Canada's Criminal Harassment Provisions: A Review of the First Ten Years

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In 1993, in response to high profile cases involving the harassment and murder of women, Parliament amended the Criminal Code *to include a new crime of criminal harassment in section 264. At that time, women's groups expressed concern that the legislation was not an adequate response to the pressing social problem of intimate violence and harassment of women. The authors examine the first ten years of case law under the new provision, in an attempt to determine whether the initial concerns have been borne out.*

After reviewing the cases qualitatively, the authors conclude that there are three main problems with the legislation. First, the requirement that the conduct in question be repeated could sometimes put women in danger. Second, the requirement that a woman's fear be "reasonable" could trivialize their actual responses to repeated harassment. Third, and most important, the subjective fault standard enables an accused to assert that, rather than harassing the woman, he was "courting" her in an attempt to (re)establish a romantic relationship. A reasonable doubt in this regard results in an acquittal.

The authors conclude that any changes to the legislation must be informed by the gendered nature of this offence and by the larger social problem of violence against women generally. The criminalization of harassment has a role to play in society's response to intimate violence, but on its own it is an insufficient response.

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Introduction

Over the past decade, there has been a realization in Canada that violence against women is an issue of sex equality. The *United Nations Declaration on the Elimination of Violence against Women* recognizes violence against women as "a manifestation of historically unequal

power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women."[1] The bulk of that abuse is committed against women by men with whom they have or have had intimate relationships. Women are particularly at risk when they try to leave violent relationships.[2]

Assaults in the "domestic" sphere have historically been treated as a private matter outside the scope of criminal law. Historically, the criminal justice system at all levels has failed to adequately enforce laws dealing with violence against women. More recently, women's groups and feminist scholars have worked to bring "private" violence back into the public sphere. Judicial education, more enlightened policing and zero tolerance for domestic violence have assisted in this effort.

With the increased involvement of law, there has also emerged a concern that criminal law is not the best tool for helping women in violent relationships. The criminal law traditionally plays a punitive role, dealing with crimes after they take place, or a deterrent role, preventing crimes from happening. After-the-fact responses do not protect women, and spousal or intimate violence appears to be largely not deterrable.

This paper examines one particular form of violence against women: criminal harassment, more commonly known as "stalking." Prior to 1993, there was no specific *Criminal Code*[3] provision to deal with harassing behaviours committed primarily by men against women. There were crimes dealing with uttering threats,[4] threatening phone calls[5] and all levels of assault and sexual assault. In 1993, Canada criminalized stalking by adding section 264 to the *Code*, thus joining a

1. 23 February 1994, 33 I.L.M. 1049 at 1051.
2. Andrée Coté, *La rage au coeur: rapport de recherche sur le traitement judiciaire de l'homicide conjugal au Québec.* (Baie-Comeau: Regroupement des femmes de la Côte-Nord, 1991) [Coté].
3. R.S.C. 1985, c. C-46 [*Code*].
4. *Ibid.*, s. 264.1.
5. *Ibid.*, s. 372.

trend, begun in California and other American states, towards enacting stalking laws.[6]

In the opinion of many people involved in issues of violence against women, section 264 was an inadequate response to the problem of criminal harassment. Professor Rosemary Cairns Way argued that the legislation was a knee-jerk response to high profile cases in which women had been murdered after being stalked by their killers.[7] In her view, this "new" social problem was constructed largely by the media. The problem was really not new at all, but rather part of the much larger systemic problem of violence against women. The media frenzy over these cases enabled the government to appear to be responding to the systemic problem of violence against women by its speedy and decisive action against criminal harassment. Cairns Way argued that in fact, the lack of consultation with women, the true stakeholders in criminal harassment and intimate violence, resulted in legislation that will do little to protect women from male violence.

In this paper, we seek to assess the concerns that were raised about section 264 at the time of its enactment. In particular, we attempt to determine whether section 264 protects women against male violence and threatening behaviours. With the benefit of almost ten years of case law on this provision, we will examine the judicial interpretation of section 264 to determine whether some of the substantive concerns raised while Bill C-126 was still in committee have impeded its effectiveness. The three main concerns we deal with are, first, the requirement for the conduct described in section 264 to be repetitive; second, the requirement that the fear of the complainant be reasonable; and finally, the use of a subjective *mens rea* test. Our perspective focuses on the need to protect women from harassment and other forms of violence, particularly from intimate or former intimate partners.[8]

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6. Bruce MacFarlane, "People Who Stalk People" (1997) 31 U.B.C.L. Rev. 37 at 59 [MacFarlane].

7. Rosemary Cairns Way, "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism" (1994) 39 McGill L.J. 379 [Cairns Way].

8. We have decided in this paper to use the male pronoun when talking about accused persons and the female pronoun when discussing complainants. We do this both for simplicity for the reader and because criminal harassment is committed overwhelmingly by men against women.

I. The Nature of Criminal Harassment

Most violent crime is committed by men against men. Criminal harassment, however, like sexual assault, is a gendered crime committed primarily by men against women. The majority of cases involve a male accused who has allegedly harassed his female (former) intimate partner. As will be discussed below, a very small percentage of the harassment cases involve conduct by men not known to the complainant. The portrayal of criminal harassment by the media in terms of the "lurking stranger" is not supported empirically.

The harassment of (former) intimate partners is described by a Department of Justice Handbook as follows:

> The majority of these stalkers have been in some form of relationship with the victim. The contact may have been minimal, such as a blind date, but more commonly is a prolonged dating relationship, common-law union or marriage. The perpetrator refuses to recognize that the relationship with the other person is over and the prevailing attitude is "if I can't have her (or him) then no one else will". A campaign of harassment, intimidation and psychological terror is mounted. The motivation for the harassment and stalking varies from revenge to the false belief that they can convince or coerce the victim back into the relationship.[9]

Criminal harassment can escalate to physical violence. A Statistics Canada study found that between 1997 and 1999, there were nine homicides for which criminal harassment was identified as the precipitating crime.[10] A study of the murder of women in Ontario found that 71% of homicides of women were committed by current or

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9. Department of Justice, *A Handbook for Police and Crown Prosecutors on Criminal Harassment* (Ottawa: Department of Justice Canada, 1999) at 4 [*Handbook*].

10. Karen Hackett, "Criminal Harassment" (2000) 20:11 Juristat at 4 [Hackett]. Since it is only recently that criminal harassment can form the foundation for a first degree murder charge, it is possible that this is an underestimation of the involvement of harassment. Other charges, such as sexual assault or forcible confinement, might have been more common precipitators of homicide, even though there was overlap with criminal harassment. A 2001 statistical profile by Statistics Canada, for example, found that separated women face a heightened risk of spousal homicide: *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: Statistics Canada Canadian Centre for Justice Statistics, 2001) at 33 [StatsCan 2001].

former partners.[11] However, criminal harassment cases usually do not involve physical violence. A study of criminal harassment charges, criminal harassment was the most serious charge in 86% of the cases.[12]

In this paper, we characterize criminal harassment as a crime of violence against women which, like sexual assault, is a crime of control and power. The crime is largely one of psychological violence, but it has the potential to escalate into physical violence and even murder. The absence of physical violence should not trivialize the psychological harm caused by living in fear, often over long periods of time. Symptoms experienced by women who have been subject to criminal harassment include anxiety (such as panic attacks), sleep disturbances, intrusive flashbacks, suicidal thoughts and post-traumatic stress disorder.[13] Those who have been harassed by former intimate partners in particular may also feel guilt and lowered self-esteem, because they perceive that others are criticizing them for poor judgment in choosing their partners.[14] These symptoms may be aggravated by the women's experiences with the criminal justice system.

One shortcoming of evaluating the effectiveness of legislation by examining case law is that it is impossible to evaluate the cases that did not make it to court.[15] Our evaluation is focused on cases in which police have laid charges, prosecutors have brought the cases forward and, for the most part, plea agreements were not entered into. This methodology makes invisible cases in which police have failed to respond to women's stories, or in which women have been harassed into not laying charges or testifying. One reason for not laying charges may

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11. Maria Crawford & Rosemary Gartner, *Women Killing: Intimate Femicide in Ontario, 1974-1990: A Report Prepared for the Women We Honour Action Committee* (Toronto: Women We Honour Action Committee, 1992) at 52 [Crawford & Gartner].

12. *Ibid.* at 4.

13. Karen M. Abrams & Gail Erlick Robinson, "Stalking Part I: An Overview of the Problem" (1998) 43 Can. J. Psychiatry 473 at 475.

14. *Ibid.*

15. One early study of criminal harassment suggested that 58% of charges laid were stayed or withdrawn before they reached trial. Richard Gill & Joan Brockman, "Working Document: A Review of Section 264 (Criminal Harassment) of the *Criminal Code of Canada*" (Ottawa: Department of Justice Canada, 1996) [Gill & Brockman].

be complainants' reluctance to testify.[16] Criminal harassment prosecutions are particularly difficult for complainants who may risk escalation of the harassing behaviour, false retaliatory accusations of criminal and, where the accused is unrepresented, cross-examination by one's harasser.

Data from other sources quantify police reports of criminal harassment and paint a more comprehensive portrait of the social reality of criminal harassment.[17] All the findings in the present study are consistent with the bigger picture of harassment painted in two Statistics Canada studies.[18]

While the present sample is too small to allow quantitative conclusions about criminal harassment cases, it does provide insight into judicial attitudes surrounding criminal harassment and the extent to which the courts are rendering section 264 a useful tool in protecting women from harassment. As such, our description of the 176 cases covered in this study forms the backdrop for a substantive discussion of the cases. The analysis in this paper is primarily qualitative, not quantitative. We then examine section 264 in light of the concerns that were voiced prior to its enactment, and we evaluate how judges are dealing with the provision and with these concerns.

II. The Legislative History of Criminal Harassment

Section 264 was enacted as part of Bill 126, which was proclaimed into force on August 1, 1993. Section 264 states the following:

(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

16. One Crown prosecutor in Vancouver informed the authors that a primary concerns in these cases is to get some form of protective order for the complainant, be it a no contact order or a condition of probation after a plea agreement.

17. Gill & Brockman, *supra* note 15.

18. Hackett, *supra* note 10; Rebecca Kong, "Criminal Harassment" (1996) 16:12 Juristat.

(2) The conduct mentioned in subsection (1) consists of

(a) repeatedly following from place to place the other person or anyone known to them;

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, 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.

(3) Every person who contravenes this section is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened

(a) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or

(b) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or a province that is similar in effect to an order or recognizance referred to in paragraph (a).

(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.[19]

In 1996, the *Code* was amended so that a person accused of criminal harassment could be barred from possessing a firearm, ammunition or explosives if, at a bail hearing, he was thought to be dangerous to himself or others.[20] In 1997, Parliament also amended section 231 of the *Code* to elevate murders that take place during the course of criminal harassment to first degree.[21]

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19. Subsections (4) and (5) were added to the legislation in 1997 as part of *An Act to Amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, S.C. 1997, c. 16. (Bill C-27).

20. *Supra* note 3 at s. 515(4.1), as am. by *An Act Respecting Firearms and Other Weapons*, S.C 1995, c. 39, s. 153. (Bill C-68).

21. *Supra* note 3 s. 231(6) provides:

Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 264 and the person

An amendment to increase the maximum punishment for criminal harassment from five to ten years received Royal Assent on June 4, 2002.[22] One reason for this amendment was to enable those convicted of criminal harassment to come within the dangerous offender provisions of the *Code*. A dangerous offender application can only be triggered by certain violent offences which are punishable by up to ten years imprisonment. A successful application leads to an indeterminate period of incarceration.[23] Criminal harassment can also trigger a "long term offender" application, which allows a judge to order that the accused serve his full term of imprisonment and then be subject to a period of parole supervision for up to ten years.

III. The Cases Under Review

In this study, we examine 176 cases of criminal harassment prosecutions reported on Quicklaw[24] and in provincial and territorial

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committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered.

It is unlikely that prior to this provision, records would always have indicated whether a murdered woman had been harassed before her murder.

22. *Criminal Law Amendment Act*, R.S.C. 2002, c.13, s. 10.

23. One of the authors has elsewhere raised concern about the dangerous offender provisions of the *Code*, and is still not convinced that indeterminate periods of incarceration are the best way to deal with violent crime. See Isabel Grant, "Legislating Public Safety: The Business of Risk" (1998) 3 Can. Crim. L. Rev. 177.

24. According to information from a personal communication with a Quicklaw employee, Quicklaw contains all written decisions released by the courts to publishers, as well as oral transcripts where available. The Quicklaw database used was "Canadian Judgments," which reports cases from all provincial and territorial courts. A total of 358 cases mentioning criminal harassment were found on Quicklaw and in the provincial and territorial databases. These cases concerned criminal harassment in a variety of ways, including: civil cases in which a past charge of criminal harassment was mentioned; trials, motions and appeals in relation to current criminal harassment charges, and; dangerous offender applications for offenders with convictions for criminal harassment. We excluded cases that did not involve a current criminal harassment charge (at the time the case was being heard). This left us with 228 entries in our database. We then excluded all cases in which we could not find a report of a final determination of criminal liability (for example, if the only matter reported was a bail or evidentiary hearing). As well, since an incident often had multiple entries associated with it (for instance, a charge might have

online databases from 1992 (when section 264 came into force) to May 2002.[25] These cases come from all provinces and territories, and all levels of court except the Supreme Court of Canada, which has not yet heard a section 264 case.[26] Cases with two or more judgments, such as a trial and an appellate decision, have been included only once with the verdict

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entries for a bail release, voir dire, trial, and sentencing), the database was further consolidated to account for duplicates. This left us with a total population of 176 "cases." (For the purposes of this database, a case is defined as all of the reported legal activity arising out of a single charging document containing one or more charges of criminal harassment).

Cases were coded for the following parameters: year; nature of the proceeding; charges involved; whether the accused was under a judicial order not to have contact with the victim (these included conditions found in probation orders, peace bonds, and restraining orders); the relationship between the victim and the accused; the gender of the accused; the gender of the victim; the result (i.e., whether the charge ultimately resulted in an acquittal or a conviction (an order staying charges was counted as an acquittal)); sentence (where applicable); and reason for acquittal (where applicable).

25. These are searchable online databases administered by the courts. In all, we found 11 cases that fit our criteria but were not found on Quicklaw. The following databases were searched: B.C. Judgments, Superior Court (1996-present); B.C. Judgments, Provincial Court (1999-present); Alberta Judgments (Court of Appeal, Court of Queen's Bench and Provincial Court Judgments, 1998-present); Manitoba Court of Appeal Judgments (1996-present); Manitoba Court of Queen's Bench Judgments (2000-present); New Brunswick Court of Appeal Judgments (2001-present); Newfoundland Court of Appeal and Provincial Court Judgments (2001-present); Northwest Territories Superior Court and Court of Appeal Judgments (1994-present); Nova Scotia Supreme Court and Court of Appeal Judgments (1999-present); Nunavut Court of Justice Judgments (1999-present); Ontario Court of Appeal and Superior Court of Justice Judgments (1998-present); Prince Edward Island Supreme Court (1997-present) and Trial Division Judgments (2001-present); Quebec Court of Appeal (2000-present) and Provincial Court Judgments (2001-present); Saskatchewan Court of Appeal, Court of Queen's Bench, and Provincial Court Judgments (1994-present), and; Yukon Court of Appeal and Supreme Court Judgments (1996-present).

