

WORKPLACE SEXUAL HARASSMENT IN SINGAPORE: THE LEGAL CHALLENGE

This article examines the nature and prevalence of sexual harassment in the work environment, and compares civil and criminal law in Singapore to the approaches taken by various jurisdictions in dealing with the problem. It is submitted that legislation is needed to protect employees, as Singapore law currently does not present any clear and coherent means for victims to seek redress for workplace sexual harassment.

I. INTRODUCTION

MADDIE Mokhtar Ahmad joined the human resource department of a well-established communications company in Malaysia. It was a dream come true — she had always wanted to work there. She enjoyed her new work environment and made new friends. Then her world changed. A male colleague who was her superior began harassing her by making lewd remarks to her.¹ Work became a nightmare for Maddie. She was afraid that her harasser's statements would escalate into actions. Under great strain, she saw a doctor who prescribed pills to relieve her stress and fatigue and to help her sleep. She became addicted to them. Eventually, she complained about the harassment to her company's human resource department and requested a transfer. However, the harasser learned about the complaint and recommended that she be discharged. The human resource manager and his deputy wanted to help her, but were afraid of repercussions. Finally, Maddie quit her job.²

Maddie's harasser subjected her to only verbal abuse. Jeffrey Yung Siew Leong, a 28-year-old Singaporean salesman, went further. In February 1995, Yung began harassing a colleague by showing her pornographic magazines and asking her to touch his private parts. On 4 May, he asked her whether she had big breasts and molested her. She warned him not to carry on but he persisted, exposing himself to her and asking her to touch him. The next day, he molested her a second time. These acts took place in the showroom of the graphics company where they worked. The victim reported Yung to the police. He was jailed six months and given three strokes of the cane for outraging the victim's modesty, and one month's jail for exposing himself and making lewd suggestions.³

- 1 She was constantly subjected to statements like: "I think you are not a virgin.", "Do you easily get wet?", "If I had the chance to screw you, I'd screw you up and down, high and low, back and front.", "Your butt is too big for your breasts, they just don't match.", "Your breasts are too small for me. I like women with big boobs.", "Don't stand in front of me, or mine will be standing!" and "Want to watch blue films with me? I can lend you some of my blue tapes."
- 2 Maddie Mokhtar Ahmad, "My Nightmare in the Office", *New Straits Times*, 10 May 1997 at 10.
- 3 "Salesman Exposed for Office Harassment", *The Straits Times*, 6 January 1996 at 30.

Work is important to most of us. Apart from enabling us to earn a living and to achieve prominence through career development, those of us who enjoy our work find that it builds self-esteem and brings a sense of fulfilment. Yet, for women like Maddie Mokhtar Ahmad, work is a nightmare because of the verbal and physical abuse they receive from those they work with. This article begins with an examination of the nature and prevalence of sexual harassment in the work environment. It goes on to look at the approaches taken by various jurisdictions in dealing with the problem, and finally considers the present legal position in Singapore and the way ahead.

A. What is Sexual Harassment?

Laws against sexual harassment can only be effective if they can accurately identify the behaviour to be proscribed.

According to Louise Fitzgerald and Alayne Omerod,⁴ sexual harassment (1) involves the sexualization of a professional relationship; (2) frequently occurs in the context of an organizational power differential (*eg* supervisor-employee), although it can occur in the absence of one (*eg* hostile work environment); (3) consists of unwanted and unwelcome behaviour, both verbal and non-verbal in nature; and (4) can be viewed along a continuum, from sexist remarks to non-verbal seductive gestures to sexual assault. Data collected by researchers in the fields of human-resource management and psychology gives us an idea of the range of harassing behaviour experienced by respondents. For instance, Frank Till⁵ classified the responses to an open-ended sexual harassment survey of college women and derived the following categories of sexual harassment, arranged in order of generally increasing severity:

- i. Gender harassment — generalised sexist remarks and behaviour not designed to elicit sexual co-operation but rather to convey insulting, degrading or sexist attitudes about women;
- ii. Seductive behaviour — unwanted, inappropriate and offensive sexual advances;
- iii. Sexual bribery — the solicitation of sexual activity or other sex-linked behaviour by the promise of a reward, such as a salary increase or promotion;

4 Louise F Fitzgerald & Alayne Omerod, "Sexual Harassment in Academia and the Workplace" in *Psychology of Women: A Handbook of Issues and Theories* (F Demark & M Paludi eds, 1993) at 556, cited Anne Levy & Michele Pahidi, *Workplace Sexual Harassment* (1996) at 48.

5 Frank Till, *Sexual Harassment: A Report on the Sexual Harassment of Students* (1980), cited in Levy & Paludi, *ibid* at 47.

- iv. Sexual coercion — the solicitation of sexual activity by threat of punishment, for instance a failure to give a promotion or being fired; and
- v. Sexual imposition or assault — this would include gross sexual imposition, assault and rape.

We can draw the following conclusions about sexual harassment:

- i. Sexual harassment occurs when one person abuses power which he possesses to intimidate, coerce or humiliate someone else because of his or her sex. When it occurs in the workplace, it introduces an inappropriate sexual element into what should be a professional relationship.
- ii. The hallmark of sexual harassment is that it is unwelcome. There can be no sexual harassment when two people voluntarily establish a personal, intimate relationship with each other.
- ii. Sexual harassment can take many forms, both verbal and physical. Examples of verbal harassment include sexual innuendos, comments and remarks; suggestive, obscene or insulting sounds; implied or overt threats; and pressure for sex. Physical harassment includes leering or ogling; displaying offensive pictures; making obscene gestures; patting, pinching or brushing up against the victim's body; assault; and coerced sexual intercourse. It can occur only once, or can be repeated.⁶

Sexual harassment has been legally defined in several jurisdictions which have enacted laws to address the problem. In the United States of America, there exist both federal and state statutes prohibiting sexual harassment. The federal statute is known as Title VII of the Civil Rights Act 1964, about which more will be said later. In 1980, the US Equal Employment Opportunity Commission (EEOC), established under that statute, issued guidelines defining workplace sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.⁷

⁶ Levy & Paludi, *ibid.*

⁷ 29 CFR § 1604.11(a). The EEOC recently proposed adding the words "or otherwise adversely affects an individual's employment opportunities" to part (3) of the above

The EEOC definition recognises two forms of sexual harassment in the workplace: *quid pro quo* harassment, and hostile environment harassment. The US Supreme Court has agreed with the Commission that both of these are violations of federal law. *Quid pro quo* harassment occurs when a manager or someone with authority to confer job benefits offers those benefits to an employee in exchange for sexual favours or threatens to take away certain benefits if the employee does not comply with his demands.⁸

Sexual harassment may occur even when there is no suggestion that a harasser is abusing his power over the victim. The victim may instead find that it is difficult for her as a woman to succeed in her working environment because of some behaviour, conduct, work rule, or a combination of these. This is the basis of hostile work environment harassment, which is why it has been suggested that a more accurate term would be *discriminatory work environment harassment*.⁹ In *Henson v City of Dundee*,¹⁰ the Court held that:

Sexual harassment which causes a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

In the landmark case of *Meritor Savings Bank v Vinson*,¹¹ a bank supervisor forced intercourse on the plaintiff, as well as exposed himself to her and other employees. Though the supervisor had not explicitly or implicitly made an offer of workplace benefits to or threatened to withdraw such benefits from the plaintiff, the US Supreme Court found that she had been sexually harassed. It agreed with the EEOC that certain conduct directed towards women, whether or not it is directly linked to the grant or denial of an economic benefit, could constitute a violation of Title VII if the conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an

definition to make it clear that conduct does not necessarily have to interfere with a person’s work performance in order to violate Title VII. However, due to a controversy which erupted about a part of the guidelines interpreting religious harassment, the EEOC withdrew the guidelines, intending to reissue them at a later date. But the proposed wording reflects current interpretations and continues to be the law in the USA: Levy & Paludi, *ibid* at 14–15.

⁸ *Williams v Saxbe* (1976) 413 F Supp 654 (DC Cir); *Barnes v Costle* (1977) 561 F 2d 983 (DC Cir).

⁹ Levy & Paludi, *supra* n 4, at 20.

¹⁰ (1982) 682 F 2d 897 at 902 (11th Cir).

¹¹ (1986) 477 US 57 (SC, USA).

intimidating, hostile, or offensive work environment.” The behaviour need not be overtly abusive. In *Ellison v Brady*,¹² an employee of the Internal Revenue Service was held to have been sexually harassed by being subjected to continuing unwanted “romantic” overtures in the form of letters and pestering questions from a co-worker, even though there were no instances of threats or physical contact.

The law on hostile or discriminatory work environment harassment is a growing area in the United States, and its boundaries have yet to be clearly outlined. For instance, a claim of sexual harassment has been upheld where women lobby attendants were ordered by their employer to wear suggestive uniforms, which led to whistling and rude comments by customers. The court decided that the dress code had demeaned the women employees and their roles as professional workers, and thus created a hostile work environment. It has also been suggested that sexually suggestive e-mail or pornographic software on company computers may create a discriminatory work environment.¹³

Laws in other jurisdictions also recognise the two aspects of sexual harassment identified in the United States. For instance, the Canadian Labour Code¹⁴ defines *sexual harassment* as “any conduct, comment, gesture or contact of a sexual nature (a) that is likely to cause offence or humiliation to any employee; or (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature or employment on any opportunity for training or promotion.” The Australian Commonwealth Sex Discrimination Act 1984¹⁵ considers a person to be sexually harassed by another person if (a) that person makes “an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed” or (b) “engages in other unwelcome conduct of a sexual nature in relation to the person harassed” in circumstances in which a reasonable person, having regard to all the circumstances would have anticipated that the person harassed would be

12 (1991) 924 F 2d 892 (9th Cir).

13 Levy & Paludi, *supra* n 4, at 32–33. In *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 440, the UK Employment Appeal Tribunal held that it may be an act of sexual discrimination within the meaning of section 1(1)(a) of the UK Sex Discrimination Act 1975 for an employer to allow male employees to display in the workplace pictures of nude and partially-nude women, and that it is crucial that complaints about such matters are not treated as trivial but are taken up, investigated and dealt with in a sympathetic and sensible fashion. On the facts, though, the Tribunal found that the appellant had not been discriminated against as she had not shown that her employers had treated her less favourably than they would have treated a man.

14 Section 247.1, RSC 1985 (1st Supp) c 9.

15 Section 28A(1) of the Cth Sex Discrimination Act 1984 (No 4, 1984) as amended by the Cth Sex Discrimination and Other Legislation Amendment Act 1992 (No 179, 1992). See also s 58, ACT Discrimination Act 1991 (No 81, 1991), 31 January 1997 reprint; s 22(2), NT Anti-Discrimination Act 1994; s 87(11), s 87(11), SA Equal Opportunity Act 1984 (No 95, 1984); s 85, Vic Equal Opportunity Act 1985 (No 42/1995); s 24(3), WA Equal Opportunity Act 1984 (No 83, 1984).

offended, humiliated or intimidated. The statute then goes on to prohibit sexual harassment in a variety of situations, including employment, education and the provision of goods and services.

B. The Nature and Incidence of Workplace Sexual Harassment

1. *How Often Does Workplace Sexual Harassment Occur?*

The short answer is: more often than we think. In 1980, the United States Merit Systems Protection Board conducted a survey among 23,000 male and female US federal government employees. They found that 42% of women and 15% of men were victims of incidents of overt sexual harassment over a two-year period. The incidents ranged from sexual teasing, jokes, remarks and questions to actual or attempted assault or rape.¹⁶ An identical result was reached in a second study by the Board covering the years 1985 to 1987 — again, 42% of women working for the federal government said that they had been sexually harassed during the 2-year period.¹⁷ Subsequently, a 1989 survey conducted by the *National Law Journal*/West Publishing Company of 918 women lawyers in 250 top law firms in the United States revealed that 60% of them had experienced some form of sexual harassment, such as unwanted sexual teasing, jokes, remarks or questions, unwanted sexual looks or gestures, unwanted deliberate touching, leaning over, cornering or pinching, as well as pressure for sex.¹⁸

In Canada, a 1983 survey by the Canadian Human Rights Commission of 2,004 men and women found that 45% of women and 33% of men had experienced unwanted sexual attention.¹⁹ Similar results were reported in the United Kingdom not too long ago. According to a survey by the Alfred Marks Bureau in 1991,²⁰ 47% of women and 14% men had experienced sexual harassment in the workplace, while the Industrial Society's study conducted in 1993²¹ showed that just over half of working women had been sexually harassed. Closer to home, a 1990 poll by the Labour Ministry of Japan reported that 43% of women managers reported experiencing some form of sexual harassment.²²

¹⁶ Arjun P Aggarwal, *Sexual Harassment: A Guide for Understanding and Prevention* (1992) at 2–3, 8; Kerry Seagrave, *The Sexual Harassment of Women in the Workplace, 1600 to 1993* (1994) at 200–01.

¹⁷ Seagrave, at 202.

¹⁸ Aggarwal, *supra* n 16; Seagrave, at 204.

¹⁹ *Ibid.*

²⁰ Alfred Marks Bureau, *Sexual Harassment in the Office: A Quantitative Report on Client Attitudes and Experience* (1991), cited in Rohan Collier, *Combating Sexual Harassment in the Workplace* (1995) at 9.

²¹ Industrial Society, *No Offence? Sexual Harassment, How it Happens and How to Beat It* (1993), cited in Collier, *ibid.*

²² Seagrave, *supra* n 16 at 213.

2. *Who Get Harassed, and Who are the Harassers?*

It is evident from the previous section that both women and men experience sexual harassment. However, it is women who form the majority, especially those who hold junior positions or are in serving or caring jobs, such as administrative staff, factory workers, nurses, receptionists, sales assistants, secretaries, social workers and teachers. The 1991 Alfred Marks Bureau survey found that 62% of sexual harassment victims are women while, according to the Industrial Society, less than 7% of working men get harassed.²³ The author may therefore be excused for referring in this article to harassers using male pronouns and those harassed using female pronouns.

Homosexuals experience more sexual harassment than heterosexuals. It has been found that one in two gay men and women have been harassed at work, 48% of these specifically because of their sexuality. Of these, 79% experienced jokes or teasing, 51% homophobic abuse, 41% aggressive questioning, 14% threats and 5% physical violence.²⁴

As for harassers, studies show that they are generally men of similar or higher status than the persons harassed, whether male or female. A 1988 survey by *Fortune* magazine of 160 of the top 500 companies in the United States showed that 36% of complaints of sexual harassment were against the woman's immediate supervisor, 26% against some other person of superior status, and 38% against co-workers of equal status.²⁵ These results are comparable to the Alfred Marks survey in the United Kingdom referred to above, which revealed that 43% of respondents had experienced harassment by their immediate bosses, 59% by senior staff other than their immediate bosses, and 55% by their colleagues.²⁶

3. *What are the Effects of Sexual Harassment?*

Sexual harassment has a devastating effect on the victim's ability to work effectively or maintain personal relationships outside work. The Industrial Society's survey revealed that sexual harassment is one of the most upsetting, humiliating and destructive experiences to an employee. Of the employees in the survey who reported being sexually harassed, 37% said that it interfered with their thinking and judgment, 24% that it made them less co-operative and productive, 18% that it made it difficult for them to concentrate, 8% that it led to behavioural changes and more frequent accidents, and 5% that they were more prone to absences or

²³ *Ibid*

²⁴ Stonewall, *Less Equal Than Others: A Survey of Lesbians and Gay Men at Work* (1993), cited in Collier, *ibid*.

²⁵ Seagrave, *supra* n 16 at 203.

²⁶ Alfred Marks Bureau, cited in Collier, *supra* n 20 at 11.

lateness. Bodily symptoms reported by sexual harassment victims include loss of concentration, headaches, nausea, insomnia, anorexia, mood swings, panic attacks, loss of libido and depression.²⁷

The physical effects of sexual harassment on employees naturally have an impact on their employers' businesses. A survey conducted by the US government in 1988 showed that about 36,000 US federal government employees had quit their jobs because of sexual harassment on the job between 1985 and 1987; this was estimated to have cost the federal government US\$267 million in turnover, sick leave and lost productivity.²⁸ A 1994 survey of Fortune 500 companies by *USA Today* found that sexual harassment costs employers US\$6.7 million (about S\$10.1 million) a year because of increased absenteeism, employee turnover, low morale and poor productivity.²⁹

4. *The Singapore Experience*

No wide-scale survey of the prevalence of sexual harassment has been conducted in Singapore. However, in an effort to determine its extent here, between June and July 1993 the Association of Women for Action and Research (AWARE) sent out questionnaires to 1,600 women working for 56 selected Japanese companies.³⁰ Rather disappointingly, only 389 responses were received. However, almost half of the respondents (49.6%) reported experiencing sexual harassment.

Of these women, 47.3% were visually or verbally harassed, while 27.8% were physically harassed. The most common forms of non-physical harassment were ogling, being called insulting nicknames (such as "sexy" and "honey"), persistent unwelcome questioning ("Are you free tonight?") and being asked embarrassing personal questions about their bodies (the size of their breasts, for instance). Those who were physical harassed were most likely to have had harassers stand very close to them or actually squeeze up against them, or to have their hands grabbed, or breasts or buttocks touched. Almost half of the respondents had experienced both physical and non-physical harassment.

²⁷ Collier, *supra* n 20 at 11, 25–26.

²⁸ Aggarwal, *supra* n 19.

²⁹ "Office Problem Can Also Affect Business Profitability, Says Study", *Business Times*, 4 August 1994 at 12.

³⁰ AWARE, *The Aware Report on Sexual Harassment* (unpublished, 24 March 1994). Some of the findings in the AWARE survey were reported in Schutz Lee, "Half of Women in Survey Cite Sexual Harassment at Work", *The Business Times*, 25 March 1994 at 2. Since their 1993 survey, AWARE has found that almost 12% of the telephone calls to their telephone helpline involve complaints of sexual harassment at work. In 1996, 29 out of 249 callers (11.6%) complained about workplace sexual harassment, while in 1997 the figures were 13 out of 110 callers (11.8%). The total number of calls includes some instances of repeat callers. The writer would like to thank Mrs Hedwig Anuar of AWARE for allowing him access to the AWARE report as well as to the telephone helpline figures.

The study also found that an overwhelming number of the women harassed were under the age of 35 (85.5%), most being between 20 and 29 (73.6%). In contrast, their harassers were largely in their 30s and 40s (33.9% and 32.2% respectively), and had repeated their unwanted behaviour a few times (42.4%). Most of the women were in administrative (30.2%), executive (24.5%) or clerical (24.5%) occupations. 56.7% of the women had been sexually harassed by their superiors, while 39.1% had been harassed by colleagues.

The most common responses to sexual harassment were to avoid the harassers (28.0%), brush off the harassment with jokes (18.3%), tell the harassers clearly that the behaviour was undesired (14.9%), and to consult relatives and friends (14.3%) or other people working in the company, such as a boss, personnel officer or colleague (11.4%). A majority of those women who confronted their harassers found that the behaviour stopped (53.7%). However, a significant proportion (27.8%) still received harassment after that. Of those who took no action, 25.4% felt that reporting the harassment would invite more difficulties at work, while 21.1% were too embarrassed to tell anyone and/or did not know what to do. 15.5% felt that no one would believe them.

In January 1995, the assistant secretary-general of the National Trades Union Congress, Ms Yu-Foo Yee Shoon, remarked in a speech that many women unionists do not feel that sexual harassment is a major or burning issue affecting them. "The reason for this could be that our society still retains some of the basic values and norms concerning morality. This could act as a restraint against abusive behaviour at the workplace... Of greater concern to the women is how to balance career and families."³¹ Her comments appear to contradict the findings of the AWARE survey. Although the significance of the survey is naturally limited by the small number of responses received, as the AWARE report points out, the findings so far are "sufficiently alarming to justify further investigation and research into the extent of the problem in other firms — foreign or local — in Singapore."

II. THE STATE OF THE LAW IN SINGAPORE

To date, no specific legislation addressing the issue of sexual harassment has been enacted in Singapore. As a result, employees who are sexually harassed and wish to obtain legal redress through the civil courts must seek their remedies in the common law.

In this Part of the article, we first consider the Singapore Constitution and its impact on the issue of sexual harassment. We then look at possible

31 "Sexual Harassment 'Not Key Issue for Women'", *The Straits Times*, 19 January 1995 at 24.

causes of action in tort and contract that may be available to employees. Most of them pin liability on the harasser himself. Such a person could be the victim's co-employee, whether her superior, colleague or subordinate. The harasser could also be the victim's employer, such as a sole proprietor of a business or a member of a partnership — here, the additional issue of whether there has been a breach of the victim's employment contract would arise. Where the victim is employed by a corporation, the latter may be primarily liable for breaching her employment contract. The employer may also be primarily liable for breaching his duty of care towards his employee, or vicariously liable for a tort committed by one of his other employees.

In addition, acts of sexual harassment may also constitute criminal offences which the State has an interest in prosecuting. The primary purposes of criminal law are to punish offenders and deter them from repeating their crimes, as well as to send a warning to others who might be tempted to commit similar offences. For this reason, a victim usually does not benefit directly from criminal proceedings in the sense of receiving compensation for the wrongs done to her,³² though she may well find testifying in court against her harasser a form of catharsis as well as an opportunity to highlight the problem of workplace sexual harassment.³³ There is nothing to stop a person from making a police report against her harasser as well as commencing a civil action against him to recover damages.

