COURT FILE No.: Toronto 06-10005399

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JOSEPH OTAVNIK

Before Justice K. Caldwell
Reasons for Judgment released on October 22, 2009

Ms. Cidalia C. Faria ..... **for the Crown**
Mr. David Berg ..... **for the accused Mr. Joseph Otavnik**

K. Caldwell J.:

[1] Mr. Otavnik is charged with three counts of criminal harassment under section 264(1)(b) of the Criminal Code:

> 264. (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
>
> Prohibited conduct
>
> (2) The conduct mentioned in subsection (1) consists of
>
> (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them.

[2] The complainants work for CSI Global Education Inc. ("CSI"). This company offers courses in order to educate people who wish to work in a licensed capacity in the securities industry. The complainants are: (1) Dr. Roberta Wilton, Chief Executive Officer (CEO); (2) Mr. Mitchell Marcus, General Counsel; and (3) Mr. Steve Lowden, Vice President, Strategic Capabilities. Mr. Lowden's position involves overseeing the human resources function of the corporation.

Background and Facts

[3] By all accounts, Mr. Otavnik has had a long and difficult history with the company. He took a number of courses with CSI, but was unhappy with what he perceived to be his unfair treatment. He then applied for an employment position with the company and was unhappy when he was not hired. It was the latest contact – the contact in relation to his potential hiring – which led to the behaviour and resultant charges that are before the court.

[4] The acts which form the subject matter of the charges are not in dispute. The primary dispute between the parties concerns, first, Mr. Otavnik's intent when committing the acts in question and, secondly, whether the complainants were fearful as a result of this conduct and, if fearful, whether this fear was objectively reasonable.

[5] On March 7, 2006, Mr. Otavnik sent an email to CSI expressing concern about its hiring practices as he noticed that the company was continually recruiting for the same job positions yet did not acknowledge its receipt of his application for these jobs nor his resume.

[6] We then move to April 20, 2006. At that time, the March 7th email was brought to Mr. Lowden's attention given a number of phone calls that Mr. Otavnik had apparently made to the company after he sent the March 7th email. Mr. Lowden then contacted Mr. Otavnik by email in an attempt to address his concerns. What followed was a series of emails that were sent over the days that followed, culminating in Mr. Otavnik's arrival at CSI on April 26, 2006. I will summarize the contents of Mr. Otavnik's emails to CSI.

[7] On April 24, 2006, Mr. Otavnik emailed Dr. Wilton, expressing dismay that he had not heard back again from Mr. Lowden. He attached a copy of his response to Mr. Lowden's April 20th email. In that response, he complained of CSI's exam practices which he claimed had disadvantaged him sometime in the past. He then stated, "I didn't litigate it. I am not in such a generous mood now". He then complained of CSI's current hiring policies, and went on to state "[p]lease tell Dr. Wilton that her PhD in 17th Century literature won't prepare hear (sic) for what I can do. And yes my lawyers are better than yours".

[8] At that point, a decision was made to involve Mr. Marcus. He wrote a response to Mr. Otavnik, acknowledging receipt of Mr. Otavnik's email to Dr. Wilton, and said that the matter had been referred to him for his review.

[9] Mr. Otavnik responded on April 24, 2006 at 3:17 pm, correcting Mr. Marcus' spelling, and stating "I hope you pay closer attention to information in any of your court filings' because I can assure you that I do. Please don't make me wait for Dr. Wilton's call. I can be reached at 1-905-728-2133. I look forward to hearing from Dr. Wilton".

[10] Mr. Marcus responded a few minutes later by telling Mr. Otavnik that all communications should be sent to him and that no one else in the company would be dealing with Mr. Otavnik. A few minutes after that email was sent, Mr. Otavnik emailed back to Mr. Marcus, stating in part "Don't be so stupid as to insult my intelligence by suggesting you have contacted Dr. Wilton as she has directed you to handle this case in this manner. Whereas you may be stupid enough to not understand where any action may go you (sic) employer will

not allow you to be as foolish. I have no intention of contacting you and you really don't want not to tell Dr. Wilton to call me. You are making decision(s) above your pay scale now Sir and I suggest you think long and hard about your next decision. Dr. Wilton has until 5:00 (sic) pm tomorrow to call me".

