CITATION: *Phillips v Phillips* [2005] NTMC 014

PARTIES:	SARAH PHILLIPS
	v
	ADRIAN MARK PHILLIPS
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Domestic Violence Act
FILE NO(s):	20413975
DELIVERED ON:	11 March 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	12 & 13 October 2004, 17 November 2004, 15 December 2004, 25 February 2005
JUDGMENT OF:	Mr V M Luppino

CATCHWORDS:

Domestic Violence – Application for restraining order.

Evidence – Inferences to be drawn from the failure of a party to call a witness when the party gives permissible hearsay evidence in lieu.

Standard of Proof – Application of the Briginshaw test.

Domestic Violence Act (NT) ss 4(1), 12.

Briginshaw v Briginshaw (1938) 60 CLR 336; Jones v Dunkel (1959) 101 CLR 298.

REPRESENTATION:

Counsel:

Applicant:	Ms Allan
Defendant:	Ms Tys

Solicitors:

Applicant:	Mary Allan
Defendant:	Cassandra Tys

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 014
Number of paragraphs:	74

IN THE COURT OF SUMMARY JURISDICTION
AT KATHERINE IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20413975

BETWEEN:

SARAH PHILLIPS
Applicant

AND:

ADRIAN MARK PHILLIPS
Defendant

REASONS FOR DECISION

(Delivered 11 March 2005)

Mr V M LUPPINO SM:

1. This is an application for a restraining order pursuant to section 4 of the *Domestic Violence Act* ("the Act").

2. There is no dispute that the applicant and the defendant are persons in a domestic relationship with each other within the meaning of that term in section 3 of the Act. Other relevant sections of the Act are set out hereunder:-

4. Restraining order

(1) Where, on an application made in accordance with subsection (2), the Court or the Clerk is satisfied, on the balance of probabilities –

(a) that the defendant –

(i) has assaulted or caused personal injury to a person in a domestic relationship with the defendant or

damaged property in the possession of that person; and

(ii) is, unless restrained, likely again to assault or cause personal injury to the person or damage the person's property;

(b) that the defendant –

(i) has threatened to assault or cause personal injury to a person in a domestic relationship with the defendant or threatened to damage property in the possession of the person; and

(ii) is, unless restrained, likely again to make such a threat or to carry out such a threat;

(c) that –

(i) the defendant has behaved in a provocative or offensive manner towards a person in a domestic relationship with the defendant;

(ii) the behaviour is such as is likely to lead to a breach of the peace including, but not limited to, behaviour that may cause another person to reasonably fear violence or harassment against himself or herself or another; and

(iii) the defendant is, unless restrained, likely again to behave in the same or similar manner,

the Court or, subject to subsection (3) and any rule or practice direction under section 20AB, the Clerk, may make an order in accordance with subsection (1A).

12. Evidence

In making, confirming, varying or revoking a restraining order the Court or a magistrate may admit and act on hearsay evidence.

3. The history of this matter is that the application was made by the applicant dated 16 June 2004. That application was supported by her affidavit sworn on the same date to which was annexed a statutory declaration of the applicant dated 15 June 2004. That statutory declaration was a statement of the applicant taken by the police as part of a report she made in relation to

the relevant events. The original application came on for hearing in this court on an ex parte basis when interim orders were made. Thereupon a summons to the defendant to show cause was issued, initially returnable 22 June 2004. Ultimately the defendant indicated that the orders were opposed and the matter was set for hearing.

4. Some of the evidence before me was hearsay evidence. That is permissible by reason of section 12 of the Act. Although the Act allows hearsay evidence, acceptance of that evidence and the weight to be given to that evidence remains a matter for me. Similarly, whether inferences should be drawn from a party's unexplained failure to call some evidence is still open where a party opts to rely on hearsay evidence in lieu of calling a witness.

5. The applicant gave evidence first. She relied on the affidavit referred to in paragraph 3 hereof. In summary form the essential allegations she made related to incidents occurring at Killarney Station in July 2002, an assault which occurred in October 2003 and, lastly and most recently, the events of 14 June 2004.

6. As to the first incident, again in summary form, the applicant alleges that in July 2002 and following on from an argument she and the defendant were having, the defendant grabbed her in a headlock and slammed her face into a washing machine followed by twice slamming her head onto the concrete floor. She alleges that she then hit the defendant in self-defence. She said that the defendant's reaction was to go "ballistic" and she alleges that he then grabbed her, pinned her to the ground, sat on her chest and pinned her head to the ground with both hands pushed against her face.

7. As to the second of those incidents, the applicant alleges that in October 2003, the defendant advised her that he was leaving her. She said that an argument developed as a result of which the defendant grabbed her around the throat and slammed her into the bedroom door. The applicant says this caused the door to come away from its "structure". She said that she then

bounced off the bedroom door and hit her head on the bedroom wall with enough force to cause a hole in the wall. She claims that the defendant then threw a bag containing books at one of their sons (Darren) which struck him in the face causing a black eye.

