08/10; [2010] VSC 57

SUPREME COURT OF VICTORIA

BVB v VICTIMS OF CRIME ASSISTANCE TRIBUNAL

Cavanough J

18 September 2009; 5 March 2010

CRIMINAL INJURIES COMPENSATION – CHILD PERPETRATORS – CHILD CLAIMANT – SCHOOL ENVIRONMENT – VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL FOUND APPELLANT NOT THE VICTIM OF CRIMINAL ACTS BECAUSE PERPETRATORS LACKED CRIMINAL INTENT – TRIBUNAL OBLIGED TO FIND BEHAVIOUR SUFFICIENT FOR DEFINITION OF "CRIMINAL ACT", PROPERLY CONSTRUED – APPEAL ALLOWED: *VICTIMS OF CRIME ASSISTANCE ACT* 1996, SS1(1), (2), 3, 4, 7(1). 8(1), 8A, 25, 31, 50, 59(1)(a); *VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT* 1998, S148.

1. Where an applicant for an award of assistance had been affected by repeated incidents of bullying and abuse during primary school and experienced significant anxiety and emotional distress, the Tribunal was obliged to determine that the perpetrators intended to do what they did and to achieve the results they achieved. This constituted the relevant ordinary mental element in the case of each alleged offence and this was sufficient for the purposes of the definition of "criminal act" in s3 of the *Victims of Crime Assistance Act* 1996 ('VCAA Act').

2. It is true that the law conclusively presumes that a child under the age of 10 years cannot commit an offence. And it is also true that the common law includes the principle of *doli incapax*, whereby knowledge of wrongfulness by a child under the age of 14 years is required to be proven beyond a reasonable doubt; and that that principle is supported by a rebuttable evidentiary presumption in favour of the child. However, at least insofar as it relates to age, the very point of that part of the definition of "criminal act" in s3 of the VCAA that is expressed in hypothetical terms is to require the court or tribunal to disregard any legal principles or protections specially appurtenant to age that would or might apply outside the confines of the VCAA. This the Tribunal failed to do.

CAVANOUGH J:

The proceeding, the parties and the suppression order

1. This is an appeal, on questions of law, under s148 of the *Victorian Civil and Administrative Tribunal Act* 1998 against a decision made by the Victorian Civil and Administrative Tribunal ("the Tribunal") in its review jurisdiction.

2. The Tribunal affirmed a decision by the respondent, the Victims of Crime Assistance Tribunal ("VOCAT"), to refuse the applicant's application under s25 of the *Victims of Crime Assistance Act* 1996 ("the VCAA") for an award of assistance under s50 of the VCAA. Leave to appeal was granted by Associate Justice Daly on 15 May 2009.

3. The appellant is a child who sues by her litigation guardian. The order granting leave to appeal also provides, in effect, that the publication of the name of the appellant or any information which may lead to her identification is prohibited until further order. I have not been asked to interfere with that prohibition. It remains in place indefinitely, subject to any further order. Further, I note that the VCAA makes provision for the protection of the identity of individuals, especially child applicants.[1] In the Tribunal's reasons, pseudonyms are used instead of names for the appellant and the other children referred to in the evidence. Other identifying details are also masked. I will do likewise.

The facts established at VCAT

4. It was common ground before me that the Tribunal can be taken to have accepted all of the evidence given or adduced by or on behalf of the appellant in the Tribunal as to the relevant events. No contrary evidence was led before the Tribunal by VOCAT (which was represented by counsel). An attenuated account of the evidence is set out in the Tribunal's reasons for decision. It is desirable, however, that the facts established by the appellant in the Tribunal be set out more fully and with greater attention to chronological order.

5. The appellant used to attend a certain Victorian State primary school. Another girl, K, was in the same year. K was much the same age as the appellant. During years 2 and 3 they were in the same class. Towards the end of Year 2, when each was approaching 8 years of age or thereabouts, K began verbally abusing the appellant, swearing at her and insulting her.

6. In Year 3 K escalated things. As well as continuing to swear at the appellant and insult her, K repeatedly threatened to kill the appellant; she threatened to have her killed by K's uncles; she menaced her with scissors; she menaced her with a broken bottle; and frequently she punched her, kicked her, pinched her and spat at her. The appellant was put in great fear. She suffered nightmares. She was reluctant to go to school. She and her parents complained to the school authorities repeatedly. Her parents reported K's conduct to the police. As a result, the police attended the school and gave a general anti-bullying presentation.

