that her motivation and energy levels were variable depending on her mood. The psychologist concluded that:[6]

> "Based on direct observation and the information provided at assessment and from a psychological perspective, [LDM] has symptoms consistent with an Adjustment Disorder with Anxious mood: Chronic (DSM IV 2005). Her symptoms may also qualify for a diagnosis of Post Traumatic Stress Disorder. [LDM's] symptoms began to develop not longer after her marriage to [FDW]. The frequency and severity of her symptoms became stronger after the earlier abduction of the children and the subsequent attempt on [their lives] and have remained constant to date. [LDM's] symptoms continue to be maintained by her ongoing fears for their personal safety and her fears about establishing a new life with her children."

[17] A further report was then prepared by the psychologist and is dated 7 October 2008. This report was prepared on the basis that FDW was released from custody a year previously and was residing in Brisbane. That report indicated that the applicant still expressed generalised anxiety about her sons.

[18] I accept, therefore, that the applicant clearly has an Adjustment Disorder with Anxious mood and Post Traumatic Stress Disorder.

[19] Quite apart from the question as to whether a victim can receive compensation there is another complexity to the current application which is that [LDM's] current psychological symptoms are not solely related to the respondent's actions in attempting to kill his sons. The applicant's symptoms in fact began to develop not long after her marriage to the respondent. It is also clear that the severity of her symptoms became stronger after the early abduction of the children and then the attempt on their lives and that the symptoms have remained constant to date.

[20] Any award under the legislation must, however, relate specifically to the offence for which the respondent was sentenced. It is clearly difficult to separate the impact of the offence from the pre-existing trauma that the applicant was suffering. I accept, however, that the applicant's acute symptoms do largely relate to the events of the offence itself and her continuing anxiety does stem from her fears of what may

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6 Exhibit "KM1" to the affidavit of Kay Morgan, filed 8 October 2006.

happen to her sons in the future. As Holmes JA (with whom Jones and Mullins JJ agreed) said in *SAY v AZ ex parte A-G (Qld)*:[7]

> "Where there is a single state of injury produced by a number of factors, some or all of which warrant a reduction in the award, the court must do its best to make allowance for their contribution, although the evidence may not lend itself to any precision. Often a broad-brush approach … will be necessary. The exercise may be one of discounting, or fixing on a lower percentage on the compensation scale to allow for the role of other factors, rather than necessarily a strict process of apportionment."

[21] Accordingly, whilst I am satisfied that the applicant has a pre-existing condition, I accept that the symptoms became increasingly severe after the attempt on her sons' lives.

[22] A more fundamental difficulty arises under the scheme set out in the Act. The essential question is whether LDM is actually an "applicant" pursuant to s 19 who can obtain an award for compensation under the scheme established by the Act.

The Scheme under COVA

[23] It is clear that the applicant is a "victim" as defined by the Act and Part 2 Division 2 of the Act is concerned, in particular, with the "Declaration of Fundamental Principles" which apply to victims of crime. Victims under the Act have certain rights particularly in relation to the right to information,[8] privacy,[9] and protection from violence and intimidation.

[24] Part 3 of the Act is then concerned with "Compensation for Personal Injury from Indictable Offences" and establishes a scheme for the payment of compensation to an "applicant".

[25] LDM has essentially argued that because she is a victim she is entitled to compensation and is, therefore, an applicant. However, to be an applicant LDM must fall within a particular category of persons as defined by s 19 of the Act.

[26] Section 19 of the COVA provides that Part 3 of the Act establishes a scheme for the payment of compensation to a person for injury suffered by that person, and caused by a "personal offence" committed against the victim:

> "(1) This part establishes a scheme for the payment of compensation to a person (the ***applicant***)—
>
> (a) for injury suffered by the applicant caused by a personal offence committed against the applicant; or
>
> (b) for the death of someone on whom the applicant was dependent, caused in circumstances constituting murder or manslaughter; or
>
> (c) for funeral or other expenses from the death of a member of the applicant's family, caused in circumstances constituting murder or manslaughter; or

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7 [2000] QCA 462 at [23].

8 Section 9 of the *Criminal Offence Victims Act* 1995 (Qld).

9 Section 10 of the *Criminal Offence Victims Act* 1995 (Qld).

(d) for injury suffered when helping a police officer to make an arrest or prevent an offence.

(2) The part does not allow anyone to apply to a court or to the State for the payment of an amount for—

(a) injury caused to the applicant by an offence to which the applicant was a party; or

(b) an unlawful killing to which the applicant was a party."

[27] Section 20 defines "injury" as meaning "…bodily injury, mental or nervous shock, pregnancy or any injury specified in the compensation table or prescribed under a regulation." The definition does not limit injury to those specified in the compensation table or those prescribed under a regulation.

[28] Section 21 describes a "personal offence" as an "…indictable offence committed against the person of someone." The applicant's two sons were clearly the victims of an indictable offence and the respondent pleaded guilty to attempting to unlawfully kill them.

[29] Section 24 provides:

"(1) This section applies if someone (the ***convicted person***)—

(a) is convicted on indictment of a personal offence; or

(b) is convicted on indictment and a personal offence is taken into account on sentence.

(2) The person against whom the personal offence is committed may apply to the court before which the person is convicted for an order that the convicted person pay compensation to the applicant for the injury suffered by the applicant because of the offence.

