SUPREME COURT OF QUEENSLAND

CITATION:	*Hocking v Attorney-General for the State of Queensland* [2012] QCA 65
PARTIES:	**PAUL RODNEY HOCKING** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 8293 of 2011 SC No 2661 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2012
JUDGES:	Muir and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – PROOF AND EVIDENCE – OTHER MATTERS – where the appellant was the subject of a supervision order made pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the appellant had a lengthy criminal history – where three experts gave evidence with respect to whether there was an unacceptable risk that when released from prison the appellant would commit a serious sexual offence – whether the primary judge should have preferred the evidence of one expert over the other two – whether two of the experts blurred the distinction between the risk of violent offending and the risk of violent sexual offending – whether the appellant should be released from prison under a supervision order *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13 *Attorney-General v Francis* [2007] 1 Qd R 396; [2006] QCA 324, followed

Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, followed
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, followed
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, considered

COUNSEL: C Chowdhury for the appellant
P J Davis SC, with M Maloney, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Crown Law for the respondent

[1] **MUIR JA: Introduction** The appellant appeals against a supervision order made by a judge of the Supreme Court pursuant to s 13 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"). The grounds of appeal are that the primary judge erred in holding that there was an unacceptable risk that the appellant would commit a serious sexual offence if he were released from custody without a supervision order.

[2] The primary argument advanced by the appellant was that the primary judge erred in accepting the opinions of two psychiatrists, Dr James and Dr Beech, in preference to the opinion of another psychiatrist, Dr Grant.

[3] The appellant, who was born in 1964, has a lengthy criminal history. The following account of it in the primary judge's reasons was not criticised:

> "[8] Relevantly, for the purposes of this application, on 19 April 1984 the respondent was sentenced for the offence of attempted rape committed on 21 June 1983. He was sentenced to two and a half years imprisonment. The circumstances of that offence involved an attack on a 34 year old woman who was a stranger to him. The woman was making a telephone call from a public telephone booth when she was forced to a nearby alley. The victim was punched several times in the face and knocked to the ground. She was dragged to a nearby vacant lot where her clothing was then removed. The victim's vagina and anus were digitally penetrated before an attempt at penile penetration was made. The respondent escaped when assistance was rendered by nearby neighbours. A report prepared for sentencing recorded that at the time of the offence the respondent had been drinking alcohol for several hours and that in addition, he had sustained a head injury about an hour earlier (although no evidence of brain injury was subsequently detected as having been sustained).
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> [9] After his release from prison, the respondent committed the offences of breaking and entering a gunsmith shop and stealing firearms (in September 1986) for which he was sentenced on 3 July 1987 to seven years imprisonment.
>
> [10] On 22 October 1987 he was sentenced to nine months imprisonment for possession of an implement capable of effecting escape. He was also sentenced on 17 March 1988 to

12 months imprisonment for assault with intent to prevent detention following the discharge of a firearm at a police vehicle during the pursuit following the commission of that offence. On 29 April 1988 the respondent was sentenced to three years imprisonment for two counts of stealing.

[11] On 15 September 1988, the respondent was convicted of the offences of assault occasioning bodily harm and unlawful wounding committed in September 1986. The respondent was released on parole in respect of those offences in October 1991.

[12] Thereafter, on 8 March 1993 while on parole, the respondent committed the offence of armed robbery in company for which he was sentenced on 18 June 1993 to 10 years imprisonment.

[13] The offences for which his current term of imprisonment relates were committed in 2005 and include offences committed against two sisters, P (aged 19 at the time) and her younger sister B. He was sentenced on 27 June 2008 for those offences.

[14] In respect of the complainant P, the respondent was convicted of two counts of assault occasioning bodily harm committed in January–February 2005 (for which he was imprisoned for two years), one count of stalking with circumstances of aggravation between 10 February 2005 and 19 August 2005 (for which he was sentenced to six years imprisonment) and an offence of common assault committed on 29 December 2005 (for which he was imprisoned for 18 months). A domestic violence order in relation to P had been served on the respondent while he was in custody. On his release he went to see P, in breach of that order. The sentencing judge outlined the circumstances of the offending against P as follows:

> 'You had been in a relationship with [P] between September 2004 and about February 2005. She was aged 19 at the time of the offences against her and you were about 40. You were violent and possessive towards her. On 29 December 2004 you were at your house with [P]. It was her 19th birthday. She wanted to leave but you did not want her to do so. In the upshot you assaulted her and she stayed…'
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> [The sentencing judge proceeded to describe a number of stalking incidents perpetrated against [P] by the appellant in 2005, four acts involved the use of violence, 32 acts involved the threatening of violence and 11 acts involved contraventions of an order of the Magistrate's Court. There was also one incident of deprivation of liberty for a period of more than 24 hours during which

> the appellant made death threats against [P], violently assaulted her and threatened her with a double-barrelled shotgun.]