8. The third incident, which involves the most serious of the allegations, occurred on Monday 14 June 2004. The applicant said that she and the defendant had agreed to separate some three weeks earlier. She was to move out and had been making arrangements to do so during those three weeks. She alleges that on the day in question the defendant threatened to run her horses out of the front gate and throw her personal belongings onto the road if she did not hurry up and move out. She claims that he also threatened to shoot her horses.

9. Later that evening she said she approached the defendant when he was working in the shed. An argument again ensued and again in relation to the timing of her intended move. Each began to abuse the other. The applicant claims that the defendant again threatened to shoot her horses. She said that in retaliation she threatened to shoot his cattle although she claimed she only said this to get back at him and in no way intended to carry out such a threat. When he gave evidence the defendant later offered the same explanation in relation to his threat to shoot the applicant's horses. The applicant concedes that she was the first to then resort to violence. She conceded that she made a veiled threat to drop the bonnet of the defendant's vehicle onto his head. She said that she hit the defendant with a torch, making contact on the top of his right shoulder. She says that in response the defendant grabbed her in a headlock. She said that she broke free of that and that the defendant then grabbed her around the throat, slammed her into a wooden cabinet and held her off the ground in that position for some time. She claims that when he did let go she picked up a clamp and threw it at him but missed, hit his vehicle and smashed one of his spotlights. She claimed that as she was walking away when the defendant came up behind her, he

got her to the ground then grabbed her by the leg and swung her like a rag doll. She said that the defendant then again put her in a headlock and this time slammed her head into the vehicle's side rail, she making contact head first. She claims to have passed out as she next recalls the defendant pulling her up. She said she felt groggy and noticed that the defendant's mother and brother were present by this time.

10. For a number of reasons I found the evidence of the applicant to be unreliable. A number of instances in her evidence led me to this conclusion. Firstly, when giving evidence of her contact with the defendant subsequent to 16 June 2004, after describing certain phone calls, she also described an incident where she claimed the defendant flew his helicopter at tree top level above her street. She said she felt intimidated by this. She also claimed to have seen the defendant flying at altitude over Springvale Homestead where she kept her horses. In his evidence the defendant denied the first incident, at least as described by the applicant and in relation to the second incident, he said that the route taken was the normal air route. He also said something which I thought was very convincing, namely the risk to his pilot's license (and consequently to his livelihood) if he had flown as described in the first incident and the cost of fuel for helicopters relating to the second incident. I thought that was quite believable and I consider it unlikely that he would have unnecessarily detoured just to fly over the applicant's horses and for that matter at altitude. The applicant's insistence that this action was intended to, and did intimidate her, lacks credibility when the applicant's evidence is scrutinised as a whole.

11. The applicant also said that the defendant had made threats to her via a number of her friends. She named Darren Shiers, Leanne Campbell and "quite a few work colleagues". The applicant has given hearsay evidence, albeit permitted by section 12 of the Act, rather than calling all those persons to give evidence. It is clear from her cross-examination, as well as the evidence from those other persons to the extent that they were called that

the applicant has exaggerated the position. One of the persons mentioned who gave evidence, Leanne Campbell, however contradicted the applicant on this issue.

12. There was also much evidence from the applicant, and from other witnesses, related to the injuries the applicant apparently sustained on the occasion of 14 June 2004. I consider the applicant's evidence on this issue to be unreliable owing to inconsistencies between the applicant's version and the versions of other witnesses. Critical however in my view are the discrepancies in the applicant's evidence and the objective medical evidence. I discuss this in more detail below when considering the evidence of Dr Manzo. For now it suffices to note those inconsistencies as it leads me to conclude exaggeration by the applicant.

13. The statement the applicant made to the police (Exhibit A to affidavit sworn 16 June 2004) describes her injuries as follows.

> "I have suffered a sore nose, because at some time I was punched in the face, I can not remember when. I have a cut to my left ear, I have suffered bruising on my left ear and left side of my face. I have a small cut to my left leg, skin missing from my left thigh, right knee and grazing on my elbow and right shoulder. My back feels sore, I had an ear-ring ripped out of my right ear".

14. This description is telling on a number of counts. Firstly, the statement was made the day following the events. It occurred after her friend Shane Yates apparently pointed out to the applicant a developing black eye on the eyelid of the right eye. It is also telling that she there claims that she had been punched to the face. There was no reference to that anywhere else in the statement or in her evidence before me. It is also telling in that it is inconsistent, by omission, with the actual actions which she attributes to the defendant e.g., holding her for a matter of minutes by the throat with her feet dangling. In her evidence in chief the applicant said that the bruising on the right eye had come out more on the following day, presumably she means after she made her statement to the police. In cross-examination it

was put to her that she had made no mention of the black eye in her report to the police. The applicant maintained that she had told the police officers of that. Similarly in relation to her sore neck. It is interesting also that neither the Hospital notes, nor the evidence of Dr Manzo, made any mention of her claiming to have been choked in the manner described i.e., held up by the throat with legs dangling for a number of minutes. As Dr Manzo was to later confirm, such an event would have left marks and would have been highly relevant in diagnostic terms. In the same way as the applicant claims that police apparently omitted important details from her statement, she also claimed that she had told the Hospital, presumably Dr Manzo, that she had been choked in the manner described and yet no reference to that appears in the Hospital notes.

