



Royal Commission
into Family Violence

WITNESS STATEMENT OF JUDGE EUGENE MICHAEL HYMAN

I, Eugene Michael Hyman, of [REDACTED], in the State of California, United States of America, say as follows:

1. I make this statement on the basis of my own knowledge, save where otherwise stated. Where I make statements based on information provided by others, I believe such information to be true.

Background and qualifications

2. From 1997 until 2001, I was elected to, and served as a judge of, the Superior Court of California, County of Santa Clara where I served in the criminal, family, juvenile, and probate divisions of the court.
3. From 1990 until 1996, I was appointed to and served as a judge of the Municipal Court of California, County of Santa Clara. Prior to my appointment as a judge, I practiced law in private practice for 11 years, where I specialised in personal injury litigation, workers' compensation law and criminal law.
4. I began my career as a police officer with the Santa Clara Police Department, and later went on to become a Police Academy Instructor at the Santa Clara County Peace Officer's Academy.
5. As a judge, many of my cases concerned domestic violence and also intersected with mental health and substance abuse issues. I presided over the first juvenile domestic violence and family violence court which received a United Nations Public Service Award in 2008.
6. I have lectured on matters related to domestic violence in the United States, Canada, Germany, Australia, and New Zealand. I was a lecturer in law at the University of Santa Clara School of Law for over 25 years, and have published articles on topics such as domestic violence courts, restraining orders and juvenile mental health courts. Attached to this statement and marked "EH-1" is a copy of my curriculum vitae which includes my publication record.

Structure of Californian court system

7. The structure of the courts in each state and territory of the United States differs slightly. Initially in California there were two trial courts, the Municipal Court (similar to the Magistrates' Court in Victoria) and the Superior Court. In 1993, the Municipal and Superior Courts unified by state-wide referendum and now the Superior Court is the only trial court.
8. In most counties in California, the Superior Court is comprised of the following divisions:
 - 8.1. **Criminal division:** hears allegations of criminal conduct (including domestic violence), and has responsibility for setting bail conditions, sentencing offenders and issuing criminal protection orders, which I discuss further below;
 - 8.2. **Family law division:** predominately hears divorce and child custody cases;
 - 8.3. **Juvenile division:** sometimes split into a 'care and neglect' division and a 'juvenile delinquency' division. This division of the court deals with child protection issues and hears allegations of criminal conduct committed by minors;
 - 8.4. **Probate division:** may become involved in domestic violence matters when there are issues of guardianship which have fallen outside the child protection system. For example, a relative of a child may have assumed guardianship in order to remove a child from a home affected by domestic violence. The probate division also hears conservatorship cases frequently involving elders with cognitive problems. Sometimes a caregiver (such as a partner or child) may be abusing the elder person which requires judicial intervention; and
 - 8.5. **Civil division:** hears general civil cases.
9. I sat in all divisions of the Superior Court, however I did not hear 'care and neglect' cases in the juvenile division.
10. In addition to the Superior Court, each state or territory has appellate courts. In California, the appellate courts are the Court of Appeal and the Supreme Court. There are also Federal Courts, however it is rare for a domestic violence case to be appealed to a Federal Court.

Types of protective orders in domestic violence cases

11. The terms “protection order” and “restraining order” are used in the United States to describe what in Victoria are known as family violence intervention orders. The term “batterer” is the term used to describe the perpetrator of domestic violence.
12. In California, there are three types of protective orders which a judge may make in cases involving domestic violence:
 - 12.1. Emergency protection order;
 - 12.2. Civil restraining order; and
 - 12.3. Criminal protection order.

