

HARASSMENT AND INTENTIONAL TORT OF NEGLIGENCE

*Malcomson Nicholas Hugh Bertram & Anor v Naresh Kumar Metha*¹

TAN KENG FENG *

I. HARASSMENT

THE part of the above title which refers to the “intentional tort of negligence” seems contradictory and impossible. Against this, Lee Seiu Kin JC in *Malcomson* recently said, *obiter*: “In the law of negligence, a person has the duty to ensure that he does not cause any damage to others. Such acts are *unintentional*....”² I will return to the question of an intentional tort of negligence later.

Malcomson itself concerns the establishment of a new tort of intentional harassment in Singapore where the defendant, a former employee of the plaintiff’s company, in seeking re-employment, pestered the plaintiff with nuisance telecommunication by e-mails, mobile phone calls and SMS messages. For this the plaintiff could not sue under the traditional tort of trespass to the person in assault or battery. The plaintiff was distressed without being harmed, and although trespass, as a tort, is actionable *per se* (without damage), the plaintiff could not claim under the tort because the defendant did not, by his harassment, come into any unwanted physical contact with the plaintiff, as required under battery, nor did he cause the plaintiff to reasonably apprehend any such contact, as required under assault. The plaintiff’s right to his personal safety in his bodily integrity was neither threatened nor invaded in this way, aside from any question as to the directness in the infliction of the harassment. It is required under trespass that the interference with the plaintiff has to be direct in the sense that the interference must follow in causal sequence directly or immediately upon the act of the defendant. It is also not within the alternative intentional tort

* MBA (IMD); DipCLS; LLB (Cantab); LLB (Sing); Advocate and Solicitor (Malaya and Singapore); Associate Professor, Faculty of Law, National University of Singapore. I am grateful to Assoc Prof Margaret Fordham for her help in finalizing the note.

¹ [2001] 4 SLR 454 (“*Malcomson*”).

² *Ibid.*, at 473 (emphasis added).

under the rule in *Wilkinson v Downton*³ that was historically developed as an additional form of action based on what was called the writ of trespass on the case to supplement trespass. This *Wilkinson* principle renders any word said or act done, whether directly or indirectly, with the intention of inflicting harm, tortious so long as harm is actually caused. The plaintiff did not suffer any bodily harm or recognizable psychiatric illness to enable him to claim under the tort. The harassment which he personally experienced in the case (apart from two other causes of action in respect of trespass to the land to his home and the private nuisance to his home and his company's office) occurred outside his home and office, and was, therefore, outside the other traditional torts of trespass to the land and private nuisance.

The torts of trespass to the person and land, the rule in *Wilkinson v Downton* and the tort of private nuisance, could not be extended incrementally to remedy the mental distress experienced by the plaintiff from the harassment without distorting the coherence of these established torts. The English Court of Appeal in *Khorasandjian v Bush*⁴ tried to provide a remedy against harassment by extending the tort of private nuisance to allow a mere licensee, with insufficient interest in the land, to recover for nuisance affecting the enjoyment of the land. In that case, the defendant, in his unrequited love for the plaintiff, pestered her at her parents' home with nuisance telephone calls. The Court by a majority decision allowed an injunction against the harassment in the tort of private nuisance. The House of Lords in *Hunter v Canary Wharf*⁵ rejected this extension, and Lord Goff emphatically said:

If a plaintiff, such as the daughter of the householder in *Khorasandjian v Bush*, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is satisfactory manner in which to develop the law⁶

In *Malcomson*, Lee JC had to go beyond the established torts to provide the plaintiff with a remedy against the harassment. In creating the new tort of harassment, *Malcomson* is a bold decision arrived at by Lee JC without

³ [1897] 2 QB 57.

⁴ [1993] QB 727.

⁵ [1997] AC 655.