15. Such omissions, in the first case by Dr Manzo from the Hospital notes and secondly by the police from the statement, are extremely unlikely. Specifically in relation to Dr Manzo, I thought she was very thorough and competent and I have no reason to believe that she did not record everything that she was told. Noting that there is an entire paragraph devoted specifically to the description of the injuries in the police statement, I think it is nonsense to suggest that the police inserted the details of many of the injuries but omitted references to the sore neck and the black eye if the applicant reported those injuries.

16. The applicant also claimed in evidence in chief that Leanne Campbell had telephoned her after she (Leanne Campbell) had had contact with the defendant. She claimed that Leanne Campbell had rung her, was upset at the time, said that the defendant had approached her and had berated her. The applicant said that Leanne Campbell told her that she was worried for her and that the defendant had threatened and intimidated her. The evidence of Leanne Campbell clearly shows that the applicant's evidence is significantly exaggerated.

17. Similarly in relation to a message allegedly left by the defendant on the answering machine of Shane Yates. Although the applicant referred to the message and said that she had been told of it by Yates, she gave no evidence, neither in chief nor in cross-examination, as to whether she had listened to the message and in that event, its content. The applicant gave the impression that there was something sinister about that message. Shane Yates subsequently confirmed that he had told the applicant of the message and that she had listened to it. When he later described the content of the message when he gave evidence, it was clear that there was nothing sinister about it at all. Again I think that that is deliberate exaggeration on the applicant's part.

18. More evidence of the applicant's exaggeration and the playing down of her role emerged in cross-examination. She insisted that she never started fights yet it was clearly her who resorted first to violence, even on her own version, on the occasion of 14 June 2004. Not only did she initiate the violence on 14 June 2004, in the course of the argument it was she who first alluded to physicality. She admitted that she made a comment about an injury that might be sustained by the defendant had the car bonnet under which he was then working, fallen on his head. The applicant was insistent that on that occasion the defendant held her in a headlock and slammed her head into a part of the car. It is clear from the evidence of Dr Manzo that the injuries actually noted on the applicant on the relevant occasion were not consistent with such an action.

19. Her claim that she and the defendant did not argue a lot was singularly unconvincing especially in light of the bulk of the evidence which I think indicates that both are quite volatile and arguments between the two were commonplace. She certainly played down her own volatility. She conceded having undergone one session of anger management, but I note that she played down the significance of that as well.

20. She remained insistent and very specific that Darren Shiers and Leanne Campbell had told her that the defendant said that he would hurt her. This suggests an actual direct threat. This was not borne out by Leanne Campbell when she gave evidence. Darren Shiers was not called.

21. Shane Yates was the second witness called by the applicant. He confirmed that the applicant had telephoned him soon after the events of 14 June 2004 and asked him to come over. He has known both the applicant and the defendant for a number of years, the applicant for longer but he has also had business dealings with the defendant. He confirmed that on arrival on the day in question he spoke to the defendant who informed him that the applicant had attacked him with a screw driver, attempted to get his gun and as a result he head locked her and had to pin her down. I note that this is largely consistent with the defendant's version per his evidence and that the defendant gave this description very contemporaneous with the events.

22. Shane Yates confirmed that he noticed the bruising coming up on the applicant's right eyelid and pointed this out to her that night. He however referred to a cut on her right ear with bleeding occurring from the ear-ring hole. This is inconsistent with the applicant's evidence.

23. He confirmed that the defendant left a message for him on his answering machine. He said that the message left was to the effect that his (the defendant's) brother was a liar, that he (Shane Yates) should not believe him (the defendant's brother) and to inform him (the defendant) if he (Shane Yates) was summonsed to give evidence. This description of the content of the message makes it clear that there was certainly nothing of a threatening nature nor in fact anything derogatory of the applicant. As I said earlier the applicant attempted to give the impression that there was something sinister about this message. The message largely becomes irrelevant in the scheme of things save for issues of credibility. Curiously though, the defendant denies leaving the message.

24. Shane Yates confirmed that other than the injuries he described (bruising to the right eye and bleeding from the lobe of the right ear) he saw no other bruises on the applicant and no other marks on her neck. He agrees that the applicant did not point out anything on her neck although he did say that the applicant had indicated that her neck was stiff that night. Given the description of events by the applicant i.e., that the defendant had held her by the throat with her feet off the ground for an extended period, marks on the neck of some degree would be expected. His evidence as to the applicant's injuries following the episode on 14 June 2004 is plagued by the same inconsistencies with the main body of evidence as is the applicant's evidence on this point.

25. Laura McCoy was next called by the applicant. She is a childhood friend of the applicant having known her for some 33 years. Through the applicant, she has known the defendant for approximately ten years.

