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TORT LAW HIGHLIGHT

Tort Law

Harassment: The Plague of Modern Society

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It is safe to say that Malaysia finally saw the light at the end of the tunnel when the Dewan Rakyat passed the much-debated Anti-Sexual Harassment Bill on 20 July 2022. This was a huge victory for many especially non-governmental organizations like the All Women's Action Society (AWAM) who have been pushing for the tabling of the Bill since 2020 and also other groups who have been lobbying for approximately 30 years. However, there still appears to be a grey area in respect of the common law tort of harassment.

Simple yet Profound

Harassment. A simple English word which we are all so familiar with and are probably aware of at least one incident be it at work or elsewhere that even Lord Sumption acknowledged harassment as a well understood term surrounded with negativity. It literally translates to some form of persistent unwelcomed pressure or intimidation. If this term is indeed well-known filled with negativity, then why does it appear to be a wearisome path for a lay person to bring a civil action against their harasser?

The culture of harassment has become so common in today's world, but many countries are yet to provide clear laws on it. In Jeremy Bentham's words, "*stretching his hands up to reach the stars, too often man forgets the flowers at his feet*". In Malaysia, there appears to be no single statutory legislation that consolidates the laws on harassment as opposed to the United Kingdom having their Protection from Harassment Act (PHA) 1997 and Singapore's Protection from Harassment Act (PHA) 2014. These broad statutes encompass harassment in all forms including sexual, workplace harassment, internet harassment, stalking, bullying etc.

Clenched With Embarrassment (Cyberbullying)

The term harassment is extensive consisting of different branches especially in the current fast paced world of technology and internet harassment, often referred to as cyberbullying, and is also on the rise. According to the 2020 UNICEF Report, Malaysia has been recorded as the second highest nation in Asia for cyberbullying amongst youth. R. Thivya Nayagi and N. Sashikala may just be two ordinary names to

us but these two names have once again highlighted that cyberbullying can be fatal. Both girls were apparently victims of suicide after being harassed with defamatory comments on TikTok. The internet being the primary source of communication for thousands today is an excellent platform for these ignoble imposters to openly harass another.

The Stepping Stone

The case of Mohd Rizwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282 sparked the fire in Malaysian harassment laws where Suriyadi FCJ finally affirmed that harassment is an actionable civil wrong. The learned judge had adopted the view of Lord Sumption in Thomas v News Group Newspapers Ltd & Anor [2001] EWCA CIV 1233 that a tort of harassment relates to a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear and distress.

The Court provided justice for the respondent employee in this case who was also counterclaiming for damages against the appellant on the basis that he had sexually harassed her. Sometimes it is the journey that matters more than the destination hence it is interesting to note the routes taken by the High Court, Court of Appeal and Federal Court respectively in arriving to their decisions. The High Court failed to expressly clarify which tort the decision was founded upon but awarded the damages for the respondent's sufferings which led to her major depression. The Court of Appeal upheld the High Court's decision but the cause of action was founded on the tort of intentionally causing nervous shock.

To Ponder

This tort of nervous shock is known for having a high threshold as past precedents have indicated that psychiatric illness is not the easiest thing to prove. The Court of Appeal went further to say that the act of harassment caused adverse psychiatric effect to the respondent as the respondent was already an emotionally non-resilient individual. Thus, there was a causal link between the sexual harassment and the respondent's major depression. A question to ponder upon is what if the respondent was not emotionally vulnerable and did not undergo a major depression as a result of the harassment? On what basis would the High Court have awarded her the damages then as there was no dispute on the tort of sexual harassment? Does this indicate that future harassment claims will rely heavily on whether a victim's mental health has severely deteriorated before a harasser can be punished? Prevention is certainly better than cure and the Federal Court at last clarified that the damages were awarded based on the tort of sexual harassment.

The Federal Court also went one step further and listed the elements of sexual harassment. This case is an important stepping stone for the laws on sexual harassment to be enforced and now with the Anti-Sexual Harassment Bill being passed, both common law and the soon to be statute seem to have provided an adequate civil remedy on sexual harassment. A point to be noted is why is it when we dive into the laws of harassment in Malaysia, be it on an online search engine or a thick textbook, the focus is more

on the sexual part of harassment? What happens when there is a form of harassment without a sexual flavor? The Anti-Sexual Harassment Bill will be rather irrelevant and the laws to govern will fall back into the common law scope of *Mohd Rizwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282.

Other Jurisdictions

No doubt that common law can be developed on an everyday basis without much delay or at the expense of the state but Courts only have the power to change common law *ex post facto* (after the fact) whereby reform or development of legal principles can only happen when an action is initiated, that too in light of that specific situation only. Three decades ago, not many individuals would have ever thought that harassment can be done so vividly online. Therefore, new forms of harassment can also mushroom in the three decades to come and the judiciary will need to be equipped with some form of guide to handle this plague. Thus, maybe the time is ripe to enact a statute to consolidate harassment as a whole to address the present social uncertainties which is a single piece of legislation that is clear on the definitions, protection orders, restraining orders, injunctions, or any other civil remedies available to victims as well as appropriate defenses available to the defendants seems necessary.

The existence of a provision is what makes the laws within that area easily accessible and somewhat understandable. This is in line with Lord Bingham's theory that the law must be accessible, intelligible and clear. This is where clever legislators play an immense role in drafting a comprehensive legislation that allows room for purposive interpretation and is wide enough to encompass a myriad of activities. This is also probably why the PHA 1997 and PHA 2014 have not stringently defined the word harassment per se and left it opened to interpretation based on a reasonable standard. The law within the realm of harassment has been systematically laid down in these statutes and has been amalgamated by various other legislations to include new offences from time to time such as how stalking was included as an offence.

It will be impossible for drafters to anticipate all future factual circumstances and this is where common law puts meat on legislative bones. The perfect example is seen in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 where the word "person" in the PHA 2014 was interpreted to include those responsible for the management or operations of a corporate or unincorporated body. This development allowed corporate and unincorporated bodies to bring harassment claims occasionally. The chief novelty of these statutes is the methodical approach in providing an avenue for the victims to initiate a civil or criminal action against their perpetrators. The legislation contains both criminal and civil sanctions and a civil remedy is usually pursued where there is insufficient evidence for a criminal prosecution as that requires a higher threshold. However, victims who intend to punish their harassers as a feel-good mechanism can continue to bring a criminal proceeding so long as the conduct is unacceptable to a degree which would sustain criminal liability as per requirements in the statute.

Progress

Increased judicial recognition of this tort has broken barriers by carving out the common law tort of harassment. Progress is also being made within the realm of stalking as after many petitions over the years to criminalize stalking, amendments were made to the Penal Code and the Criminal Procedure Code and were tabled for its first reading in the Parliament on 4th August 2022. The Communications and Multimedia Ministry is also preparing a cabinet paper on anti-cyberbullying laws.

It is plausible that Malaysia is proactively expanding harassment laws but the current piecemeal approach appears to be scattered when in fact all of these offences found in different laws can come under one wide umbrella of harassment. Thus, it may be a little premature to say that Malaysia has seen the light at the end of the tunnel for harassment laws. The fine line between amusing banter and an actionable harassment is sometimes difficult to draw and some form of descriptive aid is essential to the judiciary as well as ordinary individuals.

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