DISTRICT COURT OF QUEENSLAND

CITATION:	*Harley v Field* [2007] QDC 364
PARTIES:	**DARREN ALLEN HARLEY**
	(Appellant)
	v
	TERRY ALICE FIELD
	(Respondent)
FILE NO/S:	243 of 2007
DIVISION:	Appellant
PROCEEDING:	Appeal from Magistrates Court Cairns
ORIGINATING COURT:	Magistrates Court Cairns
DELIVERED ON:	14 December 2007
DELIVERED AT:	District Court Cairns
HEARING DATE:	28 November 2007
JUDGE:	Bradley DCJ
ORDER:	**Appeal Dismissed**
CATCHWORDS:	
COUNSEL:	Mr L. M. Weston, Solicitor for the appellant
	No appearance for the respondent
SOLICITORS:	Gayler Cleland Solicitors for the appellant

Background

[1] The appellant and the respondent resided together as a couple for about two and a half years. On 19 March 2007 they argued and (according to a statement the respondent gave to police on 23 March):

> "He snatched the car keys of [sic] me. He then grabbed my shirt around my shoulder with one hand and my jeans with the other and he picked me up on a fair hight [sic] and then he dropped me forcefully into the ground."

[2] On 23 March 2007 a police officer made an application to the Magistrates Court at Cooktown for a protection order pursuant to the *Domestic and Family Violence Protection Act* 1989 (the Act) naming the respondent as aggrieved spouse. On 3 April 2007 a temporary protection order was made in the Cooktown Magistrates Court and, on 8 August 2007 after a hearing, a protection order was made by that

Court to continue in force up to and including 7 August 2009. The appellant, who is named as respondent in the orders, appeals against the making of the protection order at the respondent's instigation. A previous temporary protection order had been made in March 2006 which subsequently lapsed. Neither the Queensland Police Service nor the respondent appeared at the hearing of this appeal.

[3] Section 20 of the Act relevantly provides as follows:

> "(1) A court may make an order against a person for the benefit of someone else (the ***other 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 2 persons; and
>
> (b) the person –
>
> (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."

Magistrate's decision

[4] The application before the Magistrate was prosecuted by the Queensland Police Service but the appellant represented himself.

[5] In the reasons given for her decision, the Magistrate noted that the appellant had conceded that an act of domestic violence against the respondent had occurred on 19 March 2007. The Magistrate therefore proceeded on the basis that the only issue was whether the appellant was likely to commit an act of domestic violence again. The Magistrate was satisfied that domestic violence was likely to occur again, and made the order sought.

Grounds of appeal

[6] The five grounds of appeal relied upon by the appellant are:

(a) That there was a miscarriage of justice in that the respondent, being self-represented, "failed to conduct his case to his benefit, made a concession without understanding its importance, and failed to adduce evidence of significant importance to the case";

(b) That the trial judge made an error in finding that there was a serious act of domestic violence;

(c) That the trial judge made an error in finding that there was "more than a mere chance, a real likelihood" of domestic violence reoccurring.

(d) That the trial judge in the circumstances should have given more weight and consideration to the high probability the [appellant] was soon to leave the area;

(e) That the trial judge was in error in stating that the seriousness of the act of domestic violence swung the case.

[7] The basis of much of the appellant's complaint about the hearing in the Magistrates Court arises from the fact that he was self-represented. However, the transcript of the proceedings in that Court reveals that the Magistrate properly and carefully explained to the appellant the procedure that would be adopted with respect to the

taking of evidence and in particular that the respondent would give her evidence-in-chief by way of the sworn statement she gave to police. The appellant's right to cross-examine the respondent was properly explained to him, as were the issues which the Magistrate needed to determine in order to make a protection order. Prior to proceeding with the evidence, the Magistrate provided the appellant with copies of District Court Appeal cases *McLennan v McLennan* [2003] QDC 398; *Keys v Keys-Tollhurst,* Southport District Court, D 237 of 2006; and *Bottoms v Rogers* [2006] QDC 80, and apparently gave him some time to read over them.

[8] In addition to the respondent's police statement, three letters from the appellant to respondent were tendered on behalf of the respondent, although all are undated, the last has been endorsed by the respondent "Received 3/7/07". A copy of a letter dated "23 May 07" from the respondent to the appellant was tendered and finally a letter dated 11 April 2007 from Dr Michelle Wallace was tendered on behalf of the respondent. The first two letters from the appellant are really love letters expressing the hope that they can be reunited, the third and the respondent's reply speak of outstanding financial and property issues.

[9] Dr Wallace reviewed the respondent on 28 March 2007 regarding injuries incurred on the 19 March and her letter speaks of bruising still being evident on the respondent's right shoulder, pelvic bone, upper right thigh, left knee and possibly on her right calf at the time of the review.

[10] When the respondent had given her evidence-in-chief the Magistrate again explained to the appellant the nature and purpose of cross-examination, however apart from establishing where the respondent now lived, and despite some prompting from the Magistrate, the appellant declined to ask any further questions.

[11] In response to a warning from the Magistrate that if the appellant had no questions for the respondent, then "her case may well be made out" the appellant replied:

> "Well, I've got no problem with the fact that, yes, there's probably been a domestic violence incident, has occurred out there. I concede that. But what I do have a problem with is like this, the likelihood of – relikelihood of it continuing."

