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Recovery in Tort for Workplace Sexual Harassment: Problems and Prospects

by

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The thesis takes as its starting point the question of whether workplace sexual harassment, apart from being recognized as a form of gender-based discrimination under Canadian human rights legislation, might also amount to a tort. The idea that sexual harassment might amount to a tort is neither new nor implausible, and yet to date, with one exception, no such tort has gained judicial recognition. The thesis does not seek to offer a comprehensive argument in favour of a new tort of sexual harassment, but rather to examine the obstacles that have been seen by courts and commentators as preventing such a development. Part II takes on the prevailing view of the judiciary that the existence of an independent enforcement mechanism under human rights legislation leaves courts without jurisdiction over matters of sexual harassment. Part III outlines the difficulties that current tort doctrine poses for plaintiffs who seek to pigeonhole their claims of sexual harassment into existing causes of action. These difficulties have led some commentators to conclude either that only with a new tort of sexual harassment will victims find adequate relief or that tort law is wholly inadequate to the task of redressing sexual harassment. Rather than abandon existing tort law as a potential approach to cases of sexual harassment, however, I go on, in Part IV, to “diagnose” the seeming inadequacy of existing doctrine. I argue that existing doctrine, along with prevailing social perceptions of sexual conduct invite—but do not compel—judicial failure to recognize sexual harassment as tortious behaviour. I conclude that the abandonment of existing tort doctrine urged by feminist commentators, either in favour of a new tort or some other legal regime, has been too hastily urged.
Many thanks to my supervisor, Professor Denise Réaume, and to my second reader, Professor Mayo Moran. Thanks also to friends Dennis and Lowri.

I dedicate this thesis to my parents.
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I. INTRODUCTION

The legal recognition and prohibition of sexual harassment is one of the most celebrated feminist accomplishments in the law.¹ The first studies of sexual harassment were conducted and published by feminist scholars.² Feminists named³ and conceptualized workplace sexual harassment variously as an expression of power,⁴ a form of sex discrimination,⁵ a result of male dominance in the capitalist workplace,⁶ a product of patriarchal myths,⁷ a dignitary injury,⁸ a technology of sexism,⁹ a tort,¹⁰ a crime,¹¹ and an occupational hazard.¹² More generally, the

¹ Susan Estrich has commented that “[t]he very existence of such a cause of action is a triumph for feminist scholars and practitioners, as well as for the victims of sexual harassment” in Estrich, “Sex at Work” in Representing Women: Law, Literature and Feminism (Duke U. P., 1994) at 192: Catharine MacKinnon has remarked that the legal recognition of sexual harassment represents “the first time in history ... that women have defined women’s injuries in law” in MacKinnon, Feminism Unmodified: Discourses on Life and Law (Camb.: Harv. U. P., 1987) at 105.


³ Elizabeth Schneider has noted that “[t]he experience of what is now called sexual harassment did not even have a name until feminist thinkers provided it with one” in Schneider, “The Dialectic of Rights and Politics: Perspectives from the Women’s Movement” (1986), 61 New York U. L. Rev. 589 at 642. Working Women United (WWU) is the first group known to have used the term “sexual harassment.” See Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (New York: McGraw-Hill, 1978).

⁴ Backhouse and Cohen, supra note 2.


⁷ L.J. Evans, supra note 2.


recognition of sexual harassment as a legal wrong can be seen as part of a broader feminist project: challenging the public/private distinction which has historically left incidents of women’s oppression beyond the reach of the law. With the legal recognition and prohibition of sexual harassment, harmful and oppressive conduct between individuals -- conduct that because of its “sexual” or “sex-based” nature was long regarded as a private matter -- comes its relocation in the public realm.

Concerned with the additional burden that sexual harassment places on the shoulders of working women, early feminist theory conceived the legal wrong to be one of gender-based discrimination. The notion that sexual harassment is a form of gender-based discrimination has been endorsed by American and Canadian courts, offering victims of sexual harassment the hitherto unavailable opportunity to seek legal redress for their injuries and losses. With the United States Supreme Court’s decision in *Meritor Savings Bank v. Vinson*, allegations of sexual harassment became actionable under Title VII of the American *Civil Rights Act of 1964*, while the Supreme Court of Canada’s decision in *Janzen v. Platy Enterprises* held that allegations of sexual harassment could be litigated under provincial and federal human rights legislation prohibiting discrimination in employment on the basis of sex. Human rights


11 Dine and Watt. *ibid*.


legislation in some Canadian jurisdictions, such as Ontario, now explicitly states that every employee has the right to be free from harassment on the basis of sex.  

This thesis takes as its starting point the question of whether workplace sexual harassment, apart from being recognized as a form of gender-based discrimination under human rights legislation, might also amount to a tort. There are a number of reasons why a victim of sexual harassment may choose to pursue a remedy in tort, in addition to or instead of, filing a complaint under human rights legislation. Time limitations under the legislation are less generous than those for tort actions. An action in tort also holds promise for a more sizeable award of damages compared to awards under the legislation which are subject to caps. Tort actions also afford the plaintiff a greater degree of control over the conduct of her complaint, whereas human rights commissions have exclusive carriage of complaints under the legislation. In addition to these practical concerns, a victim of sexual harassment may perceive the wrong she has suffered not to be one of gender-based discrimination but an invasion of her more basic, personal (i.e., non-gender specific) interests in bodily security, dignity and autonomy.

The idea that sexual harassment might amount to a tort is not new. In her 1979 work, The Sexual Harassment of Working Women: A Case of Sex Discrimination, Catharine MacKinnon

16 See, e.g., section 5(2) Ontario Human Rights Code.

17 While sexual harassment also occurs in areas other than the workplace and might also be suffered by men, this thesis focuses on the sexual harassment of women in employment.

18 See, e.g., section 34(1)(d) of the Ontario Code which gives the Commission discretion to dismiss any complaint based upon facts that occurred more than six months before the date on which the complaint was filed.

19 See, e.g., section 41(1)(b) of the Ontario Code which provides that monetary compensation for mental anguish must not exceed $10,000.

acknowledged the possibility of such a development. "Short of developing a new tort for sexual harassment as such," she argued, "tort is conceptually inadequate to the problem of sexual harassment." Other commentators have argued for the development of such a tort, motivated by what they perceive to be conceptual and practical shortcomings of the sex discrimination model proposed by MacKinnon and since accepted by American and Canadian courts. Several Canadian victims of sexual harassment have sought common law damages by asserting a tort of sexual harassment.

Nor is the idea that sexual harassment might amount to a tort implausible. It has been suggested that by permitting victims of sexual harassment to proceed with civil actions alleging existing torts, such as battery or the intentional infliction of mental distress, Canadian courts may have "given birth" to a tort of sexual harassment. Several Canadian decisions have predicted that "we may see the establishment of such a tort in the pantheon of law" and one court has held that sexual harassment is a tort.

As plausible as a common law tort of sexual harassment may seem, however, it remains the case that to date, with one exception, no such tort has gained judicial recognition. The

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21 Supra note 5 at 171.

22 Ellen Frankel-Paul, supra note 10; Schoenieder supra note 10; and Dine and Watt, supra note 10.


26 Lajoie, supra note 23 at para 40.
purpose of this thesis is, in part, to examine the obstacles that have been seen by courts as preventing the development of a common law tort of sexual harassment. The obstacle which has been the most frequent cause of common law claims for sexual harassment being dismissed outright is the Supreme Court of Canada's decision in Bhaduris v. Seneca College. In that case, the Court held that the existence of an independent enforcement mechanism within human rights legislation foreclosed the possibility of a civil action based upon a breach of the legislation or based upon the public policy given expression in that legislation. Where a plaintiff frames her civil action in terms of "sexual harassment" -- the very name given to a wrong cognized and remedied by human rights legislation -- most Canadian courts have, following Bhaduris, dismissed the claim on the grounds that the complaint falls within the exclusive jurisdiction of provincial and federal human rights tribunals. I will argue, however, that this objection to a tort of sexual harassment is based on both an overly broad interpretation of the Bhaduris decision and an overly narrow view of the common law jurisdiction of courts. Part II of the thesis is dedicated to this task and concludes that nothing in Bhaduris or the provisions of human rights legislation is inconsistent with the common law developing so as to recognize a tort of sexual harassment.

Once it is established that the existence of human rights legislation does not leave courts without jurisdiction to recognize a common law tort of sexual harassment, it falls to be considered whether such a development is both necessary and possible. Here we might turn to the arguments made by advocates for a tort of sexual harassment, the ratio decidend of the one court that has recognized such a tort and the obiter dicta of the handful of courts that have held that, were it not for Bhaduris, the common law might develop so as to recognize a tort of sexual harassment. It has been suggested that because of the prevalence of sexual harassment in the
workplace and its impact on its victims, including emotional, physical and economic harm, tort law ought to provide a means of redress.\textsuperscript{28} And, it has been suggested, because the current catalogue of intentional torts available at common law fails to adequately compensate victims of sexual harassment for these losses, a new tort is needed.\textsuperscript{29}

While sexual harassment is prevalent in today's workplace\textsuperscript{30} and does inflict physical, emotional and economic harm,\textsuperscript{31} these facts, in themselves, are not enough to warrant the development of a new cause of action. Personal relationship break-ups are also prevalent and cause similar suffering but tort law does not seek to mend broken hearts, even when maliciously caused. So while it is widely acknowledged that the law of torts is not static and that new causes of action in tort have come to be recognized by courts over the years, it is also the case that not all injurious behaviour gives rise to an action in tort nor does every injury warrant an award of damages. The onus is on the plaintiff who brings a novel claim in tort to establish that the defendant's putative wrongdoing and the losses she has allegedly suffered are of the sort that tort law regards as actionable and compensable. Just as those who sought a remedy under human rights legislation were required to establish that sexual harassment is a form of sex discrimination and so within the scope of wrongs redressable by the legislation, those who seek a

\textsuperscript{27} (1981), 124 D.L.R. (3d) 193.
\textsuperscript{28} Schoenheider, infra note 10; Chaychuk, supra note 23; and Lajoie, supra note 23.
\textsuperscript{29} Schoenheider, infra note 10.
\textsuperscript{31} See, e.g., MacKinnon, supra note 5 at 47-55; Eisaguirre, ibid. at 113-15; and Schoenheider, infra note 10 at 1463-67 for discussion of the harms and suffering reported by victims of sexual harassment.
remedy in tort must convince the court that sexual harassment falls within the scope of wrongs redressable by the law of tort.

Of course, this seems obvious: for sexual harassment to be recognized as a tort, it must be shown that sexual harassment is tortious. And yet to date, advocates for a tort of sexual harassment, I suggest, have failed to take on this task. Perhaps this is because it seems so daunting, if not impossible because it would seem to first require a theory of tortious wrongdoing which then might be seen as capturing sexual harassment. The idea that there exists a comprehensive theory of tort liability -- particularly when it comes to the domain of intentional torts many of which owe their existence to historical accident -- has repeatedly been rejected by commentators. And those that agree that tort law does give expression to some, unified fundamental principle disagree on what the principle might be.

But the absence of an agreed upon unifying principle of the wrongs it seeks to redress has not inhibited tort law from expanding so as to recognize new causes of action. Making the case for a common law tort of sexual harassment requires us to understand how such expansion occurs. For both those who deny the existence of a fundamental unifying principle of tort and those who have offered such principles, the answer is the same: new torts come to be recognized through the gradual extension of old ones. Professor Fridman offers the following account of the expansibility of tort law, using a metaphor derived from theories of evolution:


34 Goodhart, supra note 32; Williams, supra note 32; Cardozo, The Growth of the Law (New Haven, Yale U.P., 1924); and Winfield, ibid.
New forms of liability develop by a process involving the gradual alteration of existing species by subtle changes that do not entail sudden and dramatic novelty but lead to the eventual emergence of something that was not there in the beginning. This new legal creature resembles that from which it came: but it is not the same. Its origins can be deduced from its features and functions; yet it is something that is clearly distinct from its earlier avatar.\textsuperscript{35}

The point is that new torts are not seen as entirely new creations -- as Professor Winfield put it, there's no need for a "baptismal ceremony"\textsuperscript{36} for each newly recognized cause of action -- but rather as extensions of existing torts.

A more persuasive case for the development of a new tort of sexual harassment, then, would begin with an examination of existing torts and the ways in which existing doctrine might be gradually altered so as to bring instances of sexual harassment within their purview. While advocates for a tort of sexual harassment have considered the capacity of existing torts to provide relief for victims of sexual harassment, they have done so primarily with the aim of exposing the difficulties that plaintiffs who seek to pigeonhole their claims of sexual harassment into existing torts are likely to encounter.\textsuperscript{37} With current tort law proven to be inadequate, it is suggested either that tort law simply is not up to the task of remedying sexual harassment\textsuperscript{38} or that only with the introduction of a new tort will tort law afford adequate relief to victims of sexual harassment.\textsuperscript{39}

\textsuperscript{35} Fridman, \textit{supra} note 24 at 271.

\textsuperscript{36} Winfield, "The Foundation of Liability in Tort" \textit{supra} note 33 at 1.

\textsuperscript{37} See, \textit{e.g.}, Schoenheider, \textit{supra} note 10.


\textsuperscript{39} Schoenheider, \textit{supra} note 10 and MacKinnon, \textit{supra} note 5.
This is too hasty, for more than one reason. Here are four. First, attention has not been given to why it is that the current array of existing torts prove to be inadequate. Some of the problems identified by the commentators to date do not call for an amendment to tort doctrine at all. That is, it is not the doctrine that stands in the way of the recognition of sexual harassment as compensable under existing causes of action but a failure to appreciate the nature of sexual harassment. For example, what has been identified as a significant obstacle likely to be faced by victims of sexual harassment who bring an action for the intentional infliction of mental distress is the requirement that the defendant's conduct have been extreme and outrageous. The problem is that behaviour which in certain circumstances would amount to sexual harassment is often not in itself plainly outrageous. It is outrageous, however, when it is recognized as an abuse of authority and the imposition of unwanted sexual attention as a condition of employment. Thus, the difficulty lies not in the outrageousness requirement but in the failure of the judiciary to recognize that certain kinds of otherwise acceptable conduct can, in the context of the workplace, be outrageous. It is not a new tort, but rather judicial sensitivity to the nature of sexual harassment and the harms it causes that is needed to overcome this sort of difficulty.

Second, to conclude that only with a new tort of sexual harassment will its victims find adequate relief in the common law is not of much immediate assistance to the many women who, given the absence of such a tort, must pigeonhole their claims into existing torts if they are to secure common law damages for their losses and injuries. It seems that the more constructive thing to do is not only to identify the pitfalls but to offer means of negotiating them on tort law's own terms. Many of the difficulties that commentators to date have identified in existing tort doctrine relate to issues of motive and intention, "thin skulls" and overly sensitive plaintiffs, and the meaning of ambiguous acts -- all issues that have previously arisen in tort law. They are not unique to cases of sexual harassment. Why, then, assume, as it appears some commentators
have, that only with a specific tort of sexual harassment are such difficulties surmountable?
Commentators who have made this assumption, I suggest, have failed to fully tap the conceptual resources currently made available by existing tort doctrine.

The third reason is similar to the second. In identifying only the pitfalls likely to be encountered by victims of sexual harassment who bring actions under existing torts, there is a tendency to treat existing tort doctrine as immutable. Again, it seems to be more consistent with the ultimate aim of securing tort damages for victims of sexual harassment to offer arguments for the expansion and refinement of the elements of existing causes of action in a way which will bring into their purview the kinds of cases of sexual harassment which would seem to be unfairly excluded on current understandings and interpretations of the relevant doctrine. It is only by appreciating the history of tort doctrine that we can appreciate why it has taken the face that it has, and only against this background can we make a plausible case for its further development. For instance, it might be argued that the tort of defamation should be expanded so as to include damage to reputation resulting not only from a defendant’s words but also his actions. Or, it might be argued that courts ought to recognize economic coercion as analogous to the sort of physical restraint on the individual’s autonomy remedied by the tort of false imprisonment.

And finally, it is not the inadequacy of current tort law that justifies the development of a new tort of sexual harassment. Establishing the inadequacy of existing causes of action to remedy sexual harassment is equally compatible with the inference that sexual harassment falls outside the scope of wrongs remedied by tort law. Since new torts tend to develop out of existing ones, the more persuasive argument for the development of new tort involves an examination of the ways in which current tort law does, or at least can, provide relief for victims of sexual harassment. That some victims of sexual harassment will find a basis for recovery in current tort law is not disputed. Sexual harassment that involves an offensive physical touching
might amount to a battery. The harasser who falsely states that his victim’s employment has
been terminated for just cause, when in fact her dismissal was made in retaliation for her refusal
of his sexual advances might be found liable for defamation. A victim of extensive and vulgar
sexual harassment might recover for intentional infliction of mental distress. The judicial
recognition of these “easy” cases as actionable under current tort law offers more than the
immediate availability of redress to some victims of sexual harassment. It also offers promise to
other victims whose claims might not currently give rise to an action in tort. With the recognition
of some instances of sexual harassment as actionable under current causes of action comes the
possibility of the gradual extension of those causes of action to capture cases of sexual
harassment that bear some resemblance to those that have already been regarded as actionable. It
is just this sort of gradual extension through arguments by analogy that has been observed as
leading to the development of new causes of action in the common law.

It is with these concerns in mind that this thesis approaches the question of whether
sexual harassment might come to be recognized as independently actionable at common law.
My aim here is not to provide a comprehensive argument in favour of the recognition of a new
tort. Rather, I take the question of whether sexual harassment might amount to a tort as a starting
point. From there, I step back and ask whether such a development is possible, a question that
has not been adequately addressed by commentators to date.

The thesis can be understood as taking on the two main obstacles that would seem to
stand in the way of the development of a new tort. The first is the prevailing view that, in light of
the Supreme Court’s decision in Bhadouria, courts are without jurisdiction to recognize a tort of
sexual harassment. The second is the novelty of the claim. While mere novelty, in theory at
least, is not a bar to recovery in tort, it does raise a presumption that the claim falls outside the
province of tort law. The less novel the claim, the weaker the presumption. Showing up the inadequacies of current tort doctrine, as many commentators have done, only makes sexual harassment cases seem further removed from the sort of cases of concern to tort law. Unlike the several commentators who have advocated the abandonment of the existing array of causes of action in tort as a legal approach to sexual harassment, I propose that we revisit the potential of current tort doctrine. Since new torts have come to be recognized at common law through the gradual alteration and extension of existing torts, the potential for the eventual development of a new tort lies not in the inadequacy of tort doctrine but in its capacity to accommodate sexual harassment, a capacity which, I suggest, has yet to be fully tried.

The thesis proceeds as follows. In Part II, I examine the question of courts' jurisdiction to adjudicate claims of sexual harassment. Part III outlines the difficulties that current tort doctrine poses for victims of sexual harassment. Rather than conclude that the only way around the difficulties is to be found in the introduction of a new tort, I go on to consider what it is about current tort doctrine that seems to frustrate its application to sexual harassment cases. Part IV offers two “diagnoses” of tort law’s seeming inadequacy as a legal approach to sexual harassment. The first is Catharine MacKinnon’s diagnosis which traces the inadequacies to what she sees to be fundamental structural and substantive constraints within tort law itself. MacKinnon concludes that tort doctrine is fundamentally insufficient as a legal approach to sexual harassment. The second diagnosis is my own. Unlike MacKinnon, I trace the inadequacies not to some fundamental defect in tort doctrine but to various ways in which the doctrine might be said to invite -- but not compel -- failure to recognize sexual harassment as tortious behaviour. I conclude that the abandonment of existing tort doctrine urged by MacKinnon and other feminist commentators is too hasty. In the interests of both conceptual

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completeness and feminist legal strategy, I advocate a return to the question of tort law’s potential to redress workplace sexual harassment.
II. THE JURISDICTION QUESTION

In this section I will consider whether the existence of an independent enforcement mechanism established human rights legislation and under which claims of sexual harassment are adjudicated leaves courts without jurisdiction to recognize a tort of sexual harassment. Most courts have declined to dismiss on jurisdictional grounds actions brought by victims of sexual harassment alleging existing torts (e.g., assault, battery, defamation, intentional infliction of mental distress). Actions which allege a cause of action in tort for sexual harassment, however, are most often dismissed for want of jurisdiction. What this means in practice is that the prudent plaintiff will phrase her claim not in terms of “sexual harassment” but in terms of existing causes of action in the common law in order for her claim to survive the likely jurisdictional objections. The jurisdiction of courts to hear claims based on sexually harassing conduct thus becomes a simple matter of vocabulary. For ease of reference, I will call this approach to the question of jurisdiction “the pleadings approach.” On this approach, then, where a plaintiff pleads independently recognized causes of action, the claim falls within the court’s jurisdiction and where she pleads “sexual harassment,” her claim falls to be decided under human rights legislation. Thus, it would seem that courts are without jurisdiction to recognize a tort of sexual harassment.

The pleadings approach is shaped by two forces, seemingly pulling in opposite directions. On the one hand, the absence of an express legislative provision ousting the jurisdiction of courts over matters which might also form the basis of a complaint under the legislation seems to suggest that the legislation is not intended to encroach on the jurisdiction of courts. On the other hand, there is the Supreme Court of Canada’s decision in Bhadauria v. Seneca College which held that the existence of human rights legislation forecloses the possibility of a civil action
based upon a breach of the legislation or based upon the public policy given expression in that legislation. *Bhadauria* thus seems to oust the jurisdiction of the courts over claims which allege discriminatory or sexually harassing behaviour, such claims being governed by human rights legislation. A tort of sexual harassment is, on this view, regarded as redundant.

