SUPREME COURT OF QUEENSLAND

CITATION:	*SBT v CAY & Anor* [2010] QCA 289
PARTIES:	**SBT** **(by his litigation guardian BBW)** (applicant) **v** **CAY** **aka CAY** (respondent) **ATTORNEY-GENERAL OF QUEENSLAND** (intervenor)
FILE NO/S:	Appeal No 3904 of 2010 DC No 183 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2010
JUDGES:	Chief Justice and Fraser JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – CRIMINAL INJURIES COMPENSATION – QUEENSLAND – AMOUNT AND CONDUCT AFFECTING – where primary judge ordered the respondent pay the Public Trustee of Queensland, on trust for the applicant who was then ten years of age, the sum of $2,250 as compensation in relation to two counts of indecent dealing involving the applicant when the applicant was five and six years old – where the respondent had pleaded guilty to those offences and to sexual offences committed upon the applicant's older brother including maintaining an unlawful sexual relationship over a period of eight months, nine instances of indecent dealing and one instance of oral rape – where primary judge awarded the applicant's older brother $28,500 in compensation – where applicant seeks leave to appeal the primary judge's orders – where applicant submitted that the primary judge erred in not accepting the full purport of the evidence given by the psychologist in assessing the applicant's compensation – whether leave to appeal should be granted

Criminal Offence Victims Act 1995 (Qld) (repealed), s 24
Criminal Offence Victims Regulation 1995 (Qld) (repealed), r 1A
District Court of Queensland Act 1967 (Qld), s 118(3)
Victims of Crime Assistance Act 2009 (Qld)

Osgood v Queensland Police Service [2010] QCA 242, cited
SAY v AZ [2007] 2 Qd R 363; [2006] QCA 462, cited

COUNSEL: M J Campbell for the applicant
No appearance for the respondent
K A Mellifont, with N A Paul for the intervenor

SOLICITORS: Potts Lawyers for the applicant
No appearance for the respondent
Crown Solicitor for the intervenor

CHIEF JUSTICE:

[1] A learned District Court judge ordered the respondent to pay the Public Trustee of Queensland, on trust for the applicant who was then 10 years of age, the modest sum of $2,250 as compensation under s 24 of the *Criminal Offence Victims Act* 1995, operative because of a transitional provision of the *Victims of Crime Assistance Act* 2009. It related to two counts of indecent dealing with the applicant when the applicant was five or six years old. The respondent touched the applicant's penis and had the applicant touch the respondent's penis, in the one incident.

[2] The respondent had pleaded guilty to those offences, and also to sexual offences committed upon the applicant's brother B, who at the time of the offending was two years older than the applicant. The offences committed upon B were maintaining an unlawful sexual relationship over a period of eight months, nine instances of indecent dealing and one instance of oral rape. B also applied for compensation, and the judge awarded him $28,500.

[3] The applicant seeks leave to appeal against the judge's orders. Leave is necessary, having regard to the amount involved, because of s 118(3) of the *District Court of Queensland Act* 1967. I would refuse leave to appeal because an appeal would have no reasonable prospect of success. To demonstrate that, it is necessary to examine the primary judge's approach.

[4] Section 24(3) of the now repealed, but nevertheless presently applicable, legislation provided for an order for the payment of compensation for injury suffered by an applicant "because of" a personal offence committed upon the applicant. The term "injury" is defined by s 20 to include nervous shock. Regulation 1A(1) of the *Criminal Offence Victims Regulation* 1995, also applicable in this case, provided that for the purposes of s 20 of the Act, the "totality of the adverse impacts" of a sexual offence amounts to an "injury", to the extent that those impacts are "not otherwise an injury under section 20". Subsection (2) sets out instances of adverse impacts, starting with "a sense of violation".

[5] The evidence before the judge comprised a five page memorandum from the applicant's mother, setting out the effect of the offending on both her sons, a written

report from Ms Boast, a psychologist, and oral evidence given by Ms Boast per telephone during the hearing.

[6] It is important to refer to the judge's approach to B's application, because it sets a context for the applicant's. Her Honour held that:

> "For 18 months after the offences were disclosed, it appears that B acted out violently and dangerously towards his younger brother. Furthermore, he no longer allowed any physical affection towards himself, and became withdrawn and insecure. He suffered terrifying nightmares which left him afraid to sleep alone. He was afraid of the dark. He became hyper-vigilant and jumpy."

Her Honour made an award for nervous shock in relation to B, with an addition for "adverse impacts".

[7] The judge then referred to Ms Boast's report in relation to the applicant, and the psychologist's opinion that the applicant experienced post-traumatic stress disorder for three months or more, and that:

> "After the offending had come to light, [the applicant] had changed from a happy child to someone who was angry, aggressive and violent. For two years he was fearful that the respondent would find him and hurt him for making the complaint. He was afraid of particular cars or people who reminded him of the respondent. He was said to have had nightmares and would often think about those things. He was unsettled."

The judge referred also to the psychologist's reference to "adverse impacts" on the applicant, being "the loss of innocence, with more advanced sexual knowledge and low self-esteem".

[8] Her Honour was, however, not satisfied that Ms Boast addressed in her report the relationship between the commission of the offences upon the applicant, which the judge described as "only one incident of touching five years ago … not said to have been accompanied by threats or other violence", and the applicant's subsequent condition. During the submissions, the learned judge put the matter in this way:

> "… a more significant issue is how can it be said that the one incident of touching is responsible or significantly, materially contributed to post-traumatic stress when the material is that every day he was being choked up to six times a day by his brother, his brother tried to drown him. His mother says that he is doing these other sexual acts on him … that's a much more direct and understandable explanation (for what he is complaining of now)."