[12] When asked whether the domestic violence occurred as alleged by the respondent, the appellant said that he didn't agree a hundred per cent "it happened like that, no" or that the respondent's statement was entirely correct. In response to this the Magistrate again explained that if the appellant did not agree with the respondent's version of events, he should put to her his version of events so as to allow the respondent to comment on them. The Magistrate offered to allow the appellant time to consider his questions but the appellant confirmed his concession that an act of domestic violence had occurred and that it occurred in the circumstances set out in the respondent's statement.

[13] Following the confirmation of his concession, the appellant gave evidence, particularly evidence relevant to the issue of whether he was likely to commit an act of domestic violence again. In summary, the appellant's evidence was that he and the respondent had been apart for about five months, that he hadn't spoken to her since 19 March 2007, and he had not been to her place of work at the RSL Club in Cooktown and had no intention of going there. He said he did intend to leave Cooktown but had recently received a promotion and had been asked to stay until

around December, which he agreed to do "so I could save some money and then at the end of the year I'm going to move back to New South Wales to be closer to me kids". The appellant's work took him out of Cooktown much of the time and he said apart from a dog cage belonging to him and still in the possession of the respondent, there were no other outstanding issues between them with respect to property. The appellant acknowledged that if he did wish to contact the respondent regarding the dog cage he would do so through the police. It was the appellant's evidence that the only contact he'd had with the respondent was through the letters and that he was "prepared to just leave things as they are".

[14] The appellant said:

> "I've seen [the respondent] in the street a number of time since. I've never approached her and made an issue out of anything. I've just kept going about me own business. I've gone to go to the hotel a couple of times to have a beer and I've seen her in there, so I've just kept going so there's no conflict or whatever."

[15] The appellant was cross-examined briefly and fairly and was then advised by the Magistrate of the nature and purpose of an address.

[16] It is clear from the transcript that the appellant understood the nature of the proceedings, the issues to be decided by the Magistrate, and was able to express himself and his point of view clearly. The appellant does not appear to have been intimidated by the proceedings, the Magistrate or the police prosecutor. The concession the appellant made with respect to the act of domestic violence on 19 March 2007 was properly made and no miscarriage of justice occurred because the appellant was self-represented or made the concession.

[17] In those circumstances the Magistrate properly made a finding that an act of domestic violence had been committed on 19 March 2007 and the only evidence before her in that regard was the evidence of the respondent. Having regard to that evidence and that of Dr Wallace, the Magistrate was entitled to find that a "very serious act of domestic violence" occurred on 19 March 2007.

[18] The transcript reveals that the Magistrate gave real and careful consideration to the appellant's evidence that his intention was to leave Cooktown in December. In fact, prior to delivering her decision, the Magistrate invited the parties to consider the option of consenting to an extension of the temporary protection order until December 2007 on the basis that if the appellant had left Cooktown by that time, the application would proceed no further. However, it was the appellant himself who informed the Magistrate that he was not a hundred per cent certain of leaving Cooktown in December and he did not wish to consent to a temporary order being in place until then.

Likelihood of the commission of an act of domestic violence again

[19] The real issue in this case was whether there was evidence sufficient to satisfy the Magistrate on the balance of probabilities that the appellant was likely to commit an act of domestic violence again. In *McLennan* the protection order was made by the Magistrate on the basis that the respondent spouse had engaged in acts which amounted to intimidation and harassment of the aggrieved spouse, and although the parties (who were married) had separated, there were still matters in dispute

between them and there was a "chance" that similar acts of domestic violence would continue. On appeal it was held that the evidence only supported findings of harassment and intimidation with respect to two of the five matters the Magistrate relied upon which it could fairly be said amounted to minor incidents of domestic violence only, certainly not involving any physical contact.

[20] McGill DCJ held that the Magistrate in determining that there was "a chance" of future domestic violence applied an incorrect test. Section 20 of the Act requires a finding that the respondent spouse "is likely" to commit future domestic violence and I agree with McGill DCJ's statement that:

> "'Likely' in my view does not in the statute mean more probable than not, but it must at least involve a real, not remote likelihood, something more probable than a mere chance or risk".

He went on to say:

> "The Magistrate ought to have been considering whether the evidence indicated that there was some real, significant likelihood that the respondent spouse would commit an act of domestic violence in the future".

In the circumstances of that case it was determined on appeal that there was no basis on the evidence for finding that there was any likelihood of any act of domestic violence occurring in the future. The test in *McLennan* was also adopted in *Keys* and restated by McGill DCJ in *Bottoms*.

[21] In this case the Magistrate directly referred to the test as enunciated by McGill DCJ in her reasons for decision. She distinguished this case from the fact situation in *McLennan* on the basis that the act of domestic violence giving the foundation for the application in this case was "mush more severe" and that it occurred in a context where a temporary order had been in place previously so that the appellant had had "an opportunity to take on board the nature of the legislation, the nature of its protection and, unfortunately, to no avail and no success".

Conclusion

[22] On the evidence in this case, in particular the following:

- There had been a temporary order previously in place prior to the commission of the act of domestic violence;
- The nature and seriousness of the act of domestic violence and the injuries incurred;
- The fact that the appellant and the respondent continued to reside in a small town;
- The uncertainty of the appellant's plans to leave Cooktown;
- The fact that the respondent remained in possession of the appellant's dog cage;
- The sending of the letters to the respondent following separation;

- There was evidence on which the Magistrate could find that there was a real likelihood of an act of domestic violence in the future. The appeal is dismissed.