[11] At that point, Mr. Marcus emailed Mr. Otavnik, telling him that "your communications are rude, harassing and your threats are intended to serve no purpose other than to intimidate". He told him that all further communication should be done through legal counsel and that he must stop communicating directly with any of the complainants.

[12] Mr. Otavnik then replied that he was acting as counsel, and that "I will contact who I want when I want. If you want me to stop I suggest you get an injunction (sic)-you do know what that is right?...I did not contact you. As a litigant I have the option to sue and serve when I want and who I want. Perhaps I should wait for Dr. Wilton to give a speech before the Toronto Board of Trade etc and serve her personally in front of a crowd. If you don't think I have the stones to do it you really don't know me....Have a nice day".

[13] The next day, Mr. Otavnik contacted Dr. Wilton directly by email, stating that he looked forward to hearing from her that day. He then followed up in the late afternoon with an email to Mr. Marcus, stating that he would be at CSI the next day in order to deliver "one final notice before I contact ONCAP and Onex Corporation". My understanding is that ONCAP invests in CSI and that it is part of the Onex Corporation.

[14] Mr. Otavnik did arrive at CSI the next day and was stopped by security. He had a letter directed to Dr. Wilton that said in part "if I do not hear from you soon I will be contacting you in a manner and form which you may not appreciate".

The Elements of Criminal Harassment

[15] What the Crown is required to prove under section 264 is outlined in the Alberta Court of Appeal decision R. v. Sillipp (1997), 11 C.R. (5th) 71, adopted by the Ontario Court of Appeal in R. v. Kosikar , [1999] O.J. No. 3569:

> 18 In the result, a proper charge to a jury in a criminal harassment case must include reference to the following ingredients of the crime, all of which must be proved beyond a reasonable doubt:
>
> 1) It must be established that the accused has engaged in the conduct set out in s. 264(2) (a), (b), (c), or (d) of the Criminal Code.
>
> 2) It must be established that the complainant was harassed.
>
> 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
>
> 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
>
> 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable.

[16] Further, though the Crown must prove that the accused knew or was reckless or was wilfully blind to the fact that the complainant was harassed, the Crown does not need to establish that the accused knew or was reckless or was wilfully blind to the fact that his conduct caused the complainant to fear for his safety – the Crown must simply prove beyond a reasonable doubt that such fear existed, regardless of whether the accused intended by his actions to cause such fear - see R. v. Sillipp, supra, and R. v. Krushel , [2000] O.J. No. 302 (Ont. C.A.).

Charge involving Mr. Lowden

[17] I find that the Crown has established beyond a reasonable doubt that Mr. Otavnik is guilty of the charges involving Dr. Wilton and Mr. Marcus. I find, however, that the elements of the offence have not been proven in relation to Mr. Lowden. Specifically, I find that the Crown has not proven that the communication with Mr. Lowden was repeated.

[18] It is clear that the primary focus of the emails is the CEO of CSI, namely, Dr. Wilton. The Crown contends that though the emails are directed at various individuals, Mr. Otavnik's intent was that all of the communications were to be conveyed to all three complainants.

[19] The particular subsection under which Mr. Otavnik has been charged requires repeated communication. While repeated communication is not required for certain subsections of criminal harassment, such as section 264(2)(d), it is required for the subsection under which Mr. Otavnik has been charged.

[20] I do not agree with the Crown's submission that the generalized communication of March, 2006 was directed towards Mr. Lowden. Though the complaints dealt with hiring policies, which clearly could fall under the rubric of "human resources" that Mr. Lowden headed, I find the communication was of too general a nature to conclude that it was directed at Mr. Lowden.

[21] Further, other than the one communication directed at Mr. Lowden specifically, I find that it cannot be inferred that Mr. Otavnik was trying to communicate with Mr. Lowden indirectly through his subsequent emails. In my view, it is clear that the primary intended recipient of all of the emails was Dr. Wilton, whether or not they were addressed to her specifically. I reach this conclusion after examining the totality of the emails, his expressed repeated intention to contact Dr. Wilton, and his intent as expressed in email to serve Dr. Wilton publicly and further to attend at the CSI offices personally.

