“That Is Not How the Common Law Works”: Paths to Tort Liability for Harassment

Dan Priel

Can a common law court create liability for harassment without a statute? A recent decision of the Court of Appeal for Ontario has answered negatively. The Court reasoned that liability for harassment requires creating a new tort, which is not something a court could do unless there are special circumstances. Emphasizing the incremental nature of common law change, the Court concluded that this is not the kind of legal change it could, or should, effect. I challenge the decision and its reasoning. While acknowledging the epistemic and political constraints that warrant caution, I argue that the Court of Appeal erred in not considering the possibility of creating tort liability for harassment by extending existing torts. I consider six possible paths to such liability, four of which I conclude are possible but limited, and two others that are promising and should be adopted.

Un tribunal de common law peut-il établir une responsabilité en matière de harcèlement sans loi ? Une décision récente de la Cour d’appel de l’Ontario a répondu par la négative. La Cour a estimé que d’établir une responsabilité en matière de harcèlement nécessite la création d’un nouveau délit, ce qu’un tribunal ne peut pas faire, sauf dans des circonstances particulières. En soulignant la particularité graduelle du changement en common law, la Cour a conclu qu’il ne s’agit pas là du genre de modifications juridiques qu’elle pourrait, ou qu’elle devrait, effectuer. Je conteste cette décision et son raisonnement. Tout en tenant compte des contraintes épistémiques et politiques qui justifient cette prudence, je soutiens que la Cour d’appel a commis une erreur en n’envisageant pas la possibilité de créer une responsabilité délictuelle en rapport au harcèlement en élargissant l’ampleur des délits existants. J’envisage six voies possibles vers une telle responsabilité, dont quatre que je considère comme atteignables, mais restrictives, et deux autres qui s’avèrent prometteuses et qui devraient être adoptées.
“That Is Not How the Common Law Works”:
Paths to Tort Liability for Harassment
Dan Priel

I. Introduction 89

II. Merrifield v Canada (AG) 91

III. Making a Case for Tort Liability for Harassing Behaviour 92
   A. Why Tort Liability for Harassing Behaviour Makes Sense 93
   B. Countering Potential Objections 97

IV. How the Common Law Changes 100

V. Doctrinal Routes to Tort Liability for Harassment 105
   A. The Meaning of Legislative Silence 105
   B. Limited Solutions 109
      1. Nuisance 109
      2. Intimidation 110
      3. Assault 111
      4. Defamation 112
   C. More Promising Possibilities 113
      1. Updating IIMS 115
      2. Incorporation within the Tort of Negligence 120
   D. Balancing IIMS with Negligent Infliction of Mental Injury 127

VI. Conclusion: The Limits of Judicial Restraint 130
“That Is Not How the Common Law Works”: Paths to Tort Liability for Harassment

Dan Priel*

I. INTRODUCTION

Harassment happens everywhere. It happens in the workplace, it happens on the streets, it happens in schools, and in recent years, it happens at alarming rates on the Internet as well. It affects millions. There have been various statutory responses to harassment in Canada, but it remained unclear whether there is a common law tort giving rise to civil liability for harassment. At least as far as Ontario is concerned, that uncertainty has now been resolved after the Court of Appeal for Ontario decided against recognizing such a tort in Merrifield v Canada (AG). In its decision, the Court of Appeal concluded that a tort of harassment has not been previously recognized in Ontario and that there are no compelling reasons for changing the law. One of the Court’s main reasons for its conclusion is the incremental nature of common law change, which is inconsistent with the establishment of a new tort “anytime [a court] considers it appropriate to do so,” because, the Court reasoned, “that is not how the common law works.”

In this article I wish to challenge this decision and its reasoning. Specifically, I argue that by focusing its attention on the question of the Court’s power to create a new tort, it ignored the possibility of extending existing

* Professor, Osgoode Hall Law School. I thank two anonymous referees for their comments, and Jennah Khaled and Nolan Little for their helpful research assistance.

1 2019 ONCA 205, leave to appeal to SCC ref’d, 38630 (19 Sep 2019) [Merrifield]. The Supreme Court’s refusal to grant leave does not indicate agreement with the decision and does not give Merrifield greater precedential value. See Canadian Western Bank v Alberta, 2007 SCC 22 at para 88.

2 Merrifield, supra note 1 at para 38.
torts, in line with traditional common law methods. I hope to show that there are ample resources within existing law to support tort liability for harassing behaviour, without having to create a new tort. Indeed, paying attention to existing law shows that, contrary to its message of modesty, Merrifield constitutes a rather bold rejection of a recent Supreme Court precedent, where a unanimous Court held that any categorical distinction between physical and mental injury cannot be sustained. This article can be read, then, as a critique of Merrifield; it can also be read as suggesting ways of blunting its holding. Even accepting as settled law (for now) that there is no independent tort of harassment in Ontario, I argue that there are ways for plaintiffs seeking tort redress for harassing behaviour to seek redress on the basis of existing torts.

The argument proceeds as follows: Part II summarizes Merrifield and its main reasons. Part III starts outlining the case for tort liability for harassment by arguing that there are good policy reasons for it. The argument there is grounded in empirical data, much of it drawn from official Canadian sources, on the prevalence of harassment and the harm it causes. Acknowledging that that is not enough for justifying a change in the law through the courts, the remainder of the article is dedicated to showing respectable doctrinal paths to such liability. Part IV opens this discussion by showing that courts have long made significant changes to tort law, and that by the standards that Merrifield accepted for judge-made innovation in tort law, a judicial development of tort liability for harassing behaviour is justified. Part V then turns to showing several possible paths to a judicially created tort liability for harassment without creating a “new” tort. It asks specifically whether the fact that the legislature addressed harassment in various contexts but did not establish civil liability by statute, should be interpreted as an implicit rejection of such liability. After concluding that it should not be, it considers six possible routes to such an end, four that I consider relatively unpromising and two that are more successful. The conclusion that follows returns to the general question of common law change and frames it in terms of the limits of judicial restraint.

This outline helps identify the scope of this article and its aims. My main aim is practical: I aim to show how courts could, and in my view should, establish tort liability for harassment. But along the way I wish to contribute to discussions of the role of courts as norm creators. As my

---

3 See Saadati v Moorhead, 2017 SCC 28 at paras 23–24, 35 [Saadati]. Strictly speaking, the decision speaks about negligence law, but many of its remarks about the psychiatric injury and its impact on one’s life (especially at para 23) are of general application.
title suggests, one particular focus of this article is on the paths to liability for harassment by a common law court developing and adapting long-accepted bases for liability to new circumstances.

II. MERRIFIELD V CANADA (AG)

Peter Merrifield was a junior constable in the Royal Canadian Mounted Police (RCMP). In 2007, while still employed, he filed a lawsuit against the RCMP, in which he alleged he had been subjected to ongoing harassment by his workplace supervisors. In his statement of claim, Merrifield made a host of allegations, from breach of contract and breach of a fiduciary duty to a violation of his Charter rights. After a trial, Justice Vallee of the Ontario Superior Court of Justice dismissed most of these claims, but accepted that the actions of Merrifield’s supervisors constituted either harassment or intentional infliction of mental suffering (IIMS), both of which she took to be established torts in Ontario.4

The defendant successfully appealed this decision. Unusually for an appellate decision, the Court of Appeal dedicated about half of its reasons to a re-evaluation of the facts,5 and its disagreements with the trial court on this score were profound. Where the trial court’s decision tells a story of a dedicated public servant, who gave it all but was constantly rebuffed by insensitive superiors, the Court of Appeal’s decision depicts Merrifield as dishonest and insubordinate. Rather than repressed or harassed, the Court of Appeal describes an employee who repeatedly flouted workplace regulations, lied to his supervisors, misused the credit card he was given for work purposes, and more.

Without access to the full case record, it is difficult to evaluate these competing narratives, and I will not attempt to adjudicate between them. It is possible, of course, that Merrifield was harassed by his bosses and that he was a less than stellar employee. Had the Court of Appeal recognized a tort of harassment, it might have been worthwhile to consider whether Merrifield’s behaviour should in some way affect his remedies; but the Court of Appeal also disagreed with the trial court on the law, rendering such a discussion moot. The Court of Appeal held that there is no existing tort of harassment in Ontario and that there were no good reasons for a common law court to create one.

4 Merrifield v Attorney General (Canada), 2017 ONSC 1333 at paras 718, 807, 848 [Merrifield ONSC].
5 See Merrifield, supra note 1 at paras 56–104.
It is possible that the Court of Appeal’s lack of sympathy for Merrifield coloured its legal conclusions. It is also possible that the Court did not want to make a major statement on a new tort of harassment only to dismiss the case afterwards on the facts. That the case could have been dismissed on its facts may lead some to consider its discussion of the tort of harassment as obiter. But Merrifield is significant. The Court could have dismissed the case without making any general statement on the law (“we need not decide on whether there is a tort of harassment in Ontario; we can assume, without deciding, that such a tort exists, but still conclude that his claim fails”). That it chose not to do so is a clear indication that it intended its decision to have an impact, one that it is likely to have. By the imperfect measure of citation counts, the Court of Appeal for Ontario is the second-most important court in Canada, leading some commentators to call it Canada’s “junior Supreme Court.” So there can be little doubt that Merrifield will be taken seriously, obviously by the courts in Canada’s most populous province, and probably by other courts across the country as well.

III. MAKING A CASE FOR TORT LIABILITY FOR HARASSING BEHAVIOUR

The first question to address in considering tort liability for harassment is whether there is a need for it. The Court of Appeal in Merrifield referred to the institutional limits of courts, the nature of common law change, and the absence of supportive judicial authority in support of

---

6 Although the Supreme Court did this on more than one occasion. See e.g. Hill v Hamilton-Wentworth, 2007 SCC 41 (finding a duty of care of police officers and prosecutors to those accused of crime, but then dismissing the claim for lack of carelessness); AI Enterprises v Bram Enterprises, 2014 SCC 12 [AI Enterprises] (clarifying the unlawful means tort, then concluding it was not committed in that case, but still finding liability on a different basis).

7 A study from a few decades ago found that the Court of Appeal for Ontario is by far the most cited of all provincial appellate courts. See Peter McCormick, “Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices” (1994) 22:2 Man LJ 286 at 297.

8 Ian Greene et al, Final Appeal: Decision-Making in Canadian Courts of Appeal (Toronto: James Lorimer, 1998) at 146. In the time since these words were written, the significance of the provincial appellate courts (and especially that of Ontario) may have even become greater as the Supreme Court decides fewer private and commercial law cases. Cf Terence G Ison, “The Operational Realities of the Charter” (2012) 25:1 Can J Admin L & Prac 1 at 16; Camden Hutchison, “Pluralism and Convergence: Judicial Standardization in Canadian Corporate Law” 58 Osgoode Hall LJ [forthcoming in 2021].
such liability—all issues I will take up in detail in below. But it is quite clear that it was not just the absence of doctrinal grounding for a tort of harassment that troubled the Court, as the Court explicitly stated it found no “compelling policy rationale” for such a tort. My analysis, in line with the Supreme Court’s general approach when tasked with the question of whether to extend or restrict common law tort liability, is to assess the question both in terms of “policy,” i.e. whether the benefits of the legal change are greater than its costs, and in terms of doctrinal fit. In this Part, I argue that, in fact, the prima facie case for such a tort is very strong.

