DISTRICT COURT OF QUEENSLAND

CITATION:	*Bottoms v Rogers* [2006] QDC 080
PARTIES:	**TIMOTHY DAVID REIS BOTTOMS** Appellant **V** **WENDY KAY ROGERS** Respondent
FILE NO/S:	Appeal 4204/05
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Brisbane
DELIVERED ON:	13 April 2006
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2006
JUDGE:	McGill DCJ
ORDER:	**Appeal allowed; protection order set aside; order in lieu that the application to the Magistrates Court be dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – Duty of court below to give reasons – relevant facts not found – appeal allowed FAMILY LAW – Domestic Violence – what amounts to an act of domestic violence *Domestic and Family Violence Protection Act* 1989 ss 11(1), 20(1), 65. *Bawden v ACI Operations Pty Ltd* [2003] QCA 293 – followed. *Crystal Dawn Pty Ltd v Rudruth Pty Ltd* [1998] QCA 373 – followed. *Dowse v Gorringe* [2004] QDC 477 – followed. *Martin v Rowling* [2005] QCA 128 – followed. *McLennan v McLennan* [2003] QDC 398 – followed. *Mifsud v Campbell* (1991) 21 NSWLR 725- applied. *R v Byrant* [1984] 2 Qd R 545 – followed. *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 – applied.

COUNSEL: J. Korn for the appellant

The respondent did not appear

SOLICITORS: Bottoms English solicitors for the appellant

The respondent was not represented

[1] This is an appeal under s.63 of the *Domestic and Family Violence Protection Act* 1989 (the Act) from the decision of a magistrate on 18 October 2005 to make a domestic violence order (a protection order) against the appellant. By s.65 the appeal is "by way of rehearing on the record and under the rules of court applying to the District Court, or in so far as those rules cannot be applied to such appeals, in accordance with direction given by a District Court judge."

[2] The respondent did not appear when the matter was called on for hearing, although the court had given her notice that it had been set down for that day, and she had previously filed a substantial "respondent's outline of argument". Much of this document, however, appears to be in the form of evidence rather than any argument relating to an appeal. The appeal is by way of rehearing on the record, and even if fresh evidence could be admitted under the relevant rules of court[1], it could only be admitted on the basis that the evidence complied with the usual rules for admission of evidence of the first time on appeal.[2] There is certainly no general right of parties to put further evidence before the court on an appeal. Most of the material contained in this document appears to be really an attempt to put fresh evidence before the court, in circumstances where it is not shown that the fresh evidence rules have been satisfied. It must therefore be disregarded.

[3] The outline included some comment on the trial on 18 October 2005, but this was expressly set out as "clarification" of the evidence given, rather than submissions based on what was actually said at that time. There was at p11 a reference to the relevant parts of the legislation, and at p12 a summary of submissions, although those submissions appear to be based, at least in part, on the fresh evidence which I cannot receive. I have read the submissions to the extent that they are based on the material properly before me and I have taken them into account. The submissions also attach a number of documents, most of which were not before the magistrate and are therefore not to be considered.

Legislation

[4] Under s.20(1) of the Act, a court may make an order against a person if the court is satisfied that:

> "(a) the person has committed an act of domestic violence against the other person and a domestic relationship exists between the two persons; and
>
> (b) the person –

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1 UCPR v 766(i)(c), applied by r.785(1).

2 *Clarke v Japan Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 at 408; *Walker v Davlyn Holmes Pty Ltd* [2003] QCA 565 at [11]

(i) is likely to commit an act of domestic violence again; or

(ii) if the act of domestic violence was a threat - is likely to carry out the threat."

[5] Domestic violence is defined in s 11(1) as:

"(a) wilful injury;

(b) wilful damage to the other person's property;

(c) intimidation or harassment of the other person;

(d) indecent behaviour to the other person without consent;

(e) a threat to commit an act mentioned in paragraphs (a) to (d)."

[6] There was no dispute in the present case that there was a domestic relationship between the parties; they are the parents of a child: s 12(2)(b). In order to be entitled to make an order under s 20(1), the court had to be satisfied of the two other matters identified in that subsection.

