Sexual Harassment: Liability of Sexual Harasser And Employer in Tort

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ABSTRACT

Sexual harassment conducts such as patting, pinching, constant brushing or touching an inappropriate area of another person’s body, making sexually-related comments, jokes and graphic drawing, making degrading comments on one’s appearance and displaying sexually suggestive pictures, among others, are examples of situations in which the honour and dignity of an employee is violated. Such conduct, if allowed to go unchecked, would create an ‘intimidating, hostile and offensive work environment that can adversely affect the industrial relations climate in the organisation’. In most cases, the victims get annoyed, angry and even embarrassed by the unwanted sexual attention, as it belittles their person. The aggrieved worker may experience emotional trauma, anxiety, nervousness, depression and low self-esteem. Further, it may also affect the employee’s morale and job performance such as causing difficulty in concentrating on the job. Employers may avoid liability if they exercise reasonable care to prevent or correct promptly any harassing behaviour. If a co-worker is involved, employers are generally liable if they knew or should have known of the misconduct, unless they can show that they took immediate and appropriate corrective action. Further, failure to respond to bona fide complaints of sexual harassment would constitute a breach of the implied trust and confidence term. In the aforesaid breach, the aggrieved employee may resign and claim constructive dismissal. This paper explores the possible causes of action in tort against the assailant and the employer of the aggrieved worker for general and specific damages for the alleged assault and battery arising from incidents of sexual harassment.
Keywords: Sexual harassment, employer liability, vicariously liability

INTRODUCTION

The relationship between employers and workers is fiduciary as it is one of trust and confidence. This relationship imposes a duty on employers to protect workers’ safety and health at the workplace. The workplace should not only be free from dangerous and hazardous substances, but also from all forms of sexual harassment and inappropriate sexual conduct. Further, as reputation is part and parcel of human dignity, an employer is under moral and legal obligation to ensure that all employees are treated with respect and courtesy. Reasonable care and support must be given to employees so that they can carry out their job without harassment and disruption by fellow workers and/or customers of the company, among others. An employer who fails to take proactive steps to ensure a hostile free work environment may lead the affected employee to resign from employment and thereafter allege constructive dismissal (Mohamed, 2011). A serious incident of sexual harassment such as uninvited touching of the victim’s intimate parts, such as the sex organs, may invite a criminal charge of sexual assault against the harasser. This article examines the victim’s possible cause of action in tort against the harasser for unwanted or unwelcomed sexual conduct and the personal and vicarious liability of the employer for harassment at the place of work.

Safe Place of Work: Employer’s Duty

An employee should feel secure at the workplace and it is the duty of the employer to provide not only a safe system of work but also a safe place of work. The duty to provide a safe place of work relates to the employer’s responsibility to ensure that the work site is reasonably safe (Anantaraman, 2004). The workplace should be free from hazards, and this includes all forms of harassment such as degrading words or pictures (like graffiti, photos or posters), physical contact of any kind and sexual demands. In Gelau Anak Paeng v Lim Phek San and Ors (1986), Roberts CJ stated:

The common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees.

Reasonable safety and care demands *inter alia* that the employer or those to whom power is delegated for running the organisation must ensure that employees are not subjected to loss of dignity, self-respect and esteem, whether the sexual harassment was perpetrated by superiors, peers or subordinates. They should take necessary measures to protect workers from unreasonable behaviour directed at a worker or groups of workers that creates a risk to health and safety. The employer’s responsibility to provide a safe place of work is not restricted to the actual work
site but may also include any area that the employee uses in connection with and in furtherance of the employment (Mohamed, 2004).

The employer may be in breach of duty of care when he knows that acts of sexual nature are being carried out by his employees during their employment, and that these acts cause physical or mental harm to a particular fellow employee but does nothing to supervise or prevent such acts. The employer may also be in breach of that duty if he can foresee that such acts may happen and if they do, that physical or mental harm may be caused to an individual. Failure by the employer to provide a safe place of work may well expose the employer to a civil claim for negligence. In Waters v Commissioner of Police of the Metropolis (2000), Lord Hutton stated that:

> A person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which causes physical or psychiatric injury. This duty arises both under the contract of employment and under the common law principles of negligence, although an employer will not be liable unless he knows or ought to know that the harassment is taking place and fails to take reasonable steps to prevent it.