A. The Constitutional Perspective

It is appropriate to begin our consideration of sexual harassment law with the supreme law of the land, the Constitution of the Republic of Singapore.³⁴ Among other basic functions, the Constitution establishes the various institutions which govern Singapore — the executive,

³² Section 401(1)(b) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) confers on the court convicting an accused the discretion to order him to pay a sum fixed by the court as compensation to any person or to the representatives of any person injured by the crime in respect of his person, character or property. Under s 401(4), if compensation is ordered, any civil claim for damages sustained by reason of the crime shall be deemed to have been satisfied to that extent, but the order shall not prejudice any right to a civil remedy for recovery of damages beyond the amount of compensation paid under the order. One case in which compensation was ordered is *Raja Izzudin Shah v Public Prosecutor* [1979] 1 MLJ 270 (CA, Ipoh), in which the victim, a public servant, was awarded RM 200 for having been assaulted during the execution of his duties by the defendant. However, in practice compensation is seldom awarded by the courts.

³³ In appropriate cases, such as those involving victims of sexual offences, the Courts may call for victim impact statements as part of the sentencing process. In such a statement, the victim is permitted to highlight the medical, financial and emotional injuries and the other effects which the crime has had on her: Peter Low, "Empowering Victims via VIS", *The Singapore Law Gazette*, August 1997 at 27.

³⁴ 1992 Ed.

legislature and judiciary. It also defines the ambit of the responsibilities and powers of these institutions, and regulates the procedure for appointing or electing individuals to positions of power. Hence, it is perhaps not surprising that an issue as specific as sexual harassment is not mentioned at all. Nonetheless, among the fundamental liberties enjoyed by the people of Singapore are the rights to life and personal liberty and to equality and equal protection, which are set out in the following terms:

Article 9(1): No person shall be deprived of his life or personal liberty save in accordance with law.

Article 12(1): All persons are equal before the law and entitled to the equal protection of the law.

Article 12(2): Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

Singapore courts have not yet had the opportunity to interpret the word *life* in Article 9(1). However, in the recent Malaysian decision of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*,³⁵ the Kuala Lumpur Court of Appeal, in construing Article 5(1) of the Federal Constitution which is identical to Singapore's Article 9(1), held that the word did not refer to mere existence but "incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life."³⁶ The right to life therefore includes protection of the health and strength of workers, and just and humane conditions of work.³⁷ For the purposes of the case, the Court held that it encompassed the right to continue in public service subject to removal for good cause by resort to a fair procedure.³⁸ It remains to be seen whether Singapore will interpret Article 9(1) in such a broad manner.

Article 12(1) of the Constitution lays down the general principle that people who are in a similar position with respect to the law are to be treated by the law in the same manner.³⁹ Article 12(2) goes on to prohibit,

³⁵ [1996] 1 MLJ 261 (CA, Kuala Lumpur).

³⁶ *Ibid* at 288.

³⁷ *Ibid* at 287, citing *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 (SC, India).

³⁸ *Ibid* at 288.

³⁹ *Datuk Haji bin Harun Idris v Public Prosecutor* [1977] 2 MLJ 155 at 166 (FC, Malaysia); *Ong Ah Chuan v Public Prosecutor* [1980-81] SLR 48, [1981] 1 MLJ 64 (PC on appeal from Singapore).

among other things, discrimination in public employment on the grounds of religion, race, descent or place of birth. It is to be noted that sex is not one of the grounds specifically mentioned in Article 12(2). This is surprising, since the Singapore Constitution was based on the Constitution of India which does contain express prohibitions against sexual discrimination, as the following provisions show:

Article 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, *sex*, place of birth or any of them.

Article 16(1): There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Article 16(2): No citizen shall, on the grounds only of religion, race, caste, *sex*, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. [Emphasis added.]

This difference notwithstanding, there is every reason to believe that the general declaration of equality before the law and equal protection of the law in Article 12(1) of the Constitution includes equality of the sexes as well.

The constitutional provisions referred to above do not have a direct impact on sexual harassment law in Singapore. Fundamental liberties were established in the Constitution to place limits on the State's right to impinge on individual freedom, not to regulate the relations of private persons with each other.⁴⁰ This is manifest from Article 12(2) which, among other things, forbids employment discrimination against citizens of Singapore, but only as regards the appointment to any office or employment *under a public authority*, and the *administration of any law* relating to the establishment or carrying on of any trade, business, profession, vocation or employment. Therefore, an individual who is discriminated against by her employer, who is another individual or a private corporation, may not complain of unconstitutional action on the part of the latter. Her only recourse is to sue her employer under the ordinary law.

⁴⁰ See *Vidya Verma v Shiv Narain Verma* AIR 1956 SC 108 at 109–10 (SC, India), in which it was held that as a rule constitutional safeguards are directed against the State and its organs, and that protection against violation of rights by individuals must be sought in the ordinary law. See also *PD Shamdasani v Central Bank of India* AIR 1952 SC 59 at 60 (SC, India). The courts in Singapore have not yet been called upon to decide the point.

Nonetheless, it is submitted that Articles 9 and 12, despite their limitations, emphasize certain basic principles from which ordinary law should draw inspiration. Article 9 may suggest that since employment is a vital part of everyday life, the rights of employees to proper working conditions and not to be dismissed without just cause and proper procedures should be protected. Article 12 reminds us that there ought not to be unnecessary distinctions in the way people who are similarly placed are treated. Therefore, conduct is discriminatory when it is unreasonable and directed at a particular person because of his or her sex and not at others in the same situation.

B. Remedies in the Court: Civil Actions

1. Claims in Tort Against Harassers

As a result of its colonial heritage, tort law in Singapore is still very much based on English common law principles.⁴¹ In *Pang Koi Fa v Lim Djoe Phing*,⁴² Singapore's first major decision on liability for nervous shock, the High Court held that:

The courts in Singapore are not strictly bound by decisions of the English courts in the sense that the courts in England are not part of the hierarchy of courts in Singapore... Nonetheless, in respect of decisions in common law, particularly in the area of tort in general and negligence in particular, decisions of the highest court in England [*ie* the House of Lords] should be highly persuasive if not practically binding.

While Singapore courts tend to follow the English lead in novel cases, there is by no means a blind adherence. Indeed, in *Pang Koi Fa's* case, the court went beyond the English authorities and looked to American case law as well. It took the view that “[w]hile decisions in the US are in no way binding nor ordinarily applicable in Singapore, this cannot and should not preclude the courts from looking at judicial decisions in the US, which offer a far more diverse and broader base of solutions upon which legal developments may be founded. The cautionary principles to bear in mind are that the law may have developed in directions vastly different from those in the Commonwealth, so that cases must be viewed with much more circumspection.”⁴³

In this section, therefore, while there is much reference to English case law, mention is also made of decisions of the United States and other jurisdictions where they shed light on the issues raised.

⁴¹ This is affirmed by s 3 of the Application of English Law Act (Cap 7A, 1994 Ed).

⁴² [1993] 3 SLR 317 at 323 (HC).

⁴³ *Ibid* at 330.

(1) *Trespass to the Person*.⁴⁴ Sexual harassment occurs when a harasser touches or grabs his victim, or intentionally brushes his body against hers. The harasser may also restrain the victim's free movement to importune or molest her. Such acts can constitute trespasses to the victim's person. "The fundamental principle, plain and uncontestable, is that every person's body is inviolate."⁴⁵ For this reason, the victim may have causes of action in battery, assault and false imprisonment depending on the form of harassment suffered. *Battery* is the direct imposition of any unwanted physical contact on a person. It is not necessary to prove that the contact caused or threatened any physical injury or harm, nor that the defendant intended to injure the other person.⁴⁶ For instance, in *R v Chief Constable of Devon and Cornwall, ex parte CEGB*,⁴⁷ a person who kissed a newly-met colleague on the lips was found liable in battery.

If the harasser does not actually touch the victim but does an overt act which indicates to the victim an immediate intention on his part to commit a battery, and the harasser is in a position to carry that intention into effect, the tort of *assault* is established.⁴⁸ For instance, a harasser commits an assault if he approaches the victim and evinces an intention to touch her, even if he does not eventually do so.

Finally, the harasser is liable for the tort of *false imprisonment* if he completely deprives the victim of her liberty for any time, however short, without lawful cause.⁴⁹ It is enough that the victim's movements are constrained at the harasser's will. The constraint can be actual physical force amounting to a battery, or merely the apprehension of force. Therefore, the tort may be committed if the harasser tells the victim, "Don't think you're going anywhere", causing her to feel that her freedom of movement is curtailed.

(2) *Intentional Infliction of Injury; Harassment and Molestation*: On the other hand, sexual harassment frequently does not involve physical contact between the harasser and the victim. For instance, the harasser may constantly approach the victim and make lewd suggestions or sexual overtures, tell off-colour jokes or show pornographic pictures to the victim. There have even been cases where the harasser has exposed himself to the victim. Is there any recourse against such behaviour?

44 See generally *Clerk & Lindsell on Torts* (17th ed, 1995), chap 12.

45 *Collins v Wilcock* [1984] 3 All ER 374 at 378.

46 *Wilson v Pringle* [1986] 2 All ER 440 at 495 (CA).

47 [1982] QB 458 at 471.

48 *Stephens v Myers* (1830) 4 C&P 349, 172 ER 735; *Read v Coker* (1853) 13 CB 850, 138 ER 1437.

49 *Bird v Jones* (1845) 7 QB 742; *Meering v Grahame-White Aviation Co* (1919) 112 LT 44.

Apart from the torts mentioned above, there is an line of cases establishing that if a person intentionally does something which causes nervous shock to a victim, the person is liable even where there has been no physical impact or threat of force on the victim. In *Wilkinson v Downton*,⁵⁰ the defendant was held liable in tort for playing a practical joke on the plaintiff by telling her that her husband had been seriously injured in an accident, causing her to suffer nervous shock. The court found that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff. He had infringed her “legal right to personal safety”, and had been occasioned physical harm without justification.⁵¹ As regards the defendant’s intention in doing the act complained of, it should be noted that a person must be presumed to have intended the natural consequences of his or her conduct.⁵²

In the context of this tort, which might be called *intentional infliction of injury*, the defendant’s wilful act must lead to a recognised psychiatric illness — a plaintiff cannot recover merely for having experienced fear, shock or mental distress.⁵³ Furthermore, although no cases have been decided to that effect, academic opinion is unanimous in holding that the tort applies to physical injury as well as nervous shock suffered by the victim.⁵⁴ For instance, if one person suddenly shouts at another descending a narrow staircase, intending that the second person should fall, the first person is surely liable if the second person does fall and injure himself.⁵⁵

⁵⁰ [1897] 2 QB 57.

⁵¹ See also *Janvier v Sweeney* [1919] 2 KB 316 (CA); *Brelitski v Obadiak* (1922) 65 DLR 627 (SC, Canada); *Stevenson v Basham* [1922] NZLR 225 (CA, New Zealand); *Bunyan v Jordan* (1937) 57 CLR 1 (HC, Australia); *Purdy v Woznesensky* [1937] 2 WWR 116 (Canada); *Cant v Cant* (1985) 49 OR (2d) 25 (Canada); *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549 (CA, Hong Kong).

⁵² RP Balkin & JLR Davis, *Law of Torts* (2nd ed, 1996) at 51.

⁵³ Such an approach has been adopted in many tort cases: cf *Kralj v McGrath* [1986] 1 All ER 54 (negligence of obstetrician led to plaintiff suffering great pain and the loss of her baby shortly after birth. However, no damages awarded merely for the fact that the plaintiff suffered grief at her child’s death); *Hicks v Chief Constable of Yorkshire Police* [1992] 1 AC 310 (people who were trapped in a crush during a soccer match at the Hillsborough Stadium but were fortunate enough to escape injury held to have no claim in respect of the distress suffered, even though it was a truly terrifying experience).

In the Singapore decision *Pang Koi Fa v Lim Djoe Phing*, *supra* n 42, a nervous shock case, the High Court held at 333–34: “Perilously close are also the situations in which the claim for nervous shock may be confused with a claim for grief, sorrow, deprivation and suffering... This category of claim is clearly untenable. In distinguishing the present case from the ones relating to just grief and suffering, I must say that here the claim is not exclusively for the loss the plaintiff has suffered, nor the sense of loss she feels. Rather, I view it as a claim for the psychiatric illness she now suffers...” [original emphasis].

⁵⁴ *Winfield & Jolowicz on Tort* (WVH Rogers ed, 13th ed, 1989) at 69; Balkin & Davis, *supra* n 52 at 51.

⁵⁵ *Winfield & Jolowicz, ibid.*

Harassment and abuse which harms the victim's health is conduct which falls within the tort. The plaintiff in *Burnett v George*⁵⁶ was subjected to a series of molestations and assaults from the defendant, including actual assaults to her person, unwelcome visits to her home, and harassing telephone calls. An injunction was granted restraining the defendant from assaulting, molesting or otherwise interfering with the plaintiff or entering her property. The defendant appealed on the ground that since molestation and interference were not actionable wrongs, it was not just for the court to grant an injunction to restrain such acts. On the facts, the Court of Appeal found that the terms of the injunction were too wide. Nonetheless, applying *Wilkinson v Downton* and *Janvier v Sweeney*, it held that an injunction might be granted in a proper case if it was shown that the plaintiff's health was being impaired by molestation or interference calculated to create such impairment.

In *Khorasandjian v Bush*,⁵⁷ the appellant had assaulted the respondent, behaved aggressively towards her, made threats of violence, and pestered her with unwanted telephone calls to her parents' and grandmother's homes. The respondent suffered great stress as a result. On an application by the respondent, a county court granted an interlocutory injunction forbidding the appellant from using any violence to, harassing, pestering or communicating with the respondent in any way until the trial of the action or further order. The appellant appealed, claiming that the judge did not have jurisdiction to restrain him in this manner since an interlocutory injunction could only be granted a legal right of the respondent, and the words "harassing, pestering or communicating with" did not reflect any tort known to the law.

The appeal was dismissed by the English Court of Appeal. Firstly, it was clear to the Court that the form of an interlocutory injunction did not have to follow slavishly the form of the substantive relief which would be likely to be granted if the respondent succeeded at trial.⁵⁸ Secondly, it found that the respondent did have potential causes of action against the appellant for the harassing telephone calls, one of them being the tort of intentional infliction of injury. Applying *Wilkinson v Downton*, *Janvier v Sweeney* and *Burnett v George*, the Court felt that though there was no medical evidence and it could not as yet be said that the respondent was suffering from any physical or psychiatric illness resulting from the harassment, there was an "obvious risk" that the cumulative effect of continued and unrestrained further harassment would cause such illness. On this ground, both the judges in the majority and the dissenting judge felt it appropriate to grant a *quia timet* injunction preventing harm which had not yet occurred.⁵⁹

⁵⁶ [1992] 1 FLR 156 (CA).

⁵⁷ [1993] QB 727 (CA).

⁵⁸ *Ibid* at 732.

⁵⁹ *Ibid* at 677 (Dillon LJ, Rose LJ agreeing), 736 (Peter Gibson J).

The majority in *Khorasandjian* was also of the view that the respondent had a potential cause of action in private nuisance against the appellant, even though the latter had made harassing telephone calls to the homes of the respondent's parents and grandmother. The respondent had no proprietary interest in these properties, and was in law a mere licensee in her parents' home. Nonetheless, Dillon LJ (with whom Rose LJ agreed) felt that "[t]o my mind, it is ridiculous if in this age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or leasehold proprietary interest in the premises in which he or she has received the calls."⁶⁰ It was enough that the respondent was an occupier of the properties where the harassing telephone calls were received, and the inconvenience and annoyance caused by the calls and the interference thereby with the ordinary and reasonable use of the property were sufficient to found a claim in private nuisance.

In *Burris v Azadani*,⁶¹ the appellant persistently threatened and harassed the respondent, in particular by making uninvited nocturnal visits to her home. The respondent commenced proceedings for nuisance and got an interlocutory injunction restraining the appellant *inter alia* from assaulting, harassing or threatening her or communicating with her, and prohibiting him from entering or remaining within 250 yards of her home. As a result of breaches of the injunction, the respondent brought committal proceedings against the appellant. The appellant contended that the court had no jurisdiction to impose a term excluding him from the vicinity of the respondent's home. The Court of Appeal disagreed. Applying *Khorasandjian*,⁶² in its view it was not a valid objection to the making of an "exclusion zone" order that the conduct to be restrained was not itself tortious or otherwise unlawful if such an order was reasonably regarded as necessary for protection of the respondent's legitimate interest. The Court also cited the majority's decision in *Khorasandjian* with approval.⁶³

The English Court of Appeal took the view in both *Khorasandjian*⁶⁴ and *Burris*⁶⁵ that there exists a common law tort of harassment, despite earlier decisions which had declared that the common law does not recognise the existence of such a tort,⁶⁶ or indeed any tort of molestation,⁶⁷

⁶⁰ *Ibid* at 734.

⁶¹ [1995] 1 WLR 1372 (CA).

⁶² *Ibid* at 1377; see *Khorasandjian*, *supra* n 58, and the accompanying text.

⁶³ *Ibid* at 1379–80.

⁶⁴ *Supra* n 57 at 738.

⁶⁵ *Supra* n 61 at 1378.

⁶⁶ *Patel v Patel* [1988] 2 FLR 179 (CA), doubted in *Khorasandjian*, *supra* n 57 at 737–38, and *Burris*, *supra* n 61 at 1378–79.

⁶⁷ *Burnett v George* (1986) [1992] 1 FLR 525 (CA); *Patel v Patel*, *ibid*.

ill-treatment⁶⁸ or invasion of privacy.⁶⁹ This point was left untouched by the House of Lords in *Hunter v Canary Wharf Ltd*,⁷⁰ which overruled *Khorasandjian* insofar as it held that a mere occupier of property may sue in private nuisance. The House of Lords reaffirmed that the tort of private nuisance can only grant relief to a plaintiff in the limited situation where she has a proprietary interest in the property on which the nuisance is suffered.⁷¹ On the tort of harassment, Lord Hoffmann expressed the following *obiter* view:

The perceived gap in *Khorasandjian's* case was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v Downton* [1897] 2 QB 57, [1895-9] All ER Rep 267 and *Janvier v Sweeney* [1919] 2 KB 316, [1918-19] All ER Rep 1056. ... But as at present advised, 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 (see *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65). The policy considerations are quite different. I do not therefore say that *Khorasandjian's* case was wrongly decided. But it must be seen as a case on intentional harassment, not nuisance.⁷²

Regretfully, both Lord Hoffmann and Lord Goff of Chieveley⁷³ found it unnecessary to consider in more depth how the common law might have developed, since after *Khorasandjian* the law of harassment in Great Britain was put on a statutory basis in the form of the Protection from Harassment Act 1997.⁷⁴ Section 1(1) of the Act states:

A person must not pursue a course of conduct —

- (a) which amounts to harassment of another, and
- (b) which he knows or ought to know amounts to harassment of the other.

Harassment is not defined, save that it includes alarming a person or causing a person distress. A *course of conduct* must involve conduct on

⁶⁸ *Davey v Chief Constable of the Royal Ulster Constabulary* [1988] NILR 139.

⁶⁹ *Re X (A Minor)* [1975] 1 All ER 697 at 704; *Kaye v Robertson* [1991] FSR 62 at 66 (CA): “It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for a breach of a person’s privacy.”

⁷⁰ [1997] 2 All ER 426 (HL).

⁷¹ *Quaere* whether this ought to be so: see Margaret Fordham, “The Need for a Legal Interest in Land in Actions for Private Nuisance — the End of the Debate?” [1997] SJLS 436.

⁷² *Supra* n 70 at 452.

⁷³ *Ibid* at 438 *per* Lord Goff, and 452 *per* Lord Hoffmann.

⁷⁴ Chapter 40 (“PFHA”).

at least two occasions, and *conduct* includes speech.⁷⁵ The Act creates both criminal and civil liability for harassment.⁷⁶ It is also a criminal offence for a defendant who has been restrained by injunction from pursuing any conduct which amounts to harassment to do anything prohibited by the injunction without reasonable excuse, and a plaintiff who considers that the defendant has breached the terms of the injunction may apply for a warrant for the defendant's arrest.⁷⁷

As pointed out by Lord Hoffmann, had it not been for the Protection from Harassment Act, the common law may well have developed the tort of harassment by dispensing with the requirement for physical or psychiatric injury in favour of a clear finding of mental distress on the plaintiff's part.⁷⁸ This is already the position in the United States: under American law, "if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required."⁷⁹

In the New Zealand decision of *Tucker v New Media Ownership Ltd*,⁸⁰ the court seemed prepared to go even further, speculating that the tort in *Wilkinson v Downton* might usefully be adapted to cover the same field in the United States by the tort of invasion of personal privacy. One aspect of the American tort protects against any unreasonable or highly offensive intentional intrusion against the seclusion of another person.⁸¹ This tort was found to have been committed in *Rogers v Loews L'Enfant Plaza Hotel*⁸² when a supervisor repeatedly called the complainant at home and at work when he was off-duty, making lewd remarks about her personal and sex life despite requests that he stop; and in *Phillips v Smalley Maintenance Services*,⁸³ where an employer asked a female employee about her sexual relationship with her husband, and also told her that providing sexual services to him in his office was part of her job.⁸⁴

75 PFHA, ss 7(2) to (4).

76 PFHA, ss 2 and 3 respectively. In addition, s 4(1) creates an offence of engaging in a course of conduct which causes another to fear, on at least two occasions, that violence will be used against him.