Emergency protection orders

13. An emergency protection order (**EPO**) is a temporary order that removes batterers from the home for seven days. This allows the victim time to see an advocacy agency and to go to court for a more permanent order of protection.
14. In order to obtain an EPO, a police officer attending a domestic violence incident will call an on-duty judge and relay the facts of the case. If the judge determines that there are reasonable grounds to believe that the victim is in immediate and present danger of domestic violence based on the victim’s allegation of recent abuse or threat of abuse, the judge will issue the order over the phone. The police officer completes the order, serves a copy of the order on the batterer, gives a copy to the victim and turns in a copy which is entered into a nation-wide database. In Santa Clara County, attending police officers only contact the judge for an EPO if the victim consents. In other counties, an EPO will be sought regardless of the victim’s wishes.
15. The issuance of the EPO is evidence of a domestic violence incident, making it easier to obtain the more permanent order from the court.
16. In Santa Clara County, the attending police officers are trained to explain to the victim how to seek a more permanent order of protection. When a police officer responds to a domestic violence incident, he or she will give the victim a card which lists all of the domestic violence advocacy agencies in the county, together with other contact numbers for housing, drug and alcohol and other support services. The police officer

will always give the card to the victim, even if they are attending a subsequent incident and have previously given a card to the victim.

17. It is important to note that police in California follow and receive training on dominant aggressor charging policies and practices in domestic violence cases. This is important because there is always a concern about whether the police are charging the correct person in a domestic dispute. Further, without this examination by the police, an emergency protection order or a criminal protection order may be sought against the wrong person.

Civil restraining orders

18. Civil restraining orders are predominately made in the family law division of the Superior Court, but may also be made in the juvenile and probate divisions depending on the case.
19. There are two types of civil restraining orders:
 - 19.1. Peaceful contact orders; and
 - 19.2. No-contact orders or 'stay-away' orders.
20. A peaceful contact order prevents a restrained person from doing certain things such as harassing, assaulting, stalking, threatening, insulting or damaging or destroying the personal property of the protected person. A peaceful contact order allows the protected person and the restrained person to be together if the protected person so chooses.
21. A no-contact order means that the restrained person can have no contact with the protected person. This includes both direct contact (phone calls, text messages, email, Facebook messages) and indirect contact through friends or relatives. A stay-away order is where the court orders the restrained person to stay a certain distance away from the protected person (typically 300 yards).
22. The civil restraining order may be issued for up to five years, and may be renewed either for a further five years or for life. They are longer in duration than the criminal protection order which I discuss further below. For this reason, victims are routinely advised to take out a civil restraining order, even if a criminal protection order is already in place.

23. In Santa Clara County, the victim will usually seek the assistance of an advocacy agency who will help the victim complete the paperwork for the civil restraining order, including an affidavit from the victim. No filing fee is required to apply for a civil restraining order. The Sheriff's Department will usually serve the batterer without charge.
24. Based upon the victim's affidavit, the judge will usually issue a temporary restraining order. The order usually includes removal of the batterer from the home, a stay-away order requiring the batterer to remain at least 300 yards from the victim, her house and place of work, and an order that any children remain in the custody of the victim.
25. A hearing will usually be held within 21 days of the issuance of the temporary restraining order. The respondent has the opportunity to make application for a continuance (or adjournment) if they wish to seek legal representation, in which case the temporary order will remain in place. At the hearing, the respondent has all rights normally associated with a contested hearing. In the United States, if a restraining order is issued against you, you lose your right to hold a firearm. Therefore, if the respondent holds firearms, there is a real incentive to resist the issuance of a restraining order.
26. If a criminal case is pending, the respondent is given the opportunity to continue the case on the understanding that the temporary order will remain in full force and effect until the hearing of the criminal matter. Usually the reason for the grant of the continuance is that the respondent wants to testify and has a privilege against self-incrimination pending the outcome of the criminal case.
27. In cases where the criminal charge has been resolved and the person either pleaded guilty or was found guilty, then the process for obtaining a civil restraining order is faster because the criminal conviction is proof that domestic violence occurred, giving rise to the entitlement to a civil order.

Criminal protection orders

28. Criminal protection orders are made by the criminal division of the Superior Court in the event that a person has been charged with a criminal domestic violence related offence. A judge is able to make a criminal protection order whilst the final determination of the criminal case is pending.

29. If a defendant is granted probation for a domestic violence related offence, then the judge must issue a criminal protection order which includes, at a minimum, a peaceful contact provision.

