**Appellate Challenge to Protection Orders.**

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# Most appeals from a magistrate’s decision to make a protection order usually turn on whether the protection order is necessary or desirable. This will be even more critical as we gain a better understanding and appreciation of the seriousness of coercive controlling taints.

# I also take this opportunity to recap on matters which are often taken for granted, if not forgotten, in propounding appeals in this context.

***Know the mode & scope of appeal***

# A person who is aggrieved by a decision of the Magistrates Court to make a domestic violence order may appeal to the District Court of Queensland pursuant to s 164 of the *Domestic and Family Violence Protection Act* 2012.

# By s 168(1) the appeal must be decided on the evidence and proceedings before the Magistrates Court. Subsection 168(2) reposes discretion in the appellate court to order that the appeal be heard afresh in whole or in part. That discretion may be invoked if the appellant demonstrates some legal, factual or discretionary error of the trial magistrate.

# The appeal is not a new trial to consider, as if presented for the first time, the arguments advanced. Where a point was not taken in the trial court and evidence could have been adduced to prevent the point from succeeding, or the point requires a further trial, it cannot be taken afterwards.[[1]](#footnote-1) Otherwise, appellate courts generally tolerate new points.

# More broadly, requirements and limitations of such an appeal are exposed by the High Court in *Fox v Percy (2003) 214 CLR 118* at [23], as follows:

# *“On the one hand, the appellate court is obliged to ‘give the judgment which in its opinion ought to have been given in the first instance’. On the other, it must, of necessity, observe the ‘natural limitations’ that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses’ credibility and of the ‘feeling’ of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole”[[2]](#footnote-2) [Footnotes omitted]*

# Section 169 of the Act empowers this court in deciding an appeal. The court may:

### confirm the decision appealed against; or

### vary the decision appealed against; or

### set aside the decision and substitute another decision; or

### set aside the decision appealed against and remit the matter to the court that made the decision.

***Framing the appeal***

# Appeals will concern assertions of errors of law, of fact or in the exercise of discretion to make a protection order. It demands timely arduous and determined preparation, preparation, preparation.

1. In his book *Advocacy in Practice* J L Glissan QC, contrasted preparation in appeals and trials, saying:

*“Proportionately more preparation time is necessary for an appeal than for a hearing at first instance. Although we have emphasised earlier that there is never a situation in which too much preparation can be devoted to a case, on appeal preparation is even more critical.”[[3]](#footnote-3)*

1. In an address on appellate advocacy, Sir Harry Gibbs highlighted the importance of effective issue identification in this way:

*“Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and to cut a path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enable the argument directed to those issues to be properly understood.”[[4]](#footnote-4)*

# Framing the grounds of appeal requires the advocate’s careful and judicious scrutiny of the jurisdictional, factual, and legal foundations to develop the case theory of why the protection order warrants serious challenge.

# In settling the grounds of appeal requires the advocate to:

# Exactly identify the nature of the error.

# Precisely particularise the error, and where it is made.

# Analyse why the reasoning is erroneous and how it leads to the outcome sought.

# Seize only on appropriately arguable grounds; discard minor inconsequential errors.

# Refine, simplify, and concisely express each appeal ground.

***Legal Principles***

# Interrogate the decision and evidence to find relevant and consequential legal errors, for eg:

# Did the magistrate interpret or apply the right statutory provision?

# Did the magistrate interpret or apply the right legal principles?

# Did the magistrate mislead or misguide herself/himself in the proper exercise of discretion in making the order?

# Section 37 of the *Domestic and Family Violence Protection Act 2012* (Qld) requires the court to first be satisfied of three pre-requisite matters of jurisdiction, fact and law, in exercising the discretion to make a protection order:

# Is there a relevant relationship between the aggrieved and the respondent, namely: an intimate personal relationship, a family relationship, or an informal care relationship?

# Has the respondent committed domestic violence against the aggrieved (including an associated person)?

# Is a protection order necessary or desirable to protect the aggrieved from domestic violence?

# The **onus** is on the applicant to prove those elements on the balance of probabilities.[[5]](#footnote-5) But, the primary court is not bound by the rules of evidence, or any practices or procedures applying to courts of record, and could inform itself in any way it considered appropriate.[[6]](#footnote-6) Although not bound by the rules of evidence, it is well settled that the magistrate’s decision must derive from relevant, reliable and rationally probative evidence that tends logically to show the existence or non-existence of the facts in issue. It is not enough to suspect or speculate that something might have occurred. Further, the seriousness of the allegations and the gravity of the consequences of the proceedings in a protection order being imposed also warrants the considerations drawn from *Briginshaw v Briginshaw*.[[7]](#footnote-7) That is, the seriousness of the allegations in the case and the gravity of their consequences warrant that a higher degree of certainty be satisfied on the balance of probabilities.