77 PFHA, ss 3(4) to (9).

78 See also Fricker [1992] Fam Law 158; Stephen Todd, "Protection of Privacy" in *Torts in the Nineties* (Nicholas J Mullany ed, 1997), 174 at 200–201.

79 *Prosser & Keeton on the Law of Torts* (W Page Keeton gen ed, 5th ed, 1984) at § 12; American Law Institute, *Second Restatement of Law: Torts* (1965) at § 46.

80 [1986] 2 NZLR 716 at 731–33.

81 *Prosser & Keeton, supra* n 79 at 854 (§ 117); *Second Restatement of Law: Torts, supra* n 79 at § 652B.

82 (1981) 526 F Supp 523.

83 (1983) 711 F 2nd 1524.

84 See also *Pease v Alford Photo Industries* (1987) 667 F Supp 1188 (unwanted touching of thighs, breasts and buttocks); and *Waltman v International Paper Co* (1988) 47 FEP Cases 671, reversed (1989) 875 F 2d 468.

No case in Singapore has yet applied the tort of intentional infliction of injury expressed in *Wilkinson v Downton*, much less any tort of harassment or invasion of privacy. It is submitted that such torts would be a potent remedy for victims of sexual harassment. In view of Lord Hoffman's opinion in *Hunter's* case, the desirability of recognizing such torts should be seriously considered by our courts if the opportunity arises.

(3) *Intimidation*: At common law, a person commits the tort of *intimidation* if he delivers a threat to another person that he will commit an act or use means unlawful against that person, as a result of which the other person acts or refrains from doing some act which he is entitled to do, thereby causing damage to himself.⁸⁵ To establish the tort, it must be shown that the victim is subjected to a "coercive threat... coupled with a demand. It must be intended to coerce a person into doing something that he is unwilling to do or not doing something that he wishes to do."⁸⁶ Mere "idle abuse" against a person which is not taken seriously does not suffice.⁸⁷ The threat need not be in words, and can be implied from the tortfeasor's acts. For instance, the plaintiff in *Godwin v Uziozwe*⁸⁸ was brought from a Nigerian village to England and made to work for the defendants as a "domestic drudge". She was coerced into working excessive hours for no pay, and was confined to the defendants' house for two-and-a-half years with no opportunity for normal social intercourse. She slept on the floor, was poorly clothed and fed, and was occasionally beaten. The court found the defendants guilty of intimidation and intentional unlawful coercion of the plaintiff because there were "implied threats of further assaults".

The act threatened against the victim must itself be unlawful. If a person threatens to do something which he has a legal right to do, no intimidation is committed.⁸⁹ The unlawful acts can constitute a tort, a breach of contract, or in some cases even a crime.⁹⁰ It is also necessary for the

⁸⁵ *Rookes v Barnard* [1964] AC 1129 (HL); *Morgan v Fry* [1968] 2 QB 710 at 724. See *Clerk & Lindsell on Torts*, *supra* n 44 at para 23–38.

⁸⁶ *Stratford v Lindley* [1965] AC 269 at 283–84. See also *Allen v Flood* [1898] AC 1 at 129; *Hodges v Webb* [1920] 2 Ch 70 at 89; *Rookes v Barnard*, *ibid* at 1187–88, 1200–01, 1207–08.

⁸⁷ *News Group Newspapers Ltd v Society of Graphical and Allied Trades 1982 (No 2)* [1987] ICR 181 at 204.

⁸⁸ (1992) 136 SJ (LB) 205.

⁸⁹ *Rookes v Barnard*, *supra* n 85 at 1168–69, 1234; *Hadnor Productions Ltd v Hamilton* [1983] 1 AC 191 at 224–25, 229.

⁹⁰ For a crime to constitute an unlawful act, it must be shown that on a true construction of the penal statute creating the offence the victim is given a civil cause of action: *Lonrho Ltd v Shell Petroleum Ltd (No 2)* [1982] AC 173 (HL); *RCA Corp'n v Pollard* [1983] Ch 135 (CA); *CBS Songs Ltd v Amstrad Consumer Electronics* [1988] Ch 61 at 72–78 (CA), affirmed on other grounds in [1988] AC 1013 (HL); *Barrets & Baird (Wholesale) Ltd v IPCS* [1987] IRLR 3 at 6; *Lonrho v Fayed* [1990] 2 QB 479 at 489. *Quaere* whether a threat to commit any of the criminal offences referred to in Part III.B *infra* would entitle the victim to sue for intimidation.

victim to submit to the threat, and suffer to damage as a result.⁹¹ If, for example, A says to B, “I will hit you unless you give me \$5,” and B resists saying, “You can do your worst. I am not going to pay you,” at that point B has no cause of action against A.⁹² Of course, B can apply for an injunction to prevent A from carrying out his threat,⁹³ and if A later hits him, B can sue for assault.

As with the torts discussed in the last section, the tort of intimidation has not yet been applied in Singapore, though there is no reason why it should not be accepted in an appropriate case. The tort provides a potential cause of action for employees who succumb to sexual demands as a result of threats made by their employers or co-workers. It is not difficult to imagine situations where an employee might be pressured into an undesired sexual relationship with her employer if he threatens her with demotion or dismissal, or with a supervisor who threatens to assault her or to spread defamatory rumours about her.

(4) *Private Nuisance*: Victims who suffer harassment on their own property, for example by harassers who loiter in the vicinity of their homes or use the telephone to make nuisance calls, may have a cause of action in private nuisance. The essence of the tort is an undue interference with the victim in the comfortable and convenient enjoyment of her own land⁹⁴ or, as put in *St Helens Smelting Co v Tipping*,⁹⁵ “personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves.” The discomfort to the plaintiff must be of such a degree that it would be substantial to any person occupying the plaintiff’s premises irrespective of his or her position in life, age or state of health; it must be “an inconvenience materially with the ordinary comfort physically of human existence, not merely according to elegant or dainty

91 *Stratford v Lindley*, *supra* n 86 at 283; *Huljian v Hall* [1973] 2 NZLR 279 at 285–86; *News Group Newspapers Ltd v Society of Graphical and Allied Trades 1982 (No 2)*, *supra* n 87 at 204.

92 *Clerk & Lindsell on Torts*, *supra* n 44 at para 23–53.

93 See *Khorasandjian v Bush*, *supra* n 57, *Burris v Azadani*, *supra* n 61, and the accompanying text.

94 *Thompson-Schwab v Costaki* [1956] 1 WLR 335 at 338; *Laws v Florinplace* [1981] 1 All ER 659. For local cases, see *Pacific Engineering Ltd v Haji Ahmad Rice Mill Ltd* [1966] 2 MLJ 142 (HC, Kuala Lumpur) (injury to property and annoyance caused by smoke, ashes, dust and rice husks from defendant’s premises constituted a private nuisance); *Syarikat Perniagaan Selangor Sdn Bhd v Fahro Rozi Mohdi* [1981] 2 MLJ 16 (FC, Kuala Lumpur) (electronically amplified live music an actionable nuisance); and *Ng Sek Chuan v Ng Joo Soon*, unreported, Suit No 4690 of 1986, 25 March 1992 (HC, Singapore) *per* FA Chua J (plaintiff failed to prove that a shed on the defendant’s property intruded on his privacy, caused heat and glare from the sun to be reflected into his flat, or excessive noise due to human traffic).

95 (1865) 11 HLC 642 at 650, 11 ER 1483 at 1486.

modes and habits of living, but according to plain and sober and simple notions” among Singaporeans.⁹⁶

Any act done with the intention of annoying and which actually causes annoyance amounts to a nuisance.⁹⁷ In *Khorasandjian v Bush*,⁹⁸ referred to earlier, the court found that the inconvenience and annoyance caused to the respondent by the appellant’s pestering telephone calls to her parents’ and grandmother’s homes of itself amounted to interference with the respondent’s ordinary and reasonable enjoyment of property, and therefore could be restrained *quia timet* by injunction as a private nuisance. However, the court departed from established authority,⁹⁹ holding that it was unnecessary for the respondent to prove that she had a freehold or leasehold proprietary interest in the premises in which she had received the calls. It was sufficient that the respondent was lawfully present on the property and had a right of occupation there as her mother’s licensee. As pointed out above, this aspect of *Khorasandjian* was recently overruled by the House of Lords in *Hunter v Canary Wharf*.¹⁰⁰ Therefore, in order to sue in private nuisance, a victim must have some proprietary interest in the property on which the harassment is encountered.

It appears that an employee who is unreasonably harassed along a highway while entering into or exiting from her workplace may have a cause of action. Whether this is a species of private nuisance or new tort is unclear. The case in point is *Thomas v National Union of Mineworkers (South Wales Area)*,¹⁰¹ in which some working miners sought injunctions restraining the union, which had called a miners’ strike, from organizing unlawful picketing or demonstrations. Scott J held:

All citizens have a right to use the public highway. Suppose an individual were to persistently follow another on a public highway, making rude gestures or remarks in order to annoy or vex. If continuance of such conduct were threatened no one can doubt but that a civil court would, at the suit of the victim, restrain by an injunction the continuance of the conduct. The tort might be described as a species of private nuisance, namely unreasonable interference with the victim’s rights to use the highway. But the label for the tort does not, in my view, matter. In the present case, the working miners have the right to use the highway for the purpose

⁹⁶ *Walter v Selfe* (1851) 4 De G & Sm 315 at 322, 64 ER 849 at 852 (the case, of course, referred to “English people” rather than Singaporeans). The principle was applied in Singapore in *Ng Sek Chuan v Ng Joo Soon*, *supra* n 94.

⁹⁷ See *Christie v Davey* [1893] 1 Ch 316; *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 368 (deliberate firing of guns to cause vixens to abort).

⁹⁸ *Supra* n 57.

⁹⁹ *Malone v Laskey* [1907] 2 KB 141; *Bernstein v Skyviews* [1978] QB 479.

¹⁰⁰ *Supra* n 70.

¹⁰¹ [1985] 2 All ER 1 at 24 (Ch D).

of going to work. They are, in my judgment, entitled under the general law to exercise that right without unreasonable harassment by others. Unreasonable harassment of them in their exercise of that right would, in my judgment, be tortious.

The majority in *Khorasandjian*¹⁰² found it unnecessary to decide on the correctness of this decision, but in his dissenting judgment Peter Gibson J noted that the case had been criticized in *News Group Newspapers Ltd v Society of Graphical and Allied Trades 1982 (No 2)*.¹⁰³ Nevertheless, he left open the question whether harassment of the user of a highway is a tort, or whether workers have an interest in having access to their place of work analogous to the interests of those occupying business premises.¹⁰⁴

(5) *Damages*: A harasser is liable for all consequences flowing from the tort he has committed, whether or not such consequences were foreseeable. Damages are recoverable for whatever loss results as a natural consequence of the harasser's wrongful acts.¹⁰⁵ If the torts involving trespass to the person, intentional infliction of injury and harassment are made out, the victim is at the very least entitled to nominal damages, but substantial damages may be awarded for any indignity, discomfort or inconvenience suffered. Damages will be given to vindicate the victim's rights, even if no pecuniary damage is suffered.¹⁰⁶ The court will look at the time, place and manner of the trespass and the defendant's conduct. In appropriate cases, the court may even award aggravated damages.¹⁰⁷ For instance, aggravated damages were awarded in *W v Meah*¹⁰⁸ to women victims of serious sexual assault by the defendant, and in *Appleton v Garrett*¹⁰⁹ to patients of a dentist for injury to feelings, mental distress, anger and indignation upon learning that much of the dental treatment given to them was unnecessary and to a large extent performed on healthy

¹⁰² *Supra* n 57 at 738.

¹⁰³ *Supra* n 87 at 206; *Khorasandjian, Ibid* at 743.

¹⁰⁴ *Khorasandjian, ibid* at 744. See also *Clerk & Lindsell on Torts, supra* n 44, paras 18–94 and 18–95.

¹⁰⁵ *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836 at 840.

¹⁰⁶ *Kuchenmeister v Home Office* [1958] 1 QB 496; *Beckett v Walker* [1985] CLY 129a (£200 for 53 hours' detention after a warrant of arrest negligently issued); *Simmons v Polak* [1986] CLY 974 (£250 for being locked in a room for five minutes by an ex-fiancé); *Hayward v Metropolitan Police Commissioner, The Times*, 29 March 1989 (£1,750 awarded for four-and-a-half hours' detention); *Kwan Kwai Choi v Ak Zaidi bin Pg Metali* [1993] 2 MLJ 207 (HC, Brunei) (B\$3,000 awarded to represent plaintiff's annoyance at being unlawfully detained by the police for 6 hours). Section 3(2) of the UK Protection from Harassment Act 1997 specifically provides that in a civil claim for harassment, damages can be awarded for, among other things, any anxiety caused by the harassment and any financial loss resulting from the harassment.

¹⁰⁷ *Rookes v Barnard* [1964] AC 1129 at 1221–23 (HL); *Broome v Cassell & Co Ltd* [1972] AC 1027; *Carrington v AG* [1972] NZLR 1106; *Drane v Evangelou* [1978] 1 WLR 455 (CA). *Rookes v Barnard* was applied locally in *Shaaban v Chong Fook Kam* [1969] 2 MLJ 219 (PC on appeal from Malaysia).

¹⁰⁸ [1986] 1 All ER 935.

¹⁰⁹ [1996] PIQR P1.

teeth — the dentist had deliberately and in bad faith concealed from them the true condition of their teeth so that he could carry out dental work for profit.

As the tort of private nuisance is concerned with damage to or interference with rights over property, it is not altogether clear whether damages may be awarded for personal injury suffered by the plaintiff.¹¹⁰ Nevertheless, where the nuisance interferes with the plaintiff's amenity and enjoyment of her property, non-pecuniary damages can be recovered for the annoyance, inconvenience or discomfort suffered.¹¹¹

2. Claims in Tort Against Employers

(1) *Primary Liability for Negligence*.¹¹² At common law, an employer owes to each employee a duty to take reasonable care for his or her safety in all the circumstances of the case so as not to expose him or her to unnecessary risk.¹¹³ This duty is sometimes expressed as a fourfold duty to provide safe equipment, safe fellow-employees, a safe workplace and safe system of work,¹¹⁴ but it is nonetheless one overall duty.¹¹⁵ The test

¹¹⁰ Although such claims were allowed in *O'Regan v Brasson* (1977) 23 NSR (2d) 587 and *Devon Lumber Co Ltd v MacNeill* (1988) 45 DLR (4th) 300. This was doubted by Lords Goff, Lloyd and Hoffmann in *Hunter v Canary Wharf*, *supra* n 100.

¹¹¹ *Halsey v Esso Petroleum Co* [1961] 1 WLR 683 at 702–03 (noise and smell from oil distributing depot); *Bone v Seale* [1975] 1 WLR 797 (CA) (persistent smells emanating from pig farm); *Bunclark v Hertfordshire County Council* (1977) 243 EG 381 at 455 (spreading tree roots causing cracked walls, dust and general anxiety); *Hunter v Canary Wharf Ltd*, *supra* n 70, at 451 *per* Lord Hoffmann (disagreeing with *Bone v Seale* that the measure of damages for nuisance may be assessed by an analogy with personal injury rather than a diminution in the amenity value of the property).

¹¹² See generally 20 *Halsbury's Laws* (4th ed, 1976) at para 546.

¹¹³ *Smith v Baker & Sons* [1891] AC 325 (HL); *Wilsons and Clyde Coal Co Ltd v English* [1938] 3 All ER 628 (HL); *Paris v Stepney Borough Council* [1951] 1 All ER 42 (HL); *Latimer v AEC Co* [1953] 2 All ER 449 (HL); *Zakaria bin Putra Ali v Low Keng Huat Construction Co (S) Pte Ltd*, unreported, Suit No 1140 of 1991, 23 November 1993 (HC, Singapore).

¹¹⁴ It is well established in Singapore that employers have a duty to provide a proper and safe system of work for their employees: see, *eg* *Choi v Chitra Senan* [1964] MLJ 367 (HC); *Eng Lye Hup Co Ltd v Chua Sai Choo* [1965–68] SLR 369, [1968] 1 MLJ 231 (FC); *Ng Cheng Ho v Tan Ek Seng* [1969–71] SLR 66, [1969] 2 MLJ 106 (FC); *Ann Ee Siong v Kim Taw Electrical Sawmill Co (Pte) Ltd* [1980–81] SLR 112, [1980] 1 MLJ 6; *Kian Huat Lorry Transport v Kamardin bin Adan* [1978–79] SLR 607, [1980] 1 MLJ 280 (HC), [1980] 2 MLJ 56 (CA); *Mohamed Yeanikutty v Far East Truck Inc Manufacturing (Pte) Ltd* [1984–85] SLR 178, [1984] 2 MLJ 91 (CA); *The Kohekohe* [1984–85] SLR 277, [1985] 2 MLJ 422 (CA); *Mohamed Fami Hassan v Swiss Co Pte Ltd* [1984–85] SLR 675, [1986] 1 MLJ 461 (HC); *Ong Moh Cheng v Hitachi Chemical (S) Pte Ltd* [1986] SLR 181, [1987] 1 MLJ 450 (HC); *Araveanthan v Nippon Pigment (S) Pte Ltd* [1992] 1 SLR 545 (HC); *Geetha v Hong Kong Teakwood Works (S) Pte Ltd* [1992] 1 SLR 920 (HC).

¹¹⁵ See *eg* *Wilsons and Clyde Coal Co Ltd v English*, *ibid* at 640; *Winter v Cardiff RDC* [1950] 1 All ER 819 at 822–23; *Paris v Stepney Borough Council*, *ibid* at 384; *Brophy v JC Bradfield & Co Ltd* [1955] 1 WLR 1148 at 1154; *Wilson v Tyneside Window Cleaning Co* [1958] 2 All ER 265 at 271–73 (CA); *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at 165; *Cook v Square D Ltd* [1992] ICR 262 (CA).

is what is reasonable and proper to be done for the safety of the employees in the circumstances of the particular case.¹¹⁶ The employer's duty is non-delegable — if the employer asks another of his employees¹¹⁷ or even an independent contractor¹¹⁸ to take responsibility for ensuring that the duty is performed, but the third party acts negligently, the employer remains fully liable.

Although there are no cases either in England or Singapore directly on point, it is submitted that an employer's common law duty towards his employees extends to ensuring that they will not be subject to sexual harassment while at work. Although most of the cases on an employer's duty to provide a safe workplace and a safe system of work have involved some form of industrial premises or process, in principle there is no reason why the duty should be so limited.

Support for this proposition appears in the case of *Hudson v Ridge Manufacturing Co Ltd*.¹¹⁹ For nearly four years one of the defendants' employees, Chadwick, had made a nuisance of himself to his fellow employees, including the plaintiff, by persistently engaging in horseplay or "skylarking", for instance by tripping people up. He had been reprimanded many times by the foreman and warned that he could hurt somebody, but this had no effect on him. The defendants took no further steps to check his conduct by dismissing him or otherwise. One day, Chadwick, while indulging in horseplay, caught hold of the plaintiff from behind and forced him to the ground. The plaintiff put his hand out to save himself and fractured his wrist. He sued his employers. The court held:¹²⁰

It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have practices which are similarly reasonably safe. It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen. All of these duties exist at common law for the safety of the workman, and if, for instance, it is found that a piece of plant or part of the premises is not reasonably

¹¹⁶ *Wee Peng Whatt v Singapore Transport Supply Services Pte Ltd* [1975–77] SLR 641, [1978] 1 MLJ 192 (HC); *Singapore Transport Supply Service Pte Ltd v Wee Peng Huat* [1978–79] SLR 63, [1978] 2 MLJ 234 (CA). The duty varies with the employee's particular circumstances which are known or ought reasonably to be known to be employer: *Pan's v Stepney Borough Council*, *supra* n 113; *James v Hepworth and Grandage Ltd* [1967] 2 All ER 829 (CA).

¹¹⁷ *Oberoi Imperial Hotel v Tan Kiah Eng* [1992] 1 SLR 380 (CA). See also *Wilsons and Clyde Coal v English* and *Wilson v Tyneside Window Cleaning*, *supra* n 115.

¹¹⁸ *Ng Kim Cheng v Naigai Nitro Singapore Pte Ltd* [1991] SLR 517, [1991] 2 MLJ 296 (HC).

¹¹⁹ [1957] 2 QB 348.

¹²⁰ *Ibid* at 350–51.

safe, it is the duty of the employers to cure it, to make it safe and to remove that source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employer to evolve a reasonably safe system of working so as to obviate these dangers, and *upon principle it seems to me that if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger. ...*

Here is a case where there existed, as it were in the system of work, a source of danger, through the conduct of one of the defendant's employees, of which they knew, repeated conduct which went on over a long period of time, and which they did nothing whatever to remove, except to reprimand and go on reprimanding to no effect. In my judgment, therefore, the injury was sustained as a result of the defendant's failure to take proper steps to put an end to that conduct, to see that it would not happen again and, if it did happen again, to remove the source of it. [Emphasis added.]

