

ARTICLES

The non-harassment order, an interim remedy?

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The author addresses the question of whether non-harassment orders are available early in the life of an action.

Domestically and internationally there has been much political, media and academic interest in stalking and harassment during the last two decades (Scottish Executive Social Research, *Stalking and Harassment in Scotland* (2002), p.1). The first dedicated anti-stalking statute was introduced in California in 1990. Since then legislation addressing the issue has been passed throughout the United States and in Australia, Canada, Belgium and Ireland (*ibid*, p.9).

The United Kingdom and Scottish Parliaments have legislated enthusiastically. For example the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the Protection from Harassment Act 1997, the Protection from Abuse (Scotland) Act 2001, the Civil Partnership Act 2004, the Family Law (Scotland) Act 2006, the Criminal Justice and Licensing (Scotland) Act 2010 and the Domestic Abuse (Scotland) Act 2011, each make some relevant provision.

Consequently a victim seeking a civil order to regulate a defender's future conduct has a range of options available which, depending on the nature of the relationship with the defender, may include interdict, interdict with power of arrest attached, an exclusion order, a matrimonial or domestic interdict or a non-harassment order.

Interdict with or without power of arrest attached is available early in the life of an action. But, while the Inner House of the Court of Session has clarified parts of the substantive law of harassment — *Marinello v City of Edinburgh Council* [2011] CSIH 33; 2011 S.C. 736; 2011 S.L.T. 615 — civil non-harassment orders remain, in procedural terms, something of an unknown quantity. Can they be pronounced before a court has reached the stage of finally determining the outcome of a case, or part of it? Assuming they are competent prior to final determination, how should the merits of early stage applications for grant, recall or variation be assessed? These questions have yet to be decided authoritatively meaning the scope of a critical part of the anti-harassment régime in Scotland is currently unclear.

Section 8 of the Protection from Harassment Act 1997 grants every individual in Scotland a right to be free from harassment and provides that conduct amounting to breach of that right may be the subject of a civil claim by the victim. There must be conduct on at least two occasions (s.8(3)), except in the case of domestic abuse (s.8A). Harassment includes causing alarm or distress by conduct which may include speech (s.8(3)). In an action of harassment the court may award damages, grant interdict, interim interdict or — provided it is satisfied that it is appropriate for it to do so to protect the pursuer from further harassment — grant a non-harassment order (s.8(5)).

Breach of a non-harassment order is an offence punishable by up to five years' imprisonment or a fine or both (s.9). A person reasonably believed to be in breach of a non-harassment order may be arrested without warrant (s.9(1)). There is no express power to grant an interim non-harassment order.

With regard to England and Wales, s.1 of the 1997 Act provides, in effect, that a person must not pursue a course of conduct which he knows or ought reasonably to believe amounts to harassment of another. Breach of that provision is in itself an offence punishable by up to six months' imprisonment, or a fine or both (s.2). A person whose conduct on two occasions puts another in fear of violence is guilty of an offence punishable by five years' imprisonment or a fine or both (s.4). Section 3 permits a victim of harassment to pursue a civil action for damages and seek an injunction restraining the defendant from harassing the victim. A power of arrest may be attached to a non-harassment injunction (s.3(3)). As with a non-harassment order, breach of a non-harassment injunction is an offence punishable by up to five years' imprisonment, or a fine or both (s.3(6)). There is no express provision empowering a court to grant an interim non-harassment injunction.

The provisions of the 1997 Act applying to different parts of the United Kingdom are distinct. But they plainly form part of a consistent scheme. Harassment was not made an offence in Scotland because it was assumed at the time that existing Scots common law already criminalised the conduct in question (*Hansard*, HL Vol.577, col.920 (January 24, 1997)). In *Marinello v City of Edinburgh Council* the First Division assumed that although the language in s.8 is not identical to the language in s.1 the intended effect is the same: see 2011 S.C., p.740; 2011 S.L.T., p.618, para.8.

When can non-harassment orders be sought?

