



An introduction to s85B Sentencing Act Compensation Claims

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s. 85B applications - fundamental principles

T Forrest J in *Moresco & Ors v Budimir* [2015] VSC 51

“A compensation order provides a **convenient mechanism for the recovery of compensation by victims**. An application for such an order is **intended to be quick, cheap and built upon the criminal proceeding**. It is designed to avoid the ‘complex or technical rules of procedure as may properly apply’ on a civil application for damages at common law.

...

Orders for compensation are **not limited to injuries that would be compensable at common law**. The Act’s definition of ‘injury’ is **broad and includes grief and distress**.

An application for compensation for pain and suffering is **not subject to the restrictions in Part VBA of the Wrongs Act 1958** as being a claim for ‘recovery of damages’ for non-economic loss.

...

convenience and expediency are purposes of compensation order applications. A positive expression of those purposes is the evidentiary provision of the Act, s 85G.

Subsection 85G(c), in particular, provides that on an application for a compensation order **a finding of fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact**. A finding may also be proved by production of a document under the seal of the court from which the finding appears.

Other facts may be proved by more conventional methods. A victim or the offender **may** give evidence, or call another person to give evidence, and may be cross-examined and re-examined.

Although the application is **ancillary to the criminal proceeding, it is itself a civil proceeding**, to which the **civil standard of proof applies**. If there is an entitlement to compensation, the **assessment of the quantum of that entitlement is undertaken by application of the common law principles of assessment of damages, subject to any necessary modification**.

The judge must **intuitively synthesise all of the material circumstances of the case, including the seriousness of the offending, the relationship between the offence and the victim and the victim and the offender, the degree of injury suffered by the victim, the offender’s financial circumstances and the effect of an order on the offender’s prospects for rehabilitation**.” [emphasis and colour added]



A civil or criminal proceeding?

UNSETTLED QUESTIONS.... A “CIVIL PROCEEDING” IN EVERY RESPECT?

See *Brown v Loveday* [2012] VSCA 57 per Neave JA at [17]

*“In a later appeal against the compensation order which was ultimately made by a trial division judge in favour of a victim of the offending in the Esso Case, this Court decided that an application under s 85B of the Sentencing Act is a **criminal proceeding and not a civil one**. This makes it unnecessary to consider whether the order from which leave to appeal was sought in the instant case was an order made in civil proceedings from which an appeal with leave would lie to this Court under s 74(2D) of the County Court Act 1958. ”*

***Esso Australia Pty Ltd v Robertson* [2005] VSCA 138**

*“...in our view, the application under s.85B was a **criminal proceeding** and not a civil notwithstanding that the Director was not a party to it. The indicia that point to this conclusion include the following. First, such a proceeding is brought under the Sentencing Act and is, ordinarily, heard and determined by the judge who presided at the criminal trial, sitting in the Criminal Division of the Supreme Court. Secondly, “sentence” is defined ins.566 of the Crimes Act 1958 as including an order under Part 4 of the Sentencing Act, in which s.85B is to be found. The fact that Division 2 of that Part postdates the definition is immaterial as the latter is ambulatory. Further, the proceeding can only be brought if the respondent has been convicted of a criminal offence. Next, the application must be brought by or on behalf of a victim of that offence and the relevant injury must be the “direct result” of it. Furthermore, the legislative scheme of this part of the Sentencing Act contemplates that the relevant facts on which the application would be based will “sufficiently” appear from the material pertaining to the criminal proceeding, which includes victim impact statements, although provision is also made for adducing further evidence at the hearing of the application. Moreover, unlike the situation in civil proceedings, the Act permits the court to direct payment of compensation by instalments and prescribes that, in determining the amount of compensation to be awarded to the applicant, and the method of its payment, the court is required to take into account, to the extent that it can practicably do so, the financial circumstances of the offender and the burden that payment of the compensation will impose. Again, the fact that s.85E(2) requires a proceeding for compensation for an incapable person to be treated as a civil proceeding for certain purposes implies that it is ordinarily not such. Finally, and importantly, s.85L of the Act recognises the distinction between the applicant’s entitlement to compensation under the Act and the civil right to recover damages and preserves the latter for the benefit of the applicant. The terms of s.85B(2), discussed later, are insufficient to countervail against the cumulative weight of the above considerations. These factors, we think, strongly point to the s.85B application having the character of a **criminal**, rather than a civil, proceeding.*

Whilst there is some divergence in the authorities, those from the Court of Appeal point to s85B proceedings being criminal proceedings.