26. She gave evidence that on one occasion some twelve months before, she saw the applicant agitated and nervous. The applicant told her of a then recent incident involving the defendant. She said that the applicant showed her a hole in the wall which resulted from that incident. She said that she had "eggs on her head" later saying there were two in all. She said that the door was damaged and she described I think what was intended to convey an image of the veneer panels of each side of the door having come away from the frame of the door. She described the hole in the wall as at a height taller than the applicant by about one head height and she demonstrated a size equivalent to approximately nine inches in diameter. She said that the applicant had told her that she and the defendant had had a fight and that the defendant had picked her up by the throat, pushed her against the door and then onto the wall. This seems to be a combination of what the applicant described as two separate events in time.

27. That version of events as described by Laura McCoy achieved some level of consistency with the damage both to the door and the hole in the wall at the height nominated. Curiously however the applicant did not give any evidence of being picked up by the throat on that occasion and in fact she described the hole in the wall as being of head height. Curiously again this is the second episode involving a claimed grab by the throat and holding up which does not bear up under proper scrutiny of the evidence.

28. Laura McCoy also confirmed that she spoke to the applicant after the incident on 14 June 2004. She said that the applicant told her that the defendant had flogged her, chased her, thrown her against the bull catcher, knocked her unconscious and that when she came to, others were present. She said that she saw a bruised eye on the applicant and a cut on the ear, (she demonstrated the lobe of the left ear), red marks on the neck but no bruising, and various other cuts and scratches on her forehead. She said that the bruised eye covered the whole eye, which differs markedly from the evidence of other witnesses.

29. She said that in discussions she has had with the applicant since 15 June 2004 the applicant had said that this was the third time the defendant had rendered her unconscious. The applicant said no such thing in her evidence before me. In cross-examination, Laura McCoy confirmed that although the applicant admitted throwing the torch at the defendant, she omitted to say that she had actually hit him, she didn't say where in the sequence of events this occurred nor did she say anything about the veiled threat to drop the bonnet onto the defendant's head. It appears another instance of the deliberate exaggeration by the applicant of the situation coupled with a playing down of her own role.

30. Mr Carl Wright, who knew the applicant and the defendant from the time they lived at Killarney Station, was next called on behalf of the applicant. I thought his evidence was useful in giving me a better picture of the

personalities of both the applicant and the defendant and the apparent volatility of their relationship.

31. Although he said that he observed “a couple” of arguments between the applicant and the defendant, he said that generally the defendant did not swear at the applicant. He said that he has seen the defendant grab the applicant by an arm during the argument but never push her. He said that he has heard the applicant call the defendant names in the course of arguments and he could not say who started the arguments. He said that when arguments occurred, he would walk away. He said that the defendant had a quick temper and that he “goes off quicker and is loud” but he also said that the applicant also has a quick temper and described her as having a “short fuse”. In cross-examination he said that he had never seen the applicant to be scared of the defendant and didn’t think that she was intimidated by him. His evidence gave me the impression that arguments between the defendant and the applicant were quite the norm. Sadly this is the impression that I have of their relationship from the evidence as a whole.

32. Leanne Campbell was next called by the applicant. She has known the applicant and the defendant for the same period i.e., approximately eleven years. She said that she was present at a number of arguments between the applicant and the defendant and saw signs of aggression. She described the situation of fighting, yelling and that it some times became a “bit physical”. She said that on one occasion some eleven years before, as she was walking past she heard yelling and screaming from the residence of the applicant and the defendant. She said that she saw that the defendant had the applicant up against the wall. The applicant had young baby Michael (then four months of age) in her arms at the time. She could not say whether the defendant had the applicant by the throat but she did say that both were yelling.

33. She said that she has had discussions with the applicant regarding her marital situation. She said that she assisted the applicant to pack her

belongings after the incident on 14 June 2004. She said that the applicant had bruising to the right eye. She however said that she did not notice it initially but after having been told of it, she did notice it when the applicant came close to her. She said that she didn't see any other injuries. She said that the applicant told her about the cut to the ear and scratches to the leg and said that was the extent of the description of the injuries given to her by the applicant.

34. She confirmed the contact described by the applicant between her and the defendant at the Shell service station, the occasion referred to in paragraphs 11 and 16. The applicant had put a more serious slant on the events of that occasion. Leanne Campbell confirmed that the defendant was not aggressive although the situation she found herself in made her uncomfortable. She said that the defendant made a comment to the effect that her testifying might "stuff up" his kid's life. However, I did not understand her to suggest that it was an attempt to dissuade her or intimidate her from giving evidence.

35. In cross-examination she confirmed that she saw the applicant the third night after the incident on 14 June 2004 and she confirmed that she did not see any bruising to the neck or face and did not see any cut to the ear despite being told of that by the applicant.

36. She confirmed that when the applicant described the events of that night that she said nothing to her of threatening the defendant with a screw driver, of the defendant holding her up by the throat, of the applicant's veiled threat to drop the car bonnet on him and that the applicant was the first to resort to violence, particularly that she had hit the defendant with a torch. She said that the applicant only said that she had thrown the torch. She said that the applicant didn't even say that she had thrown it at the defendant.

