

Reforming the Common Law Tort of Harassment in Hong Kong

Section 1. Introduction

Harassment is common in Hong Kong and can take multiple forms, from nuisance calls to damages to property.¹ Take sexual harassment, another prevalent form of which, as an example. A survey by the Equal Opportunities Commission in 2021 reported that around 60% of the respondent have experienced workplace sexual harassment in the form of ‘sexually suggestive comments or jokes to third parties in front of the victim’, and around 15% of them have been repeatedly asked ‘out for a date regardless of [their] rejection’.² Meanwhile, one in six respondents have been sexually harassed online.³ Undoubtedly, harassment can range from one-off incidents to multiple repeated actions, and from offline to online.

Victims often experience a change in lifestyle and physical and mental hardships. An Australian survey conducted by Michele Pathé and Paul Mullen shows that more than half of the victims of stalking⁴ suffer from reduced social outings and attendances, continued fatigue, ‘chronic sleep disturbances’, ‘heightened anxiety levels’, and post-traumatic stress symptoms.⁵ Unfortunately, with the exception of sexual harassment,⁶ victims’ prospect in civil claim, particularly on the tort of harassment, is unclear in Hong Kong. Victims may not be remedied for the drastic disruptions to life resulting from harassments and have no legal recourse against ongoing harassments (when the conducts alleged do not meet criminal standards).

This essay advocates for a tort of harassment under statutory legislation. Section 2 evaluates the legal framework on protection from harassment in Hong Kong, including a common law tort of harassment. Section 3 explores problems in that

¹ Paul Harris S.C., Peter Duncan S.C. and Tony Williams, ‘Anti-Harassment Injunctions’ (*Hong Kong Lawyer*, January 2021) <<https://www.hk-lawyer.org/content/anti-harassment-injunctions>> accessed 4 December 2024

² Equal Opportunities Commission, ‘Survey on Sexual Harassment in Hong Kong 2021’ (Equal Opportunities Commission, n.d.) <<https://www.eoc.org.hk/compass/wp-content/uploads/2022/05/Territory-wide-Representative-Survey-on-SH-in-HK-2021-Infographic-EN.pdf>> accessed 4 December 2024

³ *ibid*

⁴ Cruttenden defines stalking is a ‘behaviour which subjects another to persistent conduct, whether active or passive, which taken together over a period of time amounts to harassment or pestering’ (T Lawson-Cruttenden, ‘Is There a Law against Stalking?’ [1996] NLJ 418). This definition was cited in Law Reform Commission of Hong Kong, ‘Report on Stalking’ (October 2000) para 1.1

⁵ M Pathé and P E Mullen, “The impact of stalkers on their victims” (1997) 170 *British Journal of Psychiatry* 12. This work was cited in Law Reform Commission of Hong Kong, ‘Report on Stalking’ (October 2000) para 1.50

⁶ s.76(1)(b), Sex Discrimination Ordinance (Cap. 480)

tort. Section 4 justifies a need to reform the tort of harassment. Section 5 reviews foreign laws and academic journals to suggest reforms. Section 6 concludes.

Section 2. Existing Framework on Protection from Harassment

Currently, no ‘blanket’ criminal offence exists to target harassment as a general phenomenon. Criminal liability arises only when other offences are committed in the course of harassment. For example, it is criminal intimidation⁷ if a harasser threatens a victim ‘with injury to the person, reputation or property of the victim’ with ‘an intent to alarm him’.⁸ Yet, it does not cover instances where the harasser does not make explicit threats, but annoys the victim via repeated actions such as sending gifts.⁹ Worse, the offence of ‘sending by post of any “obscene, immoral, indecent, offensive or libellous writing, picture or other thing”’ is not applicable as the ‘unsolicited gifts’ can be of an ordinary nature.¹⁰ Existing criminal offences cannot safeguard victims against a broad range of harassment activities.

