Entry No 24

12th LAW REFORM ESSAY COMPETITION 2025

SUBMISSION

A. Introduction

This essay seeks to discuss potential reforms in the common law tort of harassment ("**common law harassment**") in Hong Kong. Referring to existing case law, authorities from other jurisdictions, and expert experience. This essay holds the view that there should be reforms to common law harassment as follows:

(1) The common law harassment should be abolished, and the tort of harassment should be statutory. This is due to the confusing *status quo* of common law harassment in Hong Kong and in other common law jurisdictions.
(2) Another tort should be created in statute to address intrusion of seclusion, which addresses a lacuna arising from the statutory provisions relating to the tort of harassment.

B. The Tort of Harassment Should be Statutory

B.1 Current Position in Hong Kong

Hong Kong does not have any statutory provisions providing for civil liability for harassment. Therefore, the tort of harassment has been developed in common law. Most case law in Hong Kong suggests that there is a tort of harassment in Hong Kong. However, there is no authoritative position so far. Hong Kong case law is divided as to whether a common law harassment exists.

On one hand, most recent cases recognize a common law harassment:

(1) In *Wong Wai Hing v Hui Wei Lee*, **CACV 19/2003**, A Cheung J (as he then was) said that "it is arguable that a tort of harassment *per se*, or as part of a

tort of intentional (or reckless infliction of injury (physical or mental), exists in common law."

(2) In *Lau Tat Wai v Yip Lai Kuen Joey* **[2013] HKCFI 639** ("***Lau***"), the Hong Kong Court of First Instance ("**HKCFI"**) said that "it was time for Hong Kong to recognize the tort of harassment." This was the first case to confirm the tort of harassment.

(3) The position in the *Lau*[1] was subsequently followed in *Sir Elly Kadoorie & Sons Ltd v Samantha Jane Bradley* **[2024] HKCA 747** ("***SEKSL***")**.** The defendant was a former employee of the plaintiff company, and she sent 500 emails containing hostile accusations against the plaintiff company and affiliated persons. Chow JA formulated four elements: (1) *sufficiently repetitive, unreasonable, and oppressive conduct,* (2) conduct amounts to harassment, (3) intention or recklessness as to harm or injury, and (4) actual damage.

On the other hand, two cases dismissed common law harassment in Hong Kong :

(1) In *朱祖永* ***v*** *香港警務處*, **HCMP 1676/2022,** the Hong Kong Court of Appeal ("**HKCA**") said in para. 22 that common law harassment does not exist.

(2) In *Pong Seong Teresa and Others v Chan Norman* **[2014] HKCFI 1480 ("*Norman*")**, the HKCFI doubted the tort of harassment. In para. 59, the

[1] [2013] HKCFI 639

learned judge considered the ruling in *朱祖永*[2] as correct. Therefore, the CFI held that there is no tort of harassment at common law.

While *SEKSL*[3] provides the elements of common law harassment , it is the only HKCA case that recognizes the tort of harassment in Hong Kong. On the other hand, there is another HKCA case that doubted common law harassment . These cases illustrate the muddled position towards the tort of harassment in Hong Kong. Save for the previously mentioned cases that dismiss the tort of harassment, all cases after *Lau*[4] held that there is a common law of harassment.

B.2 Reliance on the common law of other jurisdictions

It is submitted that the common law of other jurisdictions has provided little guidance to the Courts of Hong Kong. In Australia and Canada, it is unclear as to whether there is common law harassment. Whereas, in England and Singapore, harassment is a statutory tort under the *Protection from Harassment Act 1997* ("**UKPHA**") and *Protection from Harassment Act* 2014 ("**SGPHA**") respectively. However, before their enactment, the common law was in a muddled state.

