The need for a tort of harassment

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The current inadequacies of the traditional torts and legislation in dealing with harassment highlight the need for change.

Harassment is not a new concept in law. Whether there should be a tort of harassment has been argued for a long time. Although there is disagreement over the need for a tort of harassment, a number of factors indicate the Australian common law should adopt such a tort. These include:

- history and development of this tort in other countries,
- limitations of traditional torts,
- limitations of existing statutes, and
- harassment as a growing social problem.

Any analysis of a potential tort of harassment must include a definition of the term 'harassment'. In the ordinary sense, to harass means 'to disturb persistently; torment, as with troubles, cares, etc.', or 'to trouble and annoy continually or repeatedly'. In legal terms, harassment is more specific and can mean 'engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome'. More specifically the concept of harassment covers a wide range of activity including: unwanted sexual advances; attempts to persuade tenants to leave property; intrusive journalistic practices; molestation and other forms of assault and battery and annoying activities such as nuisance telephone calls. It presents circumstances similar to the related issue of the protection of privacy, and can be classified into sexual harassment, racial harassment, physical harassment, religious harassment, disability harassment, and general harassment.

In the United States, a common law of harassment has developed. The tort of harassment is defined there, in Second Restatement of Torts (1966), s.46, as the actions of 'one who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress'. There are three elements to the tort: the conduct must be extreme and outrageous; it must be intentional or reckless; and it must cause severe emotional distress or bodily harm.

History

Development in England

The tort of harassment under English law has undergone a century of struggling development. As early as in 1897 in Wilkinson v Downton [1897] 2 QB 57, liability was based on the principle that it is a tort to intentionally cause physical injury to a person irrespective of whether there is a technical assault or battery. In that case, the defendant falsely made a joke to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill. Wright J stated that wilfully doing an act calculated to cause physical harm is to infringe the plaintiff's legal right to personal safety. The act caused physical harm to her and was in law malicious, although there was no malicious purpose to cause the harm.
To create an actionable tort, a plaintiff was required to produce evidence of actual physical harm or impairment to health.

This decision was followed in 1919 by Janvier v Sweeney [1919] 2 KB 316. Here the defendant was a private detective at the time, and had previously been a Scotland Yard detective. He informed the plaintiff she had been in correspondence with a person who was a German spy. The aim of the informing was to terrify her and thereby get her to reveal private letters of her employer. The plaintiff claimed she suffered nervous shock as a result of being falsely informed. The evidence of resulting physical illness seemed clear. Duke LJ thought this case was stronger than Wilkinson on the intention point as there ‘the defendant merely intended to play a practical joke upon the plaintiff’, whereas in Janvier ‘there was an intention to terrify the plaintiff’.

Unfortunately, these two cases were exceptions. The tort of harassment had yet to be recognised under English law. In 1988, the English Court of Appeal declared in Patel v Patel [1988] 2 FLR 179 by Waterhouse J that ‘there is no tort of harassment’. It was there alleged the defendant had broken the terms of an injunction by harassment that took the form of approaching the plaintiff’s house and making nuisance telephone calls. Waterhouse J was clear the essence of the plaintiff’s complaint was that the defendant had conducted a campaign of repeated harassment but no injunction could be granted as no tort of harassment is recognised by English law. May LJ achieved the same result by means of a slightly more circumspect approach which was to the effect that no allegations of actual trespass had been made.

Because of the unwillingness of the English courts to recognise a tort of harassment, most cases classifiable as harassment were dealt with in alternative ways, for example through statute and actions in private nuisance. Despite this, a number of commentators have still urged the recognition of the tort of harassment by English law.

Things finally began to change in 1992. A differently constituted Court of Appeal in Burnett v George (1992) 1 FLR 525 made a distinct change. It seized on evidence to the effect that the plaintiff’s health had been affected by the defendant’s conduct (which involved molestation, unwanted visits and telephone calls) and held that if such conduct produces this kind of result, it is tortious and the authorities were to deal with harassment in today’s social climate.

Nonetheless, it seems to be the fate of the newborn tort of harassment that it may be difficult for it to grow up. The decision in Khorasandjian v Bush was overruled by House of Lords in 1997 in Hunter v Canary Wharf [1997] 2 All ER 426. There it was announced it was unnecessary to consider how the common law of harassment might have developed because the law of harassment has now been put on a statutory basis — under the Protection from Harassment Act 1997 (UK).

