Sexual harassment and the common law

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The creation of a new tort would enable a holistic approach to sexual harassment cases, enabling them to be dealt with more adequately.

That the law concerning sexual harassment has evolved primarily through case law and not by the specific application of any established legal doctrine, has generated much academic and judicial debate and uncertainty.[1] To add to the uncertainty, courts have traditionally applied a separate standard of legal reasoning to offences of a sexual nature generally seeing divisions of gender as fundamental and incontrovertible, so paving the way for sexual stereotyping. Furthermore, there is a great deal of hemming and hawing — a judicial reluctance to enter the sexual arena stemming from a (feigned) incapacity to distinguish the personal from the political.[2]

In this article, I argue that sexual harassment is actually a form of sex discrimination and hence a political or social injury as well as a personal one. I examine how a case of sexual harassment would be treated if brought as a cause of action in the torts of battery, assault, or intentional infliction of emotional distress.[3]

I then present an argument for creating a separate tort of sexual harassment, suggesting that while the law of torts as it stands may be inadequate to deal with sexual harassment, it is nonetheless conceptually broad enough to incorporate a cause of action equipped with the legal ammunition necessary to remedy these inadequacies.

While acknowledging that the victims and perpetrators of sexual harassment may belong to either sex, my emphasis is on the sexual harassment of women by men; as this is the most usual form of sexual harassment in our society.[4] Also, since the workplace has many instances of female workers being harassed by their male co-workers or supervisors, and exemplifies the extent to which sexual harassment has become institutionalised, I focus on sexual harassment in the workplace. The workplace also provides a prototypical setting to examine on a micro level the patterns of harassment and power relationships that lead to the victimisation of women on a macro level.

What is sexual harassment?

Sexual harassment is unwanted, unsolicited and unreciprocated attention of a sexual nature. Where acceptance or rejection of sexual advances is made a condition of employment, sexual harassment contains an element of threat or coercion. Other less direct forms of sexual harassment, such as offensive hand or body gestures, stares and leers (hostile work environment sexual harassment), also interfere with an individual's right to work in an environment free from sex-based intimidation or hostility.

Is sexual harassment 'sex discrimination'?

The sexual element in sexual harassment obscures its true nature and distorts legal comprehension of exactly why it occurs and how to stop it. Consequently, instances of sexual harassment have, until quite recently, been treated as isolated and sporadic, stigmatising the victims by implying that they, in some way, possessed a unique personality trait that triggered the incident.[5] However, as many as seven out of ten women have been affected by some form of sexual harassment in the course of their working lives.[6] This is surely not pure coincidence but a product of current patterns of workplace hierarchy where women by and large occupy subordinate positions to men and are thus vulnerable to career blackmail.[7]

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The wide ranging physical and emotional effects of harassment reduce the employee's aspirations to strive for career advancement by seeking promotions or positions in male-dominated fields. Ultimately, therefore, sexual harassment hampers a woman's chances of economic advancement and the material independence that entails. Thus sexual harassment feeds on and propagates the economic inferiority of women.

Closer, less prejudiced inspection of such cases reveals sexual harassment is not merely misdirected sexual desire but is in fact a form of sex discrimination based on the exploitation of a relationship of unequal powers evident from the preceding analysis, that the gender of the victim, rather than her individual characteristics, is the basis for the unfavourable treatment meted out to her.[8] Sexual harassment is almost entirely impersonal, an expression of puissance rather than passion instigated by male perceptions of and directed at women as a class. It denies women equality of opportunity in employment and is therefore sex discrimination and a gendered as well as a personal injury.

Sexual harassment as battery

The tort of battery includes any act 'which directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent.'[9] Like all other torts of trespass to the person, the tort of battery is aimed at protecting an individual's physical integrity. So even the most trivial physical contact may be actionable whether or not it causes any actual bodily harm.

