WORKPLACE HARASSMENT

Persons Liable and Damages Payable under the Protection from Harassment Act 2014

The recently enacted Protection from Harassment Act offers greater protection against harassment as compared to the position before. While the said Act covers both criminal and civil liability, this article focuses on the latter and seeks to examine the persons who may incur civil liability and the principles that may apply to damages awarded. While the main focus of this article is on harassment that takes place in a workplace, the principles discussed may also apply to other contexts.

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I. Introduction

1 The Protection from Harassment Act[1] ("PHA") was passed on 13 March 2014.[2] The Minister, in moving the Protection from Harassment Bill in Parliament, stated that the existing laws on harassment in Singapore were inadequate both in terms of the criminal and civil aspects, and that there was a deep public concern about harassment and the need for greater protection.[3] While the said Act certainly provides greater protection both in relation to the criminal and civil aspects as compared to the position before, this article seeks to examine the persons who may incur civil liability and the principles that may possibly apply to damages awarded under the said Act. Both these issues are not currently clearly addressed in the legislation.

1 Cap 256A, 2015 Rev Ed.
2 Act 17 of 2014.
3 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91. As to the background surrounding the enactment of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed), see also Goh Yihan & Yip Man, "The Protection from Harassment Act 2014 – Legislative Comment" (2014) 26 SAcLJ 700.

While the main focus of this article is on harassment that takes place in a workplace, the principles discussed may also apply to other contexts.[4] Further, while the main focus of this paper is on the Protection from Harassment Act, some of the issues discussed may apply in other contexts as well, such as where the employee sues the employer in negligence for sexual harassment that takes place in the workplace.

II. Persons liable

2 The PHA applies to "persons", a term which is not defined in that Act. However, s 2(1) of the Interpretation Act[5] provides, among other things, that unless there is something in the subject or context inconsistent with such construction, the term "person" includes a company or association or body of persons, corporate or incorporate. In response to a query from a Member of Parliament as to whether the PHA applied to corporate entities, the Minister in moving the Bill replied that the Interpretation Act was indeed applicable.[6]

3 In *Tesco Supermarkets Ltd v Nattrass*,[7] the issue arose whether Tesco could be guilty of an offence relating to certain wrongful trade descriptions which came about because of a mistake made by a manager of a store. The House of Lords held that Tesco was not liable because the manager's actions could not be treated as that of the company's in the circumstances of the case. Lord Reid stated:[8]

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person which acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. *He is not acting as a servant, representative agent or delegate. He is an embodiment of the company* or, one could say, he hears and speaks through the persona of the company within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. [emphasis added]

4 See, *eg*, *Choudhary v Martins* [2008] 1 WLR 617. However, it would appear that the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) may not apply in relation to inconsiderate behaviour between neighbours (see *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91).

5 Cap 1, 2002 Rev Ed.

6 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

7 [1972] AC 153; [1971] 2 All ER 127. See also *Auston International Group Ltd v Public Prosecutor* [2008] 1 SLR(R) 882.

8 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170; [1971] 2 All ER 127 at 131.

4 Thus in so far as a director, manager or even executive[9] can be considered to be the mind of the company or the embodiment of the company, an action may be brought against the company. Whether this is indeed the case would depend on the nature of the charge, the relative position of the officer and the other relevant factors and circumstances,[10] including the policy considerations behind the statute in question.[11] For instance, if the company requests an executive to harass a client who owes the company money, to hold that the company is liable in such circumstances may be in line with the policy behind the statute. On the other hand, if the same officer sexually harasses a fellow colleague in the office on his own accord, the position may well be different.

5 Aside from primary liability, the question might also arise as to whether the employer can be vicariously liable for the actions of the employee under the PHA. Section 11(1) of the said Act provides that the "victim[12] under section 3, 4, 5 or 7 may bring civil proceedings in a court against the respondent".

6 A similar issue arose for consideration in *Majrowski v Guy's and St Thomas' NHS Trust*[13] ("*Majrowski*"). The case concerned the UK Protection from Harassment Act 1997[14] ("UK PHA"). Section 3(1) of that statute provided that "an actual or apprehended breach … may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question". The House of Lords unanimously held that the employer could be vicariously liable for the actions of an employee. One of the judges, Lord Nicholls of Birkenhead opined that employers could be vicariously liable unless the statutory provisions expressly or impliedly excluded such liability. On the facts he held that this was not the case. In fact there were policy reasons why such liability was to be welcomed because it forced employers to maintain standards of "good practice". Though this may increase the burden on employers, he stated:[15]

9 See, *eg*, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 BCLC 116.

10 *R v ICR Haulage Ltd* [1944] KB 551 at 559; [1944] 1 All ER 691 at 695.

