

**THE JUDICIAL RESPONSE TO NON-SEXUAL
HARASSMENT CLAIMS**

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Harassment of certain kinds is dealt with by the Criminal Code and by federal and provincial legislation designed to provide protection for an individual's human rights. What is not as clear is whether, outside the remedies given by these statutes, there is a civil right of action, part of the law of torts, for harassment. The purpose of this essay is to examine the possibility of recognising an action in tort at common law for non-sexual harassment, and to consider, what should be its nature and scope.

Certains types de harcèlement sont traités par le Code criminel et par certaines lois fédérales et provinciales destinées à fournir une protection pour les droits fondamentaux d'un individu. Toutefois, il n'est pas certain qu'il existe un droit de recours en responsabilité civile délictuelle hormis les recours prévus par les lois. Le but de cet essai est d'examiner la possibilité de reconnaître un droit de recours en responsabilité civile délictuelle en common law pour les types de harcèlement autres que sexuels. Aussi, cet article tente de préciser quelles devraient être la nature et la portée de ce recours.

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I. Introduction

The legal nature and consequences of non-sexual harassment are confused and confusing. Harassment seems to comprise different conduct in different legal contexts. Certain forms of non-sexual harassment are dealt with by statute and some of these result in criminal liability. Others are non-criminal but give rise to remedies under legislation dealing with human rights and discrimination. Where no statute applies the possibility of a remedy at common law requires clarification. In *Lajoie v. Kelly*,¹ a Manitoban judge thought that today in the circumstances of the particular case sexual harassment should constitute a wrong. Despite this opinion, it is a matter of debate whether either sexual or non-sexual harassment is actionable at common law. By way of comparison the United Kingdom Protection from Harassment Act, 1997 creates an offence of harassment² and establishes a civil action for damages where harassment occurs or for an injunction where it is apprehended. This suggests that, notwithstanding some prior English decisions, doubt existed as to whether at common law there was a tort of harassment.³

Whatever the United Kingdom situation, the position in Canada is both different and more complicated. It is necessary to consider how the meaning and content of harassment differ according to whether such misconduct is being dealt with by the criminal law, legislation on human rights or the common law

¹ (1997), 32 C.C.L.T.115 at 122 (Man.Q.B.); c.f. *Champagne v. Kapuskasing Plumbing & Heating Ltd.* (1996), 30 O.R. (3d) 403, where sexual harassment was regarded as actionable in itself, on the ground that the alleged harassment occurred through words and conduct including assault, battery or intentional infliction of harm. Contrast *Allen v. CFPL Broadcasting Ltd.* (1995), 24 C.C.L.T. (2d) 297 (Ont.Gen.Div.); *Chapman v. 3M Canada Ltd.* (1995), 24 C.C.L.T. (2d) 304 (Ont.Gen.Div.), aff'd (1998), 37 C.C.L.T. (2d) 319 (C.A.).

² In *R. v. Ireland*, [1997] Q.B. 114 a man telephoned three women, one of them 14 times within an hour. He never spoke but remained silent for several minutes once the women answered. In consequence the women suffered psychological harm. The English Court of Appeal held that the man's conduct constituted the crime of assault occasioning actual bodily harm in that making the telephone call was an act by which the accused caused the women to apprehend immediate unlawful violence. This decision has been criticised: Smith & Hogan, *Criminal Law*, 8th ed. at 413. But it has also been defended as "allowing the criminalisation of a particular type of harassment": Stone (1997) 113 L.Q.R. 407 at 410 and Herring (1998) Camb. L.J. 10, 13. This decision, and that in *R. v. Burstow*, where various other forms of harassment occurred, were both affirmed by the House of Lords: [1997] 3 W.L.R. 534. Notwithstanding this, possibly revolutionary decision, the 1997 Act is still necessary to deal with other forms of harassment: see Lord Steyn, [1997] 3 W.L.R. 534 at 538.

For the origins of the Act and an assessment of its provisions see Mays, Middlemass & Watson, "Every Breath You Take... Every Move You Make" in Scots' Law, the Protection From Harassment Act 1997 and "The Problem of Stalking", [1997] Juridical Review 331 at 342-49.

³ See however Middlemiss, "Civil Remedies for Victims of Sexual Harassment: Delictual Actions" [1997] Juridical Review 241, suggesting that in Scotland a remedy in delict is available as against employers and harassers where sexual harassment occurs in the context of employment.

and what are the legal consequences of such harassment. An exposition of the current situation will prove the validity of the remarks made at the outset regarding the present state of the law in Canada.

II. *Harassment in Criminal Law*

Under section 264 of the Criminal Code⁴ harassment occurs when someone without lawful authority engages in any one of various acts knowing that another person is harassed or is reckless as to whether that other person is harassed, in other words with the actual or constructive intent to harass another.⁵ However the conduct to be described below will only constitute harassment for the purposes of the section if the victim of the conduct reasonably fears for his or her safety or the safety of anyone known to him or her. It does not matter whether or not the one who is harassing knows that the victim feared for his or her safety.⁶ It is the effect of the conduct on the victim that is vital, not the realisation by the offender that the conduct has or might have such effect. Thus there is a similarity between the offence of harassment and that of assault.