The critical factor which determines whether a battery has occurred is the plaintiff's consent or lack of it, that is, whether she viewed the physical contact as hostile or offensive. In some ways for a victim of sexual harassment, an action in battery may be ample as the tort is ascertained entirely from the plaintiff's perspective. Also since battery is actionable *per se*, it is sufficient in cases of intentional battery (sexual harassment is generally intentional rather than negligent) to establish that the defendant intended to make the hostile or offensive contact with the plaintiff's person; there is no need to establish that he intended to injure the plaintiff. In other words, sexual harassment of a physical nature, if proved to be a battery, would be actionable *per se*.

The major stumbling block for most sexual harassment cases under the tort of battery is establishing lack of consent, that is, that the physical contact was indeed offensive. Often women are precluded from openly voicing their lack of consent by the canons of sexual politeness, the fear of being considered exceedingly sensitive and, in cases of *quid pro quo* sexual harassment, by the threat — implied or expressed — of losing their job.[10]

Claims in battery are also limited by the requirement that there be physical contact. This excludes actions for verbal abuse or other forms of hostile work environment sexual harassment where the plaintiff's dignity suffers despite no physical contact.

Sexual harassment as assault

An 'assault' is the threat to apply imminent force or any positive and deliberate act by the defendant which is meant to arouse and does in fact arouse the plaintiff's apprehension of imminent physical contact. Put succinctly, an assault is the expectation of an imminent battery.

For sexual harassment, the scope of the tort of assault seems wider than that of battery since it permits an action for mere apprehension, anguish, shock, humiliation, etc. produced by a threat with or without physical contact. In other words, once an assault is established, the plaintiff may recover compensatory damages solely for the apprehension induced by the threat with additional compensatory damages being awarded for any physical injury caused if a battery follows the threat. Another advantage of an action in assault is that it incorporates conditional threats, enabling a woman to bring an action against an employer who threatened to molest her if she refused to do him a favour outside the scope of her employment.

The requirement that the threatened physical contact be imminent however, creates a problem in sexual harassment cases where threats are made about a future battery. Since *Barton v Armstrong* [1969] 2 NSWR 451 where threats made over the telephone were held to constitute an assault, the requirement that the apprehended physical contact be imminent seems to have been abrogated. *Barton v Armstrong* also appears to overturn the proposition that words alone cannot constitute an assault.[11] Justice Taylor made it quite clear that the telephone threats amounted to assault because they instilled fear of physical harm in the recipient's mind and so constituted 'threatening *acts*, as distinct from *mere words*' (at 455 my emphasis).

Verbal abuse, for example, as indecent sexual propositions without physical contact and unlikely to arouse apprehension of that would not constitute an assault.[12] By the same token, conditional threats in the form of demanding sexual favours as a condition of job security, that is *quid pro quo* sexual harassment, would not be actionable on the grounds that the threat induced apprehension of economic rather than physical detriment.

Assault therefore fails to serve as an adequate course of remedy for sexual harassment in a similar way to battery.

Sexual harassment as intentional infliction of emotional distress

Also known as the intentional infliction of mental distress, this tort is similar to the tort in *Wilkinson v Downton* [1897] 2 QB 57. It allows an action for extreme or outrageous conduct that 'intentionally or recklessly causes severe emotional distress' with or without consequent bodily harm (where damages are adjusted accordingly).[13]

At first, this cause of action seems to overcome the obstacles posed by assault and battery, by extending the scope of liability to purely emotional injury caused by *any* deliberate or reckless conduct by the defendant. This clears the way not only for successful actions in *quid pro quo* and hostile work environment sexual harassment — due to the broad interpretation that can be given to the term 'extreme or outrageous conduct' — and it also entitles the plaintiff to a considerable amount as damages for all the direct and indirect effects of sexual harassment.[14] As well as claiming compensatory and punitive damages from the person who harassed her, the plaintiff could also claim 'parasitic' damages from her employer for creating a work environment conducive to sexual harassment.[15]