11 See, *eg*, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 BCLC 116.

12 The term "victim" may include a third-party who was not a direct target of the conduct (see *Levi v Bates* [2015] EWCA Civ 206) in some circumstances such as under s 4 of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed).

13 [2007] 1 AC 224; [2006] IRLR 695.

14 c 40.

15 *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224; [2006] IRLR 695 at [27]–[28].

> Parliament added harassment to the list of civil wrongs. Parliament did so because it considered the existing law provided insufficient protection for victims of harassment. The inevitable consequence of Parliament creating this new wrong of universal application is that at times an employee will commit this wrong in the course of his employment. This prompts the question: why should an employer have a special dispensation in respect of the newly-created wrong and not be liable if an employee commits this wrong in the course of his employment? The contemporary rationale of employers' vicarious liability is as applicable to this new wrong as it is to common law torts. Take a case where an employee, in the course of his employment, harasses a non-employee, such as a customer of the employer. In such a case the employer would be liable if his employee had assaulted the customer. Why should this not equally be so in respect of harassment? In principle, harassment arising from a dispute between two employees stands on the same footing.

7 Further, in response to the counsel for the employer who argued that introducing vicarious liability may give rise to unmeritorious claims, Lord Nicholls stated that the courts were well equipped to "separate the wheat from the chaff at an early stage"[16] and hence this was not a good enough reason for barring the victim from bringing a claim against the perpetrator's employer.

8 In Singapore, Parliament in passing the PHA clearly took into consideration workplace harassment[17] (though the statute is certainly not specifically or exclusively aimed at dealing with that issue). Given this, it may be argued that making the employer vicariously liable would increase workplace safety and hence this would be in line with the general intention of the legislation. As established in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*[18] ("*Skandinaviska*"), policy considerations are important in examining whether vicarious liability should be imposed. Chan Sek Keong CJ delivering the judgment of the Court of Appeal stated:[19]

> In this regard, the employer is usually the person best placed and most able to provide effective compensation to the victim. In our view, making the employer vicariously liable is not only a practical solution, but also fair and just. After all, a person who employs another to advance his own interests and thereby creates a risk of his employee committing a tort should bear responsibility for any adverse consequences resulting therefrom. This view is buttressed by the consideration that the employer may redistribute the cost of providing

16 *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224; [2006] IRLR 695 at [30].

17 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

18 [2011] 3 SLR 540.

19 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [77].

> compensation for his employee's tort through mechanisms such as insurance.

9 Like in *Majrowski*, the court in *Skandinaviska* also recognised that vicarious liability would place an incentive on the employer to reduce tortious behaviour by his employees and at one point also remarked:[20] "For instance, it is difficult to argue, on policy grounds, that victim compensation should not prevail in cases involving defenceless and vulnerable victims, such as young children who have been sexually abused by employees of welfare homes, however innocent the employer might be."

10 However, many counter arguments may also be made. The first relates to the opinions of the other Law Lords in *Majrowski*. Lord Hope of Craighead agreed with Lord Nicholls of Birkenhead but stressed that the issue was finely balanced and far from easy to decide. He also found it hard to disagree with the dissenting judge in the Court of Appeal who had held the employer should not be vicariously liable. However, finally what seemed to have really persuaded him was that in relation to the corresponding provisions in the same statute which applied to Scotland, there was a particular provision (namely, s 10) which imposed a time limit. Section 10 provided that an action had to be brought within three years from the time the pursuer became aware that the "defender was a person responsible for the alleged harassment or the *employer* or principal of such a person" [emphasis added]. Based on this, Lord Hope of Craighead concluded that the employers could clearly be vicariously liable. Baroness Hale of Richmond considered some possible policy reasons why Parliament would not have wanted to impose vicarious liability on the employer:[21]

> They might have considered that the principal purpose of the Act was prevention and protection rather than compensation … The aim, it might be thought, was to deter, to punish or to encourage the perpetrator to mend his ways by the wide range of criminal disposals available on summary conviction, including restraining orders.

11 Baroness Hale did not finally offer a conclusive view with regard to these possible policy reasons, but agreed with Lord Hope of Craighead that parliamentary intention was clearly indicated through s 10. Lord Carswell too found the various approaches equally balanced but was finally swayed by s 10. Lord Brown of Eaton-Under-Heywood again referred to s 10 but went on to state that he would have strongly agreed with the dissenting judge in the Court of Appeal, had it not been for s 10.

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20 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [75].

21 *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224; [2006] IRLR 695 at [65].

Thus the majority of the judges other than Lord Nicholls of Birkenhead seemed to have come to a decision primarily based on s 10.