Failure to give reasons

[7] The first ground of the appeal advanced by the appellant was that the magistrate failed to give reasons for the decision. The transcript reveals that the only reasons given by the magistrate were as follows:

> "It seems to me in all the circumstances an act of domestic violence have occurred in the past. [*sic*] There were certainly intimidation and harassment events that occurred between the parties to the application in the past. I am satisfied that that amounted to domestic violence and that it is incumbent on the court to make an order in an attempt to prevent it from occurring in the future."

[8] This occurred following a trial of a contested application for a protection order. There was a dispute as to both of the matters in respect of which the magistrate had to be satisfied in order to make the order. In those circumstances, in my opinion, in order to give proper reasons for making the order it was necessary for the magistrate least to make the findings of fact as to the act or acts of domestic violence which had occurred and which were relied on as satisfying paragraph (a), and to make the findings of fact as to the basis on which paragraph (b) was found to be satisfied. In the present case the magistrate has not made findings as to what incident occurred, what the content of that incident was, and even whether, let alone how, it amounted to intimidation and harassment. The reasons imply but do not actually express findings that there were other, unidentified, incidents of domestic violence. In relation to the second requirement, there are simply no findings at all of either of the requirements of paragraph (b), let alone any explanation of the basis on which any such finding was made.

[9] A failure to give proper reasons can amount to an error of law.[3] The question of what is sufficient to amount to proper reasons depends on the nature of the matter, and the extent of the controversy. When a matter turns on a single issue, it may even been possible to give adequate reason simply by finding for one party or the other. But commonly that will not be the case, and in a matter such as this in my opinion it is important to identify what particular facts were relied on as founding the jurisdiction to make the order. That is necessary in order to enable the unsuccessful party to give proper consideration to an appeal, and for this court properly to decide any appeal.[4] That has not been done in the present case. Accordingly there was an error of law and the appeal must be allowed.

[10] Under s.66 of the Act, there is no power to send the matter back for a rehearing, although the court has power to make such order or decision as it considers should have been made. It is therefore necessary for me to consider the evidence and determine what it shows. The matter is made more difficult by the fact that neither party was represented before the magistrate, although the appellant did not give evidence so there appears not to be any issue where there was a conflict of evidence to be resolved.

Was there domestic violence?

[11] There were a number of incidents mentioned by the respondent in her evidence. She said at p5 that on 21 July 2005 the appellant came up to her in a supermarket and said, "Is it 46 or 47?", something she understood to be a reference to her birthday which was approaching. She said that this came as a surprise to her, and when she looked around he was just frowning right into her face. In response to some questions from the magistrate she said that there had been what she described as a fairly casual intimate relationship between the parties for a period of about six years, and the relationship for her ended that day: p6.

[12] She then spoke at p10 of an incident, apparently on 7 January 2005, when their child was sick and the appellant had offered to come over and look after the child for a time. There was some disagreement about who was going to prepare dinner, and ultimately she bought some prawns which the appellant peeled and which she then cooked. While they were eating this she complained to the appellant about his having failed to de-vein the prawns, and said that he responded by yelling at her, saying that she was trying to control him, that if their son wasn't present he would tear shreds off her, and he was going to get her or words to that effect; he was going to pull out all stops to make her life miserable for some time, and he then left.

[13] At p11 she referred to an occasion when they were going out to breakfast together, and the appellant had sat in his car while she collected the son's belongings and got to the car. At that point she criticised him for just sitting in the car when she had all this to do and said that in response he screamed at her and yelled at her and then drove off. She referred to another occasion when he had been staying at her place

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3 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Mifsud v Campbell* (1991) 21 NSWLR 725; *Crystal Dawn Pty Ltd v Rudruth Pty Ltd* [1998] QCA 373 at [15]; *Bawden v ACI Operations Pty Ltd* [2003] QCA 293 at [29]; *Martin v Rowling* [2005] QCA 128 at [3] per McMurdo P, [80] per Mullins J

4 *Carlson v King* (1947) 64 WN (NSW) 65 at 66; *Beale v GIO of NSW* (1999) 48 NSWLR 430 at 444; *Martin v Rowling (supra)*

and she suggested in the morning that it might be good if he stayed at his own place more, and according to her he responded by screaming at her: p11.

