DISTRICT COURT OF QUEENSLAND

CITATION:	*LAF v AP* [2022] QDC 66
PARTIES:	**LAF** (Appellant) **v** **AP** (Respondent)
FILE NO/S:	D36/21
DIVISION:	Appeal
PROCEEDING:	Appeal pursuant to *Domestic and Family Violence Protection Act 2012* (Q)
ORIGINATING COURT:	Magistrates Court at Noosa; Magistrates Court at Toowoomba
DELIVERED ON:	24 March 2022
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2022
JUDGES:	Smith DCJA
ORDER:	**1. The appeal is allowed.** **2. The decision made is set aside.** **3. The matter is remitted for a retrial in the Magistrates Court at Toowoomba to be heard before a different Magistrate.** **4. I will hear the parties on the question of costs.**
CATCHWORDS:	FAMILY LAW – DOMESTIC AND FAMILY VIOLENCE – WHETHER PROCEDURAL FAIRNESS ACCORDED TO THE APPELLANT – whether Magistrate erred in reopening a transfer order – whether the Magistrate conducted a fair hearing and whether appearance of bias – whether Domestic Violence Order should have been made- whether another application should have been dismissed- the admission of fresh evidence of Post-Traumatic Stress Disorder – whether insufficient reasons given for decision- whether Magistrate failed to consider the appellant's affidavit material and submissions *Domestic and Family Violence Protection Act 2012 (Q)* ss 4, 37, 41D, 145, 151, 168, 169 *Human Rights Act 2019 (Q), s 31*

Adacot v Sowle [2020] Fam CAFC 215; 355 FLR 57, followed
Allesch v Maunz [2000] HCA 40; 203 CLR 172, followed
Antoun v R [2006] HCA 21; 224 ALR 51; 80 ALJR 497, followed
Chung v Yang [2021] QDC 68, cited
DJL v Central Authority [2000] HCA 17; 201 CLR 226, followed
Ebner v The Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337, cited
Escobar v Spindaleri & Anor (1986) 7 NSWLR 51, followed
Galea v Galea (1990) 19 NSWLR 263, cited
GKE v EUT [2014] QDC 248, followed
Hook v Commissioner of Police [2022] QDC 35, cited
Jones v National Coal Board [1957] 2 QB 55, cited
LKL v BSL [2015] QDC 337, followed
MDE v MLG [2015] QDC 276, followed
MKA v WKT [2018] QDC 73, cited
Police v Jacobs, Magistrates Court at Noosa January 2021, cited
R v Wade [2011] QCA 289; [2012] 2 Qd R 31, cited
State Rail Authority of New South Wales v Codelfa Construction Pty Ltd [1982] HCA 51; (1982) 150 CLR 29, followed
Tomasevic v Travaglini (2007) 17 VR 100, applied

COUNSEL: Ms C Ingenito for the appellant
Self-represented respondent

SOLICITORS: Directly instructed by the appellant
Self-represented respondent.

Introduction

[1] This is an appeal against the decision of the Noosa Magistrates Court to dismiss the appellant's application for a protection order and to grant the respondent a protection order given on 24 September 2021.

[2] The nature of the appeal is set out in section 168 of the *Domestic and Family Violence Protection Act 2012 (Q)*("DVA"). The court's powers are set out in section 169 of the DVA.

Notice of appeal

[3] The notice of appeal alleges that the appeal is on the following grounds:

1. A lack of and denial of procedural fairness.
2. The Magistrate erred in making findings of fact.

3. The Magistrate erred in finding the appellant committed domestic violence against the respondent.
4. The Magistrate erred in making a protection order against the appellant in circumstances where the protection order was necessary or desirable.
5. The Magistrate erred in dismissing the appellant's cross application and not making a protection order against the respondent.

Appellant's submissions

[4] The appellant in her submissions seeks leave to adduce fresh evidence in support of her appeal.

[5] The crux of the fresh evidence is the appellant's mental health during the proceedings and transcripts in Magistrates' court proceedings which highlight the potential bias the Magistrate may well have had in this matter.

[6] In her affidavit sworn 23 February 2022, she says that in 2013, she was diagnosed with Post Traumatic Stress Disorder ("PTSD") by a psychologist.

[7] The attached letter of Dr Murphy dated 24 January 2022 notes that the appellant had been a patient at her surgery since 15 August 2013 and had been continually treated for PTSD. She was admitted to the Toowoomba mental health ward on 25 September 2021 until 7 October 2021, with suicidal ideation due to PTSD. She says that during the hearing on 24 September 2021 in Noosa, she was unable to manage her symptoms and triggers of PTSD. She felt unable to stay in the courtroom in proximity of the respondent and was very affected by comments made by the Magistrate as to the validity of her mental illness. She accepts she engaged in inappropriate outbursts and was not successful in calming herself down. She spent the majority of the proceedings outside of the courtroom. Her solicitor could not continue representing her because she couldn't stop crying and could not take proper instructions.

[8] After the hearing she was taken to the emergency department at the Toowoomba base hospital and was admitted for treatment of PTSD and suicidal ideation. She completed a 12-week suicide prevention treatment program afterwards.

[9] She also refers to another decision of the Noosa Magistrate in which he said quote:

> "I just make a general comment that post-traumatic stress disorder is diagnosed way too often these days"[1]

[10] It is submitted this shows a bias on the part of the Magistrate concerning issues of PTSD.

[11] The appellant also seeks to tender a number of transcripts of other mentions of the matter.

[12] Aside from the fresh evidence point, the appellant submits she was denied procedural fairness in a number of ways. This relates to the reversal of the decision

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1 *Police v Jacobs* Noosa Magistrates Court, 30 January 2021.

to have the matters heard in Toowoomba. It is submitted that the Noosa Magistrate erred in failing to consider the appellant's PTSD, and her multiple requests to transfer the matter to Toowoomba. The appellant also submits that on 4 May 2021, she filed a request to subpoena a Ms H. Ms H was named in the respondent's affidavit as the person who brought the Facebook review to his attention. The Magistrate refused the request to issue the subpoena. The appellant submits the witness was relevant, as she made allegations regarding blocking or preventing the respondent from seeing the review.

[13] It is further submitted that during the hearing on 24 September 2021, the appellant's solicitor put forward significant evidence concerning the appellant's mental health. The Magistrate erred in finding there was nothing to satisfy him that cross examination would cause her emotional harm or distress or be so intimidated as to be disadvantaged as a witness. The appellant also submits that the Magistrate failed to consider the written submissions made by the solicitor. When the submissions were finally received, he appeared only to skim them, and failed to consider the legislative or other arguments made in the submissions.