Australia

At present there isn't common law harassment on a federal and state level.[5] Some cases suggest that there may be common law harassment . In *Australian Broadcasting Corporation v Lenah Game Meats Pty* **(2001) 208 CLR 199** ("*Lenah*"),

[2]HCMP 1676/2022
[3][2024] HKCA 747
[4][2013] HKCFI 639
[5]15.12, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (30 March 2014) https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-dp-80/ accessed 4 Jan 2023

at [123], the Court opened the door for the development of a common law harassment.[6] However, according to Professor Gligorijevic, some courts have interpreted *Lenah* as an authority dismissing a common law privacy tort.[7] While the learned author disagreed with such a restrictive interpretation, she also noted that there is a large number of Australian authorities that doubted the common law harassment.[8]

On a state level, the Queensland District Court recognized an action for a right to privacy. In *Grosse v Purvis* [2003] QDC 321, the defendant continuously and intentionally stalked and harassed the plaintiff. Here, the Queensland District Court, considering *Lenah*[9] at [448]-[451], was open to the possibility of a separate common law harassment, but did not ponder on the question of whether there was a distinct common law harassment.

Canada

Most provincial courts in Canada have held that harassment *per se* is not actionable in tort law. However, there are interesting developments in certain provinces:

(1) **Ontario.** In *Merrifield v Canada (Attorney General)*, **2019 ONCA 205** ("*Merrifield*"), the Ontario Court of Appeal said, at [36], that there was no common law harassment in Canada. The Court of Appeal went on to say, at

[6]Also 15.13, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (30 March 2014) https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-dp-80/ accessed 4 Jan 2023
[7] Gligorijevic J, "A Common Law Tort of Interference with Privacy for Australia: Reaffirming ABC v Lenah Game Meats" [2021] University of New South Wales Law Journal
[8] Gligorijevic J, "A Common Law Tort of Interference with Privacy for Australia: Reaffirming ABC v Lenah Game Meats" [2021] University of New South Wales Law Journal
[9](2001) 208 CLR 199

[43], there is no reason to recognize the common law harassment in Ontario. However, in *Caplan v Atas,* **2021 ONSC 670**, the Ontario Superior Court of Justice recognized, at [169], the tort of internet harassment in Ontario.

(2) **British Columbia.** In *Ilic v British Columbia (Justice),* **2023 BCSC 167,** the Supreme Court of British Columbia, at [196], followed the position in *Merrifield*[10] and held that the common law harassment does not exist.

(3) Manitoba. In *Galton Corporation v. Riley*, **2023 MBKB 73,** the Court of King Bench in Manitoba, at [34], and common law harassment does not exist.

(4) Alberta. In *Alberta Health Services v Johnston***, 2023 ABKB 209**, the Court of King Bench in Alberta, at [108], recognized common law harassment.

Like their Australian, Singaporean, Hong Kong, and English counterparts, Canadian authorities provide unclear guidance. The position taken by most courts in Canada is that there isn't common law harassment, save for the King's Bench in Alberta. The recognition of the common law harassment in Alberta was a recent development, and there is little case law that provides guidance for the common law in Hong Kong.

England

These English cases were considered in Hong Kong case law, and are worthy of discussion:

[10][2019] ONCA 205

(1) In *Patel v Patel* [1998] 2 FLR 179, upon a dispute between the parties, the defendant harassed the plaintiff by repetitive telephone calls and visits to the plaintiff's home but did not trespass on the plaintiff's property or the person. The Court of Appeal held that there was not a common law harassment in England.

(2) In *Khorasandjian v Bush* **[1993] QB 727** ("*Khorasandjian*"), the plaintiff and defendant were formerly friends, whose relationship broke down. The defendant was unable to accept the breakdown of their relationship and, therefore proceeded to make repetitive phone calls. Dillion LJ doubted the correctness of Waterhouse J's statement in *Patel*, where he refused to concur with the general dictum that there is no tort of harassment. This case concerned harassment by abusive telephone calls.

(3) In *Hunter v Canary Wharf* **[1997] AC 655** ("***Hunter***"), p.691-692, Lord Goff commented that developing the tort of harassment through the tort of nuisance was only effective in addressing harassment in one's home, and considered this as an unsatisfactory manner to develop the law. As the case was decided after the enactment of the *UKPHA*, Lord Goff subsequently stated to the effect that there was no need to consider if there was common law harassment. Similarly, Lord Hoffman said at 707 that the law of harassment is statutory and that it is unnecessary to consider the development of the common law.