Whether or not the employer was in breach of the duty of care is determined with reference to the test propounded by Diplock J in Houghton v Hackney Borough Council (1961), namely, that queries if the employer “has…taken reasonable care, paying special attention to the risk and paying reasonable attention to other circumstances”. This test was further elaborated on by the Australian High Court in Turner v South Australia (1982). The Court stated:

> where it is possible to guard against a foreseeable risk which, although perhaps not great, nevertheless cannot be called remote or fanciful, by adopting a means which involves little difficulty or expense, the failure to adopt such means will, in general, be negligent.

Hence, the employer is to investigate the alleged acts of sexual harassment and where the allegation is well-founded, necessary action should be taken against the harasser. As noted earlier, employers would be in breach of duty of care if they fail to take reasonable steps to prevent incidents of sexual harassment from recurring at the workplace. In Melewar Corporation Bhd v Abu Osman (1994), the Industrial Court held inter alia that the employer, upon receiving credible information of complaints committed against the employee, was under a duty to inquire into the allegations. If, pursuant to a due inquiry, the allegation of sexual harassment is proven, the employer has the duty to act firmly against the errant employee.
Sexual Harassment: An Actionable Tort

Distinct from a dismissal case tried in the Industrial Court, if harassed employees choose to claim for damages arising from the harassment, they could bring an action against the harasser through tortious action in the civil courts and compensation would be awarded depending on the nature of the damage due to the harassment. A civil action may lie against the perpetrator individually under the law of torts for a cause of action based on assault and battery or intentional infliction of emotional distress. A threat to cause harm to the victim can be considered a tortious assault, so long as the threat of harm is imminent, such as the shaking of a fist or the waving of a knife at a person to signify a forthcoming blow (Linden & Feldhusen, 2011).

A sexual assault or sexual abuse involves one person intentionally putting another person in fear of harm by threats, words or gestures of a sexual nature without bodily contact. A sexual battery claim may lie if it involves physical touching or intentional infliction of unlawful force on another person. For example, in Mas Anum Samiran v Othman Mohamed (2015), the plaintiff, a former personal assistant of the defendant, was sexually harassed physically and verbally by the defendant. A civil claim was successfully brought in the Sessions Court and a sum of RM25,000 was awarded as damages for the civil wrong inflicted on the plaintiff. Again, in Collier v Warren Shepell Consultants Corp and Anor (1994), an action was commenced by the plaintiff in the Ontario Court against the defendants for damages for sexual assault. The plaintiff’s civil claim was essentially based on the persistent attempts of the second defendant, being his superior, to seduce him into engaging in homosexual activity, which eventually led to his resignation from the company. In Sheridan v Kelly and Another (2006), the plaintiff alleged repeated episodes of sexual assault by the first defendant.

It must be added that a claim for damages for assault and battery is actionable per se. In PR v KC Legal Personal Representative of the Estate of MC deceased (2014), Baker J observed:

*The essence of a claim for assault and battery and trespass to the person is the intentional affliction of injury to that person. No proof of actual damage is required for a plaintiff to succeed in recovering damages arising from the tort of trespass to the person or assault….The essence of the tort of assault or trespass to the person is that a plaintiff may be awarded damages even in the absence of actual injury to that person. The quantum of damages ultimately awarded by the court may depend on the fact and nature of injury suffered, but it is not a prerequisite to the bringing of an action arising from this tort that actionable injury be suffered.*

Further to the above, verbal abuse, intimidation, stalking and the like can support a claim of intentional infliction of emotional distress. The outrageous conduct of the perpetrator may also entail a claim
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for mental distress damages. For example, in *Yuen Sha Sha v Tse Chi Pan* (1999), the defendant’s act of video-taping the plaintiff without her consent dressing and undressing was held to constitute an act of sexual harassment and the Hong Kong District Court awarded *inter alia* a sum of $50,000 as damages for injury to feelings. It must be added that a civil action for damages is primarily an attempt to place the victim as much as possible in the state she or he would have been but for the sexual abuse. Furthermore, the civil justice system can serve as a tool to deter perpetrators.

**Vicarious Liability of the Employer**

In cases where an employee has sexually harassed a co-worker or a customer and where it is proven that the employer has not taken steps to rectify or prevent it, the co-worker or customer can also bring a tort action against the employer. For example, if the incident occurred at the place of business, the employer can also be liable based on a negligent supervision claim or a failure to provide a safe place of work. Litigation against the employer is founded on the basis of failure to use reasonable care to protect its workers against foreseeable sexual assault.

Under the doctrine of vicarious liability, the employer can be found to be liable towards a third party for the tortious acts of its employees provided that the tort occurred during the course of employment.