(3) The court may make an order (a ***compensation order***) for an amount to be paid by the convicted person to the applicant because of the injury."

[30] Section 25 provides:

"(1) In making a compensation order, a court is limited to ordering the payment of an amount decided under this section.

(2) A compensation order may only order the payment to the applicant of a total amount of not more than the prescribed amount (the *scheme maximum*)."

[31] It is clear that the applicant is a victim as defined by the Act and I am satisfied that she has suffered mental or nervous shock. In particular, it is recognised that an applicant does not have to be suffering from a diagnosed mental disorder or psychiatric illness as a result of the injury before compensation can be awarded.[10] Accordingly, whilst I accept that LDM is suffering from mental or nervous shock caused by the actions of the respondent, I do not consider that she comes within the scheme contemplated by the Act. A number of cases have established that a bystander "…to whose person no violence was even offered"[11] can not be compensated for a nervous disorder as a result of having witnessed the offence.

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10 *R v Kazakoff; ex parte Ferguson* [2001] 2 Qd R 320.

11 *R v Callaghan and Fleming, ex parte Power* [1986] 1 Qd R 457, 458.

Clearly then, someone who was not even present would similarly not be entitled to an award of compensation.

[32] In the decision of *Pettingill v Minister for Justice & Attorney-General* [12] Mullins J summarised the leading cases on the question:

> "In construing what is meant by 'a personal offence' under s 19(1)(a) of the Act, as defined further by s 21 of the Act, it is relevant that the Act is remedial legislation and should be given a benign construction: *R v Callaghan and Fleming, ex parte Power* [1986] 1 Qd R 457, 458. In that case the offenders were charged with armed robbery with violence at a bank which involved the use of a pistol and a knife and money was taken from a particular teller who was threatened with the knife. Power was another teller and he was threatened with the pistol. The legislative scheme for compensation of victims was at that time found in the *Code*. Section 663B(1) of the *Code* provided:
>
> > 'Where a person is convicted on indictment of any indictable offence relating to the person of any person, the Court on the Application by or on behalf of the person aggrieved by the offence, may, in addition to any other sentence or order it may make, order him to pay to the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by him by reason of the offence of which the offender is convicted.'
>
> Connolly J read s 663B(1) as referring to an indictable offence which, on its facts, related to the person of any person. It was held that on the material before him the offence related to the persons of two people, the first being the particular teller from whom the money was taken and the second being Power. Connolly J stated at 458:
>
> > 'It follows from what I have said that in my opinion it would not be sufficient for a bystander to whose person no violence was even offered to say that he had suffered a nervous disorder as a result of having witnessed the offence.'
>
> This approach was applied in *Summers v Dougherty & Anor* [2000] QSC 365. The offenders pleaded guilty to armed robbery in company with personal violence and assault occasioning bodily harm whilst armed and in company. The indictment named Mr Summers as the person against whom actual violence was perpetrated. Mrs Summers and two of the children of Mr and Mrs Summers applied for compensation on the basis that violence was specifically offered to each of them personally in the course of the offenders carrying out the robbery. Even though s 663B of the *Code* was differently worded to the relevant provision found in s 24 of the Act, White J relied on the decision in *R v Callaghan and Fleming* to conclude that Mrs Summers and the children were not excluded from applying for compensation, because they were not named in the indictment. It

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12 [2003] QSC 385 at [23]-[27].

> was held that they were not mere bystanders and compensation was ordered to be paid to each of them.
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> In *Byles v Palmer* [2003] QSC 295 the offender was found guilty that he attempted unlawfully to kill one McMillan or another. The evidence was that the offender fired a shot whilst he was in a moving car at a police car driven by Byles in which McMillan was a passenger. The jury's verdict amounted to a finding that the offender attempted to murder McMillan or another (being Byles). It was not necessary to determine which occupant of the police car the offender intended to kill, provided the jury was satisfied that there was an intention to kill one of the 7 police officers. Helman J concluded that the verdict was of an offence committed against both police officers, each of whom was under fire. Helman J postulated that it would be an absurd result to characterise the jury's verdict as not excluding the possibility that there had been an attempt to murder McMillan and not Byles and, if McMillan were to apply for compensation, as not excluding the possibility that there had been an attempt to murder Byles and not McMillan. That approach would result in neither police officer being awarded compensation which was the absurd result referred to."

[33] Mullins J held that in the circumstances of *Pettingill's* case that the scheme did not apply and no order for compensation was made:[13]

> "There was no violence offered to the applicant when she first investigated the barking of the dogs. It does not appear that the applicant saw the weapon at any time or the weapon being fired. On the applicant's statement, the only gesture or act of violence that occurred was the firing of the one shot that killed Mr Dobrowolski. It is likely that either something which Mr Dobrowolski saw or something that was said to him by the offender caused Mr Dobrowolski to cause the applicant to rush back into the house. As the applicant was being pushed up the stairs and therefore in front of Mr Dobrowolski, it can be inferred that when the gun was fired, it was pointing in the direction of both Mr Dobrowolski and the applicant."

[34] In the circumstances of the current case, while I accept that LDM has been clearly affected to a significant degree by the actions of the respondent, those injuries are not injuries which can be compensated under the scheme established by the COVA. I note, however, that LDM may have other rights, entitlements and remedies under common law or otherwise.

ORDER

The application is dismissed.

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13 *Pettingill v Minister for Justice & Attorney-General*, [2003] QSC 385 at [27].