

“IF I CAN’T HAVE YOU NO ONE CAN” AND OTHER GENDERED CONSTRUCTIONS OF CRIMINAL HARASSMENT

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Section 264 *Criminal Code*

- (1) No person shall ... engage in conduct referred to in subsection (2) that causes reasonable fear for safety or the safety of anyone known to them.
- (2) The conduct mentioned in (1) consists of
 - (a) repeatedly following;
 - (b) repeatedly communicating with, either directly or indirectly;
 - (c) besetting or watching the dwelling-house, or place where ... resides, works, carries on business or happens to be; or
 - (d) engaging in threatening conduct directed at the other person or any member of their family.

Context

- Judges operate within broader political, systemic and structural contexts
- Literature often focuses on psychological aspects of offender, diagnoses and risk assessment
- Conflicting evidence re: criminal harassment as unacceptable behaviour
 - Romantic pursuit vs stalking

Final Data Set

- 526 distinct court decisions
 - 44 French-language; 482 English-language
- 402 cases - same accused & victim
 - 315 cases involved single decision/proceeding
 - 87 cases with multiple proceedings
 - Typically conviction and sentencing decisions or appeal of conviction / sentence

Demographics

- 90% male accused; 9.5% female ; one accused was transgendered
- 86.3% female victims; 7.5% male victims
 - 2.2% multiple victims both male & female
 - 4% of cases gender unknown
- Slightly higher proportion of male offenders than reported in official data

Relationship Between Accused & Victim

- 58.0% former intimate or intimate partners
- 8.2% strangers
- 6.2% acquaintances with no intimate history
- 4.2% Professional
- 2.7% neighbours

Harassment Characteristics

- Types of harassing behaviours (80% involved both)
 - Direct contact: in person or by phone
 - Indirect contact: following, emailing, leaving notes or gifts, or contacting the victim's family, friends or acquaintances to deliver messages
- Length of harassment
 - Range between 1 day and 14 years
 - More than half three months or less in duration

Gendered Constructions of Criminal Harassment

- Can't let go... or ... if I can't have you, no one can
- I may be guilty but that doesn't mean I'm sorry
- I'll do anything to get your attention
- Whose fault is it anyway?
- When Women Stalk Men

Can't let go... or ... if I can't have you, no one can

- Accused unable to relinquish relationship
 - Escalates to criminal harassment & sometimes murder
- Explained using psy terms such as obsessive, fixated, delusional or narcissistic
- Women require protection
- Explanations for the behaviour both pathologize and normalize the offender

Can't let go... or ... if I can't have you, no one can

“I can only conclude that something *snapped* in the accused's *psyche* about 1997 or so and that his *personal demons and obsessions* led him to embark upon the *campaign of terror* reflected in the charges ... and the evidence” (*R. v. Archer*, 1999a, para. 44-45)

“... Mr. Archer [is described] as an *obsessional stalker*, and ... the arsons and attempted arsons he committed were part of the *revenge plan* he determined to wreak upon the *hapless* Miss Corbett.” (*R. v. Archer*, 1999b, para 10)

I may be guilty but that doesn't mean
I'm sorry

- Accused minimize responsibility and lack insight and remorse
 - She doesn't provide satisfactory explanation for leaving
 - He can't handle pain of break up

I may be guilty but that doesn't mean I'm sorry

for the most part ... has the capacity to restraint [sic] his actions and is not a danger to himself or anyone else. He has shown capacity to follow directions by people he trusts or people who are in authority and if he knows there will be consequences to his actions. This can be used to control his behaviour effectively” (*R. v. Basha*, 2002b, para. 11).

... when I asked Mr. Basha [...] if he wished to say anything before sentence was imposed, he responded by blaming Ms. White for his actions. He offered no apology nor assurance that he would refrain from harassing her in the future. It is obvious that Mr. Basha has absolutely no empathy for Ms. White nor any concern or insight into the harm he has caused her despite her emotional plea at the sentence hearing for him to leave her alone. He has not physically harmed her yet, though he has threatened her. He has however, harmed her by taking away her freedom and her ability to live her life. (*R. v. Basha*, 2002b, para. 12)

I'll do anything to get your attention

- Accused use extreme tactics
- Belief that 'no actually means yes, just not yet.'
- Women react
- Judges acknowledge and take into account