A. Why Tort Liability for Harassing Behaviour Makes Sense

To set the stage, it will help to have a clear sense of what we mean by harassment. Ontario’s Human Right Code defines harassment as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.” A recently passed federal statute added a definition of harassment to the Canada Labour Code: “any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological harm.”

9 Merrifield, supra note 1 at para 40.
10 There is extensive literature on these questions. Some have questioned whether courts should take policy into account; others have doubted whether they can avoid it. For two different views by two judges of the United Kingdom Supreme Court, contrast David Neuberger, “Some Thoughts on Principles Governing the Law of Torts” (2016) 23 Torts LJ 89 at 89 (“almost all aspects of the law of torts are grounded on policy, and that any attempt to identify or distil principles will normally be fraught with problems”) with Lady Hale, “Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?” (Delivered at the Society of Legal Scholars Conference, 7 September) at 10–12 [unpublished], online: <www.supremecourt.uk/docs/speech-160907.pdf> (arguing that judges should avoid policy as it involves issues outside their institutional competence). My sympathies align more closely with Neuberger, but as my aim in this article is to show how tort liability for harassment fits within established Canadian tort doctrine, I put aside these more abstract debates. Instead, I focus on the practice established in multiple Supreme Court cases, which makes clear that policy is relevant for deciding on broad questions of the scope of liability. This was confirmed in various areas of tort law. See e.g. Al Enterprises, supra note 6 at para 97 (economic torts); Grant v Torstar Corp, 2009 SCC 61 at paras 48–57 [Torstar] (defamation); Hercules Management Ltd v Ernst & Young, [1997] 2 SCR 165 at paras 28–41, 146 DLR (4th) 577 [Hercules Management] (negligence). As I argue that both types of argument lead to the same conclusion in this case, those who believe that decisions on the scope of torts should be based only on doctrine (or “principle”) or only on policy (because all principle ultimately rests on policy, and doctrine bends to the demands of policy) may focus their attention only on the argument they prefer.

injury or illness to an employee, including any prescribed action, conduct or comment.”\(^\text{12}\) As the latter definition suggests with its reference to sexual harassment, a lot of harassment is directed at vulnerable groups, and the definition includes harassment on the basis of sex, race, religion, ethnicity, and so on. This is the kind of harassment that (when it happens in the workplace) is covered by anti-discrimination law. In addition, there is what is sometimes referred to as “general” harassment, which while typically also directed at vulnerable individuals is not based on any group-based trait of these individuals. This kind of harassment manifests itself in acts of public humiliation, personal slights, constant negative feedback, exclusion from certain group activities, and so on. Despite its name, group-based harassment can be directed only at specific individuals, in which case it overlaps with general harassment; but it can also take the form of a hostile environment that affects numerous members of a particular group. In this article, I focus mostly on the individualized harassment.\(^\text{13}\)

Though the statutory definitions just quoted are helpful for setting the terms of the discussion, the statutes they appear in do not provide a clear basis for civil liability for harassment. Should such a liability exist? My starting point in making the case for tort liability for harassment is embarrassingly simple. There is extensive evidence that harassment is incredibly common and that it causes enormous harm.\(^\text{14}\) I begin with harassment in the workplace, simply because of its prevalence. According to Statistics Canada, nearly one in five of the women surveyed (19 percent) and about one in six men (13 percent) reported workplace harassment in the

---

\(^{12}\) See *An Act to amend the Canada Labour Code (Harassment and Violence)*, *the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017*, No 1, SC 2018, c 22, s 0.1 [*An Act to Amend the Canada Labour Code*]. This Act received Royal Assent but is not yet in force.

\(^{13}\) In this sense, the harassment and bullying are largely interchangeable. See Ståle Einarsen et al, “The Concept of Bullying and Harassment at Work: The European Tradition” in Ståle Einarsen et al, eds, *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice*, 2nd ed (Boca Raton: CRC Press, 2011) 3 at 5 [Einarsen, *Bullying and Harassment*].

\(^{14}\) For those who take a rights-based view of tort law, the words in the text do not suffice for establishing a tort. But I do not accept this view for reasons articulated in Peter Cane, “Rights in Private Law” in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart, 2012) 35; Dan Priel, “That Can’t Be Rights” (2011) 2:1 Jurisprudence 227, Book Review of *Torts and Rights* by Robert Stevens (Oxford: Oxford University Press, 2007). However, since my argument is based on showing how liability for harassment can be established on the basis of existing torts (presumably satisfying rights-based theorists’ view), this question can be set aside for the purposes of this article.
previous year.\textsuperscript{15} Even if these numbers are somewhat inflated, given the size of the Canadian workforce, this means workplace harassment is a problem faced by millions. For most people work is a necessity, which means that a majority of the adult population spends about half of their waking hours in close proximity to people who may not be their friends, in an environment that is often competitive and hierarchical. These are the circumstances in which harassment and bullying flourish. Furthermore, because for many people there are very limited opportunities to change jobs, employees are sometimes trapped in a harassing environment with few realistic chances to escape it.

The prevalence of harassment in the workplace has led to various legislative responses, both provincial and federal, although most of them do not explicitly establish a right for a civil claim.\textsuperscript{16} With respect to claims for compensation, various provinces have included workplace claims for mental injury (including as a result of harassment) under their workers’ compensation schemes. In 2018, Ontario amended its worker compensation legislation to cover mental injury as a result of chronic mental stress, which until then had been excluded.\textsuperscript{17} This was interpreted to include mental injury from workplace harassment, thereby excluding it from the purview of tort liability.\textsuperscript{18}

This new legislation thus addresses a large number of potential harassment tort claims in Ontario. The situation is different in other provinces


\textsuperscript{16} For Ontario, see Occupational Health and Safety Act, RSO 1990, c O.1, s 32.0.6(2). Part III.0.1 of this Act, which was enacted in 2009, deals with workplace violence and harassment. Among other things, it requires employers to develop a policy to deal with workplace harassment to allow employees to report incidents of harassment and to set out ways for dealing with such complaints. Other provinces have passed similar legislation. See e.g. Quebec’s Act Respecting Labour Standards, CQLR c N-1.1, ss 81.18–81.20. For federal legislation, see An Act to amend the Canada Labour Code, supra note 12. At the federal level see also Criminal Code, RSC 1985, c C-46, s 264.

\textsuperscript{17} See Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A, s 13(4): “a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker’s employment.”

\textsuperscript{18} Ibid, ss 26(2), 28. For interpreting s 13(4) to cover mental injury from workplace harassment, thus barring a tort claim, see Morningstar v Hospitality Fallsview Holdings Inc, Decision No 1227/19, 2019 ONWSIAT 2324 at para 30 (CanLII).
or (as in the case of someone like Merrifield) for federal employees. In addition, much harassing behaviour happens in non-workplace situations. One domain of particular significance in recent years has been the Internet, due to the amount and viciousness of harassment taking place on it. According to a survey by Pew Research Center, 59 percent of United States teens have reported being harassed online; a Canadian survey put the figure at 40 percent of Canadian teens who reported being bullied, and 60 percent who reported seeing others being bullied. In a report from 2012, the Senate Standing Committee on Human Rights provided a range of statistics with widely divergent figures but all pointing to a serious and prevalent problem. Even if most of these cases are too minor for legal intervention, there is no doubt the phenomenon is pervasive. Legislatures and courts in Canada and around the world (as well as the proprietors of social media, video games, and community websites) are only beginning to grapple with it. In addition to information about the prevalence of harassment in Canada, there are also studies of its impact. Some of the


23 See e.g. Committee on Human Rights, Cyberbullying Hurts, supra note 22; AB v Bragg Communications Inc, 2012 SCC 46 at paras 20–24, which mentions some of the literature on online harassment and its harms. See also Nova Scotia’s Intimate Images and Cyber-Protection Act, SNS 2017, c 7, s 6, which gives a right to civil action against cyber-bullying. On efforts by private companies, see Laura Hudson, “Curbing Online Abuse Isn’t Impossible. Here’s Where We Start”, Wired (15 May 2014), online: <www.wired.com/2014/05/-fighting-online-harassment>.
information is anecdotal, but there are also more comprehensive studies. Those include information on the psychological effects that harassment has on the well-being of individuals, as well as studies on its costs. Obviously, the harassing behaviour and its impact diverge widely from one case to another, but the evidence clearly indicates that in serious cases, harassment leads to mental illness and self-harm, including suicide.

B. Countering Potential Objections

Based on available data, the phenomenon of harassment is prevalent and has serious effects on those subjected to it. That is not yet enough to establish that it should be the subject of tort liability, but it is enough to show that the question merits careful consideration. Making the case for tort liability for harassment must include considering and responding to the possible downsides that such liability might have.

My strategy in this article is to show that tort liability for harassing behaviour could be established on the basis of existing torts, rather than by creating a new tort. To the extent that imposing liability on harassing behaviour calls for expanding tort liability, we should examine whether the benefits of doing so are likely to be greater than the costs. It is very difficult to evaluate such matters with any precision, and without data, it is almost inevitable that one’s assessment of the relative costs and benefits

---

24 See Paula Todd, Extreme Mean: Trolls, Bullies and Predators Online (Toronto: McClelland & Stewart, 2014). One of the earliest and most famous cases of intense online harassment involved a Canadian teenager who achieved worldwide notoriety in 2003 as the “Star Wars kid.” He filed a lawsuit in Quebec, which was eventually settled for an undisclosed sum in 2006. See Allison Lampert, “Star Wars Kid Settles Lawsuit”, Montreal Gazette (8 April 2006) A8. In an interview he gave a decade later, he described the devastating effect of the event and subsequent harassment had had on his life. See Jonathan Trudel, “Star Wars Kid brise le silence”, L’actualité (8 May 2013), online: <lactualite.com/societe/le-retour-du-star-wars-kid>.

25 See e.g. Annie Hogh, Eva Gemzøe Mikkelsen & Åse Marie Hansen, “Individual Consequences of Workplace Bullying/Mobbing” in Einarsen, Bullying and Harassment, supra note 13 at 107. On the effects of bullying on children see the survey of research results in Kowalski, Limer & Agatston, supra note 22 at 33–35, 113–17.


27 Again, those who take a rights-based view might balk at such a suggestion. But it is clearly part of Canadian tort law. See e.g. AI Enterprises, supra note 6; Torstar, supra note 10; Hercules Management, supra note 10.
of liability will be coloured by one’s views on the desirability of such liability. My strategy will therefore not be to argue that there are no serious costs to imposing such liability, or to state definitively that the upsides of imposing liability for harassment clearly outweigh the downsides. I will argue instead that whatever downsides exist, they are not special to liability for harassment but are found whenever tort liability is imposed, especially when mental injury is involved. Therefore, simply citing these considerations is not a sufficient reason to deny tort liability for harassing behaviour. Further, I will show that recent doctrinal developments and empirical findings weaken concerns about the downsides of such liability.