[15] Relevantly for the purposes of this application, the offending against P's sister B, for which the respondent was also sentenced on 27 June 2008, concerned sexual offences committed when the respondent was on bail and heavily affected by amphetamines. The circumstances of the offending against B are outlined in the sentencing judge's sentencing remarks as follows:

> 'She was a girl of 17 at the time of the offences against her. She had met you twice. She knew of your relationship with her sister, [P].
>
> You attempted to contact [B] on MSN messenger but she changed her contact details. You sent her text messages, enquiring about [P]. The offences against [B] were all committed on one night while you were on bail, in July 2005.
>
> Early in the afternoon, she was at home working on her computer when you arrived. She went to the door; you walked straight past her and into the house to the computer, where you worked on the Austar cable television connection for some time. In the meantime you were consuming crystal meth or speed. …
>
> At about 4.30, [B] was seeing you off. You picked her up and carried her to your car against her will. You drove along country roads to an old wooden shed, where you stopped. You consumed more speed. You ran your hand along her thigh and forced her to remove her underclothing. You indecently assaulted her, licking the outside of her vagina and digitally fondling her genitalia and vagina, then pulling her face towards your erect penis and trying to put her hand on your penis. You forced her right hand onto your penis and made her rub your penis with her hand. You ordered her to remove her pants again. You licked her private parts, masturbating as you did so. You asked her for sex, but she declined. You continued to masturbate, and ejaculated on the back seat of the car. Then you took her home.'

[16] The respondent was convicted of the offences of deprivation of liberty, two counts of sexual assault and one count of procuring the complainant to engage in a sexual act by coercion. Sentences of six years imprisonment were imposed for the sexual offences.

[17] Also on 27 June 2008, the respondent was sentenced to a number of other property and drug offences."

The psychiatric evidence

[4] Three psychiatrists gave written and oral evidence.

[5] **Dr James** assessed the appellant on 14 October 2010 for the purposes of a preliminary assessment report dated 8 November 2010. He conducted risk assessments of the appellant using various recognised predictive tests. Application of the Static-99 test resulted in a score which indicated a high risk of future recidivism. The appellant's score on the Sex Offenders Risk Appraisal Guide ("SORAG") placed him in a group of persons, "58 per cent of whom have a chance of re-offending sexually within seven years, and 80 per cent of whom have a chance of doing so within 10 years".

[6] The appellant's score applying the Violence Risk Appraisal Guide ("VRAG") placed him in a group of persons, "44 per cent of whom have a chance of re-offending violently within a seven year period and 58 per cent of whom have a chance of doing so within 10 years".

[7] The following descriptions of the content of Dr James' report have been extracted from the primary judge's reasons. In Dr James' opinion, the majority of the offences committed in 2008 were largely attributable to the appellant's anti-social personality structure, with substance abuse as an exacerbating factor. The most likely risk of re-offending in future would be in the context of a heterosexual relationship. Any re-involvement by the appellant with intoxicating substances would "greatly heighten" his risk of re-offending.

[8] Given the appellant's past history and the inevitable uncertainties upon discharge of misuse of intoxicants and the vicissitudes of relationships, the risk to the community in terms of the appellant's potential recidivism would be unacceptably high were he to be released without a supervision order. The appellant's abstinence from drug use whilst in prison and his asserted intention to remain totally abstinent from intoxicants upon release was encouraging. However, the appellant's ability to maintain abstinence from all intoxicants was yet to be tested outside the prison environment. A number of prognostic indicators suggested a poor prognosis in that regard.

[9] Under cross-examination, Dr James maintained his opinion that the appellant's risk of serious sexual offending remained moderately high. In that regard, he pointed out that notwithstanding the significant periods of time between the two episodes of serious sexual offending (20 years), there had been a substantial period during which the appellant had been in gaol.