**Vicarious liability refers to a situation where A is liable to C for damage or injury suffered by C due to the negligence or other tort committed by B. A need not have done anything wrongful and A further need not owe a duty of care to C. The most important condition for imposing liability on A is the nature of relationship between A and B and the tort committed by B is connected to the nature of this relationship. This relationship is usually that of master and servant or employer and employee and as between a principal and his agent. (Talib, 2003).**

In *John Doe v Bennett* (2004), a Canadian case, McLachlin CJ stated:

The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise.

In John Doe’s case, the Supreme Court of Canada considered the liability of a church for the sexual assault of one of its priests.

Before doctrine can be imputed against the employer for the wrong committed by employees, certain requirements must be fulfilled, namely: (a) there must be a tortious act or wrong; (b) relationship between the person alleged to be vicariously liable and the tortfeasor must be shown; and (c) the tort was committed within the course of employment. For an act to be considered
within the course of employment, it must either be authorised or be so connected with an authorised act that it can be considered a mode, though an improper way, of performing the said act. In deciding whether an employee’s tort has been committed in his or her employment, the so-called ‘Salmond test’ is usually applied.

In Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals (2015) Mohd Zawawi bin Salleh JCA stated:

Salmond maintained that a wrongful act done by a servant is deemed to be in the course of employment if it is either: (i) a wrongful act authorised by the master, or (ii) a wrongful act and unauthorised mode of doing some act authorised by the master. Further, a master is liable even for acts which he or she has not authorised, provided they are so connected with acts which he or she has authorised, that they may be rightly be regarded as modes - although improper modes - of doing them. So, if the unauthorised and wrongful act of the servant is not so connected with the authorised act so to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting the course of his or her employment, but has gone outside it.

In Dyer and Wife v Munday and Another (1895), Lord Esher MR stated:

The liability of a master does not rest merely on the question of authority, because the authority given is generally to do the master’s business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

Lopes LJ, delivering a separate judgment, in the above case, stated:

The law says that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

Rigby LJ, in “Dyer and Wife”, explained the expression ‘within the course of employment’ thus:

The law on the matter was laid down by Willes J in Bayley v Manchester, Sheffield, and Lincolnshire Ry. Co. (1)’: ‘A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment.

In Keppel Bus Company Ltd v Sa’ad bin Ahmad (1972), it was stated that the expression ‘within the course of employment’ is not limited to the obligations which lie on an employee by
virtue of his contract of service. It extends to acts done on the implied authority of the master. The principle in the Keppel Bus Company case was followed by the Court of Appeal in Maslinda Ishak v Mohd Tahir Osman & Ors (2009). In particular, the Court stated:

_The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force in Keppel Bus Co Ltd v. Sa’ad bin Ahmad (1972). In that case, the Court of Appeal of Singapore found that there was sufficient evidence for the trial judge to conclude that the conductor in hitting the respondent in a very high handed manner, was acting in the course of employment._

The doctrine which makes the employer responsible for the act of its employee may be illustrated with reference to the case of Maslinda Ishak v Mohd Tahir Osman & Ors. In Maslinda Ishak’s case, the appellant and several colleagues were arrested by the Federal Territories Islamic Religious Department (JAWI) enforcement officers and RELA members. After the arrest, they were led into a lorry. At about 12.50 a.m., when the vehicle was in Cheras, the appellant had requested to go to the toilet but her request was denied. Instead, she was told to relieve herself inside the lorry. She did as directed and was shielded by a scarf held by her friends. The first respondent then pushed her friends away and took photographs of her relieving herself with his camera. The incident had injured her emotionally.

The High Court found the first respondent liable for his conduct in taking the pictures, an invasion into privacy, and ordered him to personally pay the appellant damages, a sum of RM100,000. It was stated that what the first respondent did was outside the scope of his duty and he did it purely on his own accord. In other words, the first respondent was acting on a frolic of his own i.e. he was solely responsible, and the other respondents could not be associated with his actions. On appeal, the Court of Appeal held that the respondents, the Director-General of RELA, the Federal Territories Islamic Religious Department and the Government of Malaysia, were jointly and severally liable to pay the said damages because the act of the first respondent was done within the course of employment. In particular, Suriyadi Halim Omar JCA, delivering the judgement of the Court of Appeal, stated:

_The first defendant therefore was not there on his own volition but on instruction. He not only was under the direct supervision of RELA, but on that particular night was also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise, and to keeping an eye over those arrested. As he took the unauthorized photographs, whilst in the course of the work or employment for which he was instructed to carry out, at a time when the operation was in progress, the respondents must be held vicariously liable._
From this case, it is seen that on the proof of the requirements of vicarious liability, the employer, as the principal, could be liable for any wrongful act done or any neglect or default committed by an employee in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done or any neglect or default committed by his agent. Every case is decided on its own peculiar facts. The tortious liability of the harasser and the employer is further illustrated with reference to the selected local and foreign decisions in the table below.