[22] Given my finding that the "repeated" requirement in relation to Mr. Lowden has not been established, it is unnecessary for me to deal with the other elements of the offence involving Mr. Lowden. The count relating to Mr. Lowden is therefore dismissed.

Charges involving Dr. Wilton and Mr. Marcus

(a) Intention to Harass

[23] It is conceded by the defense that Mr. Otavnik's communications with both Mr. Marcus and Dr. Wilton were repeated and that both were harassed by that conduct.

[24] In Kosikar, supra, the state of being harassed is defined as being "tormented, troubled, worried continually or chronically, plagued, bedevilled and badgered" (para. 25). I agree and find as a fact that Mr. Otavnik engaged in harassing conduct in relation to Mr. Marcus and Dr. Wilton.

[25] Though the defense concedes that Mr. Marcus and Dr. Wilton were harassed, it is not conceded that Mr. Otavnik knew, or was reckless or was wilfully blind to this harassment.

[26] The Supreme Court of Canada, in R. v. Sansregret , [1985] S.C.J. No. 23, compared and contrasted the civil concept of negligence and the higher standard required for the criminal concept of recklessness. Negligence carries with it the objective standard of the reasonable man. Recklessness must carry with it the additional requirement of subjectivity:

> It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence (para 16).

[27] The Court then differentiates between recklessness and wilful blindness:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry. (para. 22).

[28] Justice Doherty described wilful blindness as "deliberate ignorance" – see R. v. Lagace (2003), 181 C.C.C. (3d) 12 (Ont. CA) at para. 28. Further, in R. v. Malfara, [2006] O.J. No. 2069, the Ontario Court of Appeal noted that the question was whether the accused was in fact suspicious as opposed to whether he should have been suspicious (para. 2).

[29] Mr. Berg argues that Mr. Otavnik's stated intention was simply to commence civil litigation and thus he did not intend to harass. To further substantiate this argument, it is noted that CSI is the exclusive provider of the courses that must be taken before one can

work in a licensed capacity in the securities industry. Mr. Otavnik thus had no option but to deal with CSI.

[30] I find that Mr. Otavnik did intend to harass both Mr. Marcus and Dr. Wilton. I also agree that Mr. Otavnik thought that he would pursue civil litigation if matters could not be otherwise resolved in his favour. The fact that Mr. Otavnik wished to seek redress for the alleged wrongs he had suffered and to obtain that redress through civil litigation proceedings is not dispositive of the issue of whether he intended to harass.

[31] Further, intent and motive must not be confused; they are separate concepts. The distinction has been emphasized in many judgments, most recently in R. v. Cromwell, [2008] N.S.J. No. 283 (N.S.C.A). In the Cromwell case, the defense argued that the mens rea component had not been proven because Mr. Cromwell had communicated with the complainant in an attempt to reconcile. In rejecting this argument, the Court stated:

> With respect that is not the law. The mens rea on a charge of criminal harassment contrary to s. 264 of the Criminal Code is whether the accused knew, or was reckless, or wilfully blind as to whether the complainant was harassed. The mental element is the intention to engage in the prohibited conduct with knowledge, or with recklessness, or with willful blindness that such conduct causes the victim to be harassed. Thus, the mens rea of the offence is the intention to engage in the prohibited conduct with the knowledge that the complainant is thereby harassed. R. v. Sillipp, supra; and R. v. Krushel (2000), 31 C.R. (5th) 295, 142 C.C.C. (3d) 1 (Ont. C.A.).
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> 40 The appellant appears to be confounding intent with motive. In the criminal law the two terms are distinct. An innocent motive to reconcile is not dispositive of the required mens rea on a charge of criminal harassment. It is well established in the criminal law that the mental element of a crime ordinarily involves no reference to motive. For example, while motive, or the absence of motive, may be compelling evidence to prove identity, it is legally irrelevant to criminal responsibility. See, for example, R. v. Lewis, [1979] 2 S.C.R. 821 at para. 27, 35; R. v. Chartrand, [1994] 2 S.C.R. 864, para. 57-58. (at paras. 39-40)

