DISTRICT COURT OF QUEENSLAND

CITATION:	*McLennan v McLennan* [2003] QDC 398
PARTIES:	**DARRYL ROSS McLENNAN** Appellant **v** **KARYN ANNE McLENNAN** Respondent
FILE NO/S:	D4304/2002
DIVISION:	
PROCEEDING:	Appeal against protection order
ORIGINATING COURT:	Magistrates Court, Holland Park
DELIVERED ON:	30 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2003
JUDGE:	McGill DCJ
ORDER:	**1. Appeal allowed, order of 26 September 2002 set aside, and in lieu ordered that the application for the protection order on behalf of the respondent be dismissed.** **2. Order the respondent pay the appellant's costs of the appeal to be assessed.**
CATCHWORDS:	FAMILY LAW – Domestic Violence – What amounts to an act of domestic violence – whether respondent likely to commit an act of domestic violence again. STATUTES – Interpretation – conditions for making an order – what required to be shown. *Domestic Violence (Family Protection) Act* 1989 sections 20(1), 21(1).
COUNSEL:	
SOLICITORS:	Aylward Game Solicitors for the appellant The respondent did not appear and was not represented.

[1] This is an appeal against a protection order made under the *Domestic Violence (Family Protection) Act* 1989[1] ("The Act") by a magistrate on 26 September 2002.

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1 Now the *Domestic and Family Violence Protection Act* 1989; I have not taken into account the amendments made, as from 10 March 2003, by the *Domestic Violence Legislation Amendment Act* 2002.

The appellant was the respondent spouse and was the husband of the aggrieved spouse on whose behalf an application was made for a protection order by a police officer. The appellant was represented by a solicitor both before the magistrate and on the hearing of the appeal; the respondent's case was conducted by a police officer before the magistrate, and the respondent did not appear on the hearing of the appeal.

Hearing of application

[2] The appellant and the respondent were married at the relevant time, although the respondent moved out of the matrimonial home on 18 May 2002, and proceedings have subsequently been commenced in the Family Court. Prior to that date however they were living in the same house. The magistrate heard evidence from the respondent and other witnesses called by the police officer, and evidence of the appellant, and said that he generally accepted the evidence of the witnesses, although he recognised that it had been coloured by the views and assessments they had already made, and in the case of the appellant took into account a medical report on his psychiatric state: p.4.

[3] As the magistrate recognised, the power in s 20 of the Act to make a protection order depended upon the satisfaction that:

> "(a) the respondent spouse has committed an act of domestic violence against the aggrieved spouse; and
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> (b) the respondent spouse .... is likely to commit an act of domestic violence again ...."

By s 11 domestic violence includes intimidation or harassment of the spouse, or a threat to do such an act.

[4] Much of the evidence was directed towards events that occurred on the day on which the respondent moved out. On that day the appellant had taken a dog to a dog show, and while he was away the respondent with the assistance of other family members had removed property from the matrimonial home. However, the appellant and at least one other family member waited nearby for the respondent to return, in an attempt to obtain possession of the dog, and this led to an altercation outside the home. The magistrate in his findings said that he considered that the appellant had really been set up on that day, that his actions were not unreasonable, and did not amount to domestic violence for the purposes of the Act.

Basis of order made

[5] Nevertheless, he found that there had been domestic violence in the past by the appellant to the respondent, in that the respondent:

(a) over a period of five years kept a diary concerning the respondent;
(b) for a time refused to discuss matters with her;
(c) produced a tape recorder to tape a conversation involving her and his sister;
(d) stood close to her when she was receiving certain phone calls so that she had no privacy for them;
(e) caused her concern by the manner and speed of his driving on occasions, knowing that this was causing her concern.

He then went on to find that each of these amounted to intimidation and harassment of the respondent by the appellant and that this amounted to domestic violence for the purposes of the Act. He took into account the fact that the parties had subsequently separated, but, because there were still some matters in dispute between them, he expressed satisfaction on the balance of probabilities that there was a chance that that action, presumably intimidation and harassment of that nature, would continue between them, so he was prepared to make a protection order: p.10.