37. She confirmed that she has seen the applicant hit back at the defendant but had not seen her hit the defendant first. She confirmed that she had seen

each being aggressive to the other and yelling abuse at the other. Particularly she confirmed that the applicant "goes off" back at the defendant although she said that she thought that the applicant was intimidated by him to an extent. In cross-examination, contrary to the evidence of the applicant, she confirmed that when she saw the defendant at the Shell station he did not threaten her and specifically, she did not tell the applicant that she had been scared of him on that occasion. Similarly, again contrary to the evidence of the applicant, she said that she has not told the applicant to be scared of the defendant nor did she tell her that the defendant would hurt her.

38. Dr Erika Manzo was the Emergency Department Registrar on duty at Katherine Hospital on 15 June 2004. She was the doctor who saw the applicant when she attended following the episode of 14 June 2004. The Katherine Hospital records, including the very detailed notes of Dr Manzo, were in evidence (Exhibit 2). Dr Manzo described the history given of an assault the night before and of the applicant's complaints. She said that on examination she saw three "eggs" or lumps on the posterior side of the head, some marks on her neck and both ears were tender just behind the ears. She said there were no obvious bruises on the head, no broken ribs, respiration was normal and there was no suspicion of internal injury or fractures.

39. She said that the extent of the injuries complained of were consistent with an age of approximately 24 hours. She said there were no signs of fresh blood but the left ear had a spot of blood in the ear canal. She said that some of the injuries were consistent with constraint, particularly she said that being in a headlock and being pushed up against a motor vehicle could possibly cause the injuries to the head and similarly the injuries to the thigh could result from such an action.

40. She described in detail the position of the three lumps on the applicant's head. It was very telling that she described these as all being in the same

line. She said that this was consistent with the headlock because they were all in line. She said that if the lumps had resulted from separate blows then it is unlikely that they would have been in the same line except by rather extreme coincidence. Similarly she said that those lumps were unlikely to have been caused by contact with a curved surface, such as a bull bar, as that would likely cause the skin to break.

41. In cross-examination she confirmed that the headlock could cause all three of the lumps and she expressed the view that the headlock was more likely to cause the injuries observed than a single blow to a cylindrical object. In re-examination Dr Manzo confirmed that the three lumps plus the facial tenderness could all come from the one headlock. The former is the defendant's version and the latter is the applicant's version. She confirmed that there were no bruises on the neck, only swelling of the lower lid of the right eye. She said that the applicant had complained of tenderness to the cheekbone area and she confirmed that this was consistent with the headlock. However, she said that a punch to the face would cause a visible bruise and not just tenderness.

42. The applicant's version, per her evidence before me, was put to Dr Manzo in detail particularly that the applicant alleged that she had been held up by the throat against the cupboard with her feet off the ground for a number of minutes causing her to gasp for air. Dr Manzo confirmed that this action would likely result in bruising of the neck.

43. The defendant's version of forcing the applicant to the ground was also put to her and she agreed that the cuts and grazes to the legs are consistent with this. Noting the suggestion of loss of consciousness she confirmed that a loss of consciousness would result in the person appearing groggy when consciousness was resumed. She also said that retrograde amnesia commonly occurs with the loss of consciousness but that it is not permanent

and the memory is usually recoverable. The applicant gave no evidence of any symptoms of amnesia, temporary or otherwise.

44. Louise McKenna was called by the defendant. Her evidence was interposed. She is a psychologist in private practice in Darwin. She has extensive experience having been the Director/Psychologist at Carpentaria Disability Services from 1990 to 1997. Since 1997 she has been in private practice in her own right.

45. During her evidence in chief her affidavit sworn 12 October 2004 was tendered in evidence as Exhibit 7. That affidavit annexes her brief report dated 11 October 2004. Its brevity allows me to quote it in full hereunder -:

> *Re: Michael Phillips (11 years) and Darren Halfpenny (15 Years)*
>
> *Michael Phillips and Darren Halfpenny attended my office for psychological counselling on 18 September 2004. These children were highly distressed regarding allegations of domestic violence that had been levelled against their father, Mr Adrian Phillips, by their mother Ms Sarah Halfpenny. Both children together and independently advised that they have never witnessed their father assault their mother. On the contrary both children advised that for most of their lives they had witnessed their mother verbally and physically abuse their father, who responded by walking away or exiting from the home.*
>
> *Michael and Darren described feeling extremely angry and confused by their mother's allegations. They advised that whenever they refuted the allegations made by their mother, she becomes verbally abusive towards them and accuses them of taking sides with their father. During my contact with these children I did not gain the impression that they were siding with either parent, merely that they wished for the truth to be known. It would seem that Ms Halfpenny is making derogatory comments about the father in the children's presence. Michael alleges that when he informed Ms Halfpenny that he wished to reside with his father, she reportedly told him that she would take Darren and move to Adelaide and never wanted to see him again. Needless to say this was extremely distressing for this young man who indicated that he loved both his parents.*
>
> *I would strongly recommend that a request for a Family Report be made if this matter is to proceed to the Family Court. These children*

need to be heard and their wishes with regard to residency options voiced.