I will argue, however, that the pleadings approach is based on an overly broad interpretation of the *Bhadauria* decision. A closer look at *Bhadauria* suggests that the question of courts’ jurisdiction over common law actions alleging sexually harassing conduct requires courts to go behind the pleadings to examine the nature of the wrong alleged and the remedy sought. Only then will the court be in a position to assess whether the plaintiff’s claim is caught by *Bhadauria* so as to deny the court jurisdiction to entertain her claim. The inconsistency in the judicial treatment of common law claims based on alleged sexually harassing behaviour, and the integrity of the common law more generally, call for a re-examination of the jurisdiction of courts to hear such claims in the first place. More to the point of this thesis, such a re-examination of courts’ jurisdiction over such claims is required if it is to be established that the judicial recognition of a tort of sexual harassment is possible.

A. The Question

A victim of sexual harassment who seeks common law damages might phrase her claim in terms of recognized causes of action in tort, contract or equity, or by asserting an independent cause of action for sexual harassment *per se*, or both. It is not uncommon for a defendant to an

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41 *Supra* note 27.

42 By “going behind the pleadings,” I do not mean to suggest that court should assess the likelihood of the claim’s success. Such an inquiry is beyond the scope of a motion to dismiss: *Prete v. Ontario* (1993) 110 D.L.R. (4th) 94 (Ont. C.A.). I mean instead that the proper approach requires courts to look beyond the vocabulary used. Courts should ask not whether the cause of action is recognized but instead whether such a cause of action could be recognized: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.).
action which either implicitly or explicitly alleges sexual harassment to bring a motion to strike from the plaintiff's statement of claim any reference to sexual harassment or to dismiss the plaintiff's claim in its entirety on the grounds that matters of sexual harassment fall within the exclusive jurisdiction of human rights legislation. The question, then, is whether civil actions alleging sexually harassing behavior fall outside the jurisdiction of our courts.

B. Looking for an Answer

1. Interpreting the Legislation

The legislation itself does not expressly grant human rights commissions exclusive jurisdiction over matters falling within the scope of the legislation. In fact, legislation in some jurisdictions grants the commission discretion to dismiss or stay a complaint if the commission is of the opinion that the complainant has not exhausted other grievance or review procedures available to her, or if the complaint is one that could be more appropriately dealt with, in whole or part, in some other forum or fora. In the absence of an express provision granting human rights commissions exclusive jurisdiction over these matters, some courts have reasoned that the legislation is not intended to deprive courts of jurisdiction over common law actions based on facts which might also form the basis of a complaint under the legislation. While the court in Lajoie suggested that "it might be appropriate that the provisions of the [Manitoba Human Rights] Code should provide for exclusive jurisdiction," the court held that there being no such provision, the plaintiff's civil action for damages for sexual harassment was not beyond the jurisdiction of the court. And as the court noted in Lehman v. Davis, "[i]f the legislation was

43 In Ontario, such motions are brought under Rule 21.01(1)(b) of the Rules of Civil Procedure.

44 See, e.g., section 41 of the Canadian Human Rights Act and section 34 of the Ontario Code.

45 Supra note 23 at para. 24.
intended to limit the right to sue, it would have clearly so stated. Workmen’s [sic] legislation and auto insurance legislation are obvious examples of a legislative limit on the right to sue.46

The Lehman court also pointed to the fact that “courts have very broad jurisdiction,” and cautioned that “[b]efore declining to exercise such broad jurisdiction, there should be clear legislative intent that such jurisdiction is not to be exercised.”47 If human rights legislation were read as encroaching on this broad jurisdiction of courts, it would be quite an extensive encroachment indeed. The breadth of the potential encroachment is especially apparent in cases which allege sexually harassing conduct. Sexual harassment is broadly defined and includes, for example, threats of offensive contact (assault), unwanted touching (battery), intentionally emotionally distressing behaviour (intentional infliction of mental distress), disparaging comments on a woman’s character (defamation), and unilateral and fundamental alterations in the terms and conditions of a woman’s employment (constructive dismissal), all of which, in the words of LaForme J. in Kulyk v. Toronto Board of Education, “have historically been matters that members of the public could call upon our courts to adjudicate.”48

But of course, human rights legislation is not concerned with all instances of what might be described as sexual harassment, but only those occurring in certain settings, namely, employment, housing and rental accommodation, and sale of goods.49 That the legislation is limited to these contexts has been noted by courts in support of an interpretation of the legislation as not ousting the jurisdiction of courts, pointing to the potential anomalies to which a

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47 Ibid.
49 These are the protected areas under the Ontario Human Rights Code.
reading to the contrary would give rise. Consider the case of a woman sexually assaulted during the course of her employment.\textsuperscript{50} If human rights legislation is read as enjoying exclusive jurisdiction over matters of sexual harassment in employment, her only recourse is by way of a complaint under the legislation. To deny her the right to seek common law damages for her injuries and losses would be to deny her a right which, had the assault not occurred during the course of her employment, she would have otherwise enjoyed and thus potentially to leave much of her loss unremedied. As the \textit{Lehman} court commented, "[i]t is inconsistent with the object of the remedial legislation to use it as a shield against the person seeking redress for the very mischief to be remedied by the legislation."\textsuperscript{51}

2. \textit{Considering Bhadauria}

It is with these concerns in mind that most courts have interpreted the Supreme Court of Canada's decision in \textit{Bhadauria}, a decision which might be seen as reading into human rights legislation the kind of exclusive jurisdiction provision, the absence of which has been heavily relied upon by courts in deciding to exercise their jurisdiction in these cases. In \textit{Bhadauria}, the plaintiff alleged that the defendant had refused to hire or even consider her for a teaching position because of her race. She brought a civil action asserting that the defendant College had breached a common law duty not to discriminate against her on the grounds of her ethnic origin. She also contended that the Ontario \textit{Human Rights Code} provided for a civil action against those in violation of the \textit{Code}'s provisions. The trial judge dismissed the plaintiff's claim on jurisdictional grounds. According to Callaghan J. the existence of the Ontario \textit{Human Rights}

\textsuperscript{50} The court in \textit{Runte}, \textit{supra} note 25 considered this example at para. 10.

\textsuperscript{51} \textit{Supra} note 46 at 25.
Code and the comprehensive scheme of enforcement established by it, implied that the plaintiff’s claim must be read as disclosing no reasonable cause of action within the court’s jurisdiction.

According to the Court of Appeal, however, the existence of the Code implied something quite different for the plaintiff’s claim. The Court of Appeal reasoned that the Code’s commitment to eliminating and redressing discrimination on prohibited grounds is “evidence that it is public policy in the Province of Ontario that such rights [i.e., to be free from such discrimination] be legally protected.” In accordance with that public policy, the Court of Appeal proclaimed the existence of a common law tort of discrimination.

The Supreme Court overturned the Court of Appeal decision, explaining that while the Court of Appeal’s decision was to be “commended as an attempt to advance the common law,” such an advancement was foreclosed by the existence of the Ontario Human Rights Code. More precisely, the Court explained, the Code forecloses “any civil action based directly upon a breach thereof” and excludes “any common law action based on an invocation of the public policy expressed in the Code.” Bhadauria’s claim that the College had violated her right to be free from discrimination, a right coincident with the public policy of the Human Rights Code, was thus beyond the jurisdiction of courts and fell to be decided under the “the procedures for vindication of the public policy” established by the Code.

Had Bhadauria’s claim not rested entirely on an alleged breach of the Code and a novel tort of discrimination whose introduction was argued to be justified in light of the public policy expressed by the Code, the Supreme Court might have decided differently. For that reason,


53 Supra note 27 at 203.

courts have distinguished Bhadauria in cases where the plaintiff's claim is based on facts which might also form the basis of a complaint under human rights legislation but the claim asserts independent causes of action known to the common law. So, for instance, in McKinley v. B.C. Tel,\textsuperscript{55} even though the plaintiff alleged that he had been discriminated against by the defendant employer, his claim was based on breach of the employment contract. Drost J. denied the defendant's motion to dismiss the claim on jurisdictional grounds, explaining that the fact that the employer's conduct might also amount to a breach of the Canadian Human Rights Act was incidental to the issue of breach of the employment contract. Bhadauria, Drost J. explained, "only decided that discrimination as defined in the relevant human rights legislation does not, by itself, provide the basis for a civil cause of action." It did not "oust the jurisdiction of this Court to try an action for damages based on an independent tort or breach of contract."

The same reasoning has been applied in cases involving common law actions based on alleged sexually harassing behaviour. While courts have uniformly allowed actions for breach of contract based on alleged sexual harassment to proceed,\textsuperscript{57} the treatment of actions based on tort law has been less consistent.\textsuperscript{58} Most courts, however, when faced with actions that allege


\textsuperscript{56} Ibid. at para. 50.


\textsuperscript{58} In Nicholas v. Mullin, [1998] N.B.J. No. 123 (N.B. Ct. Q.B.), the plaintiff alleged that she had been sexually harassed during the course of her employment and brought an action for damages for, \textit{inter alia}, negligence, breach of fiduciary duty, assault, battery and deceit. The court relied on the decision in Bhadauria to dismiss the plaintiff's claim on jurisdictional grounds. The court explained that a "close examination of the specific allegations" revealed the plaintiff's claims "speak directly to the question of sexual harassment." The court acknowledged that the plaintiff's allegations of assault and battery could amount to tortious wrongdoings, but noted that the allegations also "fall within the meaning of sexually harass in the Human Rights Act." The Nicholas decision was followed in Seaton v. Autocars North (1983) Inc. (c.o.b. North Toronto Mazda), [2000] O.J. No. 1691 (Ont. S.C.J.). Bhadauria was also relied upon by the court in Kirk v. Prairie Bible Institute, [1995] A.J. No. 751 (Alta. Ct. Q.B.), to dismiss the
recognized torts (most commonly, assault, battery and infliction of mental distress) based on
sexually harassing conduct, have distinguished Bhadauria and allowed the action to proceed.59

Distinguishing Bhadauria in cases where the plaintiff asserts independently recognized
common law causes of action is easy. Where the plaintiff need not invoke the public policy of
human rights legislation or allege a violation of that legislation to ground her claim, Bhadauria
clearly does not apply. That the plaintiff has phrased her claim in terms of intentional torts,
negligence, wrongful dismissal or breach of fiduciary duty makes it plain that her claim is based
on her entitlements in, and to be decided on the principles given expression by, private law.
Distinguishing Bhadauria in cases where the plaintiff frames her claim in terms of “sexual
harassment” -- the very name given to a wrong cognized and remedied by human rights
legislation -- is not so easy.

Indeed, most courts faced with claims seeking common law damages based on a tort of
sexual harassment have held Bhadauria to be on point, leaving the court without jurisdiction to
decide the claim. For instance, in Chaychuk, the British Columbia Supreme Court dismissed the
plaintiff's action for sexual harassment. While the court noted that sexual harassment could in
theory give rise to tort liability, the decision in Bhadauria made it clear that “the law is that the
British Columbia Human Rights Act is comprehensive and exclusive, and excludes any parallel
scheme of enforcement at common law.”60 Similarly, in Chapman, the court allowed the motion
plaintiff's action for negligence and breach of fiduciary duty based on alleged sexual harassment by a co-
employee.

59 Sargeant, supra note 57 (negligence and breach of privacy); Cohen, supra note 25 (intentional
(B.C.S.C.) (assault). The exceptions are Nicholas, ibid. (assault, battery and deceit); Seaton, ibid.
(defamation) and Kirk, ibid. (negligence).

60 Supra note 23 at para 235.
brought by the defendant requesting that those portions of the plaintiff’s claim referring to "sexual harassment" and "discrimination on the basis of sex" be struck, explaining that "[t]he reasoning and rationale of Bhadauria must be applied ... with the result that the plaintiff’s pleading with respect to sexual harassment and discrimination on the basis of sex does not disclose a civil cause of action which can be pursued in this court." 61

C. The Pleadings Approach

We’ve seen that with few exceptions, the question of courts’ jurisdiction over cases which allege sexually harassing conduct seems to turn on a review of the particular causes of action pleaded by the plaintiff in her statement of claim. Pleadings which allege independently recognized causes of action in tort or contract, even though based on facts which might also fall within the definition of sexual harassment under human rights legislation, are most often found to be within the jurisdiction of the court. Pleadings which assert a tort of sexual harassment, however, will most likely be dismissed as disclosing no reasonable cause of action within the court’s jurisdiction. The pleadings approach appears to strike a balance between, on the one hand, the absence of an express provision in the legislation ousting the jurisdiction of courts over such matters and on the other, the Bhadauria decision which held that the legislation should be read as denying courts jurisdiction to hear certain claims.

Even though at one point in the Bhadauria decision, Laskin C.J.C. stated that the Ontario Human Rights Code “overtook the existing common law in Ontario,” 62 courts have not read Bhadauria as denying them jurisdiction to decide common law claims which assert existing causes of action, even where the pleadings rely on facts which might also form the basis of a

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61 Supra note 23 at para. 47. See also Allen, supra note 23 and Townsend, supra note 23.

62 Supra note 27 at 203.
complaint under human rights legislation. The decision in Bhadauria has been almost consistently interpreted as applying only against the assertion of those causes of action not already recognized by the common law. This reading of Bhadauria seems more in keeping with the legislation itself which does not expressly state that a complainant may not seek relief, including common law damages, in other fora. And, as noted above, this reading respects the broad jurisdiction of courts. As also noted above, to read Bhadauria as denying courts jurisdiction to decide common law claims based on existing causes of action would limit, not add to, the legal rights of victims of sexual harassment. That is, to interpret Bhadauria as having declared human rights legislation to have overtaken the existing common law would mean that a victim of workplace sexual harassment which includes, for example, a trespass to her person, a breach of the terms of the employment contract, or a breach of a fiduciary duty owed to her, would be denied the right to seek common law damages, a right she would have enjoyed had the harassment not occurred in the workplace. Thus, what I have called the pleadings approach, insofar as it holds existing common law actions, even though based on facts which might also give rise a complaint under human rights legislation, to properly fall within the jurisdiction of the courts, is sound.

But the pleadings approach, by disconnecting outright any claim for sexual harassment per se as outside the jurisdiction of the court, fails to consider whether the action, despite the language of the claim, is nonetheless grounded in existing causes of action. The test to be applied on a motion to dismiss is not whether the plaintiff has pleaded an existing cause of action but whether, if the facts as plead are taken as true, the claim discloses a reasonable cause of

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63 See also Canada Trust Co. v. Ontario (O.H.R.C.) (1990) 69 D.L.R. (4th) 321 where the Ontario Court of Appeal ruled that Bhadauria was without prejudice to the long recognized equitable jurisdiction of Ontario courts to invalidate or vary the terms of charitable trusts.
The pleadings approach, however, assumes that a claim which alleges only sexual harassment is based on the provisions and public policy of human rights legislation and not the assertion of rights already recognized by the common law.

The pleadings approach also takes an overly narrow view of the jurisdiction of courts and in so doing, threatens to stifle the development of the common law from developing to recognize a new tort of sexual harassment. As long as courts continue to rely on Bhadauria to find conduct described as "sexual harassment" to be beyond the reach of the common law (unless it can be and has been redescribed as some other legally recognized wrong), however, the common law will be hampered from developing so as to possibly recognize a tort of sexual harassment.

Such a development in the common law is not necessarily foreclosed by Bhadauria. While the effect of the Supreme Court's ruling was to deny Bhadauria the right to seek common law damages based on the alleged tort of discrimination, the Court did not completely close the courtroom door to victims, who might have a complaint under human rights legislation, alleging such novel claims. It was not because of the novelty of Bhadauria's claim that the Supreme Court found the matter to be beyond the court's jurisdiction, but because her claim was based directly and exclusively on the Ontario Human Rights Code and the public policy to which it gives expression. Given that her claim was grounded entirely on the provisions and policy of the Code, the Supreme Court was of the opinion that her complaint ought to be decided under the investigation, adjudication and enforcement scheme created by the Code. The category of

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65 This can be traced to what might be seen as a more fundamental shortcoming of the common law, particularly when it comes to intentional torts. Since in intentional torts there is no general theory of liability analogous to the "neighbour principle" in negligence actions, plaintiffs who allege intentional wrongdoing must pigeonhole their claims into a recognized cause of action.
claims that the Court declared to fall within the jurisdiction of human rights legislation were those civil claims based directly upon a breach of the legislation (as Bhaduria's was) and those common law actions based exclusively on an invocation of the public policy expressed by the legislation (such as the tort of discrimination as alleged by Bhaduria).

The question, then, that Bhaduria requires courts to answer in deciding whether to exercise their jurisdiction is, regardless of how it is phrased, whether the plaintiff's claim is based exclusively on an alleged breach of human rights legislation or the public policy expressed in that legislation. Only if the plaintiff's claim is grounded exclusively in those provisions or policy, is her claim caught by Bhaduria so as to fall outside the jurisdiction of the court. In Campbell-Fowler, one of the few cases to depart from the pleadings approach, the court noted the possibility that the plaintiff's claim, which alleged only sexual harassment, could fall within the jurisdiction of the court if it "is outside of the rights intended to be protected by the [Alberta] Individual's Rights Protection Act." An appropriate starting point to the question of courts' jurisdiction in these cases is thus an examination of the rights protected by human rights legislation. If the plaintiff's claim asserts rights other than those protected by the legislation, Bhaduria should not operate so as to deny the court jurisdiction. So let's take a look at those rights.

D. Sexual Harassment under Human Rights Legislation

I will not here attempt to define precisely what rights of sexual harassment victims are protected by human rights legislation. My more modest aim is to suggest that the provisions and the public policy of the legislation do not capture all instances of sexual harassment, nor do they exhaust the entitlements to which a victim of sexual harassment may lay claim. As such, there is
reason to suspect that given these limitations of the provisions and public policy of the legislation, Bhadauria ought not be read as necessarily ousting the jurisdiction of courts over matters of sexual harassment.

If it was the public policy of human rights legislation to extend to all individuals a right to be free from sexually harassing conduct and to aim to fully compensate victims of such conduct for their injuries and losses, it's hard to see how a common law claim for sexual harassment would not also fall within that public policy and so be caught by Bhadauria. But human rights legislation confers a much more precise and limited right than that. The legislation conceives of the wrong of sexual harassment to consist in the violation of a specific interest and so extends its protection to only to those circumstances where that particular interest is at stake. The procedural mechanisms through which alleged violations of that right are adjudicated and the way established violations are remedied also shape the contours of that right. A closer look at when and why sexual harassment is prohibited by human rights legislation and how the legislation remedies sexual harassment provides us with a better idea of what rights are intended to be protected by the legislation.

1. The Wrong

In O'Malley v. Simpson-Sears Ltd., the Supreme Court of Canada stated that the aim of human rights legislation is the “removal of discrimination” and to “provide relief for the victims of discrimination.” Sexual harassment is understood as a form of sex discrimination insofar as

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66 Supra note 25 at para. 13.

67 (1986), 64 N.R. 161 (S.C.C.) at 328-29. The legislation has what might be called a “distributive” function: providing for certain legal entitlements which flow by virtue of membership in the community. It also has what might be called a “corrective” function: redressing discriminatory acts and practices which stand as barriers to an individual’s equality of opportunity and undermine the individual’s sense of dignity and self-worth. Of course, the distributive and corrective functions are inextricably intertwined:
it represents "the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work place and all of its benefits, free from extraneous pressure having to do with the mere fact that she is a woman."68 In Janzen v. Platy Enterprises, the Supreme Court of Canada reviewed a number of definitions of sexual harassment and concluded that what is "common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands."69 The Court went on to suggest that "[t]he main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included the denial of concrete employment rewards for refusing to participate in sexual activity."70 Sexual harassment, as a "practice or attitude which has the effect of limiting conditions of employment, or the employment opportunities available to, employees on the basis of a characteristic related to gender,"71 the Court explained, is a form of sex discrimination in the workplace and as such, is of concern to human rights legislation.

the distributive goals explain why corrective action is required in particular cases, and the corrective action goes some way to giving concrete expression to and fulfilling the distributive goals. So understood, human rights legislation is concerned with a kind of public wrong -- one which disrupts what the legislation sees as the just distribution of rights -- and a private wrong -- one which denies an individual her entitlements under that distribution. I will not consider whether the primary goal of human rights legislation is one of distributive or corrective justice, except to note that the public nature of the wrong seems to take precedence over the private nature of the wrong. See infra at 31ff.


69 Supra note 15 at 373.

70 Ibid. at 375.

In order to understand the rights protected by human rights legislation, it is important to get clear on why exactly workplace sexual harassment is actionable under the legislation. The legislation sets out basic rights to equal treatment in the provision of services, goods and facilities, in what I will call “protected areas”: accommodation, employment, membership in a occupational association, and in the right to form contracts. And within these specified areas, the legislation provides for the right to equal treatment without discrimination on the basis of what I will refer to as “protected grounds”: race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, age, marital status, family status, handicap, sexual orientation and pregnancy. So human rights legislation is not concerned with all instances of sex discrimination, but only those that have the effect of limiting the victim’s access to and equal treatment in employment and other protected areas. (My refusal to invite you to my party because of your gender is not of concern to human rights legislation.) Conversely, not all denials of access to and equal treatment in employment and other protected areas are of concern to human rights legislation. (My refusal to hire you because of your taste in clothing does not attract the sanctions under the legislation)

What does make sexual harassment a matter of concern to human rights legislation is that the victim has suffered the harassment because of her gender and that the harassment has the effect of interfering with her access to, and equal treatment, in employment or another protected area. So the right protected by the legislation is much more precise than a right to be free from sexual harassment. It is the right to be free from harassment on the basis of a protected ground where that harassment, by design or effect, denies the victim equal treatment in a protected area.

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72 See, e.g., ss. 1 through 9 of the Ontario Code.