[10] A report of **Dr Beech** dated 18 July 2011 was put into evidence. Except where indicated to the contrary, the following facts and opinions contained in the report have been extracted from the primary judge's reasons.

[11] Dr Beech's application of the Static-99 test placed the appellant in a group regarded as being at high risk of re-offending. From his administration of the Dynamic Risk Assessment, Dr Beech concluded that the appellant had throughout his life demonstrated the actual presence of 11 of the 22 items known to be dynamic factors associated with the risk for further sexual violence listed in the Risk for Sexual Violence Protocol ("RSVP").

[12] The appellant had a severe anti-social personality disorder which incorporated violence and a callous disregard for the rights and well-being of others. He was not

a sexual deviant but bordered on psychopathy. There were essential elements of control in the current offences and a marked determination to intimidate and coerce the two victims. The risk of sexual violence by the appellant was assessed at being in the moderate to moderate–high range, but had lessened with the passage of time. Sexual violence was most likely to occur within a relationship or in the context of general domestic violence. Apart from that, sexual violence was most likely to occur when the appellant was intoxicated and resorted to violence to get his way. The victim was likely to be an adult female who could suffer severe physical harm. The use of weapons was likely and such violence was very likely to result in "emotional harm".

[13] Dr Beech observed in his report:

> "It is possible now that [the appellant] has tempered with the passing years and that he has taken stock. He may now, as he says, realise that he needs to be abstinent. He may now as he says avoid relationships and instead focus on being productive when released. In that scenario the risk of violence and sexual violence would be reduced. However he does not have a good track record in this regard. I believe that he underestimates the difficulties.
>
> Importantly he has not done anything in his time to address these difficulties."

[14] Dr Beech was of the view that the risks of recidivism could be further reduced by the appellant's participation in programs that addressed violence, sexual violence and drug use. He concluded in his report:

> "If he were to be released then I believe that he would need to be supervised and involved in appropriate programs to maintain abstinence and to avoid general criminality. The concern is that he does not do well with community supervision and he has not demonstrated any interest in individual or group programs."

[15] In his oral evidence, Dr Beech said that, taking into account the ameliorating effect of the passage of time, he now assessed the risk of sexual violence to be in the moderate range. He said that characteristics of the appellant's anti-social personality disorder, which he diagnosed, included the appellant's disregard of rules and his propensity to use violence to get his own way. He was of the opinion that the appellant "minimises the extent of his violence and the extent of the violent offending".

[16] Dr Beech conceded in cross-examination that it may have been preferable for him to have said that weapons "could be" used rather than their use was "likely".

[17] In Dr Beech's opinion, if the appellant was to be released he would need to be supervised and involved in appropriate programs to maintain abstinence from illicit drugs and to avoid criminality. The lack of appropriate program involvement in the past tended to perpetuate his denial about his actions and behaviours.

[18] The primary judge's reasons note that **Dr Grant's** application of the Static-99 test placed the appellant in the high risk group for re-offending. His application of the Hare PCL-R test revealed a condition consistent with a diagnosis of anti-social personality disorder; it did not indicate a psychopathic personality disorder. The

HCR-20 test indicated that the appellant was a moderate risk of violence (non-sexual and sexual combined). Dr Grant's administration of the RSVP instrument led him to conclude that any sexual offending would involve intimidation to persuade a young female (over the age of consent) to have sexual activity. This would be motivated by sexual drive and a wish for control. There would be possible psychological harm to victims, but the likelihood of physical harm would be low or nil. Escalation of sexual violence was unlikely. Such offending would be more likely if the appellant used alcohol or drugs and was suffering relationship instability.

[19] Applying the RSVP instrument, the overall risk of sexual re-offending was low to moderate. The appellant's sexual offending appeared to have occurred primarily as a result of substance intoxication and underlying anti-social/immature personality disorder. The appellant appeared to have matured over the last 10 years or so and in relation to his attitudes and prison behaviour. This was commonly seen in people of his age with an anti-social personality disorder.[1]

[20] In his report under the heading "Overall Risk Assessment", Dr Grant said:

> "In my opinion, as a result of my clinical assessment and the use of formal instruments, [the appellant] represents a moderate to high risk of future violent non-sexual criminal re-offending. In regard to the potential for sexual re-offending the risk would in my view be low to moderate.
>
> [The appellant] is not paedophilic, nor does he have any other identifiable sexual paraphilia. In the absence of a paraphilia and given his sexual offending history I would not view a sexual offender treatment program as strongly indicated. I do not believe that further detention in custody will be necessary to meet any treatment needs. If [the appellant] was released into the community in my opinion the risk for sexual re-offending may be manageable through his own voluntary efforts in re-establishing his social network and accessing alcohol and drug services as needed. The most important risk factors for him are a resumption of alcohol or drug abuse and re-engaging with his former criminal associates and an antisocial network.
>
> A supervision order would serve to increase the likelihood of successful, sustained abstinence from drugs and alcohol through regular urine drug testing but in my opinion a supervision order may not be essential in managing [the appellant]'s risk to the community in regard to sexual reoffending.
>
> If a supervision order was made, given that [the appellant] is not paedophilic I do not see any indication for clauses relating to access to children being forbidden or supervised. Access to pornography is not in this case likely to increase the risk of sexual offending behaviour to any significant extent.
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> No further treatment in custody is indicated and if [the appellant] is released into the community I would see a supervision order of very marginal benefit in his particular case. Non-sexual re-offending is more likely than sexual re-offending but a supervision order is

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1 Reasons at [45].

> designed to prevent the latter and as such I think it would have only a marginal benefit in containing risk in the community. If the court was minded to impose a supervision order I believe a term of five years would be sufficient."

Dr Grant's evidence

[21] Counsel for the appellant drew attention to the following evidence given by Dr Grant both orally and in his report of 16 July 2011.

[22] The appellant did not have any sexual paraphiliacs and his sexual offending appears to have occurred primarily as a result of substance intoxication and underlying anti-social/immature personality disorder. There was little indication for the appellant to undergo a sexual treatment program. The appellant's potential for sexual re-offending was low to moderate and he drew "the appropriate distinction between violent non-sexual offending, and violent sexual offending". The other two psychiatrists tended to blur these distinctions.

[23] Dr Grant gave oral evidence that the two major risks for the appellant were social instability and a return to drug or alcohol abuse: "if he goes back into those past associations …and gets into a socially unstable situation and starts to abuse drugs, then the risk of general offending would go up considerably, but, in my view, the risk of sexual offending would still remain at the low to moderate level".

[24] In Dr Grant's opinion, the supervision order "would be mainly useful in terms of assisting with the social stability and assisting with sobriety from drugs and alcohol, and with enforced urine drug screens". Compliance with a supervision order would reduce the risk of future sexual offending from low to moderate to low.

[25] Now that the appellant is in his forties, he seemed to be, not uncommonly, demonstrating an amelioration in his anti-social behaviour, particularly with respect to overt violence. The lack of history of actual sexual offending in relationships, despite the existence of considerable conflict in them in the past, made it difficult to conclude that the risk of sexual offending would occur in the context of a heterosexual relationship. There could have been some displacement of anger towards the victim "B", the younger sister of the woman with who the appellant had been in a sexual relationship.

[26] The evidence was that there was no pattern of sexual offending which would reveal a risk of greater than moderate and the risk was reduced to low to moderate given the maturing of the appellant's personality. The risk would be low if he was subjected to a supervision order. It would also be low if the appellant "realistically and enthusiastically engaged in the support of Mission Australia and got on with his life".

Criticisms of Dr James' evidence by the appellant's counsel

[27] Counsel for the appellant submitted that Dr James had difficulty in distinguishing between the risk of committing violent offences and sexually violent offences and that his evidence that sexually violent offending was most likely to occur in the context of a heterosexual relationship was demonstrably erroneous. These matters, it was submitted, should have led the primary judge to prefer Dr Grant's evidence. He made submissions to the following effect:

(a) Dr James did not address the risk of the appellant committing a serious sexual offence in his first report of 8 November 2010. He was more interested in the question of recidivism for stalking offences.

(b) In his report of 1 May 2011, Dr James commented that although the 2005 offences were "undoubtedly serious… the seriousness of his 2005 offences appears not only not to have progressed over time, but have shown some signs of having lessened". He adhered to that opinion in his oral evidence.

(c) In the November 2010 report, Dr James diagnosed the appellant as having an anti-social personality disorder in partial remission. That view was maintained in oral evidence.