46. These are very telling comments relative to the allegations in this matter. Her evidence was challenged in cross-examination. During cross-examination it transpired that she had been informed by the defendant, and accepted without question, that the applicant had consented to the counselling session. That clearly was not the case. I feel it is questionable that she did not satisfy herself that the applicant had in fact consented. It should have been clear to her in the circumstances that independent confirmation of that was required. It is also quite apparent that the defendant organised the pretence. It is telling that the counselling session with Louise McKenna was held only one week after the defendant refused to consent to a similar request made by the applicant. To that extent the conduct of the defendant is reprehensible. That only serves to highlight how advisable it would have been for Louise McKenna to have confirmed the applicant's consent to the counselling session.

47. Leaving that aside for the present, I am however satisfied that Louise McKenna's objectivity has not been compromised her by her actions and that of the defendant. She resisted suggestions concerning that in cross-examination and her responses were convincing. Moreover, and despite the underhand tactics of the defendant in arranging the counselling session, it appears that Louise McKenna received no preliminary information regarding the relevant circumstances. She confirmed that all her information was derived from the children at interview.

48. In cross-examination, the suggestion was also made that the children's responses were tainted or slanted towards the defendant as he was the person who took them to the counselling session. Again I believe Louise McKenna convincingly rebutted the suggestion. She clearly is very experienced and well credentialed and was clearly alert to these sorts of issues. She backed up her rebuttal of the suggestion by pointing out firstly, that the information

was volunteered by the children and secondly they were not in any way hesitant about pointing out matters adverse to the defendant.

49. Similarly she convincingly rebutted the suggestion that the children's comments may well have been influenced by a perception that their father would have learnt of their comments. This in any event would appear to be a two edged sword as the same would apply in relation to their mother.

50. A suggestion was also made in cross-examination that the children may have understood the session and their comments to be confidential. It is not clear to me what the basis is for making this suggestion. Nonetheless Louise McKenna sufficiently rebutted that suggestion also.

51. The evidence of the children's comments is hearsay. Section 12 of the Act allows me to rely on such evidence. I am prepared to put more weight on this than the hearsay allegations made by the applicant. The reason for this is that the evidence is put before the court via an independent person professionally trained and qualified in field. Moreover, I am satisfied that she was alert to the possibility that the children may have been influenced. Realising that possibility, she maintained her belief that the children were genuine in their comments and explained her justification for this. I accept that justification.

52. It is then of significance that what the children told Louise McKenna concerning their mother is consistent with my own impression of the applicant formed after an analysis of the evidence. I consider it extremely pertinent that evidence lead through this independent expert witness does not support the allegations made by the applicant.

53. The last witness called by the applicant was her employer John Leo. His evidence was interposed during the evidence of the defendant. I had no difficulty with his evidence. He was apparently telling me the truth. However, he gave me yet another description of the extent of the applicant's

black eye after the June 2004 episode. Interestingly though he also said that the applicant complained to him of sore ribs. Interestingly also he described noticing a "scratch" on the applicant's ear. He particularly said that he saw no bruising on her neck.

54. All these observations by John Leo occurred the morning after the episode on 14 June 2004. I think it is telling that he gives evidence of a complaint by the applicant of sore ribs yet the applicant made no mention of this to police, to Dr Manzo or in her evidence in chief.

55. John Leo also gave evidence that he had some limited opportunity to observe the interaction between the applicant and the defendant. He said he observed what he described as the normal "domestics" that occur between a husband and wife.

56. Other than giving evidence himself, the defendant called his brother Raymond Phillips, his mother Francis Shepherd and Senior Constable Sandra Nash of Katherine Police. Raymond Phillips gave evidence largely of the events that occurred on the evening of 14 June 2004. He did however give some background information regarding the relationship between the applicant and the defendant. He has had ample opportunity to make these observations. His evidence on this point, which I accept, very much confirmed my own view of the relationship formed from the remainder of the evidence namely that both the applicant and the defendant are quite volatile, quick to react and neither is intimidated by the other to any greater extent.

57. Raymond Phillips gave the impression that he is regularly and reluctantly involved in assisting the applicant and the defendant to resolve arguments. He said that on the night in question he had his "usual chat" with the applicant after she and the defendant had had an argument. He said that during that, the applicant was holding her head and that she subsequently obtained a towel and held it to her head. He said that the applicant claimed

that she was "pissing out blood" however he claims that he did not see any and the applicant refused to show him. He said he spoke to his brother, the defendant, on that occasion and that his brother described to him what occurred. That description, as recited by Raymond Phillips, was largely consistent with the defendant's evidence before me.

58. Raymond Phillips said that he next saw the applicant some two days after the incident when she attended to obtain some of her property. He said that he was aware of her claim to having a black eye at the time and therefore specifically looked for it. He said that he did not observe it nor observe any other signs of injuries on her.

59. Overall, and despite he being the brother of one of the parties to the proceedings, I thought that Raymond Phillips was a truthful witness. He did not, as his mother was later to do in her evidence, lay most of the blame for the relationship on the applicant. He described the relationship in a very fair way and in a way consistent with a number of the other witnesses called. He had a number of opportunities where he could have coloured his evidence in favour of the defendant but apparently remained objective. For example although he stated that he doubted whether the applicant was in fact unconscious at the time of the arrival of he and his mother on the evening of 14 June 2004, he conceded that it was possible. He gave a number of reasons why he thought that was not the case but he did so in an objective way and not in a determinative way. He could quite easily have insisted that she was unconscious for the same reasons however he presented his evidence on this point in a very balanced and fair way. Overall he came across to me as a truthful witness and trying to be fair and impartial to both of the parties notwithstanding that he is the brother of the defendant.