[32] Mr. Otavnik stated on April 24 at 10:57 a.m. that he didn't litigate when he was previously wronged by C.S.I. but he was "not in such a generous mood now". Further, in the same email, he made the comment that Mr. Marcus should "tell Dr. Wilton that her PhD in 17th Century literature won't prepare hear (sic) for what I can do. And yes my lawyers are better than yours". Approximately four hours later, he told Mr. Marcus not to "make me wait for Dr. Wilton's call". Then, forty minutes later, "I have no intention of contacting you and you really don't want not to tell Dr. Wilton to call me".

[33] After Mr. Marcus tells him that he is being harassing and intimidating, he continues along the same vein. He tells Mr. Marcus, at 4:31 pm, that "I will contact who I want when I want", and that an injunction must be obtained to stop him. He also states "[p]erhaps I should wait for Dr. Wilton to give a speech before the Toronto Board of Trade etc and serve her personally in front of a crowd. If you don't think I have the stones to do it, you really don't know me". Finally, of course, he says that he will be delivering a final notice to the company in person the next day and, in fact, he does show up at CSI the following day.

[34] The very tone and wording of these emails make it clear that Mr. Otavnik intended to torment, trouble, plague, bedevil and badger both Mr. Marcus and Dr. Wilton in order to convince them to meet his demands in advance of formally commencing civil proceedings. Mr. Berg argues that this is just Mr. Otavnik's style of communication. I agree from my observations of Mr. Otavnik in court and during the course of his testimony that his manner is abrupt and borders upon being both abrasive and arrogant. The fact that the correspondence in question is consistent with Mr. Otavnik's communication style does not leave me with a reasonable doubt, however, that Mr. Otavnik intended to harass Dr. Wilton and Mr. Marcus.

[35] Mr. Otavnik's ultimate motive of obtaining redress from CSI, and of obtaining it through civil proceedings, is not, as per Cromwell, dispositive of the issue of intent. I accept that this was his ultimate motive. Co-existing with that motive, however, was the intent to harass, as proven by the email communications and by Mr. Otavnik's personal attendance at CSI.

(b) Fear Component

[36] The fourth and fifth elements outlined in Sillipp, supra, are that the conduct must cause the complainant to fear for his safety and that such fear was, in all of the circumstances, reasonable. There is, therefore, a subjective and objective element to this part of the offence.

[37] It is important to note that the consequence of reasonable fear does not have to be intended by the accused. The mens rea component does not attach to this aspect of the offence – see R. v. Sillip, supra, at paras. 30-33 and R. v. Krushel, [2000] O.J. No. 302 (Ont. C.A.) at paras. 7-11.

[38] In R. v. Krushel, Justice Catzman quoted the Alberta Court of Queen's Bench decision in R. v. Sillip (1995), 99 C.C.C. (3d) 394 wherein Justice Murray outlined the mens rea of the offence, and its effect, as follows:

> In my opinion, s. 264 does not suffer from vagueness. Certainly there are many facets of it that will have to be interpreted by the Court. I have no doubt that as time progresses it will be given a constant and settled meaning. I have no problem interpreting s. 264 so as to understand that certain conduct is subject to legal restrictions and the area of risk is set out namely, if you intentionally behave in certain ways knowing that by doing so you are harassing another person then if your conduct causes that person to reasonably fear for his or her safety you run the risk of being criminally sanctioned. I would think that anyone reading the section would receive that message loud and clear.

[39] I find that I am satisfied beyond a reasonable doubt that both Mr. Marcus and Dr. Wilton feared for their safety and that such fear was reasonable in the circumstances.

[40] Mr. Marcus testified that the tone of the emails was escalating and that he perceived them as both hostile and menacing (see September 5, 2008 at pp. 31-32, 39 and 41). His fear was stated most clearly at pp. 54-55 of September 5th:

A: I was uncomfortable, you know in the sense that, you've got to understand there's my own personal discomfort as well as I'm a family man. And you know…

Mr. Berg: Sorry?