[14] There was then evidence of a disagreement about changing the arrangement for contact with the son because she wanted to have him at her birthday party on a particular weekend when it was the appellant's turn to have him, but there was nothing in that incident which could possibly amount to domestic violence. However, she said that after the party she had been sitting on her porch with some friends and had seen the appellant sitting in his car in the street and that he then quickly drove off: p12. She also said under cross-examination that there was one occasion when she was at a shopping centre when he drove past and slowed the car, frowned at her and leered at her out of the car: p17. She also complained that he had berated her in public and to her face on several occasions, but no further details of this were given: p6.

[15] Under cross-examination she said in relation to the incident at the shopping centre that she did not say that the appellant had done that on purpose: p17. Apart from the respondent, there was evidence from one witness, Ms Eastwell, who spoke about an occasion when the appellant had, in the absence of the respondent, said the respondent was denying him access to their child, said something disparaging about her mental state, said that he would take the matter further in terms of legal recourse and that the respondent would really regret it if it came to court: p20. She was not cross-examined.

[16] The appellant did not give evidence, though he did say, both in the course of cross-examining the respondent and in submissions, that he was not having anything more to do with her, and was going to leave Brisbane: p17, p26.

[17] None of the evidence was evidence of wilful injury, wilful damage to the respondent's property, or indecent behaviour towards the respondent without consent. The respondent in her outline submitted that the statement made to Ms Eastwell was indecent behaviour, and that the behaviour of the appellant in the supermarket was indecent. In my opinion plainly it was not. In my opinion for the behaviour to be indecent there has to be something about it contrary to ordinary community standards of sexual or bodily decency, given the time, place and circumstances[5], and clearly that was not present. It does not simply mean unwelcome or impolite or inappropriate.[6]

[18] The real issue was whether any or all of the behaviour amounted to intimidation or harassment. The examples given by the Act include positioning oneself outside the residence, though it is not at all clear that one instance of that would amount to intimidation or harassment. Intimidation refers to a process where the person is made fearful or overawed, particularly with a view to influencing that person's conduct or behaviour.[7] There can, I think, be a single incident of conduct which amounts to intimidation, but as I have explained elsewhere, I do not think that

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5 *R v Byrant* [1984] 2 Qd R 545: in my opinion the narrow interpretation adopted by the majority, requiring lewdness or moral turpitude, applies here, because of the effect of ss17, 18 and 80, which criminalise an act of domestic violence if an order is in place. See also *Coleman v Power* (2004) 78 ALJR 1166 at 1170 per Gleeson CJ

6 *Byrant (supra)* at p549 per Sheahan J

7 The Australian Concise Oxford Dictionary (2nd Ed) p592; Shorter Oxford English Dictionary (5th Ed) p1409

something which does not in fact intimidate could amount to intimidation.[8] Harassment on the other hand involves a repeated or persistent form of conduct, which is annoying or distressing rather than something which would incite fear. The other consideration is that I think that the matter needs to be of some significance to qualify as domestic violence, bearing in mind the other elements of the definition, and the examples that are given for paragraph (c) in the Act.

[19] Turning to particular instances referred to in the evidence, in my opinion it is clear that the incident in the supermarket and the incident at the shopping centre are not alone examples of intimidation or harassment. It was not part of the respondent's case that this involved any deliberate following around on the part of the appellant, and any distress felt by the respondent appears to be related to the mere presence of the appellant rather than anything in particular that he did. Essentially harmless encounters which occur fortuitously do not amount to harassment or intimidation even if the respondent finds them upsetting.

[20] The incident when he parked outside her residence is potentially somewhat different, because hanging around the respondent's place of residence could easily amount to harassment or intimidation. There are, however, I think two reasons why it does not amount to that in the present case. The first is that this was on the evidence an isolated incident, and the second is that the appellant left as soon as his presence was discovered. As I have previously said, in my opinion it cannot amount to intimidation or harassment unless the person is aware that this is going on. Ultimately, of course, the respondent did become aware on this occasion, but I think the appellant's intention was that she not be aware, as shown by the fact that he drove off quickly as soon as she did become aware of him. In all the circumstances, I do not consider that this amounted in this case to intimidation or harassment.