The first potential problem with tort liability for harassing behaviour is the longstanding concern over proof and the possibility of feigned claims. Advances in psychiatry make it more difficult to fake psychiatric illness, but false claims are still possible. Nevertheless, this concern should not be exaggerated and should not be the basis for an outright rejection of tort liability for harassment. The Supreme Court had the opportunity to address this concern recently in its latest examination of the topic of psychiatric injury in tort law. It stated that the same tools available for proving and disproving the existence of physical harm are available with respect to pure psychiatric injury. There is no reason to think, said the Court, that these tools would not be able to weed out unmeritorious claims based on pure psychiatric injury.28

A second possible downside to recognizing tort liability for harassment is that it might be “weaponized.” As mentioned, work often places individuals who are not otherwise friends in a hierarchical and stressful environment and requires them to interact. In such circumstances, disagreements, hurt feelings, disappointments, and rivalries are inevitable. This is the environment that lends itself to harassing behaviour; it also provides opportunities for employees to misuse tort liability for workplace harassment as a way of getting back at workmates or supervisors with whom they clashed.

While some cases of abusing the law will probably happen, this is a weak argument against tort liability for harassment. Many torts (and criminal complaints) can be misused in this way, but we still maintain them, because they provide redress to a real problem. Moreover, the evidence from other contexts suggests that the number of false claims is likely to be small. Filing a lawsuit is costly and complicated and carries with

28 Saadati, supra note 3 at para 34.
it significant risk of negative repercussions. Empirical evidence strongly suggests that the real problem is far too few meritorious claims, not false ones.29

A third possible concern is that tort liability for harassment, even if itself commendable, may end up restricting desirable activity. This may sound odd at first, as harassment is not the kind of behaviour one would think has any social value. But, as always, the boundary between desirable activity and activity we wish to discourage may be blurry. Examples from the context of workplace harassment show that the boundary between protected speech and harassment is not always easy to draw.30

With respect to workplace bullying, some may think that successful workplaces strive by pushing employees to their limits rather than by coddling them, and that liability for workplace harassment will inevitably end up stifling businesses, and especially the most successful ones.31 Concerns of this kind were probably what Justice Juriansz of the Court of Appeal for Ontario had in mind when he wrote in 2010 that there should be no duty of care for negligently causing psychiatric harm in the workplace, since imposing such a duty “has a real potential to constrain efforts to achieve increased efficiencies.”32 In other words, there may be concerns that liabil-

29 An American survey from 2007 found that only 2.7 percent of bullied employees filed a lawsuit. See Workplace Bullying Institute, “U.S. Workplace Bullying Survey” (September 2007) at 14, online (pdf): Workplace Bullying Institute <workplacebullying.org/multi/pdf/WBIsurvey2007.pdf>. The same is true in other contexts. See e.g. Tom Baker, The Medical Malpractice Myth (Chicago: University of Chicago Press, 2005), ch 2 (demonstrating that contrary to popular beliefs about many unmeritorious medical malpractice claims, only a small fraction of medical mistakes that cause injury lead to lawsuits); Tom Blackwell, “Inside Canada’s Secret World of Medical Error: ‘There Is a Lot of Lying, There’s a Lot of Cover-Up’”, National Post (16 January 2015), online: <nationalpost.com/health/inside-canadas-secret-world-of-medical-errors-there-is-a-lot-of-lying-theres-a-lot-of-cover-up> (providing evidence the same is true in Canada).

30 See generally Eugene Volokh, “Freedom of Speech and Workplace Harassment” (1992) 39:6 UCLA L Rev 1791. It is notable that even Eugene Volokh, a defender of expansive protection of free speech, acknowledged that some cases of workplace harassment should be “banned” (ibid at 1807–09).


32 Piresferreira v Ayotte, 2010 ONCA 384 at para 62, leave to appeal to SCC ref’d, 33811 (20 Jan 2011) [Piresferreira]. As the Court of Appeal relied on this decision in Merrifield, I discuss this case in detail in Subsection V(c)2 below.
ity will lead to self-imposed restrictions on desirable activity, even when the activity in question is not, in fact, tortious. Outside the workplace, in the context of Internet speech, there may be concerns that expanded liability for harassment may stifle vigorous criticism and the free expression of opinion of the kind we do not want to discourage.

Concerns of this kind, though valid, are by themselves insufficient for denying tort liability for harassing behaviour altogether. Almost all cases of tort liability involve borderline cases, and with almost all tort liability there is the concern of possible excess. This is because tort liability is rarely concerned with inherently undesirable activity (such as murder), but with limiting the negative side-effects of otherwise desirable activity. As such, the risk that excessive tort liability will end up hurting a desirable activity is one that is entirely familiar from discussions of virtually all other torts, and yet it does not lead to the abolition of tort liability. This is true in general, and it is true specifically in the case of torts (such as deceit and negligent misrepresentation) that impose liability on speech. In the case of negligence, courts noted that liability could deter the production of valuable speech, and such concerns are even more prominent in discussions by courts and commentators of the tort of defamation. While considerations of this kind have led courts to limit liability for defamation and negligent misrepresentation (much less so for deceit), they have not led to the abolition of these torts. It is hard to see why such concerns should lead to a complete denial of liability for harassment.

IV. HOW THE COMMON LAW CHANGES

So far, I have sought to show that harassment is a serious problem. That a social problem exists does not immediately imply that law should be used to address it, let alone that a common law tort is the right response to it. How is the matter to be decided? The Court of Appeal in Merrifield did not say much about the substantive merits and demerits of liability for

---

33 See e.g. Candler v Crane, Christmas & Co, [1951] KB 164 at 194–95 (CA), 1 All ER 426 (expressing concern that liability for negligent misrepresentation would over-deter map-makers). Candler, which rejected liability for negligent misrepresentation, was overruled in Hedley Byrne & Co v Heller & Partners Ltd (1963), [1964] AC 465 at 466, [1963] 3 WLR 101 (HL (Eng)), but concern over overbroad liability has not disappeared. See Hercules Management, supra note 10 at para 33 (liability for negligent misrepresentation should be limited due to its potential for “socially undesirable consequences”).

34 Torstar, supra note 10, especially at para 86.
harassment; instead, it focused on the proper process for doing so. More than anything specific to harassment, the Court endorsed a “conservative” approach to legal change through the courts: “Common law change is evolutionary in nature,” it said, “it proceeds slowly and incrementally rather than quickly and dramatically.” In other words, even if a certain change in the law is desirable, it may not be appropriate for courts to adopt it, at least not immediately.

Though a familiar idea, there is some irony that the Court mentioned it in the same decision that spends so much space on analyzing the tort of IIMS, since everything about the origins of this tort is an affront to the idea of incremental change. IIMS can be traced to a single case, Wilkinson v Downton, decided by a trial court, written by a single judge. The whole decision is three-and-a-half pages long. (Feeling perhaps somewhat embarrassed by these inconvenient facts, the Court of Appeal does not cite this foundational decision in its discussion of IIMS.) The defendant in that case decided to play a practical joke on the plaintiff, falsely telling her that her husband had been seriously injured in an accident. Hearing this story, the plaintiff “became seriously ill from a shock to her nervous system,” which incapacitated her for weeks. She sued for damages, and the jury awarded her a small amount for expenses she incurred, and a far more substantial sum of £100 (the equivalent of almost £13,000 today) for her mental injury. Justice Wright, who presided, had to decide whether there was a legal basis for the claim. He conceded that the case was “without precedent,” but nevertheless held for the plaintiff because the defendant’s act “was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant....” Rather than being alarmed by the way such a revolutionary

35 Merrifield, supra note 1.
36 Ibid at para 20.
38 [1897] 2 QB 57, [1897] EWHC 1 (QB) [Wilkinson]. For a similar Canadian case, see Bielitski v Obadiak (1921), 65 DLR 627 (Sask CA), [1922] 2 WWR 238 [Bielitski].
39 Wilkinson, supra note 38 at 58.
40 Ibid at 61.
41 Ibid at 59.
change was introduced into the common law, later decisions accepted the tort created in Wilkinson and expanded its scope.\(^\text{42}\)

It is worth reminding that Wilkinson is not a decision from the heyday of “activist” American courts in the middle of the twentieth century;\(^\text{43}\) nor is it a decision by a Canadian court of a more recent vintage, sometimes criticized for its insufficient adherence to principle and precedent.\(^\text{44}\) It is a decision from late nineteenth-century England, the “classical” period of the common law, in which a trial court judge saw no difficulty in recognizing a new tort.\(^\text{45}\) And Wilkinson is not alone.\(^\text{46}\)

Nor is the recognition of new torts something that is confined to old history. Only a few years ago, the same court that issued the Merrifield decision created a new common law tort of intrusion upon seclusion in Jones v Tsige.\(^\text{47}\) That case did not involve the more traditional form of intrusion by way of snooping, but rather a newer form of invasion of privacy, accessing another person’s electronic bank account information. This fact is significant. As mentioned earlier, much of the non-workplace harassment these days is a result of, or is at least exacerbated by, the very same technological changes that motivated the Court of Appeal in Tsige (with the fulsome endorsement in Merrifield) to recognize a new tort of intrusion upon seclusion.\(^\text{48}\) As my main aim in this article is to argue for the possibility of imposing tort liability for harassment even without creating

\(^{42}\) See Janvier v Sweeney, [1919] 2 KB 316, 88 LJKB 1231 [Janvier], where the court allowed a claim for negligent infliction of mental injury. See also Biełiński, supra note 38, which went beyond Wilkinson in that the false statement in that case was not made directly to the plaintiff but to a third party who reported it to the plaintiff.


\(^{45}\) For a demonstration that Wilkinson and Janvier did not fit any existing categories, see Jeremiah Smith, “Torts Without Particular Names” (1921) 69:2 U Pa L Rev 91 at 95–99.

\(^{46}\) See Lumley v Gye, [1853] EWHC J73, 2 E & B 216 (QB), which is another famous example of the birth of the tort of inducing breach of contract. See also SM Waddams, “Johanna Wagner and the Rival Opera Houses” (2001) 117 Law Q Rev 431 at 448–49. But see Rylands v Fletcher (1868), LR 3 HL 330, which is another example, although perhaps more contested.

\(^{47}\) 2012 ONCA 32 [Tsige].