26. The Supreme Court of Canada has heard one case involving a conviction for harassment. However, the Court did not deal with s. 264 directly (*R. v. Dutra*, [2001] 1 S.C.R. 759). There have also been numerous criminal harassment cases in which the Court has denied leave to appeal: *R. v. Kosikar*, [1999] 1 S.C.R. xiv; *R. v. Sillipp*, [1998] 1 S.C.R. xiv; *R. v. Finnessey*, [2000] 1 S.C.R. xi; *R. v. Samadi*, [1998] 1 S.C.R. xiv; *R. v. Papaioannou*, [1997] 1 S.C.R. x; *R. v. Ryback*, [1996] 2 S.C.R x; *R. v. Graff*, [1996] 3 S.C.R. viii.

from the highest court.[27] The cases in this study are only those that resulted in written judgments, and we recognize that this represents only a fraction of the total number of criminal harassment cases. A Statistics Canada report states that in 1999 alone, 5382 incidents of harassment were reported to the police forces in the study, representing just under half of all police forces across the country. Of these, 3283, or 61%, resulted in a charge.[28] Extrapolating these numbers to all of Canada, there may have been more than 5000 charges laid nation-wide in that year.

The majority of these cases are tried in provincial court and few of them result in written reasons. Most are prosecuted on summary conviction and even those that proceed by indictment rarely end up in superior court.[29] Our sample includes 21 summary conviction appeals to the provincial superior courts and fifty provincial appellate court decisions.

A. Profiles of the Accused and the Complainants

Table 1. Gender of Accused and Complainants

Gender	Accused	Complainants
Male	166 (94%)	15 (8.5%)
Female	10 (6%)	148 (84%)
Undetermined	0	13 (7.5%)
Total	176	176

(i) Male Accused

In 94% of the cases in the present study, the accused was male. This is consistent with the Department of Justice Review, which found that 91% of all accused appearing in court on criminal harassment charges were male.[30] The percentage of male accused in the present study is

27. Sixty-five of these cases are sentencing cases that necessarily involve convictions.
28. Hackett, *supra* note 10 at 3.
29. Crawford & Gartner, *supra* note 11; Coté, *supra* note 2.
30. Gill & Brockman, *supra* note 15 at 7.

somewhat higher than in the Statistics Canada study, which found that 85% of the alleged perpetrators in police complaints in 1999 were male.[31]

Other studies have found that police are more likely to lay charges of criminal harassment against men than they are against women. The Statistics Canada study mentioned above found that in 1999, complaints to police involving a male accused were more likely to result in a charge (64% of men were charged, and only 46% of women).[32] Two possible explanations for the lower charging rate for female accused are that the harassment committed by men (predominantly against women) is more serious than that committed by women, and that men are perceived by police (and victims) as more dangerous than women.[33]

(ii) Female Accused

As Table 1 indicates, only 10 out of 176, or less than 10% of the accused in this study, were female. There are no cases of women harassing former intimate partners, although there are two cases involving women charged under section 264 for harassing the new partner of a former intimate.[34]

In one well publicized British Columbia case, two girls were charged with harassment after another young girl killed herself and left a note describing the harassment she endured.[35] In this case, where "bullying" escalated to harassment, one of the two accused was convicted of criminal harassment and uttering threats.[36] The other cases involving female accused are difficult to categorize. There is a case involving the alleged harassment of a female school principal,[37] of a man who interviewed the accused for a job,[38] of acquaintances,[39] and of a lawyer

31. Hackett, *supra* note 10 at 9.
32. *Ibid.*
33. We have found no cases of men harassing former male partners.
34. *R. v. Goodman*, [2000] O.J. No. 4814 (Ct. J.) (QL) [*Goodman*]; *R. v. Hall*, [1997] S.J. No. 776 (Prov. Ct.) (QL) [*Hall*].
35. *R. v. D.W.*, [2002] B.C.J. No. 627 (Youth Ct.) (QL).
36. *Ibid.* at para. 22.
37. *R. v. Theysen* (1996), 190 A.R. 133 (Prov. Ct. (Crim. Div.)) (QL).
38. *R. v. Kenny*, [2000] O.J. No. 5346 (Sup. Ct. J.) (QL) [*Kenny*].
39. *R. v. Briscoe*, [2000] B.C.J. No. 802 (Prov. Ct.) (QL) [*Briscoe*].

by an articling student at his firm.[40] There are three cases involving the harassment of neighbours by female accused.[41] This very small proportion of cases involving female accused, and the wide range of complainants, make it difficult to identify any patterns of victimization by female accused.

(iii) Male Complainants

Because there are only fifteen male complainants (9%), it is difficult to draw any clear conclusions about men who are the victims of criminal harassment. Most male complainants (73%) in our group were harassed by other men. The relationship the male complainant has with his harasser is also very different than that of women.

We found no cases in which a male complainant had a former romantic relationship with his harasser.[42] The cases involving men harassed by women included a female articling student harassing a lawyer at her firm,[43] an acquaintance harassing a male after brief social contact,[44] and a woman harassing a job recruiter after an interview.[45]

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40. *R. v. Goodwin* (1997), 89 B.C.A.C. 269 [*Goodwin*].
41. *R. v. Wittekind*, [2001] O.J. No. 774 (Ct. J.) (QL) [*Wittekind*]; *R. v. Hnatiuk*, [2000] A.J. No. 545 (Q.B.) [*Hnatiuk*]; *R. v. Stagnitta*, [2000] O.J. No. 3024 (Sup. Ct.) (QL) [*Stagnitta*].
42. In Statistics Canada studies of complaints of criminal harassment to police, the number of men reporting victimization by a former intimate partner was higher (approximately 20%). However, in these same reports it was discovered that men victimized by their former partners have a particularly high rate of refusing to cooperate in the laying of charges (27%) (Hackett, *supra* note 10 at 8, 11). This may explain the discrepancy between our findings and the Statistics Canada results, as many of the stalking incidents reported by men victimized by ex-partners may not have made it to trial.
43. *Goodwin*, *supra* note 40.
44. *Briscoe*, *supra* note 39.
45. *Kenny*, *supra* note 38.

(iv) Female Complainants

We were able to determine the gender of the complainant in 163 of the 176 cases.[46] In 91% of the cases where gender was determined, the complainant was female. While this predominance of female complainants is consistent with other studies, the percentage of female complainants was somewhat higher in our study. In a study of complaints made to 106 different police services in 1999, Statistics Canada found that 77% of the complaints involved female victims.[47]

The majority of female complainants were harassed by men with whom they had had a relationship. Table 2 demonstrates the relationships between the female complainants and the accused.

Table 2. Relationship Between Female Complainants and Accused

Type of Relationship	Number	Percentage *(of total number of cases in sample)*	Percentage *(of total number of cases where the nature of the relationship could be determined)*
Intimate[48]	97	55%	69%
Acquaintance	19	11%	14%
Stranger	16	9%	11%
Work Contact[49]	8	4.5%	6%
Undetermined	36	20.5%	N/A
Total	176	100%	100%

46. The gender of the complainant could not be determined in thirteen cases. In some of these cases, the judgments tended to be very brief, providing little in the way of facts. In other cases, while the judgment was more detailed, the complainant was simply referred to as "the complainant," and the court gave no clues as to the gender of the victim. It was common for sentencing judgments to fail to include information such as the complainant's gender. Despite this shortcoming, these cases were included in the overall database because they provided information as to gender of accused, conviction/acquittal, sentencing, etc.

47. The study also suggested, however, that the incidence of males being victimized could be on the rise, since the number of males being victimized had jumped from 19% to 23% beyween 1995 and 1999 (Hackett, *supra* note 10 at 1).

48. The category of "Intimate" encompasses any relationship where the accused and victim were linked romantically. It therefore covers a variety of relationships—people who had been dating a short while, cohabitating couples, and couples formerly or currently married. Since we did not find any cases where the court identified the parties as being involved in a same-sex intimate relationship, all of the figures relating to intimate relationships refer to heterosexual partnerships.

49. This category represents people who were harassed in the course of employment (includes people who were harassed by co-workers, clients, customers, and protesters).

B. Conviction Rates

In this study, there were 139 convictions for criminal harassment (79%) and 37 acquittals (21%). A conviction for another offence occurred in nine cases where the accused was not convicted of criminal harassment. Criminal harassment cases involving male accused had a higher rate of conviction than those involving female accused (80% vs. 70%). Cases with male complainants also had a slightly higher conviction rate than those involving female complainants (80% vs. 77%). Since the numbers of male complainants and female accused are so small, no clear conclusions can be drawn from these results.

C. Restraining Orders

In many cases, the accused was under some type of judicially imposed order not to contact the complainant at the time of the alleged harassment. Such orders included conditions in probation orders, peace bonds and family court protection orders, as well as conditions associated with recognizances.

Table 3. Occurrence of Restraining Orders and No-contact Orders

	By Gender		By Relationship Type		
	Male accused	Female accused	Intimate	Non-intimate	Undetermined relationship
Number of cases where accused was under no-contact order	58	5	47	12	4
Percentage of all cases involving restraining orders (63)	92%	8%	75%	19%	6%
Percentage of all cases in sample (176)	33%	3%	28%	7%	2%

IV. The Elements Of Criminal Harassment

A. Substantive Concerns Surrounding Criminal Harassment

The elements of criminal harassment have been identified by the Alberta Court of Appeal in *R. v. Sillipp*,[50] and subsequently adopted by the Ontario,[51] Quebec[52] and Nova Scotia[53] Courts of Appeal. Rather than relying on the doctrinal elements of the offence, our analysis is organized according to the problems that were anticipated with section 264. In our analysis we examine: i) the scope of the conduct requirement in section 264 and the requirement of repetition; ii) the reasonable fear requirement, which requires that the accused cause the complainant to fear for her safety and that the fear be reasonable; and iii) the subjective test that requires the accused know or be reckless about whether his conduct is harassing the complainant. The first two of these issues relate to the *actus reus* and the last to the *mens rea* of section 264.

B. Actus Reus*: The Conduct Requirement*

Section 264 precisely sets out the four kinds of conduct that fall within the scope of the offence: following, communicating, watching or besetting, or engaging in threatening conduct. We expected most of the cases at trial would not raise difficult issues about whether the conduct requirement had been satisfied and this proved to be true. Most of the conduct complained of (even in those cases where acquittals have been based on insufficient conduct) fits within the categories of behaviour

50. (1997), 11 C.R. (5th) 71 at para. 40 (Alta. C.A.) [*Sillipp*]. The court held that it must be established that: 1) the accused has engaged in the conduct set out in s. 264(2); 2) the complainant was harassed; 3) the complainant feared for his or her safety or the safety of anyone known to him or her; 4) the complainant's fear was reasonable taking into account all of the circumstances; and 5) the accused knew that the complainant was harassed or was reckless or willfully blind in that regard.

51. *R. v. Kosikar* (1999), 138 C.C.C. (3d) 217 (Ont. C.A.) [*Kosikar*].

52. *R. v. Lamontagne* (1998), 129 C.C.C. (3d) 181 (Qc. C.A.) [*Lamontagne*].

53. *R. v. Shrubsal* (2000), 182 N.S.R. (2d) 351, 2000 N.S.C.A. 18.

found in section 264(2). Most acquittals based on insufficient conduct result from the Crown's failure to establish repetition.

(i) Repetition

Subsections (a) and (b) of section 264(2) have an express requirement that the acts of following or communicating be engaged in "repeatedly", while subsections (c) (besetting) and (d) (threatening) do not. However, some judges implied a requirement of repetitive behaviour from standard dictionary definitions of the word "harassment".[54] A single incident of threatening conduct under section 264(2)(d) is insufficient to sustain a charge of criminal harassment[55] because engaging in threatening conduct does not imply an ongoing course of behaviour.[56]

What purpose does the "repeatedly" requirement serve? On the one hand, it may protect an accused from conviction for isolated incidents that do not warrant criminal liability. On the other hand, it may limit the Crown by placing too much weight on an aspect of harassment that does not go to the heart of the offence, which is the ability of the accused's conduct to cause fear in the complainant.[57] As noted in *R. v. Belcher*, "[i]t is of no comfort to a person being stalked that it is the first time."[58]

In *R. v. Ryback*, the British Columbia Court of Appeal held that three incidents of conduct are sufficient to make the conduct "repeated".[59]

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54. For example, in *R. v. Geller*, [1994] O.J. No. 2961 at para. 12 (Ct. J. (Prov. Div.)) (QL) [*Geller*], the judge held that "the use of the term 'harassment' includes, in and of itself, a requirement that there be a 'course of conduct' which certainly includes more than one occasion." Using this logic, some Ontario courts have interpreted s. 264(2)(c) (besetting or watching) as requiring more than a single incident. See *R. v. Farkas*, [1994] O.J. No. 4111 (Ct. J. (Prov. Div.)) (QL) [*Farkas*] and *R. v. Riossi* (1997), 6 C.R. (5th) 123 (Ont. Ct. J. (Gen. Div.)) [*Riossi*].

55. *Riossi*, *ibid.*; *R. v. Hutton*, [1995] O.J. No. 4707 (Ct. J. (Prov. Div.)) (QL) [*Hutton*]; *R. v. Zienkiewicz*, [1994] B.C.J. No. 3141 (Prov. Ct.) (QL).

56. *Riossi*, *ibid.*

57. *Ibid.* at para. 27.

58. *R. v. Belcher*, [1998] O.J. No. 137 at para. 20 (Ct. J. (Gen. Div.)) (QL) [*Belcher*].

59. (1996), 105 C.C.C. (3d) 240 [*Ryback*]. At least two B.C. decisions have followed the Court's finding; see *R. v. Gerein*, [1999] B.C.J. No. 1218 (Prov. Ct.) (QL) and *R. v. M.R.W.*, [1999] B.C.J. No. 2149 (S.C.) (QL) [*M.R.W.*].

