

# SUPREME COURT OF QUEENSLAND

CITATION: *Public Trustee v Kaye & Anor* [2012] QSC 372

PARTIES: **PUBLIC TRUSTEE on behalf of the estate of Shane Maxwell Warren deceased**  
(applicant)  
v  
**RIKKI LEE KAYE**  
(first respondent)  
and  
**JASON MARK WARREN**  
(second respondent)

FILE NO: Maryborough S6/11

DIVISION: Trial Division

PROCEEDING: Application for criminal compensation

DELIVERED ON: 26 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 12 and 21 November 2012

JUDGE: Margaret Wilson J

ORDER: **1. The respondents pay the Public Trustee on behalf of the estate of Shane Maxwell Warren deceased \$35,000 because of the injuries Shane Maxwell Warren sustained when they did him grievous bodily harm on 15 May 2007;**

**2. Declare the first and second respondents jointly and severally liable for the payment of that compensation.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CRIMINAL INJURIES COMPENSATION – QUEENSLAND – GENERALLY – where applicant stabbed six times by respondents and suffered mental shock to a severe degree – where applicant died before hearing of application – whether cause of action survives death of applicant

COUNSEL: On 12 November 2012:  
T George (solicitor) appeared for the applicant  
The respondents were self-represented

On 21 November 2012:  
T McGarvie (solicitor) appeared for the applicant  
The respondent Rikki Lee Kaye did not appear  
The respondent Jason Mark Warren was self-represented

SOLICITORS: Suthers Lawyers for the applicant

- [1] **MARGARET WILSON J:** This is an application for criminal compensation.

### **The offences**

- [2] Shane Maxwell Warren (whom I shall call “the applicant”) was born on 2 December 1968.
- [3] On or about 15 May 2007 the applicant was asleep in his bed at his home at Pialba. He woke to the sound of loud banging and glass being smashed by the respondents (Rikki Lee Kaye and Jason Mark Warren), who broke into his house. He got up, and armed with a metal baton, approached the rear door. He opened the door and found the respondent Kaye armed with a knife and the respondent Jason Warren armed with a mini samurai sword. The applicant ran to his room and shut the door, but it was kicked in and the two respondents entered the room. The applicant attempted to leave by a rear sliding door, but there was an altercation in which he was stabbed.
- [4] The respondents were brothers of the applicant (one a natural brother and the other a cousin who had become a brother by adoption). The incident arose out of acrimony between the applicant and one of the respondents over a woman with whom the applicant had been in a relationship. The applicant had been in prison, and he believed that while he was there the respondent Jason Warren had a relationship with his partner.

### **Convictions**

- [5] On 9 April 2009 (approximately 23 months after the attack) the respondents were convicted in the Supreme Court of doing grievous bodily harm and burglary with circumstances of aggravation. Each was given a head sentence of six years imprisonment. In Kaye’s case, one year of a suspended sentence was activated, cumulative upon the six years.

### **Injuries**

- [6] The applicant suffered six stab wounds to his back, thorax, left shoulder and left armpit; two of his left ribs were broken; and both of his lungs collapsed. The stab wounds were some two to three centimetres wide and those to his arm eight to 10 centimetres long and extending to the subcutaneous tissue. The injuries were life threatening. He was admitted to hospital, where his chest cavity was drained, exploratory surgery was performed, and his stab wounds were closed.
- [7] A victim impact statement was placed before the sentencing judge. The applicant said that he still suffered from both physical and mental pain and that he had been left an emotional and physical wreck. He said –

“I hear and see it every day and night it replays through my mind. I can no longer do physical activities and this is also affecting my abilities to obtain work.

I’m on antidepressants medication twice daily also very strong painkillers for the wounds in my back.

....

I’ve lost my family my de facto and my daughter out of fear.

And every day I suffer with depression and flashbacks of the attack.”

[8] In October 2009 (about two years and five months after the attack) the applicant was assessed by Dr Barbara McGuire, psychiatrist. In her opinion he suffered from posttraumatic stress disorder to a severe degree as the result of the stabbing. This was demonstrated by his symptoms of nightmares, flashbacks, hypervigilance, exaggerated startle reflex and avoidant behaviour.

[9] Dr McGuire recorded that the applicant had had a multitude of past traumatic incidents and that he had been diagnosed with bipolar disorder. The symptoms of that disorder were not obvious at the time she saw him, but he described auditory hallucinations of a command type and had a past history of impulsive, self-destructive behaviour, including substance abuse. However, it was his perception that he was “making headway just prior to the attack, the difference being that he [had] children with whom he [was] significantly bonded.” Dr McGuire said –

“It is hard to disentangle the multitudinous traumatic events of his life from this incident but his history to me is that he did not suffer from posttraumatic stress disorder prior to the incident. I believe that the offences for which the respondents were convicted made a substantial and material contribution to his current symptoms.”

[10] She did not believe counselling would be effective for him, but recommended that he consult his general practitioner and ask for a referral to a psychiatrist – although she thought it improbable that he would do so.

### **This application**

[11] This application was commenced in the District Court on 18 November 2009, and subsequently transferred to the Supreme Court.

[12] On 9 June 2011 the applicant died from causes unrelated to the injuries he sustained in the attack. He died intestate, survived by two children. (There may be an issue as to the paternity of the children, but that is not for determination on this application.)

