CITATION: *McLeay v Boyle* [2008] NTMC 078

PARTIES:	EVELYN MCLEAY
	v
	KELLY BOYLE
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Darwin
FILE NO(s):	20823570
DELIVERED ON:	11 December 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	3 December 2008
JUDGMENT OF:	Ms Melanie Little SM

CATCHWORDS:

Personal Violence Restraining Order – Whether to make order
Sections 80 – 89 of the *Justices Act*

REPRESENTATION:

Plaintiff:	Applicant in person
Defendant:	Applicant in person

Judgment category classification:	C
Judgment ID number:	[2008] NTMC 078
Number of paragraphs:	24

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

No. 20823570

[2008] NTMC 078

BETWEEN:

EVELYN MCLEAY
Applicant

AND:

KELLY BOYLE
Defendant

REASONS FOR DECISION

(Delivered 11 December 2008)

Ms Melanie Little SM:

1. The applicant is Evelyn McLeay. She is seeking a Personal Violence Restraining Order against Kelly Boyle, the defendant. This application is made pursuant to s 82 of the *Justices Act*. This is a relatively new piece of legislation. Applications used to be under s 99 of the *Justices Act*. The new legislation is quite unlike the now repealed s 99 applications. Applications now focus upon Personal Violence Offences. This case was referred to mediation and has not been the subject of an agreed position.

2. The Court has discretion to make a Personal Violence Restraining Order (s 87 of the *Justices Act*). The Court can only make a Personal Violence Restraining Order if the Court is satisfied on the balance of probabilities that a Personal Violence Offence has been committed or is likely to be committed by the defendant against the applicant. If the Court is not satisfied that either Personal Violence Offence has been committed or is likely to be committed by the defendant against the applicant, the Court must dismiss the application.

3. A Personal Violence Offence is defined in s 80 of the *Justices Act* as an offence against specified provisions of the Criminal Code. In this case it is alleged that offences of assault and threaten harm have been committed.

4. If the Court decides to make a Personal Violence Restraining Order, the order will impose restraints on the defendant as the Court considers necessary or desirable to prevent the commission of a Personal Violence Offence against the applicant. The Court may make any other orders it thinks are just or desirable in the circumstances of the case.

5. The applicant Ms McLeay bears the onus of proving there are grounds to make the order. If the applicant does satisfy the Court on the balance of probabilities, the Court must dismiss the application.

6. On 25 November 2008 I called this matter on for a case management enquiry. As the legislation is new and as both parties were unrepresented, I handed them a two page document which I had prepared with this case in mind. The document set out a general overview of the matters relevant to the case and how the hearing would occur (a copy of that document is marked ex1 and has been placed on the file).

7. The applicant has limited hearing. The applicant advised that when there was background noise it was very difficult to hear what was being said. Even then care needs to be taken to ensure the applicant understands what is being said. The case management enquiry was conducted in the ACICA room, which is known as Court 8. That Court is in an area of the Court House which is quiet and there is limited opportunity for background noise. A table one metre wide is in the room. To ensure that the applicant could best hear the proceedings, it was determined to conduct the hearing at that table, with parties, witnesses and the Court all seated quite closely.

8. The hearing was conducted on 3 December 2008 in Court 8. At times the defendant spoke quickly and while she was looking away from the applicant.

This was especially when there was discussion about whether documents could be tendered by the applicant. Everything that the applicant sought to tender was tendered. There were times when the applicant appeared to miss short segments of the evidence. Sometimes this was when the applicant had put her head down as she was going through her papers and not observing proceedings. All efforts were made to ensure she was aware of the evidence. Evidence was repeated or summarised if parts were missed. From the applicant's responses, it was evident that the majority of the material was heard and understood in the first instance, without the need for evidence to be repeated. As stated, those parts missed were repeated or summarised.

9. There was considerable tension between the parties. The fact that the hearing was conducted in Court 8 limited the opportunity for the formality of a larger Court room setting to temper emotions. The parties and witnesses were seated closely and it is possible that meant tensions and tempers were even more strained. There were quite a lot of interjections throughout the hearing. Those interjections do not form part of the evidence.

10. Evidence was taken in the case and documents tendered. All relevant admitted evidence has been taken into account in the making of the decision. I do not propose summarising the evidence.

11. When deciding whether to make the order, the Court must consider the safety and the protection of the applicant. The Court must also consider the defendant's criminal record, any previous conduct of the defendant in relation to the applicant and all other matters the Court considers relevant (s 88 of the *Justices Act*).

12. The applicant and defendant used to be neighbours. Between the filing of the application and the hearing, the applicant has moved to another location in Darwin. There is agreement that for quite a long time the parties had cordial neighbourly relations. This relationship changed. There is

disagreement as to when their relationship changed. The applicant says things changed when Ms Best moved into the area. The defendant says things changed some time later, when the applicant wrote things about her in a document with respect to a case involving Ms Best (in a separate application brought by the applicant against Ms Best).

13. A number of incidents were alleged which do not directly relate to whether an order should be made. They can only affect issues of credit. I will now consider the evidence with respect to the two alleged Personal Violence Offences.