Despite this guidance, difficulties remain in determining what constitutes repeated conduct in various fact situations, specifically in respect of time frame, duration and spatial movement. If an accused telephones someone four times in five minutes, is that different from calling four times in a day, or four days in a row? In *R. v. Browning*, a judge found that communicating five times over five months was not persistent enough to satisfy the requirement of repetition.[60] Similarly, does the duration of any single incident determine whether it will be considered part of a repeated course of conduct? In *R. v. Vrabie*, the Court held that watching incidents lasting "but moments on each occasion" were not sufficient to sustain a charge.[61] How does spatial movement factor into the equation? As seen in two of the examples discussed below, following someone from place to place on the same day within a short time span may only constitute a single incident[62] or, given the right circumstances, it could comprise a series of discrete incidents that would meet the repeated conduct requirement.[63] Early decisions took a narrow view of repeated conduct.[64] In *Campbell*,[65] for example, the Ontario Court of Appeal upheld a trial decision that two incidents of trying to entice the complainant into a car in the space of one minute in the same locale did not meet the requirement of repetition.[66] A later case, *Belcher*, found that it was not necessary that the complainant be followed on discrete occasions, but only that there be repeated following within one occasion. In *Belcher*, six different acts of following over the course of one hour were sufficient:

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60. (1995), 42 C.R.(4th) 170 (Ont. Ct. J. (Prov. Div.)) [*Browning*].

61. [1995] M.J. No. 247 (Prov. Ct.) (QL) [*Vrabie*].

62. See *R. v. Campbell*, [1996] O.J. No 55. (C.A.) (QL) [*Campbell*].

63. *Belcher*, *supra* note 58.

64. For example, see *Geller*, *supra* note 54; *Campbell*, *supra* note 62; *Farkas*, *supra* note 54.

65. *Campbell*, *ibid.*

66. From the description of the conduct in the trial decision, the accused both followed and made several attempts to talk to the complainant. However, it is unclear from the case report which conduct he was charged with. The judge spoke in terms of "communicating" but refers to subsection (a) which is the following provision. See trial judgment *R. v. Campbell*, [1994] O.J. No. 2827 (Ct. J. (Prov. Div.)) (QL).

"repeatedly" in this context, is its meaning that equates to "persistently". . . one can guard against the criminalizing of innocuous behaviour by assessing the persistence of the behaviour, the context in which it is committed, and other factors that will assist in segregating criminal stalking from "following" a person in an annoying, irritating, perhaps even prolonged but not perilous manner.[67]

The interpretation of "repeatedly" depends on the context of the conduct. In *M.R.W.*, the accused had committed a vicious assault on the complainant, resulting in a conviction for attempted murder.[68] Years later, he went to the complainant's town and attempted to track her down by asking people where she was. The B.C. Supreme Court upheld the conviction, agreeing that these communications were "repeated" given the background of the attempted murder and the psychological impact of that on the complainant, even though the communications took place over a short period of time (two days).

Evidence of harassment often falls into more than one category of conduct. For example, the accused might follow the complainant home from work, then pester her with phone calls, and then perhaps watch her house. This segregation of the accused's conduct into categories can result in a failure to account for the cumulative effect of this conduct on the complainant. In the early cases, single incidents occurring in different categories of harassing conduct were not viewed cumulatively as "repeated" conduct. In *Farkas*, the accused was charged under section 264(2)(c) (besetting or watching) after climbing a tree and looking into the complainant's apartment. The judge granted a no evidence motion on the basis that there was only a "single incident" despite acknowledging other behaviour that could likely be classified as "communicating." In the judge's words:

the section has to, by the very meaning of it, be more than one occasion . . . Mr. Farkas was found up in the tree [watching the complainant] . . . There is no other watching and besetting conduct before that or after that and apart from that there appear to be telephone calls, the showing up at the place of work and the missing messages.[69]

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67. *Supra* note 58 at para 20.
68. *Supra* note 59.
69. *Farkas, supra* note 54 at para. 1.

In *R. v. Shortt*,[70] the judge segregated different types of conduct, even though they belonged to the same category under section 264(2). The accused was alleged to have repeatedly communicated with his estranged wife through emails, notes and letters, and through a phone call in which the accused threatened to kill the complainant's boyfriend. In acquitting the accused, the judge analyzed each type of communication separately rather than together. He held that the complainant did not fear the set of emails, letters or notes. The telephone death threat to the complainant's boyfriend did contribute to fear, and crossed the line into criminal behaviour, but was "very much separate from the other communications in nature . . . [It was an] isolated communication; it cannot be said to be part of repeated communications."[71] Unfortunately, segregating different types of communications and different forms of conduct ignores the possible cumulative effect on the complainant.

(ii) The Importance of Context in Proving Conduct

As exemplified above in the discussion of "repeatedly", the context in which conduct occurs is important. For example, *R. v. Dupuis* involved a single incident of driving by a dwelling house late at night. The Court held that "it is not besetting or watching a dwelling house, because there is no evidence that that was his intent, at that particular point in time."[72] In *R. v. Meehan*, the accused, who had a previous conviction for assaulting the complainant, was convicted of criminal harassment for repeatedly (hundreds of times over a two year period) driving by the complainant's residence.[73] In *R. v. Porsnuk*, the accused, who had an obsessive infatuation with the complainant, drove by her house up to twenty times per day after being forbidden by restraining orders from visiting her at work. The judge held that "[t]he actions of the accused in driving by her home at a very slow rate of speed up to 20 times a day at times when the complainant was home can have no other reasonable interpretation placed upon them other than the fact that the accused was

70. [2002] N.W.T.J. No. 33 (Terr. Ct.) (QL) [*Shortt*].
71. *Ibid.* at paras. 99, 101.
72. *R. v. Dupuis*, [1999] O.J. No. 1860 at para. 6 (Ct. J. (Gen. Div.)) (QL) [*Dupuis*].
73. *R. v. Meehan*, [1998] N.J. No. 3 (S.C. (T.D.)) (QL) [*Meehan*].

watching."[74] These examples show how judges view conduct in terms of intention and other contextual factors such as restraining orders, past violence toward the complainant and the aggravated nature of the conduct.

Aside from reference to other elements of section 264, basic contextual factors such as where the conduct took place or the degree of effort or precision required to complete the acts also have a bearing on whether those acts will violate section 264. Circumstances play an important role in determining whether "watching someone" will be construed as besetting or watching under section 264(2)(c). In *Vrabie*, the judge explicitly took notice that the watching took place in "an extremely public location situated on probably the busiest street in the City of Flin Flon", and that each occurrence was very brief.[75] The definitions of besetting and watching were so tied up with the accused's state of mind that the judge was "not of the opinion that the conduct of the accused was so blatant or vexatio[us] as to constitute besetting as that term has been defined."[76] These characterizations were central to the holding that the accused did not watch or beset as outlined in section 264(2)(c).[77] There is an implicit assumption that watching in public cannot (or should not) constitute criminal behaviour. However, the statutory provisions do not set out any such limitation—watching or besetting the place where the other person "happens to be" is sufficient. If judges were to limit the interpretation of subsection (c) in this way, watching someone in public could become criminal under section 264 would be if the watching were characterized as another form of conduct and the accused were charged appropriately.

The appeals judge in *Belcher* noted this problem in response to the accused's adoption of the reasoning in *Vrabie*. The judge stated that while the accused's watching activity did not have a "siege" quality and occurred in a public place, it had to be viewed in light of his actions. He had followed the complainant from one public place to another, taking

74. *R. v. Porsnuk*, [1995] M.J. No. 519 at para. 30 (Prov. Ct.) (QL) [*Porsnuk*].

75. *Supra* note 61 at para. 28.

76. *Ibid.* at para. 31.

77. A similar finding was made in *Hutton*, *supra* note 55, with respect to watching someone in a public place.

considerable trouble to manoeuvre his vehicle when she took evasive action, and he admitted that he was trying to find out where she lived.[78]

C. Actus Reus: *Reasonable Fear*

Section 264(1) requires that the Crown prove that accused persons caused complainants "reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them."[79] This element of section 264 elicited much concern from women's groups, on the basis that the inquiry into reasonableness would, as in the sexual assault context, subject the complainant to undue scrutiny about her past relationships and mental health history.[80]

The reasonable fear element of the criminal harassment provision is a consequence requirement of the *actus reus*. All consequence requirements have two components: first, the consequence must actually have happened, and second, it must have been caused by the accused's conduct. Section 264(1) has the additional requirement that the consequence of fear be reasonable "in all the circumstances."

The reasonable fear requirement has both a subjective and objective dimension, although they are not always treated as distinct by the courts. The first inquiry is whether the complainant actually was in fear for her safety. While there are cases that reject the allegation that the complainant feared for her safety, courts in the majority of cases have had little difficulty with this element. The more difficult component is whether that fear is reasonable. Both inquiries depend heavily on context. The contextual element is referred to in section 264(1) by the words "in all the circumstances." Appellate courts have generally taken a sensible approach to this element, allowing the past relationship between the parties to be admitted into evidence, and thus providing a context for the fear. From the appellate courts decisions, it appears that the context has not yet been extended to include the complainant's sexual or mental health history. However, there are trial decisions and

78. *Belcher, supra* note 58 at para 24.
79. *Supra* note 3.
80. Cairns Way, *supra* note 7 at 396.

summary conviction appeals which suggest that when a complainant is overreacting, her fear is not reasonable.

Before discussing reasonable fear in more depth, we will briefly examine the meaning of safety as it has been interpreted in the case law.

(i) The Meaning of Safety

Embedded in the reasonable fear requirement, and often left unacknowledged, is the requirement that complainants fear for their safety or the safety of anyone known to them. In some cases, the issue of safety is subsumed in the requirement that the fear must be reasonable, that is, if the risk to safety is insufficient, the fear will not be seen as reasonable. Conversely, if the fear is seen to be reasonable, then the risk to safety is assumed to be sufficiently significant.

In many cases of criminal harassment, it is the emotional well-being of the complainant that is at issue, and judges appear to realize that physical safety is not the primary risk factor. In *Goodwin*, for example, a female articling student was convicted of harassing a senior lawyer in her firm.[81] The B.C. Court of Appeal rejected "the notion that victims of harassment must suffer ill health or major disruption in their lives before obtaining the protection of section 264."[82] Furthermore, "included in emotional and psychological safety is the feeling that a person is able to set the boundaries beyond which others cannot intrude."[83] In *States*, the complainant made repeated efforts to repel unwanted attention from one of her university instructors. After the complainant had finished her degree, she moved and made it very clear

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81. *Supra* note 40. See also *R. v. Skocylas* (1997), 99 B.C.A.C. 1.

82. *Goodwin*, *ibid.* at para. 22. This case is an exception, of course, where a relatively powerless woman is convicted of harassing a relatively powerful man. See also *R. v. Leppan*, [1999] O.J. No. 3336 at para. 3 (Prov. Div.) (QL) in which the Court held that, in addition to fear for physical safety:

> fear for psychological safety is equally protected. It is not necessary that the Crown prove that the complainant suffered actual injury, either physical or mental, nor that the accused actually made a threat. But there must be a finding that there was fear for physical or psychological safety. So psychological upset certainly is protected and covered by the section.

83. *R. v. States*, [1997] B.C.J. No. 3032 at para. 64 (Prov. Ct.) (QL) [*States*].

that she wanted nothing to do with the accused. He continued to send her flowers and show up on her doorstep. Since the accused would not accept the complainant's boundaries, he "created a climate for her whereby it would be objectively reasonable for her to feel that her emotional psychological safety was very much threatened."[84]

Despite this trend, there are cases in which courts have found that the complainant did not fear for her safety because there had been no threats of physical violence. In one case, the judge found that the criminal harassment charge was not made out because the threat made to the complainant was interpreted to mean "that if she did go back to the house that she and [the accused] shared by herself, either everything she owned would be destroyed or that she would not be permitted to leave that house again. In other words, the meaning of the statement was ambiguous to her."[85] As a result, there was a doubt that the complainant feared for her safety. The accused was acquitted of criminal harassment but convicted of a number of other serious offences, including assault and uttering threats.

In *R. v. Barnard*, the accused appealed his conviction for criminally harassing his estranged wife.[86] The accused had been watching her house, allegedly out of concern about the presence of another man in the house in front of his children. The complainant had taken out a restraining order against the accused. Nonetheless, the appellate judge overturned the conviction on the basis that the complainant never feared for her physical safety.

Safety could also be threatened through threats of legal action, such as custody hearings, or threats to report the real or fictitious illegal activity of the complainant. For example, in *Hnatiuk* the accused repeatedly called city officials, including the fire department, to register complaints about the complainant.[87] In *R. v. Patrick*, the accused made calls to report the complainant to child services and welfare offices.[88] While

84. *Ibid.* at para. 70.

85. *R. v. Tremblay (J.G.)* (1999), 257 A.R. 251, 1999 A.B.Q.B. 992 para. 104.

86. [1998] O.J. No. 3304 (Gen. Div.) (QL). See also *R. v. Ducey* (1995), 134 Nfld. & P.E.I.R. 339 (S.C. (T.D.)) in which the Court held that again the complainant had no reason to fear for her physical safety.

87. *Supra* note 41.

88. [1996] O.J. No. 4985 (Prov. Div.) (QL) [*Patrick*].

both of these cases led to acquittals (on reasonable fear and *mens rea* grounds respectively), it was acknowledged that such threats could constitute a threat to a complainant's safety. In *R. v. Bensley*, the trial judge made the following findings about safety:

> The threats regarding reporting her to social services as a child beater, among many other items in this sequence of events, is enough to convince me that she has reason to fear for her mental and emotional stability. That is particularly in light of the fact that she had just spent one week in hospital for psychiatric treatment for a breakdown and that she had reasonable grounds to believe that that safety was threatened.[89]

Courts have also had to deal with the issue of threats to the safety of "anyone known to" the complainant. This typically occurs in cases where parents are concerned for the safety of their children.[90] As in the case of fear for the complainant's own safety, fear for both the physical safety of the child (*e.g.*, fear that the child will be taken away[91] or will be disturbed by the actions of the harasser[92]) are included within the meaning of fear for safety.[93]

There are also several cases in which the new romantic partner of the complainant is the target of some of the harassing behaviour.[94] However, all of these cases frame the discussion of reasonable fear in

89. *R. v. Bensley*, [1998] B.C.J. No. 3264 at para. 21 (S.C.) (QL) [*Bensley*].

90. See *e.g. Dupuis*, *supra* note 72; *R. v. MacIntyre*, [1997] O.J. No. 6023 (Prov. Div.), (QL); *R. v. Bruno*, [1997] A.Q. No. 3195 (Sup. Ct. (Crim. Div.)) (QL) [*Bruno*]; *Stagnitta*, *supra* note 41; *R. v. Dunnett*, [1999] N.B.J. No. 12 (Q.B. (T.D.)) (QL), leave to appeal to C.A. refused, [2000] N.B.J. No. 4 (QL) [*Dunnett*].

91. See *e.g. Bruno*, *ibid.*

92. See *e.g. Dunnett*, *supra* note 90.

93. It is interesting to note that a woman acting to protect her child from a criminal harasser by fleeing from a harassing husband who has legal access to their child has a defence to parental abduction (s. 285) if the abduction was "necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from imminent harm.": *R. v. A.*, [1995] A.J. No. 1304 (Q.B.) (QL).