[6] The magistrate then turned to the form of the order, and after receiving further submissions made an order prohibiting domestic violence against the aggrieved spouse, or going to, entering or remaining in premises where she was or from having or attempting to have any contact with her other than through a solicitor in relation to Family Court proceedings. Apart from the protection of the respondent however, the magistrate also ordered that the order apply for the protection of four other people, the respondent's parents and her sister and brother-in-law, who had been involved in the incident on 18 May 2002. A temporary order had been made that day, and they had been included in the temporary order, but despite the magistrate's findings in relation to what had occurred on 18 May they were also included in the permanent order. The only explanation for this was a comment at p.12 by the magistrate that, whatever had happened on that day, "There has been some friction between those parties, whether it causes a problem to him to have them included as the ....."

[7] Section 21 of the Act provides in subsection (1) that:

> "The court may include the name of a relative or associate of an aggrieved spouse in a domestic violence order made for the benefit of the aggrieved spouse if the court is satisfied that the respondent spouse has committed, or is likely to commit, any of the following acts against the relative or associate –
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> (a) wilful injury;
> (b) wilful damage to property of the relative or associate;
> (c) intimidation or harassment;
> (d) a threat to commit an act mentioned in paragraphs (a) to (c)."

Grounds of appeal

[8] The argument of the appellant focused on the findings of intimidation and harassment, and submitted that the magistrate was not justified in making those findings, on the evidence, or on the evidence they did not amount to intimidation or harassment for the purposes of the Act. It was also submitted the finding that the appellant was likely to commit an act of domestic violence again was unjustified. The appellant also challenged the inclusion of relatives of the respondent in the order, on the ground that the requirements of the Act in relation to those relatives had not been made out.

Had there been acts of domestic violence?

[9] As to the first finding, about the keeping of the diary, there is no finding that the aggrieved spouse was aware of the diary, and I cannot find any evidence in the material that she was aware of it. Whatever the limits may be of the concept of harassment and intimidation for the purposes of the Act, I regard it as obvious that nothing can amount to harassment or intimidation unless the supposed victim of that

activity is aware that the activity is occurring. The fact that she found out at the trial that it had occurred did not make it amount retrospectively to harassment or intimidation. The magistrate was entitled to find that the appellant had been keeping a diary in this way, but was not entitled to find that that amounted to harassment or intimidation for the purposes of the Act.

[10] As to the finding that the appellant refused to discuss matters with the respondent, the respondent's evidence was not entirely clear. At p.4 she said that for three years before they separated: "We weren't allowed to talk unless we had a third person", but went on to say: "If it was an in depth – if it was a conversation other than just normal greetings and that kind of thing, it – you couldn't have a conversation with Darryl." Later on the same page she said that she would not persist in trying to carry on a conversation because she was scared of Darryl, but she does not give evidence of any act of violence or threatened violence which would justify that fear, and it was not open to the magistrate to infer that there had been such a thing.

[11] It was not the respondent's case before the magistrate that the appellant was simply constantly silent around her; indeed at p.5 she complained that he continually told her that she had a mental illness and that she needed to be put into hospital. She continued: "If we got into an argument he would say 'Oh, that's because you're really sick'. You couldn't have a conversation with him, so it was just easier not to – to have that involvement." That suggests that her real complaint was that she was not able to have a sensible, in depth and constructive conversation with him about matters, the sort of discussion that she wanted to have. The reference to her being mentally ill and requiring treatment was not presented, in her evidence-in-chief at least, as something done in an aggressive or abusive fashion, but as if he were genuinely concerned about her welfare, or at least her ability properly to discuss matters. In any case, there was no finding that there was intimidation or harassment in the form of allegations of mental instability on the part of the aggrieved spouse. I am conscious of the fact that the magistrate has heard more evidence from the respondent than is available to me[2], and that may well justify some aspects of factual findings which were not obvious from the evidence transcribed. Nevertheless the evidence available throws some light on just what is meant by the finding that he had refused to discuss matters with her.