**Development in the United States**

The successful development of a tort of harassment is exemplified in the United States of America. In addition to the American definition of harassment quoted above and the existence of statutes, case law has developed for nearly a century. This development may be divided into three stages.

At the beginning the courts were concerned with the scope of unlawful harassment. In the 1903 case Reed v Malley (1903) 74 SW Ct App Kentucky 1079, the Kentucky Court of Appeal held damages should be awarded for distress falling short of actual physical injury. This reflected the court’s difficulty in affixing an appropriate sum to compensate for the distress resulting from harassment. This position was reinforced in 1961 by Samms v Eccles (1961) 358 P. 2d Sup Ct Utah 344.

The courts also took the attitude that the harassment must be sufficiently outrageous to be regarded as tortious. Samms v Eccles and Alcorn v Anbro Engineering Inc (1970) 468 P. 2d Sup Ct California 261 typify these cases. In Samms v Eccles, the defendant persistently telephoned the plaintiff in an effort to persuade her to have sexual relations with him. Some of the calls were made late at night and on one occasion the defendant came to her house to back up his proposal and, while there, indecently exposed himself. The court held the conduct was sufficiently outrageous to be actionable. In Alcorn v Anbro Engineering Inc, the gist of the complaint was the defendant had intentionally disparaged the plaintiff’s race in a rude, violent and insolent manner. The court accepted in the factual situation the insulting language used was capable of giving rise to a cause of action.

The second stage of development was recognition by courts that where the violation is intentional rather than negligent, proof of actual physical injury was not required. In State Rubbish Collectors Association v Siliznoff (1952) 240 P. 2d Sup Ct California 282, the complaint was of emotional distress caused by threats. While the plaintiff testified he vomited several times and had to stay away from work for a few days, the real issue of the complaint was the ongoing emotional distress. The court concluded that where the defendant’s conduct is deliberate and outrageous, there is no social utility in granting an exemption from liability based on an absence of sufficient damage.

The third stage of development of the American common law was the judicial ruling that the relevant conduct may be inferred as intentional or reckless from its very outrageousness. In the
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District Court of Columbia a case of Rogers v Loews L'Enfant Plaza Hotel (1981) 526 F.Supp. US District Ct Columbia 523, the defendant habitually made sexual advances to the plaintiff, the assistant manager of the hotel restaurant. He pressed notes and letters into her hand when she was busy, or slipped them inside menus or into her handbag. In addition he telephoned her at home and work and made sarcastic leering comments about her personal and sexual life. The court recognised that subjective intent to injure can rarely be proved directly, even where the facts are indeed outrageous. It held the very outrageousness of the conduct was sufficient to support a conclusion the defendant intended to harm the plaintiff. This maxim was followed and proved later in Howard University v Best (1984) 484 A. 2d Columbia Ct App 958.

Development in Australia

In Australia, there is no common law tort of harassment. Rather, complaints of sexual and racial harassment are undertaken under the relevant statutes: the Sex Discrimination Act 1984 (Cth) and Racial Discrimination Act 1975 (Cth) and their State equivalents. It is argued that this is inadequate to deal with harassment and further, that the traditional torts are also insufficient to deal with harassing conduct. Therefore, a tort of harassment must be developed in Australia. The successful development of tort of harassment in the United States lends support to the argument this tort should also have its place in Australian tort law.

Limitations of traditional torts

The courts have stretched established legal principles of traditional torts in order to find an effective remedy against harassment. However, an examination of these principles reveals certain limitations.

The tort of battery

A battery is any act of the defendant directly and either intentionally or negligently causing contact with the body of the plaintiff without the latter's consent. The tort of battery is aimed at protecting an individual's physical integrity and the most trivial physical contact may be actionable whether or not it causes actual bodily harm. The tort of battery is also aimed at protecting an individual's physical integrity and the most trivial physical contact may be actionable whether or not it causes actual bodily harm. The tort of battery since the plaintiff can sue for mere apprehension, anguish, shock and humiliation produced by a threat with or without physical contact. 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. Moreover, an action in assault could cover the circumstances the legislation does not cover. For example, in a sexual harassment situation, because assault incorporates conditional threats, it enables a woman to bring an action against an employer who threatens to molest her if she refuses to do him a favour outside the scope of her employment. In this circumstance, an action may be difficult to bring under the Sex Discrimination Act 1984, Division 3 — Sexual Harassment, as it appears the Act only applies to the workplace (see the discussion under 'Statutory approach vs harassment tort approach' on p.122).