94. See *R. v. Johnson* (2000), 198 Sask. R. 87 (Prov. Ct.) [*Johnson*]; *R. v. Baszczynski*, [1994] O.J. No. 1749 (Prov. Div.) (QL) [*Baszcynski*]; *R. v. Diakow*, [1998] M.J. No. 234 (Prov. Ct.) (QL); *R. v. Silva*, [2000] O.J. No. 2875 (Ct. J.) (QL) [*Silva*]; *Shortt*, *supra* note 70.

terms of the complainant fearing for her own safety; they do not address the issue of fearing for the safety of the new partner.

(ii) Was the Complainant Actually Afraid?

In most cases where the accused is a former spouse or romantic partner, and in cases where the accused has had an unreciprocated infatuation with the complainant, judges do not appear to have difficulty finding that the complainant actually feared for her safety.[95] This is especially so where the complainant has taken previous action, such as seeking a restraining order or calling the police, as a result of her fear. These sorts of actions provide easy-to-observe indicators that the complainant was in fact afraid.[96]

Courts have made it clear that pre-charge conduct on the part of the complainant is admissible. For example, as noted by the B.C. Court of Appeal in *Ryback*:

> If the pre-charge evidence tended to show that there had previously been a friendly relationship between the two, or that the complainant had encouraged the appellant in his advances so that the appellant believed his attentions were welcomed, it would be difficult to conceive a sound reason for excluding the evidence.[97]

While the above quote was made in the context of determining whether an accused had the necessary intent to harass, one could imagine a court using evidence of such a context to conclude either that the woman was not truly afraid or that her fear was not reasonable. In most cases in this study, the complainants had made it clear that they did not want contact with the accused.

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95. See *R. v. Sanghera*, [1994] B.C.J. No. 2803 (Prov. Ct.) (QL); *Porsnuk*, *supra* note 74; *R. v. Sousa*, [1995] O.J. No. 1435 (Gen. Div.) (QL); *R. v. MacIntyre* (1996), 157 N.S.R. (2d) 130 (S.C.); *Ryback*, *supra* note 59; *Bruno*, *supra* note 90; *R. v. McBride*, [1997] B.C.J. No. 2612 (C.A.) (QL) [*McBride*]; *States*, *supra* note 83; *Hall*, *supra* note 34; *R. v. G.B.*, [1999] O.J. No. 3169 (Ct. J.) (QL).

96. While such demonstrative displays of fear make it easy to observe, the B.C. Court of Appeal has held that witness testimony alone can be a sufficient evidentiary basis: see *McBride*, *ibid.*

97. *Ryback*, *supra* note 59 at 247.

While the cases reviewed have not shown any major obstacles to finding subjective fear in the domestic/intimate cases, there remains a concern that if complainants do not explicitly act on their fears (by doing something obvious like calling the police), or do not actively avoid fearful situations, they will have difficulty convincing the court that they experienced fear. Whether the complainant feared for her safety is a determination that requires looking at the entire context of the alleged events, as well as any past or present relationship between the complainant and the accused. Situations may arise in which complainants must justify their actions in order to establish that they feared for their safety. If their actions were inconsistent with fear, the inconsistency may be sufficient to raise a reasonable doubt. While these findings are not common in the context of spousal criminal harassment, they have arisen in other contexts. In *Goodman*, it was alleged the accused was sending the complainant letters indicating she might get a sexually transmitted disease (STD) from having sex with her boyfriend.[98] The accused allegedly induced a fear for the complainant's physical safety. The judge discounted the fear of contracting an STD, however, because the complainant was free to discontinue that activity.[99]

One context in which complainants' actions have been carefully scrutinized is that of disputes between neighbours. There is a recurring theme that neighbourhood disputes are not appropriate fodder for the criminal law. In *Wittekind*, the judge questioned the complainants' fear of an eccentric, vindictive dog walker (the accused) who repeatedly passed by their house: "I cannot be certain, however that they suffered psychological trauma . . . If Ms. Wittekind caused the complainants to fear for their safety, why go anywhere near her?"[100] In *Geller*, the judge noted that the complainant did not behave like someone who was in fear for her psychological safety. The complainant entertained relatives, had moved her business into her home and started receiving clients there during the period when she was allegedly harassed by her next

98. *Supra* note 34. In this case, the accused was a woman and was the previous romantic partner of the complainant's current boyfriend.

99. *Ibid.* at para. 81.

100. *Wittekind, supra* note 41 at para. 48.

door neighbour.[101] In *Hnatiuk*, the judge found that the evidence did not establish that the complainant feared for her safety because, during the worst of the conduct in question, the complainant continued in mediation with the accused, and when mediation failed, "[they] continued with their life, as before."[102] The judge failed to see how the complainant could fear her neighbour and at the same time go outside, tend her garden, meet her children and walk her dog. The judge concluded that there was annoyance, not fear.

Although the substantive question here relates to an emotion (i.e., fear), judges in this context sometimes place more emphasis on testimony related to the actions of a complainant than to the complainant's emotional state. While it is true that people act on their emotions, and that certain actions are often indicative of certain emotional states, responses to emotions are not universal. What causes one person to act out might cause another to withdraw. The presence of fear is a subjective test, and judges should not be too quick to dismiss testimony about emotional states which they perceive to be inconsistent with actions. It is important to point out that in these cases the judges were not yet dealing with whether or not the complainants' fear was reasonable, but just with whether the fear existed. It is disconcerting that in observing the complainants' behaviour, the judges failed to recognize that fear for one's safety can co-exist with attempts to normalize one's life or to appear brave in the face of fear. This could be especially true in cases where, for example, a complainant fears for the psychological safety of a child, or where family responsibilities dictate maintaining as normal a life as possible for the well-being of others.

Judges have been reluctant to find fear where the complainant has not acted on that fear. For example, in *Silva*, the judge said that a lack of action on the part of the complainant and a lack of expression of her fears about her estranged husband contributed to a finding of reasonable doubt about whether she had fear.[103] This finding was made despite her testimony that she had told her doctor about her fear, and that she did not want to go to the police for fear of hurting her in-laws.

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101. *Geller*, *supra* note 54.
102. *Hnatiuk*, *supra* note 41 at para. 42.
103. *Silva*, *supra* note 94 at para. 24.

It is important that the reasonableness requirement not work its way into the question of whether the complainant actually was afraid. Once the conduct has been proven, i.e., if the complainant has been repeatedly followed/communicated with, threatened or beset by someone, then fear is a plausible response.

Where subjective fear is established, it must be caused by the accused's conduct if the accused is to be held responsible. Whether the conduct caused the fear has to be assessed with a view to "all the circumstances."[104] In *Silva*, the judge held that the accused's conduct was simply one of a number of things causing stress to the complainant, and when all these surrounding circumstances were considered, the judge had a reasonable doubt about fear or, in the alternative, about the reasonableness of the fear.[105] Where there are multiple alleged incidents of conduct related to a charge, or where pre-charge conduct by the accused (or contemporaneous conduct that is not part of the charge) is used to provide context for a finding of reasonable fear, the root of the complainant's fear may come into question. The fear must be caused by the conduct described in the charge, and the Crown must prove beyond a reasonable doubt that the identified conduct both occurred and caused the fear. If fear results from conduct that is not proven beyond a reasonable doubt, there is obviously no causal connection between the criminal conduct and the complainant's fear, because there is no criminal conduct.

(iii) Was the Fear Reasonable?

It must be remembered, particularly in the context of the present study, that it is not only the judge or jury who will be passing judgment on the reasonableness of the complainant's fear; it will also be the police when she first complains, and then the prosecutor when she decides whether to pursue charges.

The reasonableness requirement was the primary concern of the Canadian Advisory Council on the Status of Women, as presented by Glenda Simms before the Justice Committee:

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104. *Ibid.* at para. 54.
105. *Ibid.* at para. 24.

[T]he inclusion of this element is both unnecessary and potentially dangerous to women who are victimized by men. First, it makes the woman and her perceptions part of the offence. This exposes victims to cross-examination on the nature of their fear and on its objective reasonableness. Experience with sexual assault has demonstrated that courts have great difficulty in both understanding and characterizing women's perceptions. Imposing a standard of reasonableness opens the door to an examination [of] the victim's character, mental health, and stability . . . In addition, requiring reasonable fear vests increased discretion in the hands of police and prosecutors who may decide not to proceed based on their own assessment of the victim's perceptions. All of these potential results are frightening for women, and may in fact discourage their reliance on the criminal justice system.[106]

In the cases studied, the determination of whether a complainant's fear was reasonable is largely dependent on the context, and in particular, on the relationship between the complainant and the accused. This context was described in *R. v. Lafreniere*:

All of the evidence is to be taken into account including the gender of the victim and the history and circumstances surrounding the relationship which existed or had existed, if any, between the accused and the victim. As per Lavallee, it is legitimate to take gender into account due to the differences which recognizably exist between the size, the strength and the socialization of women when compared to their male counterparts.[107]

Context is so important in determining reasonable fear that an absence of evidence on contextual factors can be detrimental to a case. It may be easier to provide context in domestic cases because there is always a history between the parties, and often one that would reasonably induce fear in the complainant.[108] When there is a history between the parties, the courts look at the conduct of both parties. In *Ryback*, evidence of pre-charge misconduct on the part of the accused and evidence of the

106. Canadian Advisory Council on the Status of Women (Briefing Notes and Recommendations on Bill C-126, 26 May 1993) at 4 as cited by Cairns Way, *supra* note 7 at 396.

107. [1994] O.J. No. 437 at para. 23 (Prov. Div.) (QL) [*Lafreniere*].

108. In *Vrabie*, *supra* note 61 at para. 35, the judge noted that there was no evidence before the court to show that the fears of the complainant were reasonable. There was no discussion of the relationship between the accused and complainant that could have formed the basis for a finding of reasonable fear.

complainant's behaviour toward the accused were both admissible to contextualize the fear.[109] For example, if there is a history of violence between the parties, an incident that might not appear serious to an outsider could be a signal of threatened violence to the complainant.

In the intimate partner context, pre-charge conduct, such as prior spousal abuse, "permits a comprehension of the true nature of the relationship" that can help a jury in assessing of reasonable fear.[110] As explained in *Hau*, "knowledge of pre-charge conduct may turn what might seem to be an unreasonable fear, if viewed in a vacuum, into a reasonable fear."[111] In one case, a court even allowed inclusion of events that took place more than ten years prior to the alleged incidents.[112] Judges were most likely to base an acquittal on the unreasonableness of the complainant's fear in disputes between neighbours. It has already been shown that judges tend not to find subjective fear in these cases. As well, the majority of "neighbour" cases in our sample resulted in acquittals on the basis that the fear was unreasonable.[113] However, in *Stagnitta*, the accused was convicted for continually watching and videotaping her neighbours' home and customers in their daycare business. She was ordered to move out of her parents' home, which was across the street from the home of the complainants.[114] Aside from this case, there is a perception that neighbourly disputes should not be the subject of the criminal law. For example, in *Wittekind*, the judge found that the complainants did not fear the accused, but even if they did fear him, their fear was not reasonable. The judge explained that while the accused "could be petty and spiteful . . . this is not the stuff of criminal law."[115] In another example, the fear of being unable to use and enjoy property in privacy as a result of "rude, vexatious, annoying and

109. *Supra* note 59 at 246. See also *R. v. Krushel* (2000), 142 C.C.C. (3d) 1 (Ont. C.A.) [*Krushel*]; *R. v. S.B.*, [1996] O.J. No. 1187 (Gen. Div.) (QL) [*S.B.*]; *Briscoe*, *supra* note 39; *R. v. Hau*, [1996] B.C.J. No. 1047 (S.C.) (QL) [*Hau*]; and *States*, *supra* note 83.

110. *S.B.*, *ibid.* at para. 35.

111. *Hau*, *supra* note 109 at para. 41.

112. *Briscoe*, *supra* note 39.

113. See *Geller*, *supra* note 54; *Hnatiuk*, *supra* note 41; *R. v. Martynkiw*, [1998] A.J. No. 1418 (Q.B.) (QL) [*Martynkiw*]; *Wittekind*, *supra* note 41.

114. *Stagnitta*, *supra* note 41.

115. *Wittekind*, *supra* note 41 at para. 49.

invasive" conduct by a neighbour was not a reasonable fear under section 264(1).[116]

Generally, criminal law is not the proper tool to resolve annoying disputes between neighbours; however, judges need to be careful not to dismiss fears just because the accused is a neighbour. It is possible that someone might fear for his or her psychological safety as a result of constant badgering and invasive behaviour on the part of a neighbour. We should also be concerned about any attempt to relegate serious disputes to the "private" sphere outside the public realm of judicial enforcement, in light of the history of courts treating domestic abuse as being private and unworthy of intervention.

(a) Contextual Factors and Finding Reasonable Fear

Defence arguments for excluding contextual factors or limiting the time frame usually rely on undue prejudice to the accused.[117] However, courts have found that in certain cases the relevance of contextual evidence to the "state of mind of the accused and the complainant . . . may outweigh any prejudicial effect on the accused."[118] To protect the accused against undue prejudice, the jury should be instructed that such evidence is relevant to certain elements of the offence (*mens rea* and reasonable fear), but is not relevant to show that the accused is more likely to have committed the offence in question.[119]

In *Sillipp,* the Alberta Court of Appeal noted that the vulnerabilities of the complainant may be considered when applying the objective test: "I would add only that the application of the reasonable person test to the objective evaluation of 'all the circumstances' does not mean that the particular vulnerabilities of the complainant are excluded from consideration."[120] In *Porsnuk*, the trial judge held that the assessment of the complainant's fear must be seen in light of her exposure to violence

116. *Code*, *supra* note 3; *Martynkiw*, *supra* note 113 at paras. 24-25.
117. *Briscoe*, *supra* note 39; *Hau*, *supra* note 109.
118. *Hau*, *ibid.* at para. 30.
119. *Sillipp*, *supra* note 50.
120. *Ibid.* at para. 27.

against women in the media. The judge held that the enactment of section 264 required

> a paradigm shift of sorts and the reasonable person is no longer the ordinary man on the Clapham omnibus but must include the average woman of the nineties who is exposed to a constant flow of information from many sources. Even people in semi remote communities have access to satellite technology and the numerous TV channels and the internet.[121]

The judge then cited a passage from *R. v. Gowing*,[122] which stressed that women may have fear about men and harassment from past relationships, from the media's portrayal of violence, or from general power imbalances between the sexes.

While it is wrong to suggest that all women live in constant fear of men, it is important to remember that the media tends to present only the most extreme and violent cases of harassment. The statistics on violence against women make this fear a real one for many women. Courts should be reluctant to describe those fears as unreasonable, given the social reality of domestic violence specifically, and the fear of male violence generally.

In the current sample, there are no cases in which a complainant's past relationship with the accused has been used to negate reasonable fear, although this remains a possibility. In *R. v. Morganstein*,[123] the judge acknowledged that the complainant's counseling records could be relevant evidence for the defence, and thus agreed to review them. While these records were not used to determine the reasonableness of the complainant's fear, we can imagine the evidence being used for this purpose in future cases. It is also possible that police or prosecutors weed out cases where there may be questions about the complainant's sexual or mental health history prior to trial.