\(^{48}\) Ibid at paras 67–68.
a new tort, the conditions for establishing a new tort may be beside my main point, but it is still worth considering briefly what the Court of Appeal in the *Merrifield* decision had sanctioned. In *Merrifield*, the Court explained that *Tsige* satisfied the conditions for establishing a new tort, because it reached its conclusion only after it carefully reviewed Ontario and Canadian case law, in which [Justice Sharpe] discerned both supportive dicta and a refusal to reject the existence of the tort, and provincial legislation that established a right to privacy while not foreclosing common law development. He also considered academic scholarship, much of which supported the existence of a right to privacy. He drew upon American tort law, which recognizes a right to privacy, as well as the law of the United Kingdom, Australia, and New Zealand. He also noted societal change—in particular, technological developments that pose a threat to personal privacy—and the impetus for reform that it created. “[M]ost importantly,” he said, “we are presented in this case with facts that cry out for a remedy”: at para. 69.49

Are there corresponding “facts that cry out for a remedy” with respect to harassment? This is where one would have expected the Court of Appeal to follow its earlier example and study the case law and commentary as it did in *Tsige*.50 Based on the information mentioned above, much of it coming from official government publications,51 there is a good case for an affirmative answer.

Unfortunately, the Court never took the opportunity to examine the matter. In considering the question, it is fair to acknowledge that we live in the age of statutes, where we expect the legislature to bring about major changes in the law. This idea is based on two distinct motivations. One has to do with expertise. Simply stated, the worry is that judges often lack the requisite knowledge and the necessary empirical evidence to make

49 *Merrifield*, supra note 1 at paras 25–26 (first emendation added, second in original) (quoting from *Tsige*, ibid at para 69). While insisting on the importance of law reform to adjust the law to changing circumstances, the Court of Appeal in *Merrifield* also said that the Court in *Tsige* merely “confirm[ed] the existence of the tort rather than...create[ed] it” (ibid at para 26). But if the tort had already existed, it is not clear why the *Tsige* decision had to engage in extensive research of jurisprudence and academic literature from around the world. Nor is it clear in what way that decision responded to a problem that “cri[ed] out for a remedy,” if the remedy had already existed (ibid at para 25).

50 *Tsige*, supra note 47 at paras 16–68.

51 See Section III(a), above.
informed decisions on how to develop the law. Furthermore, judicial law-making typically lacks the possibility for precise legislative drafting, restoring instead to vague standards that are often difficult to implement. The other concern is political: some instances of legislative inaction are the result of a more-or-less conscious decision on the part of the legislature to leave a domain without legal regulation. Judicial action in such cases, even if well-intentioned and informed, may flout democratic choices. In short, the first concern is that judges’ legislative efforts are likely to be poor; the second concern is that even if they do a good job, their legislative efforts may be undemocratic.

These are, of course, familiar questions from other areas of law, and I acknowledge that they are relevant also for those areas of law traditionally developed by the courts. However, unless one thinks that the two considerations just mentioned foreclose any further judicial development of the common law, it follows that we should attempt to distinguish between those cases where legislative silence is properly understood as a rejection of legal regulation, and those where the silence should be understood as leaving the law for judicial development.

The Court of Appeal’s preference for incremental change can itself be seen as an attempt to mitigate both concerns. An incremental change is less likely to have unintended consequences and will usually be less disruptive, allowing courts and others to evaluate and adjust to the impact of the change as it happens. As such, it feels “safer” for a body asked to change the law on the basis of limited information. An evolutionary change is also less likely than a revolutionary one to raise democratic concerns, as it looks like an adjustment of existing law to changed times, or perhaps just an interpretation of it, rather than a change of course.

These, then, are the questions that must be reckoned with beyond the pure “policy” question of whether liability for harassment is desirable: first, whether legislative silence on civil liability for harassment should be interpreted as a rejection of such liability which courts should respect; and second, whether there is a valid doctrinal basis for such liability that will not satisfy a court concerned about its institutional limits. The next Part is dedicated to answering these questions.

---

52 See Dan Priel, “Legal Realism and Legal Doctrine” in Pierluigi Chiassoni & Bogan Spaić, eds, Judges and Adjudication in Constitutional Democracies: A View from Legal Realism (Cham: Springer, 2020) 139. These claims are, of course, contested. For an argument regarding why courts are superior to legislatures in this domain, see Cornelius J Peck, “The Role of the Courts and Legislatures in the Reform of Tort Law” (1963) 48:1 Minn L Rev 265.
V. DOCTRINAL ROUTES TO TORT LIABILITY FOR HARASSMENT

The Merrifield decision had relatively little to say about the desirability of liability for harassment but did say that there are no strong policy reasons for liability for harassment. Part III has sought to answer this point by showing that there are, in fact, good reasons for tort liability for harassment. That, however, does not fully address the Court of Appeal’s concerns. The Court also stated that “current Canadian legal authority does not support the recognition of a tort of harassment” and that it was not directed to “any foreign judicial authority” or academic literature supporting recognition of a tort of harassment.53 These statements send a clear message: to recognize a tort of harassment amounts to a pure invention of a brand new tort, one that has no basis in existing law and therefore a decision that exceeds the boundaries of legitimate judicial action. In other words, the Court argued that even if a tort of harassment is desirable, it would be a usurpation of power for the Court to create one.

Part IV has provided the framework for thinking about such concerns. In this Part, I turn to showing why judicial action in this case fits even a court committed to judicial restraint.

A. The Meaning of Legislative Silence

There can be little doubt that provincial and federal legislatures and governments have been concerned with the problem of workplace harassment.54 Similarly, provincial and federal reports show a similar concern

53 Merrifield, supra note 1 at paras 39–40. I do not know what materials the parties to the litigation provided to the Court, but the suggestion that there is no doctrinal basis or academic support for the judicial creation of a tort of harassment is, at best, inaccurate. See e.g. GHL Fridman, “The Judicial Response to Non-Sexual Harassment Claims” (1998) 77:3/4 Can Bar Rev 299 at 314, who suggested that “[w]hat has been achieved by legislation in the United Kingdom may...be reached by judicial initiative in Canada.”

54 For legislation, see the text accompanying note 16. In addition to statutes, there are legislative reports. See e.g. Ontario, Ministry of Labour, Workplace Violence and Harassment: Understanding the Law (Queen’s Printer for Ontario, September 2016), online (pdf): Government of Ontario <files.ontario.ca/wpvh_guide_english.pdf>. There are other resources dedicated to “prevention and resolution of harassment.” See also “Harassment and Conflict Resolution” (last modified 23 December 2019), online: Government of Canada <www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/harassment-conflict-resolution.html>.
with cyberbullying. The existence of this legislative and governmental recognition of the problem of harassment raises a doctrinal question: what impact should such an interest have on the question of tort liability for harassment? One answer is that tort liability for harassment would help align the common law with this new legislation. A skeptic, however, might draw the opposite conclusion: perhaps the fact that such legislative and executive interest in dealing with harassment has not included the creation of statutory torts shows that the legislature has concluded that such liability is undesirable. If this is indeed the case, then the creation of tort liability for harassment will not fill a gap but undermine legislative will. What are we to make of legislative silence in this case?

Not all cases of legislative inaction are the same. A defeated attempt at legislation and a change in statutory language from an initial bill to the final enacted statute have the same bottom-line outcome as complete silence on an issue: no law. But silence may warrant greater judicial action than an outright rejection. My point is, in effect, an attempt to extend an idea that received the Supreme Court’s endorsement: when legislation creates a comprehensive framework for dealing with a problem, a court should not create common law causes of action that clearly go against the legislation. Specifically, where the legislature creates a comprehensive statutory liability regime, it makes sense to conclude that adding causes of action to those available in the legislation will subvert the democratic compromise encapsulated in the legislation. In the present case, however, there is legislation that does not address civil liability at all. That makes the question of judicial development of a tort more difficult, as it is not obvious in such a case whether such legislation was meant to leave the question of civil liability for courts to consider or whether the legislative silence was meant as an affirmative (if silent) rejection such liability.

Several considerations can help answer the question, and here they all militate against judicial restraint. The first point is the widespread legislative and governmental recognition of the problem of harassment, including in the workplace context (as alleged in Merrifield). Rather than courts forcing their values on a reluctant society, tort liability for harassment will mesh well and complement existing legislative and governmental schemes

aimed at addressing what is widely perceived as a serious problem. Since there is no evidence that civil liability was considered undesirable, tort liability here will not be a direct affront to legislative choice.

Second, despite the unquestioned importance of legislation to private law,\(^\text{57}\) it remains small in amount, especially when compared with the vast amounts of public law legislation. Even in this age of statutes, there seems to be an implicit understanding that the division of labour in private law is somewhat different than in public law. Courts concerned with overstepping their role can make it clear that their solution is meant as a partial stopgap and call for a more comprehensive legislative reform. Of course, it is possible that such a call may not be heeded, but by pointing out the problem, courts will give the legislature the opportunity to do more, or, if it wishes, reverse course.

Third, contrary to what the *Merrifield* decision states, liability for harassment is not some novel idea that will come as a surprise or flout expectations. Long ago, commentators already suggested that a judicial action in this context is needed.\(^\text{58}\) There are also multiple decisions, from Ontario as well as other provinces, that assumed that a tort of harassment already existed. Only a couple of months before the *Merrifield* decision, the Saskatchewan Court of Appeal acknowledged the existence of a tort of harassment, stating that such a tort had already been recognized in Ontario, Alberta, and, in a more limited fashion, British Columbia.\(^\text{59}\) In fact, even in *Merrifield* itself, the Court of Appeal acknowledged that in


\(^{58}\) For judicial *dicta*, see Section V(b) below. For academic commentary, see Jane Stapleton, “In Restraint of Tort” in Peter Birks, ed, *The Frontiers of Liability* (Oxford: Clarendon Press, 1994) 83 at 101 (arguing, in a chapter that otherwise called for caution in expanding tort liability, that a tort of harassment is “long overdue”); Fridman, *supra* note 53. It is notable that both these articles appeared long before the problem of harassment was exacerbated by the Internet.

\(^{59}\) See *McLean v McLean*, 2019 SKCA 15 at para 97 [*McLean*]. For a list of cases from Ontario, Alberta, and British Columbia that tentatively recognized the tort of harassment, see *Al-Ghamdi v Alberta*, 2017 ABQB 684 at para 137. In denying the existence of previous case law from other jurisdictions, the *Merrifield* decision actually contradicts itself, as in discussing the British Columbia Supreme Court’s decision in *Mainland Sawmills Ltd v IWA-Canada*, 2006 BCSC 1195, it acknowledged that that Court relied on “American caselaw arising out of the tort of intentional infliction of emotional distress” (*Merrifield*, *supra* note 1 at para 30).
McIntomney v Evangelista, a 2015 Ontario case, the plaintiff won modest damages on the basis of a tort of harassment.  

Outside Canada, different jurisdictions have adopted various approaches to dealing with the problem. Courts in England and Wales have begun developing a common law tort of harassment, so that already in 1995 the Court of Appeal there wrote “[n]or…can the view be upheld that there is no tort of harassment.” This is admittedly not a forthright endorsement of such a tort, but neither is it an outright rejection. More than these words, the case from which this quote comes is notable for upholding the imposition of injunctions in response to his harassing behaviour. The injunctions included restrictions on the defendant’s freedom of movement by prohibiting him from getting near the plaintiff’s house. In other words, in order to protect the plaintiff, the Court upheld injunctions that forbade the defendant from acting in ways that were otherwise non-tortious. There can be little doubt that these judicial developments would have gone further had it not been for the enactment of the Protection from Harassment Act 1997.