A civil or criminal proceeding?

Hypotheticals – attempt to enforce an “offer of compromise”

Within the County Court Civil Procedure Rules, a “*proceeding*” is an action commenced by writ or originating motion. The distinction between a “*proceeding*” and an “*application*” is reflected in the language of reg 34A.03.

There appears to us to be a good argument that the language within the ‘offer of compromise provisions’ of the Rules, (see reg 26.02) makes it plain that the offer of compromise procedure applies only to “*proceedings*”, and that the procedure set out in reg 26.02 for service and enforcement of an offer of compromise does not apply to s. 85B applications. The procedure in Reg 26.02 applies to civil proceedings commenced by writ or originating motion.

Hypothetical – do the Civil Procedure Act overarching obligations apply to an offender?

Good argument that 85B matters are not “*civil proceedings*” within the meaning of the *Civil Procedure Act* for the same type of reason.

DPP v Gardner and Coates [2004] VSCA 119 [29] per Winneke J “*It is a summary procedure ancillary to criminal process. In a case of any complexity, it is usually better to leave the parties to their civil remedies.*”

RK v Mirik (2009) 21 VR 623 [14] “*It has been said that proceedings under s 85B are “incidents of criminal proceedings.” It has also been said a proceeding under s 86 of the Sentencing Act is “a summary procedure ancillary to criminal process.” Though compensation is thus ordered as part of the criminal justice process, it is civil compensation, not additional punishment. Therefore the civil standard of proof on the balance of probabilities and not the criminal standard of proof beyond reasonable doubt is applicable. (citations omitted).*”



From the CCV Practice Note 17 March 2025

s. 85B applications are managed by the Common Law Division of the County Court

“Applications for compensation made pursuant to the provisions of Division 2 of Part 4 of the Sentencing Act (s85B applications and s86 applications) will, save as provided in this section of the practice note, be managed, listed and determined within the Common Law Division of the County Court. It is the intention of the Court to manage and determine s85B and s86 applications in a just, efficient, timely and cost-effective manner.”

Determination by criminal trial judge

“Nothing in this practice note shall act to prevent or preclude a judge sitting in the Criminal Division, in their discretion, from hearing and determining a s85B and s86 application, after pronouncing a sentence against a person found guilty of an offence (“the offender”) or as allowed for under s86(1A)(b) on the Court’s own motion. A person seeking compensation pursuant to s85B of the Sentencing Act (“the applicant”) may make a s85B application to the trial judge after sentence is pronounced. The judge will either list the matter for hearing before themselves, or, alternatively, refer the matter to the Common Law Division in accordance with these provisions.”

...

Form and content of the application

“A s85B application must be made using the application for compensation form available on the County Court website.

The application shall include:

the applicant’s date of birth, address, telephone number and email address. Unless indicated to the contrary, the email address will be the applicant’s address for service of all documents. Save as may be permitted by the judge hearing the application or directions hearing, that information shall not be provided to the offender;

if the applicant is represented by a legal practitioner, that practitioner’s contact details;

particulars of the injury for which compensation is sought;

- the judge before whom, the date of, and the offences for which the offender was found guilty or convicted at the County Court of Victoria;*
- whether the application is made on behalf of another person; and*
- whether the application seeks an extension of time.*

The application must have attached:

- the prosecution opening (if available);*
- the sentencing judge’s reasons or remarks (if available);*
- the applicant’s victim impact statement (if relevant);*
- any award made under the Victims of Crime Assistance Act 1996 (if applicable);*
- a copy of any medical or like reports relied upon;*
- a list of any medical and like expenses claimed, with receipts;*
- and details of any other costs claimed.”*



From CCV Practice Note 17 March 2025

s. 36J - Judicial Mediation

“A judicial mediation may be ordered in special circumstances, instead of, or in addition to, a final hearing.