Hudson's case is important for several reasons: firstly, it suggests that an employer's duty to provide a safe workplace and system of work is broad enough to cover not only operating procedures in factories and the like, but also the general manner in which workplaces are run,¹²¹ including managing how employees behave towards each other. It is submitted that employers have a duty to establish policies for preventing, investigating and dealing with sexual harassment, and to take appropriate action in line with these policies when complaints are received.

Secondly, the case illustrates that employers have a duty towards their employees to hire competent fellow-employees. It is submitted that this encompasses not only ensuring that employees possess suitable qualifications for the job they are hired to do, but also that they are properly trained and supervised in the course of their work. Employers may therefore be under a duty to inquire into the background of job applicants to see if they have a history of sexual harassment, and to ensure that all employees are briefed about the company's sexual harassment policies.

Finally, it was specifically held in *Hudson* that employers must take positive action against employees whose behaviour poses a danger to their fellow employees. It is not sufficient for an employer to merely reprimand

¹²¹ For instance, the duty extends to taking reasonable steps to protect employees from assault or criminal injury in the execution of their tasks: *Houghton v Hackney Corp* (1961) 3 KIR [Knight's Industrial Reports] 615; *Williams v Grimshaw* (1967) 3 KIR 610; *Charlton v Forrest Printing Ink Co* [1980] IRLR 331.

an employee who behaves unacceptably if this has no effect on him; the employer may be required to discipline him or even terminate his employment. This clearly has implications for how employers should deal with employees who sexually harass their colleagues.

An employer's duty to prevent workplace sexual harassment from occurring can also be viewed as an aspect of his duty of care towards his employees distinct from the four traditional categories. In *Veness v Dyson, Bell & Co*,¹²² one of the reasons why the plaintiff sued her former employers was because her former colleagues allegedly bullied and belittled her to such a degree that she came to the verge of a nervous breakdown and had to resign. It was submitted on her behalf that there is a well-established duty owed by an employer to his employee not to expose him to unnecessary risk. This duty was not confined merely to the provision of safe premises and equipment or a safe system of work, but extended to taking disciplinary action against fellow-employees where their actions might foreseeably cause physical or mental injury to the employee. As this was an interlocutory application, the court made no final ruling on the point, but found it to be arguable and did not strike out the relevant portion of the plaintiff's statement of claim.

The learned judge in *Hudson's* case was careful to point out that if Chadwick had merely tripped somebody up for the first time and had been at once reprimanded by the foreman and then did not do it again, such isolated conduct would not put upon his employers the duty of taking the extreme course of dismissing him. His employers would not have been able to foresee from one or perhaps two incidents of that kind the danger that was likely to result from such conduct.

This is what happened in *Smith v Crossley Brothers Ltd*¹²³ which was distinguished in *Hudson's* case. In *Smith*, the plaintiff, an apprentice employed in the defendant's company, was working at a vice when another apprentice approached him from behind, placed a compressed air pipe near his rectum and signalled to a third apprentice to turn on the compressed air. As a result of the practical joke, the plaintiff suffered a rupture of his colon. The plaintiff sued the defendants for damages for negligence, but they contended that the injuries were solely caused by the skylarking or unauthorised acts of the two apprentices in question, which were entirely outside the scope of their employment. The Court of Appeal agreed with the defendants, finding that the plaintiff's injury resulted from wilful misbehaviour by his two colleagues and that the defendants had no reason whatsoever to foresee that the apprentices

¹²² *The Times*, 25 May 1965 (QBD).

¹²³ (1951) 95 SJ 65 (CA). See also *Coddington v International Harvester Company of Great Britain Ltd* [1969J KIR 146, in which *Smith* was applied and *Hudson's* case distinguished.

would act in the way that they did. The defendants had therefore not acted negligently by failing to take reasonable care for the plaintiff's safety.

Therefore, employers may be absolved from liability for one-off incidents of sexual harassment by their employees if such behaviour could not have been foreseen, but not if the employees are known to be habitual harassers.

Corresponding to an employer's duty to provide a safe working environment is a duty on employees to take such degree of care as a reasonable person would take for his or her own safety.¹²⁴ In the context of sexual harassment, this suggests that the behaviour of the person harassed may be relevant in determining whether his or her employer has breached its duty. For instance, a court might be reluctant to hold a company negligent for not preventing sexual harassment if the victim contributed to the harassment by engaging in inappropriate behaviour such as flirting with a colleague. However, this cannot be taken too far. As in molest or rape cases, it is wrong to blame the victim for "bringing trouble on herself" by wearing provocative clothing or making sexually suggestive comments to the other party if in the end she makes it clear to him that she does not wish to take the matter further. "No" should mean no.

The Doctrine of Common Employment: Singapore law poses an added complication to those wishing to claim against their employers for harassment by their co-employees. Under the doctrine of common employment, if a person occasioning and the person suffering injury are fellow employees engaged in a common employment for and under the same employer, the employer is not liable at common law for the injury if he has taken reasonable care to select proper and competent employees.¹²⁵ The doctrine has been abolished in England,¹²⁶ but continues to apply in Singapore.¹²⁷ However, the harsh effect of this doctrine has

¹²⁴ *Oberoi Imperial Hotel v Tan Kiah Eng*, *supra* n 117. In determining what a reasonable person would do, the court has to look at the average level of education of an employee in that particular job and the status of that job: *ibid*.

¹²⁵ *Priestley v Fowler* (1837) 3 M&W 1, 150 ER 1030; *Bartonshill Coal Co v Reid* (1858) 3 Macq 266 (HL); *Bartonshill Coal Co v Maguire* (1858) 3 Macq 300 (HL); *Wilson v Merry* (1868) LR 1 SC & Div 326 (HL); *Graham (or Miller) v Glasgow Corp* [1947] 1 All ER 1 at 2, 3 (HL); *Glasgow Corp v Bruce (or Neilson)* [1947] 2 All ER 346 (HL).

¹²⁶ By ss 1(1), 3 and 6(2) of the UK Law Reform (Personal Injuries) Act 1948 (11 & 12 Geo 6 c 41). Section 1(1) reads: "It shall not be a defence to an employer who is sued in respect of personal injury caused by the negligence of a person employed by him, that that person was at the time the injuries were caused in common employment with the person injured." Therefore, an employee is now entitled to recover damages from his or her employer for the fault of a fellow employee: *Lindsay v Charles Connell & Co Ltd*, 1951 SC 281.

¹²⁷ *Nippon Yusen Kaisha v Balch* [1954] MLJ 54 (CA, Singapore).

been greatly reduced by the principle that where an employer has not provided a safe and proper system of work for its employer to begin with, it cannot rely on the doctrine of common employment as a defence.¹²⁸ Hence, a victim of harassment in Singapore may still be able to seek damages against her employer, even if the victim and her harasser share a common employment, on proof that the employer has been negligent in providing a working environment free from sexual harassment, which would include hiring proper and competent employees.

(2) *Vicarious Liability*: If an employee is sexually harassed by a colleague or a superior, and the harassment amounts to one of the torts referred to in above, can her employer be vicariously liable for his employee's wrongful act? Suing an employer in vicarious liability has several advantages over proceeding against the primary tortfeasor. A victim is more likely to obtain payment from her employer of any damages awarded to her because he will usually have deeper pockets than her harasser. More importantly, subjecting employers to legal action may spur them to establish effective procedures to prevent and deal with sexual harassment in the workplace.

In general, whenever a relationship of employer and employee exists, an employer is liable for the torts of its employee so long only as they are committed in the course of the employee's employment.¹²⁹ The classic exposition from *Salmond on Torts* reads as follows:

It is clear that the master is responsible for acts actually authorized by him, for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes — although improper modes — of doing them. In other words, a master is responsible not merely for what he authorizes his servants to do, but also for the way in which he does it. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master

¹²⁸ *Manlio Vasta v Inter-Ocean Salvage & Towage Ltd* [1954] MLJ 261 (HC, Singapore).

¹²⁹ *Karuppan Bhoomidas v Port of Singapore Authority* [1975–77] SLR 69, [1978] 1 MLJ 49 (PC on appeal from Singapore). An employer cannot escape liability on the ground that he did not authorise the employee to commit torts (*Lloyd v Grace, Smith & Co* [1912] AC 716 at 725 (HL); *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1972] 3 All ER 101 (HL); *Adams (Durham) Ltd & Day v Trust Houses Ltd* [1990] 1 Lloyd's Rep 380), or expressly forbade him from doing so (*Limpus v London General Omnibus Co* (1862) 1 H&C 526, 158 ER 995; *Betts v Nielson* (1868) 3 Ch App 429 at 441; *Whatman v Pearson* (1868) LR 3 CP 422; *Canadian Pacific Railway Co v Lockhart* [1942] 2 All ER 464 (CA); *LCC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582 (CA)).

is not responsible, for in such a case the servant is not acting in the course of his employment, but has gone outside of it.¹³⁰

The court will ask: “What was the job at which the employee was engaged for his employer?”¹³¹ If the employee was on a “frolic of his own”,¹³² or the incident was “so divergent from the employment as to be plainly alien to and wholly distinguishable from the employment”,¹³³ the employer will not be vicariously liable for the tort. The difficulty lies in determining which side of the line a particular case falls on.

There is ample case authority for the proposition that where a person acts in a manner wholly outside his duties as an employee, his employer will not be held vicariously liable for any tort which the person may commit. For instance, in *Aldred v Nacanco*¹³⁴ where an employee played a practical joke in the staff washroom by pushing a washbasin known to be unsteady against a colleague, thus causing her injuries, this was found to be a deliberate act which had nothing to do with her employment. Her employers were not held vicariously liable.

This principle was affirmed in Singapore by the Privy Council in *Keppel Bus Co Ltd v Sa'ad bin Ahmad*.¹³⁵ The respondent in the case was a passenger on a bus belonging to the appellants. The appellants' employee was the bus conductor. The respondent got into an altercation with the conductor over the latter's behaviour towards an elderly female passenger. Subsequently, the conductor abused the respondent using a very rude Chinese expression, and when told off by the respondent, struck him in the eye with a ticket punch, breaking his glasses and causing the loss of sight of the eye. The Privy Council on appeal from Singapore held that vicarious liability will lie if an employee is carrying out work he is expressly or impliedly authorised and therefore employed to do, albeit

¹³⁰ *Salmond and Heuston on the Law of Torts* (20th ed, 1993) at 457, cited in *Clerk & Lindsell on Torts* (Margaret Brazier ed, 17th ed, 1995) at para 5–21. The passage was approved in *Poland v John Parr & Sons* [1927] 1 KB 236 at 240; *Canadian Pacific Railway Co v Lockhart*, *supra* n 129 at 599; *Warren v Henleys* [1948] 2 All ER 935 at 937; *LCC v Cattermoles (Garages) Ltd*, *supra* n 129 at 998, 1005; *Harvey v RG O'Dell Ltd (Galway, Third Party)* [1958] 2 QB 78 at 100; *Ilkiw v Samuels* [1963] 1 WLR 991 at 997, 1004; *Kay v ITW Ltd* [1968] 1 QB 140 at 153, 154–55; and locally in *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar* [1996] 3 MLJ 337 (HC, Kuala Lumpur).

¹³¹ *Ilkiw v Samuels*, *ibid* at 1004; *McPherson v Devon Area Health Authority* [1986] 7 CL 3 (CA).

¹³² *Joel v Morison* (1834) 6 C&P 501 at 503, 172 ER 1338 at 1338–39.

¹³³ *Harrison v Michelin Tyre Co Ltd* [1985] 1 CR 696.

¹³⁴ [1987] IRLR 292 (CA). See also *Duffy v Thanet DC* (1984) 134 New LJ 680 and *McCready v Securicor* [1991] NI 229 (CA).

¹³⁵ [1972–74] SLR 96, [1974] 1 MLJ 191, [1974] 1 WLR 1082 (PC on appeal from Singapore). See also *Warren v Henley's Ltd* [1948] 2 All ER 935 (employers of garage attendant not vicariously liable when employee assaulted customer of garage in act of personal vengeance); *Richards v West Middlesex Waterworks Co* (1885) 15 QBD 660; *Daniels v Whetstone Entertainments Ltd* [1962] 2 Lloyd's Rep 10.

by a wrong mode. The respondent suggested that the bus conductor's function was to "manage the bus", and that what he did arose out of that power and duty of management. However, the Privy Council drew a distinction between acts of management and acts of the manager which were foreign to his authority. On the facts, the conductor had insulted the respondent and subsequently hit him. These were clearly not acts of management. Therefore, the conductor had been acting outside the course of his employment, and the appellants were not vicariously liable.

Another illustration is provided by *Irving v The Post Office*,¹³⁶ which cited *Keppel Bus* with approval. In this case, Mr and Mrs Irving, who were black and of Jamaican origin, did not get along with their neighbour, a postman named Edwards. Edwards' duties included the sorting of mail. He was authorised to write upon letters for the purpose of ensuring that they were properly dealt with; otherwise, he was not allowed to write on mail at all. While sorting mail one day, Edwards saw an envelope addressed to the Irvings. He wrote on the back of the envelope, "Go back to Jamaica Sambo". The Irvings discovered that Edwards was the culprit, and brought an action against his employers, the Post Office, under the UK Race Relations Act 1976. However, the Court of Appeal found that the Post Office was not vicariously liable. Edwards' act of writing the offensive message was done out of personal malevolence and could not be regarded as merely an unauthorised way of performing the duties for which he was employed. His employment provided an opportunity for his misconduct, but the misconduct formed no part of the performance of his duties, was in no way directed towards the performance of those duties, and was not done for his employers' benefit.

In *Waters v Commissioner of Police of the Metropolis*,¹³⁷ the appellant, a woman police constable, lived in a room in the section house of the police station to which she was posted. In the early hours of 15 February 1995, while she was off duty, a male police constable, who was also off duty, came to her room. They decided to go for a walk together and then returned to the section house. The appellant alleged she was then seriously sexually assaulted in her room by the male police officer. She reported the assault, but following an internal inquiry, no action was taken against the male officer. Subsequently, the appellant's name was removed from a list of specially trained officers used in relation to important police searches. She then brought an action against her employers complaining that this was an act of victimization contrary to section 4(1)(d) of the UK Sex Discrimination Act 1975. However, the complaint was dismissed by an industrial tribunal on the preliminary point that the male police officer had not been acting within the course of his employment. The

¹³⁶ [1987] IRLR 289 (CA).

¹³⁷ [1995] IRLR 531 (EAT).

alleged assault had taken place when both parties were off duty, the act was not committed at the constable's place of employment, and, if it did take place, it was deliberate, unauthorized and unlawful. Therefore, the appellant's employers could not be vicariously liable. The decision was upheld on appeal to the Employment Appeal Tribunal.

These cases are to be contrasted with the following case in which it was held that a harasser acts within the scope of his employment even if he carries out his duties in a wholly improper manner. In *Bracebridge Engineering Ltd v Darby*,¹³⁸ the respondent was a female employee who had been working for the appellant company for 13 years. On 11 November 1987, she was about to wash her hands before finishing her shift when she was grabbed by a chargehand and the works manager and taken to the latter's office. The lights were turned off, and the works manager picked up the respondent's legs and put them around him. The respondent tried to get away but was threatened with a written warning for leaving early. The chargehand then put his hands between her legs and touched her private parts, remarking, "You've got a big one." She was eventually able to open the door and run out. As the respondent thought there was no one to report the incident to in the factory that evening, she went home. She felt disgusted and degraded, and spoke to her sister about it, saying that she really felt that she could not go back. She was crying and upset when telling her sister about it. The following morning, the respondent complained to the general manager. However, as both the deputy foreman and works manager denied the incident, the general manager decided to take no action. The respondent found this wholly unsatisfactory and resigned a week later.

One of the appellants' contentions was that the acts perpetrated by the chargehand and the works manager were not acts committed in the course of their employment. Yet, after a review of the relevant cases, the Employment Appeal Tribunal concluded that the men had been acting in the course of employment, since at the material time they were engaged in or were in the course of exercising a disciplinary and supervisory function.

This point was emphasized in *Tower Boot Co Ltd v Jones*.¹³⁹ Raymondo Jones, whose mother was white and father black, worked as a machine operative for the employers until he resigned a month later. During that time, he was subjected to a number of incidents of racial harassment from work colleagues. Among other things, one employee burnt his arm with a hot screwdriver, metal bolts were thrown at his head, his legs were whipped with a piece of welt, and he was called names such as

¹³⁸ [1990] IRLR 3.

¹³⁹ [1995] IRLR 529 (EAT).

“chimp”, “monkey” and “baboon”. However, the Employment Appeal Tribunal found that his employers were not vicariously liable for the racial harassment as the acts complained of by Jones could not by any stretch of the imagination be described as merely an improper mode of performing authorized tasks.

Jones’ solicitor urged the Tribunal to apply *Bracebridge*. However, the Tribunal held: “We are bound to say *Bracebridge* seems to stretch the test to its limit but the explanation for that decision clearly lies in the fact that the perpetrators were at the time involved in disciplinary supervision. That was not so in the present case and we conclude that Mr Jones’s fellow employees were not acting in the course of employment and their misdeeds cannot be laid at the door of Tower Boot...”

An interesting comparison between the *Bracebridge* position on the one hand and the other vicarious liability cases on the other is provided by the recent Malaysian decision of *Roshairree bin Abdul Wahab v Mejar Mustafa bin Omar*.¹⁴⁰ The plaintiff was a lieutenant attached to the Royal Malay Regiment. Before he was fully commissioned into the regiment, he had to undergo an orientation programme. The first defendant was the officer in charge of the programme, while the second defendant was an intelligence officer with the regiment. The plaintiff alleged that while he was undergoing the orientation programme, he was ragged and assaulted by the first and second defendants. In the first incident complained of, the plaintiff was ordered to hold a used cylinder shell weighing one to two kilogrammes with his arms fully outstretched. When he was unable to continue, the first and second defendants boxed him on his head and ear. The second defendant also grabbed the plaintiff by his necktie and dragged him until he fell choking, crying and screaming. The second incident occurred three days later. This time, the first defendant instructed the plaintiff to do push ups, and while the plaintiff was on the floor he kicked and boxed his right ear. The plaintiff attempted to escape from the beatings by running away, and was pursued by the first defendant. However, the plaintiff was able to shout for help, and a senior staff officer from the Ministry of Defence intervened. As a result of the ill-treatment, the plaintiff suffered profound deafness in his right ear and partial deafness in the other. He sued the first and second defendants, and joined as third defendants the Government of Malaysia as their employers, claiming it was vicariously liable for his injuries.

Citing the passage from *Salmond and Heuston on the Law of Torts* referred to above, the court held that what it had to decide on the entire evidence was whether the acts of the first and second defendants were carried out in the course of their employment, to the extent that they

¹⁴⁰ *Supra* n 130.

were so connected with their authorised duties that they could be regarded as a mode of doing them. On the facts, the plaintiff had been directly under the charge, supervision and control of the first defendant, who was the officer in charge of the orientation programme. On both occasions when the plaintiff was assaulted, the orientation programme was still underway. Therefore, though the first defendant's acts of assault were not authorised by the Government, they were carried out during the first defendant's normal course of duties. His unauthorised acts were so connected with his authorised acts that they were merely improper modes of carrying out his duties. Hence, the Government was vicariously liable for the first defendant's unlawful actions. On the other hand, the second defendant played no part in the orientation programme at all. Except for conducting two lectures which the plaintiff attended, neither of which was taking place when he assaulted the plaintiff, he was not assigned with any official duties towards the plaintiff. The court found that the second defendant had acted completely independently, and therefore the Government could not be held liable for his wrongdoing.

It appears from the above cases that an employer will only be held vicariously liable for acts of sexual harassment perpetrated by one employee on another if the harasser exercises some form of disciplinary or supervisory responsibility over the victim. In the absence of such a situation, the court will find that the harassment is misbehaviour outside the course of the harasser's employment, and absolve the employer from vicarious liability. Nonetheless, an employee may be able to circumvent such difficulties by claiming that her employer is in breach of his primary duty of care to prevent acts of sexual harassment committed by its employees.¹⁴¹

(3) *Damage*: To succeed in making out a case in tort against her employer, it is not sufficient for an employee to simply show that her employer has breached a primary duty of care towards her, or is vicariously liable for a co-employee's act. The employee must also prove that as a result of the breach of duty she has suffered some damage for which she is entitled by law to receive compensation. There is no problem if an employer's negligence leads to an employee being sexually harassed by a co-worker, and as a result the employee suffers some physical or psychological injury. For instance, the employee may be the victim of an actual sexual assault, or she may be so affected by the harassment that she has a nervous breakdown. If the employee succeeds in proving that her employer acted negligently, she can clearly recover damages from him for such injury sustained by her. If, as a result of her injury, the employee is hospitalized or is otherwise unable to work and is not paid her wages, she can also claim such losses from her employer.

¹⁴¹ *Supra* nn 112–128 and the accompanying text.

An employee not physically or psychologically injured who simply decides to resign from her job also suffers damage in the form of lost salary and other benefits. However, this is a pure economic loss which is probably not recoverable under tort law. *Pure economic loss* has been defined as financial loss suffered by a plaintiff which is unconnected with, and does not flow from, damage to his or her person or property. In general, tort law only allows for the recovery of pure economic losses in four circumstances, namely:¹⁴²

- i. Where the loss follows physical damage to property in which the plaintiff had no proprietary interest at the time of the damage but to which he had some relationship, *eg* as a user or subsequent acquirer (also known as a *relational economic loss*);
- ii. Where the loss was suffered through reliance on a statement;
- iii. Where the loss resulted from the negligent provision of services; and
- iv. Where the defendant provided defective products or buildings, and the plaintiff suffered an economic loss spending money to repair or replace them.