A. I'm a family man, and you've got to look, and I'm sure of – the members here in the court here can understand when you – when I suggest that when you look at your own personal safety, you are looking in a larger context and have a sense of that as well in terms of appreciating when these type of communications start and where they can go. So…

Ms. Faria: So were…

A. …yes, I was..

Q: …you concerned about your…

A. …concerned…

Q: personal safety?…

A. …about what this could personally mean to me.

The Court: Sorry? About what that?

A. What these – where this could go and what it could personally mean and what type of impact it could have to me personally

[41] I accept Mr. Marcus' testimony on this point.

[42] I am aware that Mr. Marcus did not use the specific word "fear". I have also considered other aspects of his testimony, such as his testimony at pp. 62-64 on September 5, 2008 that he was feeling "uncertain" as a result of the communications. When I assess all of his evidence, however, I find that I am convinced beyond a reasonable doubt that he did fear for his safety.

[43] Further, I find that Dr. Wilton feared for her safety. Dr. Wilton testified that she felt that matters had become personal. She felt uncomfortable and extremely vulnerable. She felt that the risk might be physical. Further, she felt it necessary to bring in security to protect both her and the staff – see October 26, 2007 transcript at pp. 18-19, 25, 35, 43-44.

[44] I accept Dr. Wilton's testimony on this point and find that the totality of her comments relevant to this issue makes it clear that she was fearful for her safety.

[45] I have also considered the defense submission that the behaviour of both Mr. Marcus and Dr. Wilton on April 26th suggests that they were not fearful. Mr. Marcus spoke of going down to the underground during his lunch hour and bringing his lunch back up to the office. Dr. Wilton spoke of proceeding with a Board meeting despite observing a stranger (Mr. Otavnik) in the midst of those assembled. I do not find that such actions lead me to conclude that they lacked fear, and I find that upon considering their actions and their comments about their feelings on this date I am convinced that they were fearful. I also note that extra precautions had been taken that day, namely, an increased security presence.

[46] I also find that their respective fears were objectively reasonable.

[47] It was submitted by the defense:

> It seems, furthermore, that C.S.I. never really examined the litigation issue in the context of the communications from Mr. Otavnik (Testimony of Dr. Wilton, ibid. 73-75). Indeed, it is submitted that by ignoring the clear litigation context of the offending communications, the complainants were left misunderstanding the nature of the e-mails, etc. It is submitted that resulting fear cannot be characterized as 'reasonable' when it occurs through tunnel vision. (Written Submissions, para. 36)

[48] The references to litigation are clear in the correspondence. I acknowledge the defense submission that Mr. Marcus is not a litigator; however, it would be impossible for any counsel or, indeed, any individual to miss the references to litigation. Though the question may not have been put to the complainants directly, I find it impossible to conclude that either Dr. Wilton or Mr. Marcus missed these references. The fact remains that despite the references to litigation, the tenor of the emails was very emotional, hostile, and threatening. There is no question that they are of a far different quality than that found in communications that are simply speaking of court action.

[49] I will not reiterate the entirety of the email comments made by Mr. Otavnik which I have outlined above. In my view, however, the nature of these comments is self-explanatory and I find that a reasonable person at the receiving end of such communications would be fearful for his or her safety.

[50] I therefore find that the Crown has proven all of the elements of the offences in relation to both Dr. Wilton and Mr. Marcus and I therefore find Mr. Otavnik guilty of these two counts.

Addendum Re Directed Verdict Judgment

[51] There was a motion for a directed verdict in this case that I dismissed. Mr. Berg quite correctly pointed out that the year that I attributed to most of the emails was incorrect. I indicated that the emails that form the crux of this matter, namely, the April emails, were sent in 2007. As the charges indicate a date of 2006, clearly such charges cannot be based upon emails sent in 2007.

[52] The point requires clarification. I misstated the 2007 date, and meant 2006 instead of 2007. The substance of that judgment is not affected by this clarification as the reasoning that I put forth applies equally to the corrected dates.

Released: October 22, 2009

Signed: "Justice Kathleen J. Caldwell"