I'll do anything to get your attention

I am satisfied in this case that the complainant's psychological and emotional well being and safety were indeed threatened. That was precisely Mr. Bensley's aim. He felt that he might be able to successfully frighten her into returning to him. As he said in his letter, it was the rejection that got him and he thought that he could, as he put it, "piss her off enough to turn around and start talking to him again." (as reproduced by the Court of Appeal in *R. v. Bensley*, 1998, para. 21)

I'll do anything to get your attention

“...you've got to apply a certain amount of common sense to the situation as well. We're still dealing with people's emotions which have been rubbed raw by a break up. We must also keep in mind that there's a certain amount of folklore that says that a certain amount of persistence is forgivable. I think there's an old saying that says "Faint heart n'er won fair lady". Such sentiments may not be totally a propos these days in view of this new legislation but it seems to imply that a certain amount of persistence might win over the reluctant person who is the object of suit.” (*R. v. Baszczyński*, 1994, para. 37)

Whose fault is it anyway?

- Women blamed for causing the stalking
- Condescending prescriptions for avoiding him
 - “if she doesn’t tell him ‘right’ then he can’t be expected to understand” (Mullen *et al.*, 2000, p. 223-224).
- Accused’s behaviour is excused

Whose fault is it anyway?

...advised her [the complainant] to make a log of the harassing telephone calls that she was receiving and to come back later.

Providing such advice to complainants can only serve to discourage women who are or have been harassed by their spouses or boyfriends from complaining to the police and it must have been disheartening to Ms. Alexander to have received such a reaction to her request for police assistance. (*R. v. Gill*, 2005, para. 4-5)

Whose fault is it anyway?

... there was a whole pattern of rather disturbing obsessive behaviour that led to Ms. B. becoming ill, physically ill as a result of it. She already had had a significant operation and you were doing some of these things while she was on medication and while she was recovering from surgery, and you made her condition worse.

You terrified her child and what did she say about her cat, her cat spazzes every time she sees you or something like that. There was something like that. You upset the whole household, everybody, including the animals. (*R. v. Olivier*, 2002b, para. 8-9)

When Women Stalk Men

- 38 of 402 cases involved a female accused and male victim
 - 11 were former intimate partners
- Other relationships
 - professional relationship (8)
 - seeking a relationship (5)
 - neighbours (4)
 - ex-partner's new partner (2)

When Women Stalk Men

- When you look at the [...] forensic assessment [...] there is essentially what I call a lack of remorse. There's a lack of taking responsibility for what she has done, though she has pled guilty. I note that despite the contents of the letters, the telephone calls and even some of the comments she made when she attends and deals with the [...] complainant personally, she doesn't admit to having some kind of attraction, infatuation, or love for the complainant [...] and certainly, the complainant has had some contact, and that doesn't help, but however, she clearly has not taken responsibility fully for her actions... (*R. v. Hrabanek*, 2005, para. 44)
- Ms. Hrabanek remains closely knit in her delusional tapestry, and it is quite difficult to treat her **fetish** and fixation which appears to have been transformed into a psychotic preoccupation" (*R. v. Hrabanek*, 2005, para. 71)

When Women Stalk Men

behaviour as a *distortion of reality twisted* to suit her...purposes” ... nonetheless, the recipient of her interest has the right to reject it, and it is the duty and the obligation of that person putting forward the interest to accept that rejection in whatever difficult fashion one must accept those things, and to deal with it accordingly, but not to continue to attempt to persuade the person in whom the interest is being expressed that in spite of everything that they feel and in spite of everything that they see, the pursuer, in this case the accused, knows what is best... (as reproduced by the Court of Appeal in *R. v. Goodwin*, 1997, para. 7)

What does it all mean?

- Blurred boundaries within social context
 - Public/private dichotomy continues to exist
 - Continuum moving from pursuit to persistence to criminal harassment
- Neo-liberal influences
 - Evident in changes to VAWIR policies
 - New emphasis on distinguishable individual attributes
 - Reflected in movement towards actuarial risk assessment tools

Policy implications

- Criminalization – may not be best – and should not be – only answer
- Need to consider needs of women
- Impression that many judges appear to take criminal harassment seriously
 - Restraining orders and harsh sentences can lead to escalating violence
 - Formalized legal processes are unlikely to resolve issues
 - Funding cuts create new problems