Therefore, if an employee wishes to claim pure economic losses, she may have to frame her claim as a breach of her employment contract rather than a breach of duty by her employer. This point is dealt with in the next section of this article.

3. *Claims in Contract*

In addition to being a tort, an act of sexual harassment may also constitute a breach of the victim's contract of employment with her employer. Like tort law, the foundation of contract law in Singapore is to be found in the principles of the English common law and equity.¹⁴³ English cases expounding principles of contract law are accorded much weight in Singapore courts, and for this reason are referred to extensively in this section of the article, given the relative lack of local case law.

(1) *Breach of Express Terms in the Employment Contract*: If an employee experiences *quid pro quo* sexual harassment, suffering detrimental changes to the terms and conditions of her employment which are unilaterally

¹⁴² Clerk & Lindsell on Torts, *supra* n 44 at para 7–54.

¹⁴³ See, *eg*, *Gore v Gore* [1964] MLJ 184; s 3 of the Application of English Law Act (Cap 7A, 1994 Ed). See, generally, Andrew Phang Boon Leong, *Cheshire, Fifoot & Furmston's Law of Contract: Singapore and Malaysian Edition* (2nd ed, 1998), ch 1 ("The Sources of Contract Law in Singapore, Malaysia and Brunei").

forced through by her employer because she has refused to comply with his sexual demands, this may constitute a breach of the express terms of her contract. Detriment to the employee can take many forms. For instance, she may have her pay cut, contractual benefits withdrawn, be intentionally overlooked for a promotion, or transferred to a lower-status position.

(2) *Breach of Implied Terms in the Contract*: Apart from the terms which appear in black and white, employment contracts also contain certain important implied terms. There is, for instance, an implied term that the employer is to provide *reasonable care for his employer's safety*.¹⁴⁴ The level of the employer's duty is the same as his common law duty of care in tort which has been discussed above, and so employees may bring legal action in either tort or contract law for breach of the duty.¹⁴⁵

It is also an implied term in employment contracts that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated as likely to destroy or seriously damage the *relationship of trust and confidence* between himself and his employee.¹⁴⁶ The contract of employment is a special one, different from other contractual relationships. In many cases, an employer and employee work together on a daily basis in a common workplace. The employee takes instructions from the employer and relies on him for pay and benefits, while the employer relies on his employee's work for the support and growth of his enterprise. Therefore, in order that the contract can be effectively fulfilled, it is essential that both employer and employee have trust and confidence in each other.

To constitute a breach of this implied term, it is not necessary to show that the employer *intended* to breach his employee's contract of employment — what the court does is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.¹⁴⁷ A series of actions on the employers' part may cumulatively amount

¹⁴⁴ *Smith v Baker & Sons; Wilsons and Clyde Coal Co Ltd v English; Latimer v AEC Ltd*, *supra* n 113.

¹⁴⁵ *Matthews v Kuwait Bechtel Corp* [1959] 2 All ER 345 (CA); *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881.

¹⁴⁶ *Courtaulds Northern Textiles Ltd v Andrew* [1978] IRLR 84; *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, affirmed [1982] IRLR 413 (CA); *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308; *Lewis v Motorworld Garages* [1985] IRLR 465 (CA). The local position is the same: *Menon v The Brooklands (Selangor) Rubber Co Ltd* [1968] 2 MLJ 186 (FC, Malaysia).

¹⁴⁷ *Woods v WM Car Services*, *ibid* at 350 ¶ 17; *Lewis v Motorworld Garages*, *ibid* at 467–68 ¶ 19–20 (Industrial Tribunal applied wrong test in concluding that the employers' conduct was not repudiatory on grounds that they never intended to repudiate the contract and could not reasonably believe that their conduct would be accepted as repudiatory).

to a breach of the implied term, even though each individual incident might not.¹⁴⁸ Any breach of this implied term is considered a fundamental breach of the employment contract amounting to a repudiation of the contract by the employer, since it necessarily goes to the root of the contract.¹⁴⁹

It is a breach of this implied term for an employer to use intolerable behaviour and bad language on an employee. For instance, in *Palmanor Ltd v Cedron*,¹⁵⁰ the respondent came to work at his employers' club at 8:30 pm by arrangement. However, the club manager approached him and asked him why he was late. When the respondent said he was not late, the manager started to insult him, saying, "You are a big bastard, a big cunt, you are pig headed, you think you are always right." When the respondent told him that he had no right to talk to him like that, the manager replied, "I can talk to you any way I like, you big cunt," and added, "If you don't like it, you can go." As the respondent collected his things and prepared to leave, the manager followed him, still swearing and saying, "If you leave me now, don't bother to collect your money, papers or anything else. I'll make sure that you don't get a job anywhere in London."

The Employment Appeal Tribunal held that even though the respondent's employers had not intended to break his employment contract or dismiss him, the foul language used by the manager was such that the respondent could not be expected to tolerate it, even though the words were said in the heat of the moment or in anger. The respondent was entitled to treat himself as having been constructively dismissed.¹⁵¹ This case is interesting as it suggests that an employer can breach an employment contract by treating an employee in an unacceptable manner, even if it only a single incident — and this clearly takes place when an employer sexually harasses his employee.¹⁵²

The implied term of confidence and trust is also breached where an employer seduces his employee in circumstances where the employer exerts undue influence over the employee. In *Wood v Freelander Ltd*,¹⁵³

¹⁴⁸ *Woods v WM Car Services, ibid; Lewis v Motorworld Garages, ibid* at 468 ¶ 26, 469 ¶ 36.

¹⁴⁹ *Woods v WM Car Services, ibid* at 351 ¶ 22.

¹⁵⁰ [1978] IRLR 303.

¹⁵¹ On constructive dismissal, see *infra* Part III.A.3(3).

¹⁵² The decision in *Palmanor* is preferable to that in *Veness v Dyson, Bell & Co, supra* n 122. In the latter case, the plaintiff sued her former employers, *inter alia* because a partner of the firm had been rude and boorish to her, had humiliated her in front of her colleagues, and had made her work long hours without her salary being adequately increased. The court held that there was no implied term in her contract of service that her employers should treat her with reasonable courtesy. If she was dissatisfied with her employers' personal attitude towards her or her long hours of work or remuneration, she either had to put up with it or leave.

¹⁵³ [1977] IRLR 455.

the applicant, an immature and impressionable woman of 18, was employed by the respondent company to look after the small children of Mr and Mrs Cohen, the respondents' managing director and company secretary respectively. Mrs Cohen, aged 30, seduced the applicant into a lesbian relationship with her. After about 2 weeks, the applicant broke off the relationship as soon as she was able to obtain the advice and support of her parents. The Industrial Tribunal found that there is an implied duty of co-operation between employer and employee and in particular a duty implied by law that an employer will not do anything which will undermine the continuation of the confidential relationship between employer and employee. Mrs Cohen, the *de facto* employer behind the corporate veil of the respondent company, had breached this essential term of the employment contract. Firstly, it was she who seduced the applicant; secondly, she had exerted undue influence over the applicant in order to do so; and thirdly, the applicant broke off the relationship at the first opportunity she had when she was able to act independently and with the encouragement of her parents. Mrs Cohen's conduct had brought about an intolerable situation in which the confidence between her and the applicant could not be maintained.

Finally, it is a breach of the implied term for an employer not to take an employee's complaint of sexual harassment seriously. Among the points raised in the case of *Bracebridge Engineering Ltd v Darby*,¹⁵⁴ the facts of which were set out earlier, the Employment Appeal Tribunal was of the opinion the implied term in employment contracts relating to mutual obligation, trust, confidence and support is an extremely important one for female staff in a case where sexual discrimination and investigation were concerned. On the facts, the respondent had clearly been greatly upset and had suffered shock and trauma as a result of the sexual harassment which she had received at the hands of her chargehand and works manager. Yet, her employers had not treated her complaint with the seriousness and gravity which they should have. For this reason, her employers were in breach of contract, and she had been constructively dismissed from her job.¹⁵⁵

(3) *Effect of a Breach of Contract; Wrongful and Constructive Dismissal*.¹⁵⁶ As in general contract law, the effect of an employer's breach of contract depends on whether the breach is so fundamental that it "goes to the root of the contract" and alters the very basis of the employment contract. If not, the employee cannot treat the contract as terminated and may only sue to be compensated for any loss sustained as a result of the breach.

¹⁵⁴ *Supra* n 138.

¹⁵⁵ *Ibid* at 6 ¶ 17-18.

¹⁵⁶ See, generally, 16 *Halsbury's Laws* (4th ed, 1992) at paras 302-03, 305-10.

Where the employer's breach does go to the root of the contract, the employee has a choice: she is entitled to either treat the contract as having been terminated by her employer's breach and sue for damages; or may refuse to accept her employer's repudiation, keep the contract alive and sue for her wages.¹⁵⁷ It should be noted that if the employee wishes to treat the contract as terminated she must object clearly to the change in her employment terms, otherwise her silence may be taken as implied assent and an election to affirm the contract.¹⁵⁸

One example of a situation where the employer will be held to be in fundamental breach of the contract is where he turns his employee out of her job altogether for no good reason. In such cases, the employee may have a cause of action in *wrongful dismissal* against her employer. A dismissal is wrongful when it is in breach of the relevant provision in the employment contract relating to the expiration of the term for which the employee is engaged. The conditions that must be present are that (1) she was engaged for a fixed period or a period terminable by notice, and was dismissed either before the expiry of the fixed period or without proper notice, and (2) the dismissal was without sufficient cause to permit the employer to dismiss her summarily.¹⁵⁹ The onus lies on the employers to prove that their complaints against the employee are well-founded and justify her dismissal.¹⁶⁰

An employee need not actually be fired from her job to be dismissed. Where the detriment suffered by the employee at the hands of her employer falls short of outright dismissal, she may be able to claim what is often termed *constructive dismissal*. This is simply her common law right to repudiate the contract of service where the conduct of her employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract.¹⁶¹ As the Kuala Lumpur Court of Appeal held in *Ang*

¹⁵⁷ *WE Cox Toner (International) Ltd v Crook* [1981] IRLR 443, cited in *Bliss v South East Thames Regional Health Authority*, *supra* n 146; *Rigby v Ferodo Ltd* [1987] IRLR 516 (HL). See also *Samia El-Ibiary v International School (S) Pte Ltd*, unreported, Suit No 2781 of 1987, 14 October 1992 (HC, Singapore), digested at 8 *Mallal's Digest* (4th ed, 1996) para 796 (employers who sought to impose additional terms in employee's contract held to be in repudiatory breach of the contract as they rendered her duties substantially different from what she had contracted to do).

¹⁵⁸ *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27; *Rigby v Ferodo Ltd*, *ibid*.

¹⁵⁹ *Baillie v Kell* (1838) 4 Bing NC 638, 132 ER 934; *Edwards v Levy* (1860) 2 F&F 94, 175 ER 974; *Fletcher v Krell* (1872) 42 LJQB 55; *cf Cussons v Skinner* (1843) 11 M&W 161, 152 ER 758; *Hutton v Ras Steam Shipping Co Ltd* [1907] 1 KB 834 (CA); *W Dennis & Sons Ltd v Tunnard Bros and Moore* (1911) 56 Sol J 162; *Acklam v Sentinel Insurance Co Ltd* [1959] 2 Lloyd's Rep 683.

¹⁶⁰ *SR Fox v Ek Liong Hin Ltd* [1957] MLJ 1 (HC, Singapore).

¹⁶¹ *Western Excavating (ECC) Ltd v Sharp*, *supra* n 158, cited in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at 94 (SC, Malaysia). The employer's conduct must amount to a fundamental breach of contract — there is no

Beng Teik v Pan Global Textile Bhd, Penang.¹⁶²

Where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse, lawyers term such conduct “constructive dismissal”. There is no magic in the expression. It is only a convenient label to describe the kind of conduct we have referred to. It could be an order of transfer or of demotion. Or, it could be that the workman has been made redundant by the employer. Or, it may be a case where the workman is asked to retire. The categories are not, we emphasize, closed.¹⁶³

In *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd*,¹⁶⁴ the appellant, who was the Personnel and Industrial Relations Manager of the respondent company, successfully negotiated a new collective agreement with a trade union. Unfortunately, he failed to obtain the backing of his employers, and after he tried to implement the collective agreement he was told that he would be transferred to manage a cinema owned by the respondents. The appellant refused to accept the post as he regarded the transfer as a breach of his employment contract entitling to hold the respondents liable for dismissing him without just cause or excuse. The dispute was referred to the Malaysian Industrial Court. On appeal, it was held that the transfer was in effect a demotion, although no disciplinary action had been taken against the appellant. The relegation of responsibility with its consequent humiliation, frustration and loss of estimation among fellow employees made it impossible for the appellant to carry on being employed by the respondent company. He had, in effect, been driven out of employment, so this constituted constructive dismissal.

It is in connection with the concept of constructive dismissal that the implied term of trust and confidence takes on special significance. An employer may try to rid himself of a particular employee by altering the terms of her employment to make her life so uncomfortable that she resigns or accepts the revised terms which are detrimental to her. The employer may be behaving in a totally unreasonable way, but there may be no blatant repudiation of the contract. However, in such cases, the

remedy in constructive dismissal if the employer has merely behaved unfairly such that an employee cannot be expected to put up with it: *Woods v WM Car Services*, *supra* n 146; *Lewis v Motorworld*, *supra* n 146 at 469 ¶ 36; *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230 (HC, Kuching).

¹⁶² [1996] 3 MLJ 137 at 149.

¹⁶³ For instance, a resignation under compulsion is not a resignation in law but actually a dismissal: *Ng Peng Hon Stanley v AAF Pte Ltd* [1978–79] SLR 328, [1979] 1 MLJ 57 (HC, Singapore) (plaintiff employed as a manager of Singapore office asked to resign by the defendant company’s manager for the Far East region, and given a statement of the amounts payable to him on the spot).

¹⁶⁴ *Supra* n 161.

employer may be considered as acting in a manner calculated to destroy the relationship of confidence and trust between employer and employee. This will amount to a breach of the implied term of trust and confidence, which is a fundamental breach of the employment contract and constitutes constructive dismissal.¹⁶⁵

(4) *Damages for Breach of Contract*:¹⁶⁶ Where an employee has been wrongfully dismissed, the courts will generally not enforce a contract of employment either by specific performance or injunction. Therefore, the employee normally has to accept the repudiation of the contract by her employers and sue for damages.¹⁶⁷ An employee is entitled to recover the estimated monetary loss resulting from the premature termination of her contract. In accordance with the usual contract law principle, the employee should, so far as money can do it, be placed in the same position as if the contract had been performed.¹⁶⁸ Therefore, the employee will usually be awarded as damages the amount of remuneration that she would have earned had employment continued according to her contract, subject to a deduction in respect of any amount which she, in minimizing her damages, either obtained or should reasonably have obtained.¹⁶⁹ The onus is on the employer to show that the employee has or should have mitigated her loss by obtaining alternative employment.

Where an employee has served out the period of employment specified in her contract, she will be entitled to recover salary that has been earned but not paid at the time of dismissal.¹⁷⁰ If, however, she is dismissed without completing the contract period, she cannot sue for her salary (unless the contract is divisible) but can claim a *quantum meruit* for the value of work actually performed, or bring an action for damages for

¹⁶⁵ *Post Office v Roberts* [1980] IRLR 347; *Woods v WM Car Services*, *supra* n 146 at 351 1 20–22; *United Bank Ltd v Akhter* [1989] IRLR 507 at 512; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1989] IRLR 66.

¹⁶⁶ See generally Harvey McGregor, *McGregor on Damages* (16th ed, 1997), ch 27 (“Contracts of Employment”).

¹⁶⁷ *General Billposting Co Ltd v Atkinson* [1909] AC 118 (HL); *Denmark Productions Ltd v Boscobel Productions Ltd* [1968] 3 All ER 513 (CA); *Ridge v Baldwin* [1963] 2 All ER 66 at 71 (HL). For a local case, see *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 (PC on appeal from Malaysia).

¹⁶⁸ *Robinson v Harman* (1848) 1 Exch 850; *Radford v De Froberville* [1978] 1 All ER 33. In *Gunac Enterprises (Pte) Ltd v Utraco Pte Ltd* [1995] 1 SLR 11 (not an employment case), the Singapore Court of Appeal affirmed this principle, holding that damages in a contractual claim are compensatory and intended to protect the innocent party’s expectation interests. As far as possible, the innocent party is to be put in as good as position as if the contract had been performed.

¹⁶⁹ *Beckham v Drake* (1849) 2 HLC 579 at 607–08, 9 ER 1213 at 1223–24; *SR Fox v Ek Liong Hin Ltd*, *supra* n 160; *Subramaniam v Esso Malaysia Bhd* [1990] 3 MLJ 118 (HC, Seremban).

¹⁷⁰ *Hartley v Harman* (1840) 11 Ad & El 798, 113 ER 617; *Goodman v Pocock* (1850) 15 QB 576; *Hochster v De la Tour* (1853) 2 E&B 678, 118 ER 922; *Frost v Knight* (1872) LR 7 Exch 111; *Brace v Calder* [1895] 2 QB 253.

breach of contract.¹⁷¹ Apart from salary or wages, an employee can recover the value of benefits in kind such as commission, use of a vehicle, rent-free accommodation, pension rights and stock options if these are contractually provided for.¹⁷² Similarly, additional payments such as bonuses, tips and gratuities can only be recovered if the employers are bound by contract to pay, and the employee is contractually entitled to receive them. It is not enough for the employee to show that she would probably have received them.¹⁷³ An employee is probably also entitled to claim losses consequential on her dismissal, such as expenses incurred in finding a new job.¹⁷⁴

On the other hand, damages for wrongful dismissal cannot include compensation for the manner of dismissal (even if harsh and humiliating), the employee's injured feelings or any loss sustained by reason that the dismissal itself made it more difficult for the employee to get fresh employment.¹⁷⁵ For this reason, where the situation permits, it may be advantageous for an employee to sue in both tort and contract. For instance, the employee in *Bracebridge Engineering Ltd v Darby*¹⁷⁶ could also have sued the chargehand and works manager personally in tort for battery to obtain damages for the indignity and discomfort suffered, apart from suing her employers for breach of contract. Where a wrongful dismissal is accompanied by circumstances which give rise to other causes of action, these do not merge with the proceedings for wrongful dismissal but remain available at law if the employee wishes to pursue them.¹⁷⁷

C. Remedies in the Court: Criminal Sanctions

The harassment suffered by a person may be to such an extent that the State has an interest in punishing the offender. In most cases, the person harassed can set criminal proceedings in motion by making a police report

¹⁷¹ *McGregor on Damages*, *supra* n 166 at para 1229.

¹⁷² See, eg, *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109, in which the High Court held (*obiter*) that if the plaintiff, who was chairman of the defendant company's board of directors and group managing director, had succeeded in his claim he would have been awarded salary, contractual bonus, employer's Central Provident Fund contributions, the running costs of his car, compensation for the loss of use of his chauffeur and a telephone in his residence, and the values of a club membership and annual medical checkups.

¹⁷³ *Richardson v Mellish* (1824) 2 Bing 229, 130 ER 294; *French v Brookes* (1830) 6 Bing 354, 130 ER 1316; *Lake v Campbell* (1862) 5 LT 582; *Burton v Pinkerton* (1867) LR 2 Exch 340; *Ross v Pender* (1874) IR 352; *Laverack v Woods Ltd* [1966] 3 All ER 683 (CA); *Middlefield v SAC Technology Ltd* [1990] 1 WLR 1002.

¹⁷⁴ *McGregor on Damages*, *supra* n 166 at para 1240.

¹⁷⁵ *Addis v Gramophone Co* [1909] AC 488 (HL); *Shone v Downs Surgical* [1984] 1 All ER 7; *O'Laoire v Jackel International (No 2)* [1991] ICR 718 (CA); *SR Fox v Ek Liang Hin Ltd*, *supra* n 160.

¹⁷⁶ *Supra* n 138.

¹⁷⁷ *SR Fox v Ek Liang Hin Ltd*, *supra* n 160.

against the offender. The police will carry out an investigation and, if an offence is made out, refer the matter to the Attorney-General's Chambers for prosecution. In minor cases where the police are of the view that no offence has been committed or the Attorney-General's Chambers declines to prosecute, the complainant may commence a private summons against the offender by swearing a complaint before a magistrate in the Subordinate Courts.

While there is no specific offence of "sexual harassment" in the Penal Code¹⁷⁸ or any other piece of criminal legislation, depending on the nature of the harassing behaviour, offenders may be charged with crimes such as assault and using criminal force,¹⁷⁹ wrongful restraint¹⁸⁰ and voluntarily causing hurt or grievous hurt.¹⁸¹ Apart from these, the offences discussed below can specifically address situations of sexual harassment.