73 ibid. Grounds of prohibited discrimination vary slightly among Canadian jurisdictions. Those grounds enumerated in the Ontario Code are typical of those protected in other jurisdictions.
Now let's return to consider Bhadauria and the jurisdiction of courts to recognize a tort of sexual harassment. Bhadauria requires courts to ask whether the plaintiff's claim is based on an alleged breach of the provisions, or an invocation of the public policy, of the legislation. When sexual harassment under human rights legislation is understood as a form of sex discrimination which interferes with the plaintiff's access to and equal treatment in employment and other protected areas, the category of cases which Bhadauria declares to be outside the jurisdiction of courts is brought into sharper relief. Only those claims which assert a right to be free from discrimination on the basis of sex and a denial of access to or unequal treatment in employment or other protected areas are clearly caught by Bhadauria.

That the wrong of workplace sexual harassment is grounded, in part, in the victim's gender has led some commentators to describe sexual harassment as a "gendered wrong." That the wrong of workplace sexual harassment is grounded, in part, in the victim's employment interests has led others to characterize it as an issue of employment standards. But the wrong of sexual harassment can also be seen as being grounded in the victim's interest in bodily, emotional and dignitary integrity. That is, sexual harassment is wrong not only because it fails to treat women as equals in the workplace but because it violates interests that the victim enjoys which are not dependent on her status as a woman or as an employee. As such, it would seem that a common law claim for damages for sexual harassment which asserted such non-gender specific and non-employment status-specific rights -- rights currently protected by torts such as assault, battery and intentional infliction of mental distress -- would fall outside the public policy of the legislation and so not necessarily fall outside the jurisdiction of courts.


75 Faraday, supra note 12.
It is arguable, however, that it is the recognition of these non-gender specific and non-employment status-specific interests that forms the very foundation of human rights legislation in the first place. The Preamble of the Code, after all, does speak of "the inherent dignity and equal and inalienable rights of the human family" and provides that "it is public policy in Ontario to recognize the dignity and worth of every person." Discriminatory practices and attitudes are wrongful precisely because they fail to recognize the interests in physical, emotional and dignitary interests that follow from personhood. And so, the argument might go, by providing a mechanism for adjudicating and remediating complaints of discriminatory conduct, human rights legislation necessarily protects and remedies invasions of those basic human entitlements, entitlements which are not dependent in any way on the victim's gender or employment status.

That having been said, however, invasions of those interests in physical, emotional and dignitary security which the victim enjoys by virtue of personhood, are not in fact protected and remedied under human rights legislation in the same way that such interests are protected by the common law. A closer look at the enforcement scheme and the remedies provided for by the legislation reveals that invasions of these more basic interests often do go unregistered under the legislation, and perhaps more importantly from the victim's perspective, the emotional stress and mental suffering that such invasions can cause often go undercompensated, and sometimes are left not remedied at all.

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76 Preamble, para 1.

77 It seems unlikely the proper characterization of the public policy of the legislation for the purposes of Bhadouria is the recognition of the inherent worth and dignity of all persons. Such a broadly defined public policy could be seen as capturing much of tort and criminal law.
2. Procedure & Remedies

In some respects, proceedings and remedies under human rights legislation resemble proceedings and sentences in the criminal law. Human rights commissions, like the Crown, play an initial gate-keeping function in deciding which complaints proceed to a hearing. Human rights commissions, also like the Crown in criminal matters, have exclusive carriage of the proceedings thereafter. At least in terms of procedure, then, human rights legislation differs from tort law, where the plaintiff enjoys greater control over her claim. In tort law, the plaintiff is free to choose what facts are brought before the courts, what expert evidence is presented and what legal theory of tortious wrongdoing constitutes her case. She can choose her own counsel and, if her claim is successful, she can claim legal costs.

This resemblance to proceedings under criminal law might suggest that the wrong to be remedied by the legislation is at least in part a public wrong. Given the similarities between criminal proceedings and human rights proceedings, and the public nature of the wrongs which each seeks to protect, it might be the case that human rights legislation, like the criminal law, is less concerned with compensating victims than it is with deterring or punishing wrongdoers. It is generally accepted that the legislation is concerned with both compensating victims and deterring

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78 See Feldthun, supra note 20.

79 Legal costs are not available under the Ontario Code: Drummond v. Tempo Paint and Varnish Co. (No. 5) (1998), 33 C.H.R.R. D/175 (Ont. Bd. Inq.).

80 The Board of Inquiry in Amber v. Leder (1970, Ont. Bd. Inq., unreported) made this observation: “It follows clearly, therefore, that complaints of discrimination are not matters merely between two parties - the complainant and the respondent - but a matter concerning the public. An action of discrimination does not give rise merely to a new private claim for compensation - it amounts to a public wrong.”
The question is whether the deterrence function of the legislation qualifies, or overrides, its remedial function. Where attention is paid to the deterrence and punishing of wrongdoers, there is the threat that the victim’s losses and injuries may be undercompensated. A look at the ways in which remedies are fashioned under the legislation, I think, confirms this hunch.

My hunch would seem to be disconfirmed by the consistent characterization of human rights legislation by courts and tribunals as “remedial” legislation. The Supreme Court of Canada, in Robichaud, declared that “[t]he central purpose of a Human Rights Act is remedial.” And several courts and tribunals have held that compensation under the legislation is meant to “restore the complainant to the position he or she would have been in had the discriminatory act not occurred.” But we can see from the way tribunals have treated claims for emotional anguish and mental suffering -- which are often among the consequences suffered by victims of sexual harassment -- that the legislation does not have as its principal aim the restoration of the victim to the position she would have enjoyed had the harassment not occurred.

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81 Aggarwal writes: “Human rights statutes are aimed at providing relief to the complainant on the one hand and eradicating the problem of sex discrimination on the other hand by way of educating the public, particularly the employers.” Aggarwal, Sexual Harassment in the Workplace (Toronto: Butterworths, 1992) at 103. In Hendry v. Ontario Liquor Control Board (1980), 1 C.H.R.R. D/160, the Board awarded a victim of workplace sexual harassment $8,000 as general compensation to “both make it clearly to Ms. Hendry that her unfair treatment is recognized by this Board and to the L.C.B.O. that it must take very seriously the harm done by failure to abide by the Code.” (at D/166)


Several features of the manner in which remedies are fashioned under the legislation suggest that the legislation's deterrent and punitive function take precedence over its compensatory function.

First, the legislation sets out a maximum amount that a Board of Inquiry may award to a successful complainant for mental anguish.\(^\text{84}\) That damages for emotional suffering are capped in this way is inconsistent with the goal of fully compensating the suffering. (The victim whose suffering would otherwise entitle her to an award beyond that established by the maximum will not be fully compensated.) Second, an award for mental suffering and anguish can only be made under the Ontario legislation where the violation of the Code has been wilful or reckless.\(^\text{85}\) Thus, the victim's entitlement to compensation for mental suffering and anguish is based not on her having suffered a loss for which she is entitled to compensation, but on the blameworthiness of the perpetrator's conduct.

Finally, once it is found that the blameworthiness of the perpetrator's conduct warrants an award for mental suffering, the amount of that award is then based not on the nature or extent of the victim's suffering, but on the severity of the harassment. The list of factors\(^\text{86}\) to be considered by Boards in assessing mental anguish awards in sexual harassment cases focuses almost exclusively on the nature and severity of the harassment. Whether the harassment was verbal or physical, whether the harassment was aggressive, whether there was physical contact, and whether the harassment was enduring and frequent, are questions considered by Boards in

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\(^\text{84}\) Section 41(1) of the Ontario Code states that the Board of Inquiry may "direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000 for mental anguish.


\(^\text{86}\) These come from Torres v. Royalty Hardware Ltd (1982), 3 C.H.R.R. D/858.
making assessments of mental anguish awards. In the end, the amount of an award for mental anguish turns on where the nature and severity of the harassment suffered by the victim stands in comparison to harassment suffered by other victims. This approach to establishing awards for mental anguish can be seen in Wall v. University of Waterloo, where the Board relied upon the approach to the assessment of an award for mental suffering established in Hall v. Sonap Canada, commenting that:

In order to come up with a justifiable amount it was decided that one must keep in mind the whole range of offences that might be covered by this section of the Code. When $10,000 represents the upper limit the law provides for mental anguish, the actions in Hall were considered to fall at the lower end of the scale.

The Chair of the Board in Wall went on to conclude:

In summation, I find the infringement in this case to be towards the lower end of the scale. While there is reliable evidence that there were psychological and physical effects, the harassment was not frequent nor aggressive in nature.

The Board considered not "the reliable evidence" of the victim's psychological and physical injuries, but the severity of the harassment in assessing the quantum of the award.

Note that where the conduct includes or resembles tortious wrongdoing, a more generous award is would seem to be justified. But given that, in the end, the quantum seems to be determined based on a comparison with other harassment, it can't hardly be said that what the Board is doing is remedying the effects of tortious wrongdoing. Instead, it seems to be punishing tortious wrongdoing.


Ibid. at D/68.

Ibid.

We can see the same approach in other cases. In Reed v. Cattolica Investments Ltd. (March 26, 1996) No. 96-007 (Ont. Bd. Inq.) the Board explained that damage awards for sexual harassment should reflect the seriousness of the conduct and injury caused as well as the nature of the relationship between the respondent and the complainant. In McPherson v. "Mary's Donuts" (1982) 3 C.H.R.R. D/961, the Board stated that where the harassment is flagrant, the damage award should reflect it. And in Hughes v. Dollar
These features of awards for mental anguish under human rights legislation make such awards seem more like punitive measures -- indeed, several Boards have held that the availability of an award for mental anguish under the legislation precludes an award of punitive damages. That the legislation establishes a cap on mental anguish awards suggests that those awards behave like punitive damages; the caps are to some extent more like maximum sentences than limits on compensation. Similarly, that mental anguish awards are only made where the perpetrator's conduct has a degree of subjective fault and that the amount of the award is measured by assessing the severity, in terms of frequency and aggressiveness, of the conduct suggests that what the remedy registers is the wrongfulness of the conduct, not the degree of harm it causes.

What this suggests is that it cannot be said that the public policy of the legislation -- if that public policy is to be gleaned from the administration of the legislation -- requires the full compensation of losses and injuries suffered by victims of sexual harassment. Even if we might think of the legislation as being grounded in the recognition of the inherent worth and dignity of the individual, compensation for invasions of those interests, it would seem, does not fall within the public policy of the legislation. This doesn't mean that the legislation undercompensates for the invasion of those interests; it suggests, rather, that it does something else. We might say

\[\text{Snack Bar} \ (1981) \ 3 \text{C.H.R.R. D/1014} \text{ it was held that a larger award is justified where the harassment is ongoing. In a case of sexual harassment involving physical contact, a sizeable award is more appropriate as each such contact constitutes a trespass to the person. In this case, the fact that the complainant was a minor was also a factor in determining the size of the award.} \]

\[\text{See, e.g., Olarte v. Commodore Business Machines} \ (1983), 4 \text{C.H.R.R. D/1705; Dudnik, supra note 85; and Lampman v. Photo Flair Ltd.} \ (1992), 18 \text{C.H.R.R. D/196.} \]

\[\text{Boards have characterized the "human rights of equality of opportunity of employment" as being independent of the actual monetary or personal losses suffered by the complainant and has having "intrinsic value." The loss of the right to equality of opportunity in employment is "an independent injury suffered by the complainant: Cameron v. Nel-Gor Nursing Home, supra note 82 and Henwood v. Gerry Van Wart Sales Inc.} \ (1995), 24 \text{C.H.R.R. D/244.} \]
that there are two kinds of wrongs here, just as A's striking B can be both a tort and a crime. Just what kind of wrong the legislation remedies is not something I will address here, except to note that it seems to occupy a position somewhere between criminal and civil wrongs, exhibiting some, but not all, characteristics of each. In any case, the hybrid nature of the wrong gives us reason to believe that a tort of sexual harassment -- insofar as that claim represents a prayer for compensation of the victim's losses and injuries -- is not based on the public policy of human rights legislation, and as such, is not caught by Bhadauria.

My aim here has been merely to offer a preliminary consideration of the rights and interests protected by the legislation, and the way in which the legislation seeks to vindicate invasions of those rights and interests, in an effort to understand the public policy to which the legislation might be seen as giving expression. Based on this preliminary consideration, we might hazard the following definition of the aim or public policy of human rights legislation: the recognition of discrimination on protected grounds in protected areas as wrongful and the registration of the wrongfulness of the conduct to the wrongdoer through an order of a monetary award to the victim. When the public policy of the legislation is understood in this way, it seems that a victim of sexual harassment may base a common law action for damages on an assertion of rights and interests other than those falling within that policy. She might base her claim on non-gender specific and non-employment status-specific interests, that is, interests which flow by virtue of her personhood. And even though it may be these more basic interests which underlie human rights legislation, I have suggested that the compensation of their invasion is not the aim of the legislation.
E. Conclusion

The prevailing view of the Canadian judiciary is that the existence of federal and provincial human rights legislation leaves courts without jurisdiction to recognize a tort of sexual harassment. And at first glance, that might seem to be the case. The question of courts' jurisdiction to decide common law actions based on sexually harassing conduct, however, requires more than a glance at the vocabulary in which the plaintiff has phrased her claim. Bhadauria does not state that judicial recognition of a tort of sexual harassment is necessarily precluded by human rights legislation. It states only that the legislation forecloses civil actions based on an alleged breach of the legislation or an invocation of the public policy to which the legislation gives expression. The question of the jurisdiction of courts over claims of sexual harassment thus requires a look at the provisions of, and public policy behind, the legislation. As it stands, the jurisdiction question has been left unanswered by Canadian courts. Instead, the "pleadings approach" adopted by most courts avoids the question, compelling plaintiffs to pigeonhole their claims of sexual harassment into existing causes of action if they are to secure damages in tort for their injuries and losses. The suitability and adequacy of existing causes of action in tort as a legal approach to sexual harassment is the focus of the remainder of this thesis.
III. IDENTIFYING THE PROBLEMS

In this section, I will explore a number of causes of action which current tort law makes available to victims of sexual harassment, namely, battery, assault, false imprisonment, defamation, intentional infliction of mental distress, and intentional interference with contractual relations. Some instances of sexual harassment are easier than others to pigeonhole into one or more of these causes of action and some causes of action hold greater promise than others for victims of sexual harassment. While no one of the wrongs addressed by these causes of action completely captures the wrong of sexual harassment, each offers a victim of sexual harassment a “hook” on which to hang her claim. For instance, where the sexual harassment includes a technical battery or false imprisonment, the plaintiff is then in a position to have the losses attending that technical wrong (e.g., lost wages, mental anguish) remedied as parasitic damages. In this way, tort law, even without a new tort of sexual harassment, might offer a basis for adequate recovery. The difficulty, however, lies in securing a hook. The purpose of this section, then, is to examine the difficulties victims of sexual harassment are likely to encounter in their efforts to find a basis of liability within the current catalogue of intentional torts.

The Canadian case law to date would not seem to allow such an assessment. Only a handful of the tort actions brought by victims of sexual harassment have been decided on their merits, the majority of cases having been stalled by motions brought by defendants to dismiss the claims on jurisdictional grounds. Thus, assessing whether recognized causes of action in tort offer an adequate basis for relief for victims of sexual harassment admittedly involves a certain degree of speculation. But the shortage of decided Canadian cases does not mean that only with a crystal ball can we assess the adequacy of current tort doctrine to remedy the injuries and losses inflicted by sexual harassers. Case law in other jurisdictions, particularly in the United States where several victims of sexual harassment have been awarded and denied damages in
tort, is also instructive. Also, the potential of a particular cause of action to redress losses suffered by victims of sexual harassment can be predicted to some extent by examining its historical development along with contemporary understandings of the types of interest it is intended to protect and the types of conduct which have been found to violate that interest. Such an examination also better positions us to predict whether these causes of action might develop so as to capture cases of sexual harassment which would likely be excluded on the current understanding and application of the doctrine.

A. Battery

Battery consists in harmful or offensive contact with the person of another. To be actionable, the defendant must have performed a positive act which directly or indirectly resulted in the physical interference with the plaintiff's person.\(^95\) As a species of trespass, battery is actionable \textit{per se}, that is, the plaintiff need not have suffered actual harm.\(^96\) Nor must it be shown that the defendant intended to cause harm or insult to the plaintiff.\(^97\) The physical contact must, however, fall outside the range of contact generally acceptable in the ordinary conduct of daily life.\(^98\) Liability for battery encompasses all of the consequences of the wrongful conduct, including those consequences which were unintended and those which were unforeseeable.\(^99\)

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\(^{96}\) Allen M. Linden, \textit{Canadian Tort Law} 4\textsuperscript{th} ed. (Toronto: Butterworths, 1988) at 41.

\(^{97}\) Ibid., at 42.

\(^{98}\) Ibid.

\(^{99}\) Ibid.
Sexual harassment which includes any physical contact, then, can amount to a battery.\textsuperscript{100} Clearly, a sexual assault could ground a claim in tort for battery. So too could less severe forms of physical touching, such as, pinching, hugging, kissing and caressing. Several features of an action in battery would seem to make it an attractive means of redress for a victim of unwanted touching in the workplace. She need not show that the conduct in question was unwelcome, as she must in order to establish a complaint under human rights legislation: the absence of consent is not an element of the cause of action. Rather, it falls to the defendant to establish that the touching was consensual. An action in battery also relieves the plaintiff of the burden of establishing that the touching was sexual in nature, something that, again, must be established for her claim under the legislation to succeed.

To the extent that an action in battery does resemble a complaint under human rights legislation, it does so to the plaintiff’s advantage. As under the legislation, the plaintiff to an action in battery need not show that the defendant intended to cause her harm. Nor need she establish that she suffered actual physical harm in order for her claim to succeed. As Fleming has noted, “[t]he action serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with his person which is offensive to a reasonable sense of honour and dignity.”\textsuperscript{101} The slightest touching can amount to a battery, even if the only damage done is to the plaintiff’s sense of dignity.

\textsuperscript{100} The tort of battery has been successfully relied upon by numerous American victims of unwanted touching in the workplace. See, e.g., Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631; 53 F.E.P. Cases 1613, 1618 (Ind. Ct. App. 1990) (unwelcome touching of face, shoulders and buttocks and attempted kiss); Garcia v. Williams, 704 F. Supp. 984, 1000; 51 F.E.P. Cases 255 (N.D. Cal. 1988) (sexual touching); Waltman v. International Paper Co., 47 F.E.P. Cases 671 (W.D. La. 1988) (pinching of breasts and thighs, placing air hose between complainant’s legs); Dockter v. Rudolf Wolff Futures, 684 F. Supp. 532; 46 F.E.P. Cases 1129 (N.D. Ill. 1988), aff’d, 913 F.2d 456, 53 F.E.P. Cases 1642 (7th Cir. 1990) (breast fondling); and Valdez v. Church’s Fried Chicken, 683 F. Supp. 596; 47 F.E.P. Cases 1155 (W.D. Tex. 1988) (sexual assault).

\textsuperscript{101} Supra note 95 at 23.
The interest protected by the tort of battery has been described as the individual’s interest in “bodily security,”102 “bodily integrity,”103 “physical integrity,”104 and “personal autonomy.”105 That the plaintiff need not establish that the touching produced actual harm, was intended to cause harm or was nonconsensual seems to register a high level of commitment to the personal interest protected by the tort, no matter what terminology is used to describe it.106 Linden argues that it is because “so important an interest is bodily security” that a battery is actionable even if the victim is unaware of it at the time of its occurrence.107 The importance of the personal interest that has been violated in battery cases, he argues, is also reflected in the fact that a defendant will be held liable for all of the consequences of his wrongful conduct, even those which were unintended and unforeseeable.108 Blackstone argues that the tort of battery is based on “every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.”109 If every person’s being is indeed considered to be “sacred,” then the tort of battery would seem to hold much promise for victims of sexual harassment. The slightest touching, even in the absence of actual harm or intent to inflict harm or injury, violates an interest which tort law seems to regard very highly.

102 See, e.g., Linden, supra note 96 at 40.
103 See, e.g., Warren A. Seavey, “Principles of Torts” (1942), 56 Harv. L. Rev. 72 at 73.
106 Seavey, supra note 103.
107 Supra note 96 at 42.
108 Ibid.
But the tort of battery can also be explained in terms other than an interference with an interest personal to the plaintiff. Roscoe Pound cautions that it is often assumed that because injuries to the body are the first wrongs dealt with in the history of law, such injuries have always been thought of as infringements of an individual interest. Several commentators, Pound, Fleming and Prosser among them, remind us that "the original purpose of the courts in providing the action for battery undoubtedly was to keep the peace by affording a substitute for private retribution." Pound traces the development of the torts of assault and battery pointing out that their wrongfulness was first thought of as consisting in "the infringement of an interest of group or kindred or of a social interest in peace and good order." Physical injuries originally attracted the attention of the law, he explains, not because they amounted to a violation of a personal interest, but because "they involve the danger of private vengeance and private war." Battery was thus at first considered wrongful because it violated "a social interest against disorder, rather than an individual interest in the physical person."

The tort of battery continues to be explained, at least in part, in terms of a social interest in peace and good order. Fleming maintains that the cause of action serves to "minimize the temptation to retaliate." Linden states that along with the action in assault, the tort of battery "seeks to reduce the incidence of violence in our society" and explains the current cause of

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10 Pound, supra note 104.


12 Pound, supra note 104 at 356.

13 Ibid.

14 Ibid. at 357.

15 Supra note 95 at 26.

16 Supra note 96 at 40.
action largely in terms of that social interest. The rationale for the rule that physical contact need not be made directly with the plaintiff's person (but may, for example, involve contact with an object carried or worn by the plaintiff) to give rise to an action in battery, according to Linden, is that "such contact is regarded as serious enough to generate a violent response" and "is highly provocative of retaliation by force." He offers a similar rationale for the absence of proof of harm requirement in the cause of action. "It is better," he explains, "to permit an action for these seemingly minor intrusions than to invite violent counter-attacks by the aggrieved victims." Linden explains that "offensive contact is enough ... for it may trigger retaliatory measures by persons whose dignity and self-respect are threatened thereby."

