WHEN WORDS BECOME CRIMINAL...A FEW WORDS ON HARASSMENT

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Whoever said that “sticks and stones can break my bones but words will never hurt me” probably was never threatened in his/her lifetime by a vindictive rival, harassed by an off-the-wall ex-spouse or bullied by a mean-spirited school-mate. Or they may have never been bitten by the bitter vituperation of those bent on defaming their good name and reputation.

While there is plenty of room under the First Amendment’s protective umbrella for otherwise crude and offensive speech that arguably adds something to the free exchange of information and ideas, there comes a point where language can cross the line from protected to prosecutable when, while motivated by an intent to harass, annoy or alarm, it constitutes fighting words (i.e. those likely to evoke an immediate, violent response), a true (i.e. clear and specific) threat of harm or an incitement to violence. (see generally People v Dietze 75 NY2d 47 [1989]).

As noted in People v DePasquale 2017 NY Slip Op. 50586(u) (Crim. Ct. City of NY 5/1/17), “while every citizen may freely speak...his/her sentiments on all subjects,...and no law shall be passed to restrain or abridge the liberty of speech,... (such right) is NOT UNLIMITED.”

The court noted that constitutional free speech protections have never gone so far as to provide absolute protection to every person to speak whenever or wherever they please, or to use any form of expression in any circumstance that he/she chooses. (citing People v Shack 86 NY2d 529 [1995]).

Consequently, where one’s words (and accompanying conduct), intrude intolerably upon another person’s substantial privacy rights, (or sense of safety and personal equilibrium), the right to free speech may be curtailed. (People v Tiffany 186 Misc2d 917 [Crim. Ct. City of NY 2001], citing Cohen v California 403 US 15 [1971]). And, if the words serve no purpose other than to threaten, intimidate, or provoke violence, they enjoy no constitutional protection. (People v Prisinzano 170 Misc2d 525 [Crim. Ct. City of NY 1996]).

In People v Dietze supra, the Court of Appeals struck down the predecessor statute (PL240.25[2]), to PL 240.26 (Harassment 2d degree), as unconstitutionally overbroad because its proscription against “abusive or obscene language uttered with the intent to harass, annoy or alarm”, also encompassed utterances, which, while crude or offensive, did not rise to the level of forbidden (i.e violence-provoking or injury-inflicting) speech.

In that case, the defendant was charged with Harassment for telling the complainant (whom she knew was mentally handicapped and was previously told to leave her be), “‘you’re a bitch and your son (who was similarly disabled), is a dog. I’ll beat the crap out of you some day or night on the street.” The defendant was convicted and fined in the lower court and County Court affirmed the conviction.

The Court of Appeals reversed, however, finding that while the defendant's words were crude and abusive, there was insufficient evidence to establish that the threat was serious or likely to be taken as such by the average person. Therefore, they did not fall within the orbit of "constitutionally proscribable expression." (citing, inter alia, Lewis v City of New Orleans 415 US 130 [1974]).

The Court stated that "unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized." (citing People v Feiner 300 NY 391 [1950]). Moreover, any proscription on PURE SPEECH (i.e. words alone), must be SHARPLY LIMITED to words which BY THEIR NATURE ALONE INFLICT INJURY OR TEND NATURALLY TO EVOKE IMMEDIATE VIOLENCE OR BREACH OF THE PEACE. (citing People v Tylkoff 212 NY 197 [1914]).

Since the statute embraced "any abusive language" intended to harass, annoy or alarm, and there was no way, in the Court's view, to interpret it more restrictively without turning an "overbroad" statute into an "unduly vague" one, (i.e. providing no clear guidance as to what exactly it proscribed), it was deemed to be beyond beyond judicial repair.

Penal Law 240.26, by contrast, states that a person is guilty of Harassment 2d degree (a violation), when with INTENT TO HARASS ANNOY OR ALARM another person, he/she:

1. STRIKES, SHOVES OR KICKS or otherwise SUBJECTS such other PERSON to PHYSICAL CONTACT (or ATTEMPTS or THREATENS to do the same); or

2. FOLLOWS A PERSON IN OR ABOUT A PUBLIC PLACE; OR

3. ENGAGES IN A COURSE OF CONDUCT or REPEATEDLY COMMITS ACTS which ALARM or SERIOUSLY ANNOY such other person and which SERVE NO LEGITIMATE PURPOSE.

(Subdivisions 2 and 3 do not apply to activities regulated by the National Labor Relations Act, the Railway Labor Act or the Federal Employment Labor Management Act).