7. In Year 4, after further complaints by the appellant's parents, the school placed K and the appellant in different classes. Nevertheless K often entered the appellant's classroom and defaced her belongings by writing foul and insulting words on them. On one occasion, while the appellant was riding a bicycle, K rode up beside her, pinched her and scratched her on the lower arm and swore at her. During the second half of that year, K and certain other female students, including J, would regularly chase the appellant at lunch time and spit on her.

8. In Year 5, on a number of occasions, K held up her clenched fist to the appellant's face and then laughed. This caused the appellant great fear. She thought that K was going to hit her on each occasion. During choir, K was placed behind the appellant and would often kick her in the back of the leg, punch her in the back and push her in the back. Towards the end of the year J pushed the appellant into a peg rack, causing bruising to her back.

9. In Year 6 another female student, S, together with J and others, would often swear at and insult the appellant. Nor did K leave the appellant alone. On one occasion, during volleyball, K hit the appellant with a hat cord and verbally abused her. In the middle of the year S slammed the appellant hard into a door frame. In early July the appellant was doing a routine on monkey bars in the gymnasium when S came up unseen behind her and flipped her over so that she fell on her back partly on a thin mat and partly on a concrete floor. This caused the appellant back pain that lasted more than a week.

10. The incident in the gymnasium was the last straw for the appellant's parents. They withdrew the appellant from the school and sent her elsewhere to complete Year 6. This involved cost.

11. For the first two years of her secondary schooling the appellant was sent to a private school that her parents could ill afford. This was done to enable the appellant to avoid K, S, J and certain others who were progressing to the State high school that the appellant would otherwise have attended.

12. The Tribunal noted that a psychologist had concluded that the appellant had been "affected by the repeated incidents of bullying and abuse during primary school" and that she continued "to experience significant anxiety and emotional distress". In her evidence the psychologist also said that the appellant's symptoms appeared to be consistent with a "generalised anxiety disorder"; that the appellant's paediatrician had made such a diagnosis; and that the disorder was caused by an accumulation of the incidents at the primary school.[2]

The legislative framework

13. The Tribunal made little or no reference to the legislative framework. However it is desirable to summarise that framework at this stage.[3]

14. According to s1(1) of the VCAA, the purpose of the VCAA is to provide assistance to victims of crime.

15. An objective of the VCAA is to "allow victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources": VCAA, s1(2)(c).

16. Pursuant to s8(1) of the VCAA, financial assistance may be awarded to a "primary victim". Section 7(1) of the VCAA defines a "primary victim" as "a person who is injured or dies as a direct result of an act of violence committed against him or her".

17. According to s3(1) of the VCAA, an "act of violence" means "a criminal act or a series of related criminal acts"; and a "criminal act" is defined to mean:

> "An act or omission constituting a relevant offence or that would constitute a relevant offence if the person had not been incapable of being criminally responsible for it on account of—
> (a) age, mental impairment or other legal incapacity preventing him or her from having a required fault element; or
>
> (b) the existence of any other lawful defence; ... ."

18. A "relevant offence" is defined in s3(1) of the VCAA to mean (relevantly to this appeal):

> "An offence, punishable on conviction by imprisonment, that involves an assault on, or injury or threat of injury to, a person ... ."

19. Section 31 of the VCAA provides:

> "Any question of fact to be decided by the Tribunal on, or in relation to, an application under this Act ... is to be decided on the balance of probabilities."

20. VOCAT, the respondent, is empowered to make awards of financial assistance if satisfied, amongst other things, that an act of violence has occurred: VCAA s50(1).

21. Section 59(1)(a) of the VCAA provides for applications to be made to the Tribunal for review of a final decision of VOCAT refusing to make an award of financial assistance.

The Tribunal's reasoning

22. The Tribunal commenced its reasons for decision by quoting from a policy document published by the Victorian Education Department which stated that:

> "(A) situation where a student feels unsafe in school because of bullying is not tolerated in Victorian Government schools."

23. The Tribunal then set out in summary form, and implicitly accepted, both the appellant's account of her experiences at the relevant schools and the psychologist's evidence.