60. The same cannot be said of the defendant's mother Francis Shepherd. It is not uncommon for mothers to refuse to believe that their own children can be at fault and this was quite evident in her evidence. Even Raymond

Phillips conceded that the volatility in the relationship between the applicant and the defendant was two-way. Indeed all of the objective witnesses in the matter have largely said the same thing. Francis Shepherd however described her son as being very tolerant and that he is not about aggression. Regarding the applicant, she said that it was the applicant who usually instigated arguments and that the applicant lost her temper "worse than anyone I have seen".

61. Although Raymond Phillips was prepared to concede that the applicant may have been unconscious at the time of their arrival on the evening of 14 June 2004 Francis Shepherd was insistent that the applicant was "faking it". She describes how the defendant then picked her up. She went out of her way to gratuitously add that he did so "not in a rough manner" which clearly colours her evidence in the defendant's favour. She said that she saw no signs of injuries at all on the applicant and went on to describe it colourfully as being a "pantomime" on her part.

62. I have no confidence at all in the evidence of Francis Shepherd. Her lack of objectivity has no bounds. Her evidence was heavily slanted in favour of her son. Her views and evidence was prefaced very much with the deep set belief that her son was not at fault and that the applicant was fully at fault. She went as far as to suggest that the applicant only called the police after that incident because, in her view, the applicant did not get the sympathy from her that she was seeking at the time. I reject her evidence to the extent that it contradicts the objective evidence which I have otherwise accepted.

63. The last witness called by the defendant was Senior Constable Sandra Nash from Katherine Police. Senior Constable Nash was involved in part in the investigations and the report of the applicant in relation to the incident of 14 June 2004. Her involvement was to take a statement from the applicant, to interview the defendant and to take some photos of the applicant. She said that she spent some one and a half to two hours with the applicant at the

time that she took the statement. She said that at the same time, she took three photos of the applicant which were then tendered in evidence and became Exhibit 13. This occurred on 15 June 2004 i.e., the day following the incident.

64. During the interview of the applicant, Senior Constable Nash said that she observed a small cut on the applicant's left leg, another small cut above her left ear and an abrasion and cut in the vicinity of the left knee. She said that she observed no other injuries nor were any pointed out by the applicant. She said that she specifically asked the applicant if she had any other pain and specifically in relation to her neck. She said that she asked this because she was then aware of the allegation that the defendant had held the applicant by the neck and off the ground for a number of minutes. Senior Constable Nash said that the applicant's response was that she had no pain or soreness in the neck area. Senior Constable Nash said that she did not observe any signs of injury to the neck area.

65. Senior Constable Nash confirmed the reference in the statement to the injuries listed by the applicant. She confirmed that that was the entirety of the complaints made by the applicant.

66. The photos which comprised Exhibit 13 comprised firstly a photo taken of the left side of the applicant's face centering on her ear. Secondly, a photo of the applicant's left leg. Thirdly, a photo of the applicant's right leg focussing on an area just below the right knee. I am unable to detect any signs of injury on the applicant's left ear from the first photograph. The second photograph shows a small red laceration approximately horizontal and apparently of the size of 2 centimetres on the applicant's left leg, closer to the knee but approximately midway between the knee and the ankle. The third photo shows a number of small red marks just below the applicant's right knee. The small red marks do not appear to be lacerations. The photographs tendered are not consistent with various claims of the applicant

as to the injuries she claims to have sustained on the evening of 14 June 2004, whether that is in her history given to Dr Manzo or in her evidence in chief. They are more consistent with the defendant's version of events on that evening.

67. After considering all of the evidence I thought there were major reliability issues with the evidence of the applicant. I think she has exaggerated the events when discussing matters with her friends, some of whom were called to give evidence. It is clear that in describing what occurred to them, she has significantly played down her own role. Most relevantly however the applicant's evidence in relation to the injuries she sustained on the occasion of 14 June 2004 is at odds with the independent evidence of Dr Manzo who treated her at Katherine Hospital the following day. Dr Manzo's evidence is largely inconsistent with the version that the applicant puts up and is more consistent with the version of the defendant. In addition I thought that there were a number of objective problems with the applicant's evidence. I thought her claim that the defendant had flown over Callistemon Drive in his helicopter at tree top level as a means of intimidating her to be very questionable. Even had I been satisfied that that flight as described had occurred, her claim to feeling intimidated by that is largely inconsistent with my impressions of her own character, an impression that I derived having regard to all of the evidence but particularly her own evidence in regard to the marital history. It is quite clear that it has been her who has resorted to violence first in the past. She is far from the shrinking violet she would have me believe. Far from having the impression that the applicant is intimidated and frightened of the defendant I am left with the impression that the level of aggression between the two is approximately equal.