Similarly, PL 240.30 (Aggravated Harassment 2d degree) states that a person is guilty of this Class A misdemeanor when:

1. with the intent to harass, annoy or alarm another person, he/she either:

a. Communicates anonymously or otherwise by telephone, computer (or other electronic means), or by mail, a THREAT TO CAUSE PHYSICAL HARM TO (or unlawful harm to the PROPERTY of) another person (or member of his her family/household), and the actor KNOWS or REASONABLY SHOULD KNOW that such communication WILL CAUSE such person to REASONABLY FEAR for his/her PHYSICAL SAFETY OR PROPERTY, (or to that of his/her family/household); or
b. Causes a communication to be initiated anonymously or otherwise, by telephone, computer or other electronic means, or by mail, a threat to cause physical harm to (or unlawful harm to the property of) such person or a member of his/her family/household, and the actor knows (or reasonably should know) that such communication will cause such person to reasonably fear harm to his/her physical safety or property, or to that of his/her family/household; or

2. With intent to harass or threaten another person, he/she MAKES A TELEPHONE CALL (whether or not a conversation ensues), with NO PURPOSE OF LEGITIMATE COMMUNICATION; or

3. With intent to harass, annoy or learn another person, he/she STRIKES, SHOVES or KICKS (or otherwise subjects another person to physical contact), or ATTEMPTS/THREATENS to do the same BECAUSE OF A BELIEF OR PERCEPTION REGARDING SUCH PERSON'S RACE, COLOR, NATIONAL ORIGIN, ANCESTRY, GENDER, RELIGION, RELIGIOUS PRACTICE, AGE, DISABILITY OR SEXUAL ORIENTATION, regardless of whether such belief is correct;

or

4.With intent to harass, annoy or alarm another person, he strikes, shoves or kicks or otherwise subjects such person to physical contact thereby causing PHYSICAL INJURY to such person or to a member of his/her household; or

5. He commits Harassment 1st degree and has been convicted of PL 240.25 within the preceding 10 years.

It should be noted that subdivisions 3 and 4 represent more serious versions of the violation of Harassment insofar as they include the the aggravating elements of racial (and other similar motivations) and causation of physical injury respectively. Harassment is not, however, a lesser included offense of Assault for purposes of a verdict (but is permissible for plea purposes), (People v Moyer 27 NY2d 252 [1970]), because the intent components are different (i.e. intent to harass v intent to cause physical injury). The same is true for Harassment and Menacing 2d degree which requires proof of intent to place another person in fear of physical injury, serious physical injury or death. (People v Bartkow 96 NY2d 770 [2001]).

SOME CASES:

In People v Wilson 59 AD3d 153 (1st dept 2009) the First Department (and then the Court of Appeals at 14 NY 3d 895 [2010]), affirmed the defendant's conviction for Aggravated Harassment 2d degree upon proof that the defendant, a school safety officer, called the mother of a student who had fought with the defendant's daughter at school and said, " if you care about your daughter's well-being and safety, you will drop charges" (against the defendant's daughter).

The court found that such statement constituted a TRUE THREAT because it SPECIFICALLY REFERRED to placing the complainant's daughter's safety in jeopardy (citing People v Tiffany supra). The court noted that the defendant clearly had a reason (other than official business as she claimed), to make a threat because her daughter had a disciplinary history and was already on thin ice at school, and, in her official capacity as a safety officer, she was in a position to put the other girl's well-being in peril. As such, in the court's view, her words presented a "clear and present danger of some serious substantive evil for criminal liability to attach." (citing People v Dietze supra).

Similarly, in People v Olivio 2005 NY Slip Op, 50300(u) (Crim. Ct. City of NY 3/9/05), the court found the accusatory instrument to be FACIALLY SUFFICIENT to support a charge of Aggravated Harassment where it alleged that the defendant called her boyfriend and said, "who are the women? If I see you with another woman, I will fuck you up."

The defendant argued that these words could not be construed as a TRUE THREAT because there was no reasonable fear of immediate danger, nor was it specific as to time place or manner of harm. (citing People v Yablov 183 Misc2d 880 [Crim. Ct.nCity of NY 2000]).

The court held, however, that the test is not whether the defendant subjectively intended to convey a threat, but whether an ordinary person who was familiar with the context of the communication would take it as such. (citing US v Francis 164 F3d 120 [2d Circ. 1999]).