The first type of conduct that is specified in the section is repeatedly following another person or someone known to them from place to place. This would clearly include shadowing or "stalking."⁷ It is to be noted that this conduct must be engaged in "repeatedly". How many times the repetition must occur for the offence to be committed is not defined and is thereby left for debate.⁸ Beyond that it would seem apparent that the offender has acted in a manner that comes within the meaning of the section. The fact that it is not necessary for the offence to be committed that the harasser follows the actual victim, as long as the harasser follows someone known to the victim, reveals that the purpose of the section is to prevent the wrongdoer from affecting the truly intended victim by following someone, not necessarily a member of the victim's

⁴R.S.C.1985, c.C.46, amended by S.C. 1997, c.16, which has not yet been proclaimed.

The contents of this section are analysed in depth by the Manitoba Law Reform Commission's *Report on Stalking*, 1997, Report No. 98, at 11-15. On stalking generally see Mays, Middlemass & Watson, *supra* note 2 at 332-42.

⁵This is either an indictable offence punishable by imprisonment for up to five years, or a summary conviction offence punishable by a fine of not more than two thousand dollars or imprisonment for up to two years or both: R.S.C.1985, c.C.46, s.787(1).

⁶*R. v. Sillip*, [1995] 9 W.W.R. 552 (Alta.Q.B.). See also *R. v. Whittle* (1995), 133 Nfld. & P.E.I.R. 181 (Nfld.S.C.). In other words the accused does not have to intend to cause the victim to fear for his or her safety. But there are provincial court decisions which suggest the contrary: see the Manitoba Law Reform Commission's Report, *supra* note 4 at 11.

⁷See generally the Manitoba Law Reform Commission's Report on Stalking, *ibid*. This discusses the law relating to stalking, harassment and similar conduct in Manitoba, Canada, England, the United States, Australia and New Zealand, and contains suggested new legislation, viz., the Stalking Prevention, Protection and Compensation and Consequential Amendment Act. See also B. MacFarlane, "People Who Stalk People" (1997) 31 U.B.C.L.R. 37.

⁸Once was not enough but three times was sufficient: see Manitoba Law Reform Commission, Report on Stalking, *supra* note 4 at 12, *infra*.

family, the result of which is to operate on the mind of the ultimately intended victim.

The second kind of offensive conduct is repeatedly communicating, directly or indirectly, with another person or someone known to that other person. Again we have the ambiguity "repeatedly". Also the language of the section indicates once more that the intended victim can be affected by offensive conduct directed against someone else, so that it is no answer to state that there was no contact with the intended victim.

Third, harassment can be committed by someone who besets or watches the dwelling-house or any other place where the victim or someone known to him or her resides, works or carries on business, or happens to be. Thus simply standing outside the victim's home for a significant length of time or on a significant number of occasions would amount to the offence, as long as the effect produced thereby was to cause the victim to fear for his or her safety or the safety of someone known to him or her. It is this requirement that would make peaceful picketing in a labour conflict situation not amount to harassment under the Code.⁹

Finally, and obviously, harassment will occur if the offender engages in threatening conduct directed at another person or any member of that person's family. This type of harassment involves conduct that resembles, if it does not actually constitute, an assault unaccompanied by a battery.

In view of the requirement that the victim must reasonably fear for his or her safety or that of someone known to him or her, this provision involves a real, justifiable anticipation of some form of violence directed against someone. It is interesting to compare this provision of the law in Canada with the recent United Kingdom statute by which harassment will only occur if the offender's conduct causes someone else to fear, on at least two occasions, that violence will be used against him or her, and the offender knows or ought to know that the proscribed conduct will have that effect. Presumably, as with the Canadian legislation, the offender need not know that the victim does suffer that effect. Intention or

⁹ But the picketing of hospitals, clinics, and doctors' offices and homes to protest against abortion might amount to harassment, although the courts have dealt with such conduct by granting injunctions to enjoin such activities: *Ontario (Attorney-General) v. Dieleman* (1994), 20 O.R. (3d) 229, (1995) 22 O.R. (3d) 785, 794, (Ont.Gen.Div.); *Assad v. Cambridge Right to Life* (1989), 68 O.R. (2d) 598 (H.C.); *Canadian Urban Equities Ltd. v. Direct Action for Life* (1990), 74 Alta. L.R. (2d) 145 (Q.B.); *Everywoman's Health Centre Society* (1988) v. *Bridges* (1991), 54 B.C.L.R. (2d) 294 (C.A.) affirming (1989) 61 D.L.R. (4th) 154 (B.C.S.C.). See also *R. v. Bridges* (1989), 58 C.C.C. (3d) 1 (B.C.S.C.); *R. v. Watson* (1996), 22 B.C.L.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused (1996) 22 B.C.L.R. (3d) xxxv (note); *R. v. Toth* (1991), 63 C.C.C. (3d) 273 (B.C.C.A.) leave to appeal to S.C.C. refused (1991) 64 C.C.C. (3d) vi (note); *R. v. Bridges* (No. 1) (1988), 48 C.R.R. (3d) 535 (B.C.S.C.).

There has also been at least one prosecution under a provincial statute prohibiting certain activities within a certain distance of a free-standing abortion clinic: *R. v. Lewis* (1996), 24 B.C.L.R. (3d) 247 (S.C.) reversing [1996] 4 W.W.R. 27 (Prov.Ct.).

recklessness on the part of the offender as regards the consequences of the offender's behaviour is the gravamen of the charge.

Section 372(3) of the Criminal Code creates an offence of making or causing to be made repeated telephone calls to another person with intent to harass that other person.¹⁰

In *R. v. Sabine*¹¹ it was held that the term "harass" here was synonymous with "annoy". There is no suggestion in respect of this section of the Code that for the offence to be committed it is necessary to establish that the victim feared for his or her safety or the safety of anyone else. Thus for the criminal law the words harassment, harass and to harass have different connotations depending upon the offence charged.

