

***Baron v Walsh* [2014] WASCA 124 (18 June 2014) – Supreme Court of Western Australia (Court of Appeal)**

‘Act of abuse’ – ‘Evidence’ – ‘Evidence not previously adduced’ – ‘Following, harassing, monitoring’ – ‘Fresh evidence’ – ‘Legally available procedures’ – ‘Systems abuse’ – ‘Violence restraining order’

Appeal Type: Appeal from the District Court which upheld the respondent’s appeal against the imposition of a violence restraining order.

Facts: The appellant and respondent were in a relationship for six months. The respondent sent offensive text messages which led the appellant to apply for an interim violence restraining order (VRO). This was made a final order. The respondent successfully appealed to the District Court against the imposition of the order. The District Court judge held that the text messages from the respondent to the appellant did not contain any threats, and, more specifically, ‘threats to take, and/or the pursuit of, “legally available procedures” were incapable of constituting acts of abuse’ (under s 11A of the *Restraining Orders Act 1997*) (see at [46]). The only messages capable of constituting acts of abuse were four offensive text messages, which were not repeated and the appellant apologised for them.

Issue/s:

1. Whether the respondent’s use of ‘legally available procedures’ is capable of amounting to an act of abuse within the meaning of s 11A of the *Restraining Orders Act 1997*.
2. Whether the District Court judge erred by admitting affidavit evidence that was not adduced or admitted at the final restraining order hearing in the Magistrates’ Court.

Decision and Reasoning: The appeal was upheld.

1. The respondent’s use of ‘legally available procedures’ included making complaints to the appellant’s employer’s regulator (she was employed as a nurse) regarding her professionalism, commencing minor claim proceedings, making multiple interlocutory applications in the VRO application and making a perjury complaint to police. McLure P, (with whom Mazza JA and Chaney J agreed), noted that the use of legally available procedures, of itself, will not normally amount to an ‘act of abuse’. However, if legally available procedures are used or threatened with an improper intent or purpose, this could amount to a tort (such as malicious prosecution or abuse of process) or a criminal offence. Her Honour gave the following examples at [63] –

'a threat made with intent to cause or compel a person to settle an action is a criminal offence under s 338A of the Code: Tracey v The Queen [1999] WASCA 77 [11] - [16]. See also The Queen v Jessen [1996] QCA 449; (1996) 89 A Crim R 335. Further, the commencement or maintenance of legal proceedings for an improper collateral purpose is a tort: Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509; Flower & Hart (a firm) v White Industries (Qld) Pty Ltd [1999] FCA 773; (1999) 163 ALR 744. A knowingly frivolous and vexatious claim is also an abuse of process.' Her Honour went on at [65] – *'To threaten and/or take detrimental action against a person to achieve a collateral outcome is improper (at least) and is to behave in a manner that is intimidating, even if the action involves a person availing himself of legally available procedures. I do not intend to suggest that this is an exhaustive statement of behaviour that is intimidating.'*

The Court held that the Magistrate was correct in finding that the respondent's behaviour of using legally available procedures was intimidating and noted that the excuses given by the District Court judge for the respondent's behaviour 'underscore the failure to recognise the impropriety of the respondent's conduct' (See at [68]). The respondent's conduct therefore amounted to an 'act of abuse'.

2. This ground was also upheld. The relevant evidence concerned the relationship of the parties and what the appellant could have reasonably expected from the break up. Its use led the District Court judge to conclude that the purpose of the Act is not to 'protect a person from the fallout of a failed relationship'. This was incorrect, the purpose of the Act is, 'to protect people from acts of abuse in appropriate circumstances whether or not they occur in the fallout of a failed relationship' (see at [78]). This evidence was used notwithstanding that it was not adduced at the final hearing in the Magistrates' Court and it was not substantially litigated by the parties at the hearing. The judge was in error in using this evidence.