[14] The appellant submits that the Magistrate made a number of critical, derogatory, bullish, sarcastic and inappropriate remarks regarding the appellant and her mental health, both on 6 November 2020, and 24 September 2021. It is submitted the Magistrate acted towards the appellant in a way that would cause a reasonable observer to consider he was acting with an apprehension of bias against her. It is submitted the Magistrate should have recused himself.

[15] It is submitted the Magistrate erred in his reasons in dismissing the appellant's cross application. The Magistrate found that as the appellant was no longer there to give evidence, there was no evidence upon which he could find that an act of domestic violence had occurred. This was wrong as s 145 (4) of the *Domestic and Family Violence Protection Act 2012 (Q)* ("DVA") provides:

"The court need not have the personal evidence of the aggrieved before making a domestic violence order."

[16] It is also submitted the Magistrate made incorrect findings of fact, in particular, making a finding the appellant did not suffer from a mental illness, and that her application was retaliation.

[17] It is further submitted that the Magistrate erred in finding the appellant's conduct constituted domestic violence. It is further submitted that the Magistrate erred in finding that it was necessary or desirable to protect the respondent from future domestic violence.

Respondent's submissions

[18] The respondent disputes that the appellant suffers from PTSD caused by him. He submits as the matter had been listed for hearing in the Noosa Magistrates Court, before the Toowoomba court, it should have been heard there. The respondent alleges the appellant's lawyer did not advise the Toowoomba court on 30 September 2020 that the matter had been set down for hearing in Noosa.

[19] The respondent sets out in his submissions that the appellant has made false allegations against him. He also submits that the appellant has harassed him with respect to domestic violence orders. He alleges that following the Facebook review on 15 July 2020, the appellant denied him legal access rights to his children, as per current family law orders. He alleges the appellant has used the domestic violence proceedings to further alienate him from his children.

[20] He questions the relevance of the appellant's health post-trial, and the qualifications of Dr Murphy to diagnose the PTSD. He denies any allegation he committed perjury. In respect to the civil action in New South Wales, he says that during the 9 years of the marriage, she made no claims to the police or the courts in the form of a domestic violence order. The civil case was settled by him purely on a commercial basis and a desire to end the matter. He points out an email from his solicitor to the appellant's solicitor in this regard. The respondent submits the appellant does not deny that she posted on the Facebook page, and continued harassment thereafter. He asked that the appeal be dismissed and the verdict stand. The respondent attaches a chronology of events and other supporting materials to the submissions. He also disputes much of which was contained in the appellant's outline of submissions.

Oral submissions

[21] In oral submissions the appellant stressed there was a lack of procedural fairness concerning to permit the issue of a subpoena to Ms H. The respondent said he did not know anything of the application. I might say I found this refusal unusual. Normally it is for the person the subject of a subpoena to take objection to it rather than the Magistrate.

[22] The appellant submitted it was an error for the Toowoomba Magistrate to reopen the proceedings on 8 October 2020 and for the Noosa Magistrate to refuse to transfer the matters to Toowoomba. The respondent said he was unaware why the matter was reopened.

[23] The appellant submitted the Magistrate spoke to the appellant very loudly and had secured tapes of the matter. The respondent did not dispute this.

[24] The appellant submitted the Magistrate erred in the section 151 DVA application in that he did not consider the important medical evidence on this. The respondent said that it was not he who decided the matter but the Magistrate and he did not cause any of the errors relied on.

[25] The appellant stresses the Magistrate refused to consider the written submissions to start with and he did not really read them. The respondent conceded the Magistrate did not appear to take the time to read them. His point though was the appellant filed her material late.

[26] The appellant submits the Magistrate applied an incorrect judicial attitude relying on paragraph 69 of her submissions, in particular that he would not rely on her affidavit and that it was rubbish. The respondent acknowledged the Magistrate was abrupt, but he did not have any control over what the Magistrate did.

[27] The appellant submitted that there was a denial of natural justice in that the Magistrate did not consider section 145 of the DVA. The respondent did not dispute this.

[28] The appellant submitted insufficient reasons were given for granting the DVO in favour of the respondent. The respondent says it was justified and there was material attached to his submissions it was more than just one act but he did not put this into evidence as the appellant had filed her material late. In my view the respondent should have the chance to file an affidavit in response at any retrial of the matter.

Decision as to fresh evidence

[29] As to the fresh evidence, when pressed the respondent did not oppose the admission of the affidavit. He did not dispute the appellant may suffer PTSD, but disputes it was he who caused this.

[30] I have decided it is in the interests of justice to admit the fresh evidence. The evidence of the appellant explains how her condition was exacerbated as a result of the Magistrate's conduct on 24 September 2021. In my opinion without this evidence a miscarriage of justice may well result.[2]

Conduct of the proceedings

[31] In order to examine those grounds of appeal, it is necessary to look at the history of the matter.

[32] The parties were married in 2003 and separated in 2012 and were divorced. There are three children now aged 18, 16 and 13. The children lived with the appellant and attended high school in Toowoomba. The respondent lived on the Sunshine Coast.

[33] After their separation, the appellant brought a claim in the District Court of New South Wales as plaintiff against the respondent as defendant. The plaintiff claimed damages for trespass including aggravated and exemplary damages. In the statement of claim, it was alleged the respondent intentionally physically and emotionally intimidated, bullied and abused the plaintiff causing her to experience fear, intimidation and emotional trauma on a frequent and continuing basis resulting in loss and damage. Particulars of the abuse were given which include:

1. In June 2004, he left a suicide note.
2. In November 2004, he spoke to the appellant in an intimidatory and abusive manner causing her to be in fear and punching a hole in the bedroom wall causing fear to the appellant and her child.
3. Commencing in December 2004 periodically waking the appellant and falsely alleging there was an intruder in the homestead.
4. In August 2005, punching a hole in the bedroom wall.

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[2] See by way of example *R v Wade* [2011] QCA 289; [2012] 2 Qd R 31 where evidence of a psychologist was admitted on appeal to prevent a miscarriage of justice.

5. In October 2006, driving the plaintiff and their oldest son in a furious and intimidating manner.

6. In January 2007, becoming enraged and physically intimidating the appellant and their children with the police attending and removing the respondent and his firearms.