12 In Singapore, there is no equivalent to s 10. In fact, as stated above, s 11 of the PHA provides that the civil proceedings may be brought "against the respondent". Thus it may be argued that the statute impliedly prohibits vicarious liability even adopting Lord Nicholls of Birkenhead's views. In the Australian case of *Darling Island Stevedoring and Lighterage Co Ltd v Long*,[22] the regulations in question prescribed precautions that had to be observed in relation to loading and unloading. If there was a default, the regulations imposed a penalty on the "person-in-charge". Among other reasons, the High Court of Australia held that since the section specifically imposed liability on the "person-in-charge", the employer of that person-in-charge should not be made vicariously liable. It should also be highlighted that the policy considerations mentioned earlier in *Skandinaviska* are certainly not exhaustive and the court in that case stressed that there could well be other policy considerations.[23] In this regard, similar to the issue raised by Baroness Hale of Richmond in *Majrowski*, the Minister in moving the Bill in Parliament highlighted various possibilities being available under the statutory scheme including mandatory treatment orders, self-help and mediation without always having to resort to civil actions.[24] Thus it might be argued that the primary focus of Parliament was not civil claims. By making the employer vicariously liable, arguably the focus might shift too much towards civil claims and compensation. Aside from all this, Parliament could also have easily expressly stated that the employer could be vicariously liable as it did with the recently enacted Personal Data Protection Act.[25]

13 Thus though the position is not entirely clear, it is likely that the better view is that s 11 of the PHA does not cover vicarious liability. However, even if that is so, this does not mean the employer can never be liable for harassment that takes place in the workplace. First, as mentioned earlier, in certain circumstances, in the case of a corporate entity it might be possible to equate the actions of the officers to that of the entity itself (though as a matter of practice this is unlikely to be that common). For instance, in the recent Australian case of *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd*,[26] where one of the directors of a company engaged in sexual harassment at the workplace, the court

22 (1957) 97 CLR 36.

23 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 at [81].

24 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

25 Act 26 of 2012. See s 53(1) of the Personal Data Protection Act.

26 [2014] NSWDC 185. See also the recent Canadian cases of *OPT v Presteve Foods Ltd* 2015 HRTO 675 and *Silvera v Olympia Jewellery Corp* 2015 ONSC 3760.

held that the company was liable for among other things, the director was the "controlling mind, will and embodiment of the company".[27]

14 Second, if the employer is negligent, he could be liable outside the ambit of the statute. In *Waters v Commissioner of Police of the Metropolis*,[28] the House of Lords held an employee would have a valid cause of action against the employer if the latter fails to protect the former against victimisation and harassment, although such liability would only arise if the employer knows or out to know that the victimisation or harassment is taking place and he fails to take reasonable steps to prevent it.[29] Reasonable steps could include matters such as providing counselling to the perpetrator,[30] issuing a warning[31] or instituting a disciplinary action against the perpetrator[32] and/or transferring the perpetrator to another location or department.[33] Failing to carry out investigations or carrying out improper or inadequate investigations may also result in liability.[34] Even if the employer does not know or ought not to know, *arguably* if there are no appropriate workplace behaviour policies (including complaint procedures) to begin with,[35] that may amount to negligence, subject to the issue of causation. Aside from liability in negligence, the employer could also be liable for breach of contract,[36] in particular, the

27 *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185 at [218]. However, the court in this case also made reference to vicarious liability. It is not entirely clear whether this was a separate ground or whether the court erroneously mixed up both the grounds.

28 [2000] 1 WLR 1607; [2000] IRLR 720.

29 See also *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764.

30 *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185.

31 *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764.

32 *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764.

33 *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764.

34 See *Swan v Monash Law Book Co-operative* (2013) VSC 326 at [176] and *Coyne v The Home Office* [2000] IRLR 838. See also B Glenn George, "Theory and Practice: Employer Liability for Sexual Harassment" (2007) 13 *William & Mary Journal of Women and the Law* 727 at 738–740.

35 *Swan v Monash Law Book Co-operative* (2013) VSC 326 at 175–176, though this case concerned a situation where the employer knew of the harassment and did not introduce appropriate policies thereafter. See also the US cases of *Cerdeira v Martindale-Hubbell* A2d (New Jersey Appellate Division 18 September 2008) and *Molnar v Booth* 229 F3d 593 (2000). However, even if that is the case, the mere failure to have a policy will not always amount to a breach. For instance, if it is a very small business with a few employees all working in a small office, there is unlikely to be a breach. Further, having a policy may not necessarily mean there is no breach as well, such as where there is no active enforcement of the policy or the policy is inadequate to begin with; see for instance, *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 at [259] and B Glenn George, "Theory and Practice: Employer Liability for Sexual Harassment" (2007) 13 *William & Mary Journal of Women and the Law* 727 at 736–738.

36 *Sitt Tatt Bhd v Flora a/p Gnanapragasam* [2006] 1 MLJ 497.

implied term of trust and confidence[37] in respect of the circumstances mentioned above.