1. *Criminal Liability of Harasser*

(1) *Causing Harassment, Alarm or Distress*: It is an offence under section 13A(1) of the Miscellaneous Offences (Public Order and Nuisance) Act¹⁸² for any person, with intent to cause harassment, alarm or distress to another person, to use threatening, abusive or insulting words or behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting whether in a public or private place. If that person or any other person is caused harassment, alarm or distress as a result of the offender's actions, the offender may on conviction be fined up to S\$5,000. Where it cannot be proved that the offender acted intentionally, he may be charged under section 13B(1) of the same Act which makes an offence for any person to use threatening, abusive or insulting words or behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting in a public or private place within the hearing or sight of any person likely to be caused harassment, alarm or distress. The maximum fine under this provision is S\$2,000.

These offences would cover acts such as making lewd remarks or suggestions and telling vulgar jokes to the complainant, and possibly even displaying pornographic posters or computer screen-savers in the complainant's sight. However, one weakness is that the term *harassment* is not defined in the Act, and the ordinary meaning of the word connotes persistent or continual action on the part of the perpetrator. Therefore, a single incident might not constitute harassment.

¹⁷⁸ Cap 224, 1985 Rev Ed.

¹⁷⁹ Penal Code, ss 349–352.

¹⁸⁰ *Ibid*, ss 339, 341. See also s 357, which makes it an offence to assault or use criminal force to any person in attempting to wrongfully confine that person.

¹⁸¹ *Ibid*, ss 319–323, 325.

¹⁸² Cap 184, 1997 Ed.

(2) *Outrages of Modesty*: Section 354 of the Penal Code criminalizes the use of assault or criminal force¹⁸³ on any person with the intent to outrage the modesty or knowledge that such act is likely to outrage the modesty of that person. Section 354 applies whether the person whose modesty is outraged is male or female.¹⁸⁴ A person convicted of this offence faces a maximum jail term of up to 2 years, or with fine or caning, or any two of such punishments. The cases exhibit a range of unwanted contact ranging from groping of the complainant's breasts or private parts, to relatively minor acts such as kissing or touching. The latter are nevertheless actionable. The appellant in *Soh Yang Tick v Public Prosecutor*,¹⁸⁵ was convicted of giving his secretary a light slap on the bottom. He did not deny having done so, but insisted that he had meant no harm. Yong Pung How CJ held:

The fact that he intended to have some physical contact said it all. He intended to touch her, but unfortunately did not realise the consequences of his action. Singapore, by many standards, is still a conservative society. Physical contact between persons who do not know each other well is not appropriate and should not be encouraged. No doubt there are those who are more liberal and do not mind such physical contact, but for those who wish to protect their privacy, the law should do its bit to see that this is respected.

Where minor cases of molest are concerned, a fine is usually imposed. In *Teo Keng Pong v Public Prosecutor*,¹⁸⁶ the offender was fined S\$500 and

¹⁸³ *Criminal force* is defined in s 350 of the Penal Code to mean intentionally using force to any person without that person's consent in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear or annoyance to the person to whom the force is used. *Assault* is the making of any gesture or preparation, intending or knowing it likely that it will cause any person present to apprehend that he who makes the gesture or preparation is about to use criminal force to that person: s 351.

¹⁸⁴ *Tan Boon Hock v Public Prosecutor* [1994] 2 SLR 150 (HC) (male defendant convicted of outraging the modesty of an undercover policeman by placing his hand on the policeman's penis).

¹⁸⁵ [1998] 2 SLR 42 (HC).

¹⁸⁶ [1996] 3 SLR 329 (HC). See also *Nordin bin Ismail v Public Prosecutor* [1996] 1 CLASNews 250, cited in *Teo Keng Pong* at 342, in which the appellant, who was charged with two counts of outrage of modesty for placing his hand on the victim's shoulder and on her waist, received on appeal a S\$500 fine and one week's imprisonment in default for each charge. Contrast *Chandresh Patel v Public Prosecutor* [1995] 1 CLASNews 323 (HC) in which it was held that if the act complained of is a minor one — for instance, stroking the complainant's thigh on impulse, making a naughty but harmless nudge, or pinching or smacking the complainant's bottom — a fine of S\$4,000 or S\$5,000 may be adequate punishment. In *Soh Yang Tick v Public Prosecutor*, *ibid*, the appellant was fined S\$2,000 for lightly slapping the bottom of his secretary while chatting with her, an act which the court found was "for the shortest of moments and had no aggravating factors... and in most likelihood was done on the spur of the moment."

one week's imprisonment in default for each charge of caressing the victim's thigh. An offender is likely to receive a jail sentence if he has touched the victim more intimately (for instance, placing his hand on her buttocks or trying to kiss her,¹⁸⁷ and the benchmark sentence is at least 9 months' imprisonment with caning where the complainant's private parts or sexual organs have been intruded upon.¹⁸⁸ Unfortunately, it is difficult to discern any sentencing trends among the reported cases; much depends on each judge's view how severely the molest in question is viewed by the judge.

In passing sentence, the gender of the victim is irrelevant.¹⁸⁹ However, the court may take as aggravating factors the youth of the victim, the fact that the offender has abused a position of trust, and the manner in which the offender conducts his defence,¹⁹⁰ and impose a heavier sentence.

More severe penalties are imposed by the Penal Code if an outrage of modesty is carried out in particular circumstances. Under section 354A(1), a person who voluntarily causes or attempts to cause death, hurt, wrongful restraint, or fear of instant death, instant hurt or instant wrongful restraint, in order to outrage modesty must be punished with imprisonment between 2 and 10 years and caning. If an offence under section 354A(1) is committed in a lift or against any person under the age of 14 years, the punishment is an enhanced jail term between 3 and 10 years with caning. At present, the norm for offences under this section is 30 months' imprisonment and 6 strokes of the cane.¹⁹¹

¹⁸⁷ *Teo Keng Pong*, *Ibid* (appellant sentenced to 3 months' imprisonment for caressing the complainant's thigh and touching her breast on one occasion, and to 4 months for caressing her thigh, touching her breasts and kissing her on the cheeks and lips on another occasion); *Tan Pin Seng v Public Prosecutor* [1997] 2 *CLASNews* 365 (HC) (appellant sentenced to 5 months' imprisonment for stroking the complainant's legs and buttocks).

¹⁸⁸ *Chandresh Patel*, *supra* n 186, affirmed in *Lee Kwang Peng v Private Prosecutor* [1997] 3 SLR 278 (HC) and *Zeng Guoyan v Public Prosecutor* [1997] 3 SLR 321 (HC). Caning will only be ordered where the act of molest involves the complainant's private parts: *Zeng Guoyan*, *ibid*. In the latter case, the defendant was sentenced to 3 strokes of the cane for touching the complainant's breast, and another 4 strokes for touching her groin.

¹⁸⁹ *Lee Kwang Peng*, *ibid* (male taekwondo instructor outraged modesty of young male students).

¹⁹⁰ *Zeng Guoyan*, *supra* n 188 (the conduct of defendant, who represented himself during the trial, was characterised by the court as "reprehensible" — among other things, he alleged the complainant was a "willing partner" although his defence was one of denial, humiliated the complainant on the witness stand, asked her irrelevant questions, and badgered her to such an extent that she broke down on two occasions); *Seow Fook Thiam v Public Prosecutor* [1997] 3 SLR 573 (HC) (defendant cast malicious and totally unfounded aspersions on the complainant's character, claiming that he was having an affair with her)

¹⁹¹ *Seow Fook Thiam*, *ibid* (defendant followed the complainant, grabbed her arm, then hugged her and squeezed her breasts).

Where no assault or criminal force is involved, the law accords the modesty of women special protection beyond that of men. Under section 509 of the Penal Code, it is an offence for a person, intending to insult the modesty of any woman, to utter any word, make any sound or gesture, or exhibit any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by the woman. For instance, this offence would be committed by a man indecently exposing himself to her, using obscene words intending her to hear them, or showing her pornographic pictures. A section 509 offence is also committed if the perpetrator intrudes on the woman's privacy intending to insult her modesty. A person convicted of this offence shall be punished with imprisonment for a term which may extend to 1 year, or with a fine, or both. In *Tan Pin Seng v Public Prosecutor*¹⁹² the defendant received a fine of S\$2,000 with 1 month's imprisonment in default for intruding on the complainant's privacy by peeping at her through a hole in the bathroom door while she was showering.

The scope of this provision is illustrated by several cases. In *Tarak Das Gupta*,¹⁹³ decided under an identical section of the Indian Penal Code, an accused was convicted for sending the complainant a letter containing indecent overtures and suggesting that she should take certain actions to show whether she accepted the terms mentioned in the letter. The defendant in *Mahamad Kassam Chisty*¹⁹⁴ was found guilty of the offence for following the complainant's unmarried daughter around in a carriage, staring and laughing at her, and on occasion even standing up and shouting her name. This case is a reflection of the cultural norms of early 20th century India. Nevertheless, the case suggests that a section 509 offence is probably made out if a man harasses a woman by hounding her and making improper sexual remarks to her.

(3) *Rape and Unnatural Offences*: A man who has sexual intercourse with a woman against her will or without her consent, or with her consent when such consent has been obtained by putting her in fear of death or hurt, commits the offence of rape in section 375 of the Penal Code and may be punished with imprisonment which may extend to 20 years with fine or caning.¹⁹⁵ The tariff in Singapore is at least 10 years' imprisonment and not less than 6 strokes of the cane. If the offender pleads guilty, thereby saving the victim from the further embarrassment and suffering of reliving the experience in court, he may be given a reduction of one-quarter to one-third of the standard sentence. However, the victim's youth,

¹⁹² *Supra* n 187.

¹⁹³ (1925) 28 Bom LR 99.

¹⁹⁴ Unreported, Criminal Appeal No 454 of 1910, 18 January 1911 (HC, Bombay) *per* Chandavarkar and Heaton JJ, cited in *Ratanlal & Dhirajlal's Law of Crimes* (CK Thakker ed, 24th ed, 1998), vol 2 at 2516.

¹⁹⁵ Section 376(1), Penal Code.

an abuse of trust or a position of responsibility by the offender, and the presence of perversities and gross indignities forced on the victim are all aggravating factors which will justify a longer sentence.¹⁹⁶ Where, in order to commit or to facilitate the commission of rape, a person voluntarily causes hurt to a woman or puts her in fear of death or hurt to herself or any other person, he must serve a minimum of 8 years in prison and be caned with at least 12 strokes of the cane.¹⁹⁷

If a woman is subjected to fellatio, cunnilingus or anal intercourse against her will, the perpetrator can be charged with the offence of voluntarily having carnal intercourse against the order of nature under section 377 of the Penal Code.¹⁹⁸ This offence attracts the severe penalty of life imprisonment,¹⁹⁹ or imprisonment for up to 10 years, and a fine. The defendant in *Public Prosecutor v Norli bin Jasman*²⁰⁰ was sentenced to 3 years' imprisonment for compelling his 12-year-old niece to perform fellatio on him, while in *Kanagasuntharam v Public Prosecutor*²⁰¹ the perpetrator was *inter alia* sentenced to 6 years for fellatio and 8 years for anal intercourse forced on a 17-year-old girl during a two-hour attack in a school toilet. The court in *Kanagasuntharam* took as aggravating circumstances the fact that the perpetrator had been released from prison for a section 377 conviction shortly before the offences in this case, and the fact that he had threatened to kill the victim with a knife, used vulgar words on her and hit her continuously.

Men who force other men to engage in fellatio or anal intercourse may also be charged under section 377. For less serious acts, a male perpetrator may be charged with outraging of modesty under section 354.²⁰² Charges for conduct ranging from indecent touching to fellatio have also been brought under the offence of committing an act of gross indecency with another male person pursuant to section 377A of the Penal Code. The maximum punishment for this offence is a jail term of up to 2 years. In *Ng Huat v Public Prosecutor*,²⁰³ the defendant, a radiographer, was convicted under section 377A for touching a male patient's penis, chest,

¹⁹⁶ *Chia Kim Heng Frederick v Public Prosecutor* [1992] 1 SLR 361 (CCA) (defendant sentenced to 8 years' imprisonment and 8 strokes of the cane. Although he pleaded guilty and co-operated fully with the police, he had the responsibility of seeing the victim safely home and had abused the trust which she reposed in him by raping her. He had also forced her to masturbate and perform fellatio on him prior to the rape.)

¹⁹⁷ Section 376(2), Penal Code.

¹⁹⁸ *Public Prosecutor v Kwan Kwong Weng* [1997] 1 SLR 697 (CA).

¹⁹⁹ Which in Singapore means imprisonment for the whole of the remaining period of the convicted person's natural life: *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 3 SLR 643 (CA).

²⁰⁰ Unreported, Criminal Case No 17 of 1996, 19 November 1996 (HC).

²⁰¹ [1992] 1 SLR 81 (CCA).

²⁰² *Tan Boon Hock*, *supra* n 184.

²⁰³ [1995] 2 SLR 783 (HC).

nipples and buttocks during an X-ray examination of the patient's injured wrist. In the light of the defendant's clean record but taking into account the fact that he had abused the trust which the patient had reposed in him, he was sentenced to 3 months' imprisonment. However, the court was of the view that a substantial term of imprisonment might be justified if the offending conduct was more serious, and cited *Abdul Malik bin Othman v Public Prosecutor*²⁰⁴ in support. In that case, the defendant was jailed for 6 months for committing an act of fellatio in the children's pool of a public swimming complex.

It is noteworthy that employees who are domestic maids are now given special consideration under the law. Under a recent amendment to the Penal Code,²⁰⁵ an employer or a member of the employer's household who ill-treats a domestic maid²⁰⁶ can be sentenced by the court to one and a half times the punishment prescribed by law for the crimes committed. The offences to which this provision applies are causing hurt or grievous hurt (sections 323 to 325 of the Penal Code), wrongful confinement (sections 342 to 344), offences impacting the domestic maid's modesty (sections 354 and 509), and any attempt, abetment or conspiracy to commit the foregoing crimes.

2. *Employer's Criminal Liability for Employee's Wrongdoing?*

Where an employee is harassed by a co-worker, an interesting question is whether criminal charges may also be brought against the complainant's employer for contributing to the wrongdoing. For instance, an employer may have neglected to provide a harassment-free working environment by not establishing a clear code of conduct for his employees or exercising poor supervision. He may also have failed to properly investigate and act on complaints of sexual harassment. Procedurally, there is nothing to prevent an employer, including a corporation,²⁰⁷ from being charged for a criminal offence. In the Penal Code, the abetment of a criminal offence is itself an offence punishable with the same punishment.²⁰⁸ A person is said to abet the doing of a thing if, among other things, he or she

²⁰⁴ Unreported, Magistrate's Appeal No 429 of 1993.

²⁰⁵ Section 73, introduced by the Penal Code (Amendment) Act 1998 (No 18 of 1998).

²⁰⁶ Defined by s 73(4) as any female house servant employed in, or in connection with, the domestic services of her employer's private dwelling-house and who resides in her employer's private dwelling-house.

²⁰⁷ Section 2(1) of the Interpretation Act (Cap 1, 1997 Ed) defines *person* and *party* as including any company or association or body of persons, corporate or unincorporate. Section 57 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) provides that a corporation may be charged with an offence, and may appear by a representative appointed by a statement in writing purporting to be signed by the managing director of the corporation or any person having management of its affairs.

²⁰⁸ Section 109. If express provision is made by the Penal Code for punishing the abetment of an offence, that punishment will apply.

intentionally aids the doing of that thing by any act or illegal omission.²⁰⁹ Under the elaboration in Explanation 2 to that section, doing anything either prior to or at the time of a commission of an act in order to facilitate the commission of the act, and thereby facilitating the commission of the act, is aiding the doing of the act.

Section 43 of the Code defines as *illegal* anything which is an offence, or prohibited by law, or which furnishes ground for a civil action. As we have seen previously in this article, an employee may have civil causes of action against her employer if acts in the ways described in the preceding paragraph. Might it not be said that an employer, by “illegally omitting” to do what was required of him by law, facilitated the commission of an offence by the harasser and therefore abetted him?

It is submitted that unless the employer actually colludes in some way with the harasser, it will be very difficult to prove that he abetted the offence committed. For section 107(c) of the Penal Code to be satisfied, it must be proved beyond a reasonable doubt that the employer not merely aided the harasser but *intentionally aided* him; that is, he must have deliberately acted or refrained from acting to assist the wrongdoer in harassing the complainant. Mere neglect or oversight on his part is not enough. Furthermore, it is difficult to see how an employer, by failing to investigate and act on complaints of sexual harassment, facilitates the commission of the act since the omission takes place after the event.

Can an employer be vicariously liable for a crime committed by his employee? Neither statute law nor reported decisions in Singapore shed light on this issue, but at common law a master or principal is in general not criminally liable for an offence committed by his servant or agent, even if the crime is committed in the course of employment or agency.²¹⁰ There are also no laws imposing personal criminal liability on directors or officers of a corporation for crimes such as those described above committed by one employee against another.

3. *Evidential Rules: The Law of Corroboration*

Some comments should be made about the evidential rules on corroboration in sexual offences. Under Singapore law, a person may be convicted solely on the evidence of the complainant. In cases involving sexual offences, while there is no legal requirement that a judge must warn himself or herself expressly of the danger of convicting on the complainant's uncorroborated evidence, it has been held that as a matter of common sense it is unsafe to convict unless the evidence of the

²⁰⁹ Section 107(c).

²¹⁰ *R v Stephens* (1866) LR 1 QB 702 at 710; *Hardcastle v Bielby* [1892] 1 QB 709 at 712. See 11(1) *Halsbury's Laws* (4th ed (reissue), 1990) para 52.

complainant is unusually compelling or convincing, or there is some corroboration of the complainant's story.²¹¹

There is nothing magical about the words *unusually convincing*. A complainant's evidence will be considered "unusually convincing" if the prosecution's case can be proved beyond a reasonable doubt solely on the basis of that evidence.²¹² In *Public Prosecutor v Teo Keng Pong*,²¹³ the appellant, a tuition teacher, was charged with seven counts of outraging the modesty of one of his female students by touching her breast, caressing her thigh, squeezing her back and kissing her cheeks and lips. The prosecution called several witnesses to support its case, but none of them gave corroborative evidence. Nevertheless, the magistrate hearing the case found the student's evidence unusually convincing. She found the appellant's explanations for touching the student unbelievable and convicted him. This ruling was upheld by the High Court.

As regards corroboration, the court's duty is to analyse all the evidence and decide if the complainant's case is so reliable that a conviction based solely on it is not unsafe. If not, the court should identify which aspects are not so convincing and for which supporting evidence is required or desired. In assessing such supporting evidence, the judge must consider if it makes up for the weakness in the complainant's evidence in the light of all the circumstances and all the evidence, including the defence's evidence, as well as the accumulated knowledge of human behaviour and common sense.²¹⁴

Section 159 of the Evidence Act²¹⁵ provides for a special kind of corroborative evidence. It states that: "In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved." However, it was held in *Khoo Kwoon Hain v Public Prosecutor*²¹⁶ that while such evidence is admissible, it is not corroboration by independent evidence as it originates from the complainant and therefore has little additional evidential value.

²¹¹ *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46 at 58 (HC), citing with approval *Public Prosecutor v Mardai* [1950] MLJ 33 and *Koh Eng Soon v R* [1950] MLJ 52. This rule also applies where the victim is male: *R v Burgess* (1956) 40 Cr App R 144, cited in *Tang Kin Seng, ibid*, at 55.

²¹² *Public Prosecutor v Teo Keng Pong* [1996] 3 SLR 329 at 340 (HC), applied in *Lee Kwang Peng v Public Prosecutor* [1997] 3 SLR 278 at 296 ¶ 69 (HC).

²¹³ *Ibid*.

²¹⁴ *Tang Kin Seng, supra* n 211.

²¹⁵ Cap 97, 1990 Ed.

²¹⁶ [1995] 2 SLR 767 at 776–77 (HC).

In that case the appellant, a supervisor in a restaurant, was charged and convicted on two counts of aggravated outrage of modesty of a waitress by putting his hand against her breast, pressing himself against her buttocks and causing wrongful restraint by hugging her tightly. The complainant relied on her complaints of the incident to her sister and the police as evidence corroborating her story under section 159 of the Evidence Act. However, the court held that the evidence was self-serving and should not have been treated as independent corroborative evidence. In the light of this finding, and numerous inconsistencies in the complainant's story, the appellant was acquitted as his conviction was felt to be unsafe.

The rules on corroboration in cases involving sexual offences act as a safeguard against false stories which have been said to be "very easy to fabricate, but extremely difficult to refute",²¹⁷ but no doubt make it more difficult for prosecutors to successfully convict alleged harassers.

D. An Assessment of the Law

Currently, Singapore law does not present any clear and coherent means for victims to seek redress for sexual harassment. As there is no statutory definition of what constitutes sexual harassment nor specific laws to deal with it, victims must analyze the individual acts that they have been subjected to by their harassers, and to try and fit them somewhere within the pastiche of causes of action available at law.

Tort law today is not well adapted to deal with sexual harassment, which often takes the form of persistent badgering of the victim rather than any actual physical contact. The tort of harassment, which is only just emerging in England, has not yet taken root in Singapore. In any case, neither the elements which constitute the tort nor the limits of the tort have been clearly articulated by English courts. At present, to recover damages it is still necessary for litigants to prove that they have suffered some physical or psychological injury, no matter how much mental anguish, annoyance or fear has been endured. It remains to be seen whether Singapore law will develop along American lines and evolve a wide-ranging tort of invasion of personal privacy. As regards the tort of private nuisance, we have seen that it is of only limited use since it can only be relied on by victims who have a proprietary interest in the premises on which the nuisance is experienced.