A judicial mediation is a full-day mediation conducted by a judge or judicial registrar with expertise in the List. The most appropriate mode of appearance will be determined by a judge or judicial registrar.

A matter referred to judicial mediation will usually have one or more of the following features:

- one or more parties with limited resources;*
- one or more parties are self-represented;*
- a substantial risk that the costs and time of a hearing would be disproportionately high; and*
- aspects that otherwise make it in the interests of justice that the matter be referred to judicial mediation.*

A request for the listing of a judicial mediation should be made at the directions hearing.

Directions regarding preparation for a judicial mediation will be made at the directions hearing and/or conveyed to parties in the lead up to the judicial mediation.”

DISCUSSION

- In what circumstances might judicial mediation be helpful?**
- What is the process of judicial mediation?**



Sentencing Act provisions

s. 3 - “Victim”

The word “victim” is defined by s. 3 of the Sentencing Act:

“Victim”, in relation to an offence, means a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender.

The concept of a ‘victim’ is broader than what might be termed a ‘primary victim’.

‘Victims’ are capable of being persons who witness a crime, or family members of a principal victim who deal with the aftermath of a crime, provided that they can demonstrate they have suffered grief, distress, trauma or another ‘significant adverse effect’ as a direct result of the offence.

There are multiple cases where a ‘secondary victim’ (i.e relative of deceased; witness to the criminal conduct) has been successful in obtaining a s. 85B order.

s. 85A - “Injury”

85A Definitions

...

“injury” means—

(a) actual physical bodily harm; or

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

(c) pregnancy; or

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

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

but does not include injury arising from loss of or damage to property.

“Medical expenses” includes dental, optometry, physiotherapy, psychology treatment, hospital and ambulance expenses;

“sexual offence” means an offence under Subdivision (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I of the Crimes Act 1958 or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence.

*(2) References in this Subdivision to the **victim of an offence** must be construed having regard to the definition of injury in subsection (1).*

Note: *applications seeking compensation for damage to property are governed by s. 86 of the Sentencing Act*



s. 85B – making a compensation order

85B Compensation order

(1) *If a court—*

(a) finds a person guilty of an offence; or

(b) convicts a person of an offence-

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

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

(a) for pain and suffering experienced by the victim as a direct result of the offence;

(b) for some or all of any expenses actually incurred, or reasonably likely to be incurred, by the victim for reasonable counselling services as a direct result of the offence;

(c) for some or all of any medical expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence;

(d) for some or all of any other expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence, not including any expense arising from loss of or damage to property.

...



Causation: “*direct result of the offence*”

The types of compensation referred to in s85B(2) of the Sentencing Act are required to be as a “*direct result of the offence*”. In *Kaplan v Lee Archer Buchanan J* stated:

“...in my opinion, the addition of the requirement that the result be ‘direct’ does not mean that there can be no step between the cause and the consequence, or that the consequence must be solely due to the cause. As Lord Sumner said in Weld-Blundell v Stephens:

‘Direct cause excludes what is indirect, conveys the essential distinction, which causa causans (the immediate cause) and causa sine qua non cumbrously (an indispensable condition) indicate, and is consistent with the possibility of a concurrence of more direct causes than one, operating at the same time and leading to a common result.’