24. The Tribunal continued:

> "9. The applicant has not made her claim on the basis of bullying but on the grounds of threats to kill and assault.
> 10. Assaults are no less assaults because they are characterised euphemistically as bullying when they occur in a school yard. Somewhere a line is to be drawn between characteristic 'rough and tumble' and actual criminal behaviour.
> 11. A threat to kill by a 10 year old child is more likely to be hollow than to be made with actual criminal intent. Indeed, it is difficult to impute criminal intent to children of the age of those involved in this case. That difficulty is given statutory recognition in the *Children, Youth and Families Act* 2005 in which it is provided that it is 'conclusively presumed that a child under the age of 10 years cannot commit an offence'.
> 12. Some of the incidents complained of occurred when the applicant herself was 10 and 11 and, more likely than not, those students who mistreated her would have been much the same age. Many incidents occurred when the applicant was under the age of 10 years.
> 13. As to the incidents of physical abuse, having regard to the tender age of the perpetrators, I cannot be satisfied on the balance of probabilities, that they amounted to criminal acts rather than bullying. I think it unlikely that they were motivated by criminal intent.
> 14. The respondent Tribunal refused the applicant's application for assistance being not satisfied that any criminal act had occurred. I am of the same opinion and, accordingly, I affirm the decision of the respondent.
> 15. I think it should be said however that, having heard the evidence of the applicant and her younger sister, I formed the view that they were young ladies of impressive manner and witnesses of truth. Perhaps the quiet manner of the applicant observed by the psychologist was too much for

> the bully to resist and too little to compel more vigorous action on the part of those in authority. One cannot be other than surprised that so much harassment was [meted] out to a quiet child for so many years without more active intervention calculated to protect her in application of the declared policies of the Department."

25. Nothing else is contained in the reasons of the Tribunal. It did not set out or analyse any of the provisions of the VCAA.

The grounds of appeal

26. BVB's grounds of appeal are expressed as follows:

> "1 The Tribunal misdirected itself as to law, stating that it could not be satisfied on the balance of probabilities that criminal acts had been committed against the Applicant in circumstances where it found it could not be satisfied that the perpetrators had the requisite criminal intent. The Tribunal ought to have found on the proper construction of the Act that the Appellant was the victim of criminal acts and further:
>
> 2 (a) 'criminal act' is defined by section 3(1) of the Act as an act or omission constituting a relevant offence or that would constitute a relevant offence if the person had not been incapable of being criminally responsible for it on account of age or other legal incapacity;
>
> (b) that as the Tribunal found that the Appellant had been regularly subjected to physical and verbal bullying including threats to kill or injure, punching, kicking, pinching and spitting either it should have found that the conduct towards the Appellant constituted criminal acts or alternatively have found that the conduct would have constituted criminal acts had the alleged offenders not been incapable of being criminally responsible for it on account of their age or other legal incapacity.
>
> 3 The Tribunal erred in law in having regard to an irrelevant factor namely bullying policies of the Department of Education and Training in circumstances where the Act stated the basis upon which the Applicant was entitled to awards of financial assistance and/or special financial assistance."

VOCAT's initial response to the appeal

27. In written submissions filed in advance of the hearing in this matter, VOCAT commenced its response to ground 1 by saying:

> "BVB claims that the [Tribunal] misdirected itself as to law, when it had found that it could not be satisfied that the perpetrators had the requisite criminal intent. Necessarily implicit in that claim is the proposition that a 'criminal act' for the purposes of the [VCAA] does not include as a necessary component, in the case of a young person under the age of 10 years, criminal intent or *mens rea*."

That implicit proposition was wrong, VOCAT submitted. Rather, said VOCAT, it is necessary to establish criminal intent or *mens rea* even in the case of a young person under the age of 10 years. That submission was developed at some length.

28. As to ground 2, VOCAT's written submissions asserted that to the extent that ground 2 raised any question of law it was repetitive of ground 1; and to the extent that ground 2 invited the Court to revisit the Tribunal's findings of fact, the ground raised no question of law for the Court's consideration.[4]

29. As to ground 3 the respondent submitted that the references in the Tribunal's reasons to the Department's policies on bullying played no part in the Tribunal's reasoning on the critical aspect of the review, namely whether it was satisfied that BVB had been injured as a direct result of an "act of violence", being a "criminal act".

The parties' positions at the hearing

30. At the hearing before this Court, Mr Uren QC appeared with Mr Ingram for the appellant. Mr Uren concentrated on two points. First, he submitted that in the case of children whose age prevented them from being criminally responsible for the act or omission complained of, there was no need to establish criminal intent or *mens rea* at all. Mr Uren said that the same would apply in the case of a person who was suffering mental impairment or who was subject to any other "legal incapacity preventing him or her from having a required fault element" within the meaning of paragraph (a) of the definition of "criminal act" in the VCAA. Second, as an alternative, Mr Uren submitted that on the uncontradicted evidence before the Tribunal and on its own findings

of fact the Tribunal was obliged to determine that at least the principal perpetrators, K, J and S, intended to do what they did and to achieve the results they achieved; that this constituted the relevant ordinary mental element in the case of each alleged offence; and that this was sufficient for the purposes of the definition of "criminal act" in s3 of the VCAA.