Probation

30. Probation is a grant of leniency; if a person has been convicted of a summary offence (and most domestic violence offences are summary offences, as opposed to indictable offences), then he or she must be placed on probation for a minimum of three years. Probation can be formal or informal, or a combination of both. Formal probation is where the person is assigned a probation officer who supervises the person and who the person must report to at specified times. Informal probation does not involve a probation officer, but requires the person to report to the court at certain intervals. Usually, this will involve reporting back on a monthly basis for the first three months of probation, and then at two or three month intervals if the person is complying with the probation conditions.
31. Probation typically includes a period of incarceration which will vary depending on the severity of the offence. The length of jail time served by a batterer will depend upon the county, as some county jails are overcrowded and the entire sentence may not be served.
32. In addition, probation conditions typically include:
- 32.1. stay-away order;
 - 32.2. requirement that the batterer not cause an injury requiring medical treatment;
 - 32.3. 10 day community-based work program (for example, picking up trash);
 - 32.4. paying fines and fees;
 - 32.5. attending a 52 week batterer intervention program;
 - 32.6. attending drug or alcohol counselling in the event that the batterer has substance abuse issues; and
 - 32.7. attending a parenting program if there are children involved.
33. In most counties in California, a person begins probation on formal probation, even for a summary offence, if the county is able to provide that service. Santa Clara County does have formal probation for batterers as the result of lobbying from victim advocates and community members who strongly advocate for active monitoring of batterers, however this is not the case in many counties. If formal probation is not available in a county, then it is up to the court to monitor the case using judicial reviews to make sure that the probation conditions are being complied with (informal

probation). This is not as effective as formal probation as the court is not able to contact victims, batterer intervention personnel, substance abuse programs, or others to check-up on the batterer's progress. It is traditional in most counties, in California, with formal probation available to modify it to informal probation once the batterer has completed the 52 week required batterer intervention course. In California, once the course has been completed, further reviews are usually not required absent some specific reason. For example, if the court has concerns that the batterer will not continue to obey the protection or restraining order, pay fines and fees, and follow other conditions of probation then reviews may continue.

34. The batterer is required to come back to court and prove that he has obeyed the conditions of probation, including showing evidence of participation and completion of any relevant programs. The first review will usually occur one month after sentencing and at this point, the judge expects that the batterer has registered for the intervention program and seen the probation officer. If the batterer has not yet done this, most judges will give the batterer another week to register, and if he has still not registered by this time, the batterer will likely go to jail for about a week. Upon release, there will be a further review, and the batterer will again be sentenced to a period of incarceration if he has not registered for the program or complied with other probation conditions. In most cases, batterers will comply with the probation conditions after serving an initial period in jail which is the advantage of 'shock' incarceration.
35. It is important that batterers actually complete the intervention programs, and in my experience, the only real chance of ensuring completion is if the batterer is required to come back to court and prove to the judge that he is complying with the conditions of probation.
36. Although probation originally had a social work component to it, today it is considered a part of the law enforcement function. I would describe it as a supervisory, rather than therapeutic, intervention.
37. A defendant is entitled to refuse probation, and if this occurs it is likely that the judge will hand down the maximum sentence available as there is no other means of supervision available to the court.

Interaction between civil and criminal orders

38. Victims of domestic violence may seek either a civil restraining order or a criminal protection order, if a criminal case has been filed. Advocates encourage victims to take out a civil restraining order even if a criminal protection order is in place because the criminal orders are non-renewable and will generally expire once the probation period terminates.
39. In the event that the batterer has both a civil restraining order and a criminal protection order taken out against him, the criminal order takes precedence, by statute. The extent to which a judge will be aware of other orders made against the batterer in other divisions of the court depends upon the information sharing systems of the particular court, how proactive the judge is, and whether the lawyers appearing for the applicant and respondent bring the existence of other orders to the judge's attention.
40. It is critical that judges explain what the restraining order is to both the protected person and the restrained party. In particular, it is important to explain that the restraining order is the court's order, not the victim's order, and only the court is able to modify it. This means that if the victim allegedly tells the batterer that he can come over to her house and there is an order that prohibits that contact, the restrained party must follow the court's order.
41. Judicial scripts are extremely helpful to ensure that there is consistency between judges, and to make sure that the restrained party (and his or her attorney) understands what is expected of them.
42. Attached to this statement and marked "EH-2" is a copy of a script I used when hearing applications for domestic violence restraining orders. It was my practice to read the script at the beginning of the day's list. Once I issued an order, I re-read the script in a shortened version. I then asked the restrained person if he or she understood what I said or had any questions.