Unfortunately, victims’ access to civil remedies is equally insufficient. Academic literature and cases have explored the shortcomings of major torts and statutes in addressing harassment behaviour:

(1) Assault and battery

Assault requires a harasser’s act to ‘put the victim in fear of apprehension of an immediate infliction of an unlawful physical contact’,¹¹ while a battery requires such an infliction to be actually made¹². Harassing acts without physical touch on victims, such as persistent stalking, are not tortious.¹³ Moreover, it is practically difficult for victims to establish other elements of the torts. For battery, a consent may be inferred when victims do not duly reject to physical touch.¹⁴ For assault, victims may not prove the harasser’s intent to induce fear on them.¹⁵

(2) Private nuisance

⁷ s.24, Crimes Ordinance (Cap. 200)

⁸ Law Reform Commission of Hong Kong, ‘Report on Stalking’ (October 2000) para 4.75

⁹ *ibid* para 4.77

¹⁰ *ibid* paras 4.71, 4.73

¹¹ *ibid* para 4.12

¹² *ibid* para 4.13

¹³ *ibid* paras 4.12-4.13

¹⁴ Martin Lishexian Lee, ‘The Need for a Tort of Harassment’ (2001) 26 *Alternative LJ* 119, 121

¹⁵ *ibid*

Victims often resort to this tort but to no avail. Harassment acts without affecting enjoyment of the land itself (such as online hate speech) do not constitute the tort, and victims with no right in the land cannot sue.¹⁶ In *Khorasandjian v Bush*,¹⁷ the UK Court of Appeal upheld the plaintiff's claim in private nuisance, where she was 'pestered and threatened by unwanted telephone calls'.¹⁸ The House of Lords overruled this decision in *Hunter v Canary Wharf Ltd*¹⁹ on the basis that she had no right in the property where the harassment occurred.²⁰

(3) Negligence and the tort of *Wilkinson v Downton*

A hurdle for victims resorting to both torts is the requirement that they must suffer from recognisable psychiatric illnesses.²¹ In reality, 'mere emotional distress or discomfort' are the most common responses to harassment behaviour.²²

(4) Civil liability under the Sex Discrimination Ordinance (Cap. 480)

Victims of sexual harassment may seek 'civil proceedings in like manner as any other claim in tort' if the act of harassment is unlawful under Section 3 or 4 of the Sex Discrimination Ordinance.²³ However, only harassment that occur in specific contexts, such as employment,²⁴ provision of education,²⁵ and offering goods and services,²⁶ are actionable. Also, only harassments targeting women, not men, are protected by this Ordinance.

To conclude, the existing legal framework does not afford sufficient protection to victims. Not only do existing routes fail to cover various harassment behaviour, but the legal requirements therein also (inadvertently) paralyse potential claims. It is against this background that a tort of harassment is contended in Hong Kong.

¹⁶ Law Reform Commission of Hong Kong (n 8) 4.6

¹⁷ [1993] QB 727, [1993] 3 WLR 476

¹⁸ Law Reform Commission of Hong Kong (n 16)

¹⁹ [1997] AC 655 (HL)

²⁰ Law Reform Commission of Hong Kong (n 16)

²¹ *Reilly v Merseyside Regional Health Authority* (1995) 6 Med LR 246 (for negligence); *O v Rhodes* [2015] UKSC 32 (for the tort of *Wilkinson v Downton*)

²² Martin Lishexian Lee (n 14) 122

²³ s.76, Sex Discrimination Ordinance (Cap. 480)

²⁴ s.23, Sex Discrimination Ordinance (Cap. 480)

²⁵ s.39, Sex Discrimination Ordinance (Cap. 480)

²⁶ s.40, Sex Discrimination Ordinance (Cap. 480)

The tort was first introduced to Hong Kong in *Lau Tat Wai v Yip Lai Kuen Joey*.²⁷ Since then, its elements have been developed in case laws, and were most recently summarised in the Court of Appeal (CA) in *Sir Elly Kadoorie & Sons Limited v Samantha Jane Bradley*.²⁸