15 Third, though by virtue of s 14 of the PHA it is not possible to bring an action for the tort of harassment other than under that Act, if the employee commits some other civil wrong in the course of employment which also causes harassment to the employee, the employer could still be vicariously liable. For instance, in *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar*,[38] the officers-in-charge harassed a recruit in various ways including assaulting him. In the circumstances, the court held that the employer was vicariously liable. Vicarious liability could arise especially where the perpetrator has some form of supervisory role over the victim,[39] though this is not always necessary for the wrong in question may still be closely connected with the employment making it just and reasonable to impose liability.[40]

III. Damages

16 Even if cases in which the employee's actions are treated as that of the company are not going to be that common, and even if it is held that the employer cannot be vicariously liable for a mere breach of the PHA, it cannot be assumed that claims for damages are unlikely to be brought against fellow employees, as practically speaking they are usually not in a position to pay. Such claims (particularly including large ones) have at times been brought in other jurisdictions.[41] That aside, the question of how damages are calculated in such circumstances could also be relevant when the employer is sued in negligence or on grounds of vicarious liability outside the statute as discussed above. In this connection, the position in Australia, the UK and Hong Kong will be considered, before looking at the position in Singapore.

37 See, *eg*, *Cheah Peng Hock v Luzhou Bio-Chem Technology* [2013] 2 SLR 577 at [59], though whether there is such a term seems to have been left open in the recent Court of Appeal decision of *Wee Kim San Lawrence Bernard v Robinson & Co* [2014] 4 SLR 357 at [30]. See also Ravi Chandran, "Fate of Trust and Confidence in Employment Contracts in Singapore" (2015) 27 SAcLJ 31.

38 [1996] 3 MLJ 337. See also *Maslinda bte Ishak v Mohd Tahir bin Osman* [2009] 6 MLJ 826 and *KD v Chief Constable of Hampshire* [2005] EWHC 2550.

39 *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar* [1996] 3 MLJ 337; *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185.

40 *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764.

41 See, *eg*, the recent Australian case of *Jemma Ewin v Claudio Vergara* [2013] FCA 1311.

A. The position in Australia

17 The issue came up for consideration in the recent case of *Richardson v Oracle Corporation Australia Pty Ltd*.[42] On the facts, the employee in question had been subject to sexual harassment over a period of months which resulted in psychological injury. The trial judge held that the employer was vicariously liable due to an express statutory provision to that effect and ordered the employer to pay A$18,000 in damages. The employee appealed to the Federal Court in relation to the damages.

18 In relation to damages, the relevant legislation was s 46PO(4)(d) of the Australian Human Rights Commission Act[43] ("Australian HRCA") which provided that the court could make "an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent". The Federal Court approved the following statement by French and Jacobson JJ in *Qantas Airways Ltd v Gama*:[44] "(T)he appropriate measure will be analogous to the tortious. That may not be in every case. Ultimately, it is the words of the statute that set the criterion for any award."

19 The court also stated that causation must be established, but in this regard, the court referred to *Henville v Walker*[45] where it was stated:[46]

> Seldom, if ever will contravening conduct be the sole cause of a person suffering loss. Other factors will always be capable of identification as a cause of their loss … What the Act directs attention to is whether the contravening conduct was a cause. It does not require, or permit, the attribution of some qualification such as 'solely' or 'principally'.

20 Thus for instance, on the facts, the fact that the sexual harassment at work had an impact on the employee's personal relationships was also taken into consideration.

21 As for the exact quantum, the trial judge's basis for awarding A$18,000 was that that fell within the general range when compared with other similar Australian cases. There were a few Australian cases which had awarded far greater sums, but the trial judge distinguished them on the ground that the circumstances in those cases were much more aggravating.

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42 [2014] FCAFC 82.
43 1986 (Cth).
44 [2008] FCAFC 69 at [94].
45 (2001) 206 CLR 459.
46 *Henville v Walker* (2001) 206 CLR 459 at [163].

22 On appeal, the Federal Court referred to the English case of *Alexander v Home Office*,[47] wherein May LJ had stated:[48]

> For injury to feelings … Awards should not be minimal, because this would tend to trivialize or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.

23 In similar vein, the Federal Court also made reference to the Australian case of *Clarke v Catholic Education Office*[49] where Madgwick J had stated:[50]

> It was faintly suggested … that there were policy reasons why damages for breach … should be substantial. It was also faintly suggested that an award should not be so low that it might be eaten up by non-recoverable loss. Both propositions must be rejected. Damages are compensatory and no more.

24 The Federal Court also stated that it was not appropriate to refer to defamation cases as the aims were different.[51] It also emphasised that prevailing community standards had always to be taken into account in determining the quantum.