Therefore, a liberal summary of the English common law harassment before the *UKPHA* can be described as muddled at best. A more conservative summary of the English common law harassment is that there was no common law harassment in

England. In *McBride and Bagshaw Tort Law, 6th Edition*, the learned authors on p. 553 said:

> "[Prior to the enactment of the *Protection from Harassment Act* in 19970, it was not a tort in England – of and in itself – to harass someone else. Of course, someone who harassed someone else might commit another tort in the course of so doing….. But harassment *per se* did not amount to a tort."
>
> (emphasis added)

Similarly, in *Wong v Parkside Health NHS Trust* **[2003] 3 All ER 932**, Lady Hale said, at [29] there isn't a general tort of harassment at common law. She referred to *Hunter*[11], where Lord Goff and Lord Hoffman said to the effect, at 691-692 and 707 respectively, to support the proposition that the common law has not created a tort of harassment, and this should be left to Parliament.

Lastly, in *Norman*[12], it was observed, at [53][13]:

> "..... as far as *English authorities* are concerned, I do not think that the position whether there is a tort of harassment at common law is as clear as Mr. Fong suggests.."
>
> (emphasis added)

[11][1997] AC 655
[12][2014] HKCFI 1480
[13][2014] HKCFI 1480

Singapore

In *Lau*[14] the HKCFI heavily relied upon *Malcomson v Metha* **[2001] 4 SGHC 309** ("***Malcomson***") to conclude that there was common law harassment. In *Malcomson*[15], a former employee of a company was disgruntled over the termination of his employment sending several emails to his former employer to get his job back. Referring to English case law, Lee JC recognized, at para. 57, the tort of harassment in Singapore.

Lau[16] was decided months before *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* **[2013] SGHC 158** ("***Natesan***"), where Choo J doubted common law harassment. The defendant persistently sent threatening emails and phone calls to the plaintiff's employees and lawyers. Choo J remarked, at [8], that *Malcomson*[17] could not have recognized common law harassment because there were no preceding case law authorities. Choo J referred to Lee JC's speech, at [8] in *Malcolmson*[18] (at [55]) that "I do not believe that it is not possible for. Lastly, Choo J remarked (*supra* at [8]) that a law of harassment should be legislated by Parliament.

Both *Malcomson*[19] and *Natesan*[20] were Singaporean High Court cases. This subsequently led to the muddled state of Singaporean common law harassment and called for legislative reforms to the Singaporean law of harassment. During the

[14] [2013] HKCFI 639
[15][2001] 4 SGHC 309
[16] [2013] HKCFI 639
[17][2001] 4 SGHC 309
[18][2001] 4 SGHC 309
[19][2001] 4 SGHC 309
[20][2013] SGHC 158

Conference on the Law of Harassment in Singapore, Professor Goh, noted that after the *Natesan*[21] case, the scope for common law harassment has become unclear.[22]

B.3 Parallels with Singapore and the Need for a Statutory Tort of Harassment in Hong Kong

In Singapore, the tort of harassment is statutory. Despite the conflicting nature of Singaporean case-law authorities, the development of the tort of harassment in Singapore serves as guidance for Hong Kong. It shall be submitted that the HKCFI in *Lau*[23] was correct in its approach to draw parallels with the Singaporean context and that the Singaporean approach was done correctly in light of the circumstances. By drawing parallels between the two common law jurisdictions, it demonstrates for need for a statutory tort of harassment in Hong Kong:

The Legal Status Quo in Hong Kong is similar to Singapore before the enactment of SGPHA .

As illustrated above, the current state of the law in Hong Kong is similar to Singapore before the enactment of the *SGPHA*, both in statute and common law. The recognition of the common law harassment in Hong Kong in *Lau*[24] derives from Singaporean statute and common law, and has a significant influence on the trajectory of the tort of harassment. Therefore, it shall be submitted that the legal circumstances in Hong Kong make the Singaporean approach ideal for Hong Kong.