- (1) the harasser, directly or through third parties, has, by a course of sufficiently repetitive, unreasonable and oppressive conduct, caused, and which he ought reasonably to know would cause, worry, alarm, emotional distress or annoyance to the victim;
- (2) the conduct complained of must, objectively, amount to harassment (in the ordinary sense of that word);
- (3) the harasser either intends to cause harm or injury to the victim by his harassing conduct, or is reckless as to whether the victim would suffer harm or injury as a result of the harassing conduct; and
- (4) to complete the tort, the victim must have suffered actual damage caused by the harassment. For this purpose, physical harm, including anxiety, distress, (a *fortiori*) recognised psychiatric illness, and financial loss would suffice.²⁹

While it is encouraging to observe a clearer judicial outline of the tort, there are pending issues as to its legal status and realm, calling for a reform.

Section 3. Problems in the Common Law Tort of Harassment

(1) Status of the tort

The premise that a tort of harassment exists under common law is controversial. Firstly, opponents argue that there is no tort when the plaintiff suffers only from emotional distress and not recognisable harm.³⁰ Secondly, a clear jurisprudence on the common law tort of harassment is absent, both in Hong Kong and overseas. In practice, the prospect of a claim based on the tort arbitrarily depends on judges'

²⁷ [2013] 3 HKC 361, [2013] HKCU 920

²⁸ *Sir Elly Kadoorie & Sons Limited (For and on behalf of itself, its current and former officers, employees and agents, including its legal representatives, Messrs Simmons & Simmons) v Samantha Jane Bradley* [2024] HKCA 747, [2024] HKCU 3386

²⁹ *ibid* [32] (Hon Chow JA)

³⁰ Simon Y. W. Shiu, 'Protection of Victims Harassed by Former Intimate Partners and Love Obsessionals in Hong Kong' (2016) 10 HKJLS 1, 5

favour. It also means parties may dispute the existence of the tort, unnecessarily extending litigation and making it less accessible to victims with no intention and resources to appeal to higher courts.

In Hong Kong, there are no authoritative judgements on the status of the tort. In *Chu Jor Wing v Hong Kong Police Force*,³¹ the CA ruled that a tort of harassment does not exist in Hong Kong. This suggests that, as of now, authorities in the CA are contradictory, and must be reconciled by the highest court if the tort is to gain a firm standing. However, considering judicial comments by the House of Lords and the UK Court of Appeal against the existence of the tort, it may refrain from establishing the tort.³² Jurisdictions such as Canada and Australia also denied the existence of a tort of harassment at common law.³³ Their approaches may further persuade Hong Kong's highest court against recognising this tort.

(2) Definition of harassment

***2.1 'Ordinary sense of that word'*³⁴**

When the tort of harassment was introduced in *Lau Tat Wai*, Anthony Chan J cited the Singaporean case of *Malcomson Bertram & Another v Naresh Mehta*³⁵ for the definition of harassment:

I shall take the term 'harassment' to mean a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person. This is *not intended to be an exhaustive definition of the term*...³⁶

Remarkably, this definition does not intend to capture all instances of harassment that can lead to a harassment claim. Yet, as the Hong Kong jurisprudence evolves, this has become the exhaustive framework to make a claim. In *Sir Elly Kadoorie*, Hon Chow JA concluded, 'in order to make out a cause of action in this tort, the

³¹ HCMP 1676/2002, [2002] HKCU 1660

³² Simon Y. W. Shiu (n 30) 9

³³ *ibid* 6

³⁴ *Sir Elly Kadoorie* (n 28) [32]

³⁵ [2001] 4 SLR 454

³⁶ *Malcomson* (n 35) 464F (Lee JC) (emphasis added)

victim of harassment has to show' the alleged act fits into this definition, among other elements.³⁷ Conduct falling short of any elements in this framework cannot make this tort, even if the definition itself does not cover all harassment acts.