# That said, the first two elements are readily capable of proof by conventional evidentiary methods. Consideration of the **first element** of the present existence of a “relevant relationship” is to be determined objectively, not the subjective perceptions of the parties. The **second element** invokes finding of past domestic violence as defined in s 8, and extended definitions in ss 9, 10, 11 and 12, of the Act, and includes behaviour that is physically or sexually abusive, emotionally, psychologically or economically abusive, threatening or coercive, or behaviour that in any other way controls or dominates another person causing fear.

# Ill-conceived relationship evidence having some semblance but falling short of a requisite relationship will be fatal to the court’s proper exercise of jurisdiction, for example, improperly utilising the process as a more effective tool to control an aggressor in a boarding house or community neighbourhood dispute.

# Proof and accurate characterisation of the nature and extent of domestic violent conduct is not only important in itself as a critical element, but it also informs propensity relevant to the need for future protection involved in the third element.

# The **third element** invokes a **prospective** judgment drawing on reasonable, logical and rational inferences based on poof of evidence of past behaviour,[[8]](#footnote-8) cognisant of the principles in s 4, and any previous voluntary intervention order and compliance.[[9]](#footnote-9) The focus of this element is the paramount need to protect an aggrieved from domestic violence, and whether imposing a protection order is necessary or desirable to meet that need.

# I turn to this aspect now as the most prevalent appeal issue.

***“Necessary or Desirable”***

# While careful analysis may unearth some oversight or omission of findings about the first two elements, most appeals from protection orders involve the third element of whether “*the protection order is necessary or desirable to protect the aggrieved from domestic violence*”.

# This inquiry involves a risk assessment of the prospective risk and the need for protection against future domestic violence from that risk.[[10]](#footnote-10) But, unlike the former Act, the court does not need to be satisfied of the “likelihood” of future domestic violence.[[11]](#footnote-11) However, there must be more than a remote chance, mere possibility or speculation of the prospect of domestic violence.

# The three-stage process identified in *MDE v MLG & Queensland Police Service* [2015] QDC 151, while a useful guide to practitioners, magistrates, and on appeals, it is also a helpful litmus test to expose appealable error.

# **Did the magistrate err in assessing the risk of future domestic violence between the parties in the absence of any order?**

# This stage is largely to do with the appellant’s propensity to commit domestic violence, which necessarily turns on the particular appellant and the circumstances of the particular case.

# Relevant considerations may include evidence of the nature and extent of past conduct and domestic violence (in all its forms), emerging patterns with the aggrieved and analogies, circumstances surrounding those events, frequency and persistence, how recent and relevant to present circumstances and arrangements, isolated or repetitive conduct, coercive and controlling traits (*eg. degrading put downs, monitoring and phone tracking, media control and inspection, limiting financial recourse, imposing reproductive conditions, micro-managing, restrictions, forced isolation, humiliation and threats, etc*), genuine remorse, propensity or inclination or natural tendency to behave in a particular way, persistence, efforts and markers of rehabilitation, changes and efficacy of medical treatment, physiological counselling, demonstrated insight and effective self-regulation, arrogance and self-righteous responsibility and entitlement, disobedience to controls, regulation or orders, breaches of supervisory discipline, compliance with voluntary temporary orders (s 37(2)(b)), and other changes of circumstances. These are many mere examples, and much depends on the subjective traits of the appellant.

# Interrogate the decision and evidence to find relevant and consequential errors, for eg:

# Did the magistrate ask the right question(s)?

# Identify the factual findings made by the magistrate about the **risk of domestic** violence against the aggrieved in the future?

# Identify the **direct evidence** supporting those factual findings, or not?

# Are they consistent with any assessment of credibility, and indicators of honesty and reliability of the source witness?

# Identify any contradictory and unchallenged evidence that tends to negative the factual finding? How did the magistrate discount this evidence, if at all?

# Did the magistrate draw interferences, deductions or conclusions? About what and how?

# Is it based on facts proved by indirect or circumstantial evidence?

# Is it reasonable or unreasonable, or impermissible guesswork, speculation, or conjecture?

# Is the reasoning logical and rational to connect the basal facts with the inference?

# Did the magistrate infect the assessment with irrelevant considerations? What are they and how?

# Did the magistrate fail to take into account relevant considerations? What are they and how?

# Did the magistrate properly apply the law to the facts found, to reach a conclusion according to the evidence and law?

# **Did the magistrate err in assessing the need to protect the aggrieved from that domestic violence in the absence of any order?**

# The subject of inquiry now shifts to the aggrieved, in particular his or her vulnerabilities and circumstances, going to a need to afford the aggrieved protection from the assessed risk of future domestic violence.

