

Criminal Justice and Licensing (Scotland) Act 2010:

Stalking

Law

Section 39

- (1) A person ("A") commits an offence, to be known as the offence of stalking, where A stalks another person ("B").
- (2) For the purposes of subsection (1), A stalks B where—
 - (a) A engages in a course of conduct,
 - (b) subsection (3) or (4) applies, and
 - (c) A's course of conduct causes B to suffer fear or alarm.
- (3) This subsection applies where A engages in the course of conduct with the intention of causing B to suffer fear or alarm.
- (4) This subsection applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.
- (5) It is a defence for a person charged with an offence under this section to show that the course of conduct—
 - (a) was authorised by virtue of any enactment or rule of law,
 - (b) was engaged in for the purpose of preventing or detecting crime, or
 - (c) was, in the particular circumstances, reasonable.
- (6) In this section—

"conduct" means—

 - (a) following B or any other person,
 - (b) contacting, or attempting to contact, B or any other person by any means,
 - (c) publishing any statement or other material—

- (i) relating or purporting to relate to B or to any other person,
- (ii) purporting to originate from B or from any other person,
- (d) monitoring the use by B or by any other person of the internet, email or any other form of electronic communication,
- (e) entering any premises,
- (f) loitering in any place (whether public or private),
- (g) interfering with any property in the possession of B or of any other person,
- (h) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,
- (i) watching or spying on B or any other person,
- (j) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm, and

“course of conduct” involves conduct on at least two occasions.

(7) A person convicted of the offence of stalking is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both,
- (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

(8) Subsection (9) applies where, in the trial of a person (“the accused”) charged with the offence of stalking, the jury or, in summary proceedings, the court—

- (a) is not satisfied that the accused committed the offence, but
- (b) is satisfied that the accused committed an offence under [section 38\(1\)](#).

(9) The jury or, as the case may be, the court may acquit the accused of the charge and, instead, find the accused guilty of an offence under [section 38\(1\)](#).

1. In [Miller v HM Advocate \[2021\] HCJAC 30, 2022 JC 33](#) the appeal court outlined the three elements of stalking under [section 39](#). Firstly, there must be a course of conduct.

Secondly, that course of conduct must cause the complainer fear or alarm. Thirdly, the accused must have intended to cause the complainer to suffer fear or alarm or at least ought to have known that the conduct would do so ([Miller](#) at [44]).

Conduct

2. Section 39(6) provides an inexhaustive list of example actions that constitute stalking. Section 39(6)(j) provides for any other actions that a reasonable person would expect to cause fear and alarm to the complainer. There is no requirement for any of the actions to be directed at the complainer. The complainer only needs to suffer fear or alarm because of the accused's conduct, regardless of whether that conduct is targeted towards the complainer or another person.

3. The offence requires a course of conduct. A course of conduct involves conduct on two or more occasions (section 39(6)). It was held in [Behan v Procurator Fiscal, Hamilton \[2013\] HCJAC 118](#) that two texts constituted a course of conduct. One instance of causing fear or alarm is not enough for a section 39 offence. If only one instance is proven, the accused can be convicted of a [section 38](#) offence (sections 39(8) and 39(9)).

Fear or alarm

4. Section 39 requires that the complainer suffer actual fear or alarm ([Procurator Fiscal, Dunfermline v Ogilvie \[2020\] SLT \(Sh Ct\) 144](#)). Therefore, unlike section 38, the test is a subjective one; it is the complainer's actual reaction to the conduct that matters (section 39(2)(c), [Paterson v Harvie \[2014\] HCJAC 87, 2015 JC 118](#) at [21]). The reaction of a hypothetical reasonable person is irrelevant, whether that reaction would be one of fear or alarm or not. In [Behan](#), Lady Paton stated (at [8]):

"Parliament has specifically provided for certain abusive behaviour such as stalking, which may cause a particular individual fear and alarm, although it might not cause the average member of the public such fear and alarm."

Accordingly, the reverse of this does not amount to a section 39 offence: where the 'target' of the course of conduct does not suffer fear or alarm, but a reasonable person would. However, the accused could still be convicted of a section 38 offence of threatening and abusive behaviour.

Mens rea

5. The Crown must prove that the accused intended to cause fear or alarm to the complainer (section 39(3)). Alternatively, it is enough for the Crown to prove that the accused ought to have known in all the circumstances that the complainer was likely to suffer fear or alarm (section 39(4), [Behan](#)). Accordingly, it was found that an accused ought to have known that sending two innocuous texts to an ex-partner whom he had assaulted would likely cause fear or alarm ([Behan](#)). Contrastingly, a father and daughter seeking to contact an estranged mother to proffer apologies and to find her whereabouts were not circumstances in which the accused ought to have known that the complainer was likely to suffer fear or alarm ([Miller](#)).

Defences

6. Section 39(5) provides three defences to a charge of stalking. These defences only place an evidential on the accused as with the defence of reasonable behaviour to an offence under section 38 ([Urquhart v HM Advocate \[2015\] HCJAC 101, 2016 JC 93](#); Sir Gerald H Gordon, *Criminal Law* (J Chalmers and F Leverick (eds) 4th edn vol 2, W Green 2017) [para 48.19](#)). It is a defence if the accused can show that the course of conduct:

- “(a) was authorised by virtue of any enactment or rule of law,
- (b) was engaged in for the purpose of preventing or detecting crime, or
- (c) was, in the particular circumstances, reasonable.”

Possible form of direction on stalking

Charge [x] is a charge of stalking under section 39 of the 2010 Act.

This offence is committed if a person engages in a course of conduct that causes another person to suffer fear or alarm.