Complicating the matter is the courts' failure to outline the scope of conduct which is considered harassment. In *X and Another v Z*,³⁸ Coleman J described harassment as 'an ordinary English word with a well understood meaning',³⁹ and that whether an act amounts to harassment involves 'an objective test, applied to the particular circumstances of the case'⁴⁰. This means an act is actionable harassment when an ordinary person would, in light of the context, consider it so.

The law is unsatisfactory in this regard. Firstly, it is difficult to decide whether an act objectively amounts to harassment, especially in borderline cases where even opinions between ordinary men may divide. For instance, if an employer demands an employee to work overtime repeatedly (knowing the latter would be stressed), it is arguable that this series of request is unreasonable unless compelling business needs exist, yet reasonable bystanders can also opine that employers are entitled to manage their workforces flexibly.

Secondly, alleged acts which are objectively considered harassment may be barred from constituting a tort because they fall short of the definition. It is recognised that the criterion of repetitiveness helps exclude individual harassments which the law may not intend to cover.⁴¹ Yet, one-off harassments may also produce adverse mental impacts that warrant damages. An example is sexual harassment, a single occurrence of which will suffice for civil liability under the Sex Discrimination Ordinance.⁴² Besides, victims of deepfake materials are heavily distressed by such contents and the damages to reputation they may bring.⁴³ The tort of harassment shall cater these occasional harassments of a non-sexual nature, with impacts on victims' mental wellbeing comparable to that caused by repetitive harassments.

³⁷ *Sir Elly Kadoorie* (n 28) [32] (Hon Chow JA)

³⁸ [2020] HKCFI 826, [2020] HKCU 1959

³⁹ *ibid* [14] (Coleman J)

⁴⁰ *ibid* [15] (Coleman J)

⁴¹ J Soon, 'A comparative analysis of legislative protection from harassment: a view from Singapore' (2022) *Oxford University Commonwealth Law Journal* 22(2) 177, 189-90

⁴² Equal Opportunities Commission, 'Learn The Law, Know Your Rights: Understanding Sexual Harassment' (2021) <<https://www.eoc.org.hk/eoc/upload/userfiles/file/leaflets/SH-Booklet-E.pdf>> accessed 4 January 2025, 23

⁴³ Don Philmlee, "Practice Innovations: Seeing is no longer believing – the rise of deepfakes" (*Thomas Reuters*, 18 July 2023) <<https://www.thomsonreuters.com/en-us/posts/technology/practice-innovations-deepfakes/>> accessed 4 January 2025

2.2 Requirements of Repetitiveness and Oppression

A related problem is the ambiguous requirement of repetitiveness and oppression. Courts have not explained how each limb can be satisfied. While the alleged acts must be ‘sufficiently’ repetitive, it is unclear how frequently they must be carried out to be ‘sufficient’. In *Cheung Ping Sum v Wong Chi Hang*,⁴⁴ for example, the judge thought it uncertain whether the defendant’s one-off act of cutting off the plaintiff’s water and electricity supply, resulting in continued discomfort, would be a sufficiently repetitive harassment.⁴⁵ Without clearer standards, the tort will be enforced arbitrarily.

Similarly, in determining whether an act is oppressive, the court should evaluate whether in the context ‘the conduct has crossed the boundary from the regrettable to the unacceptable, or from the unattractive to the oppressive’.⁴⁶ This exercise is inevitably unclear. More importantly, courts may have placed themselves into an unhelpful struggle as the elements of unreasonableness and oppressiveness were absent in the very definition of harassment in *Lau Tat Wai*.

(3) Personal Qualities of the Victim

In *Lau Tat Wai*, Anthony Chan J acknowledged that people with different personal qualities may react differently to the same harassment and that the harasser must ‘take the victim as he finds him’.⁴⁷ The court must adopt the victims’ subjective emotional reactions in deciding whether the requisite injury has been caused.⁴⁸

Two problems are presented in this formulation. Firstly, this may contradict with subsequent jurisprudence (discussed above) that the alleged act must objectively amount to harassment, that it must trigger emotional distress in an ordinary man but not only the vulnerable victim. Also, this allows victims to sue even if the defendant cannot reasonably foresee their individual qualities and the emotional