*Nor do I think that ‘direct’ is a synonym for ‘immediate’ or ‘proximate’ or An injury may be directly caused by a crime notwithstanding that the injury develops gradually or becomes manifest only after a lapse of time or, as will often be the case with psychological or mental injury, is revealed only by expert diagnosis of multiple symptoms. **In a scheme of compensation which was designed to be a cheap and expeditious remedy tacked on to a criminal trial, in my view the introduction of the adjective ‘direct’ is intended to exclude those results which are but tenuously related to crimes in that their contribution is a minor factor in the production of the injury” [emphasis added]***

In the same matter, Nettle JA (as he was then) stated:

“I have therefore come to the view that when the draftsman of s 85B chose the expression ‘as a direct result of the offence’ he or she had in mind the sense in which the expression was used in relation to the injury in Fagan, which is to say an injury that is judged as a matter of fact, according to commonsense and experience, to have been caused by the offence.”



85C – Time limits; standing to commence

85D – Extensions of time

An applicant has 12 months after the offender is found guilty to make application (85C).

The Court can, and regularly does, extend the time period if it is in the interests of justice to do so (85D).

The DPP/VicPol *can* make the application for a compensation order on behalf of a victim. However there has been a real trend for more and more applicants to be legally represented. This position with the prosecution seeking a compensation orders stands in contrast with orders for restitution or forfeiture, which are very regularly made by the prosecution following a finding of guilt.

85C Application for compensation order

(1) *An application for a compensation order—*

(a) ***must be made within 12 months after the offender is found guilty, or convicted, of the offence; and***

(b) *may be made—*

(i) *by the victim; or*

(ii) *on the victim's behalf by any person other than the offender if the victim is a child or is incapable of making the application by reason of injury, disease, senility, illness or physical or mental impairment; or*

(iii) *on the victim's behalf—*

(A) *if the sentencing court was a court other than the Magistrates' Court, by the Director of Public Prosecutions; or*

(B) *if the sentencing court was the Magistrates' Court, by the Director of Public Prosecutions, the informant or police prosecutor.*

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



85E - Child applicants

Child applicants must have a compromise approved

85E Proceeding on an application

...

(2) A proceeding in a court on an application for a compensation order made by or on behalf of a child or other incapable person must be taken to be a civil proceeding for the purpose of any provision of an Act or rule of court relating to—

(a) the appointment or removal, and the power or authority, of a litigation guardian in a civil proceeding in that court; or

(b) the administration of money ordered to be paid to a child or such an incapable person—

and any such provision applies in relation to a proceeding on an application for a compensation order with any necessary modifications.



Process for approval of compromise for child applicants

County Court

See County Court Common Law Practice Note – “Applications for approval of compromise” – s. 23

“23.3 ... section applies to all cases in the Common Law Division...”

“23.7 “In order to allow the Court to determine whether a compromise be approved, it is essential that any application for an approval be supported by the applicant exhibiting all the evidence relevant to both liability and quantum. ”The affidavit to be filed by the practitioner for the person under the disability must:

- a. identify with sufficient clarity the nature of the injury the subject of a compromise by reference to medical reports which are to be annexed to the affidavit. If the injury involves disfigurement, up-to-date photographs which clearly display the disfigurement should be provided;
- b. identify with precision the terms of the proposed compromise. If the compromise involves the right to retain any payment or benefit received by the plaintiff, the amount the subject of the right of retention must be set out;
- c. if the compromise involves an obligation to refund monies or benefits received, precise amounts to be refunded must be disclosed;
- d. exhibit all relevant material as to liability and quantum, together with the letter of offer or an executed deed of release, and an advice from counsel as to the merit of the compromise;
- e. counsel must advise whether the person under a disability is at risk of receiving a less favourable sum if the proceeding went to trial; and
- f. annex a copy of the draft Orders which are sought from the Court which comply with the provisions of r15.08(6) of the Rules.

Opinion of counsel

“No application for the approval of a compromise will be considered in the absence of an advice from counsel in support of the compromise.”