⁶ *Ibid.*, at 691-2.

the support of any authoritative precedent in Singapore and England or elsewhere.⁷ Lee JC did not give an exhaustive definition of the tort of harassment. The learned judge gave a definition of the tort that was sufficient to encompass the harassment in the case: “[I] shall take the term “harassment” to mean a course of conduct by a person, whether by words or action, directly or through third parties, [which is] sufficiently repetitive in nature as would cause, ... [or] which he [the harasser] ought reasonably to know would cause, worry, emotional distress or annoyance to another person.”⁸

It may be that in this modern age the right to personal safety, protected under the traditional tort of trespass to the person, is not as frequently threatened or invaded as in the old days when trespass was first established as a tort in England to maintain the King’s peace. Society is these days more peaceful than it used to be. Instead a new tort may now be required to provide a remedy against harassment which is a form of anti-social behaviour that invades, without necessarily encroaching on safety, the privacy of a person in respect of his or her right to be left alone.⁹ Such harassment can come in the recent forms of “stalking” in public places (which was referred to as a specific example by Lee JC in *Malcomson*), or of “paparazzi photography”, both of which have happened with wide publicity to many celebrities overseas, or in the form of nuisance surveillance or telecommunication by modern technological devices, as was the case of the telecommunication harassment in *Malcomson*. Harassment, by definition, covers any course of conduct, whether by speech or action, which is sufficiently repetitive or persistent for the person harassing to know (or to be in a position where he ought to know) that his behaviour would cause mental anxiety or distress to another person. Harassment in

⁷ F A Trindade, “The intentional infliction of Purely Mental Distress” (1986) 6 OJLS 219, 221 surmises that “there is no clear authority, at least in the British and Australian law of torts (nor for that matter in Canada and New Zealand), that an action on the case for damages is available for the intentional infliction of purely mental distress or, as it is sometimes described, mental distress *simpliciter*”. However in US the *Wilkinson* principle has been extended under the *Restatement of Torts*, 2d, s 46 (1): “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and if bodily harm to the other results from it, for such bodily harm.” This constitutes a recognition in the US of the existence of a tort of intentional infliction of purely emotional distress (i.e. a wilful wrong by the invasion of mental/emotional tranquillity). The actionable conduct like that under *Wilkinson* can be “one-off” and need not be based on a “course” of conduct as under harassment, but the conduct must be “extreme and outrageous” and the emotional distress “severe”. The tort has been applied against harassment of debtors by creditors and debt-collecting agencies, mishandling of dead bodies by funeral parlours and offensive conduct by sexual abuse or harassment within and outside the workplace, especially of females. See above article and also Conaghan & Mansell, *The Wrongs of Tort* (2nd ed, 1999), chapter 7, “Feminist Perspectives on Tort Law: Remediating Sexual Harassment and Abuse”.

⁸ [2001] 4 SLR 454, at 464.

⁹ The other major aspect of personal privacy is the area of confidentiality.

this wide sense is not strictly a new phenomenon in society.¹⁰ It could be as old as the beginning of society. However, harassment may have become more acute. In *Malcomson*, Lee JC took the view that it has become so in Singapore, given both the new technological means of communication and the urban and more leisurely lifestyle, and especially given the extreme nature of the harassment that occurred in *Malcomson*, where the learned judge surmised that the defendant must have been driven by some malice or mental instability to harass the plaintiff to the unbearable extent of wearing him down.

In England, in *Wong v Parkside Health NHS Trust & Anor*,¹¹ decided just after *Malcomson*, a new employee sued some of her fellow employees for harassment for being highly uncooperative, rude and unfriendly to her in work to an extent unimaginable of grown-up adults in a workplace.¹² The English Court of Appeal, on reviewing the recent batch of harassment type of cases, disallowed her claim for mere mental distress based on the firm conclusion that the English common law had not gone so far as to recognize the tort of intentional harassment. However, in England, a specific statute, the Protection from Harassment Act 1997, has been enacted to provide the necessary civil remedies and criminal offences against such misbehaviour. The harassment claimed in *Wong* occurred before the statute came into force. If a gap was perceived in the common law in the absence of a tort against harassment, it is now been remedied, at least in England, by statutory reform.