31. Mr Hanks QC (who appeared with Ms Latif for the respondent) disputed Mr Uren's first point, but effectively conceded the soundness of Mr Uren's second or alternative point.[5] If I were to accept the correctness of the concession, there would be no need for me to consider Mr Uren's first point.

Consideration of the issues

32. In my view Mr Hanks' concession was correct.

33. I say so notwithstanding that, in an appeal confined to questions of law, it is a strong thing to conclude that the court or tribunal below was constrained to make a particular finding of fact that the Tribunal did not make.[6] I acknowledge also that to the extent, if any,[7] that the concept of the burden of proof was applicable before the Tribunal, the burden of proof lay on BVB, with the result that, to that extent, the challenge she faced may have been increased.[8]

34. However, although the Tribunal did not say so, I think it probably was in fact satisfied about basic intent. If not, it plainly should have been. The allegations by BVB against K, S and J were allegations of crimes the commission of which do not necessitate sophisticated thinking. Mainly they were allegations of assaults (including batteries) and threats to kill. There was no suggestion that any of the incidents occurred accidentally. The evidence clearly showed hostility towards BVB on the part of K, S and J at the relevant times. With respect, it is not to the point to say, as the Tribunal did, that a threat to kill by a 10 year old child[9] is more likely to be hollow than to be made with actual criminal intent. It did not matter whether K had the means or the intention of actually carrying out her threats, unless her lack of means and intention were apparent to BVB, and there is no suggestion of that. Indeed, the evidence showed that K fully intended by her threats to put BVB in fear of her life (and she did so). Similarly, according to the uncontradicted and accepted evidence, on each occasion when K, J or S physically hurt BVB by punching, kicking, pinching, pushing or scratching her, they obviously intended to do what they did and they obviously intended to hurt BVB.

35. It is true that the law conclusively presumes that a child under the age of 10 years cannot commit an offence.[10] And it is also true that the common law includes the principle of *doli incapax*, whereby knowledge of wrongfulness by a child under the age of 14 years is required to be proven beyond a reasonable doubt; and that that principle is supported by a rebuttable evidentiary presumption in favour of the child.[11] However, at least insofar as it relates to age, the very point of that part of the definition of "criminal act" in s3 of the VCAA that is expressed in hypothetical terms is to require the court or tribunal to disregard any legal principles or protections specially appurtenant to age that would or might apply outside the confines of the VCAA. This the Tribunal failed to do.

36. I do not need to rule on Mr Uren's broader, principal submission that the effect of the "hypothetical" part of the definition is to set aside, for the purposes of crimes compensation, every mental element of the offence where claims are made in respect of alleged perpetrators who are under 14 years of age or who are relevantly mentally impaired or who are otherwise subject to a "legal incapacity" within the purview of the definition. My present inclination is to doubt the correctness of the submission. To accept it would seem to be to accept that purely accidental harm caused by a child (or by a person with a relevant mental impairment or by a person otherwise under a relevant legal incapacity) would be compensable. That seems unlikely. It would make more sense to treat the definitions as requiring the court or tribunal to disregard only the relevant incident or incidents of the particular legal incapacity concerned. For example, in the case of age (like the present case), the relevant incident of the legal incapacity is a (conclusively or non-conclusively) presumed inability to distinguish right from wrong.[12] That is not a "fault element"[13] in ordinary criminal cases relating to persons of sound mind, although it is part of what needs to be inquired into in relation to the modern equivalent of the defence of insanity.[14] Whether involuntary conduct could give rise to compensation is a related question.[15] However, I do not think it would be appropriate to express a concluded view on these questions in this case.

Disposition of the appeal

37. When it became apparent at the hearing that the Tribunal's decision was likely to be set aside on one basis or another, it was suggested that the parties might be able to agree on orders that would obviate the need for a further hearing at the Tribunal. Some two months later the Court was informed that no such agreement could be reached.

38. In the circumstances of this particular appeal under s148 of the *Victorian Civil and Administrative Tribunal Act* 1998 it would not be appropriate for me to step into the shoes of the Tribunal.[16] Discretionary and other value judgments remain to be made by the Tribunal before any award of assistance can be made. Even if the preconditions set out in s50(1) of the VCAA are met, the grant of an award of assistance appears to remain discretionary.[17] In addition, assessments may need to be made about the extent of any harm suffered by BVB as a result of the conduct in question. Issues may arise as to whether the incidents complained of amounted to 'related' criminal acts within the meaning of s4 of the VCAA. Issues might also arise with respect to BVB's claim under s8A of the VCAA for special financial assistance on the basis of "significant adverse effects". Further, as to part of the claim, there appears to be an unresolved application for an extension of time.[18]

39. The parties have not yet addressed me on the question whether, on the remittal, the Tribunal should be free to hear further evidence or on the question whether the Tribunal should be reconstituted for the rehearing: see s148(7)(c) of the *Victorian Civil and Administrative Tribunal Act* 1998.

