Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282

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FEDERAL COURT (PUTRAJAYA)

ZULKEFLI CJ (MALAYA), SURIYADI, AHMAD MAAROP, RAMLY ALI FCJJ AND BALIA YUSOF JCA

CIVIL APPEAL NO 01(f)-13–06 OF 2013 (W)

2 June 2016

Case Summary

Tort — Defamation — Libel — Superior accused of sexual harassment at workplace — Whether subordinate's allegations proven — Whether allegations amounted to defamation — Verbal harassment — Whether act of sexual harassment serious enough to cause adverse psychological effect on subordinate — Whether valid cause of action for civil claim on grounds of sexual harassment under existing laws of Malaysia

The appellant and the respondent were employees of Lembaga Tabung Haji ('the company'). The respondent being the subordinate of the appellant reported directly to him. The respondent lodged a complaint ('the complaint') to the chief executive officer of the company complaining of sexual harassment by the appellant. A committee of inquiry ('the committee') conducted an inquiry and found that there was insufficient evidence to warrant disciplinary action to be taken against the appellant. However, the Human Resources Department of the company decided to issue a strong administrative reprimand to the appellant. Aggrieved by the complaint, the appellant issued a writ against the respondent seeking, inter alia, a declaration that he had not sexually harassed the respondent and that he had been defamed by her. In addition to a public apology, the appellant sought general and aggravated damages against the respondent, interest, and costs. The respondent filed her defence and also a counterclaim against the appellant for for general, aggravated and exemplary damages. The High Court dismissed the appellant's claim and also entered judgment for the respondent on her counterclaim. The appellant appealed to the Court of Appeal but the appeal was dismissed. Dissatisfied with the decision of the Court of Appeal, the appellant appealed. The issue that arose was whether there was a valid cause of action for a civil claim on the grounds of sexual harassment under the existing laws of Malaysia.
Held, dismissing the appeal:

(1) There was no reason to disturb the factual finding of the judge which led to the dismissal of the main suit. There was indeed ample evidence to show that the appellant had

uttered vulgar and sexually explicit rude remarks, either addressed directly to the respondent or in her presence and knowing that she would hear it, justifying the complaint. The

respondent was an emotionally vulnerable person, in the sense that she appeared to be under some emotional pressure. She suffered migraine and pain in her leg, and she would be more susceptible to being adversely affected by the objectionable remarks made by the appellant. The appellant surely would know that the continuous vulgar and sexually explicit remarks would make the respondent feel extremely uncomfortable (see paras 76–77).

(2) The decision by the High Court over the counterclaim must be affirmed but based on the tort of sexual harassment. The ingredients of sexual harassment were present in abundance, namely the existence of a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person (in this case, the respondent), calculated to cause alarm, fear and distress to that person. This conduct was heavily spiced with sexual hallmarks as illustrated by the continuous leery and obscene verbal remarks uttered by the appellant, which culminated in the respondent displaying symptoms of emotional distress, annoyance and mental depression due to the alarm, fear and anxiety. It was reasonable for the High Court to grant the general and aggravated damages for the proven tort of sexual harassment (see paras 78–79).

Perayu dan responden adalah pekerja-pekerja Lembaga Tabung Haji (‘syarikat tersebut’). Responden sebagai bawahan perayu melapor secara terus kepadanya. Responden membuat aduan (‘aduan tersebut’) kepada ketua pegawai eksekutif syarikat tersebut membuat aduan gangguan seksual oleh perayu. Ahli jawatankuasa siasatan (‘ahli jawatankuasa tersebut’) menjalankan siasatan dan mendapati bahawa terdapat keterangan yang tidak mencukupi untuk mewajarkan tindakan tatatertib diambil terhadap perayu. Walau bagaimanapun, Bahagian Sumber Manusia syarikat tersebut memutuskan untuk mengeluarkan teguran pentadbiran yang wajar kepada perayu. Tidak puas hati dengan aduan tersebut, perayu mengeluarkan writ terhadap responden memohon, antara lain, perisytiharan bahawa dia tidak membuat gangguan seksual terhadap responden dan bahawa dia telah difitnahkan olehnya. Tambahan kepada permohonan maaf terbuka, perayu memohon ganti rugi am dan tambahan terhadap responden, faedah dan kos. Responden memfailkan pembelaannya dan juga menuntut balas terhadap perau bagi ganti rugi am, tambahan dan teladan. Mahkamah Tinggi menolak tuntutan perayu dan juga memasukkan penghakiman untuk responden atas tuntutan balasnya. Perayu merayu kepada Mahkamah Rayuan tetapi rayuan ditolak. Tidak puas hati dengan keputusan Mahkamah Rayuan, perayu merayu. Isu yang berbangkit adalah sama ada terdapat kausa tindakan yang sah bagi tuntutan sivil atas alasan gangguan seksual di bawah undang-undang yang ada Malaysia.