While the law has come to recognize an individual interest in physical security of the person, the scope of protection afforded that interest by the tort of battery continues to be shaped by its original purpose of maintaining the social interest in peace and good order. We can see this in the rationales offered by Linden for the rule that physical contact need not be made directly with the plaintiff's person and for the absence of proof of physical harm requirement in the cause of action. The potential threat to social peace and good order seems to be what explains the law's interest in the violation of a personal interest of the plaintiff. The tort's historical preoccupation with physical interferences with the person which threaten to disrupt social peace and good order has led some commentators to suggest that there exists a presumption that the law of battery is concerned only with touchings that are hostile or violent in nature. This presumption, which according to Conaghan "continues to cast its shadow over existing case

117 /bid.

118 /bid. at 41.
law," is likely to pose difficulties for victims of sexual harassment who bring an action in battery.119

Although the law of battery has developed so as to render actionable even the slightest offensive touching, it cannot be denied that the elements of the cause of action do fit best with touchings of a violent or hostile nature. That the plaintiff need not establish that physical harm resulted from the touching fits well with the presumption that violent touchings are likely to cause harm to the plaintiff and, if the plaintiff retaliates, to the defendant. That the plaintiff need not establish the absence of consent makes most sense in cases where the touching is violent -- the law presumes that no one consents to violent interferences with one's person.120 The defendant's intention can be justified as being irrelevant to the plaintiff's claim when one purpose of the tort is admittedly to deter violent retaliation by the plaintiff. Violent behaviour is also more likely to have been designed to cause harm.121 Violent and hostile touchings -- precisely because they are so often nonconsensual and designed to cause harm -- can easily be characterized as falling outside the range of contact generally acceptable in the ordinary course of life. Indeed, violence and hostility have been recognized as the marks of touchings that fall outside the range of contact that is regarded as a part of normal everyday life.122

119 Conaghan and Mansell, supra note 74 at 166.

120 Justice Iacobucci in Scalera, supra note 105: "In these cases, the plaintiff's consent is not in question because of the nature of the conduct. Punching, shooting, stabbing, or otherwise attempting to injure another is clearly offensive, and we would not expect someone to consent to it." (at para. 101) See also Long v. Gardner (1983), 144 D.L.R. (3d) 73 (Ont. H.C.); Veinot v. Veinot (1977), 81 D.L.R. (3d) 539 (N.S.C.A.); Rumsey v. The Queen (1984), 12 D.L.R. (4th) (F.C.T.D.); Holt v. Verbruggen (1981), 20 C.C.L.T. 29 (B.C.S.C.).

121 Justice Iacobucci in Scalera, supra note 105 at para. 101, said of punching, shooting, stabbing cases that "intent to injure is obvious."

122 Holt C.J. explained in Cole v. Turner (1704), 6 Mod. Rep. 149 that "if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery ... but if any of them use violence against the other to force his way in a rude inordinate manner, it will be a battery."
Violent touchings, in a sense, speak for themselves. That is, violent touchings, by their very nature, carry with them the presumption that they were nonconsensual and designed to cause harm. The plaintiff who establishes that she has suffered a violent interference with her person, then, also raises a presumption that the touching was nonconsensual, offensive and designed to cause harm. The plaintiff who establishes that she has suffered a sexual touching, however, raises no such presumption. The idea is that it cannot be presumed that sexual touchings are inherently harmful or nonconsensual, because they are so often quite the opposite.

In a recent decision of the Supreme Court of Canada, Iacobucci J. gave expression to this idea:

Unlike more traditional batteries, sexual activity by itself is not inherently harmful. Without denying the seriousness and frequency of sexual assault, the simple fact is that sexual activity -- unlike being punched, stabbed, or shot -- is usually consensual.123

Iacobucci J. went on to explain that “sexual contact is only ‘harmful and offensive’ when it is non-consensual.”124 Because of this apparent difference between what Iacobucci J. calls “traditional batteries” and sexual touchings, he proposed, as others before him have,125 that the law of battery must be modified in its application to cases which allege a sexual battery, so as to require the plaintiff to establish that the touching was non-consensual and therefore, harmful or offensive. On this view, then, what is presumed and left to the defendant to disprove in cases involving violent touchings -- the absence of consent -- becomes the burden of the plaintiff who alleges a touching of a sexual nature. While Justice Iacobucci wrote in dissent, Chief Justice McLachlin, writing for the majority, held that although there was no need to make the

123 Scalera, supra note 105 at para. 105.

124 Ibid. at para. 107.

modification proposed by Justice Iacobucci, no matter how the cause of action is styled, as a practical matter, it will fall to the plaintiff who alleges a sexual battery to prove that the contact was nonconsensual.\textsuperscript{126}

This would not be an easy burden for a victim of sexual harassment to discharge. A number of feminist commentators have traced the difficulties women face in proving the absence of their consent to sexual offences to the normative commitments underlying the legal concept of consent.\textsuperscript{127} Linden explains that the legal concept of consent "is a manifestation of the historic individualism of the common law which allows people to work out their own destiny even if they do so foolishly."\textsuperscript{128} Whether or not there has been consent is seen as a matter between two individuals, each aiming to further his own economic, social or personal interests as he sees fit.\textsuperscript{129} Permitting the individual to consent to what would otherwise constitute a violation of a protected interest is seen at once as "enlarging the freedom of plaintiffs"\textsuperscript{130} and encouraging would-be defendants to enter into what is seen by the parties as a mutually advantageous transaction.\textsuperscript{131} Encouraging would-be defendants to rely upon consenting plaintiffs requires holding the plaintiff accountable for giving his consent. To allow the plaintiff to later withdraw his consent thereby holding the defendant liable for the invasion of the plaintiff's interest, would

\textsuperscript{126} Scalera, supra note 105 at para. 106.

\textsuperscript{127} See, e.g., Tong, supra note 38 and Conaghan, supra note 74.

\textsuperscript{128} Supra note 96 at 59.

\textsuperscript{129} Keeton explains that "[t]he attitude of the courts has not, in general, been one of paternalism. Where no public interest is contravened, they have left the individuals to work out their own destiny, and are not concerned with protecting him from his own folly in permitting others to do him harm." Supra note 111 at 112.

\textsuperscript{130} Supra note 96 at 59.

\textsuperscript{131} As Posner and Landes explain, consent "transforms coercion into a mutually desired and, therefore, a value maximizing transaction; it transforms the brawl into the boxing match." "An Economic Theory of Intentional Torts" (1988) 1 Intl Rev. of Law and Economics 127 at 143.
“inhibit [defendants] in future cooperative efforts with willing plaintiffs.”132 In this way, the law of consent gives expression to the basic liberal notion that individuals are responsible for their acts. If the plaintiff, through his words or actions, leads the reasonable defendant to rely on his conduct as a communication of consent, it does not then lie in the mouth of the plaintiff to later assert that he did not consent. The measure of consent, then, is not the plaintiff’s actual desires but whether her words and actions might reasonably be construed as manifesting the desire to waive the protection that tort law would otherwise afford her.133 Only to the extent that it is consistent with her words and conduct does the plaintiff’s mental state bear upon the issue of consent.

This is problematic for a victim of sexual harassment who, because of the circumstances in which she finds herself, is likely to act in a way which can be construed as expressing quite the opposite of her true desires. Whether out of fear of losing their jobs, suffering retaliation or offending their harassers, most women who are sexually harassed do nothing in response.134 When a victim of sexual harassment does not outwardly object to her harasser’s actions, it is often assumed that she does not desire to protest, her acquiescence being equated with consent. Since it is up to the plaintiff to establish that the touching was nonconsensual, and therefore harmful, she bears the burden of pointing to some feature of her conduct which makes manifest her lack of consent. That the touching in question is of a sexual nature is likely to only add to her burden. Recall Iacobucci J.’s comment that “the simple fact is that sexual activity -- unlike

132 Supra note 96 at 59.


being punched, stabbed, or shot -- is usually consensual." Because sexual activity is understood as usually being consensual, the sexual nature of the contact is likely to give rise to the presumption -- the opposite of the presumption raised by violent contact -- that the touching was consensual. That violent and sexual touchings give rise to these opposite presumptions can be seen in Fleming's comparison of the significance of the plaintiff's silence in cases involving sexual proposals and those involving violent threats. Of the former, he says "a girl who is silent to an amorous proposal cannot afterwards capriciously complain of assault." Of the latter, he says it would not be reasonable to construe silence on the part of "the plaintiff who stands his ground after being told that he would be punched on the nose" as his consenting to the assault.

To rebut the presumption that the sexual contact was consensual, then, the onus is on the plaintiff to point to some feature of her conduct which manifests her lack of consent. Since consent to sexual contact is not ordinarily express, the absence of express consent on the part of the plaintiff is not likely to be regarded as sufficient evidence that the sexual contact was nonconsensual. But for the victim who fails to outwardly object to her harasser's attentions, there would appear to be *nothing but* the absence of express consent for her to point to as evidence that the sexual contact was nonconsensual. While the absence of an express objection is likely to be considered evidence of consent, the absence of express consent might not be held to support the opposite conclusion. This dilemma resembles another problem identified by Conaghan as likely being considered relevant to the issue of consent in sexual harassment cases. She suggests that "for the purposes of battery, provocative dress may contribute to a 'reasonable'

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135 Scalera, supra note 105 at para 10.

136 Supra note 95 at 26.

137 Ibid.
belief on the part of the defendant that bodily contact was consented to."\(^{138}\) While evidence that the plaintiff dressed in what might be regarded as a sexually provocative manner might be (mis)construed as evidence that she consented to, if not invited, sexual contact, it seems unlikely that evidence that the plaintiff did not dress in such a manner would support the opposite conclusion. Similarly, while the complainant’s past flirtatious or sexual conduct has been considered relevant in assessing the reasonableness of the defendant’s belief that his attentions were welcomed by the complainant in cases of sexual harassment and sex discrimination,\(^{139}\) it seems quite unlikely that evidence that the complainant had not engaged in such conduct in the past would be construed as evidence that the harasser’s attentions were not welcomed. Thus, short of an express objection, there is little for the victim of sexual touching to point to in order to establish that the contact was nonconsensual, and therefore harmful so as to give rise to an action in battery.

If it is determined that the plaintiff consented, either expressly or implicitly, to the defendant’s advances, the argument might be made that her consent was not genuine. That is, it might be argued that the economic power that the defendant holds over the plaintiff prevents her from freely giving her consent. Conaghan makes note of this possibility, but dismisses it on the grounds that traditionally, it is only a threat of physical violence which will vitiate the apparent consent of the victim in a battery case.\(^{140}\)

\(^{138}\) Conaghan and Mansell, supra note 74 at 168.


\(^{140}\) Conaghan and Mansell, supra note 74 at 168. Other commentators seem to agree. Linden: “Mere economic duress, however, is not sufficient to obliterates an otherwise valid consent.” (p. 63) Fleming, “More insidious pressures, however, have been disregarded, such as being a prisoner consenting to an injection, or the economic duress which prompted a Victorian housemaid to submit, under subs and
Even where the plaintiff can establish that the contact was nonconsensual, that may not be enough to satisfy a court that the touching was harmful or offensive. While the absence of consent seems to be regarded as a necessary condition for the touching to be considered harmful, it may not always be sufficient. Not every unconented to touching amounts to a battery. As noted earlier, certain kinds of physical contact must be tolerated as generally accepted in the ordinary conduct of daily life. Conaghan sees this qualification, and in particular its open-endedness, as potentially problematic for victims of sexual harassment who bring an action in battery. “Simply put,” she explains, “there is no general consensus as to whether and to what extent a friendly ‘slap and tickle’ constitutes acceptable or unacceptable behaviour.” While a man might consider patting, pinching or brushing up against a woman’s body to be acceptable behaviour and something to be tolerated as “only the normal response of a ‘red-blooded’ man to the presence of a woman,” that same conduct might be experienced by a woman as a threat to her personal dignity, an invasion of her privacy and as such, not something to be expected or tolerated in the workplace.

To be actionable as a battery, a non-physically harmful touching must be offensive to a person of ordinary sensibilities. A victim of sexual harassment is likely to encounter difficulties establishing that she was reasonable in finding the contact offensive, in the same way that the open-endedness of the “generally accepted in the ordinary conduct of daily life” qualification is likely to prove problematic. And as with issues of consent, it is the sexual nature of the touching which complicates things. As Catharine MacKinnon has noted,

protest, to a medical examination ordered by her mistress in order to ascertain if she was pregnant.” (p. 80)

141 Conaghan and Mansell, *ibid.* at 164.

Ordinary women probably find offensive sexual contact and proposals that ordinary men find trivial or sexually stimulating coming from women. Sex is peculiarly an area where a presumption of gender sameness, or judgments by men of women, are not illuminating as standards for equal treatment, since to remind a man of his sexuality is to build his sense of potency, while for a man to remind a woman of hers is often experienced as intrusive, denigrating, and depotentiating.\textsuperscript{143}

For this reason, a number of commentators have argued that only with the introduction of a reasonable woman standard, will tort doctrine be equipped to cognize and adequately remedy injuries and losses suffered by women.\textsuperscript{144} Conaghan suggests that what problematizes issues of consent and reasonableness in cases of sexual harassment is tort law's failure to consider the circumstances in which the alleged battery occurred. She explains that because the tort of battery focuses on the act of physical touching as the legally redressable wrong, the harmfulness of the defendant's conduct is considered to flow from that physical touching. In cases of sexual harassment, however, it is not so much the physical touching that is harmful but the fact that the touching occurred in circumstances marked by a disparity of power between the parties. But because the tort of battery is concerned with physical interferences with the person and not abuses of power, she argues, it is conceptually inadequate to redress the harms suffered by victims of sexual harassment.\textsuperscript{145}

\textsuperscript{143} MacKinnon, \textit{supra} note 5 at 171.

\textsuperscript{144} See, \textit{e.g.}, Martha Chamallas, "Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation" (1992), \textit{Tex. J. Women & Law} 95; and Deborah S. Brenneman, "From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases" (1992), 60 \textit{Cinc. Law Rev.} 1281.

\textsuperscript{145} Conaghan and Mansell, \textit{supra} note 74 at 165.
B. Assault

Assault is the intentional creation in another person a reasonable apprehension of imminent harmful or offensive contact. While the plaintiff does not need to establish that the defendant intended to cause her harm, it must be shown that he desired to arouse an apprehension of contact.\textsuperscript{146} Because the apprehension must be of imminent physical contact, it is up to the plaintiff to point to some physical gesture or direct threat made by the defendant which would lead a reasonable person to believe that physical contact was pending.\textsuperscript{147}

The individual interest protected by the tort has been identified as the plaintiff's interests in "freedom from fear of being physically interfered with"\textsuperscript{148} and in "mental security."\textsuperscript{149} By offering a remedy for the plaintiff's purely mental suffering (e.g., indignation, anger, fear or humiliation), the tort of assault might hold some promise for victims of sexual harassment. It might be argued, for example, that the harasser whose sexual advances create in his victim an apprehension of imminent bodily contact has violated her interest in freedom from fear of harmful or offensive contact and as such, is liable in assault for the mental anxiety he has caused her.

Like the cause of action for battery, the underlying rationale for tort of assault is the reduction of violence in society.\textsuperscript{150} By affording victims of assault a means by which to seek redress, the tort is aimed at "punishing offenders who had attempted to commit the crime of

\textsuperscript{146} Supra note 96 at 44.

\textsuperscript{147} Ibid.

\textsuperscript{148} Ibid. at 43.

\textsuperscript{149} Ibid. at 45.

\textsuperscript{150} Ibid. at 43.
battery” and at minimizing the plaintiff’s “temptation to retaliate.” It is not the individual’s interest in freedom from emotional disturbance which renders the defendant’s conduct actionable. Rather, it is the potential threat to social peace and order that historically justified the availability of the cause of action. The individual’s interest in freedom from mental anxiety caused by the defendant’s actions is protected only to the extent that those actions threaten to disrupt social peace and order. Indeed, that the individual’s interest is protected at all “is a widely acknowledged historical accident.”

Although the tort of assault is now commonly understood as protecting an individual interest, as with the tort of battery, the scope of the protection afforded that interest continues to be shaped by the tort’s original purpose of deterring violence and retaliation. The result is that the typical assault involves conduct which threatens to cause physical harm or to provoke retaliation. Sexual harassment thus does not fit well with the typical assault. In sexual harassment cases it is not so much the threat of physical harm but unwanted sexual intrusion that causes the plaintiff distress. To the extent that sexually harassing behaviour does not involve conduct which can be perceived as a threat of impending physical harm, then, it may not be recognized as amounting to an assault.

Even if an assault is understood, as it is in theory at least, as redressing effects of apprehensions of not only physically harmful contact but any offensive physical touching so as to include unwanted sexual contact, difficulties remain. As in the context of battery, sexual activity is likely to only be seen as offensive if it was nonconsensual. So again, the plaintiff may bear the onus of establishing that she did not consent to the defendant’s advances.

151 Supra note 95 at 26.

152 Conaghan and Mansell, supra note 74 at 170.
Another obstacle likely to be faced by victims of sexual harassment under this cause of action is the requirement that her apprehension of imminent physical contact was reasonable in the circumstances. Consider the following example:

Suppose that a woman enters a lift with a male colleague at work. He sidles up to her, and standing very close (but not touching) whispers 'sweet nothings' (of a sexually intimate nature) in her ear. They are alone in the lift. Is there an assault? Is it reasonable to apprehend that that uninvited bodily contact is about to take place? ... After all, the words whispered to her were not threatening violence as such.\textsuperscript{153}

In such a case, there is nothing for the plaintiff to point to as evidence that physical contact might reasonably be perceived as having been imminent. In the absence of a gesture (for example, reaching towards the plaintiff's body) or words (perhaps something like "how about a kiss?") it would seem that there is no evidence to support the conclusion that her apprehension of imminent contact was reasonable in the circumstances. While "sweet nothings of a sexually intimate nature" often do proceed sexual contact, they do not directly threaten to bring about such contact in a way contemplated by the tort of assault.

Although one "sweet nothing" might not be enough for the apprehension of imminent physical contact to be regarded as reasonable, the plaintiff might point to a preceding barrage of increasingly sexually intimate comments as evidence that it was not unreasonable to believe that they would culminate in sexual contact. However, tort law seems to regard assault as arising from a single event. (Conditional statements do not amount to an assault, because they lack the requirement of imminence.\textsuperscript{154}) Even if the harasser's previous course of conduct might make it not unreasonable to believe that it would eventually culminate in physical contact, it still falls to

\textsuperscript{153} Ibid.

\textsuperscript{154} Ibid.
the plaintiff to point to something about the defendant's conduct on the occasion in question which made it reasonable for her to believe that it was on that occasion that it would so culminate.

C. False Imprisonment

False imprisonment involves the unlawful imposition of constraint on another's freedom of movement from a particular place against her will. The plaintiff must establish that there was total constraint (whether physical or by force of law) on her ability to move from a particular place and that there was no reasonable means of escape. The harasser who calls an employee into an office or other confined area and subsequently blocks the entrance or locks the door may be held liable under this tort.155

However, given the strict doctrinal limitations on its application, this tort is not likely to be of much assistance to victims of sexual harassment except in severe cases.156 The requirement that there have been total constraint leaving the plaintiff with no reasonable means of escape threatens to exclude the more common cases where harassers use intimidation, emotional pressure or economic coercion to induce their victims to remain in a particular place. The plaintiff who submits to confinement under "moral pressure", or "to avoid a scene," or to "accommodate the desires of others" will not likely be considered to have been confined against her will.157

155 Kersul v. Skulls Angels Inc. 130 Misc. 2d 354, 495 N.Y.S. 2d 886 (Sup. Ct., 1985)
156 Priest v. Rotary 634 F. Supp. 571, 40 F.E.P. Cases 208 (N.D. Cal. 1986) (restaurant owner picked up a cocktail waitress and carried her across the room, then later physically trapped her while he fondled her body).
157 Keeton, supra note 111 at 49-50.
D. Defamation

Defamation consists in the publication or communication of a false statement which tends to harm the reputation of the plaintiff by lowering the plaintiff in the estimation of right-thinking members of society. Defamatory communications include not only attacks on an individual’s personal reputation, but also disparagements of the plaintiff’s reputation in his or her trade, business profession or office. The plaintiff must establish that the statement was published, was made of and concerning the plaintiff, and was defamatory. Publication entails not only that the statement has been communicated to, but also received and understood by, someone other than the plaintiff. The plaintiff need not prove that the statement referred to her by name to establish that the communication was made of and concerning her. Nor need she establish that the defendant intended to refer to her. It is sufficient to establish that the words used or the circumstances attending the communication would lead a reasonable person to understand that it was the plaintiff to whom the defendant referred.

