The *Hobart City Council* Case: A Tort of Sexual Harassment for Tasmania?

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Barker v Hobart City Council and Ors[1] clearly establishes the availability of a successful tort action in circumstances where the conduct of the defendant or defendants amounts to what is ordinarily termed sexual harassment. While this is particularly significant given the present lack of State legislation in respect of sex discrimination and sexual harassment, its significance is substantially broader. The facts of *Barker v Hobart City Council* were that Barker was employed by the Hobart City Council as a horticultural apprentice. During the course of her employment she was subjected to a variety of sexual advances by her male co-workers and by her immediate superior. These included conduct which could have formed the basis for a rape complaint, repeated and persistent fondling about the breasts and buttocks, and confinement within a motor vehicle by one of the defendants. In addition, the defendants uttered repeated slurs, concerning Ms Barker's mode of dress, her conduct and her sexual proclivities, which were found to be defamatory. This note will explore the actual and potential ramifications of the *Hobart City Council* case and briefly note their connection with similar developments overseas which suggest that a new tort of sexual harassment is gradually developing within the conceptual framework provided by the common law.

It is submitted that the *Hobart City Council* case is remarkable in a number of ways, not least, perhaps, in that, through the medium of a jury trial in a civil action, it foreshadowed some quite revolutionary developments in a number of discrete tort actions generally thought to have minimal impact for the advancement of women's interests and quite often believed to be inimical to them.

Rather than begin with the more obviously relevant actions in assault, battery, false imprisonment and negligence, this note will begin with a brief comment upon the potential of the tort of defamation in this context. The language used by the defendants - the sexual and sexualised slurs and innuendos - were of a kind commonplace in statutory actions involving what is conventionally

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1 Unreported jury decision; reported in the *Sunday Tasmanian*, 11 July 1993.

termed a 'hostile work environment.' While defamation had never previously been used to provide redress for a pattern of conduct in which the work environment was permeated by sexual language, such development did not require any major extension to the conceptual structure of the action. Instead, it required creative and imaginative thinking by Ms Barker's counsel, and a willingness upon the part of both judge and jury not to allow their thinking to be confined by conventional stereotypes about women and concerning normal male conduct. Even more significantly, it emphasised that the law was prepared to take seriously women's interests in being free from sexual innuendoes and demeaning sexual remarks. No longer were these to be treated as normal or as harmless good natured fun.

Similarly, given the facts of the case, the conduct of the defendants clearly fell within the parameters of assault, battery and false imprisonment, as conventionally understood. The case is revolutionary, not because it extended the conceptual structure of these various tort actions, but because it emphasised that they were clearly available where the conduct in question was sexualised rather than conventionally hostile in character. This is significant for a number of reasons. First, it makes it clear that torts such as assault, battery and false imprisonment have the capacity to protect women's rights to dignity, autonomy and personal security. Conventionally, the torts of assault and battery in particular have often been associated in the minds of lawyers and lay people alike with hostile, aggressive, or physically threatening conduct. Often, this constellation of images has been interpreted from a male point of view as conduct which the reasonable man would understand as hostile, aggressive, or physically threatening. The *Hobart City Council* case is significant because it disrupts and extends these meanings. It establishes beyond doubt that both the threat of unwanted sexual contact and the actualisation of that threat violate the dignity, the autonomy and the personal security of those individuals (primarily women) who are subjected to them. The core value protected by tort actions in assault, battery and false imprisonment is the entitlement of all individuals to dignity, autonomy and personal security. Any contact which threatens the personal dignity, autonomy and security of the individual is potentially within the scope of the tort action.

The *Hobart City Council* case has been widely remarked upon as a warning to those Tasmanian employers who are not subject to Commonwealth legislation in respect of sexual harassment and sex discrimination. Given that the defendant Council was found liable both in relation to its failure to provide a safe system of work and vicariously liable for the actions of its servants and agents, this is clearly true. It is of the utmost importance that Tasmanian practitioners be aware of the potential for a successful action in tort

in circumstances where a statutory remedy for sexual harassment is not available.