Magistrates’ Court

Different rules apply. See Magistrates’ Court General Civil Procedure Rules 2020 for the process as it relates to litigation guardian

Rule 15.08, approval of a compromise for a person “under a disability”

Rule 15.01 deems a child to be a person “under a disability”, requiring a litigation guardian



The complex issue of... complexity

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

*(1) A court **must not refuse** to hear and determine an application for a compensation order unless, in its opinion, the relevant facts do not sufficiently appear from—*

- (a) evidence given at the hearing of the charge; or*
- (b) any **statement of the material facts** relevant to the charge given to a court in a proceeding for the offence by the prosecution and **not disputed** by or on behalf of the accused; or*
- (c) the available documents—*

together with admissions made by or on behalf of any person in connection with the application.

(2) In subsection (1)(c) the available documents means—

- (a) any written statements or admissions which were made for use, and would have been admissible, as evidence on the hearing of the charge; or*
- (b) the depositions in the committal proceeding; or*
- ~~“(c) .. Repealed”~~*
- (d) any victim impact statement made to the court for the purpose of assisting it in determining sentence, including any medical report attached to it.*



The complex issue of... complexity

In Kaplan, Buchanan J referred to circumstances where an application pursuant to s85B of the Sentencing Act 1991, may well be so complex that it is unsuitable for resolution by the summary procedure envisaged by s85B.

“The presence of possible causes of an injury other than the commission of the crime by the offender is capable of rendering an application so complex that it is unsuitable for resolution by the summary procedure envisaged by s.85B. On the other hand, the evidence may disclose that the respective roles of the crime and the rival causes may be readily distinguished and the question of causation satisfactorily determined in a summary fashion without the assistance of mechanisms such as pleadings, discovery, and interrogatories, which are available in civil proceedings.”

The question is ultimately one involving the exercise of a discretion. The sentencing judge in the present case concluded that it was possible to disentangle competing causes of the post-traumatic stress disorder and determine the role played by the commission of the thefts. I do not consider that it has been demonstrated that his Honour’s discretion miscarried. It has not been shown that his Honour acted upon a wrong principle, took into account irrelevant matters, mistook the facts or failed to take into account some material consideration. Nor has it been shown that his decision was unreasonable or plainly unjust.

Where injury is the result of the commission of a crime and other wrongdoing, civil proceedings have the advantage over an application made under s.85B of the Act that in the former the provisions of Part IV of the Wrongs Act 1958 apply and enable a defendant to recover contribution from other wrongdoers. In the present case, however, it was not suggested at first instance that there were other wrongdoers whose presence before the Court was necessary or desirable.”



The complex issue of... complexity

Later in that decision, Nettle JA (as he was then) stated:

“Thirdly, since claims under s 85B are in effect limited to compensation for personal injuries suffered as a result of an offence, and since Part IVAA of the Wrongs Act 1958 applies only to claims for economic loss and damage to property or under Part 9 of the Fair Trading Act 1999 (scil. consumer and trader disputes and small claims), I consider that Part IVAA of the Wrongs Act 1958 does not apply to a claim for compensation under s 85B. In my view, if a judge is persuaded that the victim has suffered injury as a result of an offence, the judge should calculate the amount of compensation without reduction by way apportionment of the kind for which Part IVAA provides.

*Like Buchanan, J.A., however, I consider that Part IV of the Wrongs Act does apply – in the sense that, if an award of compensation is made against an offender pursuant to s 85B of the Sentencing Act, the **offender is entitled to seek compensation from any person jointly liable for the same damage. But I think that in practice it is unlikely that a claim for contribution will be dealt with at the same time as the victim’s claim for compensation. The method of s 85B is to provide a quick low cost mechanism for the victim to recover compensation. Accordingly, if in any matter it appears to a judge that there are substantial questions of contribution to be investigated, the judge is likely to conclude that the matter is inappropriate to be dealt with under the section.**”*

FOR DISCUSSION

Is there a way that this section can be used?

Is it in your client’s interests to seek to use the provision in some way, if it invites a common law proceeding to be commenced?