In determining whether the communication is defamatory, courts have relied upon a number of tests. The classic definition of defamatory communications, now generally agreed to be overly narrow, picks out those communications “which [are] calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule” or cause the plaintiff to be “shunned or avoided.” Other judicially accepted definitions include: “a false statement about a man to his discredit,” a communication which “lower a person in the estimation of his fellow

\[158\] Fleming, supra note 95 at 526; Linden, supra note 96 at 630; and Raymond Brown. The Law of Defamation in Canada (Toronto: Carswell, 1987) at 51.

\[159\] Supra note 96 at 628.

\[160\] Ibid.
men by making them think less of him,”¹⁶¹ and a communication that “tends to lower a person in
the estimation of right-thinking members of society generally.”¹⁶² The Second Restatement
offers the following test: “if it tends to harm the reputation of another as to lower him in the
estimation of the community or to deter third persons from associating or dealing with him.”¹⁶³
From these definitions, Linden proposes the following summary: “defamation is the
dissemination of information that tarnishes the good name of a person, causing his standing in
the community to be impaired, or causing him to be pitied.”¹⁶⁴

The standard to be applied in determining whether the communication is defamatory is
objective. The relevant meaning or imputations of a communication are not those intended by its
speaker. Nor is it the meaning or imputation perceived by the subject of the communication. It
is not even the perception of the communication by those to whom it was made. Rather, the
defamatory meaning must be one which would be understood by persons “of fair average
intelligence”¹⁶⁵ or “ordinary decent folk in the community, taken in general.”¹⁶⁶ Fleming is quick
to point out that this standard is not identical with “ideal” or even “reasonable.”¹⁶⁷ It is sufficient
that the comment disparages the plaintiff “in the estimation of a substantial and respectable
minority” of the community.¹⁶⁸

¹⁶¹ Fleming, supra note 95 at 498 and Brown, supra note 158 at 38.
¹⁶² Supra note 95 at 629.
¹⁶³ Section 559.
¹⁶⁴ Supra note 96 at 629.
¹⁶⁵ Supra note 95 at 526.
¹⁶⁶ Ibid.
¹⁶⁷ Ibid.
¹⁶⁸ Supra note 96 at 631.
The falsity of the communication is presumed unless the defendant can establish its truthfulness. It is also presumed that the plaintiff did not consent to the communication of a defamatory statement. The defences of truthfulness and consent can be raised by the defendant and if proven, will defeat the plaintiff's claim.

The interest protected by the tort of defamation is the plaintiff's reputation -- what other people think of her, not her own sense of pride or self-worth. The tort is not concerned with "the plaintiff's own humiliation, wrath or sorrow,"\(^{169}\) but the reputation of the plaintiff in the eyes of others. Thus, "no matter how harrowing they may be to the [plaintiff's] feelings,"\(^{170}\) to be actionable, defamatory remarks must be communicated to some person other than the plaintiff.

One's reputation is distinct from, but related to, one's character. As Van Vechten Veeder puts it: "character is what a person really is; reputation is what he seems to be."\(^{171}\) In other words, reputation is "the character imputed to him by others."\(^{172}\)

An individual's interest in her good reputation is highly regarded by tort law. Several features of the law of defamation indicate that the plaintiff's interest in her reputation is a very highly valued interest.\(^{173}\) The tort seems to give rise to near strict liability.\(^{174}\) The plaintiff need not prove that the defendant have intended to defame the plaintiff. The defendant may not even have known of the existence of the plaintiff. Defamatory communications are also actionable

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\(^{169}\) Keeton, *supra* note 111 at 771.

\(^{170}\) Ibid.


\(^{172}\) Ibid.


\(^{174}\) Cane suggests that "this is probably the result of viewing reputation as a form of property, and defamation as an interference with that property." Ibid. at 73.
**per se**: A plaintiff need not prove actual damage to her reputation for her claim to succeed. The plaintiff’s interest in her reputation generally outweighs the defendant’s interest in freedom of expression. The limitations on the plaintiff’s right to protection of her reputation imposed in order to protect the defendant’s right to freedom of expression are for the most part found not in the cause of action, but in the defences. The defences of truthfulness, privilege and fair comment seek to protect the defendant’s right to freely express his views. The Supreme Court of Canada has held that the law of defamation strikes an appropriate balance between the two competing interests. The Court stressed the importance of an individual’s interest in her reputation, stating that the interest is “of fundamental importance to our democratic society” and “[a]lthough it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights.”

That the importance of an individual’s interest in her reputation continues to be judicially recognized bodes well for victims of sexual harassment. While it is most often the alleged harassers and harassers dismissed from their employment who claim that their reputations threaten to be, or have been damages, the same claim might be made by many of their victims. As one Canadian court has explained, “[i]t is beyond question that sexual harassment includes actions that demean” and as such “[i]t would appear logical … that such conduct could also, but not necessarily amount to defamation or ‘loss of reputation’.” The question, then, is whether the law of defamation can provide redress for the damage done to the reputations of victims of sexual harassment.

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175 *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130 at para. 120.

176 *Kulyk*, supra note 48 at para. 36.
Some instances of sexual harassment will more easily satisfy the elements of the cause of action than others: the posting of lewd photographs coupled with a reference to the plaintiff,\textsuperscript{177} accusing the plaintiff of falsely alleging sexual harassment,\textsuperscript{178} accusing the plaintiff of unsavory conduct,\textsuperscript{179} falsely stating that the plaintiff is romantically interested in her boss\textsuperscript{180} or has been witnessed engaging in sexual activity in the workplace,\textsuperscript{181} and stating that the plaintiff had been dismissed from her employment for just cause when in fact she had been dismissed in retaliation for bringing forth allegations of sexual harassment\textsuperscript{182} have been held by American courts to give rise to damages for defamation. In Canada, it has been held that falsely stating that an employee has been dismissed for just cause can amount to defamation.\textsuperscript{183} Likewise, comments which falsely state that the plaintiff lacks competence in her trade or profession have been held to be defamatory.\textsuperscript{184} And attacks on a woman’s chastity and virtue have traditionally been recognized as giving rise to an action in defamation.

But sexually harassing behaviour can demean and damage the reputation of its victims in ways that might not be captured by the law of defamation. The technical requirements of the cause of action could pose difficulties for victims of sexual harassment who turn to the law of


\textsuperscript{178} Dwyer v. Smith, 867 F.2d 184, 48 F.E.P. Cases 1886 (4th Cir., 1989).


\textsuperscript{180} Garcia v. Williams, supra note 100.

\textsuperscript{181} Schomer v. Smidt, 113 Cal. App. 3d 828.

\textsuperscript{182} Howard University v. Best, 484 A.2d 958, 36 F.E.P. Cases 482 (D.C. App., 1984).


defamation for the damage done to their reputations. Consider the requirement that there have been a communication or publication by the defendant. While this requirement has been held to capture non-verbal communications, in all likelihood it would not include purely physical conduct which threatens to damage the reputation of others. Consider the following case:

[A]t a Christmas party ... [the victim's supervisor] asked her to dance; she refused several times. ... He insisted, however, and yanking her arm he pulled her forcibly onto the dance floor, where he then shoved his hands under her sweater and vest, pushing them up and exposing her back and rubbing her bare skin. [She] was embarrassed and later said, 'I felt I was publicly humiliated' but she didn't want to make a scene in public so she didn't push him away until he released her at the end of the dance.

If someone had falsely communicated to others that the woman was intimately involved with her supervisor, the statement would likely amount to defamation. But even though this event threatens to leave others with the false and reputation-tarnishing impression that she is intimately involved with or interested in her supervisor, in the absence of the communication of that idea, the resulting damage to her reputation will not likely be actionable under the law of defamation. Likewise, a verbal communication that the plaintiff uses sex to secure a promotion or preferential treatment in the workplace for herself would likely be actionable as defamatory. If, however, her supervisor acts in a way that would lead others to reach that false conclusion on their own, the damage to her reputation would not be actionable. In both these cases, the harasser's conduct

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185 The means of publication may take a number of forms, including oral or written statements, ceremonies, theatrical productions, photographs, posters or drawings. While written or spoken words are the usual way to defame someone, there need not be a direct assertion. One may be defamed "by means of a question, an indirect insinuation, or expression of belief or opinion, or sarcasm or irony." Linden, supra note 96 at 633.


187 *Garcia v. Williams*, supra note 100.

threatens to damage the victim's reputation and possibly is even more threatening than mere words alone. While false words might be dismissed as mere rumour, in these cases, the harasser's conduct would seem to provide more of a basis upon which to base the same false conclusion. Yet, the damage to the victim's reputation does not give rise to an action under current defamation law in the absence of some communication or publication of that falsehood.

Even where there is a communication of the kind required by the law of defamation, establishing that the communication is defamatory can also pose difficulties for a victim of sexual harassment. Although being a recipient of unwanted flattery and sexual attention may lead others to falsely conclude that a woman is romantically interested in her harasser or that she takes advantage of her sexuality to secure preferential treatment in the workplace for herself, communications which seem to be flattering and complimentary are not likely to be considered to be defamatory of the plaintiff. The annoyance and embarrassment which such communications may cause the plaintiff are not actionable.189 That such comments may lessen the victim in the esteem of others, making her appear more as an object than a valued employee is something with which the current law of defamation is not concerned. Even where the communications are not complimentary of the plaintiff but are vulgar or abusive, such comments are likely to be found to be injurious only to the plaintiff's own sense of dignity and not her reputation.190 Not all disagreeable comments are actionable. The law of defamation requires that "a man must not be too thin-skinned or a self-important prig."191

189 Brown, supra note 158 at 100.

190 Ibid., at 100. See also Vander Zalm v. Times Publishers (1980), 18 B.C.L.R. 210 at 218 (B.C.C.A.): "[m]ere insult or vulgar abuse have been held not to constitute defamation."

191 Burton v. Crowell Publishing Co., 82 F.2d. 154 (2d. Cr., 1936)
That comments which disparage an individual in her profession or trade have traditionally been regarded as actionable would seem to hold promise for victims of sexual harassment. However, such comments must "definitely and distinctly affect [her] in relation to [her] trade, profession or business"\textsuperscript{192} to be actionable on that basis. As Brown explains, "[t]here must be some connection between the character of the defamatory comment and the skills necessary to carry out the particular job or occupation of the plaintiff."\textsuperscript{193} So even though disparaging comments on a woman's character may demean her value as an employee in the eyes of others, in the absence of a specific attack on her abilities to perform her job, the comments will not likely be found to be defamatory on that ground. Verbal sexual harassment often does involve such a direct attack on the plaintiff's abilities to perform her job. Words which call attention to her gender or sexual appearance, however, may nonetheless lead others to think less of her as an employee. Such words might also lead others to conclude that she invites such attention (perhaps to secure economic benefits or preferential treatment in the workplace) and so to question her integrity.

Often, then, the content of verbal sexual harassment will not be considered to be defamatory, whether because it takes the form of flattery or mere vulgar abuse, or because it cannot be said to reflect a direct attack on the victim's ability to carry out her job or occupation. While such comments can nonetheless demean the victim and damage her reputation in the estimation of her co-workers, they often do so only indirectly. That is, it is often not just the content of the comment itself that threatens to damage her reputation but the fact that the comments have been made in her place of employment and heard by her co-workers. It is not so much what has been said but that it has been said and where it has been said that threaten to


\textsuperscript{193} Supra note 158 at 335.
damage her reputation. That is, the potential damage to the victim's reputation can often be traced not to the meaning of words ("complimenting" a woman on her sexual attractiveness is not plainly defamatory) but the mere fact that the words have been uttered in the workplace (merely calling attention to her sexuality, whether in praise or disparagement, threatens to demean her as an employee). In this way, the law of defamation, by focussing on the meaning of the defendant's words and not the significance of their mere utterance in the workplace, threatens to leave many victims of sexual harassment without remedy for the damage done to their reputation.

E. Intentional Infliction of Mental Distress

The interest that is protected by the cause of action known as the intentional infliction of mental distress has been identified as the individual's "peace of mind"\(^{194}\) and "emotional tranquility."\(^{195}\) While historically courts have been reluctant to allow recovery in tort for the violation of this interest where it is unaccompanied by some other loss or injury, in some circumstances, an action in tort may lie for the intentional infliction of nervous shock or, as it is now commonly called, emotional distress or mental suffering. Emotional distress is perhaps the most ubiquitous harm suffered by victims of sexual harassment.\(^{196}\) As Lin Farley has testified:

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\(^{196}\) Eisaguirre, supra note 30 at 114: "Fear, anger, anxiety, depression, self-questioning, and self-blaming are among the most common effects women describe." And at 115: "Research has indicated that, depending on the severity of the harassment, between 21 percent and 82 percent of all women report that their emotional or physical condition, or both, deteriorated as a result."
The anxiety and strain, the tension and nervous exhaustion that accompany [sexual] harassment take a terrific toll on women workers. Nervous ticks of all kinds, aches and pains (which can be minor and irritating or can be devastatingly painful) often accompany the onset of sexual harassment. These pains and illnesses are the result of insoluble conflict, the inevitably backlash of the human body in response to intolerable stress which thousands of women must endure in order to survive.\(^{197}\)

At first glance, then, it seems that the tort of intentional infliction of mental distress might offer a common law remedy to victims of sexual harassment. Indeed, a number of commentators have identified this cause of action has holding the greatest promise for victims of sexual harassment who seek recovery in tort,\(^{198}\) and numerous American courts have awarded damages for the emotional distress caused by sexual harassment.\(^{199}\) A handful of Canadian victims of sexual harassment have sought relief under this cause of action,\(^{200}\) and at least two of them have been successful.\(^{201}\)

While it is generally agreed that this cause of action is the most promising of those available in the current catalogue of intentional torts, it is also agreed that plaintiffs who seek to pigeonhole their claims of sexual harassment into this cause of action are likely to face significant obstacles. For a claim of intentional infliction of mental distress to succeed, the plaintiff must establish that the defendant’s conduct was “flagrant and outrageous,” was

\(^{197}\) Testimony before the Commission on Human Rights of the City of New York, Special Disadvantages of Women in Male-Dominated Work Settings (April 21, 1975), quoted in MacKinnon, \textit{supra} note 5 at 150.

\(^{198}\) \textit{E.g.}, Schoenheider, \textit{supra} note 10 at 1481 suggests that: “[O]f all the theories of recovery available to a harassment victim, the tort of outrage - the intentional infliction of emotional distress - may be the most successful ground on which to recovery for mental harm.”

\(^{199}\) See, \textit{e.g.}, \textit{Howard University v. Best}, \textit{supra} note 182.

\(^{200}\) See, \textit{e.g.}, \textit{Chaychuk}, \textit{supra} note 23; \textit{Kulyk}, \textit{supra} note 176; and \textit{Petrovics}, \textit{supra} note 59.

\(^{201}\) \textit{Kulyk}, \textit{ibid.}
“calculated to cause harm” and resulted in a “visible and provable injury or illness.” Each of these elements of the cause of action have been identified as potentially problematic for victims of sexual harassment.

It is the first requirement — that the defendant’s conduct have been flagrant and outrageous — which has most frequently been identified as an obstacle for victims of sexual harassment, and indeed, most of the American cases to date have turned on this issue. Unlike other nominate intentional torts, such as battery and defamation, the cause of action does not refer to a specific type of conduct or behaviour. For some commentators this is seen as problematic since it requires the court to engage in a “kind of value judgment.” The problem, it has been argued, is that men have different standards of outrageous behaviour from women and that the law will reflect such male norms. More to the point, I think, is that sexual harassment often involves conduct which in itself neither men nor women would likely consider outrageous. Amorous proposals, flirtation, patting, pinching etc. are not in themselves outrageous. They are outrageous, however, when they become a condition of employment and thereby pose a threat to the victim’s material survival. So as one commentator has suggested, “the vitality of this cause of action depends almost entirely on judicial sensitivity to the true nature of sexual harassment.”


205 Townshend-Smith, ibid.

206 Note: Legal Remedies for Employment-Related Sexual Harassment, [1979] 64 Minnesota Law Rev. at 172.
The second requirement -- that the conduct have been plainly calculated to cause harm -- has also been identified as potentially problematic for victims of sexual harassment. It has been suggested that a court may find that the harasser's intent was not to cause harm but "simply to satisfy his own sexual needs." Recent Canadian cases, however, have interpreted "plainly calculated to cause harm" as including conduct which is "objectively such that a reasonable person would have foreseen the harm." While this endorsement of an objective standard is promising, like the outrageousness requirement, it calls for judicial recognition of the harmfulness of sexual harassment.

Finally, the requirement that the defendant's conduct have caused the plaintiff to suffer a visible and provable illness will likely pose a barrier to many victims of sexual harassment seeking a remedy for mental distress which falls short of diagnosed injury or illness. While depression and other psychological conditions have been held to amount to a visible and provable illness, no Canadian court has awarded damages for mental distress which is not accompanied by physical symptoms.

In practice, the three elements of this tort can be seen to be inter-related, if not completely circular. The outrageousness of the defendant's conduct might be considered to be evidence that the defendant could not but have been acting so as to cause harm to his victim and so also as evidence of the plaintiff's likely severe emotional distress. In turn, that the conduct was intended to cause harm or that harm was reasonably foreseeable contributes to the

207 Ibid. at 173.
208 Bogden, supra note 202 at 97.
209 Boothman, Clark, Campbell, and Bogden, supra note 202.
210 Givelber, supra note 195 at 51.
outrageousness of the defendant's conduct. The severity of the plaintiff's emotional distress, while normally an issue of damages, here serves as evidence that the defendant's conduct was in fact extreme and outrageous. And conversely, where the defendant's conduct is not plainly outrageous or reasonably foreseeably harmful, courts are likely to only find for the plaintiff who can produce compelling evidence of severe injury. Where such evidence is lacking, only the plaintiff who has been the victim of clearly outrageous conduct is likely to succeed.

The elements of the tort also work together so as to narrowly confine the cause of action. Courts have traditionally been reluctant to recognize emotional distress as independently actionable in tort law out of a concern that to do so "would open up a wide vista of litigation" and they had two kinds of cases in mind: trivial claims and fraudulent claims. Of course, the possibility of such claims was also recognized as a poor reason for denying recovery for genuine and serious mental suffering. Indeed, long before the cause of action was recognized courts had redressed what was found to be genuine and serious emotional distress by manipulating traditional tort doctrine. The purpose of introducing the tort was, in part, to do away with this judicial tinkering by allowing courts to do directly what they had long been doing indirectly. And yet, the concern that to do so would give rise to a flood of litigation, including cases based on trivial or fraudulent claims, required that the cause of action as much as possible be confined to capture only the kinds of cases in which courts had up until then allowed recovery for emotional distress. In other words, the principle justification for the introduction of the tort was not that emotional distress was unfairly going unremedied, but that the law should reflect what

211 Prosser, supra note 194 at 878.
212 Magruder, supra note 194 at 1035.
213 Prosser, supra note 194 at 877.
214 Prosser and Magruder, supra note 194.
courts had been doing for some time. Commentators noted that in all of the cases in which courts had tinkered with traditional tort doctrine in order to parasitically redress emotional distress, the defendant's conduct had been "flagrant and outrageous" and the plaintiff's suffering "extreme." It was thus suggested, and almost immediately accepted by courts, that an independent cause of action that should be made available to plaintiffs who have suffered extreme mental distress as a result of flagrant and outrageous conduct on the part of the defendant.

The cause of action, then, was not designed with the aim of enhancing tort law's protection of the individual's interest in mental tranquility. Extending the protection afforded to that interest would not sit well with long-standing and continuing judicial concerns about the difficulties of proving purely mental suffering (or perhaps, more to the point, the difficulties of disproving claims alleging such suffering). Having been modeled on the earlier cases where the outrageousness of the defendant's conduct and the severity of the plaintiff's suffering prompted courts to go to the length of manipulating traditional principles of tort law to allow recovery, the cause of action did not call for the abandonment of these concerns. Rather, it gave courts license to continue to allow recovery in cases where the outrageousness of the defendant's conduct and the severity of the plaintiff's suffering were (as the earlier cases apparently revealed) regarded by courts as sufficiently compelling to overcome those concerns.

To extend the cause of action thus threatens to disrupt its inherited safeguard against a flood of litigation. That is, to extend the definition of outrageousness or to recognize varying

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215 Prosser and Magruder, ibid.

216 Prosser, ibid. at 888 suggests that "[s]o far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability only for conduct exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause mental damage of a serious kind."
degrees of mental suffering is likely to be seen as opening the doors to potentially trivial and fraudulent claims. One commentator has suggested that such judicial concerns may be problematic for victims of sexual harassment:

A second possible reason for judicial reluctance to extend the intentional infliction of emotional distress beyond its narrow confines may be the concern that a broad definition would create a floodgate of litigation. Courts may agree that harassment is indeed outrageous but fear that allowing many different kinds of behaviour to be actionable would clog the dockets. 217

Sexual harassment in the workplace has only recently become socially unacceptable behaviour and the suffering of victims only recently documented. 218 To extend the definition of outrageousness to include sexually harassing behaviour and to extend the scope of injuries so as to recognize the kinds of suffering uniquely experienced by victims of sexual harassment would in all likelihood lead to an increase in the number of victims of sexual harassment bringing actions for the intentional infliction of mental distress. And as Prosser has noted, "courts have always stood more or less in dread of an increase in actions." 219

F. Intentional Interference with Contractual Relations

This tort is generally acknowledged to have its origins in the 1853 case, Lumley v. Gye. 220 In that case, an opera singer engaged by the plaintiff to perform at his theatre was induced by the defendant to break her contract with the plaintiff and perform for him. The defendant was found

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217 Schoeneider, supra note 10 at 1484.
218 See, e.g., Eisaguirre, supra note 30.
219 Keeton, supra note 111 at 22.
220 118 E.R. 749. See “Note: Tortious Interference with Contractual Relations in the 19th Century” (1980), 93 Harv. L. Rev. 1510.
liable on the principle that any malicious interference with contractual relations was an actionable wrong. Since then the action has expanded so as to apply not just to employment contracts but every kind of contractual relation. It has also expanded to capture not only direct interference (persuading, inducing or procuring a party not to perform her contractual relations), but indirect interference. A defendant will have indirectly interfered with the plaintiff’s contractual relations if, through some act wrongful in itself, he prevents or inhibits performance of the plaintiff’s contractual responsibilities.  