There are cases where courts have acknowledged that complainants were afraid, but have then found that the fear was an overreaction and therefore not reasonable. In *R. v. Dryden*,[124] the complainant ended her

121. *Porsnuk, supra* note 74 at para. 34.
122. [1994] O.J. No. 1696 (Prov. Div.) (QL).
123. [1997] O.J. No. 3781 (Prov. Div.) (QL) [*Morganstein*].
124. [1996] Y.J. No. 140 (S.C.) (QL) [*Dryden*].

common law relationship with a letter to the accused while he was imprisoned for fraud. The accused showed up at her work place, phoned her several times, and reported to police that she was harassing him. The complainant had her car stolen or towed away without explanation, and she discovered firecrackers which had burned a hole in her balcony. She testified that she was terrified of the accused. The judge believed that she was afraid, but thought that her fear was an overreaction:

> There is no evidence of a previous violent or abusive relationship. I am concerned that the complainant was over-reacting. She invited a call in the letter, and I found her quick, too quick, to hang up on the accused. In my view, she read far too much into his presence near her work, when she well knew that he was attending counselling upstairs.[125]

In *Browning*, the accused worked at the same office as the complainant, phoned her at home, made repeated (false) allegations that she was having a sexual relationship with a co-worker, and repeated these allegations to the co-worker's wife. He also taunted the complainant about the alleged relationship. She was so distraught that she quit her job and left town. The accused phoned her on twice while she was away, leaving messages accusing her of being with the co-worker. The judge found that it was not unusual for an individual to speak with a co-worker, nor unusual for him to call her at home given that her number was in the phone book. In other words, the judge found that "there was a working relationship between the two; it was not as though this was a complete stranger as you sometimes have in these harassment cases with regard to celebrities being harassed or stalked by someone they do not even know."[126] With regard to the reasonableness of her fears, the judge concluded that she had overreacted:

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125. *Ibid.* at para. 39. Note that the letter said at para. 5 "call me when you get a place and I will have your things delivered." The judge interpreted this as an "invitation to call."

126. *Browning, supra* note 60 at para. 21. It should be noted that when the accused called the complainant at home she had actually quit her job and thus they were no longer co-workers.

This woman is obviously afraid, she is obviously anxious. She says that she has suffered some illness as a result of this; that if she could she would carry a gun. She carries a bat in her truck; she has left town, and objectively, at this stage, it appears to me that a reasonably instructed jury would find that she is overreacting to the manners in which this accused has communicated to her. Obviously she does not feel that and obviously on the evidence before me a jury could conclude that her fears are genuine, but based on what she has reacted to, from what he has done, it strikes me that there is a failing here on the part of the Crown to show that the fear [of the complainant] is one [that is] reasonably held.[127]

This case demonstrates how subjective an assessment of the objective reasonableness of fear can be. It also shows that the stereotypical vision of the "obsessive stranger" stalking a celebrity permeated the judge's assessment of what the complainant should have feared.

Finally, in *R. v. Meyerson*, the judge found the complainant to be "evasive and overwrought almost to the point of paranoia, for her own safety and that of her children, which this court finds entirely unreasonable, in the circumstances."[128] In this case the "circumstances" included the accused's "lawful excuse" for his attempts to communicate (communications regarding the welfare of his children); the custody application which the complainant was pursuing against the accused, which "leaves the impression of inappropriate motivation in involving the police to further benefit her position";[129] and an incident where the complainant "next to stalked" the accused and their son one day after dropping him off to see his father when it would have been reasonable to drive off.[130]

The conclusion that the complainant "overreacted" in fearing the accused, gives judges a means of rejecting the Crown's assertion of reasonable fear without disbelieving the complainant. Her fear is acknowledged but trivialized. As well, while a history of violence between the parties is very important in establishing the context, courts must be careful to avoid requiring such a history before concluding that a complainant was criminally harassed by a former intimate partner.

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127. *Ibid.* at para. 24.
128. [2000] O.J. No. 4302 at para. 13 (Ct. J.) (QL) [*Meyerson*].
129. *Ibid.* at para. 17.
130. *Ibid.* at para. 35.

Violence or threats of violence may not begin until after the relationship has ended, and criminal harassment is often not about physical injury, but about the complainant's emotional well-being.

(b) Concerns about the Reasonable Fear Requirement

Recognizing that the most common harm resulting from criminal harassment is emotional or psychological upheaval opens the door for attempts by defence counsel to challenge the mental state of the complainant, often by using evidence from counselling records or other personal documents. We have only been able to find two such cases of this sort, but the possibility remains real. The source, cause and reasonableness of a complainant's psychological state could form the basis of defence attempts to impeach her credibility.

In *Morganstein*, the accused was charged with the criminal harassment of his wife. He sought production of her psychiatric records, records relating to her medication history, and those concerning the diagnosis and cause of her psychological distress.[131] The defence argued that this information was relevant to the complainant's ability to recollect the events of the alleged harassment, and to her ability to recount the events accurately. It also argued that although the complainant said that the cause of her distress was the harassment, those records would establish otherwise. Acknowledging the privacy interests of the complainant, the judge denied full access to her psychiatric records but ordered more limited production of records relating directly to medications prescribed and taken, and to diagnoses of the condition from which she suffered. In agreeing to review this information, the judge stressed that the standard for admissibility at trial would be a more stringent one.

In *Bensley*,[132] the accused successfully appealed his conviction for criminal harassment on the basis that the trial judge erred in denying him the opportunity to cross-examine the complainant on her medical and psychological background, and to challenge her assertion that the accused was the cause of her psychological breakdown. The trial judge had rejected the latter defence argument, on the basis that "you could

131. *Supra* note 123.
132. *Supra* note 89.

[never] prove that someone is lying in her belief as to who is to blame for her condition."[133] The summary conviction appeals court allowed the appeal, stating that:

> the defence was not afforded the opportunity to pursue either the medical aspects of the complainant's allegations or her opinion that the conduct of the accused resulted in her hospitalization. In my opinion these are relevant matters and the trial judge erred in "shutting out" the whole subject of the complainant's medical history.[134]

These cases indicate that defence arguments for access to the complainant's psychiatric records could be successful. It is easy to see how defence counsel could argue that psychiatric records are relevant to the reasonableness of the complainant's fear, the cause of her fear, and her overall credibility. We hope that trial judges are aware of the dangers involved in victimizing the complainant twice.[135]

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133. *Ibid.* at para. 17.

134. *Ibid.* at para. 37.

135. In *R. v. O'Connor,* [1995] 4 S.C.R. 411 [*O'Connor*], the Supreme Court of Canada outlined a two-step process for determining first whether the records are relevant, and second whether a judge should order production after considering such things as the privacy and "security of person" interests of the complainant and the necessity of the information for full answer and defence by the accused. Parliament responded to *O'Connor* with an even more stringent test, *Code, supra* note 3 at ss. 278.1-278.9, that requires the accused to prove that the information is not only relevant but "necessary in the interests of justice" before the judge will order production of the records for the court's review: *Code, supra* note 3 at s. 278.5(1)(c). The more stringent test, which has been upheld as constitutional, in *R. v. Mills,* [1999] 3 S.C.R. 668 [*Mills*], outlines several grounds as insufficient on their own to require production. These include the fact that the record relates to medical or psychiatric treatment of the complainant, that it may relate to the credibility of the complainant or the reliability of the complainant's testimony, and that it relates to sexual activity with the accused or any other person: *Code, supra* note 3 at s. 278.3(4). The regime for accessing records in sexual assault cases recognizes, at least to some degree, negative myths and stereotypes about women, as discussed in *Mills* at para. 119. Criminal harassment complainants do not, at present, receive the same level of protection for their medical records as do the complainants of a sexual assault. One possibility might be to include criminal harassment in s. 278.2 of the *Code*, giving complainants of criminal harassment the same type of protection as complainants in sexual assault cases.

D. Mens Rea

The *mens rea* for an offence under section 264 has several components. First, the accused must intentionally commit the conduct that violates section 264(2). Second, the accused must know or be reckless with respect to the fact that he has no lawful authority for engaging in the conduct. Third, the accused must know that the conduct is harassing, or at least be reckless with respect to harassment. In other words, whether the accused knew that his conduct was harassing the complainant will be assessed on a subjective standard. Usually in criminal offences, where fault is required and the offence is not a special stigma offence,[136] *mens rea* may be assessed on an objective standard. In this case, the legislature explicitly chose to assess knowledge on a subjective standard, despite arguments to the contrary.

The courts have held that there is no *mens rea* requirement for the reasonable fear consequence of the *actus reus*. The Crown does not have to prove that the accused knew or ought to have known that his behaviour was likely to cause the complainant to fear for her safety. Following *R. v. DeSousa,*[137] the Alberta Court of Appeal in *Sillipp*[138] held that the absence of a fault requirement for the reasonable fear component of the *actus reus* is constitutional because there is a fault requirement for some other component of the *actus reus* that makes the conduct blameworthy.[139]

The only *mens rea* requirement is that the accused must know that the conduct is harassing, or must at least be reckless with respect to harassment. Wilful blindness will also satisfy the *mens rea* requirement.[140] Although nothing in section 264 says that the

136. *R. v. Martineau* [1990] 2 S.C.R. 663.

137. [1992] 2 S.C.R. 944.

138. *Supra* note 50.

139. Leave to appeal to the Supreme Court of Canada was denied in *R. v. Sillipp, supra* note 26. This finding on the constitutionality of s. 264 has been followed by the Ontario Court of Appeal in *Krushel, supra* note 109.

140. See *Sansregret v. The Queen* [1985] 1 S.C.R. 570 [*Sansregret*]. Wilful blindness is generally seen as an alternative to knowledge or intention. It refers to a situation in which the accused deliberately shuts his eyes to finding out the truth. It can be read in as an

complainant must actually be harassed, the courts have read in this requirement. The Court of Appeal in *Sillipp* held that "harassed", in turn, means tormented, troubled, worried, plagued, bedeviled or badgered.[141]

(i) Intentional Conduct

The intentional conduct requirement in section 264 is rarely discussed by courts, as it does not seem to arise as an issue in the context of following, communicating, or watching/besetting. However, intention becomes an issue when dealing with the act of threatening, because it is a more complex type of behaviour, and it implies both the act of threatening and an understanding of the threatening nature of the behaviour. In *Kosikar,*[142] the Court looked to jurisprudence on section 264.1 (uttering threats) in assessing the *mens rea* requirement.[143] Section 264.1 requires the Crown to establish that the accused intended to threaten the victim. The judge concluded that when an accused is charged under the threatening conduct subsection of section 264, he must be shown to meet the *mens rea* requirement of having intended to threaten the complainant.

The *mens rea* for threatening was recently revisited by the Yukon Territory Court of Appeal in *R. v. George.*[144] The analysis in this case shows the interdependence in the analysis of conduct and *mens rea.* After reviewing the Supreme Court of Canada's decision on section 264.1 in *McCraw,*[145] the Court concluded that:

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alternative to knowledge or recklessness, and is a subjective mental state because of the deliberateness required.

141. *Supra* note 50 at para. 16.

142. *Ibid.*, aff'd (2000), 138 C.C.C. (3d) 217 (C.A.). In affirming the lower court decision, the Ontario Court of Appeal addressed only the issue of whether a single incident of threatening conduct sufficed to fulfill the conduct requirements. The issue of whether the Crown had to establish an intent to harass was not addressed.

143. See especially *R. v. McCraw,* [1991] 3 S.C.R. 72 [*McCraw*].

144. (2002), 162 C.C.C. (3d) 337 [*George*].

145. The *George* judgment refers to *Kosikar, supra* note 51, but only with respect to that court's definition of a threat and the court's finding on whether threat includes psychological safety.

In order to achieve the objectives of s. 264, the threat described in s. [264(2)(d)], must amount to "a tool of intimidation which is designed to instill a sense of fear in the recipient." Whether or not this is the case is an objective question. Here, the question is as follows: did [the accused] commit an action [1] which could be characterized as a tool of intimidation and [2] by which he meant to instill fear in the complainant?[146]

The first part of this test relates to the finding of conduct, which is judged objectively to determine whether the conduct amounts to a threat.[147] The second part of the test relates to *mens rea*. It appears that the judge in this case is adding an additional *mens rea* component for threatening conduct—the intention to instill fear. However, it may be that the judge was equating "intention to instill fear" with "intention to harass." The case suggests that this intention may be inferred from the conduct. If the conduct is not a "threat," then the accused could not have intended to threaten. In applying this test, the Court held that the encounters between the complainant and the accused did not indicate that he intended to instill a sense of fear in her. These encounters included an offer to fix the complainant's bike, which was characterized by the Court as friendly, and an offer of money to her to take a walk with him. The Court characterized the accused's proposition as crude and socially inappropriate, but held that it was not threatening since it was not designed to intimidate or cause fear.

What is interesting is that the supposedly subjective intention to cause fear is assessed on the basis of what a reasonable person would consider to be a threat. This does not mean that the accused's intention is being assessed on an objective standard. It does mean that evidence of what a reasonable person considers to be a threat can help the trier of fact to draw conclusions about what the accused subjectively thought. This approach to section 264(2)(d) has not yet appeared in other reported cases, although some courts have used objective indicators to infer subjective *mens rea* with respect to harassment.

146. *George*, *supra* note 144 at 349. This definition was approved of by the Quebec Court of Appeal in *Lamontagne*, *supra* note 52.

147. *George*, *ibid.* at 348.

(ii) Knowledge or Recklessness as to Whether the Complainant Is Harassed

This *mens rea* component is assessed on a subjective fault standard, requiring either that the accused knew his conduct was harassing or that he was aware of the risk he was taking. The language of the statute demonstrates that Parliament meant the intent requirement to be subjective.[148]

The meaning of recklessness in this context is particularly important. It is not uncommon for an accused to assert that he honestly believed that his actions were meant solely to win the affections of the complainant. If the trier of fact has a reasonable doubt in this regard, the proper verdict under the current legislation is an acquittal. But what of an accused who asserts such a belief in spite of objective evidence to the contrary, such as protests by the complainant, police warnings, or even a restraining order? On one level, this is a question of proof. Can the accused raise a reasonable doubt that it never crossed his mind, when there is objective evidence that it should have? In any assessment of subjective fault, evidence about what a reasonable person might have actually perceived in the circumstances may help the trier of fact identify what the accused perceived. This is not to say that the test is objective, but rather to use objective evidence to assess the subjective fault requirement.