None of this is definitive, but there is enough here to show that for well over two decades, tort liability for harassment (and even a “new” tort of harassment) was at least considered by numerous courts in Canada and elsewhere. Therefore, recognizing such a tort would not have been a revolutionary invention, a radical break from the past but the culmination of a slow process. With the passage of time, and with the problem only getting worse due to the ubiquity of the internet, waiting for a legislative solution no longer looks advisable.

A fourth consideration is the growing recognition, including in a clear statement in a recent Supreme Court decision, of the seriousness of psychiatric injury and the rejection of the longstanding tendency to treat physical and psychiatric harm differently.

Against this background, as I will argue in detail in the remainder of this Part, judicial action in this context can be seen as a modest updating of existing torts in response to new scientific understanding (as well as

---

60 McIntomney v Evangelista, 2015 ONSC 1419 at paras 36, 50. For other cases that discuss a potential tort of harassment, see the text accompanying notes 72 and 111.
62 (UK), c 40. This is not pure speculation: see Hunter v Canary Wharf Ltd, [1997] AC 655 at 692, 707, [1997] 2 All ER 426 (HL (Eng)) [Hunter], where Lords Goff and Hoffmann, respectively, stated that with the enactment of this Act there was no need to further develop a common law tort of harassment.
63 Saadati, supra note 3 at para 36.
greater societal acknowledgement) of mental illness, rather than the creation of a new tort.

**B. Limited Solutions**

Acknowledging some past cases that considered the tort of harassment, the Court of Appeal in *Merrifield* dismissed them because these decisions merely “asserted” or “assumed” rather than “established” the existence of the tort.\(^{64}\) The distinction is unclear (did the *Wilkinson* decision establish the tort of IIMS or merely assert it?), but to the extent one wishes to “establish” such liability from existing materials, this is typically done by showing how a proposed solution is a natural extension of existing doctrine. This is the aim of this section. I therefore ignore all past “assertions” of the existence of a tort of harassment and argue that even without them one can reach the opposite conclusion from the one the Court of Appeal reached in *Merrifield*. I begin by quickly reviewing four ideas that may have some initial attraction, but which I conclude are ultimately of limited assistance. I then turn to two more promising routes.

1. **Nuisance**

The 1976 Alberta case of *Motherwell v Motherwell\(^{65}\)* was an innovative attempt to extend the tort of private nuisance to deal with some forms of harassment. A good example of a court adjusting tort law to the effects of technological change, the case dealt with a woman who harassed her parents, brother, and sister-in-law by repeatedly calling their homes and sending them letters containing false accusations. The family members sued her for invasion of privacy and nuisance, asking the court for an injunction against contacting them.

The Appellate Division of the Alberta Supreme Court acknowledged that the case did not fit squarely within existing legal categories. Nevertheless, the Court decided to adjust the law in order to keep it in line with changing living conditions given the centrality of the telephone (the landline, of course) to the “daily life of society.”\(^{66}\) Some years later, the English

---

\(^{64}\) *Merrifield*, supra note 1 at paras 29–36.


\(^{66}\) *Ibid* at 75. The decision was also unorthodox in allowing a claim in nuisance to someone who lawfully resided in a property, even if she did not have a property right. *Ibid* at 77–78.
Court of Appeal followed *Motherwell* in *Khorasandjian v Bush*, similarly noting the need to fit the law to changing circumstances.67

Other courts did not welcome this doctrinal innovation. In *Hunter v Canary Wharf*, the House of Lords rejected the use of private nuisance “to create by the backdoor a tort of harassment.”68 But, this decision was handed down after the enactment by the British Parliament of the *Protection from Harassment Act 1997*, which made it unnecessary for courts there to consider this or other routes for a common law tort of harassment.

Despite the originality of the approach taken in *Motherwell*, it is limited in its ability to deal with the problem of harassment, as it is confined to cases of harassment related to property. Private nuisance deals only with a small number of the instances of harassing behaviour. For instance, it is difficult to see how the tort could be used to deal with workplace scenarios like *Merrifield*. Even for the kind of situations where the tort of nuisance might fit, the solution adopted by the court in *Motherwell* is an indirect one. If one were to address the problem of harassment head-on, it is better to do so more directly.

2. Intimidation

Intimidation is one of the so-called “economic torts,”69 and its most representative cases, both ancient and modern,70 deal with business-related disputes. However, in a recent article, John Murphy argued against this characterization of the tort. “Intimidation,” he wrote, is about “a genuine infringement of the victim’s autonomy,” a “wrongful coercion of the will, rather than the infringement of some […] economic interest.”71

There is no doubt that intimidating behaviour need not be confined to threats of an economic nature. If used in this broader sense, it is also not difficult to see at least a family resemblance between intimidation and harassment. However, there is a reason why we think of intimidation as an economic tort, and it has much to do with the fact that the tort of intimidation focuses on cases where the intimidating act prevented an economic transaction from taking place. In most other contexts, intimidating acts nullify consent, thereby putting us back in tortious territory

---

69 It was recently considered as such by the Supreme Court in *AI Enterprises*, *supra* note 6 at para 65.
70 See e.g. *Garret v Taylor* (1610), 79 ER 485, Cro Jac 567 (KB); *Central Canada Potash Co Ltd v Saskatchewan*, [1979] 1 SCR 42, 88 DLR (3d) 609.
(often trespass) or vitiating consent to a contract. In other words, the tort of intimidation was shaped into an economic tort by the need to capture actions that would not be captured by other torts.

Does this doom intimidation from becoming the means for dealing with harassment? There are some cases where the tort of intimidation could be used to deal with harassment. For example, in one Ontario trial court decision, the court held that the actions of an employer that humiliated an employee in order to make the employee quit not only constituted constructive dismissal, but may have also counted as “harassment and intimidation which are independent actionable torts.” Nevertheless, I do not think intimidation is likely to be a good vehicle for dealing with many cases of harassment. Both in terms of covered behaviour and in terms of outcomes, the tort of intimidation seems insufficiently narrow to deal with many cases of harassment that do not involve threats.

To be sure, all torts can, and do, change. That is, after all, one of the central points of this article. Nevertheless, there are two reasons why I think the amount of change needed in this context makes intimidation an unlikely vehicle for imposing tort liability on harassing behaviour. First, as already mentioned, the tort is limited to cases where the intimidation has proven successful in changing the plaintiff’s behaviour. Such a restriction leaves out some serious cases of unsuccessful harassment. It also means that the tort will be particularly difficult to apply to cases in which harassing behaviour is not geared toward achieving some specific goal: in many cases, harassment (especially of the non-sexual kind) manifests itself in demeaning and humiliating behaviour without hoping to gain from it something specific. Second, even without the requirement that the threat be successful, harassing behaviour can have devastating psychological effects without being intimidating.

3. Assault
Another doctrinal possibility for indirectly dealing with some cases of harassment involves expanding the tort of assault. One of the oldest recognized torts, assault deals with cases of threats of an imminent attack on the person. This may look like a rather surprising path for establishing tort

---

72 See Garcia v Newmar Windows Manufacturing (1996), 25 CCEL (2d) 114 at 124, OJ No 5079 (Ont Ct J (Gen Div)). See also Mintuck v Valley River Band No 63A (1977), 75 DLR (3d) 589 at 601, [1977] 2 WWR 309 (Man CA), which the court in Garcia relied on and also mentions “harassment,” although it is not entirely clear whether that decision refers to it as an independent tort.
liability for harassment, but just as with nuisance, some courts have been willing to use an old tort to deal with the changes brought about by new technology. A 2008 Ontario Superior Court case, Warman v Grosvenor, was concerned with highly abusive comments made by the defendant against the plaintiff on online forums as well as in emails sent directly to the plaintiff. In addition, the defendant used threatening language against the plaintiff (for instance, in one message directed at the plaintiff the defendant wrote that he owned a gun and “bullets [that] have your name on them”), to which he added the plaintiff’s home address. The plaintiff sued for defamation, assault, and invasion of privacy, and succeeded in the latter two. In allowing the assault claim, the court went beyond established boundaries of the tort, especially with respect to the need for the plaintiff to show the imminence of the attack. The court justified this by pointing to the nature and persistence of the defendant’s postings. There has since been modest appellate support for the decision.

Once again, even if we accept courts’ willingness to keep the common law with the times by adjusting it to technological developments, the ability to use assault as the basis for a robust protection against harassment is very limited. Though the defendant’s behaviour in Warman can definitely be called (among other things) harassing, the tort of assault, even in its extended form, will be a poor fit for most cases of harassment. Central to assault is the showing of imminent physical attack, but many cases of harassment do not involve any threats of physical harms, or not at the level of intensity and severity found in Warman. Therefore, even if assault could be used in some rare, extreme cases of harassment, it does not fit most.

4. Defamation
Another tort that could prove helpful for some cases of harassment is defamation. Loosely speaking, the tort requires showing that a statement by the defendant is likely to harm the plaintiff’s reputation, including by making them the subject of ridicule or contempt. Courts have tended to

73 Warman v Grosvenor (2008), 92 OR (3d) 663, 172 ACWS (3d) 385 (Ont Sup Ct).
74 Ibid at paras 22, 29, 31, 61 (in the original the quoted words were in all caps).
75 Ibid at para 62.
76 McLean, supra note 59 at para 61. In England, the House of Lords recognized that harassing behaviour consisting of silent phone calls that leads to psychiatric injury can fall within the definition of “assault occasioning actual bodily harm,” when the facts show that they are likely to cause the victim to apprehend immediate violence. See R v Ireland, [1998] AC 147 at 162, 166, [1997] 4 All ER 225 (HL (Eng)) [Ireland].
interpret these requirements broadly, and they are quite easy to satisfy. Consequently, some harassing behaviour would constitute defamation as well, if it involves humiliating or disparaging remarks that are made to a third party.

However, many instances of harassing behaviour do not count as defamation. For example, stalking rarely involves defamatory publications; and workplace harassment can be limited to communications between a supervisor and employee, thus not satisfying the requirement of “publication” to a third party. The harassment may be in the form of suggestive remarks or photos, which may sometimes be seen as defamatory (if, for example, they falsely suggest the plaintiff has certain negative characteristics) but need not be. In addition, some harassing behaviour could be protected by various defences to defamation. Harsh remarks (for instance, on poor work performance) could fall under the defence of fair comment, which protects the honest expression of opinion. Hurtful taunts (such as “you are a lousy student” or “you have no friends”) may be true, and as such enjoy a full defence of justification, which protects any true statement from liability for defamation. For these reasons, defamation, like the three other torts just considered, offers only a limited route to civil liability for harassing behaviour.