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[21][2013] SGHC 158

[22]Sin J. L., "Report on Conference on Harassment in Singapore: Realities, Conundrums and Approaches Moving Ahead", Conference on Harassment in Singapore: Realities, Conundrums and Approaches Moving Ahead 6

[23] [2013] HKCFI 639

[24] [2013] HKCFI 639

The HKCFI in *Norman*[25], at [60], said that in *Malcomson*[26] , at [53]-[55], Lee JC considered under sections 13A and 13B of the Miscellaneous Offenses (Public Order and Nuisance) Act ("**MOPONA**") which stipulates that it was an offense for a person to use words that are abusive, insulting, or threatening or behaves in a manner in any place and as a consequence causes harassment, alarm, or distress to another person. The learned judge in *Malcomson*[27] (supra) recognized that there was a lacuna as harassment by telephone may not be considered to be harassment under sections 13A and 13B MOPONA. Therefore, the HKCFI in *Norman* (supra) held that *Malcolmson*[28] (supra) was inapplicable to Hong Kong.

Firstly, it is important to note that the statutory provisions in Singapore and Hong Kong are different, they are both piecemeal developments of statutory protections against harassment..[29] The wording of sections 13A(1) and 13B(1) MOPONA shows that harassment in Singapore has two limbs for the conduct element: an oral or written statement. Whereas, wile Hong Kong has several ordinances that criminalize certain forms of harassment, the conduct element for the harassment in two of such legislations[30] consists of an oral or written statement. Therefore, it shall be submitted that the HKCFI in *Norman*[31] erred in disregarding the lacuna as relevant to Hong Kong. While the scope of Singapore's *MOPONA* is wider than Hong Kong's SDO and DDO, the conduct elements of the SDO and DDO are the same as *MOPONA*. Therefore, like Singapore, current statutory provisions in Hong Kong have a lacuna.

[25] [2014] HKCFI 1480
[26][2001] 4 SGHC 309
[27][2001] 4 SGHC 309
[28][2001] 4 SGHC 309
[29]Sin J. L., "Report on Conference on Harassment in Singapore: Realities, Conundrums and Approaches Moving Ahead", Conference on Harassment in Singapore: Realities, Conundrums and Approaches Moving Ahead 6
[30]s.2(7), Sex Discrimination Ordinance (Cap.480); s.2(6), Disability Discrimination Ordinance (Cap. 487)
[31][2014] HKCFI 1480

Secondly, the common law in Hong Kong and pre-*SGPHA* Singapore is unclear as to whether there is a tort of harassment. Both *Malcomson*[32] and *Naresan*[33] are Singaporean High Court Cases. Similarly, in Hong Kong, *SEKSL*[34] and *朱祖永*[35] are HKCAl authorities that suggest and dismiss common law harassment respectively. If the *SGPHA* was not enacted, the common law could develop in both ways. While it could have been likely that a common law harassment would be developed in Singapore, the status quo was unclear in Singapore, and "awaits a final pronouncement by the [Singaporean] Court of Appeal."[36] Likewise, should common law tharassment be pursued in Hong Kong, a final pronouncement from the Court of Final Appeal must be awaited before there is clarity.

Lastly, both Hong Kong and Singapore authorities call for legislative intervention in creating a statutory tort. In *Lau*[37], at [63], the HKCFI expressed its wishes to create a statutory tort of harassment:

> "...it should be remembered that the development of the common law is *incremental*, responding to the facts of the cases brought before the court. Hopefully, a codified body of law to provide for a remedy against harassment will soon come into place, and that will avoid a *piecemeal* development of the law which is inherent in the common law system." (emphasis added)

[32][2001] 4 SGHC 309
[33][2013] SGHC 158
[34][2024] HKCA 747
[35]HCMP 1676/2022
[36]Y.H Goh, "The Case for Legislating Harassment in Singapore" (2014) 26 SAcLJ 68
[37] [2013] HKCFI 639

Similarly, while *Natesan*[38] dismissed common law harassment, the Singapore High Court said, at [8], that the tort of harassment should be developed in statute:

> "Having made reference to the acts of harassment through legislation, it is up to the legislature to determine whether the law should be used to govern annoyance caused by means of letters, emails, and telephone messages, and whether the present public order law ought to be expanded to allow a claim for civil remedies. And it is for Parliament to determine what the nature and extent of such remedies should be."