Appellate decisions have confirmed that the test for *mens rea* is purely subjective. For example, the Manitoba Court of Appeal in *R. v. Davis* explicitly approved of the reasoning found in the Queen's Bench decisions, which described the *mens rea* for section 264 as follows:

> It is sufficient if it is proven beyond a reasonable doubt that the accused knew that the complainant would be harassed by his or her conduct, or was reckless or wilfully blind in that regard. Intention or knowledge is an awareness of a circumstance or consequence as

148. Canada, *Minutes of Proceeding and Evidence of the Legislative Committee on Bill C-126*, (26 May 1993). The discussion before the Parliamentary Committee of Bill C-126 also is very clear on why intention/recklessness is the standard provided for in s. 264. The reason for requiring a subjective fault standard is, at least in part, that some of the conduct involved in s. 264 may be, in and of itself, not criminal. It is the intent to do that conduct in order to harass that makes it criminal.

being certain or practically certain, in other words a foreseen certainty. Recklessness is foreseen probability or an awareness of probability. In *R. v. Sansregret* [citation omitted] McIntyre J. defined recklessness as "the conduct of one who sees the risk (of a result) and who takes the chance."[149]

The definition of recklessness from *Sansregret* was also used by the Ontario Court of Justice in *Kosikar* to reject the objective standard, a judgment that was upheld by the Ontario Court of Appeal on other grounds.[150]

(iii) Problems with the Subjective Test

The requirement for knowledge or recklessness with respect to harassment raised concerns during the drafting of the legislation. Marion Boyd, then Ontario Attorney General and Minister Responsible for Women's Issues, expressed this concern before the Justice Committee reviewing the draft legislation:

This requirement fails to realize the reality of the crime. Many men who engage intentionally in the type of conduct set out in proposed subsection 264(2) do not believe they are harassing the object of their intentions. They often explain their actions as the expression of love or concern for the safety of the victim and her, and perhaps his, children, or concern for the protection of their property. This is the main reason why the proposed offence is little or no better than the existing *Criminal Code* offence of intimidation, section 423, which also includes a specific intent that has proved virtually impossible to successfully prosecute.[151]

The mental element was added in part to avoid criminalizing enumerated conduct that was engaged in for legitimate reasons, a concern which we recognize. For example, an accused might be seeking access to his children, or a private investigator might be trying to obtain photos of an individual for insurance fraud purposes. Like the requirements of repetition and reasonable fear, the subjective test of

149. *R. v. Davis* (2000), 71 C.R.R. (2d) 340 at 351 (Man. Q.B.), aff'd (2000), 148 Man. R. (2d) 99 (C.A.).

150. *Kosikar, supra* note 51. Because recklessness is permitted, s. 264 has been held to be a crime of general intent (*Lafreniere, supra* note 107).

151. *Supra* note 148 at 3:6–3:7.

mens rea is another safeguard to prevent section 264 from catching innocent conduct.

The primary concern with the *mens rea* requirement is that it will exculpate accused who unreasonably believe they are engaging in the proscribed conduct out of love. If the test were objective rather than subjective, those with unreasonable beliefs could be convicted. The requirement of subjective fault makes such convictions less likely. As it stands now, wilful blindness might be present in some of these cases. When correctly applied, wilful blindness requires that the accused deliberately shut his eyes to the truth after becoming aware of reason for further inquiry. Therefore, an accused who deliberately shuts his mind to the prospect that his conduct is harassing the complainant could be convicted. Recklessness on the part of the accused also provides the requisite *mens rea* in these situations. An accused who is aware that his actions might be harassing, but proceeds anyway, can be convicted. However, an accused who never considered that his conduct could be harassing, and believed instead that he was acting out of love, is neither wilfully blind nor reckless.[152]

The difficulty with both wilful blindness and recklessness lies in proving the accused's actual state of mind when he says he was acting out of love. Evidence that shows what a reasonable person would have thought in the situation might play a role in assisting the trier of fact to determine what the accused actually thought.[153] However, the test itself remains subjective. The accused may still be able to raise a reasonable

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152. As will be discussed below, there is at least one case in which such delusional thinking on the part of the accused led the Crown to seek a finding of not criminally responsible on account of mental disorder after an initial finding of guilt: *R. v. Fraser*, [1997] 33 O.R. (3d) 161 (C.A.). The Ontario Court of Appeal, on appeal by the accused, upheld the finding of not criminally responsible. At the time of the appeal, the accused had already been detained for 2.5 years, much longer than most sentences for criminal harassment.

153. For example, in *Sansregret*, *supra* note 140 at 582, Justice McIntyre wrote that:

> on the face of it, one would have thought that a man who intimidates and threatens a woman and thereafter obtains her consent to intercourse would know that the consent was obtained as a result of the threats. If specific knowledge of the nature of the consent was not attributable to him in such circumstances, then one would think that at the very least recklessness would be. It might be said then that this case could have been disposed of on the basis of recklessness.

doubt, even if acting in contravention of court orders forbidding contact with the complainant—something that objectively points toward recklessness.

(iv) Issues in Proving *Mens Rea*

Generally, an accused is assumed to have intended the natural and probable consequences of his or her actions. The problem with making these sorts of assumptions in cases of criminal harassment is that the conduct involved is often the same conduct that is used in non-harassing situations. Thus, a trier of fact cannot automatically infer that the accused knew his conduct was harassing. For example, in *Baszczynski*, the accused repeatedly phoned the complainant and sent her "love notes" and flowers. Despite the fact that the accused was told several times by the complainant and her family to stop, the judge had a reasonable doubt about his intent:

> What I am having trouble with is whether the accused was deliberately calling her with a view to harassing her or whether he was reckless as to whether or not he was harassing her. I'm not satisfied beyond a reasonable doubt that that element is sufficiently proved.
> . . .
> I rather think he thought that if he was persistent that he would somehow win her back and didn't realize that he was crossing the line.[154]

While *Baszczynski* may have been close to the line, if the accused believes he is acting out of love for the complainant (or out of concern for their children), and if the risk of harassment does not cross his mind, then he cannot be convicted no matter how egregiously he has crossed the line into inappropriate conduct.

(a) Pre-Charge Conduct

Courts often look to pre-charge conduct to determine whether the accused knew (or was reckless) about the harassing nature of his conduct. The admissibility of such evidence was confirmed in the early

154. *Supra* note 94 at paras. 46, 48.

British Columbia Court of Appeal decision in *Ryback*, where the Court held:

> The appellant's state of mind would, of necessity, depend in large part on his past association with, and conduct towards, the complainant. His knowledge that the complainant was harassed, or his recklessness as to whether she was harassed, could be realistically decided only by looking back to what had gone before.[155]

In *Ryback*, the Court noted that the accused, a stranger to the complainant, had been warned previously by the police to desist from approaching hern and had been consistently rebuffed by her.[156] The Court concluded that he was reckless as to whether she was harassed. However, the Court noted that if there had been a "friendly relationship" between the accused and the complainant, or if she had "encouraged the [accused] in his advances," such evidence could reflect an "innocent state of mind" on his part.[157]

It is important to note that evidence of pre-charge conduct is admissible not to show that the accused was more (or less) likely to have committed the offence, but rather to provide a context in which to assess the accused's mental state. The Manitoba Court of Queen's Bench held in *Davis*[158] that, in addition to past conduct, pre-charge events and the history of the relationship, "past convictions for criminal harassment involving [the] complainant and prior civil or criminal protective orders between [the] parties may also be admissible," although the judge did not appear to rely on such evidence in entering a conviction.[159] The broad admissibility rules regarding the accused's prior conduct are important to provide a context for assessing whether the accused knew he was harassing the complainant.

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155. *Supra* note 59 at para. 34.
156. *Ibid.* at para. 2.
157. *Ibid.* at para. 34.
158. *Supra* note 149.
159. *Ibid.* at 350.

(b) The Relevance of Motive

While criminal harassment is not a specific intent offence, the requirement of general intent to harass is very close to a purposive requirement, such as motive. While motive is technically not an element of the offence, an accused might try to raise a reasonable doubt about *mens rea* by putting forward some other reason for engaging in the prohibited conduct. This is particularly the case where there is a previous intimate relationship between the parties.

In *Patrick*,[160] the accused's conduct included calls to the welfare authorities alleging fraud on the part of the complainant, and to the Children's Aid Society alleging that he had seen her using drugs in the presence of her child.[161] The judge did not believe that the accused was honest in his complaints, but had a reasonable doubt that the calls were made with the intent to harass. The accused was ultimately acquitted because it could not be ruled out that his sense of duty had motivated him to make the call.[162]

In *Dryden*, also a case that also involved a former intimate relationship, some of the alleged conduct included communications with the complainant concerning property in her possession.[163] The accused also tried to communicate with her by using the police as an intermediary. In acquitting him, the judge stated that "still looking at the facts generally, [I] find it odd that, if the intent of the accused was to harass the complainant, that he would contact the police. With his record, in my view, his behaviour is more consistent with someone trying to resolve a property dispute than to harass."[164] This case demonstrates a difficulty that arises when a charge of harassment is made in the context of an intimate relationship. Ex-partners or spouses are more likely to have legal, economic, and personal property ties that need to be dealt with. In such cases, it may be more difficult to separate

160. *Supra* note 88.

161. The accused was not the father of this child.

162. *Patrick, supra* note 88 at para. 5. The judge also expressed substantial reservations regarding the complainant's credibility.

163. *Supra* note 124.

164. *Ibid.* at para. 42.

conduct that is intended to harass from conduct that is done for a legitimate reason.

In the above two cases, the judges approached the evidence from the perspective of the *mens rea* for harassment rather than from the perspective of lawful authority in section 264. For example, the judge in *Patrick* might have considered whether the accused's belief that he had a legal duty to make the reports to Children's Aid and the welfare authorities might have excused him under the lawful authority exception.[165] In *Dryden*, the accused might have argued that he had a legal right to try to retrieve his property from the complainant.[166]

In the context of section 264, judges appear to have had difficulty reconciling the possibility of multiple intentions for carrying out prohibited conduct. In *Johnson*, the accused repeatedly made appearances at his wife's residence after they had separated.[167] On one of these occasions, he observed his wife through a window as she engaged in sexual intercourse with her new partner. The judge found that while the accused had shown poor judgment in his conduct, there was no intent to harass. The judge held that the accused happened to be in the vicinity to visit friends (not to beset his wife), and that he had looked in the complainant's window to determine whether she was having an affair, something which she had previously denied. These actions were characterized as an attempt to determine whether there was any chance for reconciliation with his wife.[168]

In *Baszczynski*, the accused was similarly acquitted on the basis of a lack of *mens rea*. The accused made several comments that could be construed as threats, including an inquiry as to whether his surveillance of the complainant had "driv[en her] nuts yet." The judge did not acknowledge the threatening quality of these comments, but noted that other comments, such as a statement by the accused that if he could not have the complainant, her new boyfriend couldn't either, indicated that "he must've known what he was doing [i.e., bothering the

165. *Supra*, note 88.
166. *Supra*, note 124.
167. *Supra*, note 94.
168. *Ibid.* at para. 2.

complainant]."[169] The judge nonetheless held that there was reasonable doubt as to intent because of the existence of a note that accompanied flowers sent to the complainant. The Court held the note did not "have any evil intent to it. It just talk[s] about how much he misses her . . . so there's nothing threatening in that note."[170]

What is troubling about cases like these is that judges use the unwanted or obsessive behaviour of the accused to point to a lack of intent to harass. If an accused has deluded himself into thinking that his actions are justified or will result in a reconciliation with the complainant, this logic can preclude a finding of knowledge or recklessness. It ignores the fact that he might have multiple mindsets. It is certainly possible for an accused to desire to win back an ex-partner and at the same time be reckless as to whether his actions are harassing that same partner.

Most judges do seem to acknowledge this in their decisions. In *Lafreniere*, Judge Greco held that a lack of a lawful or legitimate purpose could give rise to the inference that the purpose of the conduct was to harass the complainant:

> I am of the view, and I so find, that lacking a lawful purpose or, lacking a legitimate purpose, it is logical to infer that at the very least the accused did what he did, *i.e.* follow the complainant about from place to place, for the purpose of making the complainant aware of his ongoing presence, for the purpose of making the complainant uncomfortable, for the purpose of annoying the complainant . . .[171]

In *R. v. Shearer*,[172] the defence argued that the accused could not be found guilty due to a lack of intent to harass and a lack of malice. The accused had twice been convicted of harassing the complainant and was in prison when he sent her a threatening letter. The defence argued that the letter, which contained sexually explicit references, had no malice attached to it.[173] The judge rejected this argument, asserting that it "completely ignores the essence of this crime; which is to criminalize

169. *Baszczynki*, *supra* note 94 at para. 46.
170. *Ibid.* at paras. 18-19.
171. *Supra* note 107 at paras. 14-16.
172. [1997] O.J. No. 5613 (Gen. Div.) (QL) [*Shearer*].
173. *Ibid.* at para. 13.

unwanted, obsessive behaviour before it escalates to more serious criminal behaviour."[174] While the judge was satisfied that the accused was still in love with the complainant, he found as a fact that the accused knew his overtures were fear-inducing. The complainant had made it abundantly clear she wanted no further contact, yet the accused had persisted. The accused was ultimately acquitted since the judge held that although the accused's motive may not have been to cause fear, he might still have hoped that intimidation would induce the complainant to agree to further contact.

The above case law demonstrates two problems. First, the legislation itself opens the door to claims that the accused was acting for innocent reasons and that it never occurred to him that his conduct was harassing. Second, while judges generally appear to recognize that a conviction for criminal harassment can be sustained even where there is a lack of malice on the part of the accused, or where the accused is claiming that the conduct was simply motivated by feelings of affection for the complainant or their children, the problem remains that some judges construe the requirement of an intent to harass as precluding the co-existence of another motive. Where another motive is present, some judges fail to consider whether the intent to harass can co-exist with that other motive, or whether the accused was reckless about harassing the complainant when he pursued that other motive.

(c) The Relevance of a Restraining Order

In many criminal harassment cases, a complainant will seek a restraining order against the accused before resorting to criminal charges.[175] Where an accused contravenes such an order, he is likely to

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174. *Ibid.* at para. 14.

175. A person can be ordered not to have contact with another person through several legal avenues. *Code*, *supra* note 3, for example, provides that a harasser can be restrained through s. 810 peace bonds, conditions imposed in conjunction with interim release (through s. 515(4)(d)), and conditions imposed through probation orders (through s. 732.1(3)(h)). Civil remedies include the imposition of prohibitory injunctions and protective orders through provincial family law statutes (*e.g.* under s. 37 of B.C.'s *Family Relations Act*, R.S.B.C. 1996, c. 128, a court can make an order restraining anyone from molesting, annoying, harassing, or communicating with the applicant or a child in the

be seen as being at least reckless as to whether the conduct is harassing. A restraining order signifies that the complainant does not want contact with the accused. For example, in *Hau* it was held that whenever a peace bond has been issued, rejection is clear.[176] *R. v. Taylor* held that the repeated, knowing breach of a family court order bore directly on intent.[177]

An accused may still be found to have insufficient *mens rea* despite the existence of a court order. In *R. v. Carey*,[178] the accused sent gifts and cards to the complainant (his ex-wife) and their children, in contravention of a court order that explicitly forbade him from having any contact, direct or indirect, with any of them. The summary appeals court judge (incorrectly) applied an objective test of *mens rea* and determined that a reasonable person in the circumstances would not have known that the conduct would cause the ex-wife to be harassed. In making this finding, the judge relied heavily on two facts. First, the judge noted that "the history of the relationship between the parties, although tumultuous, demonstrates a pattern of breakups followed by reconciliations notwithstanding quite poor conduct by the accused."[179] The gist of the reasoning was that if she took him back before, she was likely to take him back again, and it was reasonable for the accused to assume a reconciliation rather than to assume he was harassing her. Second, the accused's psychiatrist had encouraged the accused to send the gifts. The judge found that since the psychiatrist, who was

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applicant's custody.) For a thorough discussion of the ways in which no-contact orders can be imposed see, *Stalking* (Winnipeg: Manitoba Law Reform Commission, 1997) at 26-30.