Diputuskan, menolak rayuan:

(1) Tidak terdapat sebab untuk campur tangan dapatan hakim yang membawa kepada penolakan tindakan utama. Memang terdapat keterangan yang kukuh untuk

menunjukkan bahawa perayu telah menyebut perkataan kesat dan kata-kata kasar eksplisit yang seksual; sama ada ditujukan secara terus kepada responden atau dalam kehadirannya dan mengetahui bahawa yang dia boleh mendengarnya, menjustifikasikan aduan. Responden adalah seorang yang dipengaruhi secara emosi, dalam erti kata yang dia berada dalam keadaan tekanan emosi. Dia mengalami migrain dan sakit di kakinya, dan dia akan lebih mudah terdedah untuk dipengaruhi dengan kata-kata yang sangat tidak menyenangkan dibuat oleh perayu. Perayu semestinya mengetahui bahawa kata-kata kesat berterusan dan eksplisit tentang seksual akan membuatkan responden berasa amat tidak selesa (lihat perenggan 76–77).

(2) Keputusan oleh Mahkamah Tinggi mengenai tuntutan balas mesti disahkan tetapi berdasarkan atas tort gangguan seksual. Elemen gangguan seksual adalah terdapat dengan banyaknya, iaitu kewujudan desakan dan sengaja tingkah laku yang tidak munsabah dan menindas ditujukan kepada orang lain (dalam kejadian ini, responden), diniatkan untuk menyebabkan kecemasan, ketakutan dan kebimbangan kepada orang tersebut. Perlakuan ini dipenuhi dengan ciri-ciri seksual seperti yang ditunjukkan oleh kata-kata lisan lucah dan kesangsian berterusan yang diucapkan oleh perayu, yang berakhir di mana responden memaparkan tanda-tanda penderitaan emosi, kejengkelan dan kemurungan mental akibat kepada kecemasan, ketakutan dan kebimbangan. Adalah munasabah untuk Mahkamah Tinggi untuk memberikan ganti rugi am dan tambahan bagi tort gangguan seksual yang dibuktikan (lihat perenggan 78–79).]

Notes

For cases on libel, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan [2013] 4 SLR 545, HC (distd)

Appleton v Garrett [1996] PIQR P 1, QBD (refd)

Beckett v Walker [1985] CLY 129a (refd)

Burris v Azadani [1995] 4 All ER 802, CA (refd)

Clark v Canada [1994] 3 FC 323 (refd)

FH v McDougall 2008 SCC 53, SC (refd)

Farrell (formerly McLaughlin) v Secretary of State for Defence [1980] 1 WLR 172, HL (refd)

Hayes v Willoughby [2013] 1 WLR 935, SC (refd)

Hunter and others v Canary Wharf Ltd [1997] 2 All ER 426, HL (refd)

Khorasandjian v Bush [1993] QB 727, CA (refd)

Kuchenmeister v Home Office and another [1958] 1 QB 496, QBD (refd)

Lau Tat Wai v Yip Lai Kuen Joey [2013] 3 HKC 361 (refd)

Malcomson Nicholas Hugh Bertram & Anor v Naresh Kumar Mehta [2001] 4 SLR 454, HC (refd)

Malone v Laskey and another [1907] 2 KB 141, CA (refd)

Novotel Societe D' Investissements Et D' Exploitation Hoteliers & Anor v Pernas Hotel Chain (Selangor) Bhd [1987] 1 MLJ 210, SC (refd)

Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)

Pang Koi Fa v Lim Djoe Phing [1993] 3 SLR 317, HC (refd)

Patel v Patel [1988] 2 FLR 179, CA (refd)

Rookes v Barnard [1964] AC 1129, HL (refd)

Tee Yok Kiat v Pang Min Seng [2013] SGCA 9, CA (refd)

Thomas v News Group Newspaper Ltd [2002] EMLR 78, CA (refd)

W v Meah [1986] 1 All ER 935, QBD (refd)

Wilkinson v Downton [1897] 2 QB 57, QBD (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)

Employment Act 1955 s 2, Part XVA

Protection from Harassment Act 1997 [UK]

Protection of Freedoms Act 2012 [UK]

Appeal from: Civil Appeal No W-02(NCVC)(W)-2545–10 of 2012 (Court of Appeal, Putrajaya)

Fahri Azzat (Aisya Abdul Rahman and Rafeeza Hamdan with him) (Azzat & Izzat) for the appellant.
M David Morais (Leong Phaik Leng, Karyn Khooa and Tan Shang Neng with him) (Sreenevasan Young) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] The appellant and the respondent were employees of Lembaga Tabung Haji ('the

company'). The appellant was the general manager of the risk management department whilst the respondent held the position of senior manager in that department. The respondent being the subordinate of the appellant reported directly to him.

[2] On 29 July 2009, the respondent lodged a complaint ('the complaint') to the chief executive officer of the company complaining of sexual harassment by the appellant.

[3] As a result of the complaint, the company set up a committee of inquiry ('the committee'), which then conducted an inquiry from 1–16 September 2009. The committee found that there was insufficient evidence to warrant disciplinary action to be taken against the appellant. However, the human resources department of the company decided to issue a strong administrative reprimand to the appellant. The respondent applied for and was later transferred to the legal division of the company.