Now that the tort of intentional harassment has been introduced in Singapore, it is necessary for the courts to develop under the common law, on an incremental case-by-case basis, the scope of the liability under the tort. Everyone living in this crowded world is, to a greater or lesser extent, harassed by others. My tutees harass me on the law course I teach them and about their examinations (jokingly), and they ask me (seriously) whether they can sue their parents for harassing them! Not all intentional harassment that inflicts mental distress can be actionable under the tort of harassment. There is a need to balance a defendant's right to speech and action with a

¹⁰ In this area, it is traditionally accepted under tort law that mental distress unaccompanied by personal injury, outside the mental invasion by the apprehension of imminent and unwanted bodily contact under assault, is not actionable. Lee JC in establishing the tort of harassment in *Malcomson* (at 469) did not share this view of tort law, and he expressly rejected Selvam J's *obiter* in *Arul Chandran v Gartshore & Ors* [2000] 2 SLR 446, at 451-2, to a somewhat similar effect. Instead Lee JC relied on Lord Hoffmann's *obiter dictum* in *Hunter v Canary Wharf*, *supra*, n 5, at 707 (quoted, *infra*, n 23) to assert that the modern English common law on this is, at best, unsettled and that there was, therefore, no clear authority precluding the extension of tort liability to allow for the recovery of mere mental distress arising out of harassment.

¹¹ [2001] EWCA Civ 1721.

¹² The defendants would have preferred another person to have been appointed to the job rather than the plaintiff, and right from the start they refused to explain the work properly to her, criticised her arrival and her work, locked her out of her office, interfered with her desk and personal effects, hid things she needed, and told her that she should leave.

plaintiff's right to be left undisturbed. Freedom can never be absolute or unrestricted; if it were, there would be unmitigated chaos and unjustifiable interference with the rights of others. Legitimate and appropriate fetters can be imposed on a person's liberty to the extent that the exercise of that liberty is consistent with the liberty of another. As such, the law has to distinguish between those forms of harassment that are sufficiently unreasonable in the times and context of the society (tested, perhaps, by reference to a reasonable person in the circumstances) as to be deserving of compensation in tort and those forms of harassment that are not so unreasonable as to be incapable of being considered as merely ordinary and inevitable, if unpleasant, incidents of everyday living which must be tolerated without any remedy in tort. Harassment that would otherwise appear to be unreasonable and tortious may be rendered reasonable and non-tortious by the particular circumstances of the harassment – for example, by reason of the purpose of the defendant (say, of a harassment pursued in the enforcement of law or for other legitimate purposes¹³), or by reason of the preceding behaviour of the plaintiff to the defendant (say, of a harassment provoked by the plaintiff).

My concern in this note is not solely with the establishment of the new tort of harassment in Singapore, although my own academic inclination is to opt for a statutory route to define what constitutes unreasonable intentional harassment and to provide the necessary civil remedy (in compensation and/or injunction) and criminal penalty (in restraining order, fine or imprisonment) under the statute against such misbehaviour (like the UK statutory tort and crime of harassment, referred to above¹⁴). If harassment is a serious problem in Singapore, developing a new tort with its proper scope and relevant defences under the common law takes too many cases and too much time, apart from being against the scheme of the development of tort liability so far, and this will not provide the necessary criminal deterrence.¹⁵

¹³ Protestation on issues of public interest is not considered harassment within the English Protection from Harassment Act 1997: see Michael Jones, *Textbook on Torts* (7th ed, 2000) at p 468, referring to *Huntington Life Sciences Ltd v Curtin*, "The Times", December 11, 1997. The pursuit of legitimate purpose would also presumably include the reasonable activities of the journalists, salespeople, debt collectors, political, social or religious activists and others who are similarly situated.

¹⁴ See *supra*, text at n 11. The 1997 Act was introduced in 1996 in the UK Parliament as a private member's Bill to criminalize persistent stalking that was prevalent and widely publicized then and which included the stalking of the late Princess of Wales.