7. In March 2007, the respondent became emotionally abusive and stopped her from leaving a property trapping her on property.

8. The plaintiff fled the homestead and tried to head to the neighbour's home on foot cowering in fear in a paddock. The respondent was laughing.

9. In October 2007 following an argument at dinner, the respondent threw the contents of a bottle of beer over the appellant and their child.

10. Over Christmas/New Year 2007/2008 the respondent grabbed a butcher's knife, severely lacerating his hand and blaming the appellant for this.

11. At Christmas 2007 throwing a book at the appellant.

12. In August 2008, grabbing the appellant and throwing her violently against the driver's side of a door.

13. In September 2008, pursuing the appellant in a street and trying to remove the keys from her vehicle after they had temporarily separated.

14. In May 2009, choking her.

15. In June 2009, the respondent kicked the arm off a sofa.

16. In May 2011, verbally abusing and yelling at the appellant.

17. In July 2011 in New Zealand, damaging a rental vehicle and verbally abusing the appellant.

18. In 2011 at Orange, engaging in an argument and physical fight with his brother in the presence of the family.

19. On 11 September 2011, driving in a furious manner during an argument with the appellant and slamming on the brakes.

20. On 17 October 2011, telling the appellant she was mentally ill in an aggressive fashion.

21. In February 2012, becoming emotionally and verbally abusive and physically aggressive to the appellant.

22. In March 2012, being in a rage and terrifying the children.

23. On 13 May 2012, called her a whore.

24. On 12 August 2012, threatening to crash a vehicle into the tree.

25. On 19 August 2012, receiving an abusive phone call from the respondent.

26. On 13 November 2012 at Orange after their separation, breaking into the appellant's home and refusing to leave it.

27. On 21 December 2012, verbally abusing the appellant in public and kicking the driver's side door of the car.

28. In March to August 2013, repeatedly and maliciously reporting the appellant to the police for imaginary offences.

29. In April/May 2013, falsely accusing the appellant of stealing takings from their company.

30. On 30 May 2012, being physically abused by the respondent as a result of which the police were called.

31. In June 2013, the respondent falsely alleged theft to the police.

32. On 4 March 2014, the respondent failed to return their child from contact in accordance with the arrangements and then spoke to the appellant in a menacing and intimidating manner.

33. In August/November 2013, in breach of the *Family Law Act* the respondent posted false and misleading information concerning the Family Court proceedings on Facebook.

[34] If proved, the above constituted serious domestic violence against the appellant.

[35] The matter was resolved between the parties and on 31 August 2016 the respondent agreed that judgment be entered against him in the sum of $50,000.

[36] The respondent later moved to the Sunshine Coast and the appellant with the children to Toowoomba.

[37] In mid-2020, the respondent was working in his own business. His business had a Facebook page with reviews of his business. On his Facebook page the appellant posted:

> "What [the respondent] does not disclose to his clients is that he has an NSW District Court verdict for almost 30 counts of domestic violence including trying to choke his wife while she slept and threatening to shoot her and the infant children. He agreed with the verdict and was required to pay compensation. I should know he did this to me."

[38] As a result of this, the respondent applied for a protection order (somewhat surprisingly instead of bringing proceedings for defamation) in the Noosa Magistrates Court on 21 July 2020. In the application what he said was:

> "I want the [appellant] to be prohibited from making any written or verbal comment on any medium in relation to the [respondent] in person or any activity in relation to his business or work."

[39] It was said the protection order was required to protect the respondent's business and livelihood. The matter was listed on 12 August 2020. The matter was mentioned at that stage and then listed for final hearing on 6 November 2020.

[40] On 7 September 2020, the appellant also filed an application for a protection order in the Toowoomba Magistrates Court. In her application, she alleged that on 13

July 2020, the respondent called her a "fucking bitch" to a child on the phone, the child was upset by this. There was further incident on 24 July 2020, during which the respondent swore with respect to one of the children. She alleged that the swearing was aggressive in front of the children and caused her and the children fear. She relied on the acts of violence from New South Wales.

[41] The matter was listed in the Toowoomba Magistrates Court on 30 September 2020.

[42] On 30 September 2020, the appellant represented by a solicitor, applied to the Magistrate for both matters to be heard in the Toowoomba Magistrates Court. The solicitor informed the Court that the first matter had been listed in the Noosa Magistrates Court on 6 November 2020, but despite this, there was an application the matters be heard in Toowoomba and that the matters be heard together. The grounds of the application were that the appellant resided near Toowoomba, and she had the care of the three children who attended school in Toowoomba. It would not be convenient for the matter to be heard on the Sunshine Coast. The respondent did not care for any children, and he would be able to travel to Toowoomba. It was pointed out that the nature of the respondent's application simply related to a negative Facebook post, whilst the appellant's related to extensive acts of domestic violence, the subject of the New South Wales proceedings and abusive phone calls in the presence of the children. The respondent who was self-represented, opposed the application on the grounds they were two different applications. The Magistrate told the respondent that in light of the fact the children lived in Toowoomba, he was inclined to agree on the balance of convenience that the matters be heard in Toowoomba. The respondent said, "there's nothing I can raise."

[43] The Magistrate indicated he was prepared under s 41D of the DVA for the matters to be heard together and he gave direction as to the filing of material. The Magistrate formally ordered that the matters be heard together in Toowoomba and adjourned the matter for further mention on 4 November 2020.[3] He also made a temporary protection order in favour of the appellant.

[44] After contact from the Noosa court to the Magistrate, the matter was brought on of the Toowoomba Court's own volition on 8 October 2020. The Magistrate in Toowoomba purported to vacate the transfer order made on 30 September 2020. The Magistrate said he was "lead to believe that the date of 6 November 2020 was a first mention and not a final hearing."[4] However the transcript does not support that view. Mr Bouchier had told the Magistrate it was listed for 6 November 2020. Mr Bouchier informed the Magistrate that the material filed by the appellant included the Noosa notice of adjournment with directions on it and the respondent's application showed the first mention date was August 2020.

[45] Additionally, the court file reveals that pursuant to section 41F of the DVA the appellant had notified the court of the making of a Temporary Protection Order in favour of the Respondent on 12 August 2020. This indicated that 6 November 2020 was not a first mention date.

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3 This was reflected in the Verdict and Judgment Record.