Parallel Two: The societal circumstances of Hong Kong are similar to Singapore, and warrant the need for a statutory tort of harassment

In *Lau*[39], the HKCFI relied on *Malcolmson*[40]due to similar societal circumstances, to recognizecommon law harassment and provide the parameters of this new tort. The HKCFI said to the effect, at [59], that there should be a tort of harassment to address the rapid development of technology and the densely-populated environment in Hong Kong, in turn protecting Hong Kongers.

Firstly in *Malcomson*[41], Lee JC made a similar remark at [55], where he said:

[38][2013] SGHC 158
[39] [2013] HKCFI 639
[40][2001] 4 SGHC 309
[41][2001] 4 SGHC 309

> "In Singapore we live in one of the most densely populated countries in the world. And the policy of the government is to further increase the population. It will make for an intensely uncomfortable living environment if there is no recourse against a person who intentionally makes use of modern communication devices in a manner that causes offense, fear, distress, and announce to another."

According to Professor Goh, Singapore's high population density results in land scarcity, and its spillover effects influence the legal sphere. He remarked that the reason for the Singapore Court's departure from the English law, was because Lee JC was focused on a practical solution for Singapore's high population density, rather than focusing on an intellectual debate of the English law. Professor Goh noted that Singaporean public housing was organized into clusters of high-rise apartments. It is trite that most of Hong Kong's residential buildings were also organized in such a manner. This problem is evident from the wealth of case law in Hong Kong. In *Norman*[42] the defendants and plaintiffs lived in the same building. The defendant was disgruntled over the unauthorized works in the building and made thumping noises, played loud radio and television sounds and made threats against the plaintiffs.

At the time of *Malcomson*[43] (i.e. 2001), Singaporean population density was 6,176 people per km^2. At the time of the enactment of the SGPHA Singapore's population density was 7,175 people per km^2 [44]. In 2001, Hong Kong's population density was

[42][2014] HKCFI 1480
[43][2001] 4 SGHC 309
[44]"World Bank Open Data" (World Bank Open Data)
<https://data.worldbank.org/indicator/EN.POP.DNST?most_recent_value_desc=true> accessed January 5, 2025

6,395 people per km^2; in 2021, the population density was 7,060 people per km^2 [45] While Hong Kong's population density is slightly less than Singapore, both Singapore and Hong Kong rank as the third and fourth most densely populated regions/countries in the World.

Secondly, the rapid development of technology warrants stronger protection against harassment. This view was taken by Lee JC in *Malcomson*[46], at 471, where he said to the effect that technological developments led to improved communications, urbanization, and the widespread availability of leisure time. He pointed out that life would become unbearable for those who became the object of attention of one who is determined to utilize modern devices to harass. Lee JC in *Malcomson*[47] also considered that harassment may arise digitally. Thus, a statutory tort will address the rapid growth of technology:

Cyberbullying is a persistent problem in Singapore and Hong Kong. The number of internet users in Singapore encountering cyberbullying or sexual content increased from 65% in 2023 to 74% in 2024[48]. In Hong Kong, the number of cyberbullying cases has almost doubled since 2017.[49]

There is a larger incentive for Hong Kong to address cyberbullying than Singapore. Cyberbullying may pose a threat to the administration of the law. During the 2019

[45]"World Bank Open Data" (World Bank Open Data) <https://data.worldbank.org/indicator/EN.POP.DNST?most_recent_value_desc=true> accessed January 5, 2025
[46][2001] 4 SGHC 309
[47][2001] 4 SGHC 309
[48]Chan G, 'Number of Reported Online Bullying Cases Expected to Rise as Awareness Grows: Chan Chun Sing' (The Straits Times, 14 October 2024) <https://www.straitstimes.com/singapore/politics/number-of-reported-online-bullying-cases-expected-to-rise-as-awareness-grows-chan-chun-sing> accessed 5 January 2025
[49] Li A, "Cyberbullying Cases in Hong Kong Schools Jump 95% in 4 Years as Gov't Insists 'zero-Tolerance' Policy" Hong Kong Free Press HKFP (June 2, 2022)