⁴⁴ [2018] HKCU 207

⁴⁵ *ibid* [34]

⁴⁶ *X and Another v Z* (n 38) [14] (Coleman J)

⁴⁷ *Lau Tat Wai* (n 27) [66] (Anthony Chan J)

⁴⁸ *J Soon* (n 41) 187-88

distress his/her acts may trigger on them.⁴⁹ This will ‘encourage lower tolerance of the vicissitudes of life, potentially opening the floodgates to litigation’.⁵⁰

Section 4. Justifications for Reform

The case for reforming the tort is strong. Harassment invokes adverse impacts on victims, but the existing legal framework has left them under-aided (see Sections 1 and 2). This favours a tort of harassment to be preserved and improved, more than abolished, despite its shortcomings (see Section 3). This Section examines main criticisms against this tort to identify how it shall be reformed.

Firstly, some concern that anti-harassment laws may jeopardise press freedom.⁵¹ This tension is shown in *Secretary for Justice v Persons Unlawfully and Wilfully Conducting etc.*,⁵² where the Hong Kong Journalistic Association contended that an injunction prohibiting harassment against ‘Police Officers and/or their spouses and/or their respective family members’⁵³ restricts ‘lawful journalistic activity’ by discouraging journalists to conduct persistent yet unwelcoming investigations on others, which would likely constitute harassment.⁵⁴ Similarly, it is argued that an ‘expanded liability for harassment’ may discourage the public from providing ‘vigorous criticism’ online, harming ‘free expression of opinion’.⁵⁵

In response, I adopt Priel’s viewpoint that the tort of harassment, as are other torts such as defamation, limits freedom to reduce ‘negative side-effects’ (harassment acts carried out on victims) resulted from the irresponsible exercises of such.⁵⁶ It is the nature of the law of tort that some ‘desirable activities’ are compromised, but that does not justify the abolition of tort liability.⁵⁷

⁴⁹ *ibid* 188

⁵⁰ *ibid*

⁵¹ Legislative Council Panel on Constitutional Affairs, ‘Background brief prepared by the Legislative Council Secretariat for the meeting on 19 December 2011: Law Reform Commission’s Report on Stalking’ (LC Paper No. CB(2)605/11-12(05), December 2011) para 11

⁵² *Secretary for Justice and Another v Persons Unlawfully and Wilfully Conducting Themselves in Any of the Acts Prohibited under Paragraph 1(A), (B) or (C) of the Indorsement of Claim* [2019] HKCFI 2773, [2019] HKCU 4211

⁵³ *ibid* 4 (Coleman J)

⁵⁴ *ibid* 53-54 (Coleman J)

⁵⁵ Dan Priel, ‘“That Is Not How the Common Law Works”: Paths to Tort Liability for Harassment’ (2020) 52 *Ottawa L Rev* 87, 100

⁵⁶ *ibid*

⁵⁷ *ibid*

This essay further submits that the dilemma between suppressing harassment and preserving freedom calls for a reform of the tort to ensure that the correct balance is struck. Since this involves public interest, it is preferable to establish the tort under a statutory regime, such that the legislature may formulate and review that balance according to public opinion. In fact, in the context of criminal stalking, the HKSAR Government had taken into account potential impacts of the criminal offence on freedom of expression and commissioned the Centre for Comparative and Public Law (CCPL) to research on the matter for the Legislative Council's consideration.⁵⁸ The legislature is at a more resourceful and informed position to determine the scope of protection of the tort.

Secondly, since courts are entitled to grant injunctions to protect plaintiffs against annoying behaviour by defendants without establishing a tort,⁵⁹ some argue that courts shall refrain from expanding the law of tort into a controversial area.