III. Harassment and Human Rights

Canadian, provincial and territorial legislation prohibits harassment by discrimination.¹² However the scope, of this legislation differs according to the jurisdiction involved. Under the Canadian, Manitoban and Yukon statutes discrimination by harassment will only be justiciable in the manner prescribed by the statutes if it occurs in relation to the provision of goods, facilities, and services, accommodation generally available to the public, commercial or residential premises and matters pertaining to employment.¹³

In Ontario and Newfoundland discrimination by harassment will only come within the ambit of the statutes if it occurs in relation to commercial and residential premises or employment or it takes the particular form of sexual harassment. Other provinces and the Northwest Territories do not specifically prohibit harassment. But if there is harassment that entails or results in a prohibited ground of discrimination under the legislation of these jurisdictions, this will be considered to be discrimination for the purposes of the legislation, and will justify and ground a complaint thereunder.¹⁴

For the purposes of these various statutes different definitions of harassment have been provided, in some, but not all, of the statutes. In Manitoba harassment is defined as a course of abusive and unwelcome conduct or comment undertaken

¹⁰ This is a summary conviction offence punishable by a fine of not more than two thousand dollars or imprisonment for up to six months or both: R.S.C. 1985, c.C.46, s.787(1).

¹¹ (1990) 57 C.C.C.(3d) 209 (N.B.Q.B.).

¹² Human Rights Act, R.S.C. 1985, c.H-6, s.14 (Can.); Human Rights Act, R.S.Y.(Supp.) c.11, s.13 (Yukon); Human Rights Code, S.M. 1987-88, c.45, s.19 (Man.); Human Rights Code, R.S.O. 1990, c.H.19, ss.2(2), 5(2), 7 (Ont.); Human Rights Code, R.S.N. 1990, c.H-14, ss.8, 12, 13 (Nfld. & Lab.).

¹³ *Supra*. Cf. The U.K. Race Relations Act, 1976, as applied to sexual and racial harassment in *Burton and Rhule v. De Vete Hotels*, [1996] I.R.L.R. 596, on which see Mullender, "Racial Harassment, Sexual Harassment and the Expressive Function of Law" (1998) 61 M.L.R. 236.

¹⁴ *R. v. Robichaud* (1987), 40 D.L.R. (4th) 577 (S.C.C.); *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

or made on the basis of any characteristic that is within the prohibited grounds of discrimination, viz., age, disability, race, colour, place of origin, religion or creed (as well as conduct involving sexual solicitation or reprisal or threats of reprisal for rejecting a sexual solicitation).¹⁵ Hence in *Lajoie v. Kelly* the behaviour complained of by the plaintiff could come within the scope of the Code. Ontario, Newfoundland and Yukon define harassment as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".¹⁶ The Canadian Human Rights Act contains no definition of harassment. However the Canadian Labour Code¹⁷ deals specifically with sexual harassment which it defines as conduct, comment, gesture or contact of a sexual nature that is likely to cause offence of, or humiliation to an employee. It might therefore be conceivable that, for the purposes of harassment under the Canadian Human Rights Act, since, in a sense, these statutes can be considered to be *in pari materia*, harassment would take the form of the kind of conduct or actions referred to in the Labour Code minus the sexual component.

In *Janzen v. Platy Enterprises Ltd.*¹⁸ Dickson C.J.C. said:

"Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."

Since this case involved allegations of sexual harassment, it was necessary for the Supreme Court of Canada to consider the meaning of harassment in relation to the particular variety of sexual harassment. However, it can be suggested that, if the references to the sexual nature or overtones of the defendant's behaviour are omitted, the definition in the *Janzen* case, as in the Canadian Labour Code, can provide a description of harassment in the context of human rights legislation. Thus harassment of a non-sexual kind is conduct that causes offence or humiliation, i.e. annoyance of a particularly grievous character, or upsets the victim and, in the context of employment, makes it near impossible for the victimised employee to continue in the employment.¹⁹

Yet however harassment is defined in these statutes, or is to be understood in the context of these statutes in relation to human rights it does not entail any element of fear for one's safety or the safety of anyone else. The legislation on human rights, insofar as it makes harassment a ground of complaint, is concerned with the elements of annoyance, disturbance or creating an impediment to normal life as an employee or otherwise.²⁰

¹⁵ S.M. 1987-1988, c.45, s.19(2).

¹⁶ See e.g., R.S.O. 1990, c.H.19, s.10(1).

¹⁷ R.S.C. 1985, c.L-2, s.247(1) [en.R.S.C. 1985, c.9 (1st Supp.), s.11].

¹⁸ [1989] 1 S.C.R. 1252 at 1284.

¹⁹ See Dine & Watt, "Sexual Harassment: Moving Away from Discrimination" (1995) 58 M.L.R. 343 at 350-52.

²⁰ There is a similarity here with the idea of harassment in family law situations, where harassment appears to mirror molesting or annoying a spouse, former spouse or children within the lawful custody of such spouse or ex-spouse: see, e.g., the Ontario Family Law

It should also be observed that the statutes noted above provide for administrative remedies involving boards of inquiry or of adjudication, human rights commissioners and human rights tribunals. Such administrative persons or bodies seem to be able to award monetary and non-monetary remedies, including fines, general damages for hurt feelings and mental anguish and, as evidenced by the *Janzen* case, exemplary or punitive damages. These resemble remedies in tort, where the complainant is expected to mitigate his or her loss, for example, by using reasonable diligence to find alternative employment or shelter (depending on whether the discrimination caused by harassment is in relation to employment or housing). However, if the decision in *Lajoie v. Kelly* is good law, it would seem that the existence of a remedy under these statutes does not preclude a civil action in tort for sexual harassment. If that is so, there seems to be no reason why the same should not apply where the harassment is non-sexual.

