Defining Harassment

In Brief

- For behaviour to amount to harassment it must be oppressive
- Convictions under s. 42A Family Law Act 1996 are appropriate where the conduct is sufficiently serious to be a criminal offence.

Section 42A Family Law Act

Normally when a court order is breached an individual will face sanctions for contempt of court. However, the position in relation to non-molestation orders made under the Family Law Act 1996 is a little different. Section 42A Family Law Act 1996 makes it a criminal offence to breach such an order. This provision was designed to enhance protection to victims of domestic violence by placing responsibility for enforcement in the hands of the police, rather than depending on the victim bring proceedings herself. In particular it was designed to address the concern that a victim of domestic abuse might be threatened by the abuser into not to bringing contempt proceedings.

The Facts of O'Neill

In *R v O'Neill* [2016] EWCA Crim 92 the Court of Appeal had to determine what kinds of breach of a non-molestation order might constitute an offence. Section 42A itself states that any breach of the order amounts to an offence. However, following this decision it is clear that the interpretation of the order will be affected by the fact that breach of it will amount to a criminal offence.

The appellant was a qualified solicitor and in a relationship with the complainant, a married man. The couple had a daughter but their relationship was intermittent and later broke down. In May 2013 an order was made in these terms:

> The Respondent, Maria O'Neill, is forbidden to intimidate, harass or pester the Appellant, Richard Phillips, and must not instruct, encourage, assist or enable any other person to do so, or in any way suggest that any other person should do so.

The defendant was convicted under s42A for an alleged breach of the order through a series of e-mails and sentenced to concurrent community orders for twelve months with a requirement of supervision and 40 hours. On appeal to the Court of Appeal the focus was on whether the e-mails could amount to harassment under the terms of the order.

The Definition of Harassment

The e-mails expressed a range of concerns about the appellant's upbringing of the daughter, including references to his "psychiatric issues" and allegations about photographs of girls on his computer and that he had an improper interest in girls. The complainant strongly denied these allegations and said he found them deeply distressing and threatening.

The key issue was whether the judge had correctly directed the jury on the meaning of "harassing". This term is commonly used in non-molestation orders and so the issue was one of general importance. The judge gave this direction:
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> "Harassment means causing alarm or distress. Intimidation has its ordinary meaning. I'm not going to try and define that anymore. It's an ordinary English word. You're quite capable of discerning amongst you what that means."

The appellant successfully argued that the jury should have been directed that behaviour could only be harassing if it was oppressive. It was said that oppression involved something more than being unreasonable. It was argued that the e-mails had been intermittent in nature, with there being none between July and October 2013, and while unpleasant, were not oppressive.

It seems likely that the judge's definition of harassment as "causing alarm or distress" was taken from the definition of harassment in s. 7(2) Protection from Harassment Act 1997, which states "References to harassing a person include alarming the person or causing the person distress".

Gross LJ, in allowing the appeal, noted that the definition in that statute uses the word include, indicating that there was more to the definition than simply causing alarm and distress. But it might be thought that observation hardly helps the appellant because it indicates that, if anything, the judge's direction was too narrow in not acknowledging that things other than causing alarm or distress could amount to harassment.

A more persuasive argument for the need for oppression was put in terms of policy. Gross LJ (para 31) held:

> "… a key issue here is the need to distinguish between conduct which, however objectionable, does not justify invoking the criminal law and conduct which crosses the line and results in criminal liability. This is especially so when regard is had to the many and variety of areas where allegations of harassment (justified or not) may arise: by way of examples, the workplace, the field of Public Order and family or domestic situations."

He argued that case law authority made it clear that harassment must include oppression:

> Many actions that cause alarm or distress will not amount to harassment; hence, the requirement, well established in authority …, that the conduct must also be oppressive. The requirement of oppression – always and of course to be considered in context – serves as a yardstick, helping the law to draw a sensible line between the give and take of daily life and conduct which justifies the sanctions of the criminal law. As will thus be appreciated, by equating harassment with the causing of alarm or distress and omitting any mention of the element of oppression, the Judge's direction fell into error.

In reaching this conclusion Gross LJ cited a series of cases dealing with criminal and tort claims under the Protection from Harassment Act 1997 (*Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2002] EMLR 4; *Majrowski v Guy's and St. Thomas's NHS Trust* [2006] UKHL 34; *Dowson and others v Chief Constable of Northumbria Police* [2010] EWHC 2612 (Admin), *R v Haque* [2011] EWCA Crim 1871). These all held that for the purposes of the 1997 Act, the harassment had to amount to oppression.

Relying on this case law Gross LJ held that for the purposes of interpreting a non-molestation order in section 42A prosecutions, harassment should be held to require a finding of oppression. He approved the following definition of harassment, taken from Blackstone:

> " 'Harassment' is generally understood to involve improper oppressive and unreasonable conduct that is targeted at an individual and calculated to produce [alarm and distress]"

In conclusion, the appeal was allowed because the judge had failed to direct the jury that they had to be sure that the behaviour was oppressive as well as causing alarm or distress. The Court went on to find that, on balance, although the jury may very well have convicted the appellant had the correct direction been given, they could not be sure they must have done so and so allowed the appeal.

Questioning the court's conclusion

At the heart of this judgement is an assumption, which must be open to question: namely that the case law on harassment for the purposes of the Protection from Harassment Act 1997 applies to interpreting the word harassment for the meaning of an order under the Family Law Act 1996, and convictions under s. 42A. There are some important differences between prosecutions under the 1997 Act and the 1996 Act which make the analogy inappropriate.

First, under the Protection from Harassment Act 1997 the defendant will have received no formal court warning that his or her conduct has crossed the line between being annoying or improper to becoming criminal. It is not surprising that the courts have found that a conviction is only proper where that line is clearly crossed. By contrast under the 1996 Act, on the making of the non-molestation the defendant has been warned that his or her behaviour will constitute an offence. We need not, therefore, be worried of a defendant being taken by surprise that his behaviour is an offence. Indeed it is clear from the wording of section 42 that the non-molestation order can refer to specific kinds of behaviour and it has never been suggested this must be limited to conduct which amounts to a criminal offence. It is common for non-molestation orders to prohibit behaviour which would not otherwise amount to an offence, such as approaching a house or texting another person.

Second, the whole point of the s.42A offence was designed to protect victims of domestic abuse. This decision runs the risk of weakening the protection of a non-molestation order. In the past a victim would know that if an order were made any breach could lead to contempt proceedings. Now, if a broad reading of this case is taken, only if the conduct is thought sufficiently serious to justify the intervention of the criminal law will enforcement occur. In other words had this case

been brought as a contempt of court case, prior to the introduction of section 42A, it is unlikely the same restrictive reading of harassment would have been used.

It is respectfully suggested that this decision risks weakening protection for victims of domestic violence by failing to recognise that the wrong at the heart of a s. 42A conviction is that the defendant has breached the terms of a court order; not that the defendant has engaged in actions which are in their nature criminally wrong.

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