Overshooting

In *Mirik*, Bell J made the following remarks about the applicability of the concept of overshooting in s. 85B applications:

“In crimes compensation proceedings, offenders do not have the assistance of “mechanisms such as pleadings, discovery and interrogatories, which are available in civil proceedings.” For want of the kind of detailed forensic and judicial examination that is available in civil proceedings, there exists a potential for compensation orders to be made against offenders when they shouldn’t or in amounts that exceed the victim’s correct entitlement. That potential exists in practically every case, and I should guard against it happening here. The offenders have not had the opportunity to test the claims of the victim as fully as they could in ordinary civil proceedings. It is important that injustice is not done to offenders by making assessments of compensation that overshoot the mark. Doing justice by victims can’t be at the expense of doing injustice to offenders. The victim’s right to bring civil proceedings for “any expense or other matter” not satisfied by an order of compensation is not affected by an order under s 85B(1), so any undershoot can be recovered. The offender is in the obverse position.

[154] The court has a discretion under s 85B(1) to order the offender to pay compensation “of such amount as the court thinks fit”. This encompasses a discretion to determine that the amount of compensation will be less than full compensation. By this means the courts can give the victim an appropriate measure of justice without running the risk of doing injustice to the offender. This is a different discretion to the one specified in s 85H(1) to take the financial circumstances of the offender into account. In deciding to order less than full compensation, the court can take into account the limited extent to which the offender has been able to test the claims of the victim in the proceedings under ss 85A-M. It can reduce the amount that it may have ordered had those claims been fully tested to avoid over-compensating the victim. Of course, the court can order what it considers to be full compensation if it thinks it has a satisfactory evidentiary basis for doing so.



Evidence on application

85G Evidence

(1) On an application for a compensation order—

(a) the victim or the offender may give evidence or may call another person to give evidence in relation to the application; and

(b) the victim, offender or other person who gives evidence may be cross-examined and re-examined; and

(c) a finding of any fact made by a court in a proceeding for the offence is evidence and, in the absence of evidence to the contrary, proof of that fact; and

(d) the finding may be proved by production of a document under the seal of the court from which the finding appears; and

(e) the court may have regard to any evidence or statement referred to in section 85F(1) and, with the consent of the parties to the application, to any available documents or admissions referred to in that section.

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



CCV Practice Note 17 March 2025 – s. 36K

Conduct of s. 85B hearings

The hearing

“The hearing will be conducted and the evidence presented as the judge hearing the application shall determine, and in accordance with s85G of the Sentencing Act, for both s85B and s86 compensation order applications.

Further, unless the judge hearing the application directs to the contrary, the following shall apply:

- if either party intends to rely upon the evidence of a lay witness, that party shall file a witness statement which will stand as the evidence-in-chief of that witness;*
- if either party intends to rely upon the evidence of a doctor or like practitioner, then the report of that doctor shall stand as the evidence-in-chief of that witness;*
- if one or other party seeks to cross-examine a lay witness or doctor proposed to be relied upon, that party shall give notice to that effect at least 30 days prior to the hearing, and the party seeking to rely upon that evidence must arrange for that witness to attend;*
- each party shall be entitled to open their case for no longer than 20 minutes and make final submissions for no longer than 30 minutes; and*
- examination-in-chief of each party shall not exceed one hour. Cross-examination of each party or any other witness shall not exceed one hour.”*



To disclose, or not to disclose... information about the offender's financial circumstances

85H Court may take financial circumstances of offender into account

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

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

A DIFFICULT ISSUE

Whether to disclose information about an offender's financial circumstances needs to be made carefully. Instructions from an offender need to be corroborated.

Some information may already be known, and on the record... If an offender's legal representation is being funded by VLA, this typically requires an order made under s. 143 for funding to be provided, based usually on sworn information about the offender's financial circumstances. If there are restrained assets, then at least a partial position will already be known.