In response, injunction is not the only remedy that claimants may seek. This essay advocates a reform to remedy victims of one-off harassments (see Section 3(2)), where the conduct often ceases immediately. It is also common for victims to take positive actions to escape from unbearable persistent harassment. For example, in *Kwong Yiu Keung Stanley and Anor v Chiu Sin Shum and Anor*,⁶⁰ the defendant family who had been subject to constant harassment from their neighbours moved out to escape from the stressful environment.⁶¹ In both cases the function of an injunction is diminished. Yet, for the court to award other damages a tort must be established, justifying the need for a reformed tort of harassment.

Section 5. Proposed Reforms

This Section compares civil liability of harassment in overseas jurisdictions and suggests how the tort of harassment shall be reformed in Hong Kong to address the considerations in Sections 3 and 4. In doing so, this essay is helpfully assisted by the compilation of relevant laws overseas by the Legislative Council,⁶² among other academic journals and secondary sources.

⁵⁸ Legislative Council Panel on Constitutional Affairs, 'Overseas Experience in implementing Anti-stalking Legislation' (LC Paper No. CB(2)471/13-14(03), December 2013) Introduction and para 3

⁵⁹ *Pong Seong Teresa & Ors v Chan Norman & Anor* [2014] 6 HKC 515 [84] (Linda Chan SC)

⁶⁰ [2021] HKDC 158, [2021] HKCU 548

⁶¹ *ibid* [182] (Andrew Li J)

⁶² Legislative Council Panel on Constitutional Affairs (n 58) Annex B

(1) Statutory regime for the common law tort

This essay advocates that legislative intervention is preferred (see Section 4). A statutory regime establishing a tort of harassment provides it a definite standing, addressing the uncertainty regarding its existence at common law.

This approach is adopted in overseas jurisdictions. Notably in **Singapore**, where a common law tort of harassment had been developed in *Malcomson* and Hong Kong's jurisprudence is enlightened by, abolished the tort with the Protection of Harassment Act after *Malcomson* was overruled.⁶³ In **the UK**, the Protection from Harassment Act 1997 recognised the tort of harassment and relieved courts from the struggle of reframing the common law to that end.⁶⁴ Their experiences suggest that legislation is a feasible solution to the uncertainties in common law. Besides, anti-stalking legislation is in force in major common law jurisdictions such as **the US, Canada and Australia**.⁶⁵

(2) Elements of the tort

2.1 Precision of actionable conduct

Given the challenges the tort of harassment may pose to individual freedoms, the scope of behaviour constituting harassment for the purpose of the tort should be precisely defined but not merely understood in the 'ordinary sense of that word'. There are four underlying motives. Firstly, it deters the public from engaging with acts which, in ordinary people's view, are not clear-cut harassments.⁶⁶ Defendants cannot defend misconduct by the fact that they do not subjectively perceive it as harassment. Secondly, defendants' freedoms are protected as they are less likely considered harassing the victims if the act concerned is not an actionable conduct. Thirdly, linking utility of the tort with specific conduct prompts the legislature to review the statutory regime regularly and include new harassment behaviour that require timely redress as they emerge. Fourthly, clearer laws 'encourage victims to lodge formal complaints'.⁶⁷

⁶³ J Soon (n 41) 178

⁶⁴ *Hunter v Canary Wharf Ltd* (n 19) 692 (Lord Goff)

⁶⁵ Law Reform Commission of Hong Kong (n 8) paras 5.1, 5.2 (Australia), 5.23 (Canada), 5.58 (The US)

⁶⁶ J Soon (n 41) 186

⁶⁷ Simon Y. W. Shiu (n 30) 12

This approach has received overseas support. Prohibited acts of harassment are defined in the Protection from Harassment Act 1997 in **the UK** (for the offence of stalking), the Harassment Act 1997 in **New Zealand** and the Protection from Harassment Act 2010 in **South Africa**, among others.⁶⁸ Common prohibited acts include following the victim,⁶⁹ making contacts with the victim⁷⁰ and loitering (near the victim's usual places of appearance)⁷¹. The CCPL evaluated overseas legislations and proposed four categories of prohibited acts in criminal stalking,⁷² which may serve as a starting point to this reform. More research should be done to understand the landscape of harassment in Hong Kong⁷³ and develop specific prohibited acts accordingly.