C. More Promising Possibilities

If one can fit harassing behaviour within one of the torts considered in the previous section, one should do so. It is also possible that in some contexts other torts could be utilized. However, the limitations of all the solutions just considered show that there is a need for a different approach. The different solutions just considered have one shortcoming in common: they are all limited to particular factual scenarios because they are built out of torts dealing with particular factual contexts. As mentioned at the outset, however, harassment takes place everywhere. Taken individually, each one of the solutions considered above is confined to a small subset of instances of harassment; taken together, they result in a confusing array of doctrines, each with its own elements and defences.

A better solution should satisfy three conditions: it should be general enough to capture various forms of harassment (in the workplace and outside the workplace, “general” harassment as well as harassment based on the plaintiff’s membership of a certain group); it should be direct, in that it should take harassment head-on; and it should be doctrinally viable. While
the history of doctrine shows the extraordinary malleability of legal categories to novel situations, the easier it is to fit an innovation within an existing doctrine, the easier it is to justify.

It helps to think about this problem in terms of actions, connection, and outcomes: we need to identify what types of action would count as harassing behaviour, and what sorts of outcomes should happen for liability to arise. Doing that will help identify where the law may need to change to cover cases of harassment. For example, in terms of action, IIMS contemplates any action done with intent (or at least recklessness); in terms of outcomes, the result must be mental injury.

**Table 1**

<table>
<thead>
<tr>
<th>Action</th>
<th>Connection</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any (one-off) action with intent/recklessness</td>
<td>Causes</td>
<td>Mental Illness</td>
</tr>
</tbody>
</table>

This formulation suggests that if a single harassing incident occurs that foreseeably results in mental injury, the plaintiff can sue in IIMS by the straightforward application of the tort of IIMS.

This general framework also makes it easy to analyze where the tort needs to be extended to deal with harassment. First, focusing on the action element, unlike the discrete events covered by IIMS, harassment usually involves a series of events that extend over a long period of time—what one of the legislative definitions quoted above called a “course” of conduct. Second, still focusing on the action element, liability for harassment may be broader if it can be done negligently, and not just recklessly. Third, focusing on the outcome element, liability for harassment may need to be broader if it is to cover outcomes that fall short of mental injury—for example, the “humiliation” mentioned in the recent amendment to the Canada Labour Code.80

79  See text accompanying note 11.
80  See text accompanying note 12. The framework also makes it possible to identify another potential point of expanding IIMS, i.e. the causal requirement. I will not consider this possibility here beyond noting that given recent Supreme Court cases such an approach, if taken, is unlikely to take the form of a special doctrine. Rather, the more likely method for relaxing the causal requirement is using clear evidence of wrongdoing as supporting a finding of causal connection. For a discussion of this approach, see Kenneth S Abraham, “Self-Proving Causation” (2013) 99:8 Va L Rev 1811. For a Canadian example, see Snell v Farrell, [1990] 2 SCR 311, 72 DLR (4th) 289. Such an approach is likely to prove attractive to courts in cases of serious harassing behaviour where a history of mental illness of the
With this general framework, we can turn to examining two different ways, based on existing torts, for establishing liability for harassing behaviour.

1. Updating IIMS

The Court of Appeal in *Merrifield* accepted that the tort of IIMS is an established part of the common law, despite its (unacknowledged) rather revolutionary origins.\(^81\) At the same time, it rejected the creation of a “new tort” of harassment.\(^82\) What the Court of Appeal did not consider was the possibility of *updating* IIMS, a tort born in the late nineteenth century, to present times. Such a revamped tort could either retain its rather cumbersome name, or be renamed “harassment” to better fit contemporary non-legal terminology. Either way, it would take the tort first established in *Wilkinson* as its starting point and adapt it to our times. Doing that—taking a 120-year-old doctrine and modestly adjusting it on the basis of present-day societal concerns and decades of additional empirical evidence—easily fits within the Court of Appeal’s conception of incremental common law change.

According to *Merrifield*, the tort IIMS has settled on the following elements:

1) The defendant’s behaviour was flagrant and outrageous;
2) It was calculated to harm the plaintiff; and
3) It caused the plaintiff to suffer a visible and provable illness.\(^83\)

By contrast, the tort of harassment was explicated by the trial court in *Merrifield* in the following terms:

1) Was the conduct of the defendants toward Merrifield outrageous?
2) Did the defendants intend to cause emotional distress or did they have a reckless disregard for causing Merrifield to suffer from emotional distress?
3) Did Merrifield suffer from severe or extreme emotional distress?
4) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?\(^84\)

---

\(^81\) See text accompanying note 38

\(^82\) *Merrifield*, supra note 1 at para 37.

\(^83\) *Ibid* at para 45.

\(^84\) *Merrifield* ONSC, supra note 4 at para 719, cited in *Merrifield*, supra note 1 at para 15.
These two formulations are remarkably similar. The most “visible” difference—three elements against four—is nothing more than a breaking of the third element of IIMS into two. Another difference the Court of Appeal pointed out is that while the recognized tort is limited to behaviour that was both flagrant and outrageous, the “new” tort can be committed by engaging in behaviour that is merely outrageous even if somehow non-flagrant. If this difference is of any significance, the Court of Appeal could have amended the trial court’s formulation of the tort of harassment by adding to it the flagrancy requirement. But the distinction appears spurious. It is hard to imagine conduct that would be outrageous but not flagrant, not least as a dictionary search shows that one of the meanings of outrageous is flagrant. Supposing, however, one managed to commit an outrageous-but-not-flagrant act that was intended to cause, and did in fact cause, serious mental injury, it is unclear why the Court of Appeal would not want it to give rise to tort liability.

Another insignificant difference between the two definitions is that the former is limited to actions “calculated” to cause mental injury, whereas the trial court’s suggested tort of harassment includes actions taken with reckless disregard of such a possibility. But the broader mental state that the trial court accepted is perfectly in line with the prevailing understanding of IIMS. In fact, it is almost certain that it was mere recklessness that was the basis for the imposition of liability in Wilkinson itself. There is no indication from the case that Downton, the prankster, sought the outcome that occurred. He just thought he would have a bit of harmless fun. Evidently not finding any evidence of actual intention to harm, the court in Wilkinson stated that the defendant’s action being what it is, “an intention to produce such an effect [as happened] must be imputed.” In other words, Wilkinson recognized that at most Downton was reckless with respect to the possibility of mental injury. The court also added that the fact that the actual harm was greater than the one Downton had anticipated was irrelevant. Nor was this an example of careless phrasing in a case of first impression that was rejected in subsequent decisions, for in 2004 the House of Lords explicitly accepted that IIMS can be committed

85 Merrifield, supra note 1 at para 47.
86 See The Oxford English Dictionary, 3rd ed sub verso “outrageous”: “Exceeding established or reasonable limits; egregious, flagrant; immoderate, extravagant; enormous.”
87 Wilkinson, supra note 38 at 59.
88 Ibid.
recklessly. Against this, *Merrifield* looks rather different from its self-presentation as a case that respects precedent and tradition, and more as a case of departure from settled doctrine without explanation.

These differences between the established tort of IIMS and the supposedly unwarranted new tort of harassment are at best minor. They can easily be accepted as the kind of evolutionary change that has been the lifeblood of the common law for centuries. But what about the three potential expansions that liability for harassment may require? Recall that the three were a long-term behavioural pattern (as opposed to a one-off event), a lower mental state requirement, and a harm that falls short of mental injury.

As long as IIMS remains a distinct tort different from negligence, it should not be expanded by weakening its *mens rea* requirement. The other two possible changes, however, require some consideration. The Court of Appeal did not examine the possibility of expanding IIMS to include cases where intentional or reckless action is the result of a long-term behavioural pattern. It should have done that. IIMS was born in a case involving a discrete event, and to this day this aspect is embedded in the tort’s DNA. By contrast, when people talk about harassment outside the law, they often talk about a series of incidents or a pattern of behaviour. This distinction is important, because the serious effects of harassment are often the result of their prevalence and persistence. It is the repeated nature of such attacks that can create a sense of helplessness.

---

89 See *Wainwright v Home Office*, [2001] EWCA Civ 2081 at paras 44, 46, 49, Lord Woolf, CJ, aff’d *Wainwright v Home Office*, [2003] UKHL 53 [*Wainwright*] (to commit this tort “[t]he defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not” at para 45). As mentioned, older cases also allowed for this tort to be committed negligently. See *Janvier*, supra note 42. Another oddity of the Court of Appeal’s decision in *Merrifield* is that it read and criticized the trial court’s reference to “reckless disregard,” a well-known subjective mental state, as an indication of adopting an “objectively-defined” standard (*Merrifield*, supra note 1 at para 47). Based on this, the Court of Appeal accused the trial court of turning IIMS into a negligence tort (*Merrifield*, supra note 1 at para 48). The trial court decision, however, clearly says “the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow” (*Merrifield* ONSC, supra note 4 at para 728) (quoting *Prinzo v Baycrest Centre for Geriatric Care* (2002), 60 OR (3d) 474 at para 61, 215 DLR (4th) 31 (Ont CA)). If anything, the mental state of substantial certainty is more restrictive than recklessness.

90 The terms “*mens rea*” and “*actus reus*” are more frequently used in criminal law, but they can be useful for tort law as well. See Peter Cane, “*Mens Rea in Tort Law*” (2000) 20:4 Oxford J Legal Stud 533.
and lead to long-term injury that can be more severe than the results of a one-off event.

That the law historically had an easier time recognizing liability for mental injuries arising from discrete events is understandable. Apart from the human tendency to react more strongly to direct and vivid risk and harms than to those that are hidden and whose causal paths are obscure, the law may have some good reasons for treating the two differently. Even when the physical harm is slight, it is usually easy to prove both that it happened and that it was caused by the defendant’s actions. With psychiatric injury matters are, or at least used to be, quite different as proof of both was often more difficult. For this reason, it is no surprise that historically liability for psychiatric injury was limited to cases involving a triggering event so extraordinary that the causal connection between the defendant’s action and the plaintiff’s harm could not be doubted and a psychiatric injury so serious that it would be difficult to dismiss as mere disturbance.

These days, it is more difficult to accept a categorical distinction with fundamentally different legal outcomes between discrete events and ongoing harassment, when they result in similar harms. One thing that has changed since 1897 is the state of medical knowledge with respect to the impact of exposure to stressful environments. It is not a surprise, then, that courts in various common law jurisdictions acknowledged that the distinction between shock and stress is problematic and have begun dismantling it. In at least two Federal Court decisions (not mentioned by the Court of Appeal) the Court imposed liability for harassing behaviour by extending the tort of IIMS to cases of continuous workplace harassment.  

