

October 3, 2014

Sentencing in an Unusual Domestic Violence Case

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Cases Commented On: *R v Hernandez*, [2014 ABCA 311](#)

The most recent edition of Eugene Meehan's [Supreme Advocacy](#) newsletter lists *R v Hernandez*, 2014 ABCA 311, as the Court of Appeal case of the week nation-wide. The case involves a Crown sentence appeal in the domestic violence context. Sadly, domestic violence cases are not uncommon, so what is so remarkable about this case?

First, it involves a female perpetrator. As annual Statistics Canada reports on family violence show, domestic violence is a gendered crime. In the [most recent Stats Can report](#), 80% of all domestic complaints made to police in 2011 were made by women, a number which is consistent over time. At the international level, gender-based violence has been recognized as a form of discrimination against women in documents such as [General Recommendation No. 19](#) to the *Convention on the Elimination of All Forms of Discrimination Against Women*. But in this case, Luisa Amelia Hernandez was the accused, and the complainant was her former common-law husband.

Second, the case involves unusual facts and charges. Hernandez pled guilty to two offences: intent to cause death or bodily harm through the setting of a trap, and assault with a weapon, to wit, an insulin-filled hypodermic syringe. According to the facts laid out by the Court of Appeal, the complainant served Hernandez with an eviction notice following their separation and refused her request to loan her \$1000. The next evening, Hernandez entered the complainant's home and "set a trap" by pouring oil and placing insulin-filled syringes on the floor. When arriving home, the complainant slipped on the oil but did not fall; if he had, "he likely would have been pricked by an uncapped, exposed needle." Hernandez then confronted the complainant, again asking him for money, and when he refused she stabbed him in the back of the neck with syringe filled with insulin that she, a nurse, had stolen from her employer. Hernandez told the complainant that the syringe contained insulin and Hepatitis C, and while the latter was not true, it took some time for the complainant to determine that. Hernandez also tried to block the complainant from calling the police. He was eventually taken to the hospital, where he was kept overnight for observation as his blood sugar levels were extremely low (at paras 2-3).

The offence of setting a trap with intent to cause bodily harm is set out in section 247(1) of the *Criminal Code*, RSC 1985, c C-46. It is one of the more uncommon offence provisions in the *Code*, and has been subject to little judicial commentary. The only decision I was able to find involving a similar offence – that of knowingly permitting a trap to remain in place on one's

property for the purpose of committing another indictable offence under section 247(3) – is *R. v. Legge*, [2011 CanLII 5561](#) (NL PC). In this case, the Newfoundland and Labrador Provincial Court considered a scenario where the accused owned property where numerous marijuana plants were growing, and were surrounded by 100 feet of line connected to fish hooks, with barbed fish hooks attached to branches within the perimeter. A hand written sign close to the plants warned people in very colourful language that if they were caught stealing, their throats would be slit. The Court discussed the history of the “trapping” provisions of the *Criminal Code*, which have been in place since the time of the first *Code* in 1892. In rather archaic language, the original provision was aimed at “man-traps”, and did not extend to “any gin or trap usually set or placed with the intent of destroying vermin or noxious animals” (*Legge* at para 15). (I had to look up the definition of “gin”, which is a trap used for catching animals (as well as a beverage made with juniper berries and a card game)).

In *Legge*, the Court indicated that it had not been able to find any reported decisions interpreting this provision or its successors, and ascertained the elements of the offence through the process of statutory interpretation (at para 20). Under section 247(1), the Crown must prove that a trap was set, that the accused intended to cause death or bodily harm by doing so, and that the nature of the trap made it likely to cause such harm, even though proof of actual harm is not necessary (at para 21). Different elements are in place for section 247(3), and without getting into the details, the Crown proved all of those beyond a reasonable doubt in *Legge*.

Hernandez pled guilty to setting a trap, so there was no discussion of the elements of the crime, but they are still important for understanding the gravity of the offence. The penalty for contravening section 247(1) is a maximum of 5 years incarceration, or 10 years if bodily harm is actually caused.

Assault with a weapon is certainly a more common offence, though the particular weapon used in this case was unusual, as were the circumstances in which Hernandez obtained it. Under section 267 of the *Criminal Code*, this offence has a maximum of ten years or 18 months imprisonment, depending on whether the Crown proceeds by indictment or summarily.

The sentencing judge in *Hernandez*, Judge L.G. Anderson, imposed a sentence of 6 months incarceration on each offence, to be served concurrently. The Crown appealed on the basis that this sentence was demonstrably unfit. The Alberta Court of Appeal agreed with the Crown’s submissions, and increased the sentence to 18 months imprisonment concurrent on each count.

In a decision written by Justice Ellen Picard (Justices Barbara Lea Veldhuis and Russell Brown concurring), the Court noted the principle that appellate courts should be deferential to sentencing courts, interfering only where the original sentence was demonstrably unfit. This high burden will be met where the sentencing judge made an error in principle, failed to consider or underemphasized a relevant factor. As required by section 718.1 of the *Criminal Code*, the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (at para 5).

One problem with the original sentence, according to the Court of Appeal, was that Judge Anderson failed to give adequate weight to the gravity of the offence, which can be measured by the risks created by the offender's conduct and their level of responsibility. In this case, it was not only the contents of the needle that caused potential harm to the complainant, but also the serious risks inherent in receiving a "random, aggressive stab" to the back of the neck, near the spine. As a nurse, the accused would have known these risks. And these risks materialized into harms, given the complainant's low blood sugar levels and his mental stress associated with fear of having contracted Hepatitis C (at paras 7-9). The sentencing judge also gave insufficient weight to the offender's level of responsibility, in particular the facts that she planned the offence (with a trap and a backup plan if it failed), and stole from her employer to execute her plan. The Court called Hernandez's conduct "premeditated, cruel, and vindictive", with her motive elevating her moral culpability (at para 12). She did not have a criminal record, and was given credit for her guilty plea, though the Court questioned whether she was in fact remorseful (at para 13).

The other difficulty with the original sentence noted by the Court of Appeal was that it failed to give adequate weight to the principles of denunciation and deterrence. Domestic violence offences involve a breach of trust, which make specific and general deterrence and denunciation "paramount considerations" (at para 14). Though the Court of Appeal did not cite it, this principle is codified in section 718.2(a)(ii) of the *Criminal Code*, which stipulates that "evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner" is an aggravating factor for sentencing purposes. Although Judge Anderson recognized that a breach of trust is aggravating, he found that this case did not involve "a vulnerable victim trapped in a dependent relationship." The Court of Appeal indicated that this characterization was an error based on stereotyping, which improperly diminished the responsibility of the accused (at para 15). The sentencing judge also failed to account for the breach of trust Hernandez committed in using her professional skills and connections to injure her former partner, and placed too much weight on her prospects for rehabilitation.

These difficulties collectively resulted in a sentence that was demonstrably unfit, and as noted, the term of incarceration was increased to 18 months, with credit for time served.

Interestingly, in its list of leave to appeal decisions rendered this week, Supreme Advocacy notes another spousal assault case involving a female accused. In *R. v. Kim*, [2013 ONSC 4333](#), the accused's conviction for assaulting her husband and her 12-month conditional discharge were upheld by the Ontario Supreme Court, sitting as a summary conviction appeal court. Her applications for leave to appeal to the Court of Appeal and Supreme Court of Canada were dismissed. Two cases do not a trend make, and as argued here, the *Hernandez* case in particular is quite unusual – which is likely why it was Meehan's appellate case of the week.

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