[9] The judge was additionally critical of the psychologist's report because it made no mention of a serious matter raised by the applicant's mother, which was "sexual acting out … sexualised behaviour between the boys and towards others … a serious allegation of the corruption of the boys".

[10] The possible contribution of factors other than the respondent's offending to the applicant's subsequent condition was explored through the psychologist's oral evidence. The "other" factor was the badly traumatised elder brother's subsequent treatment of the applicant, such as choking the younger applicant up to six times a day, trying to drown the applicant in a swimming pool, "terrorising" the applicant

"with serious violence on a daily basis". The judge was concerned that the adverse impacts on the applicant may have been referable to the treatment of him by B, rather than the commission of the offences, such that the applicant was in the position of a "secondary victim".

[11] The judge gave this account of the psychologist's treatment of the question of causation:

> "Ms Boast's evidence was that the principle cause of the psychological impact on [the applicant] could be said to be the offending by the respondent. She said she maintained that position because [the applicant] had spoken to her in terms of his anger towards the respondent rather than his brother. Ms Boast, however, went on to say, whether that was a result of what was happening within the family and its reaction to discovery of the abuse, or whether it was a reaction to [the applicant's] own abuse, was impossible for her to tell. As I have said, the applicant bears the onus."

[12] The learned judge asked the psychologist about the effect on the applicant of this conduct towards him, which was

> "of a pretty serious nature after the disclosures … B would get [the applicant] around the throat and squeeze, he would often get him on the floor and kneel on him, choking him … five or six times a day … he attempted to drown [the applicant] … constant and serious violence … one would ordinarily think would have a serious impact on a child."

The psychologist accepted that. The judge then queried:

> "… [H]ow do you determine that that one incident of touching when [the applicant] was only five has caused him to have the post-traumatic stress disorder and other problems as opposed to dealing with what was the aftermath of his brother's abuse and the way in which his brother acted out?"

The psychologist relied essentially on the circumstance that the applicant spoke in terms of anger in relation only to the respondent. But in the end she said this:

> "… [I]t would be impossible to completely distinguish which effects were because of the abuse and which effects were because of changes that happened afterwards … [W]hether those are because of what happened to him or because of the confusion he then saw appear in the rest of his family, that's impossible to tell."

[13] Her Honour concluded that she was not satisfied "that the severity of [the applicant's] problems can be fairly attributed to the offending against him", and took the view that the applicant's condition resulted from "a number of different factors", in other words going beyond the offending itself. Doing her best to piece out the role of the commission of the offences, the judge held:

> "Here the traumatic events after disclosure of the offences appears to so greatly overshadow the incident of offending, that it is impossible for me to identify the two offences against [the applicant] as having any significant contribution to his post-traumatic stress disorder."

[14] Her Honour therefore made no allowance for nervous shock. She then referred to difficulty in apportioning the adverse impacts to the offending itself, and concluded

that she should allow three per cent, leading to the award of $2,250. (Because of the difference between the concept of nervous shock, and the less grave "adverse impacts", there is no necessary inconsistency in that approach.)

[15] Counsel for the applicant essentially submitted that the judge erred in not accepting the full purport of the evidence given by the psychologist. But it is trite to observe that the judge was not obliged to accept such of the evidence of the psychologist as supported the applicant's claim at its highest level. I put it that way because one cannot ignore the psychologist's acknowledgement in her oral evidence that she found it impossible to relate the impact on the applicant to the offending rather than the situation within the family, or the other way around. Because of that acknowledgement, it fell to the judge to do her best to examine the extent to which the applicant's condition was brought about by the offending itself. In doing that, her Honour contrasted the limited albeit serious extent of the offending on the one hand, with the "greatly overshadowing" violence visited upon the applicant by his badly traumatised elder brother, leading to her Honour's conclusion that "only a limited impact" on the applicant was attributable to the offending.

[16] Her Honour's consequent factual conclusions were open, and she reached them by following a course which was plainly open to her. Primary judges are indeed admonished to give careful consideration to the evidence adduced in these cases, especially because of the (usual) absence of an active contradictor. As to the obvious point that the feature that evidence is given by an expert does not mandate its acceptance, even absent "competing" expert evidence, and the obligation upon courts to examine such evidence with care, as it does evidence given by lay witnesses, see *Osgood v Queensland Police Service.*[1]

[17] There is a further point. Her Honour initially referred to the need for "material" contribution between the offence and the injury, which is consistent with *SAY v AZ.*[2] Counsel referred to the judge's subsequent references to injury "fairly attributed" to the offence, and an offence which made "significant contribution" to the injury. There is no reason to think that in those later references, her Honour was referring to anything different from the requirement as initially expressed.

[18] For these reasons, an appeal would have no reasonable prospect of success, and the application for leave to appeal should be refused. There should be no order as to costs. (The respondent did not appear, and the Attorney-General, who appeared *amicus curiae*, did not seek costs.)

[19] **FRASER JA:** I agree with the reasons for judgment of the Chief Justice and the order proposed by his Honour.

[20] **PHILIPPIDES J:** I agree with the order proposed by the Chief Justice for the reasons outlined in his reasons for judgment.

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1 [2010] QCA 242, para [15].

2 [2007] 2 Qd R 363, 370.