Social Unrest, many members of society were doxxed online through social media platforms. This can be illustrated in the *Junior Police Officers Association of Hong Kong Police Force v Electoral Affairs* [2019] 5 HKLRD 291, where the HKCA recognized, at [4], that more than 2000 police officers and their immediate families were subjected to doxxing, which infringed on their right to privacy and the privacy of their homes. Likewise, in *Secretary for Justice 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* **[2020] 5 HKLRD 638** ("***Doxxing Case***"), members of the Judiciary were the targets of doxxing[50]. The surge in doxxing is attributable to the discontent over the verdicts concerning the 2019 social unrest. Coleman J went on to say *supra*, at [47], that doxxing will undermine public confidence in law and order, and the administration of justice in Hong Kong. Both cases serve to demonstrate that cyberbullying in Hong Kong not only poses a threat to ordinary citizens in Hong Kong but also undermines the rule of law. While an injunction prevented doxxing activities against the police and members of the judiciary, and should a similar quandary emerge in the future, statutory provisions will also provide for damages. The **Personal Data (Privacy) Ordinance** (Cap. 476) provides in section 64(3A) that a person who has an intent to or is reckless as to harassment concerning personal data commits a crime. However, it does not provide for civil liability nor for the damages that could be sought by victims of doxxing.

A purely common law tort of harassment *per se* has been regarded as unideal by several case authorities. In *Natesan*[51], Choo J doubted the effectiveness of the common law in addressing harassment, at [10]:

[50][15]
[51][2013] SGHC 158

> "I doubt that a clear and comprehensive law on harassment as a civil cause of action can be effectively formulated in a judicial pronouncement, more so because there are, in modern times, calls for laws relating to privacy."

Provided the rapid developments of technology and the dense population in Hong Kong, there is an urgency for the legislature in Hong Kong to provide a recourse against a victim of abuse. While some forms of harassment are criminal offenses in Hong Kong, it is logically unsound for these victims to be unable to seek a civil remedy. The legislature in Hong Kong should not only punish wrongdoers for harassing others, but also clarify the tort of harassment, and ensure that their livelihoods return to normalcy as much as possible.

B.4 Reliance on tort in *Wilkinson v Downton* ("Tort in *Wilkinson*")

While there are suggestions that a tort of harassment could be developed from the tort in *Wilkinson*, this endeavor is unpredictable and uncertain. In *Wilkinson v Downton* [1897] 2 QB 57, the defendant told the plaintiff that her husband had passed away. The plaintiff believed it to be true, and suffered from violent nervous shock. This created a new species tort, whereby false words or verbal threats could be actionable.

In *Hunter* [52] , Lord Hoffman commented, in p. 707[E] on the ruling in *Khorasandjian*[53]:

[52][1997] AC 655
[53][1993] QB 727

> "The perceived gap in *Khorasandjian v Bush* 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….."

According to *Street on Torts, 3rd Edition,* it appeared that the tort in *Wilkinson* would expand to address intentional harassment in the 90s. However, in *Wong v Parkside Health NHS Trust*[54], at [29], Lady Hale considered *Hunter* (supra) and did not expand the tort in *Wilkinson* to intentional harassment:

> "[The speeches by Lord Goff and Lord Hoffman in *Hunter* on whether there is a general tort of harassment] gives no warrant for concluding that the common law had by then reached the point of recognizing a tort of intentional harassment going beyond the [tort in *Wilkinson*] It is a clear indication that matters should now be left to Parliament."

In *Rhodes v OPO* [2015] UKSC 32, a mother of a child sought an injunction against the child's father, a famous musician, who published a book containing passages about sexual abuse. The mother worried that the book would traumatize her emotionally sensitive child. The tort in *Wilkinson* was formulated into three different elements: (1) a conduct element, (2) a mental element, and (3) a consequence element.[55] It is unclear whether *Rhodes v OPO* would be followed in Hong Kong.