Its real significance, however, lies elsewhere. Most statutory actions in respect of sexual harassment are limited to the workplace. Remedies in tort, such as those which succeeded in *Barker v Hobart City Council & Ors*, are not limited in this way. Thus, they are potentially available in a variety of settings including schools, recreational organisations, sporting clubs and voluntary organisations. While the potential for sexual harassment clearly exists in these and similar settings, statutory remedies are not generally available.

An action in tort may also be preferred by some plaintiffs even where a statutory remedy is available. Where the conduct is sufficiently serious, and the elements of the appropriate torts can clearly be made out, the option is worth canvassing, particularly since the statutory actions emphasise mediation rather than the unambiguous vindication of the plaintiff's right to dignity, autonomy and bodily integrity afforded by the tort actions.

The astute practitioner should also canvass similar extensions of tort law in other jurisdictions and be ready to explore their utility in Tasmania. Of particular interest in this context is the as yet unreported British decision in *Khorasandjian v Bush*.[2] The facts of *Khorasandjian v Bush* involved persistent harassment. The plaintiff had previously had a relationship with the twenty-three year-old defendant. After it ended he subjected her to prolonged harassment. The defendant had formed the pattern of making persistent and abusive telephone calls to her parent's home where she lived. The plaintiff sought an injunction prohibiting the defendant from, inter alia, harassing, pestering, and communicating with the plaintiff. Because the parties were neither spouses nor cohabitees, it was necessary to establish that the action complained of constituted a legal wrong. When the defendant appealed against the imposition of injunctive relief, the court, following a Canadian precedent, held that the conduct complained of constituted private nuisance as it constituted an unreasonable interference with the use and enjoyment of land. Given that the plaintiff lacked any estate or interest in the land, this approach represented a significant extension to the action for private nuisance. On the other hand, some judicial language apparently suggested an alternative foundation in *Wilkinson v Downton*.[3] Many commentators have noted that *Khorasandjian* and

2 [1993] 3 All ER 669.

3 [1897] 2 QB 57.

similar decisions[4] in other jurisdictions suggest that the common law in Canada and England is gradually moving toward what might be termed a tort of harassment, and also paralleling the United States action for the intentional infliction of emotional distress.[5] The allusions to *Wilkinson v Downton* are very interesting. As presently understood, *Wilkinson v Downton* provides a remedy where the defendant has intentionally engaged in conduct which causes nervous shock. While the plaintiff in *Khorasandjian v Bush* was undeniably harassed by the defendant, there is no evidence that she suffered harm amounting to nervous shock.

The success of the plaintiff in the *Hobart City Council* case strongly suggests that in appropriate circumstances the common law is apt to provide a remedy in cases of conduct constituting sexual harassment. Given the signs of increasing flexibility and an increasing legal willingness to recognise women's interests in dignity, autonomy and bodily security (and their right to these social goods), it is critical that the availability of common law remedies ought not be overlooked. In Tasmania, the ice has been broken with a clear affirmation of the availability of common law actions in assault, battery, false imprisonment and defamation, in cases of sexual harassment. While the common law has often been thought of as insensitive to the interests of women and the politics of gender, its flexibility and adaptiveness make it a potent weapon for legal change. The *Hobart City Council* case illustrates its utility on appropriate facts, while overseas developments such as *Khorasandjian v Bush* suggest other possible strategies. Given that Tasmania continues to lack basic statutory remedies for sexual harassment, the importance of these developments in tort law must not be underestimated. Such developments clearly provide a legal remedy in appropriate circumstances and their availability may also prove a valuable tool in securing an appropriate settlement in some circumstances.

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4 *Burnett v George* [1992] 1 FLR 525; *Thomas v NUM* [1986] Ch 20.

5 There is at least some suggestion that this represents a logical development of *Wilkinson v Downton* [1897] 2 QB 57 and *Janvier v Sweeney* [1919] 2 KB 316. The United States action for the intentional infliction of emotional distress has been used to provide a remedy in cases of racial harassment, sexual harassment and harassment on the grounds of disability. See *Alcorn v Ambro Engineering Inc* 2 Cal 3d 493 (1970); *Ford v Revlon Inc* 153 Ariz 38 (1987); *Harris v Jones* 281 Md 560 (1977). For a sound discussion of *Khorasandjian* and related issues see J Conaghan, 'Harassment and the Law of Torts: *Khorasandjian v Bush*' (1993) 1 *Feminist Legal Studies* 189.