68. In addition, the presentation of the applicant's case took advantage of section 12 of the Act to introduce hearsay evidence in relation to comments allegedly made to her by other persons. She named Leanne Campbell, Darren Shiers and "many work colleagues" in that context. Of these, only

Leanne Campbell was called to give evidence. No explanation was given for the failure to call those persons. In the case of Leanne Campbell she contradicted the applicant in material respects as to what she had actually told the applicant. As I said above, and partly as a result of that, I am satisfied that the applicant's evidence is unreliable. I would place very little weight on the applicant's hearsay evidence as a result. In light of my rejection of the evidence called by the applicant there is nothing left for a Jones v Dunkel inference to do. However, I am of the view that it would be appropriate to draw an inference adverse to the applicant for the unexplained failure to call those persons in accordance with the principle in *Jones v Dunkel* (1959) 101 CLR 298.

69. Having said that, I cannot say that there are no issues, from a reliability point of view, with the defendant's evidence. Some of his denials flew directly in the face of other evidence which I thought credible. In terms of his presentation as a witness it was clearly unimpressive. He had an annoying habit of not only failing to answer questions but in lieu volunteering excessive dialogue. This continued despite me reminding him on four separate occasions to answer the question and avoid adding superfluous information. He also was very unconvincing in relation to parts of his evidence. He also showed signs of exaggerating his evidence. He was particularly unconvincing when trying to explain the circumstances by which he came to take the children to consult Louise McKenna. I thought it was also very unconvincing when he claimed that Louise McKenna told him that the child Michael wanted to live with him. No such evidence was led from Louise McKenna. I thought he was very vague and unconvincing in his cross-examination in relation to the cupboard or cabinet up against which he held the applicant on the occasion of 14 June 2004. He was evasive in answering cross-examination questions regarding the positioning of his headlock on the applicant and his apparent vagueness and claimed inability of better recall was at odds with his apparently good recall of just about

everything else that occurred that night. His rather ridiculous explanation as to why he had to get out of the car at the time that he returned the children after access suggested provocative behaviour on his part given that the applicant had specifically sought that he not exit the car as a condition of access arrangements. Furthermore his failure to produce CASA documents in relation to their investigation of his alleged flyover at low altitude over Callistemon Drive was unhelpful. His explanation for doing so suggested that he did not consider it relevant to the proceedings. That is quite an extraordinary thing to say in light of the known allegations. For him to then purport to give evidence at what CASA investigators said to him following that investigation was quite cheeky. That evidence was that the CASA investigators told him that they knew that the report of the flyover was just "rubbish" by his ex-wife. I consider it extremely unlikely that they would have said as much. The element of exaggeration in the defendant's evidence on this point is obvious.

70. However in terms of where the burden of proof lies, the reliability of the defendant's evidence does not become an issue unless I am prepared to believe the applicant and to accept her evidence to the requisite standard or unless any unreliability in his evidence shores up the failings in the applicant's evidence. For the reasons espoused above I am not prepared to accept the applicant's evidence even at the base standard. Nonetheless I am of the view that the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 applies to the current case, at least in relation to the first limb of the requirements set out in section 4 of the Act. Briginshaw is authority for the principle that the seriousness of the allegations made and the gravity of the consequences flowing affect the process by which the necessary standard of proof is determined. Dixon J summed this up at pp 362-363 where he said:

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must effect the answer to the question whether the issue has

> been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency."

71. The relevance of the principle in the current case is apparent from the nature of the allegations levied against the defendant. Serious allegations have been made by the applicant. On the evidence before me, a report has been made to the police and criminal charges could have been laid for a number of very serious assaults. The alleged low altitude helicopter flight is also a serious allegation with possible serious consequences. Moreover there are certain consequences which follow from the confirmation of the interim order in this case. In particular the defendant alluded in his evidence to the effect that the cancellation of his firearms license, which automatically follows from the confirmation of the order, will have on his employment. There is ample scope for the application of the principle in the current case. An analysis of the evidence in light of the foregoing would see the applicant's case fall well short of the required standard.

72. Before I am able to make an order pursuant to section 4 I must be satisfied of two things. Firstly, that some incident occurred whether that be in the nature of an assault, a threat or some provocative behaviour at the instance of the defendant upon the applicant. Secondly, I must be satisfied that there is likely to be a recurrence of that or similar behaviour unless the defendant is restrained.

73. The net effect of the evidence is that I am not satisfied in relation to the first of the requirements. As I reject the evidence of the applicant except to the limited extent to where it is confirmed by other objective evidence, I am not satisfied to the requisite degree of the occurrence of the incidents that she alleges. I should add in passing that in my view the evidence also fails to

satisfy the second limb of the requirements. However my findings in relation to the first limb do not require me to elaborate. Consequently I am not satisfied that the applicant has established the matters required by section 4 of the Act. I therefore discharge the interim order and dismiss the application.

74. I will hear the parties as to any ancillary matters.

Dated this 11th day of March 2005.

_____

V M LUPPINO
STIPENDIARY MAGISTRATE