25 With these principles in mind, the Federal Court went on to determine the exact quantum. In order to do this, the Federal Court referred to negligence cases which involved psychiatric injury. One such case was *Willet v Victoria*.[52] In that case the police officer in question suffered a major depressive disorder due to the negligence of the employer in exposing her to bullying and harassment in her employment. As a result, she was permanently incapacitated from continuing to work in the police force. In the circumstances, she was awarded A$250,000 in compensation. Another case was *Swan v Monash Law Book Co-operative*[53] ("*Swan*"). Again on the facts, the employer was held to have been negligent in exposing the employee to bullying and harassment in the

47 [1988] 1 WLR 968; [1988] 2 All ER 118.
48 *Alexander v Home Office* [1988] 1 WLR 968 at 975; [1988] 2 All ER 118 at 122.
49 (2003) 202 ALR 340.
50 *Clarke v Catholic Education Office* (2003) 202 ALR 340 at [83].
51 *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [112].
52 [2013] VSCA 76.
53 [2013] VSC 326.

workplace. She was awarded A$300,000 in damages based on the fact that she was suffering from the following conditions:[54]

> In addition to the primary symptoms of her Adjustment Disorder/Depressive condition, continuing anxiety and depression, that have been described by the medical witnesses, the plaintiff has somatic symptoms including temporomandibular joint dysfunction with bruxism and tinnitus, chronic insomnia, pain, including migraine and headache, anxiety, a disabling sensitivity to antidepressants, high blood pressure, and debilitating rashes and skin irritations that have all required separate diagnosis, and continue to require separate ongoing management and treatment … I am satisfied that the plaintiff remains substantially compromised in most aspects of her life, which has been reduced to one of isolation and disconnection from her family and friends and from the world around her. The plaintiff has surrendered her personal independence, lost her confidence, and lost her capacity to take interest in and derive pleasure from the stimulus of life. This has been a substantial loss of enjoyment of life, with much pain and suffering, both mental and physical.

26 Having looked at various similar cases, in the end, the Federal Court awarded the employee A$100,000 in damages for her psychiatric damage pursuant to s 46PO(4)(d) of the Australian HRCA, though on the facts the impact was not significant enough to prevent the employee from continuing working for some other organisation or pursuing a career.

27 Under the Australian HRCA it is also possible to claim for injured feelings where there is no psychiatric damage, though such damages are not specifically referred to in that statute.[55] Nonetheless, the damages in such circumstances are likely to be less.[56] It would also be possible to claim pecuniary losses such as those relating to medical expenses (including counselling fees), both past and future.[57] It is also possible to claim for loss of employment income. In *Swan*,[58] expert evidence established that the extent of the psychiatric damage was such that the employee was unlikely to ever return to work. As such she was awarded damages in respect of that as well, after taking into account the vicissitudes of life. If the evidence was such that the employee could only do part-time work for some time before returning to full-time work, the loss resulting therefrom can also be claimed.[59] Even where the employee continues to work, if there is a salary difference, it may also be possible to claim that, as happened in *Richardson v Oracle Corporation Australia Pty Ltd*.[60]

54 *Swan v Monash Law Book Co-operative* [2013] VSC 326 at [246]–[248].
55 See, *eg*, *Sidhu v Raptis* [2012] FMCA 338 at [60].
56 See, *eg*, *Sidhu v Raptis* [2012] FMCA 338.
57 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311.
58 See also *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185.
59 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311.
60 [2014] FCAFC 82.

However, all such damages are subject to mitigation.[61] In Australia, it is also possible to claim aggravated damages under the Australian HRCA even though such damages are not specifically referred to in that statute.[62] Such damages are compensatory in nature and are to be distinguished from exemplary damages, the intention of which is to punish the defendant.[63] However, if the factors taken into account are already accounted for under general damages, they cannot be claimed again under aggravated damages.[64] As for exemplary damages, it is not clearly established whether the court has the power to award such damages under the Australian HRCA.[65]

B. The position in the UK

28 In the UK, under s 3(2) of the UK PHA, it is provided that "damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment".

29 Like in Australia, damages under the UK PHA are likely to be tortious in nature[66] and the usual principles of causation are likely to apply.[67] However, unlike in relation to the Australian HRCA, the UK PHA directly refers to awarding damages for anxiety. The leading case in relation to injury to feelings in this context is *Vento v Chief Constable of West Yorkshire*[68] ("*Vento*"). The UK Court of Appeal in this case again recognised that damages should be compensatory, but should not be so low so as to diminish the respect for the policy behind the statute or so high as to amount to untaxed riches. The court also stated that:[69]

> Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

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61 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311 at [630]; *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185.

62 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311 at [676].

63 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311.