The tort of assault

The tort of assault is not apt to cover many situations. It requires the victim to have been in fear of undesired physical contact. In many instances, proof the harasser intended, or foresaw, such fear may be problematic. Moreover, where the gist of the complaint is the unpleasantness or intolerability of the defendant's behaviour, there may be no expectation of actual physical contact. In this sense, words alone are unlikely to amount to assault, although repeated or prolonged.

The tort of private nuisance

The tort of private nuisance cannot deal with all harassment issues either as it focuses on the plaintiff's enjoyment of land. Thus a plaintiff must have some kind of proprietary interest in the land affected by the nuisance in order to bring a claim. The authorities in this area reveal considerable confusion as to the nature of the interest required. In many situations, the victims are unable to sue because of lack of title. This is particularly so in family situations. A Victorian case, Oldham v Lawson [1976] VR 654, provides a good example, where the plaintiffs, husband and wife, claimed damages for nuisance by noise from the adjoining house. In this case, the wife owned the house. In such an action, the first question was whether the plaintiff was competent to sue. Harris J ruled that where husband and wife reside in the same house, and it is the wife who is the owner, the husband is only a licensee and cannot sue in nuisance, in the absence of some particular circumstances which alter his status. Circumstances such as the payment of money due by the owner on the house and the payment of rates would be insufficient to alter that status. In English common law, the position is the same. Lord Goff reaffirmed the position of the House of Lords in Hunter v Canary Wharf [1997] 2 All E.R. 426:

If under the relevant legislation a spouse becomes entitled to possession of the matrimonial home or part of it, there is no

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reason why he or she should not be able to sue in private
nuisance in the ordinary way. But I do not see how a spouse who
has no interest in the matrimonial home has, simply by virtue of
his or her cohabiting in the matrimonial home with his or her
wife or husband whose freehold or leasehold property it is, a
right to sue. No distinction can sensibly be drawn between such
spouses and other cohabittees in the home, such as children, or
grandparents.

Consequently, the plaintiff in Khorasandjian’s case as a
daughter, and in a Canadian case Motherwell v Motherwell
(1976) 73 DLR (3d) 62, as a wife with no interest in the
property, would not be able to sue for harassment. Another
situation is that of unwanted persistent telephone calls to the
work place. If this tort is restricted to where the plaintiff has
an interest in land, many people who seek injunctions to
prevent harassment are unlikely to be able to bring a suit.

The tort of negligence

In contrast to the obstacle for a harassee to claim under the
tort of nuisance, the right to sue under the tort of negligence
extends to many situations which have nothing to do with the
ownership or occupation of property. Mere presence on the
land, in circumstances where a duty in law to those present
there is owed by the wrongdoer, is enough to enable the
victim to sue in negligence. In Jaensch v Coffey (1984) 155
CLR 549, a collision between the plaintiff’s husband’s
motorcycle with a car negligently driven by the defendant
caused a severe injury to her husband. That event, and the
subsequent critical condition of her husband resulted in her
severe anxiety, depression and gynaecological problems.
Although she had no proprietary interests in the accident
spot and the hospital where she saw her husband, she was
awarded damages on the grounds of negligence. Therefore
some commentators suggest reclassification of Wilkinson v
Downton, where the facts were similar, except that the wife’s
illness resulted from calculated misrepresentation, and
where the compensation was awarded under the ground of
fraud, would cover such claims under the tort of negligence.

The injuries for which damages were claimed in Wilkinson
v Downton and Janvier v Sweeney were described as nervous
shock. This term was used by Deane J in Jaensch v Coffey to
refer to recognisable psychiatric illness with or without
psychosomatic symptoms. This point was restated by Dillon
LJ in Khorasandjian v Bush. Although Khorasandjian’s
decision was overturned by the House of Lords in Hunter’s
case, this point was not overturned. In Australia, the position
is the same. In a High Court decision, Mount Isa Mines v
Pusey (1970) 125 CLR 383, Windeyer J stated severe
emotional distress can be the starting point of a lasting
disorder of mind or body, some form of psychoneurosis or a
psychosomatic illness. Further he emphasised it is in that
consequential sense the term ‘nervous shock’ has come into
the law (at 394).