92 See e.g. Wilkinson, supra note 38.
93 For England, see Walker v Northumberland County Council, [1995] ICR 702, [1995] 1 All ER 737 (QB) [Walker]; Hatton v Sutherland, [2002] EWCA Civ 76 at paras 7–10 [Hatton]. See also Khorasandjian, supra note 67 at 736. For Australia, see Tame v New South Wales, [2002] HCA 35 at paras 18, 65-66, 213. Particularly pertinent to Merrifield is Bau v Victoria, [2009] VSCA 107 [Bau], also involving a police officer who alleged workplace harassment. The Victoria Court of Appeal accepted that a series of minor events may have a cumulative effect that can cause a recognized psychiatric injury (ibid at paras 86–87).
94 See Clark v Canada, [1994] 3 FC 323 at 350–51, 1993 CanLII 3479 (FCTD), where the Court acknowledged the point. See also Boothman v R, [1993] 3 FC 381, 1993 CanLII 2949 (FCTD), which imposed liability for IIMS for long-term harassment but did not consider the difference between one-off and continuous IIMS. Incidentally, Clark dealt with a member of the RCMP, who successfully sued for sexual harassment and bullying in the workplace. Clark was cited in Merrifield ONSC, supra note 4 at para 878.
“That Is Not How the Common Law Works”: Paths to Tort Liability for Harassment

A narrower legal argument in support of this conclusion runs as follows: in the domain of physical injury, courts now recognize claims based on physical harm arising from long exposure to a dangerous substance. It follows that to limit tort liability for IIMS only to cases of nervous shock requires distinguishing between physical and psychiatric injury. This distinction is medically questionable, but until recently it had some support in Canadian law. It rests on much shakier ground after the Supreme Court’s 2017 decision in Saadati. Though Saadati was a negligence case, technically not dealing with the tort of IIMS, its message was general. The treatment of psychiatric injury as inherently different from physical injury cannot be justified, and to the extent that past cases affirmed it, they should be rejected. It follows that if physical harm that is the result of long-term exposure can be the basis of liability, there is no principled reason for limiting liability to “shock” cases when it comes to psychiatric injury.

As the distinction between a discrete event and a pattern of behaviour appears suspect, as it has been rejected in courts around the world, and as it is at odds with recent Supreme Court decisions, it poses no real hurdle to a modest updating of IIMS to modern realities, thereby creating tort liability for many types of harassing behaviour. Indeed, with this change IIMS could be renamed “harassment,” on the understanding that Wilkinson-type cases are the less common cases of harassment, where the harm is the result of a single harassing incident.

95 See Holby v Brigham & Cowan (Hull) Ltd, [2000] ICR 1086, [2000] 3 All ER 421 (CA) [Holby] (negligence liability imposed for long exposure to asbestos causing asbestosis). In Ontario, see Pearson v Inco Ltd (2005), 78 OR (3d) 641 at paras 46–49, 261 DLR (4th) 629 (CA) [Pearson] is illustrative: the Court of Appeal certified a class action in negligence (among others) based on long-term exposure to nickel as a result of actions by the defendant. The negligence claim was apparently later dropped, and the whole claim was ultimately dismissed by the Court of Appeal (see Smith v Inco Limited, 2011 ONCA 628 [Smith]), although for other reasons. There was never a suggestion that harm arising from long-term exposure could not be the basis for tort liability, or else the claim would not have been certified.


97 Saadati, supra note 3.

98 Ibid at para 35.
The last possible difference between the standard understanding of IIMS and the supposedly novel tort liability for harassment deals with the harm the plaintiff needs to show. According to Merrifield, IIMS requires proof of “visible and provable illness,” whereas the trial court in Merrifield required only “severe or extreme emotional distress.”99 Here too, however, Merrifield’s more restrictive requirement is at odds with Saadati, which not only challenged the distinction between physical and psychiatric injury, but also eliminated the requirement of showing “recognized psychiatric illness.”100 Once again, the reasons offered in Saadati were completely general, pertaining to the nature of the harm and not limited to the tort of negligence. Indeed, if such reasons are applicable to negligence, they are a fortiori applicable to a tort with a more stringent mens rea requirement.

Though the trial court’s decision in Merrifield was handed down a few months before the Supreme Court decided Saadati, it is better aligned with its conclusions than the Court of Appeal’s decision, which came out of it: Saadati set a limit on liability for “ordinary emotional upset or distress” which is not compensable,101 but the trial court in Merrifield limited liability only to a much narrower category of severe or extreme emotional distress. There is a certain irony in the fact that a decision premised on the idea of upholding the way “the common law works” ends up ignoring perhaps the best-known aspect of the common law, following precedent.

2. Incorporation within the Tort of Negligence

In addition to updating a late nineteenth-century tort to our times, it is worth examining the possibility of using tort law’s jack-of-all-trades for imposing liability for harassing behaviour.102 In dismissing the possibility of imposing liability on the basis of negligence, the Court of Appeal in Merrifield followed its earlier decision in Piresferreira v Ayotee.103 As this

99 Merrifield, supra note 1 at para 47.
100 Saadati, supra note 3 at para 31.
101 Ibid at para 40 (the plaintiff’s compensable claim was based on a disruption that exceeded the level of “ordinary emotional upset or distress”).
102 This is, broadly speaking, the approach taken by Australian courts. There, workplace harassment and bullying have been analyzed within the framework of negligence. See Koehler v Cerebos (Aust) Ltd, [2005] HCA 15, where the High Court of Australia recognized a general duty of care owed of employers to protect their employees’ well-being, “a duty to take all reasonable steps to provide a safe system of work” (at para 19), which includes a duty to “avoid psychiatric injury” (at paras 21, 53). On this basis, lower courts have later imposed liability on employers for negligently failing to deal with workplace harassment. See e.g. Bau, supra note 93; Brown v Maurice Blackburn Cashman, [2013] VSCA 122.
103 Piresferreira, supra note 32.
earlier decision (written by Justice Juriansz, one of the members of the Merrifield panel) shares Merrifield’s hostility to tort liability for workplace harassment, it deserves some closer attention. The case involved a plaintiff who alleged suffering mental injury as a result of demeaning and humiliating workplace conditions. In the course of dismissing her claim, the Court of Appeal in Piresferreira framed the legal question as whether there exists a tort of “negligent infliction of mental suffering,” and concluded that it “is not available in the employment context.”104

There is something misleading in presenting the question in this way, although it serves a rhetorical purpose. Speaking of “the tort of negligent infliction of mental suffering” suggests that what the Court was called upon to decide depended on the creation of a new tort. Just as in Merrifield, this made it easier to reject the claim as supposedly resting on a revolutionary change in the law, which it was inappropriate for a court to make. In fact, there is just one tort of negligence, which the Supreme Court has long ago described as “the closest the common law has come to a general theory of civil responsibility.”105 A different framing, and arguably one that better matches Canadian tort law, would have been this: when the Court of Appeal concluded in the end of its judgment in Piresferreira that “the tort of negligent infliction of mental suffering is not available against an employer and supervisor for conduct in the course of employment,”106 what it effectively decided was that employers or workplace supervisors do not owe a duty of care to their employees with respect to mental injury. Given that it has long been established that one can be liable for negligent infliction of pure psychiatric injury,107 Piresferreira stands for the idea that the workplace should be carved out as an exception to this general rule.

Such an exception is anomalous, especially after Saadati. That employers and supervisors owe a duty to their employees to take reasonable care to protect them from physical injury, including injury caused by other

---

104 Ibid at para 63.
106 Piresferreira, supra note 32 at para 94.
107 See Mustapha v Culligan of Canada Ltd, 2008 SCC 27. See also Wainwright, supra note 89 at para 40 (“By the time of Janvier v Sweeney [1919] 2 KB 316...the law was able comfortably to accommodate the facts of Wilkinson v Downton [1897] 2 QB 57 in the law of nervous shock caused by negligence”). Wainwright, however, limited the scope of IIMS to acts of intention or recklessness. It balanced the higher mental state requirement of that tort with a lower injury requirement (ibid at paras 42–45).
employees, is not in question. 108 Ontario’s *Occupational Health and Safety Act* makes it the employer’s duty to “take every precaution reasonable in the circumstances for the protection of a worker.”109 Speaking more loosely, the Supreme Court long ago affirmed a supervisor’s and employer’s duty to “ensur[e] a safe, productive, workplace.”110 These words were made without qualification or limitation; and since they were made in the context of a sexual harassment claim, there is every reason to think they were meant to cover safety from both physical and mental injury. It is thus no surprise that in other provinces negligent infliction of mental injury in the workplace has been recognized as giving rise to a claim.111

*Piresferreira* thus implies that the overlap of two recognized duties of care somehow yields a domain of no duty of care. Presenting the decision in this way helps show how odd it is. But, as mentioned, putting the question in terms of a “new tort” (or even a “novel” duty of care) provided the Court of Appeal with rhetorical ammunition. Rather than being forced to justify the creation of an *exception* to an already-recognized liability, the Court’s framing put the burden on the plaintiff to justify the establishment of a novel basis for liability. Treating the case in this way, the Court ran the claim through the *Anns/Cooper* test.112 It accepted that an employer and their employees are in sufficient proximity to satisfy the first stage


109 *Occupational Health and Safety Act*, RSO 1990, c. O.1, s 25(2)(h). Workplace supervisors have a similar duty (ibid, s 27(2)(c)). It is true that the Ontario Labour Review Board has held that this statute “does not provide workers with a right to a harassment free workplace.” *Ljuboja v Aim Group Inc*, [2013] OLRB Rep 1298, 2013 CanLII 76529 at para 35 (OLRB); *Conforti v Investia Financial Services Inc*, [2011] OLRB Rep 549, 2011 CanLII 60897 at para 15 (OLRB). But the context of discussion is different, namely whether such duties can give rise to negligence liability for not preventing harassment. Moreover, these cases were decided before the recent changes to the statute, described in text accompanying notes 17–18.


111 See *Sulz v Canada (AG)*, 2006 BCSC 99 at paras 144–60 [*Sulz*], aff’d 2006 BCCA 582. Like Merrifield, Sulz was a police officer who sued for negligent infliction of mental suffering due to harassment by her workplace supervisors. Her claim succeeded.

of the test but that the duty of care is negated at the second stage. The doctrinal argument in support of this conclusion went something like this: the Supreme Court rejected the existence of a tort that can give rise to damages for bad faith dismissal. It follows that the employer owes no duty of care with respect to the negligent infliction of mental injury in the workplace because the latter alleged duty, which extends to the entirety of the employment relationship, is far more expansive than the former. If the former does not exist, then logically the latter does not exist either.

This reasoning is unconvincing. I note in passing that in Wallace v United Grain Ltd—the Supreme Court decision on which Piresferreira built this argument—it was held that a duty of good faith in dismissal did in fact exist. What the Supreme Court rejected was the possibility of damages for bad faith dismissal, favouring instead the remedy of an extension of the notice period. When such notice is not given, the plaintiff will often get salary in lieu of the notice (as reinstating her to the workplace for the missed notice period will not be practical). The practical effect of this approach is thus not very different from that of a damage award for bad faith dismissal. Moreover, while the Supreme Court in Wallace dismissed tort damages for bad faith dismissal, it allowed them for “humiliation, embarrassment and damage to one’s sense of self-worth and self-esteem.” Compensation may be warranted in such cases, because the “compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.” All of this shows that Wallace’s support for the Court of Appeal’s argument in Piresferreira is very weak.