Ironically, the very comprehensiveness that broadens the scope of this tort also creates the ambiguity that gives the courts licence to narrow its interpretation. The non-existence of a precise definition of 'outrageous conduct' acts as its greatest impediment in dealing with sexual harassment. On occasions, liability has been limited to 'conduct of a *flagrant* character', requiring that the plaintiff's distress be 'such as a *reasonable person of ordinary sensibilities* would undergo under the circumstances' (my emphasis).[16] Female victims of sexual harassment have often fallen short of the 'reasonable person' standard applied with a male bias by judges so inclined and have failed to recover damages in cases where the evidence was otherwise clear.[17]

Hence, although the tort of intentional infliction of emotional distress has the most theoretical potential of all the torts of trespass to the person to compensate for the abuse of power underlying cases of sexual harassment in the workplace, in reality, the case-by-case decisions as to what constitutes outrageous conduct have led to inconsistencies which leave this potential largely unrealised.

Enter — the tort of sexual harassment

My examination of how sexual harassment might fare as an action in battery, assault of intentional infliction of emotional distress has revealed yawning loopholes in the framework of the law of torts which allow the culprit to go unpunished, and the victim uncompensated. It is partly because of these loopholes that Mackinnon denounces tort law as being 'conceptually inadequate for the problem of sexual harassment', chiefly because it 'considers individual and compensable something which is fundamentally social and should be eliminated'.[18]

My argument is that, in the realm of sexual harassment, tort law is inadequate, not conceptually but structurally; not because it individualises the injury, but because it strives to compartmentalise it and divide it into actionable components to fit into existing tort categories. The components that do not fit are simply ignored or may even disqualify the claim from being classified as a recognised tort. I contend that creating a separate tort of sexual harassment, formulated so that it incorporates all the components of sexual harassment, would not only compensate the injured party (as far as is monetarily possible) but would also deter future incidents of this nature.

Essentially, this cause of action would incorporate the following elements:

A broader definition of sexual harassment

For any legal doctrine concerning sexual harassment to be meaningful, it must acknowledge that sexual harassment is fundamentally the abuse of power,[19] the victims of which are singled out on account of their sex. A comprehensive definition of sexual harassment should thus recognise sexual harassment as sex discrimination, even if it is not directed at all employees of the same sex as the victim.[20] Sexual harassment should thus be recognised as a tort against gender as well as a tort against a particular individual.

Sexual harassment actionable per se

That sexual harassment is sex discrimination *per se*, an offence outlawed by statute, should justify making it actionable *per se*. The need for this is genuine, particularly where sexual harassment may have occurred only once, and the employee may not have suffered long-term detriment, or may have continued working in the same place.

Furthermore, as my discussion of the difficulties in proving lack of consent showed, that the woman's dissent is often internalised does not necessarily disprove sexual harassment. If sexual harassment were made actionable *per se*, the question of whether the sexual attention was 'unwelcome' would be treated only as a factor to be weighed with others, and not as a necessary element that has to be positively proved in order to establish the cause of action.

Employer liability

In most cases, the employer has direct control over the work environment and should have an affirmative duty to minimise if not eliminate sexual harassment in the workplace by investigating and remedying such complaints from his employees. In certain jobs, such as waitressing, where the employer may also require employees to wear revealing clothing, or act in a manner that makes them particularly vulnerable to sexual harassment, it is only fair that the employer should assume responsibility for safeguarding their right to resist sexual contact.

Comprehensive damages

Damages fulfil not only a compensatory role but also serve as an effective deterrent. This is possibly why tort law must treat sexual harassment as compensable — in order to eliminate it. Damages in tort law have traditionally been awarded with the aim of restoring the plaintiff to the position she would have been in if the tort had not been committed. Since sexual harassment denies the plaintiff equal opportunity in employment and possibly precludes her from being promoted to higher positions, this factor should be included in the damages.[21]

Due to the various ways sexual harassment can injure a person, emotional as well as physical injuries should be considered in assessing damages. Also, in order to incorporate employer liability, the concept of 'parasitic' damages, similar to that in the tort of intentional infliction of emotional distress, should be applied.