4 Transcript of proceedings 8 October 2020 day 1 page 2.35.

[46] The Magistrate purported to reopen the matter and the Magistrate revoked his earlier orders despite detailed submissions from Mr Bouchier that the matters should be heard in Toowoomba. Mr Bouchier pointed out to the Magistrate that:

- The appellant suffered PTSD from the domestic violence and there was a supporting psychiatric report.
- Mr Bouchier correctly pointed out the section 4 DVA principles.
- There would be disruption to the childrens' lives if they were taken out of school to go to Noosa.

[47] The Magistrate was not convinced of this and said he would not have made the order if he had been told the matter was set for hearing in Noosa.

[48] As noted earlier he vacated the transfer order and the directions orders. By mistake the temporary protection order in favour of the appellant was removed. This was later corrected.

[49] The appellant emailed the Noosa Magistrates Court on 13 October 2020, pointing out that a transfer order had been made and wanted to vacate the hearing date. The registrar stated in response he had consulted with the Magistrate and all parties needed to be in a position to proceed on 6 November 2020.

[50] The matter came on for mention before the Magistrates Court at Noosa on 6 November 2020.

[51] I have read the transcript of those proceedings and it is my assessment that the appellant did not receive a fair hearing on that occasion. The appellant tried to explain to the Magistrate what had occurred in the Toowoomba Magistrates Court, but the Magistrate did not appear interested in hearing submissions about that.[5] The Magistrate said "I don't care what legal advice you got" refusing to entertain submissions from the appellant on the issue of why she had filed in Toowoomba.[6] The Magistrate said he never heard of s 41D of the DVA before and in what appears to be a flippant comment said she could file it in Timbuktu.[7] He then clearly disbelieved the appellant when she told him that the Toowoomba Magistrate had been informed of the hearing date at Noosa. The Magistrates comment was "wow" and "the Magistrate mustn't have been listening to you."[8] The Magistrate then read s 41D of the DVA and said "so what are you saying? That you get the right to choose".[9] The Magistrate then proceeded to revisit the issue on whether the hearing should occur in Noosa or Toowoomba. He did not appear to ask the appellant initially for any submissions on this point and immediately turned to the respondent for his "attitude".[10] The respondent said he believed the matter should be heard in Noosa as he filed his application first, but he admitted he was the only witness. The appellant submitted she had witnesses in Toowoomba and a police officer from Crows Nest. There was also a child she wished to call to give evidence. She also submitted she had post-traumatic stress disorder as a result of the abuse of the

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5 Transcript of proceedings 6 November 2020 day 1 page 2.42.
6 Transcript of proceedings 6 November 2020 day 1 page 2.45.
7 Transcript of proceedings 6 November 2020 day 1 page 4.25.
8 Transcript of proceedings 6 November 2020 day 1 page 5.10.
9 Transcript of proceedings 6 November 2020 day 1 page 6.5.
10 Transcript of proceedings 6 November 2020 day 1 page 7.5.

respondent. The Magistrate's response was "and what difference does that make."[11] The appellant reasonably said in Toowoomba she could have a support person and a safe room and if the matter proceeded in Noosa, the children would miss more school.[12] The Magistrate's reply to this was "it seems to me like the kids are being used in the eternal fight between the two of you."[13] She denied this. He then alleged that she somehow "used" the kids in the Family Court.[14] The Magistrate then ruled there did not seem to be any good reason to adjourn the matter to Toowoomba. The main reason was because the respondent had filed his application in Noosa first.[15]

Discussion on this point

[52] What occurred here was unusual to say the least. In my opinion, a number of errors occurred. First, the Magistrate in Toowoomba erred in re-opening the orders he made on 20 September 2020. The Magistrate was informed of the date in Noosa and heard submissions from both parties on the venue of the trial. He gave reasons for this. The re-opening proceeded on incorrect basis. The Magistrate erroneously said he was not told of the hearing date in Noosa. The other aspect is that usually a Court order is final and should not, unless in exceptional circumstances be re-opened. The power to re-open should be exercised with great caution. The power to re-open should be exercised with great caution because there is a public interest in maintaining the finality of litigation. [16]

[53] Also, once an order is perfected (as was the case here) a court usually does not have the power to reopen the order.[17]

[54] The fact is the matter should have been heard in the Toowoomba Magistrates Court when one considers all of the material. The fact is the appellant was the vulnerable one here and was most in need of protection. The respondent was the only witness in his case. His case involved one act. The appellant's case was far more extensive. She had the children living with her and it would have been extremely disruptive to the children to have the hearing in Noosa. The appellant had another witness living in Toowoomba. It was not in dispute there were more extensive DV facilities in the Toowoomba court as well. Furthermore, there was clear evidence the appellant suffered PTSD which was a weighty factor indeed.

[55] The fact that a hearing date had been set in Noosa was merely one factor to be considered. It was not an absolute.

[56] I note in *MKA v WKT*[18], a case concerned with the venue of the hearing, the Judge considered that the applicant's mental health condition was an important consideration. Convenience and fairness appear to be the touchstones in such an application.

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11 Transcript of proceedings 6 November 2020 day 1 page 15.47.
12 Transcript of proceedings 6 November 2020 day 1 page 16.
13 Transcript of proceedings 6 November 2020 day 1 page 16.40.
14 Transcript of proceedings 6 November 2020 day 1 page 17.5.
15 Transcript of proceedings 6 November 2020 day 1 page 17.30.
16 *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* [1982] HCA 51; (1982) 150 CLR 29 at p 38.
17 *DJL v Central Authority* [2000] HCA 17; 201 CLR 226 at [38].
18 [2018] QDC 73.

[57] Section 41D (2) of the DVA reposed in the court a discretion to have the matters heard together and there was a discretion as to where they should be heard.

[58] As occurred on 30 September 2020 the matters should have been heard together in Toowoomba.

[59] I next turn to the Noosa Magistrate's handling of the matter on 6 November 2020. It is my respectful view that natural justice was not accorded to the appellant at that hearing. It is incumbent on a judicial officer to observe basic rules of fairness. There is to be a line drawn between a judicial officer's tentative views on a point of importance and an impermissible indication of pre-judgment.[19] There is nothing wrong with a Judge speaking sometimes in robust terms and judicial indignation might sometimes be understandable.[20]

[60] But as Kirby J noted in *Escobar v Spindaleri & Anor*[21] "It does not become a judicial officer to depart from proper procedures no matter how provocative the ill-judged conduct of those before the court may be."