There have been relatively few reported cases and in those opinion is divided. Sheriff Principal Bowen, QC has twice expressed the view that grant prior to final determination is competent, albeit that any order should be subject to a definite time limit, should not to be expressed as having been made *ad interim* and should not normally be granted before the defender has had a chance to be heard (*Furber v Furber*, 1999 S.L.T. (Sh Ct) 26; *Furber v Furber (No.2)*, 1999 S.L.T. (Sh Ct) 67). In *Heenan v Dillon*, 1999 S.L.T. (Sh Ct) 32, Sheriff Morrison, QC held there could not be a non-harassment order before the defender has had a chance to appear but left open the question of an order at an interim stage once a defender has had that chance. On the other hand Sheriff Principal Risk, QC has held that it is not competent to pronounce an interim non-harassment order and that no such order, whether referred to as interim or not, may be made at an early stage in proceedings i.e., prior to final determination (*Alexandra v Murphy*, 2000 S.L.T. (Sh Ct) 44 at pp.46 and 48). In *McCann v McGurran*, 2002 S.L.T. 592, the point was not decided but the Extra Division seems to have accepted that a non-harassment order could be granted early in the course of an action in appropriate circumstances: p.594, para.6.

Accordingly, as things stand, it is competent to apply for an order before final determination in the Sheriffdom of Glasgow and Strathkelvin while in Grampian, Highlands and Islands it is not. Elsewhere the position is unclear. Which view should be preferred?

The starting point must be the wording of s.8(5) of the 1997 Act. As Sheriff Principal Bowen notes, the reference to interim interdict in the phrase which states "... a person may not be subjected to the same prohibitions in an interdict or interim interdict and a non-harassment order at the same time", would be redundant had not Parliament intended it to be competent to grant a non-harassment order in place of an interim interdict. It has to be conceded that the Act does not expressly authorise grant of an interim non-harassment order. But express reference to interim interdict at this juncture clearly implies Parliament had in mind the possibility of an interim interdict and a non-harassment order, dealing with the same subject matter, being in force at the same time; hence the need for the express prohibition. Accordingly, putting it at it lowest, the Act is ambiguous on the point.

Ambiguity calls for interpretation. Words not expressly defined should normally be given their ordinary meaning (*Peart v Stewart* [1983] 2 A.C. 109; [1983] 2 W.L.R. 451; [1983] 1 All E.R. 859 at [1983] 2 A.C., p.114). But language should also be understood in the context of the whole Act, and of the purpose and the effect of other sections of the Act (*Magistrates of Buckie v Dowager Countess of Seafield's Trs*, 1928 S.C. 525 at p.529; 1928 S.L.T. 362 at pp.365–366; *R v Schildkamp* [1971] A.C. 1; [1970] 2 W.L.R. 279; [1969] 3 All E.R. 1640 at [1971] A.C., p.10). The end an Act was intended to achieve may be particularly influential: "No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation" (*Advocate General's Reference (No.5 of 2002)* [2004] UKHL 40; [2005] 1 A.C. 167; [2004] 3 W.L.R. 957 at [2005] 1 A.C., p.186). Even penal statutes only fall to be interpreted restrictively where meaning remains doubtful after the application of the canons of construction (*Secretary of State for Trade and Industry v Deverell* [2001] Ch. 340; [2000] 2 W.L.R. 907; [2000] 2 All E.R. 365 at [2001] Ch., p.354). Parliamentary debates, particularly ministerial statements, may shed light on the intention of the legislature (*Pepper v Hart* [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42).

They have not featured in the cases reported so far, however parliamentary records do assist. According to the Lord Chancellor (Lord Mackay of Clashfern) by introducing the Protection from Harassment Bill the government sought to protect victims of harassment whatever its nature, including stalking, racial harassment or antisocial behaviour; took the view that victims of harassment should be able to seek the protection of the criminal law before harm inflicted reaches a serious level; aimed to empower the civil courts to grant orders preventing the carrying out of activity amounting to harassment, recognising that criminal proceedings, by their nature retrospective, cannot always protect a victim from anticipated harm; sought to criminalise breach of non-harassment injunctions because, in the circumstances surrounding breach of such injunctions, the use of police investigative powers and police and CPS assistance in the prosecution of those who breach such orders was considered essential to provide adequate protection for victims, and; sought to enhance

the degree of protection available to a party confronted by breach of a civil order beyond that afforded by contempt of court proceedings. It intended cl.8–11 of the 1997 Act to make broadly equivalent provision in Scotland to that proposed for England and Wales (*Hansard*, HL Vol.577, cols 917–920 (January 24, 1997)).