This raises a number of issues: first whether harassment of a non-sexual kind is a tort; second, whether harassment that does not come within the scope of the human rights legislation is actionable; third, whether where a human rights statute has created a remedy for discrimination resulting from harassment, it is permissible for the victim to bring an action in the courts instead of, or in addition to pursuing whatever process and remedy may be provided by the relevant statute. These issues require consideration of whether, to what extent, and in what circumstances harassment can be the basis for a civil action for damages or an injunction at common law, that is, in the absence of any statute, like that recently enacted in the United Kingdom, creating a civil remedy in cases of harassment. Lastly, there remains the question of defining harassment so as to differentiate conduct that is tiresome and irritating but not so objectionable and harmful that it should be categorised as wrongful and therefore actionable.²¹

IV. The Common Law and Harassment

(a) Harassment as nuisance

Until recently it is clear that the common law in England did not recognise the existence of a tort of harassment,²² any more than it recognised a tort of invasion of privacy;²³ nor did the law in Canada as expressed or implied in *Motherwell v. Motherwell*.²⁴ Only if the conduct complained of could be subsumed under

Act, R.S.O. 1990, c.F.3, s.46(1): *McDonald v. McDonald* (1994), 5 R.F.L. (4th) 215 (Ont.Gen.Div.); *Colley v. Colley* (1991), 31 R.F.L. (3d) 281 (Ont.U.F.C.); *Mauricio v. Mauricio* (1979), 9 R.F.L. (2d) 243 (Ont.Prov.Ct.Fam.Div.).

²¹ In much the same way as the distinction is drawn between language that is mere vulgar abuse and language that is defamatory. *But see Berkoff v. Burchill*, [1996] 4 All E.R. 1008 (C.A.).

²² *Patel v. Patel*, [1988] 2 F.L.R. 179 at 182 per Waterhouse J.

²³ *Kaye v. Robertson*, [1991] F.S.R. 62, as quoted by counsel in *Khorasanjian v. Bush*, [1993] Q.B. 727 at 729.

²⁴ (1976) 73 D.L.R. (3d) 62 (Alta.C.A.).

the heading of trespass, nuisance or some other tort would that conduct be actionable.²⁵ The circumstances in which actions for trespass or nuisance could be brought evolved over the centuries. Situations which did not fall squarely within accepted parameters, whether because the conduct was not of a type that had previously been regarded as being a trespass or a nuisance or because some essential ingredient for action ability was missing seemed to preclude the availability of a remedy. To cope with particular circumstances, namely those where matrimonial or similar relationships were involved, legislation has permitted courts to provide a remedy for harassment described as "molestation".²⁶ In Canada legislation recognised that sexual harassment could attract relief such as entitling victims to remedies previously mentioned,²⁷ or as justifying what would otherwise be a wrongful dismissal of an employee guilty of sexual harassment vis-a-vis another employee.²⁸

Inroads upon the rigidity of the common law which limited nuisance as a means of dealing with harassment were first made in the *Motherwell* case. The plaintiffs were the brother, sister-in-law and father of the defendant. She suffered from a paranoid condition accompanied by some thought disorder which caused her to harass the plaintiffs continually by telephone and mail, such harassment consisting of false accusations and statements about and concerning the three plaintiffs. They sued on the grounds inter alia of invasion of privacy and nuisance claiming nominal damages and an injunction. They were successful at trial and the appeal from the judgment in their favour was dismissed by the Alberta Court of Appeal. The judgment delivered by Clement J.A. for the court brings the circumstances of this case within the ambit of the tort of nuisance and, on that reasoning, was justiciable as an invasion of privacy since invasions of privacy could result in legal liability if they took the form of actionable nuisance. However, in order to achieve this result, the court had to deal with two problems. The first was whether a continual barrage of telephone calls amounted to nuisance. The second concerned the right of the sister-in-law, the wife of the brother who was the owner of the house where the telephone calls were received, to sue in nuisance since she had no legal title to the house. The way the court dealt with these problems significantly changed the law of nuisance.

What was done by the defendant in this case, the abuse of the telephone in the manner employed by the defendant, it was held, was an invasion of privacy amounting to nuisance since it involved real interference with the comfort or convenience of living according to the standards of the average person.²⁹

²⁵ See, e.g., *Parry v. Crooks* (1981), 27 S.A.S.R. 1 (S.A.S.C.) where an injunction was issued to restrain the commission of threatened tortious acts such as assault.

²⁶ See e.g., the English Domestic Violence and Matrimonial Proceedings Act, 1976 and the Family Law Act, 1996, ss.42, 62(3).

²⁷ In addition to statutes previously cited see also the Alberta Individual's Right to Protection Act, R.S.A. 1990, C.I-2, s.7(1); the British Columbia Human Rights Act, S.B.C. 1984, c.22, s.8, now Human Rights Code, R.S.B.C. 1996, c.210, s.13.

²⁸ *Harris, Wrongful Dismissal*, (1989, Richard de Boo, Don Mills), Vol.1, para. 3.16A.