**TABLE 1**
Selected Cases on the Tortious Liability of the Harasser and the Employer

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<th>Title of the case</th>
<th>Allegation</th>
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<td><em>Mas Anum Samiran v Othman Mohamed (Malaysia)</em></td>
<td>The plaintiff, a former personal assistant of the defendant, alleged that she was sexually harassed by her former boss, the defendant. The allegation included physical and verbal harassment by the defendant throughout the time she served as his personal assistant. In one incident, the plaintiff claimed her headscarf was undone and exposed her chest area. When the plaintiff quickly pulled down her scarf to cover the area, the defendant said: “Why are you hiding it? I like to see your chest. Nice. Open it for me.” Because of the repeated incidents of sexual harassment, the plaintiff was forced to resign from her job.</td>
<td>As the plaintiff had succeeded in proving the elements of sexual harassment by the defendant, the Sessions Court awarded the plaintiff a sum of RM25,000 as damages.</td>
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<td><em>Bishop v Takla (2004) (Australia)</em></td>
<td>The applicant alleged long-term sexual harassment by the first respondent that intensified in the final four months of applicant’s employment. The application for damages for sexual harassment was based on the alleged unwanted remarks, brushed contact and actual physical contact.</td>
<td>The Federal Magistrates Court held <em>inter alia</em> that the first respondent was liable for damages minus amount paid at settlement.</td>
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<td><em>Burgiss v Clisby Pty Ltd (2004) (Australia)</em></td>
<td>The plaintiff claimed damages for sexual harassment in the course of employment. The plaintiff alleged that the defendant had made several sexually-orientated comments against her.</td>
<td>The court found in favour of the plaintiff and awarded her damages of $3000.</td>
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<td><em>Frith v Glen Straits Pty Ltd t/as Exchange Hotel (2005) (Australia)</em></td>
<td>The applicant alleged sexual harassment by the hotel director. The alleged sexual harassment included an overnight stay in the hotel when the applicant was only employed for two days at the hotel.</td>
<td>The court held that the hotel director’s conduct amounted to sexual harassment. The employer was vicariously liable for the actions of the hotel director. Damages awarded were as follows: $5000 for economic loss and $10,000 for non-economic loss.</td>
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<td><em>South Pacific Resort Hotels Pty Ltd v Trainor (2005) (Australia)</em></td>
<td>The respondent alleged that she was sexually harassed by a co-worker.</td>
<td>The learned magistrate awarded the respondent a sum of $17,536.80 as damages for sexual harassment. The employer was also held vicariously liable.</td>
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<td>Zhang v Kanellos (2005) (Australia)</td>
<td>The applicant brought a civil claim against the defendant for damages for sexual harassment. The applicant alleged that she was sexually harassed by her supervisor and the allegations included pinching her bottom on three occasions and squeezing her breast.</td>
<td>The application was dismissed as the applicant failed to establish the alleged acts of sexual harassment.</td>
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<td>Kraus v Menzie (2012) (Australia)</td>
<td>The applicant alleged that almost from the start of her employment she was sexually harassed by the first respondent by unwelcome advances and conduct, including inappropriate and unwanted gifts of lingerie, sex toys and scanty clothing and text and multimedia messaging containing explicit and pornographic content.</td>
<td>In allowing the applicant’s application, the court awarded her damages for those items of conduct at the rate of $12,000 in total. The respondents were jointly to pay the applicant the aforesaid amount.</td>
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<td>Alexander v Cappello and Anor (2013) (Australia)</td>
<td>The plaintiff alleged that the second defendant sexually harassed her during the course of her employment by actions which included asking her whether she was offended by pornography, asking her for a massage and sex, touching her bottom, pushing his groin in her face, pointing at his penis and telling her to come back, he had something to show her and trying to grab her breasts and vagina.</td>
<td>The Federal Circuit Court of Australia found that the plaintiff had succeeded in proving the allegations and accordingly awarded her damages. The first defendant being her employer was also held vicariously liable.</td>
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<td>L v Burton (2010) (Hong Kong)</td>
<td>The defendant sexually harassed the plaintiff during the plaintiff’s short-lived employment in the company. The employment relationship between the plaintiff and the defendant deteriorated when she refused the sexual advances by the defendant. The plaintiff’s dismissal from the company was extremely high-handed and openly oppressive abuse of the plaintiff’s personal dignity. The plaintiff was extremely distressed and humiliated. As a result of the sexual harassment she suffered anxiety, stress, humiliation, physical injury and insomnia.</td>
<td>The court found in favour of the plaintiff and awarded her a sum of $100,000 as damages for loss flowing from both the acts of sexual harassment and dismissal.</td>
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<td>Yuen Sha Sha v Tse Chi Pan (1999) (Hong Kong)</td>
<td>The defendant had without the knowledge or consent of the plaintiff, secretly recorded images of the plaintiff undressing and changing her clothes. In a civil action against the defendant, the plaintiff alleged that she suffered loss and damages by reason of the sexual harassment and prayed inter alia for compensation for injury to feelings pursuant to s 76(6) and 76(3A)(e) of the Sex Discrimination Ordinance.</td>
<td>In allowing the application, it was held that the defendant’s video-taping of the plaintiff without her consent dressing and undressing constituted an act of sexual harassment that was rendered unlawful under s 39(3) of Pt IV of the Ordinance. In awarding a sum of $50,000 as damages for injury to feelings, which is specifically provided for under s 76(6) of the Ordinance, the court noted that the plaintiff, “a student and not, at the time, a person enjoying a reputation in the community, the injuries done to her were mainly to her feelings and the tape had not been shown to a large section of the public”.</td>
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<td>Richardson v Oracle Corporation Australia Pty Ltd and Anor (2014) (Australia)</td>
<td>The plaintiff who worked as a consulting manager in the Sydney office of the first defendant alleged that she was sexually harassed by the second defendant. She brought proceedings against the defendants under the Sex Discrimination Act 1984 in relation to the second defendant’s conduct towards her and the subsequent handling of her complaint by the employer. The conduct complained of included a series of humiliating sexual comments and sexual advances by the second defendant towards the plaintiff over a number of months.</td>
<td>The court at first instance found that the second defendant had sexually harassed the plaintiff and that the first defendant was vicariously liable for that conduct. The court awarded the plaintiff $18,000 as general damages for the distress occasioned by the second defendant’s unlawful conduct. On appeal, the Federal Court of Australia increased the damages to $100,000. It was held <em>inter alia</em> that the award of $18,000 in general damages was “manifestly inadequate” given the physical, psychological and other non-economic loss and damage caused by the sexual harassment.</td>
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CONCLUSION