And, even though there was a contingency involved (i.e. seeing the boyfriend with another woman), the court deemed it to be likely to happen sooner or later, and, in any event, such words could dissuade the complainant from engaging in otherwise lawful conduct (i.e. seeing other women). While the court deemed it an open question whether such evidence would be enough to sustain a conviction at trial, it was not prepared to conclude that the allegations failed to make out a true threat as a matter of law.

In People v Tiffany supra the information alleged that everyday for two months the defendant (in the context of an on-going custody dispute), called the complainant, threatening to "put a bullet in your head," "I'll make your life a living hell," "If I see anyone else with you, I'll kill you." On the last date set forth, the defendant allegedly called the complainant and said, " if you try to keep my son away from me, I'll put a bullet in your head."

The court concluded, first of all, that the SHEER VOLUME of the calls bespoke an intent to communicate with the complainant in a manner likely to cause annoyance or alarm. As to the alleged content, the threats of harm were UNEQUIVOCAL AND SPECIFIC and despite the absence of specificity as to the time and place of their fulfillment, they clearly evinced an intent to cause annoyance and alarm.

The court also rejected the defendant's claim of constitutional overbreadth (citing, inter alia, Matter of Quinton A. 49 NY2d 328 [1980]), and held that while crude and vulgar outbursts which are neither intended or likely create a create a disturbance may be protected as free speech, THREATS OF PHYSICAL VIOLENCE, such as those made here, which are LIKELY TO CAUSE ANNOYANCE OR ALARM to the recipient, enjoy NO SUCH CONSTITUTIONAL PROTECTION. (citing, inter alia, People v Miguez 147 Misc2d 482 [Crim. Ct. City of NY 1990]).

Noting also that the standard for legal sufficiency of an accusatory instrument is different from (i.e. lower than) that required to prove guilt at a trial (People v Price 178 Misc2d 778 [Crim. Ct. City of NY 1990]), the court saw no basis to conclude that the information was less than legally sufficient to support the charge.

With respect to the charge of Harassment 2d degree in violation of PL 240.26(3), the court took note of the specific threats, and rejected the defendant's claim of "'legitimate purpose" (i.e. to discuss custody of their son), reasoning that threats of violence cannot be insulated from prosecution by wrapping them up in an otherwise appropriate topic of conversation. In the court's view, when threats of physical harm are made, any legitimate purpose is CORRUPTED.

In contrast, see People v DePasquale 2017 NY Slip Op. 50586(u) (Crim. Ct. City of NY 5/1/17): The defendant in this case TEXTED the complainant, saying, "you ain't low and watch when I find you. Come outside. Leave the child."

The court held that this message was too vague to be interpreted as a genuine threat (i.e. a statement meant to convey a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, and which an ordinary, reasonable recipient familiar with the CONTEXT of the communication would interpret as a true threat of violence. (citing Virginia v Black 538 US 343 [2003]).

The court, citing People v Orr 47 Misc3d 1213(a)(Crim. Ct. City of NY 2015), stated that absent allegations of a clear and specific threat of future violence (such that the recipient COULD NOT HELP but construe it as such), it cannot be said that the words qualify as a true threat.

Unlike, for example, the utterances made in People v Mitchell 24 Misc3d 1249(a) (Sup. Ct. Bronx County):(“I’m gonna kill you. You’re a ho, a bitch, a slut. If you ever let my baby see another man, I’m gonna hurt you and no one will stop me from killing you.”); People v Orr supra (“ I can have you handled. Go kill yourself bitch. You’re not worth the air to take the jump, bitch.”); and in People v Tiffany supra (“ If you keep my son away from me, I’ll put a bullet in your head,”); and People v Olivio supra (“I’ll fuck your up if I see you with another woman,”); the TEXT in this case, in the court’s estimation, amounted to an UNCLEAR AND AMBIGUOUS message.

As the court viewed it, the text could just as readily have been construed as a demand to communicate with the complaint (in the absence of the child), and the phrase, “watch when I find you,” was equally opaque. Unlike the threat in People v Wilson, supra (“you better drop charges if you care about your daughter’s safety,”), this text message did not cross the line into the realm of a true threat. It also did not meet the elements of PL 240.26(1).

Similarly, in People v Tackie 46 Misc3d 1218(a) (Crim. Ct. city of NY 2/10/15), the defendant’s reply to the complainant’s admonition to stop calling her friend, (“Don’t let me use my boxing on you,”), was deemed not to constitute a sufficiently clear and serious expression of intent to do physical harm to the complainant to sustain a charge of Aggravated Harassment.