²⁹ *Clerk & Lindsell on Torts*, (13th ed. 1969, London, Sweet & Maxwell) at 785, para. 1396.

Clement J.A. quoted with approval these remarks from an Australian case :

"The telephone system is so much the part of daily life of society that many look on it as a necessity. Its use is certainly taken as a right at least in a social sense.....It is a system provided for rational and reasonable communication between people, and its abuse by invasion of privacy is a matter of general interest....There are not many who would assert that protection against invasion of privacy by telephone would be a judicial idiosyncrasy."³⁰

This attitude to the telephone in relation to nuisance resembles that expressed in an Ontario decision with regard to a person's enjoyment of television in his home;³¹ a view that was not adopted in England where the contrary has been held.³² In the Ontario television case and the Alberta telephone case emphasis was put upon the common law's ability and need "to serve the changing needs of our present society".³³ Thus courts in Canada have experienced no difficulty in accepting that the use of telephones and television is an everyday part of living for all people; hence interference with or abuse of such use has been equated with making life difficult for someone, by causing smells, noise, or by depriving them of light, as actionable nuisance. In view of what is said later in relation to English developments the Alberta court did not consider that it was necessary to prove that the continual telephone calls caused any mental or psychic harm to the plaintiffs. The mere fact that they were inconvenienced by the improper use of the telephone by the defendant constituted a nuisance because it amounted to an invasion of privacy.

The second problem was that of standing; i.e. the right of the sister-in-law to maintain an action in nuisance although she had no proprietary interest in the premises where the nuisance was suffered. Historically the tort of nuisance was a wrong committed against one who had an interest in property,³⁴ as nuisance was conceived as a wrong against property. This proposition was restated in two English cases *Malone v. Laskey*³⁵ and *Cunard v. Antifyre Ltd.*³⁶ Therein claims in nuisance were made by the spouse of a person who was not a tenant of the affected premises (*Malone*, where the husband was the manager of the company which was the sub-lessee of the premises which allowed him and his wife to reside there), or the spouse of a man who was the lessee of the lessee of the premises (*Cunard*). In neither case, therefore, could the spouse claim to have any legal interest in, or right of possession with respect to the affected property, although on that property lawfully as spouse.

³⁰ *Stoakes v. Brydges*, [1958] Q.W.N. 9 at 10 per Townley J.

³¹ *Nor-Video Services Ltd. v. Ontario Hydro* (1978), 19 O.R. (2d) 107; distinguished, but not overruled by the Supreme Court of Canada in *St. Pierre v. Ontario*, [1987] 1 S.C.R. 906.

³² *Bridlington Relay Ltd. v. Yorkshire Electricity Board*, [1965] 1 All E.R. 264, approved by the Court of Appeal in *Hunter et al. v. Canary Wharf Ltd.*, [1996] 1 All E.R. 482, but distinguished, but not disapproved of by the House of Lords, [1997] A.C. 655.

³³ *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 at 68.

³⁴ Comyn's Digest: Action on the case for nuisance, E.1.

³⁵ [1907] 2 K.B. 141, followed in Australia in *Oldham v. Lawson* (No.1), [1976] V.R. 654 (Vict.S.C.).

³⁶ [1933] 1 K.B. 551 at 557.

In *Read v. J. Lyons & Co.*³⁷ Lord Simonds appears to have enunciated a gloss on the doctrine of these earlier cases when he stated: "He alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land". The expression "or other interest" may have been intended to indicate that it was not always necessary to prove stringently that the plaintiff enjoyed some legal title to the property, despite the fact that the *Malone* approach had been upheld and applied in *Metropolitan Properties Ltd. v. Jones*,³⁸ where Goddard L.J. said: "unless the plaintiff in an action for nuisance has legal interest in the land which is alleged to be affected by the nuisance, he has no cause of action". Lord Simonds may have had in mind cases where actions in nuisance were maintained by a person in de facto possession of land, as in the case of the oyster beds, *Foster v. Warblington Urban District Council*,³⁹ or someone who was the licensee with an exclusive right to possess land, as in *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.*⁴⁰ Such cases would not support allowing a mere licensee or a spouse or family member living with the legal owner of property to sue for nuisance.⁴¹

In *Motherwell* Clement J.A. referred to the *Malone*, *Cunard* and *Metropolitan Properties* decisions and stated that the *Malone* case did not support the remarks of Goddard L.J. quoted above. This was because the husband in *Malone* had no right of occupancy as against the real tenant, therefore his spouse could enjoy no better position. In *Motherwell* the sister-in-law's husband, who was the brother of the defendant, was the owner of the premises.⁴² Relying on *Foster*,⁴³ Clement J.A. drew a distinction between someone who was merely present and someone who enjoyed occupancy of a substantial nature. The wife in *Motherwell* was harassed in her matrimonial home where she had a status, a right to live with her husband and children. Consequently her occupancy of the matrimonial home was sufficient to found an action for nuisance. She was entitled to the same relief as her husband.

This approach to standing in cases of nuisance has been followed in a number of Canadian cases since *Motherwell*.⁴⁴ Family members have sued for nuisance without having to prove any legal interest in the affected land. However it seems unlikely that relaxation of the earlier and stricter rule will

³⁷ [1947] A.C. 146 at 183.

³⁸ [1939] 2 All E.R. 202; see also *Nunn v. Parkes & Co.* (1924), 158 L.T.J. 431.

³⁹ [1906] 1 K.B. 648.