176. *Supra* note 109 at para. 58. It is interesting to note that in the provincial court decision of *Hau*, court orders were also given great significance. The judge had excluded all pre-charge conduct from evidence, except for conduct that came after the imposition of court orders. The rationale for the exception was that the orders created a special relationship between the parties. On a summary conviction appeal by the Crown, this decision was reversed and all pre-charge conduct was held admissible. An interesting question is what the effect would have been if the complainant had sought an order or peace bond, but the order had not been granted by the court? Would this be seen to be as clear a rejection?

177. *R. v. Taylor* [1998] O.J. No. 5917 at para. 10 (Gen. Div.) (QL) [*Taylor*].

178. *R. v. Carey* (1998), 17 C.R. (5th) 123 (Ont. Gen. Div.) [*Carey*].

179. *Ibid.* at para. 17.

acquainted with the history of the couple, did not think the complainant would feel harassed by this activity, it was not reasonable to assume that the accused would think she would be. In addition to the error in using the objective test, this case seems at odds with the general trend in the case law that violation of a court order is indicative of knowledge that the conduct is harassing.

(iv) Evidence of Rebuke by the Complainant

The accused may try to assert a lack of *mens rea* on the basis that he did not know that his communications or other actions were harassing the complainant because she did not adequately communicate to him that his actions were unwanted. In *Ryback*, the Court of Appeal found that a lack of forceful rebuff did not prevent a finding that the accused had the requisite *mens rea* to be convicted:

> The complainant should not be faulted for not being more forceful in her rebuff of the appellant. She made her feelings plain. It was doubtless frightening for her as a woman to be pursued single-mindedly by a man, in the face of her refusal and conspicuous absence of encouragement. It is also understandable that she would not wish to provoke such a man by confronting him directly.
> Apart from what the appellant must have known given the complainant's responses to his overtures, there is evidence that he did actually know he was harassing the complainant.[180]

That the accused raised this issue in *Ryback* is surprising, given that the complainant and accused were total strangers and the complainant (and others connected to her) had clearly communicated to the accused that his attentions were unwanted.

Where an accused is connected to the complainant, particularly by children, the issue is more complex. Complainants who know the accused may have equally compelling reasons for not giving a forceful rebuke. The complainant's attempts to leave the relationship, lack of response to or encouragement of the accused's approaches, or steps to stop or avoid his conduct should all be adequate to indicate to him that

180. *Ryback, supra* note 59 at paras. 41-42.

his conduct is not wanted. A complainant should not have the onus of delivering a strong rebuke.[181]

Most courts dealing with this issue have found that complainants do not need to tell the accused that the conduct is unwanted if their actions and gestures communicate their displeasure.[182] However, some courts have taken another view. For example, in *Carey*, the Court held that the accused did not have the requisite *mens rea*, in part because the complainant did not communicate her displeasure with the appellant's notes and gifts.[183]

In our view, judges should not place the onus on the complainant to communicate to the accused that the conduct is unwanted. However, where these rebukes do exist, such communications should be considered strong evidence of knowledge/intent.[184]

VI. Sentencing

A. General Approach to Sentencing

Until June 4, 2002, the maximum sentence for criminal harassment was five years' imprisonment if the Crown proceeded by indictment and six months if the case was prosecuted on summary conviction. The maximum sentence has since been increased to ten years, at least in part so that criminal harassment can serve as an underlying offence for a dangerous offender application.[185] Even when the maximum was five years, which was true for all cases in this study, sentences were rarely close to the maximum. The cases exhibit a range of sentences, from a suspended sentence to substantial imprisonment.

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181. This is analogous to sexual assault where, historically, courts have put the burden on the complainant to communicate the absence of consent. It has only recently been recognized that it should be up to the accused to inquire into consent, not up to the complainant. See *R. v. Park*, [1995] 2 S.C.R. 836 at 868-869.

182. *R. v. Rehak* (1998), 125 Man. R. (2d) 181 (Q.B.).

183. *Supra* note 178.

184. For example, in *Shearer*, *supra* note 172, the Court held that the accused had the requisite *mens rea*, in part because it was made abundantly clear that the complainant did not want any further contact.

185. *Supra* note 21.

The British Columbia Court of Appeal set the tone for sentencing offenders of criminal harassment in domestic situations in *R. v. Khemhus.*[186] The sentencing judge had paid particular attention to the longstanding abuse of a marriage partner, and had sent a strong message of specific and general deterrence. The Court of Appeal, in upholding a jail sentence of eighteen months, said that courts take a "very serious view" of abuse of one's spouse, and that considering this fact was not a misconception of relevant principles by the trial judge. The Court reaffirmed that conduct that is not part of the charge, such as domestic violence, can be considered in sentencing the offender.[187]

More recently, the Ontario Court of Appeal has stressed the seriousness of criminal harassment. The Court's reasons for a sixteen-month jail sentence in *R. v. Bates*[188] have been cited across the country:

> Domestic violence and harassment cases most often involve conduct directed by a male spouse or partner against a woman. Yet offenders who feel empowered to harass a partner or former partner with impunity will not necessarily confine their behaviour to that person, but may also harass and terrorize her friends and family members. As this case illustrates, the respondent somehow perceived that his love and need for the complainant allowed him to be an unwanted presence in her life and in the lives of her family and associates, and to threaten and terrorize them to achieve his ends. His irrational actions made him a menace to [the complainant] and to those close to her.
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> . . .
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> The number of recent cases continuing to reach this court emphasizes the extent of the problem of criminal harassment and the need for sentencing courts to respond to this type of offence in the most forceful and effective terms, sending the message of denunciation and general deterrence to the community, and specific deterrence to individual offenders.[189]

In another case involving a prison term of two years and four months, the Ontario Court of Appeal held that the principles of sentencing emphasized in *Bates* "apply with full force even where there is no physical violence . . . The psychological violence . . . is the very evil that

186. (1994), 54 B.C.A.C. 158.
187. *Ibid.* at para. 7.
188. (2000), 146 C.C.C. (3d) 321 (Ont. C.A.) [*Bates*].
189. *Ibid.* at 331, 344.

Parliament sought to punish."[190] The Manitoba Court of Appeal also upheld a sentence of imprisonment of two years less a day, in addition to the seven months that the accused had already served.[191] The court held that the sentence was severe, but fit, designed to keep the offender out of circulation and give him time to reconsider his past course of conduct.

In *R. v. Thomas*,[192] the Ontario Court of Appeal upheld the trial judge's finding that the aggravating circumstances of the offence, in addition to two prior assaults on the complainant, justified a three year prison term, rather than the two years sought by the Crown. The Prince Edward Island Court of Appeal has said that, in light of the very serious physical and/or emotional harm to the victim, trial judges must "be wary of positive pre-sentence reports," and that factors such as the absence of a criminal record or expressions of remorse should not be given undue weight.[193]

B. Types of Sentences Given

Our data set included 65 sentencing cases. While the five year maximum was not given in any of these cases, 48 cases resulted in terms of imprisonment and seven cases in conditional sentences to be served in the community. The terms for conditional sentences ranged from six to eighteen months, while prison terms ranged from one day[194] to four years. The cases that did not attract a term of imprisonment or a conditional sentence resulted in suspended sentences or fines with probation.

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190. *R. v. Finnessey* (2000), 135 O.A.C. 396 at para. 16.

191. *Davis*, *supra* note 149 at paras. 12, 16.

192. (2001), 146 O.A.C. 298.

193. *R. v. Wall (P.J.)* (1995), 136 Nfld. & P.E.I.R. 200 at para. 9 (P.E.I. C.A.) [*Wall*].

194. There were two cases in which the offender was sentenced to one day. In one of them, the offender was concurrently sentenced to three years on the charge of wounding the complainant: *R. v. Kresky*, [1997] O.J. No. 6190 (Prov. Div.) (QL). The other involved a first time offender with mitigating factors (the offender had acknowledged the conduct, was seeking professional help, and had spent a month in custody already): *R. v. Carter*, [1993] O.J. No. 3403 (Prov. Div) (QL).

(i) Terms of Imprisonment

Most offenders (74%) in our sample received jail terms for criminal harassment, although it is possible that our sample consists of more high-end cases because we are dealing with cases that led to written judgments. A majority of the jail terms imposed (56%) were for less than six months, indicating that judges generally feel that shorter sentences are adequate to meet the principles of sentencing. When assigning these short sentences, most judges remark on the need for general and specific deterrence, denunciation, giving the offender time to consider his conduct or receive rehabilitative treatment, and the need to provide complainants with some sense of security, however brief.

While judges seem to be imposing prison sentences for the most serious cases of criminal harassment, the duration of those sentences is generally short. There is a growing recognition that long prison sentences do not serve the interests of society, except in isolating the offender from the community. Since almost all criminal harassment offenders will be released at some point, the question becomes: what sentence provides the best protection for the complainant in the long term? While sentences that promote rehabilitation are desirable, we remain concerned about cases in which the accused has previously violated a restraining order. This should be viewed as a serious aggravating factor. The fact that the offender has acted in utter disregard of a legal mechanism designed to protect the complainant should militate in favour of a term of imprisonment. Unfortunately, this does not always happen.[195]

(ii) Conditional Sentences

While only seven of the cases reviewed imposed a conditional sentence, the issue of whether such a sentence was appropriate arose in several cases. In every one of the cases, the reasons for either accepting

195. For example, in *Taylor, supra* note 177, the Ontario Court of Justice upheld a suspended sentence for a summary conviction where the offender had violated a court order forbidding the offender to contact the complainant except for the very limited purpose of accessing his child.

or rejecting it related to whether the sentence would endanger the complainant and the community[196] and/or whether a conditional sentence would adequately reflect the sentencing principles of deterrence and denunciation.[197]

There is no real consistency as to what warrants a conditional sentence. In some instances violating a peace bond is held to warrant jail time,[198] while in others it is not.[199] The most consistent thread is that the protection of the complainant is the most pressing concern, coupled with a recognition that prison offers protection only in the short term.[200] Therefore, in cases where it is believed that counselling offers a better chance of long term protection for the complainant, a conditional sentence is more likely.[201]

In *R. v. MacInnis*,[202] the Yukon Territorial Court held that conditional sentences are not appropriate for a second conviction of criminal harassment, because the prior conviction is a significant aggravating factor in determining the safety of the community.[203]

In determining whether a conditional sentence would endanger the complainant and the community, the conditions to be imposed on the offender must be considered. As noted by the Newfoundland Court of Appeal in *R. v. Bailey*, "it would be rare in a criminal harassment case that the provisions of a probation order or a conditional sentence order

196. For example, in *R. v. Boaz*, [1999] Nu. J. No. 4 at para. 48 (Ct. J.) (QL) [*Boaz*], the judge rejected a conditional sentence as it was likely to endanger the safety of the complainant. Again, in *R. v. Skinner*, [2002] N.J. No. 43 at 51-52 (Prov. Ct.) (QL) [*Skinner*], the offender's propensity to re-offend meant that protection of the public could only be achieved through incarceration.

197. For example, in *R. v. Simms*, [2002] N.J. No. 3 (Prov. Ct.) (QL), the judge said that a conditional sentence in a case in which the offender had threatened to kill the complainant, had repeatedly called her, and had followed her and watched her would fail to satisfy the need for both specific and general deterrence and denunciation.

198. See *R. v. Maheu*, [1995] O.J. No. 2312 (Prov. Div.) (QL) [*Maheu*]; *R. v. Masnica*, [1997] O.J. No. 6157 (Prov. Div.) (QL) [*Masnica*]; *R. v. Sayyeau*, [1995] O.J. No. 2558 (Prov. Div.) (QL) [*Sayyeau*].

199. *Taylor, supra* note 177.

200. *Boaz, supra* note 196; *Skinner, supra* note 196.

201. *Meehan, supra* note 73.

202. [1999] Y.J. No. 97 (Terr. Ct.) (QL).

203. *Ibid.* at para. 12. See *Boaz, supra* note 196 and *Skinner, supra* note 196.

would not include a stipulation that the offender stay away from the complainant."[204]

Unique conditions can also be shaped to meet the needs of the complainant. For example, in *Bailey*, the offender was prohibited from participating in a boating regatta involving the complainant.[205] In *R. v. Perrier*,[206] the offender had distributed posters containing vulgar remarks about the complainant, with the warning that anyone having sex with her might get AIDS. The judge was "sorely tempted to impose a prison term as retribution for the offender's conduct."[207] However, because denunciation and deterrence could be achieved by a non-custodial sentence and the offender was not a danger to the public (assuming the complainant is not part of the public), "the community will be best protected by promoting rehabilitation of [the offender]. Prison will not assist this."[208]

Even where the safety of the complainant and the public can be achieved through a conditional sentence, the other principles of sentencing must be met. In *Krushel*, the Ontario Court of Appeal upheld a three month prison term, noting that even though it was a first offence and no physical violence was involved, the conduct spanned a number of years, that it occurred during the currency of a peace bond, that it had a dramatic impact on the victim, and that the offender lacked remorse.[209]

(iii) Suspended Sentences and Fines

Suspended sentences are given instead of terms of imprisonment or conditional sentences where there is a high likelihood that the offender can be rehabilitated or has already been adequately deterred. For example, in *R. v. Gingell*,[210] an aboriginal offender who made a series of

204. *R. v. Bailey*(1998), 124 C.C.C. (3d) 512 (Nfld. C.A.) at para. 19 [*Bailey*].
205. *Ibid.*
206. (1999), 177 Nfld. & P.E.I.R. 225.
207. *Ibid.* at para. 29.
208. *Ibid.* at paras. 28-29.
209. *Supra* note 109.
210. (1996), 50 C.R. (4th) 326 (Terr. Ct.).

lewd phone calls to four different victims was given a suspended sentence with three years' probation. This was based largely on the fact that the offender had willingly participated in an aboriginal sentencing circle, which the judge noted was perceived by the community as being a tougher sentence than incarceration.