In the court’s view, true threats encompass those statements by which the speaker means to communicate a SERIOUS EXPRESSION OF AN INTENT TO COMMIT AN ACT OF UNLAWFUL VIOLENCE to a particular person or group of persons. Such threats arise when an ordinary and reasonable person who is familiar with the context of the communication would interpret it as a GENUINE THREAT of injury, whether or not the the defendant subjectively intended to actually carry it out. (citing People v Bonito 4 Misc3d 386 [Crim. Ct. City of NY 2004]).

See also Matter of MT v ET 184 Misc2d 292 (Nassau County Family Court 2000) where the court found the petition, which alleged that the respondent pointed his finger in the petitioner’s face and called him a “fat fuck,” (whereupon the petitioner swiped his hand away and broke his own hand on the wall), to be INSUFFICIENT to support the charge of Harassment 2d degree.

The court held that while an intent to harass could be inferred from these factual allegations, there was no indication that the respondent attempted to subject the petitioner to any physical contact which is a necessary element of Harassment 2d degree. In the court’s view, the fact that the confrontation turned ugly did not, perforce, turn it into a criminal violation.

See also People v Hall 48 NY2d 927 (1997): Although the information alleged that the defendant subjected the complainant to physical contact (pushing him out of his house), it was facially insufficient for failing to allege that the defendant intended to harass, annoy or alarm him when he ejected him.

And see People v Ramnerine 184 Misc2d 292 (Sup. Ct. App. Term 2007): Information alleging that the defendant “yelled obscenities” (without specifying what was said before the complainant hung up), was legally insufficient.

In People v Todaro 26 NY2d 325 (1970), the defendant went to trial on charges of Disorderly Conduct (which requires an intent to create [or reckless creation of a risk of] a PUBLIC RATHER THAN PRIVATE annoyance or alarm), and Harassment as a result of a confrontation with a New York City police officer who tried to disperse the defendant and three cohorts who were lingering in front of a subway entrance.

The officer testified that he had observed them loitering there for over an hour whereupon he told them several times to move on. After the defendant reportedly said, “you can’t f’n tell us to move,” the officer arrested him, cuffed him and deposited him in the backseat of the patrol car where he exclaimed, “I’ll get you for this.” That remark resulted in the Harassment charge.

The defendant’s witness testified that they were only there a short while when the officer approached, claimed to recognize them and ordered them to move along. He said they were not obstructing any pedestrian traffic otherwise behaving in a disorderly manner.

The defendant was found guilty on both counts by the trial judge. The intermediate appellate court affirmed but the Court of Appeals reversed the Harassment conviction, holding that this single, equivocal statement uttered from the backseat of patrol car by an angry 16-year-old was more hot air than substantive evidence of an intent to harass the officer.

The Court observed that “something more must be established than that a teenager, angered and annoyed at being arrested upon what he believed to be insufficient grounds, expressed his anger in terms of apparent bravado, particularly in the absence of proof of ANY FURTHER WORDS OR ACTS TENDING TO CONFIRM THE CRIMINAL NATURE OF THE ACT CHARGED.” (48 NY2d 927). Long story short, the threat, under the circumstances, whatever it meant, was not found to be either serious or substantial enough to warrant criminal prosecution.

In People v Prisinzano 170 Misc2d 565 (NY Crim. Ct. 1996) the defendant challenged the constitutionality and legal sufficiency of an accusatory instrument charging him with Harassment (PL 240.26[1]) arising from an altercation between himself and three replacement workers at the Fulton Fish Market whose presence he objected to after the union-based company that he supported lost its contract with the city to supply personnel for unloading work.

The information alleged that the defendant repeatedly exclaimed “ when the police leave, the blood is going to run down your bald fucking head, ...I’m gonna get you....You’ll get yours!”

While the defendant acknowledged that he was there to protest (the employment of the replacement workers), he argued that his language, however vociferous it may have been, did not constitute FIGHTING WORDS, nor were they made FACE-TO-FACE because there was a police barricade between him and the workers. He also argued that if his words could be construed as inviting a hostile response, they were future and conditional in nature (i.e. when the police were gone).

The court observed that FIGHTING WORDS: must be a. addressed to a specific person (or persons), b. made in person, c. likely to provoke the average person into acts of responsive violence and d. the threat of response must be imminent. (citing Chaplinsky v New Hampshire 315 US 568,573 [1942]).

