

Ambiguity of Unlawful Stalking – s 359B(d)(i) knowledge on the part of the victim (Vol 1: Issue 3)

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This article examines in detail the legislative requirements for unlawful stalking in Queensland and in doing so, highlights possible ambiguities as to whether the victim is required to know that the alleged perpetrator is engaged in certain activities.

Unlawful Stalking – s 359

The relevant anti-stalking provisions in Queensland are found in Chapter 33 *Unlawful Stalking*, ss 359A-359F of the *Code*. The actual offence of stalking is created pursuant to s 359E which provides for an aggravated form of the offence in certain circumstances. The current definition and relevant acts that might constitute stalking are listed in s 359B of the *Code*:

359B What is unlawful stalking

Unlawful stalking is conduct—

- (a) intentionally directed at a person (the stalked person);
- and
- (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
- (c) consisting of 1 or more acts of the following, or a similar, type—
 - (i) following, loitering near, watching or approaching a person;
 - (ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;
 - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
 - (v) giving offensive material to a person, directly or indirectly;
 - (vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;
 - (vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and

- (d) that—
- (i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or
 - (ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

Accordingly, stalking is unlawful when it involves conduct that is intentionally directed at a person on any one or more occasions.^[1] The provision makes it clear that stalking can occur on one occasion providing the alleged stalking is over a 'protracted' length of time.^[2] The section then details a non-exhaustive list of acts which might constitute stalking and these include – following, loitering, watching, approaching, contacting, leaving offensive material where it will be found by the person, harassing whether or not involving violence.^[3] The requirements pursuant to ss 359B(a)-(c) are then read in conjunction with s 359B(d)(i)-(ii) that stipulate the conduct *would* cause the stalked person to apprehend or fear or *causes* detriment. The legislation contains a further provision under s 359C that details what is immaterial for unlawful stalking:

Section 359C

- (1) For section 359B(a), it is immaterial whether the person doing the unlawful stalking—
- (a) intends that the stalked person be aware the conduct is directed at the stalked person; or
 - (b) has a mistaken belief about the identity of the person at whom the conduct is intentionally directed.
- (2) For section 359B(a) and (c), it is immaterial whether the conduct directed at the stalked person consists of conduct carried out in relation to another person or property of another person.
- (3) For section 359B(b), it is immaterial whether the conduct throughout the occasion on which the conduct is protracted, or the conduct on each of a number of occasions, consists of the same or different acts.
- (4) For section 359B(d), it is immaterial whether the person doing the unlawful stalking intended to cause the apprehension or fear, or the detriment, mentioned in the section.
- (5) For section 359B(d)(i), it is immaterial whether the apprehension or fear, or the violence, mentioned in the section is actually caused.

As shown in several Queensland cases, there appears to be some confusion as to the exact meaning of s 359B(d)(i), specifically in relation to the word, 'would' thus indicating that there may be a requirement that the 'stalked person' must have some knowledge of the alleged stalking, as will now be discussed.

Ambiguity of Unlawful Stalking – s 359B(d)(i) knowledge on the part of the Victim

The ambiguity with unlawful stalking in Queensland occurs because there is no explicit reference in the legislation that requires the victim to be aware they are in fact being stalked. The section merely states that the act be sufficient so that it 'would' cause the stalked person apprehension or fear, reasonably arising. In situations where there does not appear to be evidence of the accused actually causing detriment to the stalked person pursuant to s 359B(d)(ii), the effect of s 359B(d)(i) works to include the potential or likelihood of apprehension or fear of violence reasonably arising, as opposed to requiring the person *actually* experiencing the fear or the apprehension of it. In other words because the legislation refers specifically to the 'stalked person', there would appear to be a requirement to assess *that* person and not any person; thus requiring the imposition of a subjective test on the part of the victim as well as an objective assessment based on 'reasonableness'.^[4] It is the wording of this provision that would appear to be unsettled and subject to further judicial scrutiny.

Two cases that illustrate this ambiguity are *R v Davies* [2004] 279 and the more recent case of *Re Taylor* (2009) 195 A Crim R 53.

In the case of *Davies*, a pre-trial ruling held at the Beenleigh District Court in 2004 ruled that s 359B(d)(i) is not made out unless the 'stalked person is aware what's going on and is reacting to that awareness ...'^[5] One of the questions before the Court was whether it was necessary for the person stalked to be aware of the stalking activity? The accused was charged with two counts of unlawful stalking against his two step daughters. The accused installed a hidden camera in the ceiling cavity of the family bathroom. From time to time when either of the complainants were undressing or showering in that room, the accused would activate the camera and watch the complainants on a monitor in another room, or would record them on video tape.^[6] The alleged acts were carried out between 31 May 2001 and 22 January 2003.^[7]

The two complainants only became aware of the actions of their step father when their brother alerted authorities upon discovering the existence of the video camera. Once informed of their step father's actions, the girls' reactions were not consistent

with the apprehension of any fear of violence to themselves or of property,^[8] or the suffering of actual detriment^[9] as required. Rather, the actions were that of anger and annoyance and in particular a concern that the video evidence might be circulated to others.^[10] During the course of proceedings, McGill DCJ discussed the meaning and operation of s 359B(a)-(c) and referred to the explanatory notes to the amended section from 1999 in order to derive meaning of s 359B(d)(i). Ultimately, McGill DCJ concluded that,

It is not stalking unless the person concerned, the stalked person, is aware of what is going on and is reacting to that awareness so as to satisfy paragraph (d) ... It seems to me that it is not stalking to engage in conduct, the stalked person is entirely unaware of merely because once the stalked person finds out about it later the stalked person is unhappy about it.^[11]

His Honour reached the conclusion that the acts perpetrated by the accused were insufficient to have breached s 359B(d)(i) on the basis that the said acts did not cause the victim apprehension of fear of violence. The mere fact that there was an element of 'indecent' about the behaviour, did not necessarily constitute a breach of the anti-stalking provisions. Emphasis here was given to the requirement of causing actual detriment or the potential to cause apprehension of fear of violence. His Honour therefore reached the conclusion that the acts, despite being 'indecent' in nature, did not breach either of the two provisions in s 359B(d).

