



## Summary

This case concerns the relationship between the physical element and the fault element of a contravention offence under s 123 of the *Family Violence Protection Act 2008* (Vic) ('Act'). The respondent was subject to an interim family violence intervention order prohibiting him from committing family violence against the affected family member (AFM) while still being permitted to have contact with the AFM. The respondent allegedly breached the order by committing emotional or psychological abuse through numerous phone calls, text messages and FaceTime calls to the AFM that intimidated, harassed or offended her.

The magistrate held, and the primary judge agreed, that while the AFM felt emotionally or psychologically abused by this conduct, the respondent had not breached the interim order because the prosecution had failed to establish that he **intended** to emotionally or psychologically abuse the AFM.

On application for leave to appeal, the majority of the Court of Appeal held that the fault element under s 123(2) is one of general intent (that is, intent to commit the conduct alleged, e.g., sending a text message) and not specific intent to cause any particular consequence of an act. The majority found this construction gives effect to the purpose of the Act to protect victims of family violence. However, while the Court granted leave, it dismissed the appeal for two reasons. First, the prosecution changed its position on the fault element between the first instance proceeding and appeal, and it should not be permitted to rerun its case on a different basis from that which it contended for at first instance. Second, the order did not explain what emotional and psychological abuse involved, or that it prohibited the giving of intentional or unintentional offence, so the defects in the explanation of the order provided to the respondent meant he could not properly be convicted of the offence.

## Facts

The respondent was subject to an interim family violence intervention order under s 53 of the Act. A few days after the order was made, the AFM reported a series of breaches to the police, consisting of the respondent texting, calling and FaceTime calling the AFM. The AFM gave evidence that the contact intimidated, harassed or offended her. The respondent was charged with four counts of contravening a family violence intervention order under s 123 and one count of persistently contravening a family violence intervention under s 125A of the Act.

## Magistrates' Court proceeding

In the Magistrates' Court, it was agreed the prosecution had to establish the AFM was in fact tormented, intimidated, harassed or offended by the respondent's conduct. However, the prosecution argued it did not have to prove an intention to torment, intimidate, harass or offend, as the offence under s 123 of the Act is a strict liability offence. The respondent argued that *mens rea* must be proven for any offence, particularly where a gaol term can be imposed.

The magistrate dismissed the charges against the respondent. While she found that the respondent's conduct was emotionally and psychologically abusive to the AFM, her Honour held that the offence was not strict liability, that *mens rea* had to be proved to the standard required in criminal proceedings, and that she was not satisfied the respondent intended to breach or persistently breach the interim order.

## Appeal to the Supreme Court<sup>1</sup>

The Director of Public Prosecutions (DPP) appealed to the Trial Division of the Supreme Court on a question of law: did the magistrate misconstrue the relationship between the physical and mental elements of the offence in

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<sup>1</sup> *Director of Public Prosecutions v Cormick* [2022] VSC 786.



s 123? The DPP argued that s 123 only requires proof that the respondent intended to commit the physical acts that constituted the offence and did not need to intend the acts to torment, intimidate, harass or offend the AFM.

The primary judge dismissed the appeal. The judge approached the question as a matter of statutory construction concerning the nature of the mental element for an offence under s 123. His Honour stated that although the answer was to be found in the text of the Act, construed in its context, it was necessary to have regard to the principles of criminal responsibility which inform the construction of that provision. Having traversed those principles, the judge held that the relevant physical acts prohibited by s 123(2) – the behaviour ‘towards’ the protected person – were impossible to divide from the effect or impact of the behaviour on the protected person.

The judge therefore concluded that the prosecution needed to establish that the respondent intended to commit an act that had the psychological or emotional consequences which formed part of the offending conduct; that is, that the respondent sent the messages and made the calls and that he did so with the intent to torment, intimidate, harass or be offensive to the AFM. Accordingly, and despite accepting that the AFM had felt emotionally or psychologically abused by the respondent’s conduct, the judge was satisfied that there was no error in the pathway of reasoning of the magistrate and dismissed the appeal.

## Application for leave to appeal to Court of Appeal<sup>2</sup>

The DPP sought leave to appeal on a question of law: What is the correct relationship between the physical element and the fault element under s 123 of the *Family Violence Protection Act 2008* (Act), and, in particular what is the correct relationship where the form of ‘family violence’ is the type described in section 5(1)(a)(ii) and section 7 of the Act [emotional or psychological abuse]?

### Decision of the majority

Emerton P gave the decision for the majority (with Osborn JA), granting leave to appeal but dismissing the appeal. The majority held that:

- the judge erred in holding it was necessary to prove the respondent intended to torment, intimidate, harass or offend the AFM
- the magistrate erred in construing the relationship between the physical element and the fault element in s 123, and
- it was not correct to hold that ‘it is impossible to divide the physical act, namely behaviour ‘towards’ the protected person, and its effect or impact on that person’.<sup>3</sup>

First, the majority accepted the DPP’s submission that the language of ss 5 and 7 of the Act separates the act towards a family member from its consequences, which are felt by the family member. Accordingly, the behaviour is abusive because of its effect on another person rather than because it is intended to be so. This language is important for determining the relationship between the physical element and the fault element of the s 123 offence.<sup>4</sup>

The majority considered the three categories of *mens rea* applicable to the external elements of an offence – voluntariness, general intent and specific intent – and noted the principle that specific intent to cause a prescribed result should not be implied in statute, unless the text of the statute allows this implication. In this case, there was nothing in the text of the relevant provisions, construed in the context of the Act as a whole and

<sup>2</sup> *Director of Public Prosecutions v Cormick* [2023] VSCA 186.