(d) Dr James agreed in oral evidence that the appellant's sexual offending "were examples of offending in general". His opinion was that the appellant did not have "a particular paraphilia" or "a particular inclination to offend sexually". He accepted that there was a difference between the risk of offending generally and the risk of offending in a sexually violent way. He conceded that the appellant's risk of committing a serious sexual offence was less than the risk of his committing a general offence.

(e) In oral evidence, Dr James sought to elevate the minimal contact between the appellant and the complainant "B" in the 2005 sexual offences into a relationship. That was an exaggeration done to accommodate Dr James' opinion that "the most likely risk of re-offending in the future is likely to occur, as it has in the past, within a context of heterosexual relationships".

[28] Dr James was criticised for what was described as his "somewhat nebulous manner in assessing risk of committing a particular type of offence".

Criticisms of Dr Beech's evidence by the appellant's counsel

[29] Counsel for the appellant levelled the following criticisms at Dr Beech's evidence.

[30] Although in his July 2011 report Dr Beech assessed the risk of sexual violence as in the moderate to moderate-high range, he was also of the view that the risk had lessened with the passage of time. In his oral evidence he assessed the risk as moderate and discussed the risks that arise from what he diagnosed as a "severe anti-social personality disorder". He considered that a significant risk factor and said:

> "It is a significant risk factor - that combined, I think, with his high level of psychopathic traits. It's just general criminality itself is a risk factor for re-offending. In his case, I think he's got quite a significant criminal history and I think it reflects his, like, disregard for rules, disregard for the law, propensity to return to criminal behaviour, and I think it is part of that general criminal behaviour that could include sexual offending. Part of that criminal behaviour, of course, has included difficulties on bail, on parole, on probation as well."

[31] Responding to a question about the connection between substance use on release and future sexual offending, Dr Beech said, "I think, once released, he's prone or at risk of general offending, and with that general offending comes a risk of sexual offending". He observed that there was an increased risk of offending sexually if the appellant was intoxicated. He did not believe that the appellant had a particular sexual deviance or that he was driven by sexual offending or an urge or compulsion to sexually offend. He considered that the appellant simply disregarded rules and was prone to using violence to get his own way.

[32] In cross-examination, Dr Beech accepted that the older a person gets the less likely it was that he would use illicit substances. He also conceded that with respect to the type of offending in question, including sexual offending, the older the appellant got the less likely he was to offend. He said:

> "It is for that reason – if you look at simply the statistics in [the appellant's] case, he gets placed within the group but high risk of offending sexually, but I think that overstates his risk, and I think that's why I've downplayed - reduce it to moderate, because of his age and the type of offending that he's involved in."

[33] In oral evidence, Dr Beech maintained his opinion that sexual violence would most likely occur in an intimate relationship despite there having been no history of that having occurred.

[34] Dr Beech conceded that his statement that weapons were "likely" to be used in future incidents of sexual violence was overstated. His opinion was that the appellant's sexual offending was part of "general criminal offending rather than any sadistic sexual violence", that it did not form a pattern of offending and was an example of his using coercion, intimidation and violence to get his own way. He conceded also that his concern about the appellant being released without any graduated release under supervision would apply to almost any prisoner who had spent a considerable period of time in prison.

[35] The effect of Dr Beech's evidence is that, in his opinion, there is no direct risk of the appellant committing a serious sexual offence. Rather there is an indirect risk of the appellant returning to undesirable associates, returning to an unstructured life, returning to drug use and then resorting to criminal offending again.

The appellant's arguments

[36] The arguments advanced by counsel for the appellant may be summarised as follows.

[37] The conclusion of both psychiatrists that the most likely risk of the appellant's committing a serious sexual offence would occur in the context of a heterosexual relationship was not supported by the evidence.

[38] A more rational and logical explanation for the offence committed on "B" was that it was an opportunistic offence whilst the appellant's sexual desire was heightened by his use of amphetamines. It could not be characterised as an offence in the context of a relationship.

[39] In order for the Court to be satisfied that the appellant was a serious danger to the community in the absence of a Division 3 order, there had to be an unacceptable risk that the prisoner "will commit a serious sexual offence". It is not enough that the prisoner "might" commit a serious sexual offence. At best, the evidence disclosed a risk that the appellant may commit a serious sexual offence and that the risk would be likely to materialise only after the appellant had resorted to substance abuse. Dr Grant's prognosis in this regard should have been preferred over those of Dr James and Dr Beech. Particularly relevant in this regard is the 22 year gap between sexual offences. Although the appellant spent a considerable part of that time in prison, he also spent sufficient time out of prison and committed a large

number of offences, none of which involved sexual offending. Although all psychiatrists considered that the appellant would benefit from being under supervision, as the primary judge accepted, that was not a relevant consideration.

