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# ACCOMMODATING TORTIOUS LIABILITY: SEXUAL HARASSMENT OF MEN

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## ABSTRACT

This research article focuses on the patterns of discrimination apparent in the Indian legal system in terms of gender-specific laws about sexual harassment in the workplace. It seeks to accommodate tortious liability while offering a just remedy to male sexual harassment victims through the different avenues of the Law of Tort. The researcher is of the view that with the advent of modernization, the time has come for laws to be amended with a more contemporary approach, especially because gender is an exceptionally fluid concept today. Uncovering the malleability of how an individual expresses sexual harassment is uncomfortable and elucidating sexual harassment is a multifaceted task. Nevertheless, it is important to note that, in such cases the victim and the perpetrator can be of any gender and making gender-specific laws resolve only half the problem, a fact the Indian legal system seemingly overlooks. Although equality is supposedly the crux of the Indian constitution the researcher is of the view that sexual harassment laws in India are violative of articles 14-18 of the Indian Constitution. In this article, the researcher argues that, as the remedies for male sexual harassment are limited under codified statutes, compensatory damages through the Law of Torts awarded to male victims is the most suitable approach, until laws are further amended.

## INTRODUCTION

Sexual harassment, a type of sex discrimination and a violation of human rights is detrimental to workers and organizations. Even though sexual harassment in the workplace is illegal in over 75 countries, it is pervasive and underreported. To date, laws and market incentives have not been effective in eliminating workplace sexual harassment. Success may necessitate policies that increase market and legal incentives by increasing the costs to the firms of tolerating a hostile work

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environment, enacting robust anti-sexual harassment laws, with constant checks at the grassroots levels and developing a redressal mechanism that protects workers from retaliation.

Sexual harassment encompasses a wide range of activities, from glances and crude jokes to degrading statements based on gender stereotypes, as well as sexual assault and other forms of physical violence. Although the legal definition varies by jurisdiction, it is often commonly recognized as unwanted and inappropriate sexual behaviour. It would fall under any unwelcome sexual advance or request for sexual favour that can be reasonably perceived to cause humiliation or offence to another. Such harassment may interfere with work and create a hostile work environment.

Suggestive jokes or insulting remarks directed at one's sex may be considered sexual harassment in the legal sense, but not always, depending on context and frequency. Since there is not a clear line between annoying courtship overtures and sexual harassment, quantifying the severity of sexual harassment is even more challenging, as people react differently to objectively identical treatment.

## **REASONING BEHIND THE CHOICE OF TOPIC**

When most people perceive sexual harassment, they picture male employees harassing or pursuing female co-workers. People erroneously believe that sexual harassment primarily affects women. How frequently do we hear in the news and the media about a man being sexually harassed? The media and other outlets have stereotyped women as naïve, as damsels in distress and as subservient to men. This common misconception has led the general public to believe that men are always the perpetrators, and women, always the victims.

The promise of equality and equal protection under the law enshrined in Article 14 of the Constitution, appears to have lost its significance to our lawmakers when it comes to drafting legislation on sexual harassment. Undoubtedly, the legislators or the judiciary do not seek to discriminate against a victim of sexual harassment solely based on their gender, however it may appear this way as there is limited or no acknowledgement of men as victims on the subject. Furthermore, men are less likely to even report instances of sexual harassment because of the pre-existing stigma in Indian society.

Thus, accommodating tortious liability of perpetrators of male sexual harassment in the workplace through several torts such as trespass to person, battery, assault, vicarious liability can prove to be

effective in terms of offering an alternate method for remedy. An effective application of these torts can provide remedies to the victims in the form of monetary damages which appear to be practical and fruitful as such victims would otherwise walk away empty handed, and the perpetrators scot-free, if their grievances were left solely to the hands of the statutes of the BNS( IPC).

## **SEXUAL HARASSMENT AND THE LAW OF TORT**

### **A BRIEF COMPARISON OF THE LAW IN THE USA AND INDIA**

In the USA, the Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, which provides broad, gender-neutral protection against workplace discrimination, including sexual harassment. This includes both quid pro quo harassment and creating a hostile work environment, with explicit protections for men and established procedures for reporting and investigating complaints. In contrast, India's primary legislation, the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (POSH Act), specifically protects women, and men must rely on general provisions under Bharatiya Nyaya Sanhita (2023) for redressal, which lacks the same structured mechanism as the POSH Act. While the POSH Act mandates the formation of Internal Complaints Committees (ICCs) for workplaces with more than ten employees to handle women's complaints, men face practical challenges and societal biases when seeking justice under the IPC. The USA's centralized approach through the EEOC and explicit gender neutrality in protections contrasts with India's women-centric legislation and fragmented enforcement. To address these disparities, India could benefit from legislative amendments or new laws that explicitly protect men and provide structured reporting and redressal mechanisms, ensuring comprehensive and inclusive protection against sexual harassment in the workplace.

