Out with the new, in with the old: A recent decision has put an end to de novo hearings in intervention order appeals from the Magistrates' Court to the County Court of Victoria. **By Mario Cenacchi (This article was written for and publish in the LIJ)**

Introduction

From the inception of the *Family Violence Protection Act 2008* (Vic) (Act) until now intervention order appeals from the Magistrates' Court to the County Court of Victoria have been conducted by way of hearing de novo. The decision of Justice Dixon of the Supreme Court of Victoria in *AAA v County Court of Victoria & Ors* (*AAA*)**1** has put an end to that practice. The decision significantly changes the legal landscape in a manner which has far-reaching implications.

Although some ambiguity remains, there is certainty about at least three things. First, there is no longer an absolute right of appeal to the County Court of Victoria pursuant to Division 9 of the Act from the Magistrates' Court of Victoria. Second, in addition to the strictly adhered to 30 day time limit for filing a notice of appeal there is now a requirement to identify an appellable error in order to enliven the County Court's appellate jurisdiction. Third, the conduct of the final hearings in intervention order matters in the Magistrates' Court will now be open to close examination and scrutiny. At the time of writing this article no appeal to the decision in *AAA* has been filed.

The law before the change

Prior to the decision of *AAA*, an appeal from the Magistrates' Court to the County Court of Victoria was by way of hearing de novo. In other words, the appeal was not like a traditional appeal but rather proceeded as though it was being heard for the first time. Nothing of what occurred in the Magistrates' Court would have any direct bearing on the hearing in the County Court. There was, of course, the ability to raise issues such as prior inconsistent statement if the evidence given during the appeal differed to that given at the Magistrates' Court but, in reality, the obtaining of a recording from the Magistrates' Court, the transcription of that recording and the analysis of that transcription were not a usual component of the appeal process. An appellant did not need to establish any legal basis to appeal. Any party could appeal simply because they did not like the outcome. Intervention order proceedings constitute a significant portion of the Magistrates' Court workload and appeals from those decisions constituted a significant and ever-increasing portion of the County Court's workload. There were many examples of appeals which had very little merit but had to be heard because the appeal was as of right. Due to the application of ss70 and 71 of the Act, Victoria Legal Aid funding was always available to the parties because of the limits placed on the respondent's ability to cross-examine, or be cross-examined by, the protected person directly. A grant of legal aid funding often meant the barristers briefed would run the entire case for their clients or a least assist their clients with organising their case.

What has changed?

In *AAA* the plaintiff's contention was that the County Court did not have jurisdiction to hear an intervention order appeal by way of hearing de novo. The Supreme Court agreed. It is now necessary to identify an error on the part of the court below. The appellate jurisdiction is only enlivened on the identification of a legal, factual or discretionary error. What occurs during the Magistrates' Court hearing is now of paramount importance. Given that magistrates often do not provide written reasons for their decisions, practitioners whose clients wish to appeal a Magistrates' Court decision relating to an intervention order application will need to apply for a copy of the audio recording of the Magistrates' Court hearing as soon as possible because it will almost always be required in order to properly formulate grounds of appeal. No change has occurred to the requirement that an appeal must be filed within 30 days of the Magistrates' Court decision, with no prospect of any extension of time.**2** The appeal will be conducted primarily and sometimes exclusively on the evidence adduced during the Magistrates' Court hearing, though the Court does have a discretion to allow the introduction of new evidence. It is likely this change will lead to a significant reduction in appeals to the County Court and a significant reduction in the amount of that Court's time required to hear such appeals. In fact, it is conceivable that a practice may emerge of appeals being dealt with on the papers in circumstances where no new evidence is sought to be, or permitted to be adduced. Victoria Legal Aid funding may not be available to the parties in cases where no oral evidence is adduced and, therefore, there is no requirement to cross-examine the protected person or for the protected person to cross-examine the person alleged to have committed family violence against them.

The remaining ambiguity

There remains some ambiguity about the appeal process. In particular, the nature of new evidence which may be introduced during the appeal. The most relevant paragraphs of Justice Dixon's decision are [51]-[67]. The question which remains is this: What threshold will be applied to exercise the discretion of the Court to allow new evidence to be adduced during the appeal?

In pursuit of the answer, let's examine the pertinent parts of the judgment.

To begin, Justice Dixon said at [63]:

"I am satisfied that, properly construed, the Act directs that an appeal under s119 is a broad appeal by rehearing that allows for new evidence, as described above at paragraph [51(b)]".