[40] Although the appellant did not undertake any particular rehabilitative courses when serving his current sentence apart from the transitions program, he was a model prisoner despite not being granted parole. The primary judge's conclusion that the appellant was an unacceptable risk of committing a serious sexual offence was not open on the evidence. She erred in not accepting the more compelling evidence of Dr Grant in preference to that of the other psychiatrists.

Consideration

[41] The criticisms of Dr James' and Dr Beech's opinions that sexual violence was most likely to occur "within a context of heterosexual relationships" (Dr James) or "within a relationship" (Dr Beech) loses much of the force it may otherwise have had when Dr Grant's oral evidence is considered. Asked whether he held the view that "the most likely occurrences of re-offending would be in the context of a relationship" he responded:

> "…it's difficult from the history to say that that would be definitely the pattern… a conflicted relationship, especially associated with stalking behaviour, can be associated with sexual offending, and so I would see that as a possibility, but given the lack of history of actual sexual offending in relationships, albeit some of them quite conflicted in the past, I think it is difficult to say that that would be the context, definitely."

[42] A little later in his cross-examination, Dr Grant implicitly acknowledged the relevance of the familial link between P and B. Dr James made it plain in his oral evidence his reference to "relationships" was sufficiently broad to encompass his connection with B.

[43] The challenge to the evidence of Drs James and Beech appeared to be based in part on the premise that there was a disconnect between a propensity to offend generally (even violently) and a propensity to commit sexual offences. That was not the evidence. Asked, in effect, whether it was appropriate to draw a sharp distinction between violence and sexual offending, Dr Grant responded:

> "…I think we shouldn't be dissecting them in too stark a manner. There is a definite link between general violence and sexual violence, and, in this case, that is evident in that offending and the relationship between the two women. So, I think – that's why, I think, Dr Beech has indicated that sexual violence might occur within a relationship, and I would agree that that is a potential scenario."

[44] Drs Beech and James also perceived a link between non-sexual and sexual violence. Dr Beech said in his oral evidence, "I think, once released, he's prone or at risk of general offending, and with that general offending comes a risk of sexual offending".

[45] The primary judge was not obliged to treat Dr Beech's change in emphasis in relation to the "likely" use of weapons by the appellant as damaging to his credibility. She may have seen it as a willingness on Dr Beech's part to keep an open mind and to make appropriate concessions.

[46] The appellant has failed to demonstrate that the primary judge erred in preferring the opinions of Drs Beech and James over that of Dr Grant. All three expert medical witnesses were appropriately qualified and experienced. There was no suggestion that their respective opinions were not genuinely held and were not arrived at after due regard to the relevant evidence.

[47] The results derived by the experts from the various predictive tests were similar and the opinions of the three experts also coincided in many significant respects. All three experts diagnosed an anti-social personality disorder and substance abuse/dependence. All were of the view that time had an ameliorating effect on the appellant's anti-social tendencies and that there was a risk of the appellant resorting to the use of intoxicating substances and that the use of such substances would heighten the risk of re-offending.

[48] Dr James' opinion was that the risk of sexual re-offending was moderately low if the appellant took no intoxicating substances, but moderately high if he did, at least if his use of them was habitual. He considered that there was a substantial risk that on release the appellant would resort to the use of intoxicating substances.

[49] Dr Beech's conclusion was that the risk of sexual violence has reduced from moderate-high to moderate with the passage of time. He also concluded that sexual violence was most likely to occur when the appellant was intoxicated. He was concerned at what he perceived to be the appellant's failure to recognise the difficulties he faced in coping with his problems and with his lack of insight and state of denial.

[50] Dr Grant assessed the risk of sexual re-offending as low to moderate. He also identified the most important risk factors as a resumption of alcohol or drug abuse and reengaging with former criminal associates and an anti-social network.

[51] It is apparent from the foregoing that the differences in the opinions of Dr Grant on the one hand and Drs James and Beech on the other concerned matters of judgment, in respect of which minds may legitimately differ, rather than principle. No evidence was identified which necessitated the primary judge's preferring Dr Grant's evidence and, as I have indicated, the differences of opinion were relatively minor.