64 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311 at [678].

65 *Jemma Ewin v Claudio Vergara* [2013] FCA 1311 at [681]–[682].

66 See *Ministry of Defence v Cannock* [1994] ICR 918, though the case did not relate to the UK Protection of Harassment Act 1997 (c 40) as such. However, foreseeability of damage may not be relevant in the statutory context; see *Jones v Ruth* [2012] 1 WLR 1495.

67 *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224; [2006] IRLR 695 at [22].

68 [2003] ICR 318.

69 *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 at [51].

30 The court then laid down some guidelines for offering compensation for injury to feelings ranging from £500 to £25,000 depending on impact and severity. Though *Vento* itself was not decided under the UK PHA, it has been applied in relation to cases decided under the UK PHA.[70] *Vento* was decided in 2002 and subsequent cases have adjusted the amounts upwards to take into account inflation.[71] Aside from injury to feelings, where psychiatric damage results, a claim may be made in respect of that as well,[72] though it has been held that there should not be any double counting.[73] In relation to psychiatric damage, the UK courts[74] have taken into consideration the UK Judicial Studies Board *Guidelines for the Assessment of General Damages in Personal Injury Cases*.[75] Compensation prescribed by these guidelines currently ranges from about £1,000 to about £90,000. It may also be possible to claim for both past and future medical expenses.[76] In addition, it may be possible to claim for loss of employment income or any difference in employment income.[77] In *Chagger v Abbey National plc*,[78] the court held that if as a result of the action, it is proven that it is difficult for the employee to get other jobs due to the stigma of bringing an action, consequential damages may also be recoverable. In particular the court held:[79]

> [T]he mere fact that third party employers contribute to, or are the immediate cause of, the loss resulting from their refusal to employ does not, of itself, break the chain of causation. If those employers could lawfully refuse to employ on the grounds that they did not want to risk recruiting someone who had sued his employer and whom they perceived to be a potential troublemaker, there is no reason why that would not be a loss flowing directly from the original unlawful act.

31 Like in Australia, all damages are also subject to mitigation.[80] Further as in Australia, it may be possible to claim aggravated damages[81] though this is not expressly referred to in the statute. Aggravated damages

70 See, *eg*, *KD v Chief Constable of Hampshire* [2005] EWHC 2550.
71 *Da'Bell v National Society for Prevention of Cruelty to Children* [2010] IRLR 19 at [44]. See also *Southern v Britannia Hotels Ltd* ET/1800507/2014 at [75].
72 *Choudhary v Martins* [2008] 1 WLR 617.
73 *Choudhary v Martins* [2008] 1 WLR 617 at [18]; *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 at [68].
74 *Choudhary v Martins* [2008] 1 WLR 617 at [10]; *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764 at [181].
75 Oxford University Press, 12th Ed, 2013.
76 See, *eg*, *Jones v Ruth* [2012] 1 WLR 1495; [2011] EWCA Civ 804 at [49]; *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764 at [190].
77 *Helen Green v DB Group Service (UK) Ltd* [2006] IRLR 764.
78 [2010] IRLR 47.
79 *Chagger v Abbey National plc* [2010] IRLR 47 at [89].
80 *Majrowski v Guy's and St. Thomas' NHS Trust* [2007] 1 AC 224; [2006] IRLR 695 at [22].
81 See, *eg*, *KD v Chief Constable of Hampshire* [2005] EWHC 2550.

are subject to the "no double counting" rule[82] and may be claimed, for instance, when the defendant has behaved in a "high-handed, malicious, insulting or oppressive manner"[83] or, where the actions of the defendant with regards to the way in which the litigation and trial were conducted justify the imposition of such damages.[84] Exemplary damages may also be claimed[85] though the circumstances in which they can be claimed are limited. In *Rookes v Barnard*,[86] Lord Devlin stated that exemplary damages may be claimed where:

> (a) there has been oppressive, arbitrary or unconstitutional action by the servants of the government; or
>
> (b) the defendant's conduct has been calculated to make profit which exceeded the compensation payable to the plaintiff; or
>
> (c) the statute states they can be awarded.

32 In summary, the position in the UK is by and large similar to that in Australia, other than for the issue of exemplary damages and the fact that the courts in the UK tend to follow established guidelines in relation to both injury to feelings and psychiatric damage.