[4] Aggrieved by the complaint, which the appellant claimed to be defamatory of him, and had affected his reputation and standing as a Muslim, and as a member of the senior management of the company that led to his contract at the company not being renewed, the appellant lodged an official complaint to the company. He sought for disciplinary action to be taken against the respondent for lodging the complaint without any proof. Despite his request the company took no disciplinary action against the respondent.

[5] The appellant then requested the company to supply him with the respondent's complaint documents and the report of the committee. However the company only furnished the complaint documents.

[6] The respondent also never apologised to the appellant for the sexual harassment complaint made against him.

[7] On 9 December 2011, the appellant issued a writ against the respondent seeking, inter alia, a declaration that he had not sexually harassed the respondent and that he had been defamed by her. In addition to a public apology, the appellant sought general and aggravated damages against the respondent, interest, and costs.

[8] The respondent filed her defence and also a counterclaim against the appellant on 28 December 2011. In her defence the respondent particularised the sexual harassment as laid down at paras 27 and 28, of this judgment and further alleged that she had suffered under the appellant. She pleaded that the allegations of defamation of the appellant were untrue. The respondent also pleaded that her allegations were upheld by their employer and that a serious disciplinary warning was issued to the appellant pursuant to the complaint.

[9] The respondent counterclaimed for damages predicated on sexual harassment. She claimed for general, aggravated and exemplary damages. She relied largely on a psychiatrist's report to explain the repercussion of the harassment.

FINDINGS OF THE HIGH COURT

[10] On 24 September 2012, the High Court dismissed the appellant's claim and also entered judgment for the respondent on her counterclaim. The counterclaim as pleaded, laid down that she had suffered emotional and mental stress and trauma. As the finding of fact of the High Court of the sexual harassment allegation had been established, general and aggravated damages of RM100,000 and RM20,000 were respectively awarded for sufferings, which the High Court held was the cause of the respondent's major depression (p 92 CB). The learned judge, on the other hand failed to clarify her stance as regards the pleaded tort of sexual harassment, or upon what tort the decision was founded on.

[11] The appellant appealed to the Court of Appeal in a singular notice of appeal against the rejection of the appellant's main suit and for allowing the counter claim filed by the respondent. On 6 February 2013 the appeal was dismissed. The effect was that the whole decision of the High Court was affirmed. It is pertinent to observe that the Court of Appeal upheld the factual finding of the learned judge though the cause of action was founded on the tort of intentionally causing nervous shock.

[12] Dissatisfied with the decision of the Court of Appeal, the appellant applied for leave to the Federal Court, and on 30 May 2013 successfully obtained leave from us on the following question of law:

> Is there a valid cause of action for a civil claim on the grounds of sexual harassment under the existing laws of Malaysia?

[13] A perusal of the notice of appeal to the Federal Court filed by the appellant again showed that it was an appeal against the whole of the decision of the Court of Appeal that upheld the High Court's decision regarding the main suit and the counterclaim. Having traced the chronology and antecedent of the case, and having considered the submissions of parties, we then proceeded with the appeal, dealing simultaneously with the main suit and the counterclaim.

[14] Our main constraint was that the leave question concerned the tort of harassment, a tort that was not the basis of the Court of Appeal's decision, or stated to be so by the High Court.

[15] Due to the very nature of the leave question to be determined by us, much of the submissions of both parties were focused on the counterclaim.

THE APPELLANT'S SUBMISSION

[16] The appellant began by submitting that there is no civil cause of action of sexual harassment under the present Malaysian law. The tort of intentionally causing nervous shock found by the Court of Appeal too is not yet common law in Malaysia, and cannot be introduced through this case, as the respondent neither pleaded nor had successfully proven it at the trial.

[17] The appellant submitted that a victim of a tort of intentionally causing nervous shock may only avail herself to civil remedies if her case fulfills the ingredients of that tort.

[18] After that initial general introduction, the appellant zeroed in onto the issue of the tort of sexual harassment. It was highlighted that what constitutes as sexual harassment remains undefined under Malaysian law. The Malaysian Code of Practice on the Prevention and Education of Sexual Harassment in the Workplace 1999 ('1999 Practice Code') on the other hand is merely used as a guideline to Malaysian employers and is without any legal force. The recent amendment to the Malaysian Employment Act 1955 only imposes a duty on employers to adequately deal with sexual harassment complaints at their workplace.

[19] Learned counsel for the appellant contended that even if the respondent were to have a cause of action, she failed to establish the elements of sexual harassment, let alone the tort of intentionally causing nervous shock.

[20] It was further submitted that the respondent must prove her counterclaim based on her own evidence, and corroboration of her evidence could not come from the appellant. Learned counsel for the appellant submitted that the courts below therefore erred in finding that the respondent's evidence could be corroborated by the appellant's evidence and witnesses.