The sexual harasser who facilitates his victim’s dismissal or demotion (perhaps out of retaliation for her refusal of his advances or for her filing a complaint of harassment against him) may be held to have directly interfered with her contractual relations. The majority of sexual harassment cases, however, are likely to involve indirect interference. That the tort has been applied to cases where the defendant’s (non-sexual) harassment of an employee made performance of the employee’s duties more difficult bodes well for victims of sexual harassment who seek recovery under this tort. Indeed, a few American courts have made awards against defendants whose sexual harassment has indirectly interfered with the plaintiff’s contractual rights and obligations.

The major difficulty likely to be faced by victims of sexual harassment who seek recovery under this tort is the requirement that the defendant have acted with the intent to

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221 See Fleming, supra note 95 at 690-92 for more on the distinction between direct and indirect interference.


procure a breach of the plaintiff’s employment contract or to hinder her performance of that contract. As Fleming explains, “merely that breach was a natural consequence of his conduct is not sufficient: he must have intended it.”\textsuperscript{225} While the defendant who is indifferent to the consequences of his actions may nonetheless be held to have intended to interfere with the plaintiff’s contractual rights, the defendant who acts under a \textit{bona fide} belief that we was not interfering with those rights will not.\textsuperscript{226} This is likely to be problematic in cases of sexual harassment where the defendant’s intention is likely to be regarded as, for example, to satisfy his own sexual desires.

Furthermore, while for cases involving direct interference it is sufficient that the breach or inhibition of contractual performance have been foreseeable, in cases involving indirect interference, it must be shown that the breach or difficulties in performance were a necessary consequence.\textsuperscript{227} This limitation opens the plaintiff who asserts that her harasser’s behaviour caused her such distress that she could not live up to her contractual obligations to charges of hypersensitivity.

\textbf{G. Conclusion}

We have seen that some instances of sexual harassment are easier than others to pigeonhole into one or more of these causes of action. For these “easy” cases, current tort law holds out the promise of adequate relief by providing the victim of sexual harassment with a hook on which to hang her claim. While the wrong of sexual harassment may not be fully captured by any one of these causes of action, with the recognition of some aspect of the

\textsuperscript{225} \textit{Supra} note 95 at 694.

\textsuperscript{226} \textit{Ibid.}

\textsuperscript{227} \textit{Ibid.}
harassment as wrongful, whether it be an unwanted touching or a defamatory remark, comes the possibility of recovery for the losses attending that wrong. But in many cases, the existing causes of action seem to prevent, or at least frustrate, in various ways a finding that the harasser’s behaviour was at all wrongful.
IV. DIAGNOSING THE PROBLEMS

The preceding analysis of six nominate torts has revealed the difficulties likely to be faced by a victim of sexual harassment who seeks a basis of liability within the current catalogue of intentional torts. The purpose of this section is to diagnose the current inadequacy of tort law to redress sexual harassment: what is it about current doctrine that frustrates its application to cases of sexual harassment? We are then in a position to ask whether the prognosis is fatal or, whether tort law might be suitably rehabilitated to provide relief for victims of sexual harassment.

I will set out two very different diagnoses of tort law’s apparent inability to accommodate cases of sexual harassment. The first is Catharine MacKinnon’s famous rejection of tort law as being wholly inadequate to the task of remedying sexual harassment in her 1979 work, Sexual Harassment of Working Women: A Case of Sex Discrimination. MacKinnon’s prognosis is fatal: tort law is “fundamentally insufficient as a legal approach to sexual harassment.”228 Only sex discrimination legislation, she claims, offers the possibility of overcoming the tendency of standard legal doctrine to “internalize and reflect, and thereby legitimize and enforce, traditional male and female norms.”229 She traces the inability of traditional legal theories, such as tort and criminal law, to accommodate claims of sexual harassment to their “conceptual inadequacy … to [reflect] the social reality of men’s sexual treatment of women.”230 For MacKinnon, the rehabilitation of tort law to remedy acts of sexual harassment is precluded by structural and substantive constraints within tort law itself.

228 Supra note 5 at 158.

229 Ibid.

230 Ibid. at 161.
The second diagnosis is my own. I agree with MacKinnon that tort law historically and presently threatens in various ways to fail to recognize sexual violations of women as wrongful and harmful. I also agree with her that it is tort law’s historical and continuing failure to recognize sexual conduct as wrongful and its effects as compensable that ultimately frustrates its application to sexual harassment cases. Unlike MacKinnon, however, I do not see tort law as inherently incapable of redressing sexual harassment. I will suggest that while tort law in various ways invites judicial failure to recognize sexual harassment as wrongful and its effects as compensable, it does not compel such failure. Unlike MacKinnon, then, I see the rehabilitation of tort law as a worthwhile feminist endeavour. Or, at least for now, my more modest claim is that since the capacities of current tort doctrine have yet to be fully tried, its abandonment has been too hastily urged.

A. MacKinnon’s Diagnosis: Three Defects

In Sexual Harassment of Working Women, MacKinnon concludes that tort law is conceptually inadequate to accommodate cases of sexual harassment. I will argue here that not only does MacKinnon fail to provide compelling reasons to abandon tort as a possible approach to sexual harassment, but her very approach to the question of tort’s capacities is unsatisfying both conceptually and as a matter of feminist legal strategy. In many ways, MacKinnon’s ultimate goal of establishing sexual harassment as a case of sex discrimination shapes her approach to the question of tort’s conceptual capacities. Her analysis seems more dedicated to establishing the greater suitability of sex discrimination law as an approach to sexual harassment than it is to taking seriously the potential of tort law to redress sexual harassment. Indeed, at times, her analysis even reads as though she is of the view that if sexual harassment is to be recognized as a case of sex discrimination, it must be shown that tort law fails as an alternative
approach. In the end, MacKinnon both overestimates the potential of sex discrimination legislation and, more importantly for our present purposes, underestimates the potential of tort law as a legal approach to cases of sexual harassment.

MacKinnon identifies three “defects” of tort doctrine which lead her to the conclusion that it must be abandoned as a potential means of redressing sexual harassment. The first points to the essential purpose of tort law which she identifies as “to compensate individuals one at a time for mischief which befalls them as a consequence of the one-time ineptitude or nastiness of others.” The second points to the seeming inability of tort law to capture the “nexus between women’s sexuality and women’s employment.” The third defect is what she calls the “disabling (and cloying) moralism” underlying sexual tort cases. In each, I will argue, we see how her approach to the question of tort’s capacity to remedy sexual harassment influences (and sometimes undermines) her conclusion that tort law is wholly inadequate to the task.

1. The “Essential Purpose” of Tort Law

MacKinnon argues that tort law is fundamentally ill-designed to redress sexual harassment because it has as its essential purpose the compensation of individuals on a case by case basis. She sees this as problematic for two reasons. First, “tort law,” she explains, “considers individual and compensable something which is fundamentally social and should be

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231 Perhaps this is because MacKinnon starts her analysis by citing then recent judgments in which courts declined to find sexual harassment to amount to sex discrimination, implying instead that the remedy for sexual harassment is to be found in tort law.

232 Supra note 5 at 172.

233 Ibid.

234 Ibid. at 171.

235 Ibid.
eliminated." The idea is that since tort law remedies wrongs between individuals, it cannot remedy sexual harassment which is not only an individual wrong but a social wrong. The tort approach thus threatens to treat incidents of sexual harassment as "incidental or deviant aberrations which arise in one-to-one relationships gone wrong" without recognizing that the defendant's behaviour is evidence of a greater social wrong. However, this criticism of tort law seems to be a more general criticism of law. While sex discrimination law does have as its ultimate goal the elimination of discriminatory and oppressive practices in society, it seeks primarily to achieve that end through individual cases. Discrimination law redresses wrongs perpetrated by individuals against other individuals: an individual brings a complaint under the legislation and the merits of her claim are judged on whether she has suffered the type of discriminatory wrongdoing with which the legislation is concerned. The legal conception of sexual harassment as sex discrimination thus seems no less individualistic than it does on the tort model. While tort law might not, on its face, take into account the broader social context in which the wrong took place, it would seem that the administration of discrimination law through individual cases threatens in much the same way to take little practical account of the wider social context in which sexually harassing behaviour occurs.

MacKinnon sees the individualism of tort as problematic for a second reason. By regarding sexual harassment as a wrong committed by one individual against another individual, tort law cannot remedy sexual harassment which she defines as a group injury. She argues that,

Sexual harassment ... is not merely a parade of interconnected consequences with the potential for discrete repetition by other individuals, so that a precedent will suffice. Rather, it is a group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that


connect with other deprivations of the same individuals, among all of whom a single characteristic - female sex - is shared. Such an injury is in essence a group injury.  

If sexual harassment is in essence a group injury, a legal approach which treats sexual harassment as a matter between individuals seems inadequate to the task of providing meaningful relief. But again, it is not clear that even sex discrimination law in practice redresses sexual harassment as a group injury. The claimant under discrimination legislation asserts that she, as an individual, has suffered some burden or been denied some entitlement by virtue of her membership in an identifiable group. Discrimination is in some sense a wrong against a group but the acts of discrimination which the legislation seeks to redress are discriminatory acts against individuals.

While her conceptualization of sexual harassment as essentially a group injury and her claim that discrimination legislation redresses sexual harassment as such are open to question, my concern here is with MacKinnon's approach to the question of tort's ability to redress sexual harassment. By conceptualizing sexual harassment as essentially a group injury, MacKinnon has assured the failure of tort law. In her assessment of tort law, MacKinnon first conceptualizes sexual harassment as a form of sex discrimination and then asks whether tort law is conceptually capable to redress sexual harassment as sex discrimination. Her diagnosis of tort law's inadequacies, at times, thus seems to merely confirm that tort law is not concerned with the same wrongs as discrimination legislation. Having tested tort law's capacity to redress sexual harassment against a standard to which it has never aspired, her dismissal of tort law on this ground seems unjustified.

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238 Supra note 5 at 172 (emphasis in original).
2. *A Missing Link*

That sexual harassment might be understood alternatively as an affront to a woman’s sexual dignity and as an injury to an individual interest in employment, for MacKinnon, reveals a further conceptual inadequacy of tort law. She argues that “the tort approach misses the nexus between women’s sexuality and women’s employment.” The tort approach, she argues, requires us to consider whether sexual harassment is an injury to personal integrity with damages extending to employment losses or an injury to the individual’s interest in employment with damages extending to the harm to personal integrity. She concludes that,

Since it is both, either one omits the social dynamics that systemically place women in these positions, that may coerce consent, that interpenetrate sexuality and employment to women’s detriment because they are women.

Here again, MacKinnon has at once given short shrift to tort law and overestimated the potential of sex discrimination law. While sex discrimination legislation might be understood to have been enacted in an effort to correct the social dynamics that systemically place women in inferior economic positions, the success of an individual’s complaint under the legislation rides not on the social treatment of women generally, but rather how she, as an individual woman, has been unfairly treated. Discrimination law does provide a link between gender and employment status, gender being a protected ground and employment a protected area under the legislation, but the link does not go near as deep as MacKinnon would have it. As public policy, sex discrimination legislation might be aimed at eradicating the social dynamics that systemically place women in economically and socially inferior positions, but it redresses on a case by case basis conduct

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directed at individuals which might be seen as contributing to or perpetuating the greater social dynamics.

Moreover, tort law, it could be argued, is able to provide the kind of link between gender and employment status that sex discrimination in practice provides. Consider the Supreme Court of Canada's 1992 decision in *Norberg v. Wynrib*. In 1978, Laura Norberg became addicted to Fiorinal, a prescription pain killer, given to her by her sister to alleviate the pain she experienced from an abscessed tooth. Norberg first obtained the drug from her sister and later obtained it from a medical doctor who prescribed it for a broken ankle. In 1982, Norberg approached Dr. Wynrib and obtained Fiorinal from him by telling him about her ankle injury and other health problems requiring pain killers. Later the same year, Dr. Wynrib, having identified Norberg as chemically dependent on the drug, and rather than recommending a drug addiction program, proposed a “sex-for-drugs” arrangement. The following year, when Norberg could no longer secure the drug from other sources, she returned to Dr. Wynrib and began engaging in sexual activities with him in exchange for access to the drug. Norberg was later charged and pleaded guilty to the offence of “double doctoring” under narcotics control legislation. At that time, she stopped seeing Dr. Wynrib and enrolled in a drug rehabilitation program. She later commenced an action against Dr. Wynrib on the grounds of sexual assault, breach of fiduciary duty and negligence.

While all the judges on the Supreme Court of Canada decided the case in Norberg's favour, they divided on the question of which legal doctrine was decisive. Justice LaForest, with the concurrence of Justices Cory and Gonthier, found that the sexual assault alleged by Norberg fell under the tort of battery, while Justice McLachlin, with the concurrence of Justice L'Heureux-Dubé, held instead that Dr. Wynrib had breached a fiduciary duty. The different
approaches taken by the Court to the facts in Norberg might be seen as pointing to the very sort of “missing link” that MacKinnon argues renders tort law inadequate to the task of remedying sexual harassment as an injury to the victim both as a person and as an employee. It might be said that we must decide whether the wrong Norberg suffered was a wrong to her as a person or a wrong she suffered as a patient. By treating the law of battery as governing, Justice LaForest seems to treat the wrong committed by Dr. Wynrib as a wrong against Norberg as a person while Justice McLachlin, by grounding liability in the law of fiduciary obligations owed by physicians to patients, sees the wrong to be one committed against Norberg as a patient. Since it is both, either approach threatens, as MacKinnon accuses a tort approach to sexual harassment cases, to “rip injuries to women’s sexuality out of the context of women’s social circumstances as a whole.”

Justice McLachlin seems to have shared such a concern. Not unlike MacKinnon’s rejection of tort law as a legal approach to sexual harassment, Justice McLachlin dismissed tort doctrine as a suitable approach to the wrong suffered by Norberg. While she conceded that tort law did “catch aspects of that wrong,” she held that it was incapable of capturing the “essential nature of the wrong.”

Concerns about the ability of tort law to adequately redress the wrong suffered by Norberg also prompted the Women’s Legal Education and Action Fund (LEAF) intervene in the case. In its factum, LEAF made arguments in support of Norberg’s claim based on the plaintiff’s disadvantage, the nature of addiction and the abuse of patients with disabilities. The factum urged the court’s recognition of Norberg’s addiction as a disability and condition of

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243 Supra note 5 at 171.

244 Supra note 242 at 256.
disadvantage.\textsuperscript{245} It was further argued that sexual assault represents an issue of sex equality and that consent to sexual battery should be considered in the context of abuse of power in order to guarantee women’s right to the equal protection and benefit of tort law.\textsuperscript{246} LEAF also sought to provide the kind of “missing link” identified by MacKinnon in the tort approach to sexual harassment cases by identifying the nexus between Norberg’s gender and her status as a patient:

It is increasingly acknowledged that women who consult professionals are at risk of sexual exploitation. This makes it dangerous for women to seek help. Just as sexual harassment is a barrier to sex equality in the workplace, the threat and reality of sexual assault are barriers to sex equality in access to medical and other professional services.\textsuperscript{247}

Arguing that other areas of the law recognize the legal relevance of relationships marked by a disparity in power and vulnerability, LEAF provided examples from, among other areas, contract law, citing in particular the doctrines of unconscionability, undue influence and duress which recognize actions or circumstances which leave one of the parties without the ability to make a free contracting choice. Tort law, LEAF argued, ought to do the same in assessing whether a plaintiff had consented to a sexual battery:

Similar insight should inform the distinction between consent and coerced submission in the tort law of sexual assault. Achieving equality requires the recognition of social hierarchies. In this case, the factors to be recognized are sex, disability, and the confidential relationship (here between doctor and patient), factors which combined and interacted synergistically.\textsuperscript{248}

\textsuperscript{245} Intervenor’s Factum at pp 10-11.

\textsuperscript{246} Ibid. at 1, 12.

\textsuperscript{247} Ibid. at 1.

\textsuperscript{248} Ibid. at 10.
Thus, notwithstanding what might be called the "dual nature" of the wrong (i.e., a wrong to the individual both as a person and as a patient), LEAF did not see tort law as conceptually inadequate to the task of recognizing the full extent of the harm suffered by Norberg.

Nor did Justices LaForest, Cory and Gonthier. Justice LaForest found Dr. Wynrib's action to amount to a battery -- the intentional infliction of unlawful force on another person. He noted that it has long been held that consent in tort will be vitiated where it is obtained by force or by threat of force, by fraud or deceit as to the nature of the defendant's conduct, or where it is given under the influence of drugs. He went on to add, however, that "this approach to consent in this kind of case is too limited," explaining that "the concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will."249 LaForest then stated that a position of relative weakness can, in some circumstances, interfere with the individual's autonomy and exercise of free will. As such, he held that the concept of consent in tort must be "modified to appreciate the power relationship between the parties."250 Drawing upon the equitable doctrine of unconscionability in contract law, LaForest proposed that consent in tort could be modified to take account of an imbalance in the power relationship between the parties and the illegitimate use of that power. Where it can be shown that there existed an inequality of power between the parties and that the imbalance of power was exploited, it can be concluded either that consent was not voluntarily given or that the ability to consent existed but that relief is to be provided as a matter of public policy in the same way that the doctrine operates in contract law. Applying this analysis to the facts, LaForest found that an inequality of power existed between the parties, owing in part to Norberg's disability but also to the doctor-patient relationship. He went on to find that Dr. Wynrib had exploited that power imbalance by failing

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249 Supra note 242 at 260.

250 Ibid.
to treat Norberg’s addiction, instead abusing his power over her to exploit the information he obtained concerning her weakness to pursue his own personal interests.\textsuperscript{251}

LaForest’s modification of the concept of consent in tort law thus goes some way toward capturing the otherwise missing link between the wrong done to the plaintiff as a person and the wrong done to her as a patient. His approach to the question of consent recognizes that by virtue of her status as a patient (a position which “may coerce consent” in MacKinnon’s words), the plaintiff was made vulnerable to harm as a woman. Perhaps the most significant aspect of the Court’s decision in \textit{Norberg} is the recognition of the legal relevance of the power imbalance between the parties. One commentator has applauded the decision for adopting an analysis which takes “account of the non-egalitarian dimensions of relationships which affect the behaviour of vulnerable participants” and for “concluding that legal doctrine should recognize these factors.”\textsuperscript{252} Whatever else might be said of LaForest’s judgment, his approach holds promise for a victim of sexual harassment who, like Norberg, has suffered a personal wrong at the hands of someone who holds power over her. His approach also gives us reason to dismiss MacKinnon’s prediction that tort law, if it were to remedy sexual harassment, must decide whether it is an injury to the person with damages extending to employment losses or an injury to the individual’s interest in employment which damages extending to the harm to personal integrity. The decision in \textit{Norberg} brings us one step closer to recognizing that often it is the relative social and economic weakness of women that renders them vulnerable in the first place to conduct which, when viewed in isolation from the broader context, may not make apparent the

\textsuperscript{251} \textit{Ibid.} at 265.

inherent exploitation of power and therefore, the full extent of their wrongfulness and harmfulness

3. A "Disabling Moralism"

Having dismissed tort law as inherently individualistic and thus fundamentally insufficient as a legal approach to sexual harassment, MacKinnon identifies as a "related defect," the "disabling (and cloying moralism)" underlying tort law's historical approach to sexual violations of women.\(^{253}\) She argues that historically tort law's compensation of sexual violations of women has been motivated by the desire to protect the "delicacy" of womanhood.\(^{254}\) She then cautions that since these same motivations might prompt tort law to compensate sexual harassment, the recognition of sexual harassment as tortious behaviour might be seen as "repressive impositions of state morality."\(^{255}\)

I agree with MacKinnon that legal prohibitions on various forms of sexual conduct might be perceived as impositions of repressive sexual morality by the state. I further agree that this moralism is, as she labels it, disabling since it tends to paint women as vulnerable to all things sexual. But I would suggest that legislative prohibitions against sexual harassment, more than tort remedies, are likely to be seen as impositions of state morality, legislation being an act of the state and, in the case of discrimination law, a statement of the state's moral and political commitments. While tort law might also be seen as having moral content, in the end, it might more plausibly be said that tort law is concerned with acts, whether moral or immoral, that have harmful consequences. Likewise, while MacKinnon cautions that tort prohibitions against sexual harassment would institutionalize "new taboos rather than confront the fact that it is

\(^{253}\) Supra note 5 at 172.

\(^{254}\) Ibid.

\(^{255}\) Ibid. at 173.
women who are systematically disadvantaged by the old ones," I think it is more likely that discrimination legislation would be (and often is) seen as institutionalizing "new taboos." And perhaps worse, legislative prohibitions against sexual harassment are likely to be (and often are) seen as imposing new taboos for the benefit of women. Tort, by contrast, with at least its appearance of gender-neutrality, were it to remedy acts of sexual harassment, might be seen as creating new rules for the benefit of all individuals regardless of gender.

Moreover, tort law, with its concern for correcting wrongs and compensating harms, offers a means of establishing that sexual harassment is indeed harmful. While MacKinnon turns to discrimination law to "confront the fact that it is women who are systemically disadvantaged" by sexual harassment, she might also turn to tort law to confront the fact that sexual harassment does disadvantage women. My point is not that MacKinnon is wrong to turn to discrimination law as a legal approach to sexual harassment, but rather that her abandonment of tort law is unjustified, especially since it, in theory at least, offers a means of establishing that sexual harassment is harmful to women.

That MacKinnon has identified the disabling moralism to be found in much of tort's treatment of sexual violations of women points to a deeper problem with her approach to the question of tort's ability to accommodate sexual harassment cases. In assessing whether sexual harassment might be accommodated within existing tort doctrine, she considers only "sexual tort cases." When she identifies problems with tort's historical treatment of sexual violations of women, she concludes that tort is fundamentally insufficient as a legal approach to sexual harassment. She thus measures tort's capacity to redress sexual harassment against tort law's

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256 Ibid.