C. The position in Hong Kong

33 Under s 76(3A)(e) of the Hong Kong Sex Discrimination Ordinance,[87] the court is empowered to "order the respondent to pay to the claimant damages by way of compensation for any loss or damage". It has been held that the damages payable under this provision are compensatory in nature and that they should neither be too low nor excessive.[88] However, it should be highlighted that s 76(6) of the said Act specifically allows the court to award damages for injury to feelings. In assessing the quantum of damages for injury to feelings, the Hong Kong courts[89] have placed reliance on the *Vento* guidelines referred to earlier. It is also possible to claim for psychiatric injury if any.[90] In Hong Kong, it is

82 *Vento v Chief Constable of West Yorkshire* [2003] IRC 318 at [68].
83 *Alexander v Home Office* [1088] 2 All ER 118.
84 *KD v Chief Constable of Hampshire* [2005] EWHC 2550 at [186].
85 See, *eg*, *KD v Chief Constable of Hampshire* [2005] EWHC 2550, though on the facts of the case, it was held not to be payable. See also *Dr Eva Michalak v Mid Yorkshire NHS Trust* (UK, Employment Tribunal, unreported).
86 [1964] AC 1129 at 1226–1227.
87 Cap 480, 1995.
88 *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731.
89 *L v David Roy Burton* [2010] HKDC 252; *Yuen Wai Han v South Elderly Affairs Ltd* [2005] 2 HKLRD 277.
90 See *L v David Roy Burton* [2010] HKDC 252 at [28], though it was not awarded on the facts.

also possible to make a claim for loss of earnings.[91] Damages are also subject to mitigation.[92]

34 As for aggravated damages, they may also be payable though they are not expressly referred to in the statute. In *Yuen Sha Sha v Tse Chi Pan*,[93] the court held that aggravated damages were payable on the facts on the following basis:[94]

> I take into consideration the Defendant's conduct of prolonging the settlement of the matter; failing to tender apology until the last minute; and particularly, causing the two telephone calls to the Plaintiff resulting in further distress to the Plaintiff on the day before the hearing with the aim of putting pressure on her to abandon her claim against him. He deliberately added insult to injury. He was defiant, unrepentant and vindictive.

35 On the whole, it would appear that the position in Hong Kong too is quite consistent with the position in the UK. However, it should also be highlighted that s 76(3A)(f) of the Hong Kong Sex Discrimination Ordinance specifically allows the court to award exemplary damages and such damages have indeed been awarded.[95]

D. The position in Singapore

36 Section 11(2) of the PHA provides that if the court is "satisfied on the balance of probabilities that the respondent has contravened …, the court may award such damages in respect of the contravention as the court may, having regard to all the circumstances of the case, think just and equitable". The heading of s 11(2) reads, "Action for statutory tort".

37 Headings of sections can help ascertain parliamentary intention[96] and since there is reference to "tort" in the heading, tortious principles are likely to apply in Singapore as well. The aim of damages in tort is compensatory and the intention is to put the victim in the position he would have been in if the tort had not been committed.[97]

38 It should be highlighted that the Minister in moving the Bill in Parliament stated that under the PHA, in terms of damages, the court

91 *L v David Roy Burton* [2010] HKDC 252.
92 *K v Secretary of Justice* [2000] 2 HKC 796.
93 [1999] 1 HKC 731.
94 *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731 at [65].
95 *L v David Roy Burton* [2010] HKDC 252; *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731.
96 See, *eg*, *Seiko Epson Corp v Sepoms Technology Pte Ltd* [2008] 1 SLR(R) 269 at [37]–[38].
97 See, *eg*, *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909.

could order whatever the common law allowed.[98] He also specifically stated that there was no prohibition against awarding damages for emotional distress.[99]

39 Thus the first question that arises is whether damages for injury to feelings (short of a psychiatric injury) can be claimed in common law. In *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd*[100] ("*Man Mohan Singh*"), the issue arose as to whether damages for grief could be claimed in a negligence action which involved the appellants' children being killed in a road accident. The court held that this could not be done. One of the reasons was that under s 21 of the Civil Law Act,[101] the appellants would be compensated for bereavement and by allowing a claim for damages for grief there could be a risk of double recovery. In addition, on the facts, it was held that the second respondent did not owe a duty of care not to cause psychiatric harm to the appellants.

40 As discussed earlier, in Australia, there is no specific reference to injury to feelings and yet the courts have not hesitated to award damages for that. In addition, as stated in Parliament, there was no intention to prohibit such damages. Further, in such a situation, there is no question of double recovery unlike in *Man Mohan Singh*. The court in *Man Mohan Singh* also did not decide that damages for grief can never be recovered.[102] There also has been at least one occasion in the past in Singapore[103] where damages for injury to feelings short of psychiatric injury have been awarded in a tort action. Not awarding just damages will also leave the statute largely emasculated in terms of civil remedies as a matter of practice. Thus, on the whole, it is suggested that a good case can be made for awarding such damages. However, the next question that arises is the quantum of such damages. In Hong Kong, as mentioned earlier, the *Vento*

98 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

99 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

100 [2008] 3 SLR(R) 735.

101 Cap 43, 1999 Rev Ed.

102 *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 at [41].