[12] It is unnecessary therefore to consider whether it could amount to harassment or intimidation if he remained totally silent for an extended period. I think that the magistrate's finding must be characterised as a finding that the appellant had persistently refused to discuss with the respondent matters which she wished to discuss with him. I can understand that that might be annoying or frustrating or inconvenient to the respondent, but I do not consider that it amounts to harassment or intimidation for the purposes of the Act. One would ordinarily expect that harassment or intimidation would involve some positive acts on the part of the respondent spouse, rather than a mere unwillingness to cooperate. Perhaps there may be exceptional cases where the harassment took the form of putting the aggrieved spouse to additional trouble because of an unwillingness to cooperate, but I have difficulty in characterising what occurred here in that way. I do not think that ordinarily merely being uncooperative amounts to harassment or intimidation for the purposes of the Act. A mere unwillingness, even if persisted in, to do what the

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2 Unfortunately the transcript does not include part of the cross-examination of the respondent, so I am not able to assess to what extent, if at all, some of these issues were clarified in cross-examination.

aggrieved spouse wants done, in circumstances where there is no particular harm done if it is not done, does not in my view amount to intimidation or harassment. In my opinion the magistrate's primary finding on this point did not justify a conclusion that this amounted to harassment or intimidation for the purposes of the Act.

[13] With regard to the production of the tape recorder, evidence was given by the respondent, and by the appellant's sister who was present at one particular incident when the appellant did produce a tape recorder to tape record a conversation. There was some conflict in the evidence between the respondent and the appellant's sister as to the circumstances surrounding this, and in particular whether the appellant had chased the respondent around the house while holding the tape recorder. The magistrate's finding was limited to the production of the tape recorder to tape the conversation, so presumably the magistrate was not prepared to find that anything more aggressive towards the respondent occurred on this occasion. In my opinion the mere production of a tape recorder to tape a conversation is not intimidation or harassment for the purposes of the Act, even if the respondent finds it distasteful or uncooperative or unpleasant, and is not prepared to engage in a conversation which is tape recorded. I would regard the use of a tape recorder in such circumstances as essentially a defensive act, rather than an aggressive one. The evidence only referred to one occasion on which this occurred, and that in my opinion cannot amount to intimidation or harassment for the purposes of this Act.

[14] The next finding was that the appellant had stood close to the respondent while she was receiving telephone calls from members of her family, so that she would have no privacy. There was some conflict of evidence in relation to that, and the appellant is really seeking to go behind the primary findings of fact by the magistrate, at least to the extent that any such incidents were found to have occurred in a deliberate and systematic way. The magistrate did find that the appellant stood by so that he was able to hear the conversation that had occurred (p.6), and I think that that was treated by the magistrate as a finding that he was deliberately standing there to overhear the telephone conversation in order to prevent her from having a private conversation. There was evidence to support that finding before the magistrate, and there is no reason to think that in the circumstances of this matter the magistrate misused his advantage in seeing and hearing the witnesses for himself. It was submitted that the respondent had exaggerated her evidence throughout the hearing, and to some extent the magistrate seems to have accepted that proposition, because of some comments made on p.4 that the evidence was coloured to some extent. I think that the magistrate took the evidence with a salutary grain of salt, but was entitled in my view on the whole of the evidence to find that there had been some deliberate intrusion on the respondent's privacy in making or receiving telephone calls.

[15] It is not suggested that this is a case where the aggrieved spouse was attempting to telephone for assistance after some behaviour on the part of the respondent spouse, or even telephoning to complain about the respondent spouse, so that such conduct could be characterised as intimidation in that way. I do not regard the conduct as being particularly serious, and on the whole I do not think it is capable of amounting to intimidation without some further context to support such a characterisation, but I conclude that it was open to the magistrate to find that it amounted to harassment by the appellant. That part of the finding may therefore be sustained.

[16] The final matter was the issue of how the appellant was driving. The respondent complained in particular about his driving while only holding the steering wheel with two fingers. In a car with power steering, and at a time when driving conditions are not particularly demanding, such behaviour is perhaps not all that unusual. More careful drivers may like to keep two hands on the wheel most of the time, but no doubt there are plenty of people in the community whose standards are less demanding. The point about this issue however is that there was a specific finding (p.8) that the appellant had driven in this way knowing that this was causing the respondent concern. Whether or not his behaviour was objectively inappropriate, if driving in a particular way is known to cause distress to the aggrieved spouse and the appellant deliberately drives in that way in circumstances where that could easily be avoided, such behaviour can fairly support the inference that he is deliberately driving in that way in order to annoy the aggrieved spouse, which could well amount to harassment or intimidation. In my opinion the crucial point here is not whether the manner of driving was objectively appropriate, but whether he was deliberately doing something he knew would upset her in order to upset her. That I think can fairly be characterised as harassment, and that was essentially the basis upon which the magistrate approached the matter.