This essay, meanwhile, appreciates the flexibility of the current 'broad definition' approach to address the diverse forms of harassment. An express list of conduct constituting harassment is also unavailable in the Protection from Harassment Act 1997 in **the UK**,⁷⁴ and the common law tort of harassment in **the US**⁷⁵. To retain this adaptability, the law may provide a separate ground to sue in harassment even if the conduct is not expressly prohibited but has induced the required emotional distress to victims. Inspiration is drawn from the Harassment Act 1997 in **New Zealand** which, in its list of specified acts, include both explicit conduct such as loitering and generally any act that 'causes that person (person A) to fear for his or her safety'.⁷⁶ Hong Kong can also include 'acts that cause worry, emotional distress or annoyance' along its list of actionable conduct.

2.2 Repetitiveness and oppression

Despite uncertainties about the repetitiveness and oppression requirements, this essay proposes to preserve the elements. Principally, the proposed reforms aim to widen victims' remedies, such as injunctions (for repeated acts) and damages (for

⁶⁸ CCPL, 'Study on the Experience of Overseas Jurisdictions in Implementing Anti-Stalking Legislation: Final Report' (October 2013) para 11

⁶⁹ s.2A(3)(a), Protection from Harassment Act 1997; s.4(1)(b), Harassment Act 1997; s.1(1)(a)(i), Protection from Harassment Act 2010 (as summarised in n 62)

⁷⁰ s.2A(3)(b), Protection from Harassment Act 1997; s.4(1)(d), Harassment Act 1997; s.1(1)(a)(ii), Protection from Harassment Act 2010 (as summarised in n 62)

⁷¹ s.2A(3)(e), Protection from Harassment Act 1997; s.4(1)(a), Harassment Act 1997; s.1(1)(a)(i), Protection from Harassment Act 2010 (as summarised in n 62)

⁷² Legislative Council Panel on Constitutional Affairs (n 57) para 21

⁷³ Simon Y. W. Shiu (n 30) 17

⁷⁴ CCPL (n 68) para 12

⁷⁵ s.46, Second Reinstatement of Torts (1966) (cited in Martin Lishexian Lee (n 14) 119)

⁷⁶ s.4(1), Harassment Act 1997 (as summarized in n 62)

one-off disturbances), against harassments. Thus, this essay supports the current threshold of emotional injury, while elements of the tort must effectively exclude the vicissitudes of life to avoid floodgate of litigation.

Repetitiveness shall not be an independent element but only a factor informing the wider considerations of unreasonableness and oppression. This allows victims of one-off harassments to seek remedies, while limiting such claims to only those that unreasonably oppress victims' way of life. Inspired by jurisprudence in **the US** that 'extremely outrageous' acts can suggest defendants' intention to harm the victim,⁷⁷ this essay contends that the more repetitive an alleged act of harassment, the more oppressive it usually is (subject to counter arguments in the facts), and since this can suggest the defendant's intention, it is less likely a misfortune that cannot be deterred by damages or prevented by injunctions.

Admittedly, repetitiveness is an integral part to civil claims against harassments in jurisdictions such as **the UK** and **New Zealand**.⁷⁸ Yet, it is (partially) absent in places with more recent legislations. For instance, there is no express requirement of repetitiveness in **South Africa's** Protection from Harassment Act 2010⁷⁹ and Section 4 of the Protection of Harassment Act in **Singapore**⁸⁰. This suggests that repetitiveness is not as essential to the tort as is traditionally viewed.

This essay submits that contrary experiences in the UK and New Zealand are not fatal to the proposed reform. In both jurisdictions, the requirement for a course of conduct is defined in the form of minimum required frequency (see below), whilst the proposed reform concerns the degree of frequency with which an act is carried out such that it is considered unreasonable and oppressive. The proposed reform aligns more with the approach currently adopted by Hong Kong courts.