# Relevant considerations may include the aggrieved’s vulnerabilities, emotional, mental and physical health and needs, interdependencies, evidence of continuation or changes to the parties’ future personal and familial relationships, their places of residence and work, the size of the community in which they reside and the opportunities for direct and indirect contact and future communication, for example, in relation to children, and for how long. Of course, this list is not exhaustive, and the particular idiosyncrasies and circumstances of the aggrieved will vary widely.

# With that in mind, interrogate the decision and evidence to find relevant and consequential errors for this element:

# Did the magistrate ask the right question(s)?

# Identify the factual findings made by the magistrate **about the need** for protection against domestic violence against the aggrieved in the future?

# Identify the **direct evidence** supporting those factual findings, or not?

# Are they consistent with the assessments and findings of risk and need?

# Are they consistent with any assessment of credibility, and indicators of honesty and reliability of the source witness?

# Identify any contradictory and unchallenged evidence that tends to negative the factual finding? How did the magistrate discount this evidence, if at all?

# Did the magistrate draw interferences, deductions or conclusions about future need for protection? About what and how?

# Is the inference based on facts proved by indirect or circumstantial evidence?

# Is the inference reasonable; or unreasonable, or impermissible guesswork, speculation, or conjecture?

# Is the reasoning logical and rational to properly connect the basal facts with the inference?

# Is the inferential finding consistent with the findings of risk and need?

# Did the magistrate infect the assessment with irrelevant considerations? What are they and how?

# Did the magistrate fail to take into account relevant considerations? What are they and how?

# Did the magistrate properly apply the law to the facts found, to reach a conclusion according to the evidence and law?

# **Did the magistrate err in considering whether imposing a protection order is “necessary or desirable” to protect the aggrieved from the domestic violence?**

# The terminology “necessary or desirable” invokes a very wide and general power, and should be construed in a similarly liberal manner to enable a court to properly respond, and, if appropriate, tailor an order to protect a person from domestic violence. The phrase is not unusual in that appears in both state and federal legislation, including analogous anti-domestic violence legislation.[[12]](#footnote-12)

# Note the disjunctive “or”, such that the magistrate does not need to find that an order is both necessary and desirable. It may be both, or just one, and not the other.

# Did the magistrate ask the right question(s)?

# Did the magistrate expressly consider the principles in s 4(1) that – where absence to do so may bespeak and error of the mandatory considerations pursuant to s 37(2)(a).

# the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount;

# people who fear or experience domestic violence, including children, should be treated with respect, and disruption to their lives minimised;

# perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;

# if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;

# in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified;

# a civil response under this Act should operate in conjunction with, not instead of, the criminal law.?

# Identify the **direct evidence** supporting those factors relevant to the case?

# Are they consistent with any assessment of credibility, and indicators of honesty and reliability of the source witness?

# Identify any contradictory and unchallenged evidence that tends to negative the factual finding? How did the magistrate discount this evidence, if at all?

# Did the magistrate draw interferences, deductions or conclusions about those factors relevant to the case? What are they and how?

# Is the inference based on facts proved by indirect or circumstantial evidence?

# Is the inference reasonable; or unreasonable, or impermissible guesswork, speculation, or conjecture?

# Is the reasoning logical and rational to properly connect the basal facts with the inference?

# Did the magistrate infect the assessment with irrelevant considerations contrary to those factors? What are they and how?

# Did the magistrate fail to take into account relevant considerations of factors relevant to the case? What are they and how?

# Did the magistrate properly apply the law to the facts found, to reach a conclusion according to the evidence and law?

# Even if an order is found necessary or desirable per se, that is not the end of the matter. Did the proper exercise of the discretion err by blindly adopting a ‘one-size-fits-all approach’, without active consideration the persons names, any conditions and time the order will be in force.

# Are the **right people named** as the aggrieved in the order?

# Consider those associated with the aggrieved and potentially exposed to future violence, for example, children, relatives etc; is it necessary or desirable to protect from the domestic violence?

# **Are the conditions** necessary or desirable to curtail, restrict, or prohibit the appellant’s movements and behaviour, to protect the aggrieved from the domestic violence?

# Is the condition(s) relevant, realistic, and practical in the particular circumstances of the case?

# Is the condition(s) supported by the evidence-based findings about risk of domestic violence, and/or need to protect the aggrieved from domestic violence?