Breaches of restraining orders or protection orders

43. Breaching an EPO, a civil restraining order or a criminal protection order is a criminal offence. If it is a first breach, it is a summary offence and attracts a penalty of up to one year in jail. If the defendant has prior convictions for breaches of domestic

violence related offences, the breaches may then be filed as a summary offence or an indictable offence at the election of the prosecutor.

44. Frequently it is possible for a breach of a protection order or a restraining order to be both a violation of a probation condition and a new crime subject to prosecution at the discretion of the prosecutor. Most breaches of restraining orders and protection orders are brought before the court as a breach of probation (against a background of the defendant having been sentenced to probation for criminal conduct, either a previous breach of an order or an offence constituted by the same conduct that led to the protection order), rather than as the subject of new criminal charges.
45. Often victims do not report breaches of the orders to police, so the only way that these matters are brought to the attention of authorities is through the probation officer contacting the victim and asking whether there has been any contact. In some cases, the offender will attend court as part of the probation review process, and it will be brought to the court's attention that the offender has allegedly breached a restraining order or protection order. The judge will inform the defendant about the allegations of probation violation, remand the defendant in custody and often set a high bail (say \$10,000) because based upon the allegation, the judge believes there is a safety risk to the victim. The judge does not know at this point whether the prosecutor will be filing criminal charges, so the remand is for breach of probation. 90% of these cases do not go to a contested hearing, but are resolved on the day because the defendant admits the violation of probation. In practical terms, many people are not in a financial position to meet bail and will go to jail.
46. The standard of proof required for breach of probation is a preponderance of the evidence, not beyond reasonable doubt. This is a lower evidentiary threshold and means that it is usually possible to establish breach of probation. In addition, the defendant is not entitled to a jury trial on the issue of violation of probation, however all other due process rights apply.
47. There is a rising gradation of penalties for breach of a restraining or protection order which depend upon the nature of the breach. If the breach involved, for instance, a telephone call, text message or email, the likely penalty will be five days incarceration and community-based work on the weekend. If the breach involved showing up at the victim's home or place of work, the likely period of incarceration will be 30 days.

48. In contrast to the process I have described above for batterers who have already breached an order and are on probation, if the only order in existence is a civil restraining order and the restrained party breaches the civil order for the first time, then the protected person may file a motion for contempt of the court's order. In these cases, the judge is able to order a maximum of five days' incarceration for breach of the order. In practice, contempt applications are never made by protected persons and the victim is encouraged to report the breach to police.

Effectiveness of restraining orders and protection orders

49. In order for restraining orders and protection orders to be effective, they need to be enforced and there need to be real consequences when there is a breach. There needs to be consistency in approach by judges, police officers and prosecutors. Effective monitoring and enforcement of these orders requires each part of the system to be committed and working together. For instance, police officers are unlikely to put effort into investigating breaches of restraining orders if they think the matter will likely be dropped further up the line.
50. In California, the attitudes of police, prosecutors and judges to investigating and prosecuting breaches of these orders varies from county to county. The local legal culture in a particular county greatly influences what happens on the ground. In this regard, the role of the judge is extremely important. The judge sets the tone. It is critical that judges, police officers and prosecutors involved in domestic violence cases are committed and want to be there. Domestic violence cases are too important to have people working on them who don't want to be there. The end result, if the judge is not taking it seriously, is that the batterers pick up on the disinterest and cause all kinds of problems. The judge needs to know how to hold the offender accountable, speak to the victim in a supportive way and also hold police and the prosecutors accountable to ensure they are doing their job.
51. Finally, the Santa Clara County Death Review Report was first published in 1993, and has demonstrated that in the last 20 years, there have been 253 domestic violence related deaths. Of these deaths, 28 incidents involved one of the parties being protected by a restraining order. I believe that restraining orders and protection orders can save lives, if properly monitored and enforced.

A handwritten signature in cursive script that reads "Eugene Michael Hyman". The signature is written in black ink and is positioned above a horizontal dotted line.

Judge Eugene Michael Hyman, (Retired)

Dated: 5 August 2015