

Misleading the court.... when is it perjury?

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We have all experienced clients in the Family Court who have different accounts or versions of particular events.

Sometimes, people just get it wrong with no intention of misleading the court, but when does it become perjury?

Section 108 of the Crimes Act 1961 provides that perjury is an assertion made in any judicial proceeding that is known to be false and is intended to mislead the court. Perjury is a serious crime which can come with a prison sentence of up to seven years.

In the recent case of *Nisbet v R* [2017] NZCA 476, Mr Nisbet appealed his 18 month prison sentence after being found guilty of perjury. Mr Nisbet was the respondent to an application for a protection order.

An issue in the Family Court proceedings was whether Mr Nisbet had travelled in a car with his child unrestrained on his lap. In affidavit evidence, Mr Nisbet stated he had never driven on the road with his child standing at the steering wheel.

Following a warning about honesty from the presiding Judge, under cross examination, Mr Nisbet admitted to driving with his child unrestrained on his lap.

Mr Nisbet was charged with perjury and plead not guilty. He gave evidence that he had instructed his lawyer to admit he had driven with his child unrestrained but he changed his plea to guilty once he realised his lawyer would refute this claim. Mr Nisbet was sentenced to 18 months imprisonment.

Mr Nisbet appealed his sentence to the Court of Appeal.

(a) The Court of Appeal noted that when looking at perjury the court must consider five elements:

(b) the seriousness of the perjury in context of the case;

(c) the level of premeditation;

(d) the extent to which the perjury is sustained;

(e) the motivation for the perjury; and

(f) the harm caused.

The Court of Appeal found in Mr Nisbet's favour. The perjury was not a significant factor in the Family Court proceedings and fell at the bottom end of the spectrum for this offending. The offending was premeditated however and Mr Nisbet did correct his false evidence during cross examination. Mr Nisbet's perjury was not intended to achieve any economic advantage or avoid a criminal sanction. He was concerned about the effect the protection order would have on his access to his daughter. The court found that no significant harm was done to either party.

The court held that 18 months imprisonment was grossly disproportionate to the level of offending. The court was of the opinion that a community based sentence would have been more appropriate.

The sentence was quashed and replaced with a 12 month imprisonment sentence. Mr Nisbet was granted leave to apply to the District Court for home detention.

This is a situation that commonly arises in Family Court proceedings. As lawyers, it serves as a timely reminder to explain the implications of perjury to our clients.

There is always a fine line between a genuine mistake and a lie that misleads the court. This is particularly important in without notice applications where judges are making decisions based on the information and evidence before them.

We need to challenge our clients to ensure their evidence is nothing but the truth.