The tort of negligence does not compensate for mere grief
or sorrow, which is no more than an immediate emotional
response to a distressing experience, no matter how severe it
is. Harassment more often occurs where the victim suffers
mere emotional distress or discomfort, which is
distinguished from recognisable and severe physical damage
to the human body caused by the impact, through the senses,
of external events on the mind (Khorasandjian v Bush at 676
per Dillon LJ). Consequently, some claims may not satisfy
the requirement of damage in the tort of negligence.

The conclusion from this brief evaluation of the
traditional torts is they do not adequately cover situations of
harassment. A tort of harassment is therefore required.

Statutory approach vs harassment tort approach

The legislative approach also has limitations. First,
legislation fails to protect personal integrity. For instance,
although the Sex Discrimination Act (Cth) was enacted in
1984, a 1996 survey showed only 31% of Australian women
bothered to report incidents of serious harassment.11 This
failure is partly blamed on the limitations of the Act itself.
While focusing on structural workplace discrimination, it
fails to deal adequately with harassment as a violation of
personal integrity analogous to, or indeed constituting an
assault or battery. It may thus fail to assuage the demands of
the victim that justice be meted out to the harasser. In
contrast, it is the common law that emphasises individual
rights and has the potential to supplement such insufficiency
in statute law.12

Another limitation with respect to statute law is the
location of harassment. Although s.9(1) of the Racial
Discrimination Act(Cth) widely extends its application to all
fields of public life by rendering ‘[i]t is unlawful . . . to do any
act involving a distinction . . . based on race, colour . . . which
has the purpose . . . of nullifying . . . the recognition . . . on an
equal footing, of any human right . . . in the political, economic,
social, cultural or any other field of public life’, the Sex
Discrimination Act (Cth) appears restricted to the
workplace. When reading s.28B, the main part of sexual
harassment, as a whole: s.28B(1)–(5) state unlawful sexual
harassment in different work-relationships, while s.28B(6)
stresses ‘at a place that is a workplace’. This assumption is
supported by the holding of Finn J in McManus v
Scott-Charlton (1996) 70 FCR 16 (at 27):

... notwithstanding such individual view . . . of the need to
proscribe an employee’s private, sexually harassing conduct of
a co-worker and no matter how powerfully that view may be
held, the Sex Discrimination Act alone does not provide
justification for the use of binding employment directions to the
end.

Although the issue in McManus was whether an
employer may exercise the power to stop an employee’s
sexual harassment conduct towards a co-employee outside
the workplace, the holding suggests that when outside the
workplace, the work-relationship is invalidated. Therefore,
arguably, his ruling that the Sex Discrimination Act ‘does not
provide justification for the use of binding employment
directions to the end’ implies s.28B(1)–(5) does not extend
outside the workplace.

A similar example can be seen in British statutes. The Sex
Discrimination Act 1975 (UK) the model on which
Australian jurisdictions have relied,13 and the Race Relations
Act 1976 (UK) focus on sexual and racial harassment in
the workplace. In other contexts, victims of such harassment
are left to the traditional torts, supplemented by the very
narrowly circumscribed offence of incitement to racial
hatred. Thus, legislation is unlikely to assist the victim of
racial harassment on the streets. Furthermore, trivial
offences are not actionable. Where behaviour is covered by
anti-discrimination legislation, the statutory requirement
that an action be to the victim’s ‘detrimen’ in effect provides
a threshold of seriousness. Thus, a Tribunal may conclude
that relatively trivial actions are not actionable. 14
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Another problem is delay. Two Australian sexual harassment cases, Hall v A. & A. Sheiban (1989) 85 ALR 503, and Bennett & Anor v Everitt & Anor (1988) EOC 192-244, took two and a half and three and a half years of mediation and conciliation respectively before being heard by the court. Not only did this waste public money, since these complaints are dealt with by government agencies, but it also frustrated the victims, resulting in impatience or the forgetting of important details. By comparison with the statute, the tort of harassment enables the victims to be represented by private solicitors, and to bring an action to the court without delay. Accordingly it should be more efficient.

Moreover, compensation for harassment under statute is lower than under the tort of harassment. In Britain, industrial tribunals, where sexual harassment cases are pursued under statute, have in the past been restricted by statutory limits on the total amount of compensation, which may have meant that adequate recompense for the degree of injury could not be provided. By the Unfair Dismissal (Increase of Compensation Limit) Order 1993, the maximum compensation in discrimination cases not also comprising unfair dismissal (where a basic award may in addition be payable) was set at £11,000, and there was no increase in 1994. The fact that compensation for sexual harassment has been towards the top end of the range under the Sex Discrimination Act 1975 (UK) only emphasises the relatively low level of compensation under that Act. In racial harassment cases, the situation is the same. Compensation for racial harassment is not higher than other awards under the Racial Relations Act 1976 (UK).