Justice Dixon continued at [64](i):

"The powers afforded to the appellate court under the Magistrates' Court and Children's Court Act include the court 'informing itself in any way it thinks fit'. This does not define the nature of the appeal. Rather the process to be applied is more inquisitorial, reflecting the purpose of protection of victims of family violence and getting at the truth of circumstances of complaints".**3**

The combination of these two paragraphs suggests the provisions of the Act sanction little if any restriction to what new evidence is available to the appellate court. However, later in the judgment Justice Dixon at [67] seems to suggest an alternative approach is warranted:

"Considered altogether, s119 contemplates a rehearing in the sense of a broad appeal where new evidence may be led; the court may determine the case at the time of the appeal, in light of the record of the first instance court and the additional evidence before the appellate court at the time of the appeal, applying the law at the time of the appeal. The jurisdiction is appellate in the sense that it is only engaged where there is factual, legal or discretionary error in the magistrates' decision, identifiable in light of all the new evidence before the County Court at the time of the appeal. As the High Court made clear in *Allesch***4** and *Coal*,**5** statutory provisions conferring appellate powers, including the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise (and the subject Act does not do so), the power is to be exercised for the correction of error".

Here, Justice Dixon appears to suggest a narrower approach consistent with the existing body of law in Victoria on the introduction of new evidence during an appeal.**6**

My view is that Justice Dixon intended the narrower more conservative approach. I have formed this view for the following reasons:

- At [64 (e)] Justice Dixon identified as a relevant consideration the fact no further appeals are permitted from the County Court other than for jurisdictional error. Justice Dixon was alluding to the plaintiff's submission articulated at [23] that permitting the introduction of fresh evidence at an appeal would deprive the parties of the right to appeal any determination based on that fresh evidence; and
- The reference to *Allesch* suggests Justice Dixon was adopting the view of Gaudron, McHugh, Gummow and Hayne JJ who said at [31]:
  "If on an appeal by way of rehearing from a discretionary judgment an appellate court is minded to exercise the discretion in question by reference to circumstances as they exist at the time of the appeal, it is necessary that the parties be given an opportunity to adduce evidence as to those circumstances."**7**
- The reference to *Coal* in paragraph 51(b) suggests Justice Dixon was adopting the view of Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ who said at [13] that:
  "Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance".**8**

It follows that the introduction of fresh evidence on appeal is a matter which ought to be approached conservatively and only considered if the Court is minded to exercise the discretion in question. No doubt a body of evidence will emerge in due course relating to the application of s65 of the Act and its effect on the admissibility of new evidence during an appeal to the County Court. As was submitted by the plaintiff during the appeal but not addressed by Justice Dixon in his reasons, s65's work relates to the evidentiary standard. It does not purport to dictate when or if evidence ought to be admitted. It simply removes

any impediment to the Court hearing evidence which is pertinent to its purpose, but which would otherwise be excluded by some rule of evidence. In my experience it is overused and sometimes creates an insurmountable procedural unfairness.

The appeal process will best serve the community and the legal system if it is kept streamlined and efficient. It is not the appropriate venue for the introduction of fresh allegations. If new circumstances emerge following the hearing in the Magistrates' Court, a fresh application for an intervention order can be made in the Magistrates' Court where the comprehensive procedures and support agencies can ensure complainants have every opportunity to acquire any support and or interim protection they need.**9**

How do the changes to the appeal process affect the manner in which contested intervention order hearings ought to be conducted in the Magistrates' Court?

There is nothing new or strange about the fact that different judicial officers run their respective courts differently. However, the jurisdiction created by the Act provides fertile ground for extreme perspectives to take hold and to influence the manner in which intervention order proceedings are conducted. One pertinent example of such an occurrence was revealed in a recent Supreme Court case decided by Justice Croucher**10** during which the Magistrate being reviewed was described as being on a "frolic of her own".**11** I commend Justice Croucher's decision to anyone interested in this area of law. His Honour's eloquent expression paints a clear picture of the ease with which a hearing of this nature can stray from what may be considered the usual course.

The fertile ground referred to above is generated by several factors including:

The emotive nature of the subject matter

I consider this factor to be a self-evident truth. Whether you are someone who has experienced, directly or indirectly, some form of extreme family violence or you are someone who has experienced, directly or indirectly, the breakdown of a family unit which you consider to be a sacred institution, or as is often the case both, there is an extreme emotional effect. This effect is felt by every human being in the court room to varying degrees and sometime overwhelmingly. Proceedings in this jurisdiction are, as is common with all jurisdictions which deal with children, very difficult to manage and the balance between providing adequate protection for vulnerable people and not imposing draconian measures on individuals unnecessarily is difficult to maintain.