<sup>3</sup> *Ibid* [98]-[99].

<sup>4</sup> *Ibid* [70].

having regard to its purposes, to support the implication of a specific intent to torment, intimidate, harass or offend the protected person.<sup>5</sup>

As to the primary judge’s finding that behaviour ‘towards’ the protected person was indivisible from the effect or impact of that behaviour, the majority noted that while many of the examples of behaviour constituting ‘family violence’ in s 5(2) use words carrying a connotation of positive intent – such as assaulting, intentionally damaging, depriving, threatening – it is not the case that conduct will not be abusive unless its purpose is to abuse. On the contrary, emotional or psychological abuse can occur without the perpetrator intending to intimidate, harass or offend.<sup>6</sup>

In support of that analysis, the majority noted that the aggravated breach offence in s 123A expressly requires intent to cause harm, apprehension of fear, or being reckless about whether harm, apprehension or fear is caused. In further support of that analysis, the majority observed that the purposes of the Act are better supported by their favoured construction – specifically, the protective focus of the regime, the gendered nature of family violence, that family violence is not limited to overt violence and threats but rather may involve the subtle exploitation of power imbalances, and the adverse impact of family violence on the entire community.<sup>7</sup>

The majority observed that the range of moral culpability embraced by s 123(2) is very broad. A respondent may be charged with an offence under s 123(2) by ‘innocently or unknowingly’ causing offence with an objectively trivial ‘slight’, but the consequences for a person charged with contravening an order are potentially significant. Further, the defence of honest and reasonable belief and the requirement that the accused be explained the effect of the family violence intervention order do not significantly protect a respondent from the potentially harsh consequences of causing unintended offence.<sup>8</sup>

However, the majority considered their favoured construction to be correct, having regard to the text, context and the purpose of the Act, which seeks to address a pervasive social problem and capture forms of abuse that, while subtle, are pernicious. They observed that those who have allegedly committed family violence often offer other reasons for their conduct, and in many cases it will be difficult to ascribe specific intention to an act which results in emotional or psychological abuse. In their view, Parliament has decided that in cases of family violence, the prosecution should not be required to exclude all other explanations for conduct that is perceived by the victim as abusive. It has struck the balance between the rights of family members so as to protect the vulnerable, even at the cost of criminalising behaviour carrying unintended consequences.<sup>9</sup>

The majority granted leave to appeal, but dismissed the appeal for two reasons: because the prosecution should not now be permitted to rerun its case before the magistrate on a different basis from that which it contended for at first instance (that the s 123(2) offence is a strict liability offence),<sup>10</sup> and because the defects in the explanation of the order to the respondent (specifically as to the prohibition on giving unintentional offence) meant that the respondent could not properly be convicted of the offence charged.<sup>11</sup>

### **Dissent by T Forrest JA**

Justice Forrest agreed with the majority, but for different reasons, that leave to appeal should be granted but the appeal should be dismissed.

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<sup>5</sup> Ibid [74]-[77].

<sup>6</sup> Ibid [82].

<sup>7</sup> Ibid [85]-[86].

<sup>8</sup> Ibid [87]-[90].

<sup>9</sup> Ibid [95]-[96].

<sup>10</sup> Ibid [101].

<sup>11</sup> Ibid [91]-[94], [102], [106].



His Honour agreed with the reasoning of the primary judge and noted that the consequences of a conviction for an offence under s 123 is potentially ruinous. He contended that the majority's favoured construction of the fault element may open people up to criminal prosecution for actions that are harmless or benign.<sup>12</sup>

His Honour gave an example of a respondent who pokes his tongue out at an AFM, at which AFM 'takes offence, disproportionately and perhaps irrationally, but nonetheless genuinely.' He disagreed that that the 'posited scenario is extreme or far-fetched', or that police discretion or the availability of a *Proudman v Dayman* 'defence' is an adequate panacea for any perceived harshness in the favoured construction (as the mere fact of being charged means that the accused may still experience inconvenience, expense of engaging legal representation, anxiety and reputational damage).<sup>13</sup>

His Honour suggested that his posited scenario with a knowledge ingredient (that the respondent knew, because of an incident in the couple's shared past, that AFM would be offended or distressed if he poked his tongue out at her) would properly qualify as psychological abuse; and that he preferred a construction of s 123(2) which included a specific intention to cause family violence as an ingredient of the offence. For these reasons, His Honour rejected the majority's favoured construction which he considered to effect irrational or unjust consequences.<sup>14</sup>

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<sup>12</sup> Ibid [111]-[112].

<sup>13</sup> Ibid [115]-[118].

<sup>14</sup> Ibid [119]-[120].