### **IMPACT OF SEXUAL HARASSMENT**

Sexual harassment has a catastrophic effect on individual employees. Victims often experience insomnia, depression, anxiousness, and other psychological symptoms, sometimes leading to a complete emotional breakdown. Harassment can cause headaches, backaches, nausea, loss of appetite, weight change and exhaustion. Harassment poses a significant threat to an employee's physical and mental well-being. In addition, harassment ultimately results in severe economic harm to its victims. Although the extent of the harm is difficult to measure precisely, observable

consequences include increased unemployment and absenteeism, obstacles to promotions lower income from lost earnings and substantial limitations to free choice within employment.

All the above-mentioned consequences apply to both men and women as psychological and mental stress do not discriminate between genders, however the legal remedies available to ensure protection of all genders against sexual harassment ironically enough, do.

## **LEGAL REMEDIES AVAILABLE FOR MALE SEXUAL HARASSMENT VICTIMS**

According to the definition of sexual harassment as seen in the case of *Vishaka v State of Rajasthan*, sexual harassment is gender specific and thus, remedies for male victims are absent under the statute.

Furthermore, Section 354 of the IPC states that whoever assaults or uses criminal force on a woman to outrage her modesty, intends to do so or knowing that any act caused by him would outrage her modesty shall be punished with up to two years of imprisonment, or with a fine or with both.

Section 355 provides remedies to a victim of assault (not specifically a woman), by means of imprisonment of the accused, with a fine or both. However, while this section deals with assault, nothing regarding the sexual assault and harassment of men is specifically stated and thus arises the need to incorporate tortious liability in male sexual harassment cases.

## **ACCOMMODATING TORTIOUS LIABILITY FOR SEXUAL HARASSMENT**

Unlike criminal laws, which are narrowly written and strictly enforced, tort law is more malleable. To establish a cause of action, victims do not need to meet particular requirements about which portion of the defendant's body touched which part of the plaintiff's body. In the case of battery, for example, a plaintiff just needs to show that they were damaged or offended by the defendant's touch and that the defendant intended the contact and potential harm. The tort actions discussed below further explain the liability of such assailants.

## **1. NEGLIGENCE**

“Generally speaking one is responsible for the direct consequences of his negligent acts where he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct, he will cause injury to another. Negligence causes risk, danger, or harm - A.K Jain

The three essentials of negligence include:

- (a) The defendant owed a duty of care to the plaintiff
- (b) The defendant made a breach of that duty
- (c) The plaintiff suffered a damage thereof

In most sexual harassment cases, the plaintiff could possibly raise an action for negligence against the employer of the workplace as if the said harassment occurred in the workplace, it can be considered as a hostile work environment and every employer has a duty of care towards his employees to maintain a good and safe work environment.

The employer in such cases would owe a duty of care to the employee in terms of permitting such harassment to take place in the course of employment as seen in the case of *Lister v Hesley Hall*, and thus would also be vicariously liable for the acts of the same. The mental and emotional stress caused to harassment victims as well as the tangible economic damages and loss in productivity fulfill the third essential required for the tort of negligence.

## **2. VICARIOUS LIABILITY**

“In general, a person is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious liability for the acts of others, however blameless himself” – Salmond

If such sexual harassment occurs during the scope of employment, such action for vicarious liability can arise.

If the act of harassment occurs on the premises and the authority conferred by the employer encourages or increases the chances of the supervisor committing such unruly behaviour on the

victim, it should be treated as occurring within the scope of employment, attracting the primary principle of agency law - vicarious liability of the employer. Although the employer cannot manifest himself in every place in order to check harassment, it may not be an excuse for him to evade liability. He has all means to make sure that such behaviour does not occur within the premises. Thus, the tort of vicarious liability is another means of providing compensation to male harassment victims that lies within the ambit of the law.

### **3. ASSAULT AND BATTERY**

Liability for assault requires proof that the tortfeasor meant to cause harmful or offensive physical contact, and that the victim had reasonable apprehension of such conduct. Any conduct that causes such apprehension is tortious assault even if no physical contact occurs. Thus, this can be a suitable tort while bringing an action for a sexual harassment victim.

Battery is defined as an offensively caused, damaging or offensive contact. Liability requires the showing of intent to touch but not necessarily to damage. As a result, regardless of the actor's intent, battery may involve rude, insulting, or physically damaging touch. Because the fear of unwanted physical contact sometimes accompanies the actual touching, a plaintiff may easily file an action under both assault and battery grounds.

These two ideas are appropriate in the context of sexual harassment as long as the victim has either experienced or expected objectionable or harmful physical contact. In *Skousen v. Nidy*, for example, a sixty-five-year-old caregiver in a trailer park won a claim against her employer for assault and battery. The park owner had continuously sought to entice the woman by sexually groping her and severely assaulting her on multiple occasions. "The Arizona Supreme Court upheld an award of compensatory and punitive damages, recognizing the need to offer compensation for both the mental and physical repercussions of the employer's behavior."

Potential benefits to victims of tort actions are numerous. The victim, as a plaintiff in a civil action, controls many important decisions in the litigation including whether to file a case, proceed with it, settle the case or pursue further action. In short, the victim gets to direct the course of the litigation (within the confines of the law). This is in stark contrast with criminal law, in which the state is the party in interest and the prosecutor represents the state. However, pursuing an action in torts also has its inadequacies and limitations.