[21] It was submitted that as the appellant was the alleged harasser, while PW2 and PW4 were the appellant's subordinates and the respondent's colleagues at the material time, the High Court had also failed to warn itself of the dangers of accepting the respondent's uncorroborated evidence. In short, the evidential complaint of the appellant was that the allegations of the respondent were uncorroborated.

THE RESPONDENT'S SUBMISSION

[22] In reply, learned counsel for the respondent argued that while there is no express

legislative enactment on the tort of sexual harassment, there is recognition by the Government of Malaysia of sexual harassment as a prevalent

occurrence, which must be addressed and eradicated from the workplace. This recognition comes in the form of the 1999 Practice Code.

[23] While the 1999 Practice Code does not have the force of law, it invariably sets out the government's guidelines and public policy in relation to sexual harassment. It is recognised as a gender discrimination, which goes against the principle of equality of treatment in employment between genders.

[24] For purposes of this appeal, the respondent conceded that at common law there are two possible routes through which the tort covering harassment could be taken, namely the tort of intentionally causing nervous shock and the tort of harassment.

[25] The respondent rested her case on the tort of harassment which covers sexual harassment. The Court of Appeal on the other hand found that the appellant had committed the tort of intentionally causing nervous shock by willfully causing physical harm to the respondent.

OUR PRELIMINARY FINDING

[26] The statement of claim unfolds that the appellant sued the respondent for defamation arising from the respondent's complaint regarding his character in a letter dated 29 July 2009. This letter, to use the appellant's words in the statement of claim, was a sexual harassment complaint. In short, the terminology of sexual harassment was not an afterthought but had been alluded to right from the very beginning by the appellant himself.

[27] The complaints of the respondent alleged to be defamatory, as supplied in the statement of claim (from that letter of complaint) verbatim, are as follows:

(a) Dr. Ridzwan had on 19th July 2009 at 8.15 a.m. uttered a vulgar remark towards me at the office;

(b) Dr. Ridzwan is fond of making dirty jokes that are sex oriented in front of his subordinates without the slightest respect for his female subordinates;

(c) Dr. Ridzwan had been using dirty words in emails which I found very disturbing, unethical and intolerable;

(d) Dr. Ridzwan repeatedly offered me if I would be interested to be his second wife. His 'kidding' offerings were not funny at all ... I felt extremely disgusted by his 'offerings' belittled and most of all insulted and humiliated;

(e) Dr. Ridzwan had taken advantage of his position as a boss that he would simply say anything he wishes without considering the boundary and

others' feeling and perception ... he would not be bothered with the do's and don'ts and most of all the work ethics; and

(f) Dr. Ridzwan's immoral behavior has affected me psychologically.

[28] In her defence, the vulgar words and other harassing words uttered by the appellant were detailed out, inter alia:

(a) 'Fuck you';

(b) 'Kalau cari husband cari yang beragama, bertanggungjawab, macam I', 'You kena buat sembahyang istikharah dan kalau you mimpi, you akan berjimak dengan orang tu;

(c) 'Ingat tak seorang Cina masa di Bank dulu? Kalau you pergi meeting, you kena tebalkan muka, you kena ada strong 'ball'';

(d) 'Kalau you nak tahu 'benda' lelaki tu berfungsi ke tak ikut orang-orang tua, ikat 'benda' tu dekat tali. Tali tu sambungkan dengan buah kelapa. Kalau buah kelapa tu terangkat, maksudnya 'benda' tu 'good'. 'Sexual graph of a person, men after 50 is no use. Kalau 20 it shoot up. 30 graf turun. When 40, it shoots up again';

(e) 'F-U-C-K' (was the appellant's laptop password);

(f) 'ANOTHER SOB, TYPICAL HOMEBREED';

(g) 'I AM BEGINNING TO HATE VERY MUCH THESE HOMEBREED, WORST THAN KHINZIR';

(h) 'You nak kahwin dengan I tak, I banyak duit tau';

(i) 'Would you prefer married man'; and

(j) 'You ni selalu sangat sakit. You kena kahwin tau. You nak tak laki orang'.

[29] In the counterclaim, the respondent had explicitly pleaded the tort of sexual harassment by the appellant and had alluded to the above vulgar and demeaning remarks to support her case. In brief, the respondent pleaded that the sexual harassment had traumatised her emotionally and mentally.

[30] The High Court judge after meticulously sifting the evidence found that the respondent's various allegations set out in the letter of complaint, except the complaint about the emails, to be true. Pursuant to that factual finding the main suit founded on defamation was dismissed.

[31] The learned High Court judge thereafter procedurally dealt with the counter claim, and after going through the allegations point by point, found 'On the totality of the evidence, the … complaint had been proved on a balance of probabilities. 'The High Court also accepted the psychiatrist's ('DW1')

[2016] 4 MLJ 282 at 291

~~findings that the respondent suffered from maj~~or depression caused by the sexual harassment of the appellant. The learned judge thereafter awarded her a sum of RM100,000 as general damages and a sum of RM20,000 as aggravated and exemplary damages.