It seems clear, then, that the government intended to make preventive civil orders backed by criminal sanctions available early in the life of an action, that is *before* harm, or further harm, is inflicted — and that it intended such orders be available in both jurisdictions.

Harassment and stalking are serious *per se* and can be the precursor to more serious crimes, even murder (*Stalking and Harassment in Scotland*, pp.16–17). Accordingly in extreme cases — indeed in all appropriate cases — there is much to be said for having available at an early stage an order which packs more deterrent effect than unadorned injunction or interdict. Sheriff Principal Bowen is alone in expressly having considered the potential effect on pursuers if such orders were to be competent only at determination: “... it appears to me that in extreme cases of harassment the entire purpose of the exercise might be defeated by delaying the making of an order until a late stage of proceedings” (*Furber v Furber (No.2)* at 1999 S.L.T. (Sh Ct), p.69). This does seem a reasonable point.

The express intention to make similar provision north and south of the border is also relevant. Albeit s.3 does not expressly make interim non-harassment injunctions competent, they are granted (*University of Oxford v Broughton*[2004] EWHC 2543 (QB); *EDO MBM Technology Ltd v Campaign to Smash EDO* [2005] EWHC 837; *Novartis Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty*[2010] H.R.L.R. 8). As noted above, in common with breach of a non-harassment order, breach of a non-harassment injunction is a criminal offence punishable by a maximum of five years’ imprisonment and a fine or both. It is unlikely Parliament intended to place a party seeking a non-harassment order in a materially poorer position than a party seeking a non-harassment injunction in the early stages of a pending case, that is to say able to obtain similar levels of protection only when an order finally disposing of an action is being made.

Further, the express power to review, vary or recall a non-harassment order under s.8(7) of the 1997 Act is consistent with Parliament having intended a court of first instance to have authority to make a non-harassment order early

in procedure and, thereafter, to adjust or revoke it while the action is pending in light of new information or changed circumstances. In this respect it looks very much as though Parliament intended to put the court of first instance in the same position with respect to a non-harassment order as it would be in were it, for example, to be dealing with an application to recall or vary an interim interdict or an application under s.15K of the Debtors (Scotland) Act 1987 to recall or restrict warrant for diligence on the dependence.

Sheriff Principal Risk’s view has received support (Sheriff N M P Morrison, QC, *Civil Practice Bulletin* (Issue 35, September 2000), pp.1–2). No doubt the Act would have been improved had express provision for the making of an interim non-harassment order been included — as was done, for example, in relation to interim exclusion orders (Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.4(6)). But, as the foregoing makes clear, applying the rules of construction to the provisions in question there is plenty to be said for the approach of Sheriff Principal Bowen i.e., that non-harassment orders are competent before final determination.

Assuming this to be the case, the next question is whether a non-harassment order pronounced before final determination should be characterised as an interim order? Sheriff Principal Bowen thought not (*Furber v Furber* at 1999 S.L.T. (Sh Ct), p.27; *Furber v Furber (No.2)* at p.68) and in *McCann v McGurran* it was accepted, apparently without the point being argued, that there is no provision for an interim non-harassment order (p.594, para.6). But, arguably, the absence of express power to grant an interim non-harassment order is not a compelling reason to refrain from granting such orders *ad interim*. The 1997 Act does not expressly provide they are competent, but interim non-harassment injunctions are granted. In any event, an order made before final determination subject to recall or variation on application is surely, in terms of practical effect, pronounced with a view to regulating matters pending final determination. And that is so whether or not the word interim features in the interlocutor. In *McCann v McGurran* the Inner House left open the possibility of an order being made early in the life of an action in appropriate circumstances (p.594, para.6). But, if an order looks like and has the same effect as an interim order, why not simply refer to it as such?