[61] In the recent case of *Adacot v Sowle*[22] the following principles were stated:

(a) There is a fundamental right to a fair trial.[23]

(b) The test is whether the judicial officer has created a danger that the trial is unfair.[24]

[62] I also note that section 31 of the *Human Rights Act 2019 (Q)* provides that a party to a civil proceeding has the right to have the proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

[63] It is my assessment the Magistrate in Noosa crossed the line here. Additionally, I consider the Magistrate gave inadequate reasons as to why the matter should be heard in Noosa rather than in Toowoomba.

[64] Relevant to this decision are the provisions of s 4 of the DVA which provide:

> "**4 Principles for administering Act**
>
> (1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.
>
> (2) Subject to subsection (1), this Act is also to be administered under the following principles—
>
> (a) people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives should be minimised;

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19 *Antoun v R* [2006] HCA 21; 224 ALR 51; 80 ALJR 497 at [29].
20 *Antoun v R* [2006] HCA 21; 224 ALR 51; 80 ALJR 497 at [27].
21 (1986) 7 NSWLR 51.
22 [2020] Fam CAFC 215; 355 FLR 57.
23 *Jones v National Coal Board* [1957] 2 QB 55 at p 67.
24 *Galea v Galea* (1990) 19 NSWLR 263.

(b) to the extent that it is appropriate and practicable, the views and wishes of people who fear or experience domestic violence should be sought before a decision affecting them is made under this Act;

(c) 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;

(d) 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;

Examples of people who may be particularly vulnerable to domestic violence—

- women
- children
- Aboriginal people and Torres Strait Islanders
- people from a culturally or linguistically diverse background
- people with a disability
- people who are lesbian, gay, bisexual, transgender or intersex
- elderly people

(e) 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;

(f) a civil response under this Act should operate in conjunction with, not instead of, the criminal law."

[65] Section 37 of the DVA requires the Court to have regard to these principles. The Magistrate failed to have regard to those principles in his approach to the matter.[25] On the material then before the court, the appellant was more in need of protection, bearing in mind the serious allegations in the District Court civil proceedings and the allegations the respondent swore in the presence of the children as distinct from some alleged defamatory Facebook post made about the respondent.

[66] It appears the Magistrate had in effect closed his mind to the matter being heard in Toowoomba. He disbelieved the appellant that the Toowoomba Magistrate had been

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25 See for example *MKA v WKT* [2018] QDC 7.

informed of the hearing date. He dismissed any relevance of her mental health condition. He also had a view she was using the children.

[67] I find that errors occurred in these rulings such that the Magistrate's orders should be set aside here.

Final hearing

[68] I now turn to the final hearing on 24 September 2021.

[69] The appellant initially was represented by a solicitor. At the commencement of the hearing the Magistrate wanted to know why the appellant had not filed her affidavits until the week before the hearing. The solicitor informed the Magistrate "she was suffering from exacerbated post-traumatic stress syndrome and there's medical evidence in her affidavit."[26] The Magistrate's response was "it's not good enough to come here and say I've got post-traumatic stress disorder so I can be late in filing things." The Magistrate then adjourned for a time to read the material.

[70] When he resumed, the Magistrate noted that there was a request that he recuse himself due to a course of conduct that a reasonable lay observer would think that he could not bring an impartial mind to the matters.[27] The solicitor noted "I note that my client does not wish to proceed with that application, but she does want it recorded on the Court records."

[71] The Magistrate then alleged he had not seen any evidence of post-traumatic stress disorder.[28] He must not have read her affidavit because there was extensive material on the point.

[72] In paragraph 20 of her affidavit sworn 20 May 2021 she says she has chronic PTSD. In paragraph 21 of her affidavit, she said that she had PTSD and could not adequately self-represent and in paragraph 28 she said "my PTSD has taken over all aspects of my life. I cannot work. I barely leave my house. My GP Dr Michell Murphy has repeatedly provided medical opinion that my PTSD be taken seriously, which it hasn't been. She supports a transfer to Toowoomba where I have support during the Court proceedings including medical providers familiar with my condition." Attached to the affidavit were exhibits 15, 17 and 24 - copies of medical certificates and doctor's opinion. Exhibit 15 was a report from Dr Murphy dated 9 February 2021 which stated "L has been a patient at the surgery since 2013. During this time, she has been treated for post-traumatic stress disorder caused by domestic violence. At this stage, we have a deterioration in her condition due to domestic violence in July 2020, and subsequent Court proceedings that have required contact with her ex-husband. She is currently taking escitalopram with diazepam to manage her anxiety and panic attacks. Continuation of contact with her ex-husband inhibits her recovery and prevents her returning to full health."

[73] Exhibit 17 was a report dated 11 March 2021, noted that the upcoming possible attendance at Court in Noosa had escalated the PTSD.

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26 Transcript 24 September 2021, Transcript day 1, page 4.1.
27 Transcript 24 September 2021, Transcript day 1, page 5.25.
28 Transcript 24 September 2021, Transcript day 1, page 6.1.

> "L has displayed high levels of anxiety/increased panic attacks/tearful/agitation and disturbed sleep associated with the Court proceeding at Noosa. She has advised us that no domestic violence facilities are available within the Court. At the previous hearing, she was sat in an area where her ex-husband was also present. She had no support person to attend the Court with her. As a single parent, she informed us she had to take her three children with her to Noosa to attend Court in November. The children missed two days of schooling. If the hearing proceeds in Noosa, she has said she would have to take the children out of school again for two days as she has no provisions for prolonged childcare.
>
> The delay in the Court proceedings being resolved only increases her anxiety symptoms. PTSD patients require support services. Transferring proceedings to Toowoomba would reduce a number of PTSD triggers."

[74] There was also an expert psychiatric report dated 2015 which diagnosed PTSD and said it was chronic and it was the result of the domestic violence.[29]

[75] The doctor also noted "I do not foresee an improvement in L's PTSD in the current circumstances and as such she is unfit to engage in Court proceedings this time."

