

***Owen v Jilba* [2002] WASCA 283 (17 October 2002) – Supreme Court of Western Australia (Court of Appeal)**

‘Breach of misconduct restraining order’ – ‘Following, harassing, monitoring’ – ‘Intimidation’ – ‘Lawful conduct’

Charge/s: Breach of misconduct restraining order.

Appeal Type: State appeal against dismissal of charge.

Facts: A misconduct restraining order was in place against the respondent which prevented him from behaving in an ‘intimidatory or offensive manner’ towards the complainant. He was charged with breaching that order by intimidating the complainant. The alleged intimidatory conduct included the respondent driving past the complainant’s house and staring at her such that she felt intimidated. At trial, the Magistrate accepted a no case submission made by the respondent’s counsel. The Magistrate concluded that an order which restrained the respondent from behaving in an ‘intimidatory or offensive’ way was not authorised by the *Restraining Orders Act 1997* (the Act). The Magistrate concluded that the respondent’s alleged conduct would constitute an offence under the *Police Act 1892*. As such, because the Act only provides for the restraint of ‘lawful’ activities, an order which purported to restrain ‘unlawful’ conduct would fall outside the scope of the section. The Magistrate was also concerned with the subjective nature of the alleged intimidation. The order appears to prevent conduct which is objectively intimidatory, but the evidence referred to the subjective experience of the protected person.

Issue/s:

1. Whether the Magistrate was correct in concluding that the purported intimidatory behaviour was not ‘objectively intimidating’ within the meaning of the order.
2. Whether it is open for restraining orders to restrain unlawful conduct.

Decision and Reasoning: The appeal was dismissed.

1. Wheeler J agreed with the Magistrate’s concerns and held that while conduct that is subjectively intimidating will often coincide with conduct that is objectively intimidating, ‘it is self-evident that not all conduct which is experienced by a person as intimidating will be regarded as intimidatory from the point of view of an objective observer. The person who feels intimidated may be hypersensitive or may simply misunderstand the nature of the conduct’ (see at [6]). In this case, the Court found that given there was little context or background before the Magistrate (such as acts of prior violence, property damage or threats), merely driving near someone’s house and staring at them for a ‘relatively short period’ is difficult to perceive as intimidatory. While the respondent’s conduct may have upset and intimidated the protected person subjectively, it could not objectively be regarded as intimidatory.
2. Wheeler J concluded that it was unlikely that the purpose of the Act was to substitute the sanctions of the criminal law or provide another means for deterring and punishing the commission of offences.

However, her Honour then held that the Magistrate erred in finding, 'that the mere fact that conduct which was alleged to be in breach of a restraining order was at the same time conduct which might be punishable under some other legislation took it outside the scope of the order, or alternatively meant that the order was not a "proper" order as applicable to such conduct' (see at [17]). Rather, the power to impose restraints of 'lawful activities and behaviour' under the Act should be read as granting a power to impose restraints on broadly lawful behaviour. Her Honour gave the example of an order purporting to restrain 'threatening' behaviour which could be lawful or unlawful behaviour, depending on the context. On the other hand, an order which restrains a person from murdering another would fall outside the scope of the Act. As such, depending on the circumstances and context, conduct in breach of a restraining order could be conduct which contravenes other legislation, and should not for that reason be determined to be outside the scope of the Act.