Neutralising (or neutering) the 'reasonable person'

As discussed earlier, the 'reasonable person' standard used in tort law to evaluate a plaintiff's response to a particular situation has, in reality become more of a 'reasonable man', and hence a somewhat misogynous standard. Some feminist writers have suggested the imbalance be rectified by forming a reasonable woman standard, alleging that men and women have different perceptions of what is harmful because of different socialisation processes and this needs to be accounted for as does the unequal relationship between the sexes.[22]

However, formulating separate standards based on each and every social inequality would lead to a seemingly endless proliferation of categories of reasonableness.[23] This could ultimately destroy the objectivity and defeat the very purpose of the 'reasonable person' standard. Besides, projecting women as 'something different and special' has, more often than not, led to the reinforcement of inequality, inferiority and disadvantage.

A better approach would be to widen the range of reasonable responses encompassed by the existing 'reasonable person' standard to accommodate responses that may normally be considered unique to one sex and restore the 'reasonable person's' gender-neutrality. A gender-neutral standard would be less discriminatory than a gender-specific one, e.g. by not denying male plaintiffs the right to respond with the degree of sensitivity usually attributed to women.

Conclusion

Sexual harassment can only be assured of a fair hearing in courts if it is tried on the basis of a doctrine that approaches it as a whole, embracing both the personal and social aspects, rather than without a context. Current tort law is ill equipped to deal adequately with sexual harassment, but possesses the theoretical potential to develop a separate tort devoted to sexual harassment.

Abandoning the tort approach altogether might be a less onerous process than creating a completely new cause of action. However, the civil standard of proof, the ability to compensate specific injuries with specific damages, and, above all, the conceptual flexibility of tort law compared to other branches of law makes it as, if not more, capable of dealing adequately with sexual harassment.