⁴⁰ [1942] Ch. 427.

⁴¹ Cf. *Khorasanjian v. Bush*, [1993] Q.B. 727 at 745 per Peter Gibson J.

⁴² (1976) 73 D.L.R. (3d) 62 at 77.

⁴³ *Foster v. Warblington Urban District Council*, supra note 43.

⁴⁴ *Muirhead v. Timbers Bros. Sand & Gravel Ltd.* (1977), 3 C.C.L.T. 1 (Ont.H.C.J.); *O'Regan v. Bresson* (1977), 3 C.C.L.T. 214 (N.S.Co.Ct.); *Lewis v. St. Stephen* (1981), 34 N.B.R. (2d) 508 (C.A.); *MacNeill v. Devon Lumber Co.* (1988), 42 C.C.L.T. 192 (N.B.C.A.). But the judgment in *Motherwell* was severely criticised and declared incorrect in *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 at 690-95 per Lord Goff (who also criticised *MacNeill v. Devon Lumber Co.* at 690) 698 per Lord Lloyd, 707 per Lord Hoffman, 725-26 per Lord Hope; contrast Lord Cooke at 712-19.

permit merely casual or temporary occupants of affected land to be able to maintain an action. Some continuation or permanency of occupancy is required before the right to sue will be extended to non-proprietors.

Following *Motherwell*, the common law in Canada appears to recognise that certain forms of harassment may be actionable as a nuisance; and the right to sue is not confined to those who have a proprietary interest in the land where the harassment is occasioned. In other words, harassment, although a nuisance, is no longer a wrong to, or in relation to property: it is a wrong to the person. If this is conceded, it is not a major step to turn harassment into a distinct wrong, unconnected with the law of nuisance.

This approach influenced the English Court of Appeal in *Khorasandjian v. Bush*⁴⁵ and *Burris v. Azadani*.⁴⁶ What was decided therein suggests that there are reasons, based on recent developments in other areas of the law of tort, for saying that it may be possible to depart from the connection between harassment and nuisance to enable the courts to recognise a distinct tort of harassment.

(b) *A tort of harassment*

Two developments in the common law clearly influenced the approach of the English court in *Khorasandjian*: recognition of (a) mental or emotional distress as a form of damage on which an action can be based and (b) a tort of intimidation.

The past century has seen a turnaround in the common law's approach to situations in which a plaintiff suffered no direct physical injury as a result of the defendant's wrongdoing but was affected psychically or emotionally (which in turn produced physical symptoms).⁴⁷ Initially the judges were reluctant to admit liability for such harm, chiefly on the ground that the requisite causal connection could not be established. However even before medical science made the connection English courts accepted that, in appropriate instances, liability for the infliction of what was termed nervous shock, mental distress or emotional harm might be imposed on a defendant. Two distinct sets of circumstances determined liability. One was where the defendant said something to the

⁴⁵ [1993] Q.B. 727, which was overruled in respect of liability in nuisance by several members of the House of Lords in *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 at 690-95, 698, 725-26. Lord Hoffman thought it was a case of intentional harassment not nuisance *ibid.* at 707. Contrast Lord Cooke at 712-19.

For discussion of the *Khorasandjian* case and the issues involved therein see S. Bridgman & M. Jones "Harassing Conduct and Outrageous Acts: A cause of Action for Intentionally Inflicted Emotional Distress" (1993) 13 Legal Studies 180; R. Townshend-Smith, "Harassment as a Tort in English and American law: The Boundaries of *Wilkinson v. Downton*" (1995) 24 Anglo-American L.R. 299. See also J. Conaghan, "Gender Harms and the Law of Tort: Remedying (Sexual) Harassment" (1996) 16 Ox.J.L.S. 407.

⁴⁶ [1995] 1 W.L.R. 1372 (C.A.).

⁴⁷ See generally Mullany & Handford, *Tort Liability for Psychiatric Damage*, (Sydney, Law Book Co. Ltd., 1993).

plaintiff that resulted in the latter's suffering shock or distress.⁴⁸ The other was where the negligence of the defendant caused the plaintiff to fear for his or her own safety,⁴⁹ or for that of a relative⁵⁰ or a stranger.⁵¹ In such situations it was incumbent on the plaintiff to prove that psychiatric illness occasioned by shock, i.e., that some physical consequence, had occurred. Such damage was recognised as a separate head of damage distinct from, but equalling damage in the form of physical injury.⁵²

This was the foundation upon which the majority of the Court of Appeal, in *Khorasandjian*, founded the plaintiff's right to an injunction to restrain the conduct of the defendant. Earlier in *Burnett v. George*⁵³ it was held that an injunction to restrain harassment by telephone calls (as in *Motherwell* and *Khorasandjian*) was only available if there was evidence that the health of the victim was impaired by molestation or interference calculated to cause such harm (and only for the purpose of avoiding the impairment).⁵⁴ That decision did not preclude Dillon L.J. in *Khorasandjian* from taking a wider view of telephone harassment as private nuisance, since neither that nor the cases on nervous shock caused by a direct statement made by the defendant to the victim had been considered in *Burnett*.⁵⁵ Those decisions could be married with the facts of *Khorasandjian*:

"There is no medical evidence, and it could not as yet be said that the plaintiff is suffering from any physical or psychiatric illness. But there is.....an obvious risk that the cumulative effect of continued and unrestrained further harassment such as she has undergone would cause such an illness".⁵⁶

The law did not expect a young person to bear indefinitely such a campaign of persecution as that conducted by the defendant. Therefore, "in line with the law as laid down in *Janvier v. Sweeney*", the court was entitled to look on the defendant's conduct as a whole, and, on a *quia timet* basis, restrain those aspects of his campaign of harassment which could not strictly be classified as threats.⁵⁷

⁴⁸ *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Janvier v. Sweeney*, [1919] 2 K.B. 316.