Significant periods of pre-trial custody will also militate against a requirement of incarceration. In *R. v. Massa*,[211] the court held that pre-trial custody may provide sufficient specific deterrence, while adequate protection of the complainant could be achieved through strict terms of probation. What is worrisome about that case is that the accused had breached a recognizance during the commission of the offence. In *Patrick*, the judge suspended the sentence on the condition that the offender leave Canada and return to his home in Louisiana.[212]

Sometimes a suspended sentence seems at odds with the hope for rehabilitation or deterrence. In *R. v. Bowden*,[213] the judge clearly felt obligated to give a suspended sentence for three counts of criminal harassment, due to the fact that the offender had already spent time equivalent to a penitentiary sentence in jail. However, the judge expressed worry over this, stating that the offender's conduct was "as dangerous and sinister as any conduct I have heard in over 22 years sitting on the bench."[214] The judge recommended that a transcript of the sentencing proceeding be placed in the offender's file,

> so that the moment [he is] arrested, if that unhappy event should happen, for any similar transgression in the future, the police will have my opinion on file, that if this happens again you are to be treated as the most dangerous kind of offender and that your release should be opposed at all costs.[215]

The sentencing result was highly discordant with the judge's description of the accused.

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211. [1998] O.J. No. 6320 (Prov. Div.) (QL).
212. *Supra* note 88.
213. [1997] O.J. No. 5624 (Gen. Div.) (QL).
214. *Ibid.* at para. 6.
215. *Ibid.*

The use of fines in criminal harassment cases was questioned in *Wall*.[216] The Crown appealed the appropriateness of a fine and restitution payment, where the accused had pled guilty to harassing a former romantic partner through a series of acts that culminated in the complainant's finding the accused on her couch holding a large knife. The Crown sought a jail term of four months. The Prince Edward Island Court of Appeal took the position that jail is "an over-simplified solution toward solving what most often will be a very complex set of circumstances."[217] The Court upheld the sentence, stating that, given the offender's income, the fine would be a hardship on him, serving as punishment, and that an order for counselling during the probationary period would serve toward rehabilitation.[218]

(iv) Probation and Prohibitions

In addition to terms of imprisonment, suspended sentences or fines, nearly all offenders received a term of probation ranging from two to three years. Probation can be added to any sentence of not more than two years.[219] Typically, conditions of probation include staying away from the complainant and not communicating with her in any way. Where the complainant and offender have children in common, there is often a term related to the offender's ability to access the children through a third party such as a lawyer. Several Ontario judges have imposed forms of banishment on offenders. In *Maheu*, in addition to restricting the offender from being near the complainant's residence and place of work, the judge forbade the offender from being anywhere in town on Thursdays, except at his house or on the highway leading out of town. This was to allow the complainant to freely use the town's amenities without encountering the offender.[220] In *Masnica*, the judge imposed a condition that the offender not enter the town, except to pick

216. *Supra* note 193.
217. *Ibid.* at para. 11.
218. *Ibid.* at para. 15.
219. *Code*, *supra* note 3 at s. 731(1)(b).
220. *Maheu*, *supra* note 198.

up his belongings and attend medical appointments at the hospital.[221] In *Sayyeau*, a judge banished the offender from town on Sundays, from malls on Thursday evenings, and from restaurants on Tuesday evenings.[222] The offender was also banished from certain parks and recreation areas for up to five hours per week. In *Stagnitta*, the offender was ordered not to live in her parents' house because it was across the street from the complainant.[223] While some of these developments are positive in that the courts recognize the ongoing harm to the complainant when the offender lives in the same community, banishing an offender from an area one day a week could be construed as precluding the complainant from going into certain areas on the other six days. In these cases, the complainant is likely to feel more constrained in her movements than the offender.

Perhaps the most difficult issue facing a sentencing judge in a criminal harassment case arises when the accused shares children with the complainant and is seeking access to them. While some courts have shown deference to access rights when it comes to sentencing,[224] others have given more weight to the vulnerable position in which such orders can place the victim.[225] For example, in *Sayyeau*, the Court found that the multiple offences, death threats, and suicidal ideation by the accused called for an order denying the accused access to his child.[226] The Court emphasized that "this [was] a temporary situation that [would] be corrected once the appropriate family court order [was] obtained."[227] In our research, we were able to find only one case in which the court imposed an unqualified prohibition on the accused's access to his child. In crafting an interim release order for a man accused of assault and

221. *Supra* note 198.
222. *Ibid.*
223. *Supra* note 41.
224. See *R. v. Cowell* (2001), 153 B.C.A.C. 45.
225. *R. v. Leach*, [1999] O.J. No. 3669 (Ct. J.) (QL); In *Boaz*, *supra* note 196 at para. 57, one of the conditions of the probation order was that the accused "make reasonable efforts to provide for the support and care of his child and provide his probation officer with a monthly report on his efforts to do so."
226. *Supra* note 198.
227. *Ibid.* at para. 48.

criminal harassment, the judge in *R. v. Baker*[228] ordered that there be no contact with his former partner or their daughter. The judge stipulated that this order was to remain in force, notwithstanding any further orders that family court might make. The judge recognized that this order was "hard" on the father, but indicated that it was necessary given the Crown's concerns about abduction. However, this condition was associated with an order for interim release and therefore was limited in its duration.

Conclusion

Based on nearly ten years of Canadian criminal harassment jurisprudence, this study has attempted to evaluate both the courts' approach to criminal harassment and the degree to which section 264 can protect women who are harassed. We started this paper expecting to find support for the concerns raised by women's groups during the section's enactment. We thought the reasonable fear requirement would leave women's lifestyles and backgrounds open to attack. We feared that the subjective fault standard, which requires an accused to know he is harassing the complainant or at least be reckless as to that fact, would result in acquittals of accused who had deluded themselves into honestly believing they were acting out of love. We also feared that the narrow conduct requirements would limit the provision to cases neatly falling within those confines.

These cases do validate some of the concerns voiced during the enactment of section 264, particularly about the *mens rea* requirement, and indicate a need for amendments to the provision. These amendments must be informed by the reality that criminal harassment, like sexual assault, is a gendered crime, and that section 264 was enacted specifically to deal with the problem of men harassing women, usually their former intimate partners. We therefore recommend the following changes:

228. [2000] O.J. No. 5103 (Ct. J.) (QL).

1. The word "repeatedly" in subsections 264(2)(a) and (b) should modify all types of following, communicating or watching conduct generally. This should be done in such a way that leaves "engaging in threatening conduct" unmodified by the "repeatedly" requirement;
2. The requirement that the complainant's fear be reasonable should be dropped from the legislation. In the context of harassing conduct, the existence of subjective fear on the part of the complainant should suffice; and
3. The subjective test of *mens rea* should be changed to a modified objective test.

A. Conduct and the Requirement for Repetition

The rationale for requiring repeated conduct is that innocent activity is less likely to be caught by the legislation. There is also an assumption that repeated conduct is more likely to cause reasonable fear. While this redundancy may provide safeguards for an innocent accused, it may also frustrate the purpose of protecting complainants. If the reasonable fear requirement were removed from the legislation and a modified objective test were adopted for *mens rea*, there would still be safeguards in place for the accused.

There are some valid criticisms to be made of the "repeatedly" requirement when it is viewed on its own. For example, one might question whether requiring a woman to wait for three episodes of harassment could put her safety at risk. Waiting could delay police intervention. However, when all the elements of the offence are viewed together with the need to safeguard both innocent accused persons and complainants in danger, retaining the "repeatedly" requirement and eliminating the reasonable fear requirement makes the most sense.

Nonetheless, significant interpretation problems with the "repeatedly" requirement necessitate a change to the provision. Repeated conduct should refer to any combination of single incidents of following, communicating or watching. Otherwise, artificial segregation of conduct into different categories ignores the harassing effect of combinations of different conduct. Threatening conduct is never appropriate, regardless of the number of times it occurs, and therefore

"engaging in threatening conduct" should remain unmodified by the repeatedly requirement.

B. Reasonable Fear

At the time of section 264's enactment, the greatest concern about the "reasonable fear" requirement was that it would result in victims being "put on trial." This has not happened in the reported decisions we reviewed. There have been more cases in which the reasonable fear requirement has been held to justify the inclusion of previous misconduct by the accused than cases in which the complainant's background or mental health has been challenged. As well, judges have broadly interpreted "safety" to include psychological well-being, which gives voice to the psychological violence underlying this crime. Making a woman's psychological state an essential element of the crime, however, opens the door to evidence on whether it was the accused's conduct that caused the psychological distress or whether the complainant suffered from psychological problems independent from the harassment. More troubling are cases, particularly trial decisions, in which judges find that women are "overreacting" to the harassment, a problem which is inherent in the reasonableness requirement of the legislation. This requirement allows judges or juries to assess whether they themselves would have been afraid, without seeing the incidents in the context of the long history that the complainant may have shared with the accused.

Even though most judges have taken a sensible approach to reasonable fear, it is still not an appropriate requirement. If an accused repeatedly acts in a way that causes fear in the complainant, and the accused should have realized that the complainant was being harassed, it is unnecessary also to require that the complainant's fear be reasonable. Repeated harassing conduct is inherently frightening. The reasonable fear component obscures that reality. It also largely ignores the fact that most incidents of harassment do not occur in isolation, but rather in the context of the history of a relationship that only the complainant and the accused have experienced. It should be enough if the complainant was truly frightened by the harassment.

It is impossible to discover the extent to which the reasonableness requirement hinders effective prosecution of harassers. There are several junctures at which the reasonableness of a woman's fear may be questioned: by the complainant herself, who may discredit her own feelings; by police officers responding to complaints; by prosecutors deciding whether to lay charges; and by the courts that try the cases. Historically, the attitude that violence within a marriage was a private matter perpetuated such violence. The reasonable fear requirement condones harassment in a similar way, implying that fear induced even by repeated harassment may be unreasonable. Cases may not be prosecuted because someone has failed to understand the nature of the crime and to validate the complainant's fear. While the courts may not be prying into the complainant's background, we do not know whether police officers and prosecutors judge the merits of a case on the strength of the complainant's character. This paper has identified two cases where the possibility of seeking mental health histories has arisen. While this is not yet common in criminal harassment cases, it may be a problem in the future. We can only hope that courts will be more attuned to the problems involved in challenging a complainant's mental health history after their experience in that regard in the sexual assault context.

C. Mens Rea

As the law stands now, the *mens rea* requirement is the most troubling aspect of section 264. Because of the requirement for intent or recklessness with respect to harassing the complainant, some accused are being acquitted on the basis that they did not intend to harass. We feel the question should be whether the failure of the accused to acknowledge the harassing impact of his conduct demonstrated a marked departure from the standard of a reasonable person in the circumstances. While subjective intention to harass certainly indicates moral blameworthiness and justifies criminal sanctions, requiring a subjective form of *mens rea* does not recognize the reality of this crime. Some accused have deluded themselves into thinking that they are acting solely to win the heart of their former partner, or for some other

acceptable reason. While many judges have rejected claims of an accused who asserts an honest mistake in the face of blatant evidence to the contrary (such as when an accused acts in violation of a restraining order), some accused are acquitted due to the special difficulties of determining *mens rea* in criminal harassment.

One of the arguments put to the Justice Committee which held hearings into Bill C-126 was that this element was going to hinder prosecution in many cases, because many men who engage in harassment do not think they are harassing. Critics recommended removing it, and changing the wording of the legislation to provide that the accused must have "no lawful authority or purpose"[229] for engaging in the conduct. They argued that adding the words "lawful purpose" would make it clear that men who were engaged in legitimate activities were not caught by the legislation, and the subjective intent requirement would not be necessary. This proposal was not accepted.

If only one change were to be made to section 264, we recommend that it be to the *mens rea* requirement. The *mens rea* for this offence, in our view, should be assessed through a modified objective test. This would make it much more difficult for a harasser to raise a reasonable doubt about *mens rea* by claiming an ulterior motive such as "trying to win the complainant back." The conduct itself would still have to be intentional, and the accused would still have to be reckless as to whether he had lawful authority to make contact with the complainant. When combined with a penal negligence standard for the impact of the harassing behaviour, this would be sufficient.

The Supreme Court of Canada has upheld objective standards for *mens rea* as long as the offence is not one of the small category of "special stigma offences."[230] Some of the crimes for which the objective standard has been upheld have more serious penal consequences than criminal harassment.[231] The minimum fault required in these contexts has been penal negligence or a marked departure from the standard of a

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229. "Or purpose" are the words that were suggested and that are not currently in s. 264.

230. *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Finlay*, [1993] 3 S.C.R. 103; *R. v. Creighton*, [1993] 3 S.C.R. 3 [*Creighton*]; *R. v. Naglik*, [1993] 3 S.C.R. 122; *R. v. Gosset*, [1993] 3 S.C.R. 76.

231. For example, *Creighton*, *ibid.*, unlawful act manslaughter.

reasonable person in the circumstances as they were known to the accused. This standard of penal negligence would be particularly appropriate for criminal harassment, because of the common assertion of romantic motives.

D. Beyond Section 264

This study illustrates the extent to which criminal law is a very limited tool in preventing crime, particularly crime that is entrenched in the gendered dynamics of intimate relationships. Violence and intimidation, particularly against women trying to leave intimate relationships, are pressing social problems that will require solutions that are far more complex than amending one *Criminal Code* provision.

Criminal harassment of former intimate partners is based on physical, economic, social and other power imbalances between men and women. A multi-dimensional problem such as criminal harassment requires a multi-dimensional solution. In 36% of the criminal harassment cases in this study, the conduct complained of violated some type of judicially imposed no-contact order. Other cases involved repeated convictions for criminal harassment. These factors indicate that offenders who perpetrate these crimes are not easily deterred by the law. Similarly, there is an inability to craft remedies that offer safety for women. This is apparent in the sentencing cases, despite the fact that many judges are interpreting the legislation in a reasonable manner. While harassers are sometimes briefly incapacitated while imprisoned, those periods of imprisonment are so short that this is of little benefit to the woman. Once the offender is released, there is no protection, short of a long term offender designation, for the complainant who remains fearful that the harassment will resume.

The rendering of unusual sentencing orders, such as banishment, reflects judges' intention to give complainants some peace of mind. However, it is clear that none of these sentences will stop men, except in the short term, from re-victimizing the complainant, if that is what they are determined to do. Although increasing the maximum sentence may give the complainant a longer window of safety than under the five year maximum sentence, meaningful efforts at rehabilitation need to be

pursued in conjunction with possible longer-term involvement in the offender's life to decrease the risk of re-offending.

Given the appearance of futility, what is the value in the criminal harassment provisions? Part of the rationale in enacting section 264 was to facilitate early intervention by police in situations that could escalate into further violence, such as assault and homicide. If the provision is truly helping police intervene more quickly, then section 264 is worth retaining for that reason alone. It could also be argued that any reprieve for the complainant, in terms of jail sentences for the offender, is welcome. The huge number of harassment complaints to police demonstrates both that the provision is used, and that the problem of criminal harassment in Canada cannot be resolved by law alone. Nevertheless, section 264 makes a clear statement that harassing another person, even someone with whom the offender shares an intimate relationship, is criminal behaviour and will be punished. As such it is an important piece, albeit a small one, of our response to the reality of physical and psychological violence in intimate relationships.