References

1. Mackinnon, Catherine, *Feminism Unmodified — Discourses on Life and Law*, Harvard University Press, 1987, p.104.
2. As Catherine Mackinnon puts it 'Privacy sanctifies the sphere of the sexual', *Sexual Harassment of Working Women*, Yale University Press, 1979, p.162.
3. Sexual harassment may also be actionable under other existing torts such as defamation, tortious interference with contractual relations etc. Since the torts of trespass to the person seem to be the causes of action that relate directly to most cases of sexual harassment and since my purpose is to merely provide a sampling of how tort law might handle cases of this ilk and not to provide a comprehensive survey of all possible causes of action, I have chosen to limit my discussion to these three torts.
4. '. . . studies and decided cases indicate that this [sexual harassment of women by men] is the epidemic form of sexual harassment occurring today', Pask, E., Mahoney, K. and Brown, C., *Women, the Law and the Economy*, Butterworths, Toronto, 1983, p.42.
5. Mackinnon, 1987, above, p.106.
6. Mackinnon, 1979, above, p.26.
7. 'Organisations are, by and large, male-dominated in terms of power, control . . . and ownership and have traditionally reflected "male" values and a view of the world in which men and women stand in different relationships to work values that assign an uneven social worth to women', Khan, A. and Mills, A., 'Sexual Harassment', (1990) 134(3) *Solicitor's Journal* 166.
8. Discrimination, according to *Bundy v Jackson* 641 F 2d 934 (1981) (USCA) at 942, can be classified as sex discrimination if 'sex [meaning "gender"] is for no legitimate reason, a substantial factor in the discrimination'. The Court of Session in *Strathclyde Regional Council v Porcelli* suggested that whether a certain case of sexual harassment tantamounts to sex discrimination can be determined by asking if the victim was 'less favourably treated on the grounds of her sex than a man would have been treated' [1986] IRLR 134 as per s.1(1)(a) of the *Sex Discrimination Act* 1975 (UK).
9. Street, Harry, *Law of Torts*, Law Book Company, 4th edn, 1968, p.18.
10. In Britain, the onus of proving lack of consent lies on the plaintiff since the decision in *Freeman v Home Office (No. 2)* [1983] 3 All ER 589 at 594-95, whereas in Canada, the onus is on the defendant, e.g. as in *Hambly v Shepley* (1967) 63 DLR (2d) 94 at 95. Australian courts have yet to consider the matter but Balkin and Davis argue that the onus should be on the plaintiff since she is the one who alleges no consent in the first place, *Law of Torts* (1991) 39. What has been said here with regard to consent also applies to the two other torts discussed in this paper.
11. This proposition has been adhered to in old cases like *Re Meade and Belt* (1823) 168 ER 1006.
12. In *Reed v Maley*, 115 Ky 818, 74 SW 1079 (1903) in which a man solicited a woman to have sexual intercourse with him, it was held that the injury of a sexual proposition without ensuing physical contact had a 'metaphysical character' [at 1080] and did not constitute an injury in itself.
13. Strictly speaking, the scope of the tort of intentional infliction of economic distress (more an animal of United States courts than Australian ones) is broader than that in *Wilkinson v Downton* since the former embraces both intentional and reckless acts while the latter restricts itself solely to intentional acts. In reality, however, most legal textbooks such as Keeton, *Prosser and Keeton on Torts* (5th edn) 1984 appear to treat both causes of action as synonymous.
14. Successful sexual harassment cases under this tort include *Rice v United Company of Arizona* 465 So.2d 1100 (Ala.1984) where a pattern of outrageous acts by an employer and a supervisor was sufficient to support a claim of intentional infliction of emotional distress and *Howard University v Best* 484 A 2d 958 (DC 1984) in which a dean was held liable for sexually harassing a faculty member.
15. For example, in *Shaffer v National Can Corporation*, 565 F Supp.909 (ED Pa 1983) an employer was held liable for creating an oppressive workplace atmosphere which caused severe emotional distress whereas in *Ford v Revlon Inc*, 1987 153 Ariz 38, 734 P 2d 580, an employer was held liable for failing to stop gross misbehaviour by the plaintiff's supervisor.
16. Keeton and others, above, pp.57 and 63.
17. Some male judges have actually expressed astonishment that a woman 'should ever allow herself to be frightened or shocked into a miscarriage', Keeting and others, above, pp.55-56; Magruder, 'Mental and Emotional Disturbance in the Law of Torts', 1936 49 *Harvard Law Review* 1035, even suggests that in most cases 'a toughening of the mental hide is a better protection than the law could ever be'. Thus, in *Great Atlantic & Pacific Tea Co. v Roch* 1930, 160 Md 189, 153 A 22, a single invitation to illicit intercourse was held to be insufficient in itself unless it was prolonged or repeated to the point of hounding.
18. Mackinnon, 1979, above, pp.171-172.
19. 'To say . . . that she was victimised in her employment simply because she declined [the boss's sexual advances] . . . was to ignore the asserted fact that she was invited only because she was a women subordinate to the inviter in the hierarchy', *Bundy v Jackson* 641 F 2d 934 (1981) (USCA) at 942.
20. Cf. with the Manitoba Court of Appeal's ruling in *Govereau and Janzen v Platy Enterprises* (1987), 43 Man R (2d) 293 (Man CA) where sexual harassment was not held to constitute sex discrimination unless it was directed at all women as a means of achieving a discriminatory purpose (e.g. the termination of employment of all women).
21. For instance, in *Hill v Water Resources Commission* [1985] EOC (cited by Innes, Graeme, 'Sex Discrimination and Sexual Harassment' (1985) 10(3) *Legal Service Bulletin* 143) damages were awarded for the loss of opportunity to act in higher grade positions as well as for the future loss of earning capacity.
22. Forell, C., 'The Reasonable Woman Standard of Care' (1992) 11(1) *University of Tasmania Law Review* 7; Shoenheider, K., 'A Theory of Tort Liability for Sexual Harassment in the Workplace', (1986) 134(2) *Uni. of Pennsylvania Law Review* 1346.
23. Nancy Ehrenreich suggests a few such categories like the 'reasonable black woman' and the 'reasonable lower class black woman', 'Pluralist Myths and Powerless Men: the Ideology of Reasonableness in Sexual Harassment Law', (1990) 99(6) *Yale Law Journal* 1218.