⁴⁹ *Dulieu v. White & Sons*, [1901] 2 K.B. 604.

⁵⁰ *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141; *King v. Phillips*, [1953] 1 Q.B. 429; *McCloughlin v. O'Brian*, [1982] 2 All E.R. 290; *Marshall v. Lionel Enterprises* (1971), 25 D.L.R. (3d) 141; *Benson v. Lee*, [1972] V.R. 879.

⁵¹ *Chadwick v. British Transport Commission*, [1967] 2 All E.R. 945.

⁵² *Attia v. British Gas plc*, [1987] 3 All E.R. 455.

⁵³ [1992] F.L.R. 525.

⁵⁴ In this respect it should be noted that it has been held that where employees inflicted nervous shock on another employee, which led to that employee's resignation, this was harassment that entailed liability in tort: *Boothman v. R.*, [1993] 3 F.C. 381 (F.C.T.D.); *Clark v. Canada* (1994), 20 C.C.L.T. (2d) 241 (F.C.T.D.).

⁵⁵ *Supra* note 48, the *Wilkinson* and *Janvier* cases.

⁵⁶ [1993] Q.B. 727 at 736. *Cp.* the discussion of psychiatric illness in *R. v. Ireland*, [1997] 3 W.L.R. 534 at 541-44 per Lord Steyn. See also, on the expansion of the rule in *Wilkinson v. Downton*, *supra* note 48, R. Mullender, "Racial Harassment, Sexual Harassment and the Expressive Function of Law" (1998), 61 M.L.R. 236 at 241-42.

⁵⁷ His Lordship refuted *dicta* in *Pidduck v. Molloy*, [1992] 2 F.L.R. 202; *Patel v. Patel*, [1992] 2 F.L.R. 179; *News Group Newspapers Ltd. v. Society of Graphical and Allied*

The other basis for the judgment in *Khorasandjian* was the existence of a tort of intimidation as expounded in *Rookes v. Barnard*.⁵⁸ Whatever difficulties there may be to the application of this tort where there has been tri-party intimidation, there can be no doubt that in a situation in which the defendant directly intimidates the plaintiff, liability will follow. Intimidation occurs when the defendant, by threats or menaces of physical or other acts, pressures the plaintiff into acting in a manner harmful to the interests of the plaintiff. However it is not necessary to establish that the plaintiff actually incurred physical harm — actual or potential economic harm will suffice, as will actual or potential interference with the plaintiff's relations with others.⁵⁹ What the House of Lords did in *Rookes v. Barnard* was to broaden the scope of a tort that had affinities with trespass to the person, in the forms of assault or battery. Some instances of intimidation may well involve conduct that is, in the technical sense, an assault in that it entails an immediate threat to the physical safety of the plaintiff who, as a reasonable person, is in fear of such harm. However the verbal or non-verbal actions of the defendant may not amount to trespass to the person, i.e. assault or battery, which under the earlier law, would not have resulted in liability. In the post-*Rookes* law of tort, however, such conduct can have legal consequences.

Since intimidation today has a wider meaning than before *Rookes*, it may be that the scope of intimidation can be widened to give rise to liability not only where the plaintiff is compelled by the intimidation to act externally in a manner harmful to his or her interests but also where the plaintiff responds internally, by suffering emotional harm, mental distress, or psychiatric damage, or by being compelled, for reasons of safety, to avoid possible harm, to remain indoors or otherwise not pursue his or her normal life and activities. There might be economic consequences as by the fear engendered by the defendant's threats the plaintiff could be prevented from working, thereby incurring financial loss, possibly even loss of employment. Such a situation (which is undoubtedly one, if not the major basis for the prohibition of harassment in the form of discrimination that is dealt with in legislation protecting workers) would clearly fall within the parameters of *Rookes*. However, even if economic loss is not involved, the fact that the plaintiff was put in fear or was upset or distressed to the point of recognised psychical or physical harm ought to satisfy the elements of intimidation.

Not surprisingly, it was possible for the court in *Khorasandjian* to accept that intimidatory conduct on the part of the defendant could be the basis of liability. There it was held that the appropriate form of action was private

Trades 1982 (No. 2), [1987] I.C.R. 181 (the latter of which, in turn, had refuted the suggestion by Scott J. in *Thomas v. National Union of Mineworkers*, [1986] Ch. 20 that interference with a person's right to use the public highway could be a tort in itself).

⁵⁸ [1964] A.C.1129; *Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269 and *Central Canada Potash Co. Ltd. v. Attorney-General for Saskatchewan*, [1979] 1 S.C.R. 42.

⁵⁹ *D & C Builders v. Rees*, [1966] 2 Q.B. 617; *Universe Tankships Inc. of Monrovia v. I.T.W.F.*, [1982] 2 All E.R. 267.

nuisance. However it is not necessary for a court to utilise the theory of nuisance to provide a plaintiff with relief. Now that the common law includes conduct that is intimidatory without necessarily also being trespassory, it would require little in the way of development for the common law to hold that such conduct actionable as harassment.