The court rejected the defendant’s arguments, noting that the fact that the threats depended upon the absence of the police did not obviate the possibility of an imminent violent response from the threatened workers. In the court’s view, there was still a strong likelihood that an average person, sensing the danger of physical violence, would try and beat the offender to the punch. The court was also unpersuaded by the defendant’s claim that the presence of a police barricade removed this incident from the ambit of a face-to-face encounter.

On these facts, the court concluded that the information sufficiently made out a claim of Harassment under a “FIGHTING WORDS” theory because in-person threats of physical

violence to another (which are likely to evoke an imminently violent response) are as incendiary as they come. Moreover, the inflammatory nature of the words, in the court's assessment, outweighed any possible value they might carry, in the exchange of ideas (i.e. opposition to the hiring of replacement workers in a contentious labor dispute).

The court did, however, determine that there was was no basis to support a prosecution on the theory of inciting others to violence inasmuch as the allegations in the information (while inflammatory), made no mention of any attempt by the defendant to engage others in the imminent use of force or violation of the law. (citing Brandenberg v Ohio 395 US 444 [1969]).

The court also rejected the defendant's constitutional argument, finding that the defendant's words, as set forth in the information, were enough to make out a TRUE THREAT (i.e. words voluntarily and intentionally uttered which avow a PRESENT OR FUTURE determination to inflict physical injury on a person [or persons]).

Citing, inter alia, Watts v US 394 US 705 [1969] and US v Kelnar 534 F2d 1020 [2d Circ. 1976]), the Court noted that a genuine threat of harm (as opposed to mere idle chatter, careless banter or political hyberbole which is protected by the First Amendment), consists of content that is entitled to no constitutional protection because it carries NO VALUE in the exchange of ideas (other than to place another in fear of imminent danger. (RAV v City of St. Paul 505 US 388 [1992]).

The court explained that the prohibition against true threats is based on the State's interest in PROTECTING its citizens from the FEAR OF VIOLENCE, the DISRUPTION it creates and the POSSIBILITY that such threats will be brought to fruition. There is NO REQUIREMENT, however, that the subject of the threat actually be placed in fear of physical injury (or that he/she was even aware of it), as long as such threat was COMMUNICATED TO ANOTHER PERSON. (US v Carver 672 F2d at 304). As such, a true threat, (unlike fighting words), need not be delivered in person but may be conveyed to a third party. (People v McKay 140 Misc 3d 696 (Nassau County Dist. Ct. 1988]).

It must be shown, however, that the defendant INTENDED TO CONVEY A THREAT (i.e. to place the target in fear that such threat was SERIOUS), whether or not he actually intended to carry it out. (People v Shack supra, 86 NY2d at 529). The court in Shack noted that the specific intent element of the Harassment statute (to harass, annoy or alarm another person), serves to eliminate the risk that criminal liability would be imposed based on the peculiar (and unascertainable) sensitivities of the individual victim. (People v Bakolas 59 NY2d 51 [1983]).

With respect to the conditional nature of the threat, the court stated that a threat can be real whether it promises immediate or eventual violence. (see, for example, US v Malik 16 F3d 45 [2d Circ. 1994]: "I'll kill you as soon as you get out of prison" = a true threat). And, it is only where the threat is SO EQUIVOCAL, HYPOTHETICAL or NEXT TO IMPOSSIBLE TO FULFILL (e.g. Watts v US: "if I get drafted, the first person I'm gonna point my gun at is LBJ.") that it will be deemed not to qualify as serious.

In Prisinzano, the court concluded that the threats to "get" the replacement workers ('and that there would be blood), as soon as the police were gone was sufficient for pleading purposes to uphold the information on a theory of true threats.

When evaluating accusatory instruments charging Harassment of one degree or another, counsel should be sure to carefully distinguish between words that constitute pure and specific threats of harm to another person (which are not insulated by the First Amendment), and vague, ambiguous or exaggerated utterances (as in People v DePasquale supra and People v Tackie supra), and fighting words constituting a face-to-face invitation to physical

violence (e.g. People v Prisinzano supra) versus crude outbursts (e.g. People v Dietze supra) or ineffectual protestations (People v Todaro supra) which, while offensive, do not rise to the level of imposing criminal liability.

As with most things in the world of criminal prosecutions, CONTEXT is everything in Harassment cases, and the words set forth in an accusatory instrument must be analyzed in a common sense way in light of the relationship between the parties and the particular circumstances of the encounter(s) giving rise to the charges. That way, counsel can separate the serious cases from the suspect ones and move for appropriate relief (i.e. dismissal) as a matter of law.