[32] Despite the methodical analysis of the case, an error was detected whence the learned judge failed to mention the cause of action relied upon by her, when allowing the counterclaim. Only at the Court of Appeal stage was the cause of action identified ie the tort of intentionally causing nervous shock, though not in accord with the pleadings. For the latter tort, the Court of Appeal in a large way, had relied on *Wilkinson v Downton* [1897] 2 QB 57 and *Clark v Canada* [1994] 3 FC 323.

[33] In *Wilkinson v Downton* the defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill. The court held that these facts constituted a good cause of action.

[34] *Clark v Canada* is more on point on the cause of action as introduced by the Court of Appeal. The facts are as follows. An action for damages was filed against the Crown by Clark, a former lady member of the Canadian Mounted Police, and alleged sexual and other harassment on the part of some of her male colleagues, causing her to suffer severe stress and depression and drove her to resign from the force. She claimed that she was wrongfully dismissed and that the actions of her colleagues and supervisors, amongst others had led to infliction of nervous shock. The court found for her.

[35] Whether the tort of intentionally causing nervous shock was correctly introduced by the Court of Appeal will be seen as we go along.

[36] We need also to highlight a few concessions made by parties, namely that in Malaysia the tort of sexual harassment at the time of filing of the action did not exist, nor any legislation had been promulgated on the law of sexual harassment prior to the Employment (Amendment) Act 2012 (Act A1419), which came into force on 1 April 2012. This Act included an amendment to include Part XVA into the Employment Act 1955 (Act 265). This amendment provided for the manner in which employers should deal with complaints of sexual harassment at the place of work ie it puts the employer to task. This amendment unfortunately did not address the rights and liabilities of the harasser and the victim.

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[37] Prior to the abovementioned amendment, the 1999 Practice Code was already in place. Its shortcoming was that it did not give rise to a cause of action for the victim against the harasser.

[38] The appellant also conceded that the court is not prevented from developing the law and introducing a law of tort where and when appropriate.

COURSE OF ACTION AND ANALYSIS

[39] After mulling over the matter, we arrived at a decision to undertake some judicial activism exercise and decide that it is timely to import the tort of harassment into our legal and judicial system, with sexual harassment being part of it.

[40] So, what should constitute definitive sexual harassment? Assistance may be sought from the 1999 Practice Code, in particular article 4, which describes sexual harassment in the following manner:

> any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment;
>
> (i) that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
>
> (ii) that might, on reasonable grounds be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has no direct link to her or his employment.

[41] According to the 1999 Practice Code, sexual harassment can be divided into two categories namely sexual coercion which is sexual harassment that results in some direct consequence to the victim's employment and sexual annoyance that is sexually related conduct that is offensive, hostile or intimidating to the recipient, which creates a bothersome working environment, which the recipient has to tolerate in order to continue working. Such conduct nevertheless need not be directly connected with any job benefits.

[42] Article 7 of the 1999 Practice Code provides that 'sexual harassments refer to sexual conduct which is unwanted and unwelcome to the recipient'. The 1999 Practice Code supplies examples of where harassment is likely to happen, and goes further to describe five possible forms of sexual harassment.

[43] Nevertheless, we must admit that the 1999 Practice Code merely represents a collective guideline on what sexual harassment is. Its aim is to provide guidelines to employers on the establishment of inhouse mechanisms

at the enterprise level to prevent and eradicate sexual harassment in the workplace. This Code does not provide any other avenue other than the workplace for the victim.

[44] As said above, at para 36, of this judgment until the Employment (Amendment) Act 2012 came into force on 1 April 2012, there were no statutory provisions at all on sexual harassment in Malaysia. An important change came about in the form of the Employment Act 1955, when the new Part XVA, which deals with sexual harassment in the workplace was included. The newly created portion of the Employment Act 1955 therefore is a significant aspect of legal reform aimed at addressing the calls for specific legislative intervention in dealing with sexual harassment.

[45] Section 2(g) of the Employment (Amendment) Act 2012 inserted a new definition of sexual harassment in s 2 of the Employment Act 1955, and it reads:

> sexual harassment means any unwanted conduct of a sexual nature, whether verbal, nonverbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.

[46] This definition satisfies the three main elements of sexual harassment namely:

(a) the occurrence of conduct that is sexual in nature;

(b) the conduct being unwanted; and

(c) the conduct is perceived as threatening the victim's ability to perform her job.

[47] It is evident that there has been no reported case pertaining to the Employment Act 1955 in our country where the individual victim has claimed civil remedies from an alleged perpetrator for sexual harassment. The striking feature of the 1999 Practice Code and the creation of Part XVA in the Employment Act 1955 has been that a victim is now entitled to lodge a complaint to the employer and to require the employer to investigate the complaint of sexual harassment. However, admittedly as said earlier, no civil cause of action per se for sexual harassment under the present Malaysian law, exists.

[48] Tort law in our country is still very much based on English common law principles (s 3(1) of the Civil Law Act 1956). Although the courts in Malaysia, as in Singapore are not bound by decisions of English Courts, decisions of the highest court in England are highly persuasive (*Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317).