Furthermore, only complainants who have to quit their jobs obtain high compensation payouts. The strong emphasis in Industrial Tribunals on providing compensation for financial loss, and the consequent underplaying of the significance of non-pecuniary loss, means it is difficult to obtain high compensation without quitting a job which results in a loss of earnings. It is also clear successful claimants in harassment and other discrimination cases may experience consequential difficulties at work causing them to leave their work. From a legal perspective, the ideal is for victims to be in a position to obtain substantial compensation, while retaining their employment status. From a practical perspective, victims want the harassment to cease. Both of these scenarios are unlikely to be achieved by statute. The solution should be left to the common law.

Sexual and racial harassment are not the only factors which may cause people to be treated intolerably. Disability, appearance, religion and other personal or non-personal factors may lead to unpleasant treatment. These may occur both within and outside the workplace, so if the focus switches to a personal remedy against the harasser, the law should reflect a wider and more consistent approach. In this regard, a tort of harassment is desirable.

Another significant advantage of permitting victims of harassment to claim in the civil courts rather than before an industrial or other tribunal is that legal aid may be available. In contrast, when being heard in a tribunal under statute, victims usually have to represent themselves. The change of litigation in the United States illustrates the need to combine the statute and the tort of harassment. After the civil rights movement of the 1950s and early 1960s, Title VII of the Civil Rights Act (Title VII) was enacted in 1964, as anti-discrimination legislation. It appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, colour, religion, sex and national origin. This was before sexual harassment had been named and recognised. The courts created a cause of action for sexual harassment under the existing anti-discrimination legislation; for example in the case of Williams v Saxbe (1976) 413 F.Supp D.D.C. 654. In spite of this, Title VII applied only to businesses with at least 15 employees and exempted private clubs and religious organisations. Nevertheless, ‘women went into court armed with Title VII and argued it applied to cases of sexual harassment’. For example, in Barnes v Costle (1977) 367 F.2d D.C.Cir 983, the plaintiff, a woman employee, brought a sex discrimination claim under Title VII, alleging that her supervisor made unwanted sexual advances towards her.

Similar to Australia, under the Civil Rights Act 1964 (US), a condition precedent to litigation was that a claim under the statute must go to the Equal Employment Opportunity Commission (EEOC) first. A US complainant would wait the required 180 days, and receive a letter of ‘right to sue’ that allowed them to litigate. Not only was this seen as waste of time, but also the fact that the EEOC rarely took any action — the EEOC rejected 73% of the sex harassment cases for insufficient cause over six years prior to 1995 — would frustrate the social justice against the wrong doers.

Now, as result of the Civil Rights Act 1991 (US), the plaintiff not only may sue for sexual harassment, but also file common law causes of action for intentional torts or simultaneously a cause of action pursuant to a State human rights legislation, for example in Taylor v Central Pa. Drug & Alcohol Service Corp (1995) 890 M.D. Pa F.Supp. 360. Coupled with being quicker under the common law, the tort of harassment is still necessary as alternative or supplementary to statutory measures in the fight against harassment.

In Australia, the legislation is not sufficiently strong. Apart from the limitation to the workplace, and the scope of sexual and racial harassments as discussed above, a further major problem is weak enforcement provisions. For example, the Sex Discrimination Act is beset with compromise and consequently does not adequately empower the victim. Dearden points out: ‘... the Sex Discrimination Act ... was a classic example of a committee setting out to create a horse and ending up creating a camel’. By opting for mediation and conciliation, the message carried by legislation is essentially blunted. These solutions do not identify harassing conduct as unequivocally wrong. The plaintiff’s autonomy and interest in physical and mental integrity are not unequivocally affirmed. In addition, unnecessarily complex enforcement procedures further weaken the protection of victims. The procedure includes lodgement of a complaint in writing within 12 months of the act (Sex Discrimination Act s.52, (2)(c), Racial Discrimination Act, s.24 (2)(c), Human Rights and Equal Opportunity Commission Act, s.20(2)(c)(i); conciliation consisting of negotiations and conferences; Commission hearing; and then a Federal Court hearing. A successful tort action before the court would achieve this goal.