257 Supra note 5 at 171.

258 Ibid. at 172.
historical treatment of sexual wrongs, implying that sexual harassment too is a sexual wrong. But sexual harassment is not merely a sexual wrong; it is also, as MacKinnon was among the first to argue, an abuse of power, an exertion of economic power, and an interference with the terms and conditions of employment. While MacKinnon is quick to argue that sexual harassment is not merely a sexual wrong, her assessment of tort law's ability to redress acts of sexual harassment focuses exclusively on its ability to redress sexual wrongs. If tort law does prove inadequate to redress sexual wrongs though, rather than abandon tort as a possible approach to sexual harassment, it seems the better strategy is to conceptualize sexual harassment not as a sexual wrong but as a wrongful exertion of economic coercion or interference with contractual relations.

Furthermore, it is not just strategical considerations that might lead one to this conceptualization of sexual harassment. To emphasize the element of economic coercion, more than the sexual violation, is also to conceptualize sexual harassment more as it is experienced, and less as it appears. To treat sexual harassment as exclusively a sexual wrong is, in a sense, to take the perpetrator's perspective. The perpetrator acts in a sexual way but the harm he causes his victim is at once a sexual violation and a threat to her material survival. Assessing tort law's capacity to redress sexual harassment by considering its commitment to the individual's right to economic liberty, for example, might not only prove more promising, it more closely resembles the experience of sexual harassment from the victim's perspective.
B. Another Diagnosis: Three Invitations to Failure

The diagnosis that I will offer is that, in the end, the difficulties we identified in the preceding section can be traced not to some conceptual shortcoming or inadequacy of tort doctrine but rather to a failure to recognize sexual harassment as more than mere sexual conduct. Of course, my claim is not that Canadian courts adjudicating sexual harassment claims in tort have in fact misunderstood sexual harassment as purely sexual conduct -- there are very few such cases that have been decided to date, some in favour of the plaintiff.\textsuperscript{259} Rather, my claim is that in various ways the law of torts, and in particular the law of intentional torts, invites the failure to recognize sexual harassment as wrongful and harmful.

My diagnosis begins with the identification of three ways in which current tort doctrine tends to direct us away from the recognition of sexual conduct in the workplace as wrongful and its effects as compensable. The first does not point to something about tort doctrine \textit{per se} but rather to widely held sexist beliefs that objectify women and the ways in which the current state of tort law may be seen as consistent with or even perpetuating the image of women as sex objects. The second points to the idea embedded in traditional liberal political thought and given expression in much of existing tort doctrine that the only serious threats to the person take the form of a (usually violent) physical interference or an abuse of legal authority. The third points to the once explicit (but now only implicit) theory of liability upon which those causes of action which have come to be known as “intentional torts” rely, namely, the requirement of directness of injury. My claim is that these three “invitations” to fail to recognize sexual harassment as constituting wrongs and causing harms of the sort of concern to tort law encourage one very basic -- and common -- misunderstanding of the nature of sexual harassment.

\textsuperscript{259} \textit{E.g.,} Clark, \textit{supra} note 202.
1. *A Vicious Circle*

Several of the problems we identified as likely to be encountered by plaintiffs who seek to pigeonhole their claims of sexual harassment into existing causes of action might be seen as consistent with, or perhaps even endorsing, the treatment of women as sex objects. While the term "sex object" tends to be used in ordinary parlance as referring to a sexy or sexual person, here I am relying on its literal meaning. To treat an individual as a sex object is to treat her as though it is her role to receive the sexual attentions of others: she is properly the object of their sexual attentions.

However we might account for the inadequacy of current tort law to provide relief to victims of sexual harassment, the mere fact that current tort law is inadequate invites the conclusion that sexual harassment neither constitutes a wrong nor causes harms. A finding that the defendant committed no actionable wrongdoing through his sexually harassing behaviour (a finding which we saw in the preceding section is not unlikely to be made) announces that he has done no wrong and caused no harm. Since the plaintiffs in such cases are most likely to be women and the defendants most likely men, the court's finding might also be seen as announcing more precisely that sexual attention directed at a woman by a man is neither wrongful nor harmful. In this way, the fact that current doctrine is likely to leave many victims of sexual harassment without a remedy in tort is, in itself, consistent with the idea that sexual attention cannot harm a woman because she is a sex object. As a sex object, it is her role to receive the sexual attention of men.

Take the difficulty we identified as likely to be encountered by the plaintiff who seeks recovery in defamation for the damage to her reputation caused by the defendant's "flattering" sexual comments. Although being a recipient of unwanted flattery and sexual attention may lead
others to reach the false and reputation-tarnishing conclusion that a woman is romantically interested in her harasser or that she takes advantage of her sexuality to secure preferential treatment for herself in the workplace, statements which seem to be flattering and complimentary are not likely to be considered to be defamatory of the plaintiff. That such comments may lessen the victim in the esteem of others, making her appear more as an object than a valued employee is something with which the law of defamation does not seem to be concerned. However we might account for the failure of defamation law to recognize and redress the potential damage to her reputation, the fact that current tort law does not recognize the defendant’s conduct as wrongful invites the conclusion that “flattering” sexual comments cannot harm a woman, or even that far from being defamatory, to “flatter” her sexually is to praise her worth as a woman i.e., as an object of men’s sexual attentions. Even though no court (I should hope) would ever explicitly state that a woman, as a sex object, could not be harmed but could only benefit by a “positive” assessment of her sexual attractiveness, the mere fact that current tort doctrine denies her recovery is at least consistent with such sexism and at most, endorses it.

Consider also the difficulties posed by the outrageousness and reasonable foreseeability requirements in the cause of action for intentional infliction of emotional distress. Again, however we might account for the difficulties, a finding that the defendant’s sexual harassment of the plaintiff was not “outrageous” so as to give rise to liability for the intentional infliction of emotional distress might be seen as announcing that it is not outrageous to treat a woman as a sex object. Similarly, a finding that the plaintiff’s emotional distress was not a reasonably foreseeable consequence of the defendant’s sexual attentions might be seen as announcing that it is unreasonable for a woman to be emotionally distressed when she is treated like a sex object and not at all unreasonable for a man to assume that she will welcome and even enjoy his sexual attentions.
It is not hard to see how similar announcements might be seen as implicit in the fact that
the requirements of the cause of action for battery threaten in various ways to deny recovery to a
victim of unwanted touching in the workplace. A finding that a sexual touching was not
sufficiently offensive so as to fall outside the range of touchings ordinarily expected and
tolerated in daily life is consistent with the claims that it is ordinary to treat women as open to
sexual contact by men, that women should expect such contact and that they should tolerate it.
Placing the burden of disproving consent on the plaintiff registers the idea that sexual contact by
men is presumed to be neither harmful nor offensive to women. That acquiescence threatens to
be regarded as amounting to (implied) consent is consistent with the idea (and perhaps here's an
instance where current tort law is directly complicitous in the treatment of women as sex objects)
that women, as the objects of men's sexual desires, are presumed to consent to sexual contact by
men.

And so on. The point is that the fact that current tort law, for whatever reason, denies
recovery to many victims of sexual harassment for their losses and injuries suggests, even if only
implicitly, that sexual attention directed at a woman by a man is neither wrongful nor harmful.
Even if what frustrates current tort law's application to cases of sexual harassment can be traced
to something other than a view of women as sex objects, that current tort law is likely to find a
sexual harasser free of wrongdoing and leave his target without a remedy is consistent with such
a view of women.

But it is not just that it is consistent with or invites a view of women as sex objects that is
the problem. The inadequacy of current tort law might also prompt one to conclude that since
tort law does not redress sexual harassment, it neither can nor should provide relief to victims of
sexual harassment. This idea is, of course, based on the assumption that the tort law is neither
capable of nor in need of further development. Both assumptions, I suggest, are plainly false but
they have been made.\textsuperscript{260} To the extent that current tort law does not recognize sexually harassing behaviour as tortious, the (viciously circular) argument might go, sexually harassing behaviour is not tortious. We are then only a small step away from concluding that tort law does not regard treating women as sex objects as tortious behaviour. To the extent that tort law fails to hold sexual harassers liable for the harms and injuries that they cause, it might be said that tort law considers it legally permissible (and insofar as tort law is seen as having moral content, morally permissible) for men to treat women as sex objects. In this way, the present inadequacies of tort law invite continued judicial failure to recognize sexual attentions directed at women as potentially wrongful and capable of causing harm.

2. \textit{Ghosts from the Past}\textsuperscript{261}

A second invitation to fail to recognize sexual harassment as tortious behaviour can be traced to the original purposes of the action in trespass from which the modern day “intentional torts” are derived. The original purpose of the action in trespass was not to protect an individual interest, but rather a social interest.\textsuperscript{262} While tort law, and in particular the law of intentional torts, has come to be understood as protecting individual interests, the scope of protection afforded those interests continues to be shaped by their original purposes. The shift from the old way of thinking about torts as concerned with social interests to thinking about them in terms of individual interests was neither sharp nor complete.\textsuperscript{263}

\textsuperscript{260} The availability of a legal remedy under human rights legislation might make tort liability for the same conduct seem redundant. As I have argued in Part II, however, human the two regimes differ in important ways in their procedural and substantive approaches to remedying acts of sexual harassment.

\textsuperscript{261} This heading and the next allude to Maitland’s comment about the forms of action ruling us from their graves.

\textsuperscript{262} Pound, \textit{supra} note 104.

\textsuperscript{263} \textit{Ibid.}
As we saw with battery, the tort's historical preoccupation with physical interferences with the person which threatened to disrupt social peace and order has, some suggest, led to a presumption that the law of battery is concerned primarily with touchings that are hostile or violent in nature. And, as we noted, while the law has developed to render actionable even the slightest offensive touching, it cannot be denied that the elements of the cause of action do fit best with touchings of a violent and hostile nature. That the plaintiff need not establish that physical harm resulted from the touching fits well with the presumption that violent touchings are likely to cause harm to the plaintiff and, if the plaintiff retaliates, to the defendant. That the defendant need not establish the absence of consent makes sense in cases where the touching was of a violent nature since it can quite easily be presumed that no one consents to violent interferences with one's person. That the plaintiff need not establish that the defendant intended to cause her harm also makes sense in cases of violent touchings since violent touchings are, by their very nature, more likely to have been designed to cause harm. A violent touching, which is capable of causing physical harm and provoking retaliation, is thus the paradigmatic battery. While nothing in the cause of action announces on its face that only violent touchings violate the individual's interest in bodily integrity, the plaintiff who has suffered a violent touching is more likely to be successful than the plaintiff who has suffered a non-violent touching.

While the tort of battery does redress violations of an individual interest (labeled variously as "physical integrity," "physical privacy" and "bodily security"), the cause of action favours those violations which also threaten the social interest with which the tort was historically concerned. It is important to remember that this social interest belonged to a society in which women's social and legal participation was subject to many constraints. The circles travelled by women were, and to a lesser extent still are, considered to fall within the realm of
the "private" and as such, beyond the reach of the law which was, and again to a lesser extent still is, concerned exclusively with the "public" social order. The social interest originally protected by the action in trespass was thus a social interest shared, by and large, only by men. So not only does the cause of action work to pick out touchings that pose a threat to social order, it works to pick those touchings which pose a threat to a male social order. Violent conduct, which once attracted the law's attention as a threat to social order, is now understood as a threat to the individual. Just as the social interest protected by the tort was an interest of men, the individual interest is the interest of a man. What was seen as threatening the interest of men as a group (the "social" interest) has come to be regarded as threatening the interest of men individually (an "individual" interest). In this way, the cause of action has inherited from the tort's historical purposes the exclusion of women's interests. By favouring plaintiffs who suffer violent touchings over plaintiffs who suffer non-violent touchings, the cause of action threatens to leave sexual conduct which is not plainly violent beyond the tort's reach. It is not just that the doctrine, and in particular its reliance on objective standards (e.g., the requirement that touching have been offensive to a person of ordinary sensibilities), leaves room for judicial discretion that poses difficulties for victims of sexual harassment who seek relief under existing causes of action; it is also that the doctrine itself invites a court to deny the wrongfulness and harmfulness of conduct that does not fit with the paradigmatic battery.

Other intentional torts invite a similarly narrow (and male-biased) view of the kinds of conduct which can violate interests of the individual. Indeed, much of existing doctrine gives expression to the idea found in traditional liberal thought that the greatest threats to man and mankind are violence and abuses of legal authority. The limitations on the applicability of the tort of false imprisonment provide perhaps the most vivid example. False imprisonment redresses only those deprivations of personal liberty caused by either physical conduct or an
abuse of legal authority, or more precisely, the exertion of false legal authority. To be actionable the defendant's conduct must have left the plaintiff with no reasonable means of escape. For the purposes of this tort, then, the defendant who uses intimidation, emotional pressure or economic coercion to induce his victim to remain in a particular place has not left the plaintiff without a means of escape thereby depriving her of her personal liberty. The tort takes a narrow view of the kinds of conduct which can invade the individual interest in personal liberty, limiting its protection to invasions which take the form of physical conduct or an exertion of false legal authority. The only sorts of conduct which can leave an individual with no reasonable means of escape are physical restraint or an (unauthorized) legal restraint.

The kind of restraint on personal liberty that occurs in sexual harassment cases, however, often stems not from purely physical conduct or from, strictly speaking, an exertion of false legal authority. Rather, it is most often economic, and sometimes emotional, pressure which restrains her liberty to escape from her harasser's advances. So while it cannot be disputed that the harasser who exploits his economic power over his victim or plays upon her vulnerabilities to force her to stay in a particular place - say, his office - has compromised her personal liberty, for the purposes of tort law, such conduct is not regarded as sufficiently threatening, if at all, to personal liberty to be actionable. Exerting economic coercion over an employee does not restrain her personal liberty because she is always free to enter a contract with another employer. Emotional pressure likewise does not compromise her liberty because she is always free to stand her ground or walk away.

Consider also the tort of assault. We saw that one of the obstacles facing victims of sexual harassment is the requirement of imminence. There is often nothing for a victim of sexual harassment to point to as evidence that physical conduct might reasonably been perceived as having been imminent. This, I suggest, is because the law of assault invites us to look for
evidence of an imminent violent touching of a kind the deterrence of which is mandated by the
tort's original purpose of preventing private retaliation and maintaining social order. To prove
that imminent physical contact might reasonably have been perceived, tort law asks the plaintiff
to point to some physical gesture or threatening words of the defendant. But often what makes
sexual contact seem imminent is quite different from what makes other forms of contact seem
imminent. The gestures tend to be more subtle (e.g., slowly edging closer) and the words more
gentle (e.g., “how about a kiss?”). However, the less the defendant's conduct is suggestive of
imminent violent touching, the less likely the plaintiff is to be successful.

The idea that violence and abuses of legal authority are the only threats to the individual
also finds expression in tort law's treatment of emotional distress. Apart from the cause of
action for intentional infliction of mental distress, tort law recognizes, even if only indirectly,
emotional distress as an injury deserving of compensation. The harm caused by assault and false
imprisonment is really an emotional harm. What is being compensated for in assault cases is the
emotional anxiety caused by the apprehension of imminent physical contact. And what is being
compensated for by the tort of false imprisonment is the emotional distress of having one's
personal liberty restrained. What we might take from this is that while tort law has all along
recognized emotional distress as a harm deserving of compensation, it has seen compensable
emotional distress as something that can only be caused by physical force or an exertion of false
legal authority.

We might take the same thing from the circumstances leading to the development of the
tort of intentional infliction of emotional distress. As we noted earlier, the main purpose of the
tort's recognition, it seems, was not to afford greater protection from emotional distress, but
rather to permit courts to do directly what they had long been doing indirectly by manipulating
traditional tort doctrine to first find a recognized wrong the remedy for which damages for
emotional distress might then be attached. This judicial tinkering is consistent with the idea that emotional distress is something that can only be caused by independently unlawful behaviour. And while the recognition of the tort of intentional infliction of mental distress has done away with the requirement to first identify an independently unlawful action, as we saw, the elements of the cause of action work together so as to narrowly confine the tort's application. Conduct which is independently unlawful is more likely to have been outrageous, to have been calculated to cause harm and in fact to have caused serious emotional distress. Indeed, that is because the requirements of the cause of action were read off the kinds of conduct which had led courts in the past to tinker with traditional tort doctrine in order to remedy what they perceived to be serious and genuine emotional distress.

So not unlike the torts of assault and battery, then, with the tort of intentional infliction of mental distress, even though the elements of the cause of action do not announce that certain kinds of behaviour are not actionable, they prove in practice to favour certain kinds of behaviour. With the tort of intentional infliction of mental distress, the elements of the cause of action favour those kinds of behaviour which traditionally have been regarded as actionable in tort (or at least behaviour which very closely resembles traditionally actionable behaviour *i.e.*, close enough that judicial tinkering would result in it being recognized as actionable.) And conduct which has traditionally been regarded as actionable, I have argued, tends to be limited to conduct which puts men at risk of harm. Again, then, the more the conduct in question resembles conduct which might harm a man, the more likely a victim of sexual harassment is likely to find relief under this cause of action.

The tort of intentional interference with contractual relations poses the same difficulty. One of the limitations of that tort is that the defendant's conduct have been independently unlawful. Again, insofar as the law tends to reach only those kinds of conduct which put men at
risk of harm, establishing that the defendant's conduct was independently unlawful is likely to be difficult for the mostly female victims of sexual harassment.

The second way in which current doctrine invites us to fail to recognize the wrongfulness and harmfulness of sexual harassment, then, is found in its historical preoccupation with conduct which puts men, individually and collectively, at risk of harm. What once attracted the law's attention as a threat to social order -- violence and abuses of legal authority -- are now understood to attract its attention as a violation of individual interests. But just as the social interest represented the interests of men, so do the individual interests. The more an instance of sexual harassment is violent or can be said to represent an abuse of legal authority, the more likely she is to find relief within the existing catalogue of intentional torts. The problem, however, is that more often than not, sexual harassment is neither plainly violent nor, strictly speaking, an abuse of legal authority. Quite the opposite: sexual harassment can be seen as an expression of affection and, as a private matter between two individuals, to have nothing whatsoever to do with the law, let alone represent an abuse of legal authority.

3. Another Ghost from the Past

The third invitation to fail to recognize the tortious nature of sexual harassment is extended by another ghost in tort law's past. Before the end of the nineteenth century, remedies for tortious behaviour were required to be brought under one of two forms of action: trespass vi et armis (or simply "trespass") and trespass on the case (or simply "case"). The action of trespass remedied forcible, direct and immediate injuries, while the action on the case, which developed later as a supplement to the parent action of trespass, was designed to remedy injuries
resulting indirectly from non-forcible conduct. Winfield gives the following example of the difference between the two actions:

The trite illustration of the difference between trespass and case is that if I throw a log upon another man’s land, that is trespass, for the injury is direct; but if he stumbles over it when it is there and is hurt by it, that is trespass on the case. The injury is indirect or consequential.

The distinction between the two actions, then, was not based on the character of the defendant’s conduct but on the causal sequence leading to the plaintiff’s injury. An action in trespass would lie for all direct injuries, even though they were not intended, while the action in case would lie against “obviously wrongful conduct” that could only be said to have indirectly caused injury to the plaintiff. The action in case was later expanded to include injuries which were not intended but were merely negligent, and were inflicted directly and immediately. The action in case then came to be used quite generally in all cases of negligence, while the trespass action became the remedy for intentional wrongs. It is the action in case from which modern actions in negligence are derived and from the action in trespass those actions known as intentional torts.

The mark of actions in trespass from which we get the intentional torts was originally the directness of injury. But how did we get from directness of injury to intention of action as the basis of liability? One answer is that, in a sense, intention was there all along. That is,

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264 Keeton, supra note 111 at 29; and Dix, “The Origins of the Action of Trespass on the Case” (1937) 46 Yale L. J. 1142.


266 Keeton, supra note 111 at 30.


268 Another answer is that intention was never relevant. I will not here engage in this debate, proceeding instead on the, I think, more commonly held view that directness carries with it a presumption of intention.
conduct which directly caused harm to the plaintiff was, it seems, presumed to have been intentional. In other words, it was not the mere fact that the injury was directly caused that gave rise to an action in trespass, but rather, that directly caused injuries raised a presumption that the defendant intended to cause those injuries. *Stanley v. Powell*, a case decided in 1890 after the enactment of the *Judicature Act* which abolished the forms of action in England, makes this clear. In that case, the plaintiff alleged and proved that one of the pellets from the defendant’s gun had, after bouncing off a tree, hit and injured the plaintiff. The plaintiff, pointing to the fact that he had been directly injured by the defendant’s shot, argued that an action in trespass against the person had been made. The court rejected the plaintiff’s argument that mere directness of injury, without proof of fault, was sufficient to ground an action in trespass and that such was not the case even before the abolition of the forms of action:

> But no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

Instead, the court explained, directly caused harm will not in itself yield liability unless it was so caused either intentionally or negligently. But it is not up to the plaintiff to establish the defendant’s intention or negligence, rather it falls to the defendant to disprove intention and negligence. Directness of injury raises a (rebuttable) presumption that the injury was intended.

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So what really grounds an action in intentional torts is proof of a directly caused harm or loss, not intention. Indeed, as we saw (and identified as potentially promising for victims of sexual harassment), intention need not be proved by the plaintiff in an action for battery, assault, false imprisonment or defamation. What gives rise to an action for these torts is a harm or loss which can be identified as a direct consequence of the defendant’s conduct. Interference with one’s bodily integrity is a direct consequence of physical contact. An apprehension of imminent physical contact can be directly caused by threatening words or gestures. A deprivation of personal liberty is the most direct consequence of a total restraint on the plaintiff’s ability to move from a particular place. A threat to the plaintiff’s reputation directly results from the communication of disparaging remarks concerning the plaintiff in the presence of others. With each of these torts, the cause of action works to pick out conduct which results in immediate harm to the plaintiff. And in some cases, the elements of the cause of action (e.g., the imminence requirement in assault and the requirement that the communication have been made in the presence of others in defamation) compel the plaintiff to prove that the harm was immediate.

