***BJH v CJH* [2016] QDC 27 (26 February 2016) – Queensland District Court**

'Damaging property' – 'Emotional and psychological abuse' – 'Meaning of domestic violence s 8' – 'Physical violence and harm' – 'Protection order' – 'Risk' – 'Whether it was necessary or desirable to make an order to protect the aggrieved'

Appeal Type: Appeal against a Protection Order.

Facts: The appellant appealed against a magistrate's decision to make a Protection Order requiring him to be of good behaviour towards the aggrieved (his partner) and her son. The order was made after a disagreement over the family meal. The appellant took the aggrieved's mobile phone in an attempt to get her to go downstairs to discuss matters with him. The aggrieved tried to get the phone back and the appellant discarded it onto the floor, causing minor but irreparable damage to its cover. At some point, the back of the appellant's hand came into contact with the aggrieved's ear, causing relatively low level pain and no injury to the aggrieved. The appellant and the aggrieved continued arguing loudly until the police arrived (see [9]).

The magistrate made the following findings of domestic violence (see [10]):

- The appellant took the aggrieved's phone in an attempt to force her downstairs. He threw the phone to the ground in response to the aggrieved's attempts to retrieve the phone.
- The appellant slapped the aggrieved in a backhanded motion to the head on purpose.
- There was constant harassment by the appellant towards the aggrieved that night that was intimidating (causing her to retreat from him). This intimidation and harassment amounted to an act of domestic violence when considered with the yelling and the banging of plates (emotional and psychological abuse).

Issue/s: Whether the magistrate erred in making a protection order under s 37 [*Domestic and Family Violence Protection Act 2012* (Qld)], specifically:

1. Whether the magistrate erred in finding that domestic violence had been committed against the aggrieved: s 37(1)(b).
2. Whether the magistrate erred in finding that it was necessary or desirable to make the order to protect the aggrieved from domestic violence: s 37(1)(c).

Decision and Reasoning: The appeal was allowed. Rackemann DCJ held that it was open to the magistrate to conclude that there was at least some domestic violence committed by the appellant against the aggrieved. His Honour agreed that the following behaviour amounted to domestic violence under s 8 [of *Domestic and Family Violence Protection Act 2012* (Qld)]:

'The action of the appellant in seizing the aggrieved's mobile telephone was behaviour which, in the circumstances, was coercive - being designed to compel the aggrieved to do something which she did not wish to do (ie come downstairs to discuss matters of concern to the appellant). Further, the appellant responded to the aggrieved's attempt to get her telephone back by, amongst other things, throwing the phone onto the floor thereby damaging it. That the phone was discarded in a throwing motion had support in the evidence' at [11].

However, beyond that, the magistrate erred in her findings of domestic violence. In light of the evidence (see consideration at [14]-[29]), the magistrate's finding of an 'intentional back-handed slap' could not be supported. Further, the magistrate erred in characterising the appellant's behaviour as emotionally or psychologically abusive – behaviour that, amongst other things, intimidates (a process where the person is made fearful or overawed, particularly with a view to influencing that person's conduct or behaviour) or harasses (there must be an element of persistence): *GKE v EUT*. A consideration of the evidence could not support this conclusion (see [30]-[46]).

The finding of more extensive domestic violence on the night in question than what occurred further affected the magistrate's consideration of whether an order was necessary or desirable. In reconsidering whether an order was necessary or desirable, Rackemann DCJ again noted the decision in *GKE v EUT* where McGill SC DCJ observed in relation to s 37(1)(c) [*Domestic and Family Violence Protection Act 2012* (Qld)] that:

'I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved … I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future' (see [32]-[33]).

Here, the risk was not such to conclude that the making of a protection order was 'necessary or desirable' on the facts as established at the time of the hearing before the magistrate in February 2015. This was in circumstances where: there was no demonstrated history of domestic violence prior to the night in question; the event was a single incident involving domestic violence which, whilst in no way acceptable, was not at the most serious end of the scale of such conduct; the aggrieved gave evidence that she was not fearful of the appellant and did not believe that she needed protection from him; and, at the time of the hearing

before the magistrate, the appellant and the aggrieved had continued their relationship without suggestion of further incident (see [49]-[50]).