Conduct

Conduct means:

[Select as appropriate:]

- following the complainer [or any other person];

- contacting, or attempting to contact, the complainer [or any other person] by any means;
- publishing any statement or other material:
 - (i) relating or purporting to relate to the complainer [or any other person];
 - (ii) purporting to originate from the complainer [or any other person];
- monitoring the use by the complainer [or any other person] of the internet, email or any other form of electronic communication;
- entering any premises;
- loitering in any place, whether public or private;
- interfering with any property in the possession of the complainer [or any other person];
- giving anything to the complainer [or any other person] or leaving anything where it may be found by, given to, or brought to the attention of, the complainer [or any other person];
- watching or spying on the complainer [or any other person];
- acting in any [other] way that a reasonable person would expect would cause the complainer to suffer fear or alarm. A 'reasonable person' simply means the ordinary person in the street.

Course of conduct

The accused must have engaged in a course of conduct which means the accused must have engaged in conduct, as I have defined it, on at least two occasions.

Intention

You must be satisfied that the accused intended the complainer to suffer fear or alarm as a result of the course of conduct, or alternatively, that the accused knew, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause the complainer to suffer fear or alarm.

Intention can be inferred from what has been said and/or done and from the nature of the conduct.

Fear or alarm must result

You must also be satisfied that the course of conduct did, in fact, cause the complainer to suffer fear or alarm.

Corroboration

Both the commission of the crime and that the accused committed it must be proved by corroborated evidence, meaning evidence from more than one source. The other elements of the charge are descriptive only, to give the accused fair notice of how the crime is said to have been committed. They do not need to be corroborated. The fact that the accused acted intentionally does not need corroboration.

At least two incidents forming part of the course of conduct must be proved by corroborated evidence. Provided you are satisfied that two incidents are proved by corroborated evidence, you can convict of other incidents in the charge which are spoken to by a single witness if you are satisfied that those incidents were part of the same course of conduct, as I have defined it.

[NOTE – There may be cases where corroboration could be found by mutual corroboration from the evidence of another complainer, or there may be a basis for mutual corroboration to be found in the manner described in Rysmanowski v HM Advocate 2020 JC 84 at para 21. See also the Corroboration: Omnibus/ Composite charges chapter. Appropriate directions on mutual corroboration would be required and may in some cases replace the direction: “At least two incidents forming the alleged course of conduct must be proved by evidence coming from at least two sources.”]

[One or more of the following directions should be given where relevant:]

- **Where the complainer is an essential witness**

[In cases in which there is sufficient evidence independent of the complainer, the complainer may not be an essential witness, in which case the following direction may not be necessary, or may need to be adapted.]

You do not need to find the complainer’s evidence to be credible and reliable in every detail but before you could convict the accused on this charge you would have to regard the complainer’s evidence as credible and reliable in its essentials: namely that the accused committed the crime.

In deciding whether you accept the complainer's evidence about this you should have regard to the other evidence in the case.

- **Where there is evidence of distress**

[If anything more elaborate is required, reference can be made to "Corroboration: Evidence of Distress" in Part II of the Jury Manual.]

Corroboration for the complainer's account can come from the evidence of others that the complainer was distressed afterwards, provided the distress was genuine, was caused at least in part by what the complainer said happened, and was not wholly due to other extraneous factors.

- **Where there is evidence of a *de recenti* statement**

When a complainer gives an account to a witness shortly after the event, and as a continuing reaction to it, it is evidence to prove facts. What the witness reported the complainer saying can corroborate the complainer's evidence.

- **Other sources of corroboration**

[Where appropriate, judges may identify other sources of circumstantial evidence that may corroborate the complainer's account- see the chapter on "Corroboration generally/Corroboration in rape etc.".]

Where the defence lead evidence that the course of conduct was authorised by virtue of an enactment or rule of law, or was engaged in for the purpose of preventing or detecting crime.

[A direction on the statutory defence(s) in terms of s39(5)(a) or (b) will require to be given.]

Where the defence lead evidence that the course of conduct was, in the particular circumstances, reasonable

The accused's evidence [*Or: specify the evidential basis*] was that the course of conduct was, in the particular circumstances, reasonable. You will have to decide if you accept that evidence, and if it suggests that the course of conduct was reasonable. If you conclude that the course of conduct was reasonable in the circumstances, that is a defence to the charge and you must acquit.

The Crown has to prove beyond reasonable doubt that the course of conduct was not reasonable in the particular circumstances, and so if the evidence leaves you in reasonable doubt about that, you must acquit.

In deciding whether that has been proved, you should consider all of the evidence including: the nature of the conduct; its frequency; the effect of the course of conduct on the complainer; the circumstances in which the conduct arose; and any explanation given by the accused.

Additional directions

- A background of domestic abuse direction may require to be given in appropriate cases.

Summary

For the Crown to prove this charge you must be satisfied that:

1. The accused engaged in the course of conduct set out in the charge;
2. The accused intended to cause the complainer to suffer fear or alarm, or the accused knew or ought to have known, in all the circumstances, that engaging in the course of conduct would be likely to cause the complainer to suffer fear or alarm;
3. The course of conduct caused the complainer to suffer fear or alarm; and

[Only if applicable:]

4. The course of conduct was:

[Select as appropriate:]

- not authorised by virtue of any enactment or rule of law,
- not engaged in for the purpose of preventing or detecting crime,
- not, in the particular circumstances, reasonable.

Where alternative verdicts require to be considered

Now, members of the jury, if you are not satisfied that the Crown has proved charge [x], that is not an end to the matter. You will then require to consider whether you are

satisfied that the accused behaved in a threatening and abusive manner on any of the occasions set out in the charge.

[Thereafter, if appropriate, the judge should give a direction on [section 38 of the 2010 Act](#)]