[76] It seems clear that the Magistrate had not read these important documents. The Magistrate was referred to medical certificates contained in the affidavit and the solicitor referred to a Queensland Ambulance report.[30] This ambulance report noted that on 6 November 2020, after the hearing before the Noosa Magistrate, the ambulance was called because of emotional distress; the appellant was crying and very emotional with the children on the scene. She was reluctant to come to the hospital but was convinced to be transported when told her sons could come with her. The primary diagnosis was emotional distress and the secondary diagnosis "exacerbation of PTSD." The solicitor explained that part of the report had been redacted because it related to matters relating to her personal health.[31] Without any objection by the respondent, the Magistrate said he was not going to pay any attention to a document that had been redacted.[32] He repeated "I don't pay attention to documents that are redacted by one party or another without seeing the original."[33]

[77] The solicitor submitted that the documents were not filed until a week prior because the appellant's health had deteriorated and her affidavits were filed on 17 September 2021 attested to her inability to function.[34] The Magistrate stated "well I'm not sure that I accept her statements about that you see without the evidence being challenged and all of that." The respondent had not objected to the medical evidence.

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29 See paragraph 53 of Appellant's affidavit dated 20 May 2021 and exhibit 24.

30 Proceedings 24 September 2021, Transcript day 1, page 7.41 and p 32 of the attachments to the appellant's affidavit.

31 Proceedings 24 September 2021, Transcript day 1, page 8.5.

32 Proceedings 24 September 2021, Transcript day 1, page 8.11.

33 Proceedings 24 September 2021, Transcript day 1, page 10.15.

34 Proceedings 24 September 2021, Transcript day 1, page 10.32.

[78] The respondent then made submissions about whether the last affidavit should be accepted. The Magistrate then asked the appellant's solicitor "Ms Spain, what's the real reason that she hasn't filed." The response was "the real reason is because she has been suffering post-traumatic stress syndrome which has been diagnosed since…" The Magistrate interrupted saying "and do we have a doctor here, do we have a doctor's evidence?" despite the fact there was medical evidence in her affidavit. The solicitor said there was specialist evidence and Dr Murphy explained the condition.

[79] The solicitor pointed out that the affidavit filed in May was done with the assistance of a police officer who is also a Mackenzie friend. The Magistrate's response was "that's wonderful".[35] Ultimately, the Magistrate allowed the material and said "I must say there's a lot of stuff in her material that I'm not going to be paying terribly much attention to" including conversations with the children. He said a lot of the affidavit was "rubbish."[36]

[80] The respondent then gave evidence and the solicitor commenced to cross-examine him as to whether the statement made on Facebook was defamatory.[37] The Magistrate objected to this line of questioning. The respondent explained how he negotiated the civil proceedings down to $50,000.[38] The appellant then said, "I'm leaving and I'm not doing this any further, you're so horrible and harassing and awful to someone like me."[39] The Magistrate told her to be quiet, but she refused. The Magistrate stood the matter down. The appellant repeated "You've treated me terribly, you've rehashed section 41D." The Magistrate said he was not going to put up with this sort of rubbish and the behaviour would not be accepted in the Court room.[40] The matter was stood down for 10 minutes. On resumption, the appellant's solicitor told the Magistrate "my client is unable to come into Court at this moment and she is still in a highly distressed state, so it is difficult to get instructions. I am able to continue acting in this matter and to proceed with the cross-examination, she is just attempting to calm herself down at this stage."[41]

[81] The respondent continued his evidence explaining that he had negotiated the civil proceedings from $300,000 to $50,000. He was then cross-examined about the various claims made in the statement of claim in New South Wales and in nonresponsive answers said, "that's her claim". With respect to post by the appellant, he accepted he had a five-star Google review, it was only knocked down to four and a half or four stars originally and that it went back up to five.[42] After the respondent's case closed the Magistrate informed the appellant's solicitor that he could not consider the appellant's affidavit if she was not there to be cross-examined.[43]

[82] The matter was stood down again and once the matter resumed the appellant's solicitor told the court she was unable to receive instructions from the appellant and

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35 Proceedings 24 September 2021, Transcript day 1, page 13.7.
36 Proceedings 24 September 2021, Transcript day 1, page 14.20.
37 Proceedings 24 September 2021, Transcript day 1, page 18.15.
38 Proceedings 24 September 2021, Transcript day 1, page 20.25.
39 Proceedings 24 September 2021, Transcript day 1, page 21.10.
40 Proceedings 24 September 2021, Transcript day 1, page 21.40.
41 Proceedings 24 September 2021, Transcript day 1, page 23.27.
42 Proceedings 24 September 2021, Transcript day 1, page 28.35.
43 Proceedings 24 September 2021, Transcript day 1, page 29.42.

will have to excuse herself from acting.[44] The solicitor informed the court that she was incapable, extremely emotionally aroused and incoherent.[45] The appellant came back into the courtroom and told the Magistrate that her lawyer thought she was not capable of giving proper instructions. The Magistrate said, "well you sound to me like you are."[46] The appellant then referred to written submissions that her lawyer had sent to the court and the Magistrate said, "I've not read them and I'm not going to read them because she's [the lawyer] not here to talk to them."[47]

[83] The Magistrate then asked for the appellant's submissions and she said, "they'd been filed well I'll hand these up to the court." The Magistrate said, "I don't want them handed up". The appellant said she was allowed to. The Magistrate said, "no you're not." The Magistrate said the lawyer had prepared the submissions she wasn't there to talk to them and he was not prepared to entertain them.[48] The appellant asked the Magistrate "can you stop talking to me like this we shouldn't even be here." The Magistrate said, "you know as a lawyer madam and I'll talk to you like this."[49] The appellant said "no". Ultimately, the Magistrate said, "give me a read of them".[50] As to the submissions he said "alright so we've got P the appellant against F respondent submissions alright I'll read that and then we'll start the other matter after this. I mean all this refers to stuff that's in your affidavit which Mr P hasn't had an opportunity to cross-examine you on it at this point so we'll go ahead Mr P you wish to cross-examine her could you go into the witness box please Ms F."[51]

[84] In fact, the submissions were important and should not have been dismissed out of hand. They contained the following:

- They noted that the appellant sought an order in her favour and having the children named in the order.
- The factual background was referred to and the history of violence in New South Wales.
- The appellant's diagnosis of PTSD as a result of the domestic abuse was referred to.
- The fact that the respondent had instituted numerous family court proceedings referred to.
- She noted that she had been denied a support person and there were no DV support services available at Noosa.
- The appellant relied on not only her two affidavits but the affidavit of Mr PT.
- A summary of the alleged domestic violence was set out from pages 4-5.
- The alleged false complaints to the police and government agencies by the respondent was set out and relevant case authorities were referred to.
- The abusive phone calls on 13 July 2021 and abusive behaviour to Mr PT her partner was referred to.