Although it is well-established that at common law employers owe their employees a duty to take reasonable care for their safety in all the circumstances of the case so as not to expose them to unnecessary risk, it

²¹⁷ *R v Henry, R v Manning* (1968) 53 Cr App R 150 at 153, quoted in *Tang Kin Seng*, *supra* n 211.

is still not clear whether a work environment in which employees suffer sexual harassment will be held to be “unsafe” Where harassment has been committed by a co-employee, an employer will not be vicariously liable unless the co-employee is exercising a disciplinary or supervisory role over the victim. Otherwise, the victim’s only recourse is to sue her harasser directly. However, she may not be fully compensated as he may not have much financial resources. Since the employer will not have to pay a cent, there will also be little incentive for him to implement measures to ensure that sexual harassment does not recur. In any case, even if the victim can establish that her employer has breached his duty of care towards her, she can probably only recover damages for physical or psychological injury suffered by her, and not pure economic losses.

Suing in contract law has its drawbacks as well. By treating sexual harassment as grounds for terminating an employment contract, the victim is forced to give up her job in order to obtain redress. The courts do not generally enforce contracts of employment by specific performance or injunction. And if the employee claims that she has been wrongfully dismissed, damages cannot be awarded for the manner in which the dismissal was effected or for any injury to her feelings, no matter how humiliating or unreasonable it was.

Finally, criminal law is not really an adequate means for victims to secure justice against their harassers. Whether action will be taken depends how seriously the matter is viewed by the police or the Attorney General’s Chambers. Criminal charges are subject to strict standards of proof and rules of evidence. It is also highly unlikely that employers will be found to have abetted the harasser or to be vicariously liable for his wrongdoing. Finally, in most cases, the sanction imposed on a guilty harasser is a fine or a jail term, and compensation is not awarded to the victim. To obtain damages, the victim must sue her harasser in separate proceedings. This is costly, time-consuming and stressful for the victim as she must testify in court against her harasser all over again.

For these reasons, it is submitted that Singapore law does not fully address the problem of workplace sexual harassment. Other countries who have encountered similar situations have since enacted remedial legislation. It is to this that we now turn.

III. THE RESPONSE IN OTHER JURISDICTIONS

A. The Approaches Taken: Substantive Provisions

A variety of approaches is evident in the laws passed by the jurisdictions which have taken steps to deal with the issue of sexual harassment.

Some jurisdictions have elected to enact specific provisions defining and prohibiting sexual harassment in many areas of life. We have already

seen the definition of sexual harassment in the Australian Commonwealth Sex Discrimination Act 1984.²¹⁸ The Act goes on as follows:

28B(1): **Employment, Partnerships etc.** It is unlawful for a person to sexually harass:

- (a) an employee of the person; or
- (b) a person who is seeking to become an employee of the person.

28B(2): It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.

28B(3): It is unlawful for a person to sexually harass:

- (a) a commission agent or contract worker of the person; or
- (b) a person who is seeking to become a commission agent or contract worker of the person.

28B(4): It is unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.

28B(5): It is unlawful for a partner in a partnership to sexually harass another partner, or a person who is seeking to become a partner, in the same partnership.

28B(6): It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both of those persons.

28B(7): In this section... 'workplace participant' means any of the following:

- (a) an employer or employee;
- (b) a commission agent or contract worker;
- (c) a partner in a partnership.

The Act also prohibits sexual discrimination by members of bodies with power to grant occupational qualifications; in registered organisations, employment agencies, educational institutions and clubs; in the course of providing goods, services, facilities or accommodation; in transactions dealing with the acquisition or disposal of land; and in the performance of any function, exercise of any power or carrying out of any other responsibility for the administration of an Australian Commonwealth law or programme.²¹⁹ Similar provisions exist in legislation of the Australian

²¹⁸ *Supra* n 15.

²¹⁹ Sections 28C–29.

Capital Territory, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia.²²⁰

Other jurisdictions simply have legislation which prohibits sexual discrimination which has been judicially interpreted by the courts to include a prohibition of sexual harassment.²²¹ For instance, the following provision appears in Title VII of the US Civil Rights Act 1964:

It shall be an unlawful employment practice for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

In *Williams v Saxbe*, the Federal Court held for the first time that sexual harassment is a form of sexual discrimination actionable under Title VII. In that case, a Justice Department employee successfully established sexual discrimination when her male supervisor terminated her employment after she had turned down repeated requests for sexual favours. The Court was of the view that the supervisor's conduct had "created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders are similarly situated."²²² The harassment experienced by the victim was a form of sexual discrimination because her supervisor had only sought sexual favours from her because she was a woman.

In the United Kingdom, section 1(1) of the Sex Discrimination Act 1975 provides that a person discriminates against a woman for the purpose of the Act (1) if on the ground of her sex he treats her less favourably than he treats or would treat a man; or (2) if he applies to her a requirement or condition which he applies or would apply equally to a man, but (a)

²²⁰ See the ACT Discrimination Act 1991 (No 81, 1991); the NT Anti-Discrimination Act 1994; the Queensland Anti-Discrimination Act 1991; the SA Equal Opportunity Act 1984 (No 95, 1984); the Tasmania Anti-Discrimination Act 1992; the Victoria Equal Opportunity Act 1995 (Act No 42/1995); and the WA Equal Opportunity Act 1984 (No 83, 1984).

²²¹ In fact, the statutes of the various Australian states referred to in the preceding footnote are all anti-discrimination statutes, of which the provisions dealing specifically with sexual harassment form a part.

²²² (1976) 413 F Supp 654 at 657-58 (DC Cir).

which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, (b) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (c) which is to her detriment because she cannot comply with it. By section 2(1), the above provisions apply to discrimination against men as well. Sexual harassment was held to be a form of unfavourable treatment of a woman on the ground of her sex falling afoul of the Sex Discrimination Act in *Porcelli v Strathclyde Regional Council*.²²³ This is because the victim would not have been treated the same way if she were a man in the same situation.

Section 41 of the UK Act goes on to make an employer liable for harassing behaviour by one of their employees, unless the employer has taken steps reasonably practical to prevent the harassment. Examples of such steps might include making policy statements on sexual harassment which make it clear that such behaviour is unacceptable, having a proper complaints procedure, acting immediately when allegations arise, and training managerial staff to ensure effective implementation of sexual harassment policies.²²⁴ Such a provision avoids the need to show that the employer is vicariously liable under common law for his employee's acts.

Finally, it is possible to elevate the right not to be sexually harassed to a constitutional right or a basic human right. In Canada, the provincial governments of Manitoba, New Brunswick, Newfoundland, Ontario and Quebec have made workplace sexual harassment a human rights violation. For instance, the Ontario Human Rights Code²²⁵ states:

7(2): Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee;

7(3): Every person has a right to be free from:

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Apart from that specific provision, it has also been held that sexual harassment is a form of sexual discrimination under the Human Rights

²²³ [1986] ICR 564 (CA).

²²⁴ Rohan Collier, *supra* n 20 at 47.

²²⁵ RSO 1990, c H19.

Code.²²⁶ Provisions analogous to those in the Ontario Human Rights Code appear in New Zealand's Human Rights Act 1993.

Given the weaknesses identified in Singapore's current legal approach to sexual harassment, it is submitted that consideration should be given to adopting legislation in one of the above forms. While it is possible to have a statute specifically dealing sexual harassment, there is much to be said for taking a wider approach and having legislation which proscribes sexual discrimination together with discrimination on grounds such as race, religion, descent, disability and sexual orientation as well. At the same time, Parliament may wish to consider amending Article 12(2) of the Constitution to ensure that neither legislation nor government policy can discriminate against Singapore citizens on the ground of gender or sex.

B. Alternative Modes of Dispute Resolution

1. *In Other Jurisdictions*

Litigation is a highly antagonistic way of resolving disputes. In Singapore, use of the adversarial system of litigation means that parties must file pleadings and affidavits containing allegations against each other, and that their witnesses will be subject to rigorous cross-examination to test their evidence. As trials are held in open court except in special cases, the parties may be exposed to unwanted publicity. For this reason, jurisdictions that have enacted legislation against sexual discrimination have realized that litigation is often not an effective way to settle such disputes between employers and employees. Instead, provision is made for complaints of sexual harassment to be dealt with by a designated official or institution. An inquiry is scheduled, and attempts are made to bring the parties together to try and achieve a settlement by conciliation. If the matter cannot be settled, the complaint is then heard by a special tribunal empowered to grant a wide range of reliefs, some of which are not available at common law.

For instance, in the United States, Title VII of the US Civil Rights Act 1964 creates a body known as the Equal Employment Opportunity Commission (EEOC) which has authority to investigate and conciliate complaints that allege a violation of the law on employment discrimination. Before employees may commence legal action in a court, they are required to file a charge of discrimination with the EEOC. The Commission then conducts an investigation to find out if there is any merit to the charge, and will usually hold a fact-finding conference to

²²⁶ *Bell v Ladas* (1980) 1 CHRR D/155 (Board of Inquiry, Ontario); *Janzen v Platy Enterprises Ltd* (1989) 10 CHRR D/6205 (SC, Canada).

work out a settlement using “conference, conciliation, and persuasion”.²²⁷ If there is reasonable cause to believe that sexual discrimination has occurred, the EEOC can persuade the employer involved to voluntarily eliminate or remedy the problem. It can seek reinstatement of the employee, back pay and/or restoration of lost benefits. If conciliation fails, the EEOC can consider the case for a federal lawsuit. In appropriate cases, the Commission may bring an action on the employee’s behalf and bear the cost of litigation. Alternatively, after 90 days from the filing of the complaint, the employee can ask the EEOC for the right to sue in court. The EEOC will issue a “right to sue” letter, upon which the employee has 90 days to file a lawsuit in a federal or state court.

In Australia, the Commonwealth Sex Discrimination Act 1984 empowers the Human Rights Commission established by the Australian Commonwealth Human Rights Act 1981 to “inquire into alleged infringements [of the Sex Discrimination Act] and endeavour by conciliation to effect a settlement of the matters to which the alleged infringement relate.”²²⁸ Written complaints alleging sexual harassment may be lodged with the Commissioner of Human Rights by the person aggrieved by the act on her own behalf or on behalf of herself and other persons aggrieved; by a person on behalf of a class of persons aggrieved; or by a trade union of which the members include persons aggrieved.²²⁹ The Commissioner may also act on his own motion or if matters are referred to him by the relevant Minister.²³⁰

Upon receiving a complaint, the Commissioner is required to inquire into the act and endeavour by conciliation to effect a settlement of the matter.²³¹ In the process of doing so, the Commissioner may direct the complainant and the respondent to attend a compulsory conference.²³² He may also order the attendance of other persons who are likely to be able to provide information relevant to the inquiry or whose presence at the conference is likely to be conducive to the settlement of the matter, and to require the production of documents.²³³ Conferences are held in private, and parties are not allowed to be represented.²³⁴

If a settlement cannot be reached, the Commissioner must refer the matter to the Human Rights Commission. The Commission will then hold a public inquiry into the matter.²³⁵ The complainant and respondent must appear personally, but with the Commission’s leave may be represented

²²⁷ These words are taken from Title VII itself.

²²⁸ Section 48(1), Commonwealth Sex Discrimination Act 1984, *supra* n 15.

²²⁹ Section 50(1).

²³⁰ Section 51.

²³¹ Section 52(1).

²³² Section 55(1).

²³³ Sections 55(2)(c) and 54 respectively.

²³⁴ Section 56(4).

²³⁵ Sections 57(1), 59(1) and 66.

by solicitors.²³⁶ The Commission may endeavour by using reasonable means to resolve the complaint by conciliation and to “take all such steps as to it seem reasonable to effect an amicable settlement of a complaint... and for this purpose may adjourn an inquiry at any stage to enable the parties to negotiate with a view to settlement of the complaint by amicable arrangements.”²³⁷ During an inquiry, the Commission is not bound by rules of evidence and may inform itself on any matter in such matter as it thinks fit. Inquiries are conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Commission permit.²³⁸

If it finds the complaint to be substantiated, the Commission may make a wide range of orders, including a declaration that the respondent’s conduct is unlawful and should not be repeated or continued, an order that the respondent perform any reasonable act or conduct to redress the loss or damage suffered by the complainant, a declaration that the respondent should employ, re-employ or promote the complainant, an order for damages and an order that the termination of the complainant’s contract be varied to redress any loss or damage suffered. In particular, awards for damages for injury to the complainant’s feelings or humiliation suffered are specifically allowed.²³⁹ The Commission’s determinations are not binding or conclusive between parties; the complainant or the Commission itself must institute proceedings in the Federal Court of Australia for an order to enforce the determinations. If the Federal Court is satisfied that the respondent has engaged in conduct or committed an act which is unlawful under the Act, it can make such orders as it thinks fit, including orders giving effect to the Commission’s determinations.²⁴⁰

Similar dispute resolution mechanisms exist in other Commonwealth jurisdictions such as Canada, England and New Zealand.²⁴¹

2. *In Singapore*

Although Singapore presently does not have any legislation specifically dealing with employment discrimination or sexual harassment, there do exist mechanisms for resolution of employer-employee disputes apart from litigation. In addition, alternative dispute resolution methods are also employed in the course of litigation to assist parties in settling their disputes without having to proceed to a full trial.

²³⁶ Section 65(1).

²³⁷ Section 73(b).

²³⁸ Section 77(1).

²³⁹ Sections 81(1) and (4).

²⁴⁰ Sections 81(2), 82(2) and (3).

²⁴¹ Canada: see Aggarwal, *supra* n 16 at 78–79, 84. England: see *Hatsbury’s Laws of England Cumulative Supplement 1996*, Part 1, paras 767–771:38.

(1) *Dispute Resolution Under the Industrial Relations Act*: The Industrial Arbitration Court (IAC) was established in 1960 by the Industrial Relations Act.²⁴² Its main functions are to certify collective agreements on the terms and conditions of employment made by employers and trade unions, and to arbitrate industrial disputes which cannot be resolved amicably through conciliation.²⁴³

The Industrial Relations Act sets out various procedures by which differences between employers and employees may be resolved. Firstly, where there exists some dispute involving “industrial matters”, which are defined by section 2 of the Act as “matters pertaining to the relations of employers and employees which are connected with the employment or non-employment or the terms of employment, the transfer of employment or the conditions of work of any person”, a trade union may give notice to an employer setting out proposals for a collective agreement and inviting the employer to take part in negotiations.²⁴⁴ If a collective agreement is reached, it must be brought before the IAC to be certified and registered.²⁴⁵

However, if the employer does not accept the invitation to negotiate or if no collective agreement can be reached, either the trade union or the employer may notify the Commissioner for Labour of the situation. The Commissioner shall then consult, or direct a conciliation officer to consult, with the parties to try and persuade the employer to accept the invitation to negotiate or to assist them to reach agreement by conciliation.²⁴⁶ If these efforts fail, the Commissioner is to notify the Minister of Manpower and the Registrar of the IAC that a trade dispute exists.²⁴⁷ The Minister may then, if he or she considers it possible that the trade dispute may still be settled by conciliation, direct that parties attend a conference in private for this purpose.²⁴⁸

Failing the above, the trade dispute may be brought before the IAC for arbitration. Usually, both the trade union and employer must jointly agree to make a request that the dispute be submitted to arbitration.²⁴⁹ The IAC is bound to “carefully and expeditiously hear, inquire into and investigate every trade dispute of which it has cognizance and all matters

²⁴² Cap 136, 1985 Rev Ed.

²⁴³ *Singapore 1997* (SB Balachandrer ed, 1997) at 234–35.

²⁴⁴ Section 17 of the Industrial Relations Act (“IRA”).

²⁴⁵ IRA, s 24.

²⁴⁶ IRA, ss 19 and 20.

²⁴⁷ IRA, ss 19(3) and 21.

²⁴⁸ IRA, s 22.

²⁴⁹ IRA, s 31(b). In certain cases, a trade dispute may be directed to be submitted to arbitration by the Minister of Manpower by notice in the *Government Gazette*, or by the President of Singapore by proclamation where by reason of special circumstances it is essential in the public interest that a trade dispute be arbitrated: ss 31(c) and (d).

affecting the trade dispute and the just settlement of the dispute and shall determine the dispute by arbitration.”²⁵⁰ In carrying out its duties, the IAC may have regard not only to the interests of the persons immediately concerned but to the interests of the community as a whole and in particular the condition of the economy of Singapore.²⁵¹ During the hearing of a trade dispute, the IAC is master of its own procedure and acts “according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.” It is not bound to act in a formal manner or to comply with rules of evidence, but may inform itself of any matter in such manner as it thinks just.²⁵² Trade unions may be represented by one of their officers or an industrial relations officer, while other parties may be represented by employees or officers of the trade unions which they are members of, but generally no party may be represented by lawyers or paid agents acting on their behalf.²⁵³ Any award rendered by the IAC is final and not subject to appeal or review in any court.²⁵⁴

Where the Minister of Manpower is of the view that it may be desirable for the operation of an award to be extended to bind any person or trade union not already bound by the award, it may request the IAC to inquire into the matter and render a report. The IAC must hear representations from all interested trade unions and persons before making its decision. If the IAC is of the opinion that it is desirable to extend the operation of the award, the Minister may make an appropriate Order to that effect.²⁵⁵

It should be noted that the IAC is expressly enjoined from considering disputes relating to the dismissal of employees or making awards relating to the reinstatement of employees.²⁵⁶ In such cases, the Industrial Relations Act provides a different procedure. Where an employee considers that she has been dismissed without just cause or excuse, she may, within 1 month of her dismissal, make representations in writing through her trade union to the Minister of Manpower to be reinstated. The Minister must give the employer an opportunity to explain his position, and may also direct the Commissioner for Labour to inquire into whether the dismissal is indeed unjustified.

If, after considering the representations of the trade union and the employer, and any report by the Commissioner, the Minister is satisfied

²⁵⁰ IRA, s 32.

²⁵¹ IRA, s 34(a)(a).

²⁵² IRA, ss 60(1)(b) and (c).

²⁵³ IRA, s 64.

²⁵⁴ IRA, s 47.

²⁵⁵ IRA, s 40.

²⁵⁶ Except where the dismissal is related to the employee’s activities as a trade union member: IRA, s 35(1).

that the employee has been dismissed without just cause or excuse, he may, notwithstanding any rule of law or agreement to the contrary, either direct the employer to reinstate the employee and to pay her the wages that she would have earned had she not been dismissed, or direct that compensation be paid. Failure on the employer's part to comply with the Minister's direction constitutes a criminal offence. The Minister's decision is final and cannot be challenged in either the IAC or an ordinary court of law. Furthermore, any direction made by the Minister bars the employee from taking out any action for damages for wrongful dismissal.²⁵⁷

It is submitted that pervasive sexual harassment in the workplace constitutes an industrial matter which may require resolution between a trade union and an employer, since it is clearly a matter which pertains to the relations of employers and employees connected with employment, the terms of employment or conditions of work.²⁵⁸ Although collective agreements between employers and trade unions have traditionally dealt with matters such as pay, leave, rest days and other benefits, there is no reason why such agreements cannot touch on sexual harassment as well. In January 1997, the Malaysian Trades Union Congress announced that it would include a clause on sexual harassment in the collective agreements of its 163 member unions. The MTUC secretary-general was of the view that a safe working environment should include freedom from sexual harassment, and it was the duty of employers to prevent sexual harassment in the workplace.²⁵⁹

If no collective agreement can be reached, the procedures for conciliation and arbitration by the IAC established by the Industrial Relations Act can also be used to resolve the matter. To date, though, it appears that no sexual harassment cases have yet been brought before the IAC.²⁶⁰ Where an employee has been sexually harassed and, because of her reaction, is subsequently fired from her job without justification, she may either elect to sue her employer for wrongful dismissal or avail herself of the complaint procedure set out in section 35 of the Industrial Relations Act.

(2) *Dispute Resolution Under the Employment Act*: The provisions of the Employment Act²⁶¹ apply to only certain classes of employees. Under section 2 of the Act, an *employee* is a person who has entered into or works under a contract of service with an employer, and includes

²⁵⁷ IRA, ss 35(2) to (8).

²⁵⁸ IRA, s 2.

²⁵⁹ "Union Pacts to Cover Sexual Harassment", *The Straits Times*, 13 January 1997.

²⁶⁰ Personal correspondence with the Registrar of the IAC in April 1998.

²⁶¹ Cap 91, 1996 Ed ("EA").

workmen²⁶² and employees of the Government declared by the President to be employees within the meaning of the Act. It does not, however, include any seaman, domestic worker, any person employed in a managerial, executive or confidential person, or any person excluded from the operation of the Act by notification of the Minister of Manpower.

Under section 14(1) of the Employment Act, an employer may after due inquiry either dismiss without notice, downgrade, or suspend an employee employed by him from work without pay for a period not exceeding one week on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of her service. However, where the employee considers that she has been dismissed without just cause or excuse, she may make representations to the Minister of Manpower to be reinstated. The Employment Act has provisions almost identical to those found in section 35 of the Industrial Arbitration Act, which were described above. The main difference is that under the Industrial Arbitration Act the representations must be made by the employee's trade union, whereas the employee can make a personal complaint under the Employment Act.