Alternatively, if Hong Kong retains repetitiveness as an *absolute* requirement, the frequency should be clearly defined. This helps victims evaluate the prospect of their claim given their unfamiliarity about the law.⁸¹ **The UK** defined a course of conduct as 'conduct on at least two occasions'.⁸² **New Zealand** requires an act to

⁷⁷ Martin Lishexian Lee (n 14) 120-21

⁷⁸ J Soon (n 41) 190

⁷⁹ s.1(1), Protection from Harassment Act 2010 (as summarised in n 62)

⁸⁰ J Soon (n 41) 189

⁸¹ Simon Y. W. Shiu (n 30) 12

⁸² s.7(3)(a), Protection from Harassment Act 1997 (as summarised in n 62)

be done ‘on at least 2 separate occasions within a period of 12 months’.⁸³ For the same purpose, Hong Kong may detail the requirements of unreasonableness and oppression by listing relevant factors in a non-exhaustive list.

2.3 Personal Qualities of the Victim

This essay adopts Soon’s view, albeit in the context of reforming anti-harassment legislation in Singapore, that relevant laws should recognise victim’s subjective, unique reaction to an act of harassment (due to personal vulnerability, etc.) while ensuring the reaction is objectively reasonable.⁸⁴ Soon proposed a two-stage test that involves, firstly, identifying the victim’s reaction to an act and the underlying ‘unique sensitivities’ and, secondly, determining whether a reasonable man with such sensitivities would react similarly.⁸⁵

This approach has been embodied in the legislation in **New Zealand**, with which reforms in this essay share some resemblance. There the alleged act of harassment (outside the list of specified acts) must ‘cause a reasonable person in person A’s particular circumstances to fear for his or her safety’,⁸⁶ giving due regard to both victims’ individual qualities and the need to limit claims to those with reasonable emotional reactions.

(3) Defences

Concerns about the tort’s implications on freedom of expression justify the need for defences to protect legitimate interests associated with acts causing inevitable disturbances to others, such as journalistic activities (see Section 4).

The Law Reform Commission (LRC) Report on Stalking in 2000 and the CCPL Study in 2013, upon consulting overseas anti-harassment legislations, have both recommended defences to the tort.⁸⁷ However, LRC proposed a general defence of ‘reasonable pursuit’ while CCPL backed a specific defence for ‘news and protest activities’ to safeguard press freedom.⁸⁸ Since both reports were published

⁸³ s.3(1), Harassment Act 1997 (as summarised in n 62)

⁸⁴ J Soon (n 41) 188

⁸⁵ J Soon (n 41) 187

⁸⁶ s.4(1)(f), Harassment Act 1997 (as summarised in n 62)

⁸⁷ Law Reform Commission of Hong Kong (n 8) para 7.1-7.72; CCPL (n 68) para 1198

⁸⁸ Legislative Council Panel on Constitutional Affairs (n 58) para 25

more than a decade ago, this essay proposes that the legislature revisit this issue and consult stakeholders on the preferred form of defences.

Section 6. Conclusion

In *Lau Tat Wai* Anthony Chan J described the tort of harassment as a response to ‘protect the people of Hong Kong who live in a small place and in a world where technological advances occur in leaps and bounds’.⁸⁹ This essay, while concurring that harassment is prevalent in Hong Kong and exacerbated by the application of online platforms and artificial intelligence, discusses weaknesses of existing legal framework, including the tort of harassment, in addressing these challenges.

Considering such weaknesses, and criticisms against the tort, this essay supports incorporating the tort in a statutory regime to remove doubts on its common law existence. While a low threshold of emotional injury makes the tort accessible to more victims, the requirement for it to be reasonable in light of victims’ unique qualities, combined with clearly defined elements of the tort including prohibited conduct and oppressiveness, will effectively distinguish actionable claims from mere vicissitudes of life. Defences should also be devised to safeguard legitimate freedoms and activities. The reforms will provide fuller protection to victims of distressing behaviour in this increasingly boundless world.

⁸⁹ *Lau Tat Wai* (n 27) [59] (Anthony Chan J)