Classification is to some extent a secondary issue. But it does bear on the question of what criteria should be assessed before discretion is

exercised granting, varying or recalling an order before final determination. The language of the Act offers little assistance beyond making clear that a court enjoys wide discretion. Sheriff Principal Bowen applied the words of s.8(5)(b)(ii), concluding that he could make an order provided he was "... satisfied that it is appropriate ... to do so in order to protect the person from further harassment" (*Furber v Furber* at p.27). Section 8(7) provides, similarly, that on application to revoke or vary the court has power to act "in such a manner as it considers appropriate". However, unqualified references to satisfaction and appropriateness beg the question of what specific factors should be assessed.

Reference to satisfaction is compatible with an order being granted prior to final determination (*Furber v Furber* at p.27; *Armstrong v Gibson*, 1991 S.L.T. 193). Applications for interim non-harassment injunctions are, generally, considered by asking whether there is a serious question to be tried and considering the balance of convenience (*EDO MBM Technology Ltd v Campaign to Smash EDO* at para.46; *American Cyanamid Co v Ethicon Ltd* (No.1) [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504), but the references to appropriateness and satisfaction in s.8 might be taken to suggest a different standard applies in relation to non-harassment orders sought early in procedure. However, given the potential consequences for a defender in breach, can this be right?

There are perhaps three reasons why not. First, the practical effect of such an order is broadly equivalent to interim interdict in terms of its capacity to impact on a defender prior to the merits of case being finally assessed, and it is plainly important therefore to consider the interests of both parties when an application is made prior to final determination. Second, a procedurally unfair award of an interim order in a civil case may breach a defender's art.6 rights (*Micallef v Malta* (2009) 50 E.H.R.R. 37 at p.940, paras 83–86). Third, it is unlikely Parliament contemplated substantially different conditions applying in relation to the grant of an order substantively similar to an interim non-harassment injunction.

What this comes to — it is thought — is that a court requested to make, vary or recall a non-harassment order prior to final determination (whether or not the order is described as an

interim remedy) might wish to consider whether there is a *prima facie* case and whether the balance of convenience favours making the order sought. In short, whatever other factors are taken into account in the exercise of an undoubtedly broad discretion, the test for grant of interim interdict should be met. That is to adopt a purposive interpretation of the Act. But doing this appears entirely appropriate — it is in keeping with the spirit and purpose of the Act that non-harassment orders should be available early in the course of an action, it is to treat broadly equivalent orders alike, and to make due allowance for a defender's interests, bearing in mind the stage of procedure at which the order in question is being sought.

Whether interim interdict, interim interdict with power of arrest attached or a non-harassment order is appropriate then becomes an issue to be decided according to the nature and the gravity of the threat posed by the defender in the particular circumstances of the case in question.

An interim interdict certified as a domestic abuse interdict under s.3 of the Domestic Abuse (Scotland) Act 2011 is equivalent to an interim non-harassment order in so far as breach is an offence punishable by up to five years' imprisonment or a fine or both. However, certification is only available in respect of an interdict protecting the pursuer from a narrow class of persons i.e., his or her spouse, civil partner, cohabitant or a person with whom the pursuer has been in an intimate relationship.

So far as other cases are concerned (those involving, for example, harassment by parents or step parents, siblings, colleagues, neighbours, campaigns targeting employees of companies engaged in controversial activities etc.) interdict with power of arrest is available but breach is not *per se* a criminal offence — although it may be punishable as contempt of court, and the defender's conduct may in any event result in a criminal charge — and is not subject to the specific and stiff tariff of sanctions attaching to breach of a non-harassment order. So, interdict plus power of arrest is not a substitute of equivalent value. Hence the utility, in a wide variety of situations, of non-harassment orders granted (*ad interim*) in the early stages of litigation.

