

***Howe v S* [2013] TASMC 33 (29 July 2013) – Tasmanian Magistrates' Court**

'Breach of domestic violence order' – 'Charge particulars' – 'Emotional and psychological abuse' – 'Following, harassing, monitoring' – 'Guilty plea - withdrawal' – 'Protection order'

Charge: Breach of a police family violence order (3 counts)

Proceeding: Application for leave to withdraw a plea of guilty in respect of each charge and substitute a plea of not guilty

Facts: On 4 May 2012, a police family violence order was made against the male defendant that included the following order: *'you must not directly or indirectly threaten, harass, abuse or assault J'*. It was alleged that the defendant contravened this order by harassing the female protected person ('J'). The defendant demanded that the protected person spend the night with him. The defendant threatened to take her child away if she refused to do so. In relation to pending family law court proceedings, the defendant also stated, 'if you take this to court, things will get vicious and you know what happens when things get vicious. So it's up to you. Either come and meet me tonight at the house or we will be enemies' (count 1). This conduct also amounted to a breach of s 9 (emotional abuse or intimidation) of the *Family Violence Act 2004* (Tas) (count 3). The police family violence order included an order that, *'you must not approach (J) directly or indirectly threaten, harass, abuse or assault; by telephone, email, facsimile or letter'* [sic]. It was alleged that the defendant contravened this order by approaching the protected person on numerous times by text messages (count 2).

The defendant pleaded guilty because of advice from his lawyer. He obtained new legal representation and they advised him to lodge an application for leave to withdraw the guilty pleas. His counsel submitted that leave ought to be granted because the particulars alleged of the complaint were insufficient, as a matter of law, to support the allegation contained in each charge. It would be a miscarriage of justice to allow the guilty pleas to stand.

Issue: Whether leave should be granted to withdraw the pleas of guilty.

Decision and Reasoning: The application for leave to withdraw the guilty plea was allowed in respect of counts 2 and 3 but refused in respect of count 1. In relation to count 2, a miscarriage of justice would result if the guilty plea was allowed to stand. The particulars of the charge alleged the defendant approached the complainant on numerous undefined occasions by use of text messages. This breached the requirements of the *Justices Act* because the prosecution failed to set out each matter of complaint in separate numbered paragraphs and because the prosecution failed to provide particulars by which to identify the text messages said to constitute breach. The ‘rolling up’ of charges meant that the defendant had no real understanding as to what approach and which text message/s constituted the offence. It was impossible to determine what exactly he admitted to in the plea of guilty ([17]-[18]).

Leave was also granted in respect of count 3. The magistrate held that ‘the mental element required to amount to a breach of s 9 is that the defendant knew or ought to know that the course of conduct in which he was engaging is *“likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in his spouse or partner”*. This is not what has been alleged. That he knew or should have known that his conduct was *“likely to have the effect of abusing or intimidating”* his partner, is a different mental element from that referred to in the section’ ([23]).

However, the guilty plea was held to stand in relation to count 1. Counsel for the defence submitted that a person could not be ‘harassed’, as a matter of law, by one act alone. The magistrate concluded that, *‘Whilst I accept that the term “harass” as used in the general community could well include an element of persistence or repetition, I see no reason why a person cannot be harassed within the context of a Family Violence Order, by one act alone. This view is in fact consistent with the definition in s.4 of the Family Violence Act of the word “harassing” ... The reference in the definition to “any one or more of the following actions” suggests that a single act might be sufficient. Furthermore, it is appropriate, in my view, to interpret the term having regard to the context in which it is used in the order. The reference to “threaten, harass, abuse or assault” suggests that the order is to be understood as providing protection to a person from contact with the respondent which is unwelcome, and might be in various forms or have variable effect’* ([12]-[16]).