14. The applicant has said that the defendant has assaulted her by throwing a bucket of water over her (s 188 of the Code) and threatened her by putting her finger across her throat in a cutting motion (s 166 of the Code). This is denied by the defendant. The onus of proof is on the applicant. The applicant called Mr Clint Walker as a witness in her case. As it transpired, Mr Walker did not assist the applicant's case with respect to the matters in dispute, except that he agreed he phoned the Police on behalf of the applicant on the day of the alleged bucket incident. Having heard the evidence, I have concluded that there is no doubt there was an issue with respect to a bucket. The defendant says she was the person who had the water thrown on her by the applicant and that the plastic bucket landed on the ground. She stated that she then threw the empty bucket at the applicant, connecting with the applicant's hip area. This was neither alleged by the applicant to have occurred, nor commented upon. The Court does not know whether the applicant agrees that the defendant threw the bucket at her or not. The defendant says that this incident occurred in the context of the applicant spitting on her face several times a few days earlier and attempting to run her over. She also says that the applicant had previously racially abused her. These allegations were denied by the applicant. Ms Best gave evidence for the defendant. Her evidence was in accordance with the defendant's on the question of the bucket incident. Her evidence was that it

was the applicant (and not the defendant) who had made the threats by way of putting her finger across her throat.

15. The applicant made a series of allegations against both the defendant and Ms Best. Most were irrelevant to the application. At times the applicant revealed some spitefulness towards both the defendant and Ms Best, which the applicant made no attempt to hide. Some quite bizarre allegations were made by the applicant during the hearing. Some evidence was tendered that did not appear to have any direct link with the defendant, such as the pieces of exploded cracker and the pink plastic object with offensive words written on it (which was said by the applicant to be a penis but to me is a deflated pink balloon, albeit with offensive words written on it). These allegations and this irrelevant material did not reflect well upon the applicant. This is especially given that the applicant was seeking an order that required proof of a Personal Violence Offence either being committed or likely to be committed. It is not clear as to how that would be proven by much of the material that the applicant elected to call. While the defendant did interject at times, she was a credible and open witness. As evidence of her frankness, she made an admission against her own interests. She was genuinely distressed at the allegations being made against her.

16. The applicant says that it was obvious that the defendant and Ms Best had put their heads together prior to giving their evidence. I did not form the view that that was obvious. I did form the view that Ms Best did seem prone to melodrama – although I agree there was one part of the evidence (about her father) which was especially distressing to her.

17. I am mindful that both parties before the Court were unrepresented. Not all was put to each other in the formal way lawyers would have. Nevertheless, I am satisfied that the parties understood what was being alleged against them and that they knew the nature of the case being presented by the other party.

18. I have carefully considered the evidence before me. I find that the applicant has not discharged the onus of proof with respect to the allegation that a bucket of water was thrown over her by the defendant. I find this allegation is not proven. I accept that the defendant did throw an empty plastic bucket at the applicant and that the bucket connected with the applicant's hip. The applicant did not allege such an incident happened.

19. With respect to the question of the threats being made, I find that the applicant has not discharged her onus of proof on this question.

20. I find that it is not proven on the balance of probabilities that a Personal Violence Offence has been committed by the defendant against the applicant in the manner alleged by the applicant. I find that the defendant did throw an empty bucket at the applicant and that it connected with the applicant's hip. Given that finding, the Court will consider whether the discretion to make a Personal Violence Restraining Order should be exercised.

21. This application was lodged by the applicant in late August 2008. The parties are no longer neighbours as the applicant moved to another area of Darwin on 27 August 2008. Daily contact will no longer occur, or be likely to occur. Of course the parties are mobile and Darwin is not a large city, so the possibility of contact cannot be completely ruled out. I reject any suggestion that the defendant is seeking out the applicant. The incident involving the bucket occurred on 27 August 2008, more than three months before the hearing. That time period is not insignificant. There is no evidence before the Court of any recent contact between the applicant and the defendant, let alone any new allegations. There is no material before the Court that the defendant has a criminal record. Previous conduct of the defendant towards the applicant must be considered. The applicant agreed that the defendant had previously behaved well towards her. I reject the assertions by the applicant that the defendant had damaged the applicant's car. I am satisfied that the defendant's previous conduct towards the

applicant does not raise any matters of concern when considering the question of the applicant's safety and protection. Previously the defendant assisted the applicant as neighbours do. Whilst there were some occasions when the defendant was verbally provocative towards the applicant in the hearing, it was generally in quite a light hearted way. There was nothing about the defendant's conduct at the hearing which caused the Court to have concerns about the applicant's safety. Having said this, I accept that there are those who are able to maintain composure in a Court room setting. The applicant did not appear fearful of the defendant, despite their close proximity. The applicant is going interstate two days after this decision is given and will be away on holidays for between six weeks and two months. In March 2009, the applicant will again be going interstate (for an operation) and will stay there some time. Accordingly, there will be long periods of time in the next four months when the parties will be separated by vast distances. When the applicant is in Darwin, there is no need for the parties to be in any contact, as there would be if they worked together or were members of the same club or organisation. The defendant has stated to the Court she has no intention of going near the applicant, Ms McLeay. The defendant has stated to the Court she has no intention to harm Ms McLeay.

22. The only relevant incident which I find proven in this case arose following a provocative act (and arguably an unlawful act) by the applicant towards the defendant. Having said that, even if the incident had occurred in the absence of any provocation, I would not have regarded it as so serious as to warrant an order for a Personal Violence Restraining Order. This incident was not the subject of a complaint by the applicant.

23. The Court has discretion whether to make an order for a Personal Violence Restraining Order. In the circumstances of this case, I decline to make an order for a Personal Violence Restraining Order in favour of the applicant against the defendant.

24. I am not satisfied on the balance of probabilities that a Personal Violence Offence has been committed or is likely to be committed by the defendant against the applicant. Accordingly I dismiss the application.

Dated this 11th day of December 2008.

_____

Melanie Little
STIPENDIARY MAGISTRATE