[17] It follows that I would not interfere with two of the five bases on which the magistrate found that the appellant had committed an act of domestic violence against the respondent. This is one of the two pre-requisites to the jurisdiction to make a protection order under s 20(1). The other is relevantly that the respondent spouse is likely to commit an act of domestic violence again.

Likely to commit an act of domestic violence again?

[18] In my opinion the magistrate's finding on this matter was unjustified on two grounds: the magistrate appears to have applied the wrong test, and such a finding was in my opinion not reasonably open on the evidence.

[19] The magistrate at p.10 said in relation to this aspect of the matter, after noting that there were still matters in dispute between the parties: "I am not prepared in the circumstances to accept that such intimidation may not continue if the parties are still in that dispute. I am prepared to accept that there is a chance, on the balance of probabilities, that that action will continue between the parties, ..." I recognise that this is an ex tempore judgment, and that the choice of words used in these circumstances should not be scrutinised too carefully, particularly when it is apparent that the magistrate is familiar with the relevant provisions of the Act. Nevertheless, the first of these sentences appears to be reversing the onus, and the second is a finding that there is "a chance" of future domestic violence, rather than that future domestic violence is likely. "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.[3] The magistrate has also expressed himself in terms of the possibility of a recurrence of the particular domestic violence which had occurred in the past; in my opinion the statute is not so limited, and what has to be established is that the respondent spouse is likely to commit an act, that is any act, of domestic violence in the future.

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3 *Sheen v Fields Pty Ltd* (1984) 58 ALJR 93 at 95; *Goss v Swan* [1994] 1 Qd R 40 at 41.

[20] 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. That was not the test applied by the magistrate, and in that respect he fell into error. I have concluded that there were only two bases found by the magistrate which could have amounted to domestic violence as defined. The evidence was also that on 18 May the parties separated, and that there had been no contact between them since then, although admittedly there was a temporary protection order in force after the separation. Nevertheless, in my opinion there was simply no basis for any finding that the appellant was likely to be preventing the respondent of having a private telephone conversation, or that the appellant was likely to be driving the respondent somewhere so as to be able to drive deliberately in a way which would annoy her, in the future. Nor was there any basis for thinking that there was any likelihood of any other act of domestic violence.

[21] I was concerned in this appeal about whether the evidence justified findings which were not made by the magistrate, but which would have justified a conclusion that the appellant was likely to commit an act of domestic violence again, and perhaps that there had been other acts of domestic violence in the past, so as to justify the making of a protection order, although not on the basis adopted by the magistrate. In other words, whether the order could have been supported on some other basis. Because the respondent did not take any part in the appeal, I decided to consider the transcript of evidence myself, particularly the evidence of the respondent, to see whether any such argument was open, given the nature of the proceeding. I do not propose to review the evidence in detail; it is sufficient to say that it does not lead me to a conclusion that the order made by the magistrate was justified on some other basis.

[22] It follows that in my opinion the evidence did not support a conclusion favourable to the respondent in respect of the second pre-requisite to jurisdiction, and it was therefore not open to the magistrate to make a protection order on this evidence.

Orders to protect others

[23] In these circumstances it is perhaps unnecessary for me to consider the further question of whether the protection order was appropriately extended to the other persons concerned under s 21. In my opinion however once the magistrate found that there was no act of domestic violence by the respondent on 18 May 2002, and that the appellant's behaviour on that occasion was not unreasonable, there was simply no basis for a finding that the appellant had committed or was likely to commit any of the acts identified in s 21(1) against any of the other people. The magistrate did not give any clear justification for making such an order, and the mere fact that there had been a dispute and that that might have given rise to some continuing ill feeling was not in my opinion sufficient. That part of the protection order was clearly unjustified.

Conclusion

[24] Accordingly the appeal is allowed, the order of 26 September 2002 is set aside, and in lieu it is ordered that the application for the protection order on behalf of the respondent be dismissed. I order the respondent to pay the appellant's costs of the appeal to be assessed.