The ability of the judicial officer to ignore the rules of evidence

In some circumstances the vulnerability of the complainant is compelling and justifies the departure from the strict rules of evidence. However, the now well-established institutional supports for complainants have changed the landscape. We now have specialised police units both in the fields of investigation and prosecution. There are numerous family

violence support services, many with liaison officers in the court complex, well-resourced, aptly skilled and eager to assist. There has also been a substantial change in the law. Section 164 of the *Evidence Act 2008* (Vic) has altered the previous position that uncorroborated evidence ought to be approached with caution. As the law stands there is no impediment to the sworn evidence of a complainant being accepted by a court as credible without the need of any corroboration provided the witness themself is deemed to be credible. It is notable both the *Evidence Act 2008* (Vic) and the Act emerged during the same period. It is unclear whether the authors of s65 of the Act considered the effect of s164 of the *Evidence Act 2008* (Vic). I maintain there is no need to depart from the rules of evidence on a regular basis. The rules of evidence have been established over a long period of time for very good reasons – namely to promote procedural fairness and the attainment of justice. The balance obtained by the established rules of evidence is not easily replaced, particularly when the subject matter is emotive. Therefore, departure from the rules of evidence ought to occur only when necessary and not as a matter of course.

The perception that intervention order applications can be easily used as tools to achieve ulterior purposes

The Act has achieved a great deal of good. The 2015 Royal Commission into Family Violence exposed many concerns about the extent of family violence in Australia. The Act attempts to contribute to the reduction of family violence. Among its achievements are the fact that children who prior to the Act could not be offered any protection can now be offered protection, and people in relationships with abusive partners who had very limited options, now have had those options expanded. The Act is and must remain simple and easy to access. The people who need it most are often the least capable of advocating for themselves. Unfortunately, there is nothing to stop what is a lifeline for one person from being used as a weapon by another. I do not advocate for any tightening of the regime. It must remain the case that a magistrate has the power to grant an interim intervention order on the say so of an applicant alone. It is difficult to gauge how often intervention orders are obtained for ulterior motives. It remains a fact that a party to a family law proceeding is advantaged by the existence of an intervention order in their favour. It remains a fact that an intervention order can have a law abiding, hardworking decent human being excluded from their home and from almost all their earthly possessions (often until the matter is finally determined) without being afforded an opportunity to present their version of events. It also remains a fact that many respondents to intervention order applications claim to be victims of an abuse of process when clearly the vast majority are not. The problem is that no effort is being put into dispelling the perception that abuses of process occur regularly. Instead, an arbitrary dismissal of any notion of ulterior motives is applied. The regular departure from a strict application of the rules of evidence contributes to the perception of regular abuses of process. I am of the view greater attention needs to be paid to the perceived application of intervention orders in order to dispel any perception which may undermine the intended purpose of the Act and undermine confidence in the legal system.

Until now, the manner in which intervention order hearings have been conducted in the Magistrates' Court has been largely unmonitored. Other than the occasional judicial

review, appeals have been by way of hearing de novo making the conduct of the hearing in the Magistrates' Court of little concern to the higher courts. An analysis of the conduct of intervention order contested hearings in the Magistrates' Court will now become a regular feature of appeals. I hope a body of law will emerge which will provide valuable guidance and be of assistance to both magistrates and practitioners.

Conclusion

With the new regime comes an opportunity to refresh the system. There is no doubt magistrates have been hampered by the absence of judicial guidance. Each magistrate has developed their own approach in isolation from those of others. There is no body of law relating to the intricacies of the application of the Act. The absence of guidance from superior courts creates the potential for inconsistency in the administration of intervention order proceedings. One area I expect to see develop as a direct consequence of *AAA* is the application of s65 of the Act. Any unnecessary departure from the rules of evidence which creates a procedural disadvantage to a party ought to be questioned. Having the authority to ignore the rules of evidence does not mean the rules of evidence ought to be ignored on a regular basis. The rules of evidence ought to be set aside only when they are an impediment to the court's truth-seeking objective.**12**

AAA has changed the legal landscape of intervention order appeals to the County Court of Victoria. I expect it will also have an impact on the manner in which intervention order applications are dealt with in the Magistrates' Court, though that remains to be seen. One thing is certain, closer attention will need to be paid to the application of the law and the running of the hearing during Magistrates' Court intervention order proceedings as enlivening the appellate jurisdiction now requires the establishment of a factual, legal or discretionary error by the Magistrates' Court.

1. *AAA v County Court of Victoria & Ors* [2023] VSC 13.
2. *Carroll (a pseudonym) v Browne (a pseudonym) & County Court of Victoria* [2018] VSC 253, *Summers (a pseudonym) v McKenzie (a pseudonym)* [2015] VCC 2015 (14 August 2015), R [30].
3. Note 1 above at [64](i)
4. *Allesch v Maunz* (2000) 203 CLR 172.
5. *Coal and Allied Operations Pty Ltd v Australian industrial Relations Commission* [2000] 223 CLR 194.
6. *Clarke v Stingle* [2007] VSCA 292; BC200710768, at [25].
7. Note 4 above, at [31].
8. *Note 5 above*, at [13].
9. *Carroll v Brown* [2018] VSC 253, at [49].
10. *DDD* v Magistrates' Court of Victoria [2023] VSC 89.
11. Note 10 above, transcript of proceeding 10/11/2022 p92.
12. Note 1 above, at [64](i).