[49] The law of tort, even though does provide protection to an individual in England, at the outset is very much property related; if one does not have a proprietary interest, say, a freehold or leasehold interest, then protection is not accorded (*Malone v Laskey and another* [1907] 2 KB 141). As seen from the perspective of case laws, overcoming that proprietorial hurdle is a major challenge in the development of the tort of harassment.

[50] In *Patel v Patel* [1988] 2 FLR 179, Waterhouse J when sitting as the second judge in the Court of Appeal had occasion to state that there was no tort of harassment in England then. A brief respite was seen when in *Khorasandjian v Bush* [1993] QB 727, by a majority, the Court of Appeal held that the daughter who held no proprietorial interest over the property was entitled to litigate in that case. There the daughter was deluged by harassing and pestering telephone calls (the primary complaint being harassment rather than private nuisance). Dillon LJ after referring to Waterhouse J of *Patel v Patel* (above) doubted that there was no tort of harassment. *Burris v Azadani* [1995] 4 All ER 802 later also doubted the position of Waterhouse J.

[51] The House of Lords in *Hunter and others v Canary Wharf Ltd* [1997] 2 All ER 426 (HL) unfortunately halted the development of *Khorasandjian v Bush*, though it did acknowledge that there was no reason why an intentional tort could not compensate for mere distress, inconvenience or discomfort, rather than insisting on proof of a physical or psychiatric injury.

[52] The uncertainty in England as regards the tort of harassment is rescued by the existence of English legislation in the like of the Protection from Harassment Act 1997 (providing protection from harassment and similar conduct) and the Protection of Freedoms Act 2012 (creating offences for stalking as distinct from harassment). Lord Hoffmann in *Hunter and others v Canary Wharf Ltd* pointed out that if not for these statutory protections for victims of harassment, the common law might have developed the tort of harassment.

[53] In Singapore, in the case of *Malcomson Nicholas Hugh Bertram & Anor v Naresh Kumar Mehta* [2001] 4 SLR 454 the plaintiff had filed an action against the defendant as he had been harassed and pestered, especially at his place of work. In that action the plaintiff prayed for damages and aninjunction against the defendant. Despite the defendant not having entered his defence, the learned judicial commissioner still had to overcome various legal obstacles before arriving at a decision. At that point of time (2001) there was no recognisable tort under which the plaintiff could have successfully sued the defendant. The plaintiff could not sue under trespass as there was no physical

contact and *Wilkinson v Downton* was found to be equally inapplicable. The plaintiff had not suffered any bodily harm or any psychiatric illness. The learned judicial commissioner also made a finding of fact that the tort of private nuisance was inapplicable in that case. The judicial commissioner could easily have taken the easy way out by dismissing the suit, but despite those constraints, with judicial justification introduced the new tort of intentional harassment. The learned judicial commissioner in the course of introducing the latter tort defined *harassment* to mean:

> ... a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature aswould cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person.

[54] Then came the case of *Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9, a Singapore Court of Appeal's case. Even though the Court of Appeal found for the plaintiff on the tort of intimidation, it also considered the tort of harassment. It acknowledged that *Malcomson* had extensively discussed the tort of harassment, and that tort had been compared and distinguished with the tort of intimidation thus recognizing that the tort of harassment was good law in Singapore. At paras 43–44, the Court of Appeal in the abovementioned *Tee Yok Kiat v Pang Min Seng* had said: '... we found that the tort of harassment would also have been made out on the evidence ... As both the torts of intimidation and harassment were made out on the evidence, we allowed the appeal in relation to the Blackmail claim'. We therefore are satisfied that the Court of Appeal recognised the existence of the tort of harassment in Singapore.

[55] The case of *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 threw a spanner into the spokes when it ruled that there was no such tort of harassment in existence in Singapore. It ruled that the Court of Appeal's treatment of *Malcomson* in *Tee Yok Kiat* was obiter. Regardless of the view held by *AXA Insurance* obviously it could not overrule *Malcomson* as both are High Court cases. Why it was necessary for *AXA Insurance* to discuss the tort of harassment and arrive at a finding, when it was not pleaded, is beyond us (and hence distinguishable with the appeal us). From a scrutiny of *Tee Yok Kiat* we fail to understand too how it was misread by *AXA Insurance*.

[56] Hong Kong, in line with the approaches taken by England and Singapore also opted to import the tort of harassment in *Lau Tat Wai v Yip Lai Kuen Joey* [2013] 3 HKC 361 Anthony Chan J, after finding the harasser liable for the tort of intimidation, took the extra step of recognising the tort of harassment by adopting the definition of *harassment* as propounded by the above Singapore's case of *Malcomson Nicholas Hugh Bertram & Anor v Naresh Kumar Mehta*.