¹⁵ In *Malcomson Lee JC* (at 472) referred to the criminal provisions under sections 13A and 13B, Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Ed), but the learned judge said: "[I]f a person uses words that are abusive, insulting or threatening or behaves in that manner in any place and as a consequence causes harassment, alarm or distress to another person, the former may have committed an offence under the Act. However it would appear that similar words expressed by the perpetrator over the mobile phone which causes harassment, alarm or distress to the victim would not be an offence under this Act". Moreover, the criminal provisions relate to the preservation of public order and safety and, as such, many forms of harassment that are not "threatening, abusive

To effectively counter unacceptable harassment in society, it would appear that private civil law has to be employed in conjunction with public criminal law. It is most unlikely, for example, that the recent widely reported Everitt Road incident in the local press of quarrelling neighbours apparently harassing each other unremittingly over many years will be durably sorted out by civil law alone.¹⁶

II. INTENTIONAL TORT OF NEGLIGENCE

I am also concerned with another tort. This time it is the established tort of negligence and the relationship of this tort to the nascent tort of intentional harassment, arising from the *obiter dictum* of Lee JC in *Malcomson* that the tort of negligence involves unintentional acts.¹⁷ In *Paterson Zochonis & Co Ltd and Others v Merfarken Packaging Ltd and Others*,¹⁸ Goff LJ (as he then was) observed, some years before and in contradiction to the later dictum of Lee JC, that negligence can be committed intentionally: “[T]he action of negligence lies not only for carelessness but also for intentional conduct...,”¹⁹ hence the title of the note. It is a paradox which has to be explained in order to better understand the tort of negligence and its relationship to the new tort of intentional harassment in Singapore.

Negligence as a type of human misconduct – that of careless or unintentional acts – is too wide as a basis for imposing tort liability. Different people have different conceptions of carelessness. In the subjective sense, I can say that my behaviour, even when it causes damage, does not amount to carelessness by my own standards, although others, especially those injured, may think that I am careless. Carelessness, as defined subjectively, is too arbitrary. Carelessness, if it is to be used for legal liability, has to be taken objectively in the sense of a misconduct that is below the standard of a reasonable person in the circumstances. Even this objective carelessness, as defined by reference to a reasonable person, is still too wide. Not all careless misconduct that is below the standard of a reasonable person can constitute the tort of negligence. My female law students can be careless about their affection by the standards of reasonable ladies in their situation, but it does not follow that the distraught male victims of their misplaced affection can automatically claim in the tort of negligence. The tort of negligence is more than a particular type of misconduct. It is a concept of legal liability, which selects those situations of objective carelessness that are considered by law as deserving of compensation in tort. Not all objective carelessness is, therefore, the tort of

or insulting” are not penalised under the Act. Harassing another out of infatuation is an example.

¹⁶ See “The Sunday Times”, November 3, 2002 at p 30.

¹⁷ *Supra*, n 2.

¹⁸ [1986] 3 All ER 522.

¹⁹ *Ibid*, at 541, quoting from *Salmond and Heuston on Torts* (18th ed, 1981).

negligence. Only those situations of objective carelessness that cause damage in the breach of an existing legal duty to take care are actionable under the tort of negligence.

In the ordinary negligence cases of physical acts causing impact physical harm involving the common road and work accidents the legal duty to take care arises when it is reasonably foreseeable that a failure to take care will result in harm. In the non-ordinary and infrequent cases of negligence involving special parties (like a plaintiff as an unborn child or a defendant as a public authority), or exceptional mechanics of causing harm (like omission, instead of action), or unique types of damage (like purely economic loss, instead of the usual physical damage), it is more difficult to establish the existence of a duty to take care. The additional concepts of “public policy”, “proximity” and “justness” or “reasonableness” have been used with differing interpretations and varying efficacy, individually or in conjunction with the others, to determine the special duties required in such situations.²⁰ It is not the place to discuss this, but it must be said, that the courts have made this part of the law of the tort of negligence more confusing and complicated than it is really necessary.

The only relevance of the duty of care concept here (be it ordinary or special duties) is that the carelessness, as discussed above, in relation to the tort of negligence, is strictly a breach of this legal duty to take care and the breach of this duty can logically encompass any type of misbehaviour that is objectively below the standard of a reasonable person. A defendant can definitely behave below the standard of a reasonable person in the breach of a duty to take care, either carelessly or intentionally. I can drive too fast below the standard of a reasonable driver in the circumstances and knock a pedestrian down, and this can be done intentionally, if I desire to harm