The suggested Australian tort of harassment

The tort of harassment in the US, defined in Second Restatement of Torts (1966) should be a model for an Australian tort of harassment. In this way the tort can apply to conduct outside the workplace and beyond the scope of
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sexual and racial harassment. Currently, sexual harassment is the most common claim. The branches of the tort of sexual harassment may be referred to as: a sexual advance, solicitation, or request or demand for sexual compliance is made, after the complainant has required the defendant to stop the behaviour.

Attention should be drawn to two qualifications. First, for the complainant to succeed they must not be able to leave without tangible hardship. In other words if the complainant can leave without trouble or difficulty they cannot found an action based on harassment. For example, if a person is about to undergo emergency surgery, it would be deadly to leave. Also, in the lawyer-client relationship, the difficulty of finding a new lawyer in the middle of a case might be a tangible hardship. Arguably this requirement may prevent a flood of claims. By the same token, in a sexual harassment claim, arguably the 'leaving without tangible hardship' test would provide protection to an innocent defendant. The second qualification is that the claimant has made a request to stop the behaviour. This means the first request or advance is never illegal, that is, any individual has a right to try and the claimant's perception should not be the sole factor to be considered.

With respect to racial harassment, the law should also recognise individual acts of racism to be torts in recognising that the indignity of racist insults can be compensated like any other personal injury. During the application of these torts, case law may modify the developing law to further suit the Australian social climate.

Disadvantages of a tort of harassment

This discussion has thus far suggested a tort of harassment is necessary in order to supplement statute law. Nonetheless, the potential disadvantages of having a tort of harassment must be addressed.

One practical problem is a plaintiff's sensitivity may be abnormal. When any remedy is decided in relation to emotional harm, there is always the argument the victim is abnormally sensitive. In Bunyan v Jordan (1937) 57 CLR 1, the plaintiff observed her intoxicated employer handling a loaded revolver and overheard he was going to shoot himself or someone. His statement was repeated to her by an employee, and she became nervous. Then the employer left and she heard a shot fired, but he returned unharmed. Later on he tore up pound notes in the plaintiff's presence and said he would not be there in the morning and a death would be reported. The plaintiff made a case supported by medical evidence that the defendant's conduct shocked her and caused her illness. The court held the injury was not such as might reasonably have been expected by the defendant to result from his conduct and she failed in the claim. Although the grounds of action included negligence and other factors rather than harassment, this case illustrates there is a danger that an apparently highly-strung individual might be denied recovery on the basis that severe emotional distress is unforeseeable.

An American case, Harris v Jones (1977) 380 A. 2d Ct App. Maryland 611, exemplifies such a danger in harassment claims. The defendant had maliciously laughed at the complainant's stutter. The court noted that outrage 'may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity'. This demonstrates the possibility that a claim may be defeated by the defendant's denial of any knowledge about such susceptibility. The more stoic plaintiff might fall on the ground no severe emotional distress has occurred, and even if they win, their compensation may be lower, based on the way in which they have come to terms with the events.

Another difficulty is that judges have to be sensitive to the offence a particular conduct or speech may cause to particular groups. Judicial education on these matters is crucial for the effective use of the tort of harassment.

Conclusion

The current inadequacies of the traditional torts and legislation in dealing with harassment highlight the need for a separate tort of harassment. In particular, the current Australian legislation covers only racial and sexual harassment, and the latter is limited to conduct in the workplace. Even if there was comprehensive harassment legislation, a common law tort of harassment should be established as an alternative and supplementary weapon to fight harassers. The existence of legislation to deal with racial and other vilification is recognised but while it may deal with some harassment issues it does not have the ambit of the suggested tort.

In addition, law is not static but reflects changes in society. Therefore, the law should not be fettered in established but outdated principles. It should adopt new ideas when dealing with new issues, and consequently redevelop itself. Such a development at common law would provide the basis for subsequent legislation, which must continue to mature in order to allow for a more sophisticated and nuanced understanding of, and remedy for, harassment. The fact that a tort of harassment has been successfully integrated into American law provides a pioneer model, indicating the expediency of instigating such a tort in Australia.

References

5. Townshend-Smith, R., ref 3, above, pp.313-23.
8. Townshend-Smith, R., ref. 3, above, p.311.
12. Townshend-Smith, R., ref. 3, above, p.301.

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