## **LIMITATIONS IN TORTIOUS LIABILITY**

Although tort proceedings have a reduced standard of proof for the plaintiff, victims and their advocates must recognize that civil law is not merely a weakened or inferior version of criminal law.

Tort lawsuits can provide the plaintiff with both familiar and novel challenges. A tort action can take five years or more to conclude at the trial court level alone. This delay, as well as the subsequent long-term interaction with the defendant, can be extremely challenging for victims, hindering healing and causing them to relive the trauma and keep the memories of the assault fresh in their minds. Victims of sexual harassment frequently express concerns about their privacy and confidentiality. From the scope of discovery permitted into the plaintiff's activities to potential arguments over the availability of anonymous filing, to judicial rulings that can make some details of the case public, tort law presents various issues in the realm of privacy.

Finally, commencing a tort action before filing a criminal action may jeopardize the success of an existing criminal prosecution against the culprit. Although tort compensation is similar to restitution in a criminal process, defense attorneys and the media may utilize the presence of the tort suit to undermine the victim's credibility by presenting them as someone looking to profit financially from their charges.

## **ANALYSIS**

To further evaluate this, the researcher has prepared a comparative analysis of two judgements, (Vishaka & Ors v state ) & (Shiladitya v state of West Bengal) which highlight the blatant sex discrimination and shortcomings in the justice system.

## **VISHAKA & ORS VS STATE OF RAJASTHAN**

### **Definition according to the judgement:**

The constitution of India defines sexual harassment as “such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) Physical contact and advances.
- b) A demand or request for sexual favors.



- c) Sexually colored remarks.
- d) Showing pornography.
- e) Any other unwelcome physical verbal or non-verbal conduct of sexual nature.

The definition of sexual harassment given above is gender neutral. The court however, qualified the preceding with the following observation:

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises an objection thereto."

#### **Analysis of the definition:**

The qualifying statement thus deprived the definition from being perceived as gender neutral and can be viewed as gender specific and discriminatory.

Furthermore, the sexual harassment of women at workplace (Prevention, Prohibition, and Redressal) Act, 2013, was instituted by the legislature to safeguard only women at work. The amended IPC, now Bharatiya Nyaya Sanhita (2023) also does little to safeguard rights of men in similar situations, and Section 74 (Sexual harassment and punishment for sexual harassment), is essentially women centric with regards to the victims, and male centric with regards to the offender, thus, do little to protect men against a female or male aggressor.

Curiously, the recommendations of the Justice Verma Committee which was constituted in 2013 to propose amendments to sexual harassment laws in terms of gender neutrality of sexual offences have not been incorporated in the statute. (Criminal Law Amendment Act, 2013).

In addition, if a male victim of sexual harassment in India comes forward, he not only becomes the target of innuendoes from his male peers, but he also may fear that the female harasser, who profits from women centric laws, may turn the tables and depict the male victim as the harasser.

## **SHILADITYA BARMA V STATE OF WEST BENGAL ,**

In one of the more recent cases (2018), Mr Debopriya Chatterjee, the learned advocate appearing on behalf of the petitioner submitted that it was an “absolute misconception that acts of making physical contact, advances involving unwelcome, explicit sexual overtures, making sexually coloured remarks, making a demand for sexual favours, or showing pornography without consent do not happen to males and persons of the third gender.” According to him it was challenging for an individual of the masculine or third gender to get out of such a situation of sexual abuse. He maintains that there are several instances in which perpetrators harass males and third gender individuals without their consent. He submitted that the main thrust of his argument is that even males and persons of the third gender were victims of sexual abuse and sexual harassment but the law enforcing agencies have failed to ensure protection of such victims.

### **The Judgement:**

The court was of the view that, since the petitioner was more concerned with the theory of male sexual harassment and not actual material facts in which he submitted real witnesses of the same, he was not truly concerned with the cause of the public good. What the court failed to take into consideration, in the researcher’s opinion, is the societal stigma in Indian society which revolves around males being victims of any sort. Coming forth on cases of sexual abuse subject such victims to further harassment and innuendos by their male peers thus the public interest litigation was the right step in terms of amendment of gender specific laws.

However, in view of the discussions and observations made by the court, the court decided that the writ application did not deserve their consideration. The court also ruled that the writ application was for the purpose of “publicity” and at the cost of the deliberate consumption of the time of the court. Thus, the writ application was dismissed and an additional cost of Rs.2,00,000 was borne by the petitioner.

## **CONCLUSION AND TAKEAWAYS**

In conclusion, India is still a developing nation, and it is time the legislation develops and evolves along with the society. The researcher thinks that there is an urgent need of statutes like those in the UK and the USA, which provide equitable legal remedies for both genders. The U.S. Supreme Court jurisprudence emphasises on to set out the contours of employer liability for harassing behaviour by employees, employers must be liable for harassment that results where the employer

allows, fosters, or fails to correct workplace conditions that are likely to give rise to the typical harassment behaviour, Indian statutory authorities must take note of this and implement the same while amending existing gender-specific laws.