A victim of sexual harassment may file a tortious lawsuit against the harasser in civil court for assault and battery. A claim for battery may lie when the abuse involves physical touching. If the victim was threatened with physical sexual abuse or had been assaulted, an assault claim could be maintained. A claim of emotional distress would lie when it involved verbal abuse, intimidation and stalking, among others. Where the claim is well-founded, the court may award damages for the physical and emotional harm suffered by the victim. The employer may be liable to the victim for the tortious acts of its employees committed within the course of employment. The victim may consider filing a suit for vicarious liability against the employer for sexual harassment done by another employee of the organisation. However, before the employer can be made vicariously liable as principal for any claim in tort, the employee who was responsible for the alleged tortious act must be made a party and his liability be established. To successfully bring a vicarious liability claim, the plaintiff must prove the following elements: (a) there was an employee and employer relationship between the parties; (b) the act was done in the course of employment, and (c) the committed act was either authorised by the employer, or a wrongful and unauthorised mode of an act that was authorised by the employer. The abovementioned claims are alternative to other available remedies of the victim employee, namely, resigning from employment and alleging constructive dismissal and lodging a police report pursuant to the Criminal Procedure Code for various sexual offences governed by the Penal Code.
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REFERENCES


Dyer and Wife v. Munday and Another (1895) 2 QB 742.

Frith v. Glen Straits Pty Ltd t/as Exchange Hotel (2005) 218 ALR 560.


Houghton v. Hackney Borough Council (1961) 3 KB 615.


Keppel Bus Company Ltd v. Sa’ad bin Ahmad (1972) 2 MLJ 121.


PR v. KC Legal Personal Representative of the Estate of MC deceased (2014) IEHC 126.


Roshairee bin Abdul Wahab v. Mejar Mustafa bin Omar & Ors (1996) 3 MLJ 337.


Yuen Sha Sha v. Tse Chi Pan (1999) 1 HKC 731.