- [13] The originating application and supporting affidavits and the order transferring the proceeding to the Supreme Court were served on the respondents in prison – on Kaye on 11 July 2011 and on Jason Warren on 31 October 2012.
- [14] The application came before the Court on 12 November 2012, when the applicant’s sister applied for leave to continue the proceeding as litigation guardian. This was clearly an inappropriate course. The respondents opposed her being substituted as applicant (pursuant to *UCPR* r 72(2)), arguing that instead the Court should appoint someone who would represent the interests of the applicant’s children. It was adjourned to 21 November 2012.
- [15] At the adjourned hearing, the respondent Jason Warren appeared self-represented by telephone from prison, but Kaye, who by then had been released on parole, did not appear.
- [16] By then the solicitors on the record for the applicant had received correspondence from solicitors acting for the applicant’s de facto partner (the mother of the children), asking to be kept informed about the future conduct of the matter. Further, the Public Trustee had consented to administering the applicant’s estate, and to being substituted as applicant in this application.
- [17] The solicitors for the applicant told the Court that the substantive application needed to be heard and determined urgently, because the *Criminal Offence Victims Act* 1995 (Qld) had been repealed, and the window for seeking an ex gratia payment from the Crown in the event of non-satisfaction of an award of compensation is to close at the end of this month.
- [18] The Court received written submissions upon whether the claim had been extinguished by the applicant’s death.

### **Survival of cause of action**

- [19] This application was made pursuant to the *Criminal Offence Victims Act* 1995 (Qld). Although that act was repealed on 1 December 2009, it continues to apply to this application: see *Victims of Crime Assistance Act* 2009 (Qld) ss 154 and 155.
- [20] The applicant’s cause of action was a statutory one, which arose under s24 of the *Criminal Offence Victims Act* 1995 (Qld). That section provided –

**“24 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.”

[21] Research by the applicant’s solicitor and by my associate failed to find any decided case in which the victim of crime died before his or her application for criminal compensation was heard. Be that as it may, I am satisfied that the cause of action survived pursuant to s 66(1) of the *Succession Act* 1981 (Qld), and that the recovery of compensation is not precluded by s 66(2)(a). Section 66 provides (relevantly) –

**“66 Survival of actions**

(1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person’s estate.

(2) Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought—

(a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life; ...”

[22] Compensation under the *Criminal Offence Victims Act* 1995 (Qld) is conceptually different from the compensatory damages recoverable at common law or otherwise. It is intended to assist the victim of crime, but not to reflect compensation to which he or she may be entitled under the common law or otherwise: s 22(3). Accordingly, it may be recovered by the deceased applicant’s estate – although in assessing the severity of injuries with ongoing effect, it is relevant to take account of the applicant’s death.

[23] Orders were made substituting the Public Trustee on behalf of the estate of the deceased applicant as applicant in the proceeding, and giving the Public Trustee leave to proceed.

**Assessment**

- [24] The Court may order the payment of compensation, in total not exceeding the “scheme maximum” of \$75,000: *Criminal Offence Victims Act 1995 (Qld) s 25*; *Criminal Offence Victims Regulation 1995 (Qld) s 2*. Various categories of injuries and degrees of severity are set out in the compensation table (Schedule 1), and with respect to each of them, there is a range, expressed as percentages of the scheme maximum, within which compensation may be awarded. The maximum amount is reserved for the most serious cases and the amounts provided in other cases are intended to be scaled according to their seriousness (s 22(4)).

In the present case the potentially relevant heads in the compensation table are as follows-

32	mental or nervous shock (moderate)	10 – 20 %	\$ 7,500 - \$15,000
33	mental or nervous shock (severe)	20 – 34 %	\$15,000 - \$25,500
1	bruising/laceration (minor/moderate)	1 - 3 %	\$ 750 - \$ 2,250
2	bruising/laceration (severe)	3 – 5 %	\$ 2,250 - \$ 3,750
22	chest injury (moderate)	5 –10 %	\$ 3,750 - \$ 7,500
23	chest wound (severe)	8 – 40 %	\$ 6,000 - \$30,000
25	stab wounds (moderate)	8 – 16 %	\$ 6,000 - \$12,000
26	stab wound (severe)	15 – 40 %	\$11,250 - \$30,000
27	bodily scarring (minor/moderate)	2 – 10 %	\$ 1,500 - \$ 7,500
28	bodily scarring (severe)	10 – 30 %	\$ 7,500 - \$22,500

- [25] Some of the applicant’s injuries could be categorised under more than one head in the compensation table. The Court must be careful to avoid overcompensation by compensating for the same injury under more than one head.

- [26] “Mental shock” and “nervous shock” are interchangeable expressions, and mean recognisable psychiatric illness or disorder: *JS v Graveur* [2012] QCA 196 at [20].

- [27] As I have recorded above, Dr McGuire considered that the applicant had suffered posttraumatic stress disorder to a severe degree. She clearly thought that without treatment the plaintiff’s condition would persist. Of course, the severity of an injury for compensation purposes is ultimately for the Court to determine. In the present case it is relevant to take account of the applicant’s death, which cut short the period of his suffering. In my view there should be an assessment under item 33, but at the lower end of the range, namely \$15,000.

- [28] There is potential overlap between the chest wounds, the stab wounds and the bodily scarring. There should be an assessment under item 23 of \$20,000.

**Orders**

- [29] I order that the respondents pay the Public Trustee on behalf of the estate of Shane Maxwell Warren deceased \$35,000 because of the injuries Shane Maxwell Warren sustained when they did him grievous bodily harm on 15 May 2007.
- [30] I declare the respondents jointly and severally liable for the payment of that compensation.