An employee whose monthly salary does not exceed S\$1,600²⁶³ has additional recourse under section 115 of the Employment Act. This section empowers the Commissioner for Labour to inquire into and decide any dispute between an employee and her employer where the dispute arises out of any term in the contract of service or out of any of the provisions of the Act. Incidents of sexual harassment can lead to disputes within the meaning of section 115, as we have seen that the harassment itself or an employer's failure to investigate complaints of harassment may constitute a breach of the express or implied terms in the employee's contract of employment. In addition, the Employment Act contains several provisions regulating situations when an employee's contract may be terminated²⁶⁴ or where an employee may be summarily dismissed.²⁶⁵ If

²⁶² A *workman* is defined by s 2 as (a) any person, skilled or unskilled, who has entered into a contract of service with an employer in pursuance of which he is engaged in manual labour, including any artisan or apprentice, but excluding any seaman or domestic worker; (b) any person, other than clerical staff, employed in the operation of mechanically propelled vehicles used for the transport of passengers for hire or for commercial purposes; (c) any person employed partly for manual labour and partly for the purpose of supervising in person any workman in and throughout the performance of his work; (d) any person specified in the First Schedule to the EA, *ie* bus conductors; lorry attendants; bus, lorry and van drivers; bus inspectors; goldsmiths and silversmiths; tailors and dressmakers; harbour-craft crew and all workmen employed on piece rates in their employer's premises; and (e) any person whom the Minister of Manpower declares to be a workman for the purposes of the EA.

²⁶³ Employment (Salary of Employees) Notification (Cap 91, 1996 Ed, N2).

²⁶⁴ EA, ss 9–10 (giving of notice) and 11 (payment of salary in lieu of notice).

²⁶⁵ EA, ss 13 (absence of employee from work) and 14(1) (employee's misconduct).

incidents of sexual harassment lead to the employee being wrongfully dismissed, this might be a breach of the Employment Act leading to a dispute arising out of the provisions of the Act.

The employee must lodge her claim with the Labour Relations Department of the Ministry of Manpower within a year of the matters out of which the complaint arises or, if the complaint involves a termination of her contract of service, within 6 months of the termination.²⁶⁶ A conciliation meeting chaired by a labour relations officer will usually be arranged for the employee and her employer to try and resolve the dispute. If the dispute cannot be settled, the Commissioner will then summon the party against whom the claim is made as well as all persons whose interests are likely to be affected by the proceedings to attend at a hearing of the claim at the Labour Court.²⁶⁷

Before the claim is heard, the Commissioner may convene a preliminary inquiry to attempt settlement between the parties.²⁶⁸ If this fails, the Labour Court will proceed to hear the claim. As in the IAC, the Commissioner for Labour acts according to “equity, good conscience and the merits of the case without regard to technicalities”, and is not bound to act in a formal manner or to follow rules of evidence but may inform himself on any matters in such manner as he thinks fit.²⁶⁹ The Labour Court has power to summon people to attend the hearing and hear evidence from witnesses on oath or affirmation before giving its decision.²⁷⁰ An employee may be represented by an officer of the trade union of which she is a member while an employer may be represented by an employee, but neither party may engage lawyers or paid agents to appear on their behalf.²⁷¹ The Labour Court’s decision is appealable to the High Court.²⁷²

Similar to the procedure for complaints to the Minister of Manpower under section 35 of the Industrial Relations Act and section 14 of the Employment Act, an employee cannot enforce her civil rights and remedies for any breach or non-performance of her employment contract in a civil court if she has already instituted proceedings before the Labour Court, unless proceedings are not pursued to judgment.²⁷³

(3) *Court Dispute Resolution*: Finally, it should be mentioned that mechanisms for alternative dispute resolution are also built into the

²⁶⁶ EA, ss 115(2) and 119(1)(a).

²⁶⁷ EA, s 119(1)(b).

²⁶⁸ EA, ss 119(1)(e)-(g).

²⁶⁹ EA, s 119(2).

²⁷⁰ EA, ss 119(1)(h) and (i).

²⁷¹ EA, s 120.

²⁷² EA, s 117.

²⁷³ EA, s 132.

litigation process in Singapore.²⁷⁴ Mediation was formally introduced in the Subordinate Courts in 1994 with the establishment of the Court Mediation Centre, now known as the Primary Dispute Resolution Centre. In civil proceedings after the close of pleadings, the registrar hearing the summons for directions in the matter will usually inquire if the litigants have any objections to attending a settlement conference. If not, a tentative date about four weeks after the summons for directions will be set for the conference. Alternatively, either party to a dispute may write to the Director of the Primary Dispute Resolution Centre at any time after legal proceedings have been commenced to request for a settlement conference to be convened.²⁷⁵ The process is voluntary and free of charge.

The settlement conference is presided over by a district judge, who will hear submissions by the parties' solicitors and propose ways of settling the dispute. The settlement judge may also direct that parties attend in person so that he or she may speak to them if it is felt that this will promote a settlement. If a matter cannot be settled at the Primary Dispute Resolution Centre and proceeds to trial, a different judge will hear the case. Matters raised during a settlement conference are treated in strict confidence, and may not be referred to at trial since the conference proceeds on a without-prejudice basis.²⁷⁶ All attendance notes taken by the settlement judge are kept separate from the court papers before the trial judge.

Court dispute resolution in Singapore appears to have been fairly successful — in 1995, a total of 960 cases were settled out of the 1,133 for which settlement conferences were convened. This represents a settlement rate of 85%.²⁷⁷

Where no settlement on liability is reached but the quantum of damages has been agreed upon, parties may choose to have their dispute determined in a more informal mediation-arbitration before a district judge or registrar in chambers rather than by trial in open court. Mediation-arbitration was introduced at the launch of the Sixth Workplan of the Subordinate Courts in 1997. After a dispute has been adjudicated by mediation-arbitration, the matter is referred back to the settlement judge who concludes the case by giving necessary orders on the issues earlier determined.

To further promote the use of alternative dispute resolution mechanisms, in district court actions involving claims of between S\$100,000 and

²⁷⁴ See Lim Lan Yuan & Liew Thiam Leng, *Court Mediation in Singapore* (1997) at 50–53, 75–101; and Lim Lan Yuan, *The Theory and Practice of Mediation* (1997) at 219–23.

²⁷⁵ *Subordinate Courts Practice Directions*, paras 23(3) and (4).

²⁷⁶ *Ibid.*, paras 23(11) and (12).

²⁷⁷ Lim & Liew, *supra* n 274 at 52–53.

S\$250,000 pre-trial conferences are held after the close of pleadings.²⁷⁸ At such conferences, the possibility of resolving the dispute or particular issues in the dispute by alternative dispute resolution is discussed. If parties consent to mediation at the Singapore Mediation Centre or the Primary Dispute Resolution Centre, the registrar hearing the pre-trial conference will refer the matter accordingly.²⁷⁹

Settlement conferences and mediation-arbitration are not carried out in the High Court. Instead, the Registry of the Supreme Court identifies suitable cases for mediation, and during pre-trial conferences parties are encouraged to avail themselves of the services of the Singapore Mediation Centre, which was incorporated in August 1997 by the Singapore Academy of Law as a company limited by guarantee. Solicitors may also write to the Registrar to request for cases to be referred to the Centre. As an incentive to use the Centre's mediation services, parties who have attempted mediation in good faith and made reasonable attempts to resolve their dispute by such means may, if the mediation is unsuccessful, request for a waiver or refund of a part or all of the court hearing fees that have been paid or will have to be paid for a trial.²⁸⁰

In the absence of any statute specifically addressing the problem of sexual harassment, these modes of alternative dispute resolution provide avenues for employers and employees to settle complaints of harassment without a trial, thus achieving a result which is satisfactory to both parties and which saves time and expense.

IV. THE INSURANCE DIMENSION

We have seen that acts of sexual harassment may amount to a tort, a breach of contract, or a criminal offence. Employees who have civil causes of action may sue their employers for damages, interest and legal costs. There is also statutory provision for compensation to be awarded to victims in criminal cases. In this Part, we examine whether employers may insure themselves against the risk of having to making payments to employees as a result of sexual harassment on their own part, or on the part of their other employees.

In general, the principle *ex turpi causa non oritur actio* — no action arises from a base cause — applies in the context of insurance contracts. This principle was set out by Diplock LJ in *Hardy v Motor Insurer's Bureau*²⁸¹ in a passage that deserves to be quoted in full:

²⁷⁸ Pursuant to O 34A of the Rules of Court. See the *Subordinate Courts Practice Directions*, para 23A(1).

²⁷⁹ *Ibid*, paras 23A(4) and (6).

²⁸⁰ Registrar's Circular No 4 of 1997.

²⁸¹ [1964] 2 QB 745 at 767–68.

The rule of law on which the major premise is based — *ex turpi causa non oritur actio* — is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that *the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right...* The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced. [Emphasis added.]

The principle has two implications in insurance law which concern us. Firstly, it means that as a matter of course a court will decline to enforce insurance contracts which seek to insure risks which are unlawful or otherwise contrary to public policy. It is clear, for instance, that insurance policies which cover intentional criminal acts committed by the insured are unenforceable. So, if a motorist insures his car, intending from the beginning to make criminal use of it, and the insurers are aware of this intention, the policy is bad in its inception.²⁸² It would appear that the principle extends to torts intentionally committed by the insured as well. In *WH Smith & Son v Clinton & Harris*,²⁸³ it was held that an indemnity given by a publisher to a printer against liability for libel was not enforceable. It is not clear, though, whether a deliberate breach of contract is sufficiently “anti-social”.

Secondly, even if a risk insured against is itself unobjectionable, a court will nonetheless decline to enforce the policy if the insured's conduct is regarded by the law as unlawful or anti-social. Much insight into this issue can be gained by examining the decision of the House of Lords in *Beresford v Royal Insurance Co.*²⁸⁴ The question in that case was whether the personal representative of an assured under a life insurance policy was entitled to the insurance proceeds if the assured had committed suicide. On the facts, the policy specifically provided that the insurers would pay under the policy if the assured committed suicide after the expiry of one year from the commencement of the policy.

The House of Lords held that even though the insurance policy had expressly permitted recovery in the circumstance specified, such a policy was legally unenforceable because “no system of jurisprudence can with reason include amongst its rights which it enforces rights directly resulting

²⁸² *Hardy v Motor Insurers' Bureau*, *ibid.*

²⁸³ (1908) 99 LT 840.

²⁸⁴ [1938] AC 586 (HL).

to the person asserting them from the crime of that person.”²⁸⁵ Despite the express words purporting to insure against a loss due to the insured’s own wilful misconduct, the court would not permit recovery as it would be against public policy to do so. The principle applies to wilful misconduct which amounts to a crime; it has yet to be seen whether recovery is possible if the misconduct only amounts to a tort or a breach of contract.

It would appear, though, that where an insured’s act constitutes a crime but was due to inadvertence or negligence rather than an intentional breach of the law, a court may be prepared to permit recovery. In *New India Assurance Co Ltd v Woo Ching Fong*,²⁸⁶ the insured, who was drunk, drove her a car into a tree and killed herself. It was not disputed that she had committed a statutory offence by driving under the influence of alcohol to an extent where she was incapable of having proper control of her car. Nevertheless, the Singapore Court of Appeal held that since her act was inadvertent rather than deliberate, her estate was entitled to claim under her insurance policy.²⁸⁷

Apart from the *ex turpi causa* principle, it was held in *Beresford* by Lord Atkin that “[o]n ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening.” Insurance is for fortuitous events only, not for cases where the assured has not only exposed himself to risk but has actually caused the risk to occur.²⁸⁸ Therefore, “the fire assured cannot recover if he intentionally burns down his house,²⁸⁹ nor the marine assured if he scuttles his ship,²⁹⁰ nor the life assured if he deliberately ends his life. This is not the result of public policy, but of the correct construction of the contract.”²⁹¹ The principle applies equally where the assured himself is not directly involved, but acts causing the risk to occur have been done with his privity or consent.²⁹²

²⁸⁵ *Ibid* at 596, citing *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156. See also *Geismar v Sun Alliance & London Insurance Ltd* [1977] 2 Lloyd’s Rep 62 (insured not entitled to enforce an insurance indemnity against loss of articles which the insured deliberately imported into the country without payment of customs duty, a breach of the Customs and Excise Act 1957)

²⁸⁶ [1962] MLJ 432 (CA, Singapore)

²⁸⁷ See also *Minasian v Aetna Life Insurance Co* (1936) 3 NE 2d 17 at 19 (Massachusetts); *Shaw v Gillan* (1982) 143 DLR (3d) 232 at 237 (HC, Ontario) (wife who killed husband by her careless driving allowed to enforce his life insurance in her favour).

²⁸⁸ *British Marine v Gaunt* [1921] 2 AC 41 at 52, 57.

²⁸⁹ *Upjohn v Hitchens* [1918] 2 KB 48 at 58; *City Tailors v Evans* (1921) 38 TLR 230 at 233–34.

²⁹⁰ *Samuel v Dumas* [1924] AC 431; see also the Marine Insurance Act (Cap 387, 1994 Ed), s 55(2)(a).

²⁹¹ *Beresford*, *supra* n 284 at 595. See also *WH Smith & Son v Clinton & Harris*, *supra* n 283, and *Marks v Philip Trent & Sons Ltd* [1954] 1 QB 29 at 39.

²⁹² *Midland Insurance v Smith* (1881) 6 QBD 561; *Samuel v Dumas*, *supra* n 290.

Malaysia and Singapore have both accepted this rule of construction. In *Brighton Industries (M) Sdn Bhd v Supreme-QBE Insurance Bhd*,²⁹³ which involved a fire insurance policy, the insurers succeeded in showing that the fire was set wilfully or with the connivance of the insured. In the premises, recovery under the policy was disallowed by the court. Similarly, in *Ng Choon Hoo trading as Overseas Union Radio & Electric Co v The Nippon Fire & Marine Insurance Co Ltd*²⁹⁴ the Singapore High Court found that the fire was deliberately started by the insured, his servants or agents. The courts in both cases noted that as contentions of wilful misconduct or connivance on the part of the insured in causing the risk to occur are serious allegations, they must be proved to a higher degree of probability than that required to establish negligence.

The foregoing suggests that insurance contracts which specifically purport to cover acts of intentional sexual harassment by the insured himself (at least those which amount to a crime or a tort) are unenforceable. Furthermore, even if the insurance contract's object is not anti-social, as would be the case with a general all-risks policy, the insured would be denied recovery under the policy if he committed an act of sexual harassment which constitutes a crime or a tort, unless he was acting inadvertently or negligently. The basis of this would either be the *ex turpi causa* principle, or the rule of construction preventing recovery by insured persons who themselves cause the risk to occur. It is not yet clear whether an insured would be disentitled from claiming under a policy if his acts of sexual harassment amount only to breaches of his employee's contract of employment.

On the other hand, there is no objection to a person effecting insurance against the consequences of wilful misconduct on the part of his servants or agents.²⁹⁵ Thus, fidelity policies are valid. Such policies are designed to protect an assured against the contingency of a breach of fidelity on the part of a person in whom confidence has been placed (usually an employee). Since fidelity policies can be extended to cover acts such as an employee's wilful default²⁹⁶ or negligence,²⁹⁷ it is submitted that insurance policies protecting employers against loss and expense occasioned by sexual harassment committed by their employees are valid and enforceable.

²⁹³ [1992] 3 CLJ 1424 (HC, Johor Bahru).

²⁹⁴ [1996] 3 SLR 180 (HC).

²⁹⁵ *Shaw v Robberds* (1837) 6 Ad & El 75, 112 ER 29; *Midland Insurance v Smith*, *supra* n 292; *Lind v Mitchell* (1928) 45 TLR 54; *Goddard Smith v Frew* [1939] 4 All ER 358. See also *Ohio Casualty Insurance Co v Welfare Finance Co* (1934) 75 F 2d 58 (8th Cir), certiorari denied 296 US 734 (employer entitled to enforce indemnity for punitive damages awarded against him in respect of tort committed by servant); *Higgins v Orion Insurance Co* [1985] CCLI 139 (CA, Ontario) (wilful misconduct of a partner).

²⁹⁶ *Kenney v Employers' Liability Assurance Corp'n* [1901] 1 IR 301.

²⁹⁷ *American Surety Co of New York v Wrightson* (1910) 103 LT 663; *Pawle & Co v Bussell* (1916) 114 TLR 805.

In the American decision of *Western Casualty & Surety Co v Aponaug Manufacturing Co*,²⁹⁸ the court went so far as to permit a corporation to insure against liability for assault committed by its president. Nonetheless, the more prevalent view is that the acts of persons in high managerial positions should be regarded as acts of the corporation itself.²⁹⁹ In such a case, an insurance policy taken out by a corporation would only be enforceable if it expressly covered deliberate acts of its managers.

At present, it appears to be virtually unheard-of for insurance companies in Singapore to insure employers from the pecuniary consequences of sexual harassment. Nevertheless, insurance may become a necessity if the incidence of sexual harassment does not diminish and victims who are more aware of their legal rights begin instituting legal proceedings against their employers in larger numbers. Insurance would also ensure that employees who succeed in proving their employers responsible for the sexual harassment they suffer will be able to recover damages from them.

V. CONCLUSION: THE LEGAL CHALLENGE

On 7 May 1988, Singapore signed the Declaration of the Advancement of Women in the ASEAN region (the Bangkok Declaration) together with Brunei, Indonesia, Malaysia, the Philippines and Thailand.³⁰⁰ Under its terms, the parties to the Declaration recognized “the importance of active participation and integration of women in the region in sharing the future development and progress of ASEAN and the necessity of meeting the needs and aspirations of women in the ASEAN Member Countries” and were cognizant of “the multiple roles of women in the family, in society and in the nation and the need to give full support and provide facilities and opportunities to enable them to undertake these tasks effectively”.

Among the declarations made, the parties stated that, “in the context of strengthening regional co-operation, collaboration and co-ordination for the purpose of advancing the role and contribution of women in the progress of the region”, each member country, either individually or collectively, in ASEAN would endeavour:

²⁹⁸ (1952) 197 F 2d 673 (5th Cir). See also *Morgan v Greater New York Taxpayers Mutual Insurance Association* (1953) 112 NE 2d 273 (New York) (partner covered in respect of partnership liability for assault committed by another partner).

²⁹⁹ *Glen Falls Indemnity Co v Atlantic Building Corporation* (1952) 199 F 2d 60 (4th Cir); *Greater New York Mutual Insurance Co v Perry* (1958) 178 NYS 2d 760; *S & Y Investments (No 2) Pty Ltd v Commercial Union Assurance Co Ltd* (1986) 82 FLR 130 (Northern Territory, Australia).

³⁰⁰ Regional Treaty No R83. It entered into force on 5 July 1988.

1. To promote and implement the equitable and effective participation of women whenever possible in all fields and at various levels of the political, economic, social and cultural life of society at the national, regional and international levels.
2. To enable women in the region to undertake their important role as active agents and beneficiaries of national and regional development, particularly in promoting regional understanding and co-operation and in building more just and peaceful societies.
3. To integrate in national plans the specific concerns of women and their roles as active agents in and beneficiaries of development, specifically considering their role as a productive force to attain the full development of the human personality.

Subsequently, on 5 October 1995, Singapore acceded to the Convention on the Elimination of AH Forms of Discrimination Against Women (CEDAW).³⁰¹ Article 2 of the Convention condemns “discrimination against women in all its forms” and binds state parties to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women”. In particular, Article 11 paragraph 1 states that:

State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

³⁰¹ UN Gen Ass Resn 34/180, GAOR, 34th Sess, Supp 46, p 193; Bowman & Harris Treaty No 769; 19 ILM 33; UKTS 2 (1989), Cm 643; UNTS 20378. For an overview of CEDAW’s impact on Singapore law, see Thio Li-ann, “The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism and the Transformative Potential of CEDAW” (1997) 1 SJICL 278.

- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

It is noteworthy that in 1992 the Committee on the Elimination of All Forms of Discrimination Against Women, which is established by Article 17 of CEDAW to monitor its implementation, noted that equality in employment could be seriously impaired when women were subjected to gender-specific violence such as sexual harassment in the workplace. This could be humiliating and could constitute a health and safety problem. It could also be discriminatory when the woman had reasonable grounds to believe that her objections to the harassment would disadvantage her in connection with her employment. The Committee recommended that effective legal and other measures be taken to sanction and prevent sexual harassment.³⁰²

It is submitted that Singapore, as a state party to both the Bangkok Declaration and to CEDAW, has committed itself to enacting legislation and adopting policies which effectively proscribe sexual harassment, since this is one aspect of discrimination against women in the field of employment. However, the view at the ministerial level is that Singapore's existing laws, values and practices are consonant with those CEDAW espouses, and that no amendments are required.³⁰³ Such a dismissive view is to be regretted. In view of the 1993 AWARE report, while further research is certainly desirable, sexual harassment in the employment context does appear to be a problem in Singapore which cannot be swept under the carpet. It is submitted that since Singapore law is currently not well-adapted to cope with the problem, there is a need for remedial legislation to be enacted to protect employees, both female and male, against sexual harassment in the workplace and in other areas of life. Therein lies the legal challenge.

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³⁰² *Conditions of Work Digest*, volume 11, 1/1992, Part II, pp 23–25. Actions taken by other international government organisations are also summarized in this work.

³⁰³ “No Changes Needed for Women’s Convention”, *The Straits Times*, 19 January 1996 at 29.

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