[57] For our purpose, before defining the tortious phrase of *sexual harassment,* we need to know what *harassment* is in the first place. For brevity, when identifying the harasser or the victim, the pronouns *he*, *she* and *her,* apply to both gender whenever appropriate. Putting aside the statutory definition provided for in the Employment (Amendment) Act 2012 and in the Employment Act 1955 as discussed earlier, Lord Sumpton in *Hayes v Willoughby* [2013] 1 WLR 935 acknowledged that *harassment* is an 'ordinary English word with a well understood meaning'. Citing *Thomas v News Group Newspaper Ltd* [2002] EMLR 78 (at p 30), Lord Sumpton stated that harassment is, 'a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear or distress'. We certainly have no disagreement with such a definition.

[58] Taint further the persistent, and deliberate course of unreasonable and oppressive conduct with some constant and objectionable sexual hallmarks, a tort of sexual harassment would have been committed. Jack Lee Tsen-Ta in his paper 'Workplace Sexual Harassment in Singapore: The Legal Challenge, when referring to Louise Fitzgerald and Alayne Omerod's *Sexual*

Harassment in Academia and the Workplace, authored that sexual harassment involved, amongst others:

(a) sexualisation of a professional relationship;

(b) unwanted and unwelcome behavior both verbal and non-verbal in nature; and

(c) a continuum from sexist remarks to non-verbal seductive gestures to sexual assault.

[59] After taking into consideration the above cases, empirical studies, and our personal researches, the recognisable hallmarks of sexual harassment are that they are unwelcome, taking the form of verbal and even physical, which include sexual innuendos, comments and remarks, suggestive, obscene or insulting sounds, implied sexual threats, leering, oogling, displaying offensive pictures, making obscene gestures etc. These overtures all share similar traits, in that they all have the air of seediness and cause disturbance or annoyance to the victim (short of a recognised psychiatric illness or physical harm) (see 'The Case For legislating Harassment in Singapore' by Goh Yihan (2014) 26 SAcLJ).

[60] The Court of Appeal here (paras 25–26, 40 and 49 of its grounds of judgment) agreed that the vulgar and sexually explicit words complained of by the respondent clearly would be sexual harassment, emanating from verbal harassment as elucidated under the 1999 Practice Code. Without the need to

seek assistance from the latter Code, we on the other hand are satisfied that the lecherous behavior of the appellant would fall squarely under the definition adopted by Lord Sumpton in the earlier cited case of *Hayes v Willoughby* and the hallmarks of sexual harassment as alluded to at para 59 of this judgment.

[61] Instead of stopping short at the tort of harassment, the Court of Appeal proffered that, as the acts of sexual harassment were serious enough, and had caused adverse psychological effect to the respondent, those acts of the appellant would fall under the tort of intentionally causing nervous shock propounded in *Wilkinson v Downton*.

[62] We hold the view that even though a singular act is sufficient to establish a tort of intentionally causing nervous shock as introduced in *Wilkinson v Downton*, but being a more demanding tort, an aggrieved person must necessarily establish that she has suffered physical harm (*Halsbury's Laws of England* (4th Ed) at p 306 para 456).

[63] The psychiatrist ('DW1'), only saw the respondent three years after the incident and his report is silent on the physical harm aspect, despite seeing her four times. In fact exh D1 at p 333 of the record of appeal, Part C (Vol 1) in no uncertain terms reads, 'Physically she is normal'. Therefore on a balance of probability it cannot be said that the respondent has successfully established the tort of intentionally causing nervous shock.

[64] By taking that course of action the Court of Appeal thus had unwittingly missed the opportunity to discuss the applicability of the tort of harassment at the outset (based on the facts), despite this tort fitting the bill in the circumstances of the case.

[65] To reiterate, our introduction of the tort of harassment can be justified on the premise that:

(a) the tort of sexual harassment was pleaded

(b) it was ventilated at the High Court;

(c) the tort of intentionally causing nervous shock was never pleaded in the counterclaim;

(d) parties had no opportunity to submit or call witnesses to establish or disagree with this unsolicited tort;

(e) there was insufficient evidence or reason to introduce and establish the tort of intentionally causing nervous shock; there were sufficient reasons to import the tort of sexual harassment; and

(f) the evidence was more than ample to establish this tort.

OTHER ISSUES VENTILATED

Corroboration

[66] The appellant ventilated that corroboration is required, 'as a matter of practice for evidence of complainant in sexual cases and by accomplices in cases of sexual harassment (para 93 of the appellant's written submission)'. As the appellant has made mention of the need of corroboration we will now discuss whether corroboration is a legal requirement. We start by stating the obvious ie the standard of proof in civil cases has traditionally been on a balance of probability, a standard that is certainly lower than that of criminal cases; nowhere near that of proving a case beyond reasonable doubt.

[67] To allay any fear, we are constantly wary and alert of vindictive complaints and the debilitating effect such complaints has on a person, the family and the alleged perpetrator's social standing once they are made.

[68] Even Ashgar Ali Ali Mohamed, Muzaffar Shah Mallow and Farheen Baig Sardar Baig in *Sexual Harassment at Workplace in Malaysia (2011) MCLJ* did highlight the need for corroborative evidence in order to establish such tort. Regretfully, the writer somehow has missed the point that a harassed person, say a lady, does not file a complaint for the pleasure of it. By filing a complaint she equally suffers potential censure. An unsuccessful complaint, or eliciting disbelief by her employer, will inevitably expose her to public ostracisation, and may create great anxiety and discomfort at the work place for her.