Questions for practitioners to consider on this issue include:

- Does disclosure of the offender's financial circumstances, if complete and truthful, expose client to **risk of criminal prosecution or civil penalty**?
- Does disclosure of the offender's financial circumstances invite **cross examination** of the respondent, or some other person?
- Would disclosure reveal information about the offender's financial circumstances that is **not presently known**?
- Is the situation different for **child respondents**? (see s417 *Children Youth and Families Act 2005* (Vic))



Costs

85K Costs of proceeding

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

More and more, there are attempts by applicants to try and seek costs, and to try and use conduct occurring during preliminary phases of the litigation as forming the basis for an application for costs.

In *Stevens v Baxter*, Forrest J considered an application for costs subsequent to a s85B application where the respondent had murdered his wife and the applicants were the two children of the deceased. The application was heard over the course of a day and reports of a psychologist tendered on behalf of the applicants. His Honour said:

“Counsel for the children sought that I make an order in favour of the children in relation to costs of the application. Section 85K of the Sentencing Act mandates that each party ‘must bear their own costs of the proceeding’ unless the court otherwise determines. Although counsel advised me that in applications in the County Court there have, on occasions, been orders for costs against the offender, the clear tenor of the section is that the costs should lie where they fall, absent unusual or special circumstances. Such circumstances, it seems to me, cannot be the events surrounding the crime as one would imagine that in many, if not all, cases in which applications under s 85B are made the circumstances are such that a court would (absent legislative direction) be readily disposed to order costs in favour of the victim or victims. In my view, there should be no order as to the costs of the application.”



85L – Right to bring civil proceedings unaffected

85L Right to bring civil proceedings unaffected

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

INTERESTING QUESTIONS....

For applicants – if you have what you perceive to be a high value common law claim with an offender you believe you can recover from, where an offender has pleaded guilty, should you elect to commence such a proceeding and forego your s. 85B application?

Reasons for doing so might include: prospect of higher award, existence of double recovery prevention, higher legal costs for conducting two proceedings



Advice to an accused in the criminal proceeding

- The 85B application is not the place to try and plead not guilty
- Accepting a sentence indication opens the door to 85B applications.
- The accused should be aware of the existence of the s. 85B regime prior to giving instructions to plead guilty.
- Accused should be strongly encouraged to conduct the criminal proceedings on their merits, and as the priority. The tail should not wag the dog.
- Fight hard for facts in an agreed summary
- But good practice requires accused to be aware of ramifications prior to giving instructions to plead guilty/accept indication

Making offers

- Without prejudice
- Without prejudice save as to costs
- Open letters

Are we definitely resolved?

Carefully consider what, precisely, is being resolved, and make this clear to client.

Is the agreement a resolution of the 85B application alone, or is the applicant settling all claims they have against the respondent, once and for all?

Terms of settlement / deed

What is a deed?

A deed is a special type of promise or commitment that indicates the most serious and or solemn indication that the executing party intends to do what they have promised. Probably not necessary that there be a deed, as opposed to terms of settlement

Orders

No agreement, just orders

Enforcement

Process

Costs

Avoidance of enforcement process as an incentive to settle

Penalty interest



Enforcement

85M Enforcement of order

Subject to section 30 or section 36ZA of the Confiscation Act 1997, a compensation order, including costs ordered to be paid by the offender on the proceeding for that order, must be taken to be a judgment debt due by the offender to the person in whose favour the order is made and payment of any amount remaining unpaid under the order may be enforced in the court by which it was made.

On the issue of stay of enforcement of compensation order pending other criminal appeal – see *Tsahrelias v Hanna & LH Holding [2024] VSC 420; 73 VR 551*

On the issue of the sometimes complex interactions with the family law system - *Director of Public Prosecutions v Pain & Bush; Lambert & Paris v Pain [2019] VSC 728*



VOCAT / FAS deductions

85I Court must reduce compensation by amount of assistance under victims of crime legislation

If a court decides to make a compensation order, it must reduce the amount of the compensation by the amount of:

- (a) Any award made to the victim under the **Victims of Crime Assistance Act 1996**; or
- (b) Any assistance paid to the victim under the **Victims of Crime (Financial Assistance Scheme) Act 2022**

For the expense of other matter for which compensation is being sought under Part 2, subdivision 1 of the *Sentencing Act 1991* (Vic).