There is no reason why a tort of harassment should not emerge at the present time. In *Lajoie v. Kelly*⁶⁰ Smith J. quoted from Prosser's *Law of Torts*:⁶¹

"The law of torts is anything but static, and the limits of its development are never set....the mere fact that the claim is novel will not of itself operate as a bar to the remedy".

Thus the learned judge recognised a tort of sexual harassment "in today's world and in the circumstances of this case". As Dillon L.J. said in *Khorasandjian*,⁶² echoing the language of Clement J.A. in *Motherwell*, the court "has at times to reconsider earlier decisions in the light of changed social conditions". Although this comment was made *propos* the issue of standing to sue for private nuisance, it can be applied generally. Such judicial statements indicate there exists a climate in which courts are willing to extend the scope of the law by creating rights and remedies in novel situations where it is conceived that justice requires this be done.

V. The Scope of a Tort of Harassment

The acceptance of a tort of harassment requires the resolution of certain issues raised earlier.⁶³ There is the question of the relationship between a common law tort of harassment and the recognition that harassment may be discrimination under human rights legislation. And there is the fundamental issue of determining the kind of conduct that will attract liability.

As explained some forms of harassment can trigger remedies of the kinds provided by the appropriate statutes. If harassment has occurred which falls within the scope of such legislation, e.g., by taking place in relation to employment or the provision of accommodation, can that permit the victim to raise a civil claim in tort as well as, or instead of the non-common law process in the legislation? Or, as was held with respect to discrimination in *Bhadauria v. Governors of Seneca College*,⁶⁴ is the statutory scheme the only remedy available to a victim ousting a civil claim? However in *Smith v. New Brunswick*

⁶⁰ (1997) 32 C.C.L.T. (2d) 115 at 121 (Man.Q.B.).

⁶¹ 4th ed. (1971, St.Paul Minn.: West Publishing Co.), at 3.

⁶² [1993] Q.B. 727 at 735.

⁶³ Introduction, pp 300-1.

⁶⁴ [1981] 2 S.C.R. 181, followed in *Allen v. CFPL Broadcasting Ltd.* (1994), 24 C.C.L.T. (2d) 277 (Ont.Gen.Div.); *Chapman v. 3M Canada Ltd.* (1995), 24 C.C.L.T. (2d) 304 (Ont.Gen.Div.), affirmed (1998), 37 C.C.L.T. (2d) 319 (C.A.); and in *Nicholas et al. v. Mullin et al.* (1998), 199 N.B.R. (2d) 219 (Q.B.), on the similar effect of the New Brunswick Human Rights Act, R.S.N.B. 1973, c.H-11, (added by S.N.B. 1985, c.30, s.1), s.7.1(4).

Human Rights Commission,⁶⁵ despite *Bhadauria*, it was held that a tort of discrimination might exist at common law and permit an action in spite of the provisions of the provincial Human Rights Act. Moreover in *Lajoie v. Kelly*⁶⁶ and *Champagne v. Kapaskasing Plumbing & Heating Ltd.*⁶⁷ sexual harassment was treated as actionable in itself, even where there existed provincial legislation providing redress. Hence it can be argued that the victim of harassment should not be confined to statutory remedies where the harassment falls within the ambit of such legislation.

Where the harassment does not occur in relation to the circumstances that are set out in the legislation (which would be the situation in cases like *Motherwell* and *Khorasandjian*), there can be no question of the exclusion of a common law remedy. Indeed the fact that there is no legislation in Canada, and was not in England until 1997, providing for a remedy almost compelled to courts to distort the existing law of nuisance in order to ensure that the victim could obtain necessary relief — when, it is suggested, such distortions were not really needed because the problem could have been resolved more satisfactorily by the legitimate acceptance of a new tort.

There are differences between harassment within the human rights legislation and harassment at common law. The former seems to be confined to unwelcome, abusive, vexatious or possibly humiliating conduct. It does not involve the element of fear for one's safety found in the definition of harassment under the Criminal Code. It is suggested that this seems at least to be an element in the kind of conduct that has allowed courts to conclude that harassment can comprise a nuisance. Nor does harassment in human rights legislation seem to entail the kind of psychic effects that have been required in the common law cases. The reason for this is clear. The human rights legislation is concerned with discrimination, i.e., harmful social or economic consequences while common law harassment is directed toward harmful mental or physical consequences. This provides another rationale for allowing a civil action for harassment even where the situation falls within the legislation, as long as the common law consequences have occurred as well as the "statutory" ones.

It also suggests the true test of harassment at common law. What the judges are interested in is to provide relief from conduct that goes beyond annoyance, vexation or humiliation of the victim. There must be a serious disruption of the victims' normal life, by putting them in the position of fearing to come and go as they would normally; or interfering with their right to live in accord with their desires and of causing them to suffer mental distress beyond the limits of hurt feelings. Elements of assault, nervous shock, intimidation and discrimination or victimisation all comprise harassing conduct. This derives from the jurisprudence examined above. What it reveals is that the courts have realised that new ways of inflicting harm upon a person call for new remedies. What I suggest is that,

⁶⁵ (1996) 137 D.L.R. (4th) 76 (N.B.Q.B.).

⁶⁶ *Supra* note 1.

⁶⁷ (1996) 30 O.R. (3d) 403.

although the courts have grasped the essence of the problem, they have dealt with it in an unsatisfactory manner because they have not been willing to grasp the logical conclusion — the recognition of a new cause of action. What has been achieved by legislation in the United Kingdom may nevertheless be reached by judicial initiative in Canada.