[54][2003] 3 All ER 932
[55]at [73]

Moreover, *Wilkinson v Downton* has only been discussed in Hong Kong cases but never applied. Thus, one can turn to other common law jurisdictions for guidance, to see if *Wilkinson v Downton* should be applied in Hong Kong. In *Natesan*[56], Choo J said, at [10], that the "rule in *Wilkinson v Downton* (which does not require direct physical contact but requires proof of damage) should be done only where the rule can be formulated, comprehensively, and concisely." Provided that few existing authorities are developing on the tort in *Wilkinson v Downton*, and most of these authorities are from England, the development of common law harassment from *Wilkinson v Downton* will be a lengthy and unclear process for Hong Kong. The needs of the Hong Kong context (as discussed in the previous section) suggest against the development of the tort in *Wilkinson* to address harassment.

C. Statutory Tort of Intrusion Upon Seclusion ("TIUS") in Hong Kong

C.1 What is the TIUS

The Law Reform Commission ("LRC")'s report on *Civil Liability for Invasion of Privacy* recommended a statutory TIUS: "any person who, without justification, intrudes upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where the latter has a reasonable expectation of privacy should be liable under the law of tort if the intrusion is seriously offensive or objectionable to a reasonable person."[57] (emphasis added). It shall be submitted that it is time for Hong Kong to adopt the LRC's suggestions concerning a statutory TIUS.

[56][2013] SGHC 158

[57]Hong Kong Law Reform Commission, "CIVIL LIABILITY FOR INVASION OF PRIVACY" (2004)

In New Zealand and Canada, the TIUS exists in common law. In New Zealand, the TIUS was developed in *C v Holland*[58] ("***Holland***"), where Whata J (as he then was) set out the elements of the TIUS in New Zealand similarly to the LRC's suggestions. Whereas, the TIUS was introduced in *Jones v Tsige*[59] ("***Jones***") into Ontario Law, at [65], where Sharpe JA remarked that the changing circumstances of Canada call for the need of the TIUS. Sharpe JA held, at [70], the elements of the Ontarian TIUS, which is the same for Hong Kong.

C.2 Appropriateness in the Hong Kong Context

Provided that the Ontario and New Zealand TIUS has the same elements as the proposed reforms, it serves as useful guidance.

Firstly, both *Jones* and *Holland* consider the implications of technological advancements. In *Jones*[60] , Sharpe JA remarked, at [67], that technological change has fundamentally changed the nature of communication and our access to information. Whereas in *Holland*[61], Whata J said to the effect, at [86], that "privacy concerns are undoubtedly increasing with technological advances, including prying technology through, for example, the home computer."

At the time of *Holland*, there was a statutory tort of harassment in New Zealand under the 1997 *Protection from Harassment Act* 1997. However, this does not suggest that "intrusion upon an individual's seclusion in breach of a reasonable expectation of privacy gives rise to an actionable tort in New Zealand." Should Hong

[58] *C v Holland* [2012] NZHC 2155
[59] 2012 ONCA 32
[60] 2012 ONCA 32
[61] [2012] NZHC 2155

Kong enact legislation to create the statutory tort of harassment, it will not suffice to cover situations like *Holland*[62], where a woman was secretly filmed bathing.

It is submitted that a common law tort would be inappropriate for Hong Kong. In *Holland*[63], Whata J suggested, at [80]-[86], that the TIUS should be developed in the common law. He pointed out *supra* that (1) the tort was recently affirmed in another case and (2) that the Law Commission of New Zealand believed that codification could constrain common law development. Whereas Hong Kong has not developed a common law TIUS, therefore there is no need to follow suit. Moreover, the circumstances in Hong Kong (as mentioned previously) call for more hasty action by the legislature of Hong Kong.

D. Conclusion

In conclusion, in light of the societal circumstances of Hong Kong, it is appropriate to tackle flaws within common law harassment by making it statutory, to match the everchanging and versatile nature of technology, and its adverse effects on the privacy of Hong Kong citizens. There is uncertainty as to how the common law can cater to the social circumstances, which call for rapid reform. The uncertain nature of the tort in *Wilkinson* makes it an extremely infeasible trajectory for the law of harassment to develop. The LRC was correct in suggesting to enact a TIUS tort to better address the lacuna that arose when the common law TIUS had yet to have been established.

[62][2012] NZHC 2155
[63] [2012] NZHC 2155