# Consider conditions that are tailored and specifically address the needs and circumstances of the parties to the particular case, for example:

# *prohibition the from committing certain forms of domestic violence; entering the aggrieved’s residence, workplace or other frequented paces; keeping a specified distance of the aggrieved or specified place; controlling text, social media, telephone or other direct or indirect contact; interfering with personal or real property; locating or attempting to locate the aggrieved; or possessing firearms or prohibited weapons.*

# **Is the time the order will remain in force** necessary or desirable?

# There does seem to be a tendency to automaticly impose, or even a complacency to accept, the maximum of 5 years for the duration of the order.

# Is that necessary or desirable?

# Consider whether this is consistent or incongruous with the demonstrated risk and/or need, which may call for a more effective shorter period, always remembering there opportunities to review and seek variations.

# **Is fresh evidence necessary on the appeal?**

# Is there a need to apply to adduce fresh evidence in the exercise despite the mandatory terms of s 168(1) of the Act?

# Remember s 168(2) reposes discretion in the appellate court to order that the appeal be heard afresh in whole or in part. That discretion may be invoked if the appellant demonstrates some legal, factual or discretionary error of the trial magistrate. And, may warrant or open the way to adduce fresh evidence.

# The admission of new evidence for the first time in the appeal ought be reserved for special circumstances where the new evidence:

## Could not have been obtained with reasonable diligence for use at the hearing;

## Would probably have an important influence on the result of the case, even though not decisive; and

## Must be apparently credible though not incontrovertible.

# Consider whether there is new evidence showing, for example - any change of personal, living, work etc circumstances that impact the utility or compliance with the order; any active and substantial steps toward rehabilitation through men’s behavioural; change programs; Illness or other incapacity etc. realised during the period since the protection order and pending appeal. The exigencies of life will have commensurate changes of circumstances relevant to risk and need.

***Conclusion***

# This paper has focused on effective preparation in framing the appeal. It demands developing the case theory to clear an appeal pathway coupled with judicious issue identification, planning, avoiding unnecessary minutiae, to propounding meritorious grounds of appeal

# This is far more than a mere desk top exercise; it’s the foundation of persuasively advocating the appeal. Its critical work that informs every step of the appeal process - starting with formulating the appeal grounds in the notice of appeal, then developing arguments in the written outline and finally harnessing the best points in the oral argument.

# It is the fundamental role for the appellate advocate.

***Judge Dean P Morzone QC***

***25/5/22***

1. *Suttor v Gundowda Pty Limited* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9 and *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at [51]. [↑](#footnote-ref-1)
2. *Fox v Percy* *(2003) 214 CLR 118* at [23]*; See also* Qld Court of Appeal in *Commissioner of Police v Toomer* [2012] QCA 233 at [21] [↑](#footnote-ref-2)
3. J L Glissan QC, *Advocacy in Practice* (LexisNexis Butterworths,4th ed, 2005) 191. [↑](#footnote-ref-3)
4. H T Gibbs, "*Appellate Advocacy*" (1986) 60 ALJ 496. [↑](#footnote-ref-4)
5. *SCJ v ELT* [2011] QDC 100 at [12]; *Domestic and Family Violence Protection Act 2012* (Qld), s 145(2). [↑](#footnote-ref-5)
6. *Domestic and Family Violence Protection Act* 2012, s 145(1) [↑](#footnote-ref-6)
7. *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362. [↑](#footnote-ref-7)
8. *GKE v EUT* [2014] QDC 248 at [32] to [33]. [↑](#footnote-ref-8)
9. *Domestic and Family Violence Protection Act 2012* (Qld), s 37(2). [↑](#footnote-ref-9)
10. *GKE v EUT* [2014] QDC 248 at [32] to [33] per McGill S.C. DCJ. [↑](#footnote-ref-10)
11. See Explanatory Notes of the *Domestic and Family Violence Protection Bill* 2011 [↑](#footnote-ref-11)
12. See for example: *Crimes (Domestic and Personal Violence) Act 2007* (NSW), ss 35, 96(2)(b), *Family Violence Protection Act 2008* (Vic), s 81; *Summary Offences Act 1921* (SA), ss 99H & 99AAC; *Domestic Violence and Protection Act 2008* (NT), ss 21, 94; *Domestic Violence and Protection Orders Act* 2008 (ACT), s 48(1); *Justices Act* 1959 (Tas), s 106B; *Family Violence Act 2004* (Tas), s 16. [↑](#footnote-ref-12)