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44 Proceedings 24 September 2021, Transcript day 1, page 31.26.
45 Proceedings 24 September 2021, Transcript day 1, page 31.35.
46 Proceedings 24 September 2021, Transcript day 1, page 32.37.
47 Proceedings 24 September 2021, Transcript day 1, page 33.17.
48 Proceedings 24 September 2021, Transcript day 1, page 33.35.
49 By this stage the bench and the appellant were yelling at each other.
50 Proceedings 24 September 2021, Transcript day 1, page 34.46.
51 Proceedings 24 September 2021, Transcript day 1, page 35.5.

- There was reference to harassing statements in August 2020, derogatory text messages in 2018 and domestic violence directed at the children in 2020 and 2021.
- Submissions about section 37 of the DVA were made. There was specific reference to her vulnerability due to her suffering PTSD.
- There were submissions about an order in her case being necessary or desirable and relevant authorities were referred to.
- It was submitted that the respondent had demonstrated a course of conduct over an extended period.
- In the submissions in response to the respondent's application, there were submissions made that the application should be dismissed as an abuse of process.
- The factual background was referred to.
- She asserted there was a lack of procedural fairness in the refusal for the issue of a subpoena for Ms H.
- She relied on a number of affidavits.
- She pointed out that the respondent did not claim the Facebook post was harassment but more rather it was an "unfair recommendation."
- There were no assertions of domestic violence in his application.
- The appellant referred to the decision of *Chung v Yang*[52] submitting that the court did not have jurisdiction.[53]
- Other cases were referred to.
- It was submitted the respondent's application was an abuse of process particularly where the respondent which to challenge a consent judgment. Section 118 of the Constitution was referred to.
- It was finally submitted that one incident of harassment could not be domestic violence referring to *GKE v EUT.*[54]

[85] As was said in *Allesch v Maunz*[55]it is a principle of justice that a decision maker must ordinarily afford a person whose interests are affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made.

[86] The appellant pointed out to the Magistrate that she had been advised that she could object to being cross-examined if she was self-represented. The Magistrate said, "what's your application what section is made it under". He then wanted the lawyer back there to find out "what's going on here … because I don't like it."[56] The appellant wanted to go to the bathroom and was allowed to leave the Magistrate stating, "I'm getting concerned about what's going on here because I raised the fact that he would now need to cross-examine her and she starts to object to being cross-examined by someone I haven't heard that from you today now I'm hearing for the first time so I'm really getting concerned."[57]

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52 [2021] QDC 68.
53 The Magistrate did not refer to this case in his decision.
54 [2014] QDC 248 at [23]. The Magistrate did not refer to this case in his decision.
55 [2000] HCA 40; 203 CLR 172 at [28].
56 Proceedings 24 September 2021, Transcript day 1, page 35.20.
57 Proceedings 24 September 2021, Transcript day 1, page 35.37.

[87] The Magistrate then asked the appellant what she based her application to be not cross-examined on. The appellant in quite reasonable submissions said "I have post-traumatic stress disorder I've got some medical information has been presented to the court across a long period of time. This was originally consolidated to be heard in Toowoomba, but the Magistrate determined the matters it would be heard together there. I came for a hearing in November because I was ordered to. I brought my witnesses; I came for some reason without appellate jurisdiction s 41D was reheard but the matters be heard here and here we are again."[58]

[88] The Magistrate said he did not need to hear from the respondent and ordered that the respondent be allowed to cross-examine her because "my reasons are there is nothing before me to satisfy me that the cross-examination is likely to cause you to suffer an emotional harm or distress or to be so intimidated as to be disadvantaged as a witness."[59]

[89] This was a clear error. Section 151 of the DVA allowed the court to refuse the respondent to cross-examine a protected person in person. In this case, contrary to the ruling made by the Magistrate there was clear evidence of the appellant's PTSD in her affidavit which was ignored by the Magistrate. In my respectful opinion, this was a significant error here.

[90] As a result of the ruling given by the Magistrate, the appellant went into the witness box and the respondent commenced to cross-examine the appellant. At one point she objected to a question but the Magistrate told her to answer it.[60] The appellant continued to object to being asked questions not in the material, the respondent's or hers. The Magistrate said, "you've already made that objection I've overruled that."[61] And further "don't interrupt him again please or you'll find yourself being looked at for contempt of court." He further said "I'm not going to countenance bad behaviour in this court madam so you're going to you listen you're going."[62]

[91] The Magistrate then said "I'll say this for the last time because I'm starting to lose patience now would you please..? ANSWER you don't have post-traumatic stress disorder … I don't recall. Can you stop yelling at me."[63]

[92] The Magistrate then said "be quiet and listen to the question start the question again. I don't wish you to be talking over the question." The appellant said "I'm leaving I object I've got post-traumatic stress disorder. I'm not going to be picked on about things that there are a verdict for."[64]

[93] The appellant later returned to the court stating "I object to being cross-examined further. You can make whatever rule you want I say my papers are here. If you make a ruling against me or don't make an order against him I'll accept whatever your ruling is. I don't like you being here I think you should have recused yourself before. Here we are he's picking on me about things from 2012 that I have no material no information on how could I even know so here we are. So whatever you

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58 Proceedings 24 September 2021, Transcript day 1, page 37.5.
59 Proceedings 24 September 2021, Transcript day 1, page 37.20.
60 Proceedings 24 September 2021, Transcript day 1, page 39.25.
61 Proceedings 24 September 2021, Transcript day 1, page 40.11.
62 Proceedings 24 September 2021, Transcript day 1, page 40.20.
63 Proceedings 24 September 2021, Transcript day 1 page 40.42.
64 Proceedings 24 September 2021, Transcript day 1, page 41.1.

are going to do just do it I cannot get cross-examined by him. I've got a verdict he agreed to it. It's in the papers 10 million people have read so please do whatever's gonna happen so I can go home. I've come here a couple of times now."[65]

[94] The Magistrate then gave his decision.

[95] The Magistrate referred to the Facebook post. He then accepted the respondent's evidence that he settled the matter in New South Wales on the basis of a commercial decision.[66] He found that for her to publish this detail on the website was harassing behaviour and constituted an emotional or physical abuse of the respondent causing him fear for his financial wellbeing. He accepted there were no further posts and his rating remained at five stars.