²⁰ As in the “two-stage” test formulated by Lord Wilberforce in *Anns v Merton London Borough Council* ([1978] AC 728 of reasonable foreseeability qualified by considerations of public policy, or as in the succeeding “three-part” test formulated in *Caparo Industries plc v Dickman* ([1990] 2 AC 605 (taken from views expressed in the High Court of Australia) of foreseeability, proximity and fairness. It would appear from the latest decision of the High Court of Australia in *Tame v New South Wales; Annetts v Australian Stations Pty Limited* [2002] HCA 35 (5 September 2002), that there is now a revival of the original Atkinian reasonable foreseeability test (*Donoghue v Stevenson* [1932] AC 562), but this time the test is used disjunctively with “foreseeability” as a fact (the degree of predictability of harm required for liability) and with the “reasonable” that qualifies foreseeability being construed separately as a value (the soundness of public policies that are relevant in limiting or excluding, or even extending, liability under the tort of negligence). Suffice it to say that this latest Australian test is not too different in content from the earlier two-stage test. But it is somehow formulated as a rejection of all the previous tests. The two-stage test, if it is applied properly, may prove to be not too bad as a test after all (see Tan Keng Feng, “The Three-Part Test: Yet Another Test of Duty in Negligence” (1989) *Malaya Law Review* 223 written in the vain support, so far, of the two-stage test).

him,²¹ or carelessly, if I am inattentive with regard to his safety by my fast driving. The injured pedestrian has a cause of action in battery under the tort of trespass to the person if I injured him deliberately, but the existence of an alternative action in battery does not exclude my liability in the tort of negligence. It would be illogical and counter-intuitive if I were only liable in the tort of negligence if I drove too fast below the standard of a reasonable driver and injured the pedestrian carelessly, but were exempted from such liability if I did exactly same thing, but did it deliberately. Negligence, as a tort and as a concept of legal liability under a fault system of accident compensation, encompasses any behaviour below the standard of a reasonable person, whether careless or intentional, that is committed in the breach of a legal duty to take care.²² It is thus irrefutable that the tort of negligence is not logically confined to careless misconduct and that the tort can be committed intentionally.²³

Lee JC is right in the practical sense that most negligence cases are indeed committed carelessly. But Lord Goff is conceptually correct in saying that the tort of negligence can also be committed intentionally. The intentional tort of negligence is a legal possibility. It is necessary to accept this notion of an intentional tort of negligence, even though it may be statistically insignificant in practice, in order to make sense of the tort of negligence as a legal concept of liability. As a result, a clear distinction must be maintained in the law between negligence as a type of misconduct

²¹ It would also, presumably, be intentional if by driving fast it is substantially certain that the pedestrian will be injured or if, by so driving, I am shown to be recklessly indifferent to his safety.

²² Put it another way, the tort of negligence requires three interlinked elements: the existence of a legal duty to take care based generally on reasonable foreseeability, a breach of this duty by any behaviour that is below the foreseeable standard of a reasonable person, whether careless or intentional, and foreseeable damage as a result. The tort of negligence is the notion of “foreseeability” repeated three times in different, but related, contexts in the given situation of legal liability. Carelessness, as such, by itself, as a particular type of misconduct, is unnecessary and insufficient for liability under the tort of negligence.

²³ Intentional harassment does not usually come under the tort of negligence, even though an intentional version of this tort is conceptually possible. This is because harassment that causes mental distress by invading another’s solitude does not necessarily inflict personal injury. The tort of negligence, unlike the new intentional tort of harassment, is not actionable without damage, and there is no necessity under the intentional tort of harassment, unlike that under the tort of negligence, of establishing the existence of a legal duty to take care not to harass. Lord Hoffmann in *Hunter v Canary Wharf* [1997] AC 655, 707 said: “I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence....The policy considerations are quite different”. His Lordship may be correct in suggesting that an intentional tort of harassment should on sound policy be made actionable without damage, if there is a need for such a tort. But, it is humbly submitted that the implication from his Lordship’s statement that the tort of negligence is always, in contrast to the other intentional torts, unintentional is logically questionable, although his Lordship is right in postulating the tort as one that is generally based on carelessness, rather than wrongful intention.

and negligence as a tort, and it has to be recognized that negligence as a tort can be committed intentionally – not unlike the newly established inchoate tort of harassment in Singapore which, however, in contrast to the tort of negligence, is always intentional and actionable even without damage.