Orders

40. Subject to any submissions Counsel may wish to make as to form, I propose to make orders to the following effect:

> (1) The appeal be allowed.
>
> (2) Paragraph 1 of the order made by the Victorian Civil and Administrative Tribunal (VCAT) on 16 March 2009 in proceeding no G770/2008 (whereby the Tribunal affirmed a decision of the respondent made on 29 August 2008) be set aside.
>
> (3) The applicant's application to VCAT for a review of the respondent's decision is remitted to VCAT to be reheard and redetermined in accordance with the reasons for judgment of this Court.

41. I will hear counsel as to the directions that should be given in relation to further evidence before the Tribunal and as to whether the Tribunal should be reconstituted and as to costs.

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[1] See ss42, 42A and 43 and especially s42(3)(a)(ii).

[2] Appeal Book, p C 152 lines 37-46; see also at C 155 lines 3-35.

[3] As to the history of the relevant provisions, see *Bentley v Furnan* [1999] VSC 481; [1999] 3 VR 63; (1999) 30 MVR 241 (Ashley J).

[4] Citing *S v Crimes CompensationTribunal* [1998] 1 VR 83 at 86, 88, 89 (Phillips JA); and comparing *Vetter v Lake Macquarie City Council* [2001] HCA 12; (2001) 202 CLR 439 at [24]; (2001) 178 ALR 1; (2001) 75 ALJR 578 (Gleeson CJ, Gummow and Callinan JJ).

[5] Transcript p89 lines 7-13. He referred in this regard to p411 of the 1984 Report of the Victorian Government's Child Welfare Practice and Legislation Review Committee, better known as the *Carney Report*.

[6] See *Ericsson Pty Ltd v Popovsk* [2000] VSCA 52; (2000) 1 VR 260 at 265 per Brooking JA and see also the other cases collected in *South East Water Ltd v Transpacific Cleanaway Pty Ltd* [2010] VSC 46 at [16], footnote 52.

[7] I need not and do not express any view as to whether any party to a review by the Tribunal of a decision of VOCAT bears any onus of proof on any issue: see Pizer, *Victorian Administrative Law Service* [VCAT 98.240].

[8] See footnote 5.

[9] In fact, mainly, the threats to kill were made when K was about 8 years old.

[10] *Children, Youth and Families Act* 2005, s344.

[11] *R v ALH* [2003] VSCA 129; (2003) 6 VR 276 at 297 [84] - 298 [87] (CA); cf *R v JTB* [2009] UKHL 20; F. Bennion, "*Mens rea and defendants below the age of discretion*" [2009] CrimLR 757.

[12] See *Re C (A Minor) v DPP* [1995] UKHL 15; [1996] AC 1 at 26; [1995] 2 All ER 43; [1995] RTR 261; [1995] Fam Law 400; [1995] Crim LR 801; [1995] 2 WLR 383; [1995] 2 Cr App R 166; (1995) 159 JP 269 per Lord Lowry; Bennion, *op. cit.* at 763.

[13] "Fault element" is not a term defined in the VCAA or much used in Victorian legislation (but see s61(8) of the *Road Safety Act* 1986). It is, however, a term of importance in the Commonwealth *Criminal Code*: see *R v Wei Tang* [2008] HCA 39; (2008) 237 CLR 1 at 9 [5] and at 24 [46]-[49]; (2008) 249 ALR 200; (2008) 82 ALJR 1334; (2008) 187 A Crim R 252. There, it refers to specified mental elements in relation to particular "physical elements" of Commonwealth offences, namely intention, knowledge, recklessness or negligence.

[14] See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s20(1)(b).

[15] Compare *Gulcan v Victims of Crime Assistance Tribunal* [2007] VCAT 642; *Jafaro v Victims of Crime Assistance Tribunal* [2009] VCAT 2372.
[16] See Pizer, *Victorian Administrative Law*, [VCAT 148-500] and cases there cited.
[17] See *Interpretation of Legislation Act* 1984, s45.
[18] See AB, pC 165, lines 24-25.

APPEARANCES: For the appellant BVB: Mr A Uren QC with Mr A Ingram, counsel. Cahills, solicitors. For the respondent VOCAT: Mr P Hanks SC with Ms E Latif, counsel. Victorian Government Solicitor's Office.