[69] To demand corroboration, just because there exists some sexual flavor in the complaint will cause the harassed person to be, more often than not helpless, as most of the evidence will consist of the words of the harasser vis a vis the victim. And much of such leery harassment invariably takes place in private (*FH v McDougall* 2008 SCC 53).

[70] In our judicial system much deference is given to the ability of judges to scrutinise carefully the evidence before them and eventually arrive at a factual finding, but subject to the long-standing rule of the litigant establishing his case on the standard of balance of probability. The learned judge who is in an advantageous position, and has the audio visual superiority, will be arriving at a decision based on the facts adduced before him. In short, there is no hard and fast rule that in a tort of sexual harassment case there must be corroboration, though like in any civil case the rule of evidence must be stringently upheld.

Pleadings issue

[71] It is established law that parties are confined to their pleadings and courts are to decide on issues raised in them. The confinement of issues within the four corners of the pleadings, amongst others, help the court identify and adjudicate in an orderly fashion the matter before it, prevent surprises, and to inform parties in advance of the case they have to meet and thereafter deal with them accordingly (*Novotel Societe D' Investissements Et D' Exploitation Hoteliers & Anor v Pernas Hotel Chain (Selangor) Bhd* [1987] 1 MLJ 210; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; *Farrell (formerly McLaughlin) v Secretary of State for Defence* [1980] 1 WLR 172; *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293).

[72] The appellant took issue pertaining to the adequacy of the pleadings, submitting that no cause of action was pleaded.

[73] After perusing the pleadings before us we are in full agreement with the respondent that the cause of action of sexual harassment was adequately pleaded, supported further by the particulars of the harassment.

Entitlement to damages

[74] For purposes of this appeal, we shall only discuss the general and aggravated damages awarded by the High Court, which were subsequently affirmed by the Court of Appeal. Civil courts have at their disposal coercive powers, the main object being to redress harm and restore injured parties to their former position, if possible. General damages may be awarded for injuries that the law presumes to be a necessary result of the harm committed by the tortfeasor. Any pleaded and successfully proven damages may be awarded too eg medical expenses (categorised as special damages). The stage of classifying damages, based on the amount,

comes next. Nominal damages may be awarded where an aggrieved party proves that he has suffered from a tort actionable per se, particularly if he fails to show no loss. Such damages is given to vindicate the victim's rights, even if no pecuniary damage is suffered (*Kuchenmeister v Home Office and another* [1958] 1 QB 496 and *Beckett v Walker* [1985] CLY 129a).

[75] In appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in light of the motive or conduct of the tortfeasor (*Rookes v Barnard* [1964] AC 1129 (HL) at pp 1121–1123; *W v Meah* [1986] 1 All ER 935). As an analogy, in *Appleton v Garrett* [1996] PIQR P 1 aggravated damages were given 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 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.

[76] From the evidence led before the High Court, it was established that the respondent was an emotionally vulnerable person, in the sense that she appeared to be under some emotional pressure. She suffered migraine and pain in her leg, and she would be more susceptible to being adversely affected by the objectionable remarks made by the appellant. The appellant surely would know that the continuous vulgar and sexually explicit remarks would make the respondent feel extremely uncomfortable.

[77] Having perused the evidence, we see no reason to disturb the factual finding of the learned judge which led to the dismissal of the main suit. There was indeed ample evidence to show that the appellant had uttered vulgar and sexually explicit rude remarks, either addressed directly to the respondent or in her presence and knowing that she would hear it, justifying the complaint.

[78] We are also of the considered view that the decision by the High Court over the counterclaim must be affirmed but based on the tort of sexual harassment. The ingredients of sexual harassment are present in abundance, namely the existence of a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person (in this case the respondent), calculated to cause alarm, fear and distress to that person. This conduct is heavily spiced with sexual hallmarks as illustrated by the continuous leery and obscene verbal remarks uttered by the appellant, which culminated in the respondent displaying symptoms of emotional distress, annoyance and mental depression due to the alarm, fear and anxiety. On the other hand, we are not satisfied that her sufferings had attained the level of physical harm to qualify for the tort of intentionally causing nervous shock as decided by the Court of Appeal.

[79] In the circumstances of this case it was reasonable for the High Court to grant the general and aggravated damages for the proven tort of sexual harassment.

CONCLUSION

[80] Sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his or her mental and emotional wellbeing. Perpetrators who go unpunished, will

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continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment.

[81] We therefore find substance in the submission of learned counsel for the respondent and therefore dismiss the appellant's appeal with costs.

[82] With the tort of sexual harassment being freshly introduced into our legal and judicial system, we therefore refrain from answering the leave question.

[83] We order costs at RM20,000 as agreed by parties.

Appeal dismissed.
Reported by Afiq Mohamad

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