[52] In *Fox v Percy*,[2] Gleeson CJ, Gummow and Kirby JJ, discussing the circumstances in which an appellate court should interfere with a trial judge's findings of fact, said:

> "… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.[3]
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> … In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the

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2 (2003) 214 CLR 118 at 128.

3 eg, *Voulis v Kozary* (1975) 180 CLR 177; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306; 160 ALR 588; cf *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-351.

> decision at trial is 'glaringly improbable'[4] or 'contrary to compelling inferences' in the case[5]. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion."

[53] After referring to the nature of an appeal by way of re-hearing, their Honours said:

> The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[54] In *Devries v Australian National Railways Commission*,[6] Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact.[7] If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage'[8] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."[9]

[55] Gleeson CJ, Gummow and Kirby JJ, in their reasons in *Fox v Percy*, referred to *Devries* as one of three cases in which the High Court had reiterated:[10]

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4 *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

5 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

6 (1993) 177 CLR 472 at 479.

7 See *Brunskill* (1985) 59 ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

8 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

9 *Brunskill* (1985) 59 ALJR at 844; 62 ALR at 57.

10 (2003) 214 CLR 118 at 127.

> "…its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

[56] Their Honours observed that those three decisions "…were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges".

[57] Plainly, it has not been shown that the primary judge "palpably misused" her advantage of seeing the witnesses nor are the probabilities strongly against any finding of fact. None of the primary judge's findings of fact was challenged directly by the appellant.

[58] The primary judge's reasons were criticised for failing to identify the particular nature of the risk which the appellant posed to the community. That criticism was unjustified. It was abundantly plain from the expert reports and the way in which the case was conducted that the central issue was whether the respondent posed an unacceptable risk of serious sexual offending in the absence of a supervision order. The primary judge expressly found that such risk existed. The evidence justified that conclusion.

[59] The following passages from the reasons of the Court in *Attorney-General v Francis*[11] is of direct application to the question now under consideration:

> "It is to be emphasised here that the primary judge's assessment 'call[s] for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right'. It follows that it would be wrong for:
>
> > 'a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.'[12]"

[60] For the reasons advanced above, the appellant has not demonstrated, as he must to succeed on his appeal, any material error in the primary judge's reasons. Accordingly, I would order that the appeal be dismissed.

[61] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour's conclusion that this appeal must be dismissed for those reasons.

[62] The appellant contended that Dr James and Dr Beech impermissibly blurred the distinction between the risk of violent offending and that of violent sexual offending. In so doing they did not properly acknowledge that it is only the latter

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11 [2007] 1 Qd R 396 at 402 [34].

12 *Norbis v Norbis* (1986) 161 CLR 513 at 518 - 519.

which comes within the jurisdiction of the *Dangerous Prisoners (Sexual Offenders) Act*. Those specialists were alive to the boundaries. It was the mix of the appellant's history of violent offending together with one crime of violent sexual offending and stalking, his personality traits of coercion and control in his relationships, and his addiction to chemical substances which informed their opinion about the applicant's risk of serious violent sexual offending on release.

[63] Dr Grant gave evidence that there was a definite link between general violence and sexual violence. The three psychiatrists were unanimous that the appellant's long history of substance abuse, together with his failure to maintain abstinence on release from prison in the past leading to violent crime, and his failure to address this in custody by participating in an intensive substance abuse program, would be the most likely trigger for relevant offending conduct.

[64] The primary judge carefully weighed the competing opinions and no error has been identified in her approach by the appellant. In such a circumstance the observations of the High Court in *Norbis v Norbis*[13] are apt:

> "… the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

The court was there emphatic that where the primary judge's assessment calls for value judgment in which there was room for differences then no particular opinion can be uniquely correct.

[65] The only witnesses to give oral evidence were the three medical specialists who regularly appear in respect of matters brought under the *Dangerous Prisoners (Sexual Offenders) Act.* There was unlikely to be any special advantage which the primary judge enjoyed over this court in evaluating the oral evidence of the witnesses.[14]

[66] **DAUBNEY J:** For the reasons given by Muir JA, with which I respectfully agree, the appeal should be dismissed.

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13 (1986) 161 CLR 513 at 518-519.

14 *Fox v Percy* (2003) 214 CLR 118 at 128; [2003] HCA 22.