The Financial Assistance Scheme

VOCAT to FAS

In 2018, the VLRC reported on its review of VOCAT and the Victims of Crime Assistance Act 1996. Among the VLRC's 100 recommendations, the flagship reform focused on the creation of a new administrative scheme to replace VOCAT, 'a trauma informed model which would assist victims in their recovery from acts of violence'. The VLRC found that the experience for victims in applying to VOCAT is highly retraumatising and requires engagement with an often complex, lengthy and delayed process.

The Victorian government introduced the Victim's of Crime (Financial Assistance Scheme) Bill 2022 to implement the VLRC's recommendation. The Bill passed and the Victims of Crime (Financial Assistance Scheme) Act 2022 (the FAS Act) is now in effect.

The Financial Assistance Scheme has replaced VOCAT. VOCAT is now unable to accept new applications for assistance, however it continues to exist to manage pending applications made through VOCAT before FAS came into effect.



FAS – key points

Definitions of ‘injury’, ‘primary victim’, ‘domestic partner’ and ‘close family member expanded’ from their VOCAT definitions.

Primary victims are entitled to \$60,000 for expenses and eligible for a lump sum payment of \$25,000 not tied to expenses. Secondary and related victims are entitled to \$50,000.

Other entitlements (e.g. common law damages, compensation, assistance or payments of any other kind) are taken into account in determining the amount of assistance to be paid to a person.

Unlike VOCAT, decisions under the FAS Act are purely administrative. They are decided by scheme decision makers employed under Part 3 of the Public Administration Act 2004 (s 52 FAS Act). In a further departure from the procedure under VOCAT, a scheme decision maker must decide applications without conducting oral hearings. The justification for dispensing with oral hearings was removing the need to subject applicants to the potentially traumatic experience of attending hearings.



FAS – key points

FAS applicants can be legally represented. Limits apply on how much legal practitioners can charge FAS applicants for representation. There is limited discretion in the fees payable and it is generally restricted to complex matters. Importantly, a lawyer must not:

- Charge or recover from an applicant any legal costs incurred for representing or assisting the applicant to apply for the FAS unless otherwise allowed by FAS;
- Claim a lien over any amount of assistance granted to an applicant; or
- Withhold any legal or other costs or amounts from any amount of assistance granted to an applicant.

Victoria Legal Aid have a 'Victims Legal Service'. The Victims Legal Service provides free legal advice and support to people who have suffered injury or loss because of a crime and need help to get financial assistance through FAS and get compensation from the person who committed the crime.

FAS has implemented a restorative justice model, including victim recognition statements and victim recognition meetings.

The FAS Act makes inadmissible in any legal proceeding certain documents subject to certain exceptions. It also curtails cross-examination of victims in any legal proceeding about the contents of those documents.



Comparing cases... with caution

Limited utility in comparable cases

In **DPP v Energy Brix Australia Corporation Pty Ltd (2006) 14 VR 345**, Vincent JA sounded the following cautionary note about considering awards in other cases...

“Bearing in mind the caution with which the making of comparisons between the awards of compensation in other cases under the Act or awards of damages under the common law or other legislation, I have had regard in a general fashion to those to which our attention has been directed. Due, inter alia, to the difficulty of identifying the precise considerations to which the various judges had regard in the individual matters and the weight attributed to the differing relevant factors as well as the significant variations in the circumstances and awards themselves, I found this process even less useful than the comparison of sentences imposed in different or not clearly identified fact situations.”

If we have time.... each panelist will now discuss a recent and/or interesting case.


1. *Greensill v The Queen* [2012] VSCA 306; 37 VR 257, especially from para 57 onwards




Questions



Thank you

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