His Honour indicated that in order for the section to be made out completely it is a requirement for the victim to become aware of the actions at some stage since only then can it be ascertained whether the acts *would* cause apprehension of fear of violence. Despite this, His Honour stipulated that the knowledge on the part of the victim did not need to coincide exactly with the timing of the acts in question. In some circumstances there might be some lapse of time [between] the act and the stalked person becoming aware of it. ... But it seems to me that even in relation to that, unless the stalked person is made aware of it at some time, then it is difficult to see how either of the detriments could be suffered.^[12]

Thus, while it appears there is a temporal requirement that the victim have knowledge of the alleged behaviour, it is not necessary that the knowledge be contemporaneous with the alleged behaviour. Unfortunately, his Honour offered no further clarification on this point as to when the victims would need to have knowledge of the relevant acts. His Honour also did not provide any clarification as

to the appropriate test to determine how the accused's actions 'would' cause the stalked person apprehension or fear of violence.

A similar situation arose a number of years later in the case of *Re Taylor* (2009) 195 A Crim R 53 where the question once again related to whether the victim needed to be aware of the actions of the stalker in order for the offence to be made out. In *Taylor*, the accused was charged with, among other things, one count of stalking his estranged wife and daughter while in possession of an automatic shotgun.^[13] Prior to the day in question, the accused went to great lengths to seek the location of his wife and daughter. Upon learning of their whereabouts, he obtained a number of items including a knife and a map and drove interstate to the area where he suspected her to be. Upon locating his wife, he laid in wait to avoid detection from them and others, but was ultimately apprehended by police after a tip-off by a shop assistant.

In this case, the victims had no knowledge of the accused's actions until they were informed by the police. Applegarth J considered the ruling in *Davies* but unlike the outcome of that case, concluded that there was sufficient evidence to deduce that the acts of the accused 'would' cause the wife apprehension or fear, reasonably arising, of violence against her.^[14] His Honour made it clear that *Davies* was not like the present case.

This is not a case, ...in which the complainants were simply angry and upset. The conduct would also cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to her, or another person.^[15]

Applegarth J accepted the argument that the complainants were not aware of the accused until after the arrest. Importantly, it was only after the arrest of the accused that the 'unlawful stalking was in fact completed upon their becoming aware of those matters.'^[16] The crucial factor required for the offence to be made out was that the acts have the 'causal potency' to satisfy the detriment pursuant to s 359B(d)(i).^[17] This would indicate that stalking is a continuing offence in the sense that it is only complete when the victim is made aware of the acts and that such acts have the 'causal potency' to cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to the stalked person. While Applegarth J in *Re Taylor* and McGill DCJ in *Davies* both agree that there is at least an 'implicit' requirement of knowledge of the acts,^[18] at some point, there

would appear to be a number of questions still unanswered. Of greatest significance is the fact that the section is silent on the knowledge aspect of the victim, and it is arguable that a higher court could determine that it is not a requirement that the victim have any knowledge at all of the acts. It is certainly arguable that the purpose of the criminal law is to prohibit offending behaviour and it should not matter whether a person is aware of the behaviour or not since this changes nothing of the offending acts.

A different question that remains relates to which test to apply in determining whether the victim 'would' have the necessary apprehension of detriment. Given that the section refers to 'reasonably' arising, and the 'stalked person', the statute does appear to contemplate the use of an objective standard. However, is this an objective assessment of an ordinary person in the position of the 'stalked person', thereby taking into consideration the personal attributes of the victim, or is it an objective assessment using an ordinary person test, irrespective of the personal characteristics of the complainant? The judgments in *Re Taylor and Davies* would indicate the former is more likely to apply, however in the absence of judicial clarification, the matter remains open to debate.

One way to shed more light on the issue, might be to examine more closely the purpose of the anti-stalking legislation, and this will be the topic of future posts.

[1] ss 359B(a)-(b).

[2] s 359(a).

[3] s 359B(c)(i)-(vii). Interestingly, s 359B(c)(ii) has been amended to allow the 'contacting' to occur 'in any way' by telephone ... email 'or through the use of any technology'. This was amended to allow for the increased electronic means of communication. It will be interesting how the law adapts to future cases involving alleged stalking by use of social media sites such as Facebook, Twitter and the like.

[4] s 359B(d)(i).

[5] *R v Davies* [2004] QDC 279 (2 August 2004) 1 [10].

[6] *Ibid* 2 [10]-[20].

[7] *Ibid* 2 [1].

[8] s 359B(d)(i).

[9] s 359B(d)(ii).

[10] *Ibid* 2 [40].

[11] *Ibid* 7 [10].

[12] *Ibid* 6 [50].

[13] *Re Taylor* (2009) 195 A Crim R 53, 3 [10].

[14] *Ibid* 13 [30]-[34].

[15] *Ibid* 13 [34]-[40].

[16] *Ibid* 14 [10].

[17] *Ibid* 14 [30].

[18] *Ibid* 14 [46].