Where the causal link between the defendant’s conduct and the plaintiff’s harm is less direct, however, the cause of action typically requires the plaintiff to prove that harm was intended by the defendant. The action for intentional interference with contractual relations is a

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273 Cook v. Lewis, supra note 269 at para. 31: “In my view, the cases collected and discussed by Denman J. in Stanley v. Powell establish the rule ... that where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove “that such trespass was utterly without his fault.”

274 While the plaintiff in an assault action is not required to prove that the defendant intended to cause physical harm, she must establish that the defendant intended to arouse apprehension. The requirement that the plaintiff prove such an intention on the part of the defendant might be seen as “compensating” for the intangible nature of the harm and courts’ continuing ambivalence towards purely emotional harm.
particularly vivid example. There the plaintiff points to the defendant's independently unlawful conduct as the cause of her contractual losses. To succeed, however, she must establish that the defendant acted with the intent to procure a breach of contract or to hinder the plaintiff's performance of her obligations under contract. The action for intentional infliction of emotional distress is similar in structure. There the plaintiff points to the defendant's outrageous behaviour (which, as we've seen, stands in place of independently unlawful behaviour proof of which was required for recovery before the recognition of the tort) as the cause of her emotional distress. Each element of the cause of action works to limit recovery to only emotional distress which can be directly traced to the defendant's conduct. The reasonable foreseeability of harm requirement, in part, serves to exclude from the causal chain the plaintiff's own potential hyper-sensitivity. The requirement of reasonable foreseeability also sets a standard, albeit an objective one, against which to measure the defendant's likely intentions.

Where the defendant's conduct is of the sort that can be readily identified as putting the plaintiff at risk of immediate and direct harm, tort law does not call for proof of the defendant's intention to cause harm, such intention being presumed to follow from the nature of the conduct. And where the causal link between the defendant's putative wrongdoing and the plaintiff's alleged losses is not direct, the plaintiff must establish that the defendant intended to cause her harm.

How is this feature of intentional torts an invitation to fail to recognize sexual harassment as tortious behaviour? It is because, I suggest, sexual harassment at first glance might appear to fit better with the second category of cases, i.e., cases where the causal link between the defendant's conduct and the plaintiff's losses is less direct. Where the plaintiff's harm is seen as only indirectly caused by the defendant's conduct, the law of intentional torts compensates for
the indirectness by requiring proof by the plaintiff of the defendant's intention to cause such harm.

Proving that the defendant intended to cause harm is perhaps the greatest evidentiary obstacle a victim of sexual harassment could face. Many harassers neither intend to cause harm nor are they aware that their actions could cause harm. Even for those harassers who might be aware of the wrongfulness or inappropriateness of their conduct, it might still be difficult to say that they intended to cause the plaintiff the kind of harm contemplated by existing causes of action. While, as we noted earlier, the use of an objective standard of intention (such as the reasonable foreseeability requirement in intentional infliction of mental distress) might relieve the plaintiff of proving the defendant's actual (i.e., subjective) intent, the more direct the harm, the more readily it can be identified as having been reasonably foreseeable. So much depends on how directly the harm to the plaintiff can be traced to the defendant's conduct.

Consider the facts of Janzen v. Platy Enterprises,275 the case in which the Supreme Court held that sexual harassment constitutes sex discrimination under human rights legislation. In that case, the respondent Tommy Grammas made repeated sexual advances towards the complainant, Dianna Janzen. For over a month, Grammas touched Janzen sexually without her consent and made sexual comments despite her repeated objections to his behaviour. Shortly after her employer declined to speak to Grammas about his behaviour, telling Janzen that she was overreacting, Janzen terminated her employment. The Adjudicator, whose decision was ultimately upheld by the Supreme Court of Canada, awarded her damages for lost wages and the "psychological impact" of Grammas' conduct on her self-esteem.

We might say of Janzen's losses that they were only indirectly caused by Grammas' conduct. It might be said, for example, that the sexual touchings were not the immediate cause
of Janzen's lost wages: sexual advances, in themselves, do not cause lost wages. It was not the sexual advances in themselves which caused Janzen to leave her employment. To make the causal link between Grammas' behaviour and Janzen's loss, we need to point to another fact (that the sexual advances occurred in the workplace). Thus, it might be said that Janzen's losses were only an indirect consequence of Grammas' behaviour. That it was Janzen's status as an employee that caused her to be distressed by Grammas' behaviour which in turn caused her to terminate her employment made his behaviour, the argument might go, at best only an indirect cause of her losses.

In this way, Grammas' behaviour might be seen as akin to the paradigm case of indirectly caused harm: the defendant who leaves a log on the road and the plaintiff who is injured when she stumbles over it. That is, it might be said that Grammas merely "left" his sexual behaviour in the workplace and then the plaintiff was injured by it when she stumbled upon it. While that doesn't make much sense, as between throwing a log and leaving a log, one might still be inclined to think that Grammas' behaviour more closely resembles the latter. Just like leaving a log does not always cause an injury, nor do sexual advances always cause harm. In both cases, much depends on the circumstances. A log left on a busy thoroughfare is more likely to cause harm than one left on an abandoned lot. Sexual advances directed at one's sexual partner or a fellow patron of a singles' bar is less likely to result in harm than sexual advances directed at, say, one's student or employee.

Also, unlike throwing a log -- the paradigm example of conduct which directly causes harm -- sexual conduct does not speak for its harmful self. This is in part because the same sexual conduct can, depending on the circumstances, be either harmful or not. But also, sexual conduct, unlike throwing a log or violently striking another person, threatens to be seen as

275 Supra note 15.
normal behaviour. Sexual advances directed at a woman from a man often appear as, and indeed often are, normal interactions between the sexes. While throwing a log or violently striking someone clearly stand out from the normal course of events, sexual conduct seems to be very much a normal event. Thus, it might be thought that since sexual conduct is not inherently harmful, if it is to cause harm it must do so only indirectly.

But of course, this is nonsense. Just because the same conduct might be harmful in one circumstance and not in another does not mean that when it is harmful, it must be only indirectly so. If it did, then no conduct could “directly” cause harm. The context in which an action is performed in always relevant to the question of whether it was harmful. Examples are easily multiplied and familiar in tort: think of a kick to the shin on a soccer field and a kick to the shin in a shopping mall. The defendant’s conduct cannot be quite so easily separated from the circumstances in which he acted. And yet, in sexual harassment cases, I suggest, such a separation seems tempting.

We might first be tempted by the cause of action itself. The first question we ask in a case of an alleged battery is whether the defendant physically touched the plaintiff. So in order to pigeonhole her claim of sexual harassment into the cause of action for battery, the plaintiff must first point not to the employment context or the nature of her relationship with the defendant, but to a touching. Since it is this touching that forms the basis of her claim in battery, we might be tempted to think that the alleged wrongfulness and harmfulness of the defendant’s touching follows from the mere fact that the defendant touched the plaintiff. The cause of action does not obviously compel us to consider the circumstances in which the conduct occurred, but it does require the plaintiff to prove a physical touching. Where the touching in itself (i.e., in
isolation from the circumstances in which it occurred) is not plainly wrongful or harmful, we
might then be tempted to think that the defendant has done no wrong and caused no harm.

That the touching is sexual in nature only adds to the temptation. For many, what defines
sexual activity is thought to be the presence of a man and a woman. At its most basic level, it is
not the context or the nature of the parties’ relationship that defines sexual activity as sexual in
nature, but the presence of a man and a woman. Since sexual activity is widely considered to be
a private matter between a man and a woman, we might be tempted to think that the only way to
judge whether sexual activity is wrongful or harmful is to consider “what he did” and “what she
did.” In other words, there is a tendency to think of sexual activity as context-insensitive: sexual
activity, regardless of the context in which it occurs, is only ever about sex.

Sexual harassment might be (and often is) seen as merely sexual activity which just so
happens to occur in the workplace and just so happens to more often than not be marked by a
disparity in economic power in favour of the harasser. As Conaghan has suggested, conduct
amounting to sexual harassment threatens to be seen as “only the normal response of a ‘red-
blooded’ male to the presence of a woman.”

When sexual harassment is seen in this way, the
measure of the wrongfulness of the defendant’s conduct turns on the question of whether the
harasser’s behaviour was “normal,” that is, whether “what he did” is a normal response to the
presence of a woman. If “what he did” is adjudged “normal,” then he cannot be held
accountable for the losses that might result from the facts that his normal behaviour just so
happened to occur in the workplace and that it just so happened to be directed at someone over
whom he holds economic power.

Taking this one (short) step further, if the wrong of the sexual harasser’s conduct is to be
found in the barest description of “what he did” (i.e., with no reference to the circumstances or
the nature of his relationship to his victim), we might be tempted to also think that the range of potential harms that can be immediately traced to his conduct must, like his conduct, somehow be sexual in nature. Consider one of the difficulties we identified as likely to be faced by the victim of sexual harassment who seeks recovery in defamation for damage to her reputation. The tort of defamation seems unable to recognize that a sexual attack on a woman's character might damage her reputation in her office or employment. While the fact that comments which disparage an individual in her profession or trade have traditionally been regarded as actionable was identified as potentially promising for victims of sexual harassment, the requirement that the defendant's comments must have definitely and distinctly related to the plaintiff's abilities to carry out her job or occupation proves problematic. Even though verbal sexual harassment may demean the victim's value as an employee or her personal integrity in the eyes of others, in the absence of a specific attack on her abilities to perform the job, her harasser's comments will not likely be found to have defamed her in her profession or trade.

While tort law has traditionally recognized sexual comments directed at women as defamatory, it has done so only in cases where the defendant's comments threaten to damage her reputation for chastity. The link between the harasser's sexually disparaging remark and the potential damage to his victim's reputation for chastity (i.e., her sexual worth to men) is direct. Any damage done to her reputation in her profession or trade by such a remark is at most only indirectly attributable to a sexually disparaging remark. In the latter case, it might be said that the third persons reaching the conclusion that the plaintiff lacks integrity or the skills to perform her job is an intervening event which turns a sexual remark into a comment on the plaintiff's personal integrity and professional abilities.

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276 Conaghan and Mansell, supra note 74 at 164.
Thus, if we think of sexual harassment as sexual activity that just so happens to occur in the workplace and that just so happens to very often be marked by an inequality in economic power in favour of the harasser, we are left with the "sexual" as the only salient feature of the defendant's conduct. And if we treat the "sexual" as the only salient feature of the defendant’s conduct, we might think that the immediate consequences must also be somehow sexual in nature. A sexual comment is thus seen as being the immediate cause of only strictly "sexual" consequences: a disparaging sexual remark seems to be understood by current defamation law as having only sexual significance, i.e., as a comment on the plaintiff’s sexual worth.

Furthermore, by picking out the sexual as the salient feature of the defendant’s conduct, we pick out some action or some doing: what he did. What is generally thought to make conduct sexual in nature, is not the circumstances or the nature of the parties’ relationship, but some outward action (e.g., a caress, a kiss, or even the making of a suggestive comment). We are thus invited to think of sexual conduct as just an action or series of actions. As such, sexual harassment might be seen as just an action, and not also, for example, a statement. Or, if it is seen as a statement, it is just an expression of the defendant’s sexual desire.

Recall that another limitation of defamation law we identified was its seeming inability to capture cases where the defendant defames the plaintiff not by his words but by his actions. Defamation law looks to the defendant’s behaviour for some communication or statement of a falsehood of and concerning the plaintiff. But a harasser’s actions often threaten to be more damaging to his victim’s reputation than do his words. The harasser whose behaviour leads other to reach the false and reputation-tarnishing conclusion that his victim is intimately involved with him, perhaps to secure economic benefits or preferential treatment for herself in the workplace, is not actionable under current defamation law in the absence of a communication or statement. And yet, his actions not only amount to a communication of the idea that he has the
right to treat his victim as though she is sexually available to him, they also give some evidence that it is true. Defamation law has recognized that while written or spoken words are the usual means to defame someone, the means of publication may take a number of forms including ceremonies, theatrical productions, photographs, posters or drawings. There is thus potential for defamation law to recognize that the defendant’s sexual harassment of the plaintiff might amount to a defamatory communication even though no words have been uttered. The problem is getting the defendant’s conduct recognized as anything other than an expression of his own sexual desires. Thus, what seems to frustrate the application of defamation law to cases of non-verbal sexual harassment is not that such conduct does not threaten the reputation of the plaintiff but rather, the idea that sexual activity only ever expresses -- and can only be perceived by others to express -- sexual desire.

A third invitation to failure, then, might be traced to the presumption given expression in much of existing tort doctrine that directly caused injuries are intentionally caused, coupled with the idea that if sexual conduct causes losses other than or beyond strictly “sexual” harm, those losses must be at best indirectly related to the defendant’s “sexual” conduct. This threatens to be problematic since, as I have argued, the law of intentional torts has historically been reluctant to hold a defendant liable for injuries only indirectly caused by his behaviour, absent proof of the defendant’s intention to have caused such injuries. Such an intention is often absent in sexual harassment cases or in any case, is very difficult to be proven.

4. Accepting the Invitations to Failure: Putting Sex First

In at least three ways, it seems, the law of intentional torts invites judicial failure to recognize sexual harassment as wrongful and its effects on women as compensable. First, the fact that current tort law is likely to deny recovery to many victims invites the conclusion that
sexual harassment is neither wrongful nor harmful and is at least consistent with a view of
women as sex objects. Second, tort law's historical preoccupation with conduct which puts men
at risk of harm threatens to leave the harms suffered by the mostly female victims of sexual
harassment beyond its reach. And third, because the harm he causes his victim might seem to be
only an indirect consequence of a sexual harasser’s conduct, tort law threatens to place on the
plaintiff the onerous burden of proving the defendant’s intention to have caused her harm.

This third invitation is also an invitation to the first and second invitations. The first
invitation effectively says that sexual conduct cannot harm a woman because, as a sex object, it
is her proper place to receive the sexual attentions of men. The second says that sexual conduct
cannot harm a person, the only serious threats to the person being physical force and an abuse of
legal authority. It is the third invitation which invites us in the first place to think of sexual
harassment as merely sexual conduct, that is, sexual conduct which just so happens to occur in
the workplace and just so happens to more often than not be marked by a disparity in economic
power in favour of the harasser.

But sexual harassment is not just about sex; it is also about power. In fact, as many
feminist commentators have argued, it has more to do with power than it does with sex.277 From
the perpetrator’s perspective, his actions may seem to only be about sex, inspired by a woman’s
sexual attractiveness and motivated by his own sexual desires. From the victim’s perspective,
however, the same acts are experienced as economic coercion which threatens not only her
personal integrity and liberty, but her also her material survival. Rather than thinking of sexual
harassment as sexual conduct which just so happens to occur in the workplace and just so
happens to be marked by a disparity of economic power in favour of the harasser, it is, I suggest,
more appropriate to think of it as economic coercion which just so happens to take the form of
sexual advances or propositions. Of course, it is no accident that the harassment of women often takes the form of sexual advances or propositions. To say that sexual harassment represents an abuse of power is not to deny its sexual character. Sex, itself, is frequently about power. As MacKinnon argues, "sexuality is socially organized to require sex inequality for excitement and satisfaction." Men routinely dominate and women commonly submit. Given the "built-in" inequality offered by this social construction of sexuality, sex becomes a convenient way for the traditionally dominant to exploit the traditionally submissive. The "sexual" in sexual harassment is not the only salient feature; rather, I would suggest, it points us to the very wrong of sexual harassment: the exploitation of those on the traditionally submissive side of the power divide by those on the traditionally dominant side.

To treat the "sexual" as the only salient feature of sexual harassment is thus to get only half the story. Moreover, it is to get the perpetrator's version. By picking out only the sexual, we allow the perpetrator to hide behind institutionalized and hence legitimized constructions of sexuality. Because the inherent power dimension of sexuality is masked by the social, political and legal institutionalization and legitimization of sex as power, the perpetrator's conduct, when understood merely as sexual conduct, except in extreme cases, does not stand out as wrongful to those who buy into the deeply entrenched construction of sexual relations between the sexes.

And yet, those who have dismissed current tort doctrine as inadequate to the task of remedying sexual harassment have only tested tort's abilities to redress sexual wrongs. MacKinnon dismisses tort as a potential approach to sexual harassment, in part, based on its historical failure to redress sexual violations of women (or at least to redress them for the right

277 See, e.g., Backhouse and Cohen, supra note 2.


279 E.g., Schoenheider, supra note 10.
reason, *i.e.*, not based on a disabling moralism which paints women as delicate beings to be protected from all things sexual.) It is precisely because of the threat that tort law will treat sexual harassment as a purely sexual wrong and because of tort's historical inadequacy in redressing wrongs perceived as such that MacKinnon advocates the construction of a new cause of action under sex discrimination legislation.

While, as I have argued, tort law seems in various ways to invite us to think of sexual harassment as purely sexual conduct, the first step in a true (and more promising) test of tort's capacities to redress sexual harassment requires us to decline the invitations and reveal sexual harassment for what it is: not sexual conduct that just so happens to be marked by a disparity in social and economic power in favour of the harasser, but an abuse of that power which, because the dominant constructions of sexuality so permit and even encourage, happens to be sexual in nature. MacKinnon, of course, supports this reconceptualization of sexual harassment. Where we disagree is on the potential of tort law to recognize and redress sexual harassment so reconceived. While MacKinnon does not explore, or even acknowledge, the potential of tort law to redress sexual harassment not as a sexual wrong but as an abuse of power or a restraint on economic liberty, I suggest that such an exploration is necessary before the dismissal of tort as an approach to sexual harassment can be rightfully urged. It may of course turn out that tort law still proves inadequate to the task. But in the interests of both conceptual completeness (revealing sexual harassment to be more than purely sexual conduct) and feminist legal strategy (playing into the strengths and not the weaknesses of tort), I urge a return to the question of tort's abilities to redress sexual harassment but this time, not as a purely sexual wrong but as an abuse of power and a threat to women's material survival. This is not to exonerate tort law's failure in its treatment of sexual wrongs, rather it is to test its ability to redress sexual harassment not as it
appears to a legal and political system seemingly blind to the inherent power dimension of sexuality, but as it is experienced by those without the power. As MacKinnon urges in *Toward a Feminist Theory of State*, "the first step is to claim women’s concrete reality."\(^{280}\)

\(^{280}\) *Supra* note 278 at 244.
VI. Conclusion

My aim here has not been to provide a comprehensive argument in favour of the introduction of a common law tort of sexual harassment, but rather to argue that notwithstanding the prevailing view of the Canadian judiciary and the skepticism of some feminist commentators, such a development is both possible and a worthwhile feminist endeavour. Just as Canadian courts have been too quick to decline jurisdiction over civil claims which allege sexual harassment, feminist commentators have too hastily urged the abandonment of existing tort doctrine as a legal approach to cases of sexual harassment. Those commentators, such as MacKinnon, who have rejected tort doctrine as fundamentally insufficient have both failed to prove it to be so and to justify the abandonment of feminist efforts to secure judicial recognition of sexual harassment as tortious behaviour. Those commentators who have abandoned existing causes of action, directing their efforts instead toward securing the judicial recognition of a new tort of sexual harassment have not only been equally hasty, but in so doing have undermined their new cause. Establishing (or in some cases, presuming) the inadequacy of existing doctrine might equally lead one to conclude that sexual harassment falls outside the scope of wrongs remedied by tort law, as it might to the conclusion that a new tort is needed. Since new torts have historically come to be recognized as extensions of existing ones, a more persuasive case for the recognition of a new tort involves an examination of the ways in which current tort law does, or at least can, redress sexual harassment. It is with these concerns in mind that I have advocated a return to the question of the adequacy of existing tort doctrine as a legal approach to sexual harassment.

The answer to the question, however, remains uncertain. For now, the most that can be said is that existing tort law has not been established to be, as MacKinnon would have it, “wholly
inadequate."\textsuperscript{281} While the doctrine, along with misunderstandings of the nature of sexual harassment and social constructions of sexuality, does seem to invite judicial failure to recognize sexual harassment as tortious, it does not compel such a finding. The task set for the legal feminist is thus to dispel those misunderstandings and encourage the decline of the invitations to failure extended by current legal doctrine. While it seems a daunting task, it has been undertaken in the effort to secure the legal recognition of sexual harassment as a case of sex discrimination. It is time now to direct those same efforts toward the rehabilitation of tort law as an alternative legal approach to sexual harassment.

The benefits of returning to the question of tort law's capacity to redress sexual harassment stand to accrue on more than one level. Immediate and practical benefit is to be had by the many victims of sexual harassment who, in the absence of a recognized tort for sexual harassment \textit{per se}, seek a common law remedy by pigeonholing their claims into one or more of the existing causes of action currently made available by tort law. An awareness of the ways in which current tort doctrine seems to invite the conclusion that sexually harassing behaviour is not tortious arms these plaintiffs in their quest to secure damages in tort for their injuries and losses. The need to engage with tort law, however, derives not just from the unevenness and inadequacy of the protection extended to victims of sexual harassment by current doctrine. Returning to the question of tort law's seeming incapacity to accommodate cases of sexual harassment affords the opportunity to expose the historical contingencies and deeply embedded gender biases that frustrate the law's ability to redress harms to women. To abandon existing tort law in favour of a "quick fix" -- whether it be a new common law tort or a statutory cause of action -- is to surrender to, rather than challenge, the historical contingencies and continuing social misperceptions that stunt the growth of the law.

\textsuperscript{281} \textit{Supra} note 5 at 158.