103 See *Sivakami d/o Sivanathan v Attorney-General* [2012] SGHCR 5 at [30]. Though such damages were classified as nominal damages, the point was not really argued and no authorities were cited, there is some support in recent times from other jurisdictions for awarding damages for injury to feelings in non-defamation tort actions; see, for instance, *Lee Ewe Poh v Dr Lim Teik Man* [2011] 1 MLJ 835; *Campbell v MGN Ltd* [2002] EWHC 499 (upheld on appeal: [2004] 2 AC 457; [2004] UKHL 22); *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065; *Giller v Procopets* [2008] VSCA 236 and *Wilson v Ferguson* [2015] WASC 15. See also in particular, *Richardson v Howie* [2004] EWCA Civ 1127 at [23] where the English Court of Appeal stated, "It is and must be accepted that at least in cases of assault and similar torts, it is appropriate to compensate for injury to feelings including the indignity, mental suffering, humiliation or distress that might be caused by such an attack, as well as anger or indignation arising from the circumstances of the attack".

guidelines have been relied upon. However, the *Vento* guidelines as adjusted to take into account inflation, when compared to the local *Guidelines for the Assessment of General Damages in Personal Injury Cases*,[104] seem comparable or higher. Thus it is unlikely that they would be simply followed. Nonetheless it is hoped that the guidelines would be given some consideration bearing in mind that if compensation is too minimal it might defeat the policy behind the statute, though at the same time it cannot be excessive and it must be compensatory in nature. On the other hand, like in Australia,[105] comparisons to defamation cases are unlikely to be appropriate in this context.[106]

41 With regards to psychiatric injury, it is likely that the courts will make reference to the local *Guidelines for the Assessment of General Damages in Personal Injury Cases*. It is also likely that loss of income or medical expenses may be claimable, as typical of some other tort actions, subject to mitigation.[107] Like in all the three other jurisdictions referred to, it is likely that aggravated damages too may be claimed in so far as there is no double counting.[108] In Singapore, such damages may be payable where there is "contumelious or exceptional conduct or motive on the part of the defendant".[109] Whether exemplary damages which are punitive in nature are payable in Singapore is in a state of flux.[110]

IV. Conclusion

42 Workplace harassment appears to be a real issue affecting a significant portion of employees.[111] The enactment of the PHA is certainly a step in the right direction. However, in so far as the said Act does not create vicarious liability, the position seems less optimal as compared to the other jurisdictions examined in this article where such liability exists.[112] The Minister in moving the Bill in Parliament mentioned that in relation to workplace harassment one step at a time has

104 Academy Publishing, 2010.

105 However, in Hong Kong, there seems more readiness to look at defamation cases; see, for instance, *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731 at [37].

106 *Li Siu Lun v Kooi Kok Poh* [2013] SGHCR 27 at [26]. See also *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 at [128].

107 See, *eg*, *Wee Sia Tian v Long Thik Boon* [1996] 2 SLR(R) 420.

108 See, *eg*, *ACES System Development v Yenty Lily* [2013] 4 SLR 1317 at [58].

109 *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR(R) 513 at [82]; *Li Siu Lun v Looi Kok Poh* [2013] SGHCR 27 at [21].

110 See also *Li Siu Lun v Looi Kok Poh* [2013] SGHCR 27 at [31] and *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150.

111 See <www.aware.org.sg/ati/wsh-site/> (accessed 1 August 2015).

112 See s 46 of the Hong Kong Sex Discrimination Ordinance (Cap 480, 1995) and s 106 of the Australian Sex Discrimination Act (Act No 4 of 1984). As for the UK, see *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224; [2006] IRLR 695.

to be taken[113] and it is hoped that this (as well as others such as requiring the employer to have adequate sexual harassment policies in place[114] and to carry out an inquiry upon receipt of a complaint[115]) will be the next. As far as the courts are concerned, it is hoped that they would take heed from the other jurisdictions[116] examined in this article in truly compensating the victim of harassment especially by recognising injury to feelings and adequately quantifying it.

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113 See *Singapore Parliamentary Debates, Official Report* (13 March 2014), vol 91.

114 See, *eg*, Pt XX of the Canadian Occupational Health and Safety Regulations (SOR/86-304) and Pt II of the Kenyan Employment Act (Cap 226, 2012 Rev Ed).

115 See, *eg*, Pt XVA of the Malaysian Employment Act (FM Ordinance No 38 of 1955) and Pt XX of the Canadian Occupational Health and Safety Regulations (SOR/86-304).

116 Though the position in Canada was not considered in this article, see similarly the recent Canadian cases of *OPT v Presteve Foods Ltd* 2015 HRTO 675 and *Silvera v Olympia Jewellery Corp* 2015 ONSC 3760.