[21] The various incidents of yelling or screaming as the appellant described it are I think more difficult. Yelling could be or could be part of a course of conduct which amounted to harassment, but I think it depends on the circumstances. On each of the specific occasions spoken of by the respondent, the yelling was said by her to be the appellant's reaction to criticism of him by her, and the appellant then departed. That may amount to a bad tempered or disagreeable reaction on the part of the appellant, but in my opinion without more does not amount to harassment or intimidation.

[22] In addition, there were two parts of the evidence which need to be considered to see whether they disclose domestic violence in the form of a threat within paragraph (e) of s.11(1). The first is the incident on p10 where there was yelling following the meal of prawns: the respondent's evidence there did contain some sort of a threat but it was very vague. It is important to bear in mind that the only relevant threat, the only threat which can amount to domestic violence under paragraph (e), is a threat to commit an act mentioned in one of the other paragraphs. If a threat is delivered in general terms, in my opinion it is not enough simply to say that what was threatened was a result which could be achieved by committing one of the acts mentioned in those paragraphs.

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8 *Dowse v Gorringe* [2004] QDC 477 at [31], [32].

[23] That was the situation here. No doubt there were all sorts of things which could have made her life miserable, or could have been intended to do so, which would not fall within one of those paragraphs. One matter which occurs to me is taking proceedings in the appropriate court to formalise the arrangements in respect of their child. Evidently there were no such proceedings at that time, although they have apparently since been brought. In my opinion, this did not amount to a relevant threat and therefore did not amount to an act of domestic violence.

[24] The other threat referred to in the evidence was the threat communicated to Ms Eastwell. In my opinion a threat which falls within paragraph (e) can be domestic violence even through it is communicated to someone other than the relevant "other person", so long as it is a threat against the "other person". This was, however, also a threat in very general terms, and the same considerations apply; it does not amount to domestic violence within paragraph (e).

[25] In the circumstances, therefore, I would not on the evidence before the magistrate conclude that the appellant had been shown to have committed an act of domestic violence against the respondent. In these circumstances it is strictly unnecessary for me to consider whether the requirements of paragraph (b) were satisfied, but in my opinion on the evidence neither was satisfied. The evidence was to the effect that as far as the respondent was concerned, the relationship came to an end on 21 July 2005. The respondent's evidence was frequently vague in terms of time, but it does not appear that any of the evidence referred to any particular incident after then. There was also no evidence of any threats to continue to be violent, or any other evidence directly supporting a conclusion that the appellant was likely to commit an act of domestic violence in the future.

[26] No doubt in practice that will not be uncommon, and a court will generally be asked to make this finding on the basis of an inference from the previous acts of the person concerned. However, when there is evidence that there has been some particular change in the position of the parties, such as the ending of a relationship, that may not be an appropriate inference to draw. There is also the consideration that at the trial the appellant's express position was that he would have nothing more to do with the respondent. I appreciate that he did not give evidence but the issue was raised in cross-examination of the respondent, and there was not in response any particular evidence supporting the inference. The exchange with the magistrate at the end of the appellant's address, when the magistrate said that in the past he had found that there is not much sense in taking anybody's word in this life (p26), suggests that the magistrate was not approaching this issue on the basis that this was something that the respondent had to show on the evidence.

[27] To some extent this finding is dependent upon the earlier finding; in circumstances where I am not persuaded there has previously been any act of domestic violence, there is no evidentiary basis for an inference that there is any real likelihood of an act of domestic violence in the future.[9] The alternative basis, that the appellant was likely to carry out a threat which was an act of domestic violence, also depends on a finding that there was an act of domestic violence in the form of a threat that was within paragraph (e). For reasons I have previously given that was not established.

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[9] See *McLennan v McLennan* [2003] QDC 398 at [19].

[28] Accordingly, I allow the appeal, set aside the order made by the magistrate on 18 October 2005, and order instead that the respondent's application for a protection order be dismissed. There is a power in s.66(3) to make an order for costs in relation to an appeal. Prior to the hearing of the appeal the appellant was not legally represented, though he appeared by counsel at the hearing. Nevertheless, costs were not expressly sought, and in all the circumstances I will not make any order for costs.