[96] Without more the Magistrate found the appellant would continue to make harassing and derogatory remarks about the respondent and felt he was in need of protection from the domestic violence.[67] Without giving reasons he found that the order was necessary or desirable to protect the respondent from the appellant committing further acts of domestic violence and made a final order for five years.[68] Merely pronouncing conclusions did not amount to the giving of adequate reasons.

[97] With respect to the appellant's application, he noted she had not consented to being cross-examined and said that the appellant was play acting. The Magistrate then referred to the court finding that the transfer to Toowoomba was not appropriate and the appellant's application seemed to be a retaliation to the respondent's application.[69] There appears to be no evidence to justify that observation.

[98] The Magistrate said there was no evidence on which he could find the respondent committed an act of domestic violence because the appellant was no longer there to give evidence and dismissed the application.[70]

Discussion as to the final hearing

[99] On my assessment, at the final hearing, the Magistrate did not give the appellant a fair hearing. There was clear evidence before the court that she did suffer from post-traumatic stress disorder. The Magistrate ignored this evidence and failed to take it into account in determining the application under s 151 of the DVA.

[100] The Magistrate seems to have a preconceived view that PTSD is diagnosed too often.[71] He had also already expressed his views about her PTSD on 6 November 2020.

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65 Proceedings 24 September 2021, Transcript day 1, page 41.25.
66 Reasons page 3.37.
67 Reasons page 5.12.
68 Reasons page 5.21.
69 Reasons page 6.15.
70 Reasons page 7.
71 *Police v Jacobs* January 2021.

[101] I also consider that insufficient reasons were given by the Magistrate in finding that the Facebook post was domestic violence[72] and further that the order was necessary or desirable.[73]

[102] It was also an error to find there was no evidence on the appellant's application. Section 145(4) of the DVA specifically provides that a court need not have the personal evidence of an applicant before making a DVO. This section was considered in *LKL v BSL*[74] where the court found it was an error for the Magistrates court to fail to have regard to the affidavit evidence. The Magistrate failed to have regard to this in reaching his decision.

[103] The affidavit evidence was important. It was not "rubbish" as stated by the Magistrate.

Affidavit of appellant filed 20 May 2021

- The appellant's first affidavit filed 20 May 2021 set out the background to the relationship.
- She referred to the PTSD she suffers.
- She attached an affidavit of Dr Gearing. This evidence was of importance as it contained details of the extent of publication concerning the domestic violence allegations against the respondent.
- She set out that her complaint that the respondent engaged in psychological abuse, harassment and economic abuse.
- She raises issues as to the Magistrates court at Noosa failing to issue a subpoena for Ms H.
- She attaches medical evidence concerning her PTSD.
- She attaches the report of Dr Oelichs a Psychiatrist from May 2015. This was prepared for the NSW District Court proceedings. This report opined that there were clear signs and symptoms of Post-Traumatic Stress Disorder which was chronic. She required a treatment regime. The condition was having an effect on her levels of everyday functioning. Her prognosis was moderately guarded. She would need two years of treatment.
- She noted the treatment she was receiving from her doctor Dr Murphy. Since July 2020 she had not been able to manage the court proceedings even with increased medication.

Affidavit of appellant filed 17 September 2021.

- In this affidavit the appellant also set out the background to the relationship.
- She responded in detail to the respondent's affidavit.
- She swore to the extensive domestic violence she alleged by the respondent from paragraphs 6-7.
- She referred to the litigation history in these proceedings.
- She set out in detail the Post Traumatic Stress disorder caused by the respondent.

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72 The Magistrate did not consider *GKE v EUT* [2014] QDC 248 at [23] where the court held that harassment ordinarily could not be constituted by a single incident.

73 The Magistrate did not consider the three-stage process mentioned in *MDE v MLG* [2015] QDC 276 at [55].

74 [2015] QDC 337 at [11].

- She set out that she began having suicidal ideations and has been taken by ambulance to hospital.
- She talks about the medical treatment she has received.
- She refers to acts of domestic violence by the respondent in 2020 and to false allegations he had made to the authorities about her.
- She refers to abusive behaviour of her partner on 24 July 2020.
- She gave examples of harassing text messages and details of domestic violence directed at the children.
- She attached supporting evidence for her assertions.

Affidavit of PT filed 17 September 2021

- The appellant's partner deposed to aggressive behaviour by the respondent towards him in 2017 and 2020
- He also gave evidence of the effect of the respondent's behaviour on the appellant's PTSD.

[104] Also, in light of the Magistrate's conduct at the mention on 6 November 2020 and the continuing conduct on 24 September 2021 I consider he should have recused himself. An impartial observer would conclude that there was an appearance of bias here.[75]

[105] In summary:

- He told her he would not read her lawyers submissions and they were not "hers." When he relented, he did was dismissive of them.
- He failed to have regard to the medical evidence as to the appellant's condition.
- He objected himself to evidence.
- He failed to properly consider the appellant's affidavit evidence.
- He failed to have regard to the appellant's vulnerability under 151 of the DVA.
- The Magistrate also erred in failing to have regard to section 4 of the DVA.

[106] It is true that the appellant should not have talked as she did but one must consider the likelihood that Magistrate's conduct exacerbated the appellant's PTSD symptoms which explains why she acted as she did in the court.

[107] One can appreciate that sometimes it can be frustrating for a busy Magistrate to deal with self-represented litigants and no doubt the Magistrate became frustrated in this matter. But as the cases note, every judge has a duty to ensure that a trial is fair. There is a particular duty to ensure self-represented litigants are given due assistance.[76] It is true the appellant was a lawyer but as she said at one point she was a construction lawyer and this did not alter her vulnerability as a result of her mental health condition.

[108] In the circumstances, I consider that fundamental errors occurred here. It did seem that the Magistrate had a view that the appellant's application was simply retaliatory to the respondent's although there was clear contrary evidence.

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75 *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337.

76 *Tomasevic v Travaglini* (2007) 17 VR 100 at [139]-[140]. Applied in *Hook v Commissioner of Police* [2022] QDC 35 at [35].

[109] The appeal must be allowed and a rehearing ordered.

Conclusion

[110] In all of the circumstances, on my review of the evidence I consider that the following orders should be made:

1. The appeal is allowed.
2. The orders made by the Magistrate are set aside.
3. The matter is remitted for rehearing in the Toowoomba Magistrates Court before a different Magistrate.
4. I will hear the parties on the question of costs.