113 In doing so, the Court of Appeal implicitly rejected numerous decisions from several common law jurisdictions, both in Canada and elsewhere. For a Canadian case, see Sulz, supra note 111. For English decisions, see Johnson v Unisys Ltd, [2003] UKHL 13 at paras 18–20; Hatton, supra note 93 at para 22; Walker, supra note 93, all of which grounded an employer’s duty to maintain employees’ physical and psychiatric security in their contractual relationship.


115 Wallace, supra note 114 at para 98, 103.


117 Ibid at para 103.

118 Ibid at para 103. Similarly, courts that rejected claims for mental distress for wrongful dismissal have still allowed them for inadequate notice. See Bohemier v Storval International Inc (1982), 142 DLR (3d) 8 at 18–20; 44 OR (2d) 364 (Ont H Ct J), aff’d (1983), 4 DLR (4th) 383, 44 OR (2d) 361 (CA) (the trial court “correctly stated the principles applicable...and [its] judgment is unassailable” at 383), leave to appeal to SCC ref’d, [1984] 1 SCR xiii.
But even accepting the premises of *Piresferreira’s* reasoning, the conclusion is a *non sequitur*. Dismissal is a particular and unique aspect of employment, one that involves the termination of the contractual relationship between the parties. As such, it is difficult to generalize from it to the duties employers owe to their employees in the course of employment. Furthermore, a duty of good faith and a tort law duty of care are different. The former is a fairly general duty whose specific requirements are loosely defined. It is for this reason that common law courts have long been reluctant to recognize such a general duty. Duties of care in tort are more specific to particular types of relationships and often also to particular types of harm. Indeed, if the Court of Appeal’s reasoning were convincing, it would follow that employers do not owe any duties of providing a safe workplace to their employees, since such duties would also be more extensive than the duty supposedly rejected by the Supreme Court. And that is clearly not the law.\(^{119}\)

There are further doctrinal grounds for doubting the reasoning of *Piresferreira*. In seeking to restrict a tort claim on the basis of a contractual right, *Piresferreira* is at odds with the drift of the case law with respect to the relationship between possible contract and tort claims. Roughly speaking, in the 1970s, the Supreme Court took the view that in a contractual context, the contract sets the terms of the relationship between the parties, therefore limiting them to contractual claims.\(^{120}\) In subsequent years, the Supreme Court changed course. Beginning with *Central Trust Co v Rafuse*,\(^{121}\) and especially after *BG Checo International Ltd v British Columbia Hydro and Power Authority*,\(^{122}\) the Supreme Court established the present position that the existence of a contractual relationship does not affect tort rights and that a plaintiff is entitled to choose the most favourable course available to her. Rather than treating the contractual and the

\(^{119}\) See e.g. *Hatton*, supra note 93 at para 22; *Walker*, supra note 93 (“It is clear law that an employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable... [T]here is no logical reason why risk of psychiatric damage should be excluded from the scope of an employer’s duty of care or from the co-extensive implied term in the contract of employment” at 710). See also text accompanying notes 109–110.

\(^{120}\) See *J Nunes Diamonds Ltd v Dominion Electric Protection Co*, [1972] SCR 769 at 777–78, 26 DLR (3d) 699. See also *Central Canada Potash Co Ltd v Saskatchewan*, [1979] 1 SCR 42 at 8, 88 DLR (3d) 609.

\(^{121}\) [1986] 2 SCR 147, 31 DLR (4th) 481.

tort paths as independent, *Piresferreira* fits the earlier approach, in which contractual claims limited the scope of tort claims.

In addition to the doctrinal argument just considered, the Court in *Piresferreira* also stated policy reasons against liability. A duty of care on employers with respect to mental harm, the Court of Appeal said, “would be a considerable intrusion by the courts into the workplace,” as it “has a real potential to constrain efforts to achieve increased efficiencies, and [also because] the postulated duty of care is so general and broad it could apply indeterminately.”

This passage reads like a throwback to the nineteenth century when, under the influence of the “political economists,” some judges sought to leave workplace conditions to be regulated by contract alone. The doctrine of common employment (which held that employers are not liable vicariously for employees’ injuries arising from the negligence of other employees) was in fact justified for encouraging workplace security.

The Court of Appeal’s reference to “increased efficiencies” sounds similar to comments made by opponents of legislative proposals to eliminate the judge-made rule of common employment, because its abolition “would effect a serious disturbance in the industrial arrangements of the country.”

In one respect, the *Piresferreira* decision goes even further: the doctrine of common employment was an exception to the doctrine of vicarious liability and as such restricted the employer’s vicarious liability for torts committed by employees. According to *Piresferreira*, an employer owes no duty of care for *direct* liability, either when it is the employer’s actions that caused the injury, or when it was the result of ongoing actions of another

---

123 *Piresferreira*, *supra* note 32 at para 62.
124 See *Priestly v Fowler* (1837), 150 ER 1030 at 1032 (Ex) (arguing that allowing liability “would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master”); *Farwell v Boston and Worcester Rail Road Corp* (1842), 45 Mass (4 Met) 49 at 58 (supporting the rule for “the safety and security of all the parties concerned”). On the history of the doctrine and the reasons courts provide in support of it, see Eric Tucker, “The Law of Employers’ Liability in Ontario 1861–1900: The Search for a Theory” (1984) 22:2 Osgoode Hall LJ 213 at 228–32.
125 *Piresferreira*, *supra* note 32 at para 62.
126 UK, House of Commons, *Report from Select Committee on Employers Liability for Injuries to their Servants; Together with the Proceedings of the Committee, Minutes of Evidence, and Appendix* (June 1877) at iv. Cf *Vose v Lancashire & Yorkshire Rail Co* (1858), 27 LJ Ex D 249 (“there was never a more useful decision, or one of greater practical and social importance in the whole history of the law” than the decision establishing the rule of common employment, and “if it had not been so, we could hardly have lived into the present century without having actions brought over and over again” at 252).
employee, where direct liability could be imposed for failure to properly monitor employees. From a policy perspective, such a restriction is odd. Discrete events may be the result of a momentary act of foolishness, and, if taking place in the workplace context, may be far more difficult for an employer to monitor. Therefore, it is not easy to establish carelessness on the part of the employer in such cases.\footnote{127} By contrast, repeated acts of harassment or bullying are more straightforwardly the kind of events that an employer can be expected to stamp out as part of its obligation to provide a safe workplace.

All this shows that \textit{Piresferreira}, which the \textit{Merrifield} court relied on for its dismissal of the plaintiff’s claim in negligence, is a very problematic precedent when analyzed on its own terms. But even if accepted as correct when decided, several important developments have taken place in the ensuing years that undermine its premises and render its precedential status even more suspect. To begin, \textit{Piresferreira} appears to accept that employers owe duties to employees to protect them from physical injury in the course of their employment. This presumably includes bullying behaviour that results in physical harm. Thus, to deny a duty of care for protecting employees from bullying that causes psychiatric harm crucially depends on treating physical and mental harm differently. However, as already mentioned, \textit{Saadati} rejected this distinction, at the very least with respect to negligence.\footnote{128} The Court of Appeal in \textit{Merrifield} attempted to minimize the significance of \textit{Saadati}, asserting that it was merely concerned “with proof of mental injury in the context of a known cause of action.”\footnote{129} This is a very narrow, and arguably misleading, description of \textit{Saadati} and its impact on \textit{Piresferreira}. \textit{Saadati} accepted that the medical distinction between physical and psychiatric injury is dubious, stating further that there is no reason to consider physical injury as inherently more serious.\footnote{130} The decision is also critical of the idea that there is a defensible basis for a legal distinction between physical and psychiatric injury.\footnote{131}

\footnote{127} On some views, even vicarious liability might be problematic in such cases. See \textit{Konradi v United States}, 919 F (2d) 1207 at 1210 (7th Cir 1990) (“‘scope of employment’ can be functionally defined by reference to the likelihood that liability would induce beneficial changes in activity”).

\footnote{128} See the text accompanying note 97.

\footnote{129} \textit{Merrifield}, supra note 1 at para 52.

\footnote{130} \textit{Saadati}, supra note 3 at paras 23–24, 35.

\footnote{131} \textit{Ibid} at para 23 (“Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one’s mental health.”)
and stated in plain language that “the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury.” Since *Piresferreira* is premised on precisely the opposite view—accepting that employers owe a duty of care to employees for physical harm but owe no such duty for psychiatric harm—the Court of Appeal in *Merrifield* could not have relied on its earlier decision without explanation.

If the precedential status of *Piresferreira* is, as suggested here, suspect, the Court of Appeal could have considered the possibility of using negligence for dealing with harassment. At its broadest, such liability would cover all behaviour that foreseeably causes mental injury, provided there is an existing duty of care between the parties. At this point we encounter again the question of whether such liability must be limited to discrete events. In the next section, I will suggest that one possible way of maintaining the distinction between IIMS and negligence liability in this context can be confining negligence liability to discrete events. However, it must be stated that such a distinction would be based on policy, since the doctrinal basis for extending negligence liability to cases of long-term harassment is there, and follows, once again, from *Saadati*. As mentioned, there is no question that carelessly exposing someone to a substance that causes physical injury over an extended period of time can give rise to negligence liability. If we take seriously *Saadati*’s elimination of a categorical distinction between physical and psychiatric injury, then carelessly exposing someone to harassing behaviour that causes psychiatric injury over time could similarly give rise to negligence liability.

**D. Balancing IIMS with Negligent Infliction of Mental Injury**

If the arguments in this Part are convincing, there are two major paths to tort liability for harassment. If the two end up being exactly the same, there is not much of a point in keeping both. As presented above, they end up looking quite similar, but I want to leave open the possibility of maintaining both as slightly different bases for liability. There are three possible ways of distinguishing between the two approaches, in

---

132 Ibid at para 24. Incidentally, the Court stated that this was implicit already in *Mustapha*, decided before *Piresferreira*.

133 See Holtby, supra note 95; Pearson, supra note 95; Smith, supra note 95.
each “compensating” for the lower mens rea requirement of negligence by demanding more from one of the other elements: one way is to limit liability in negligence only to psychiatric harm arising from a single, discrete event (“shock”); another is to limit negligence only to more serious psychiatric injury; yet another way, and here I go beyond what I said above, is allowing claims in the revised tort of IIMS that do not involve mental injury, but only dignitary harm.

Admittedly, the first two possibilities do not fit easily with the message coming from Saadati of removing the distinction between physical and psychiatric harm. Of the two, the second one is more problematic: it is true that the common label for the intentional tort suggests the tort is concerned with “mental suffering” even when it does not amount to mental injury (mental illness). But Saadati makes it difficult to draw a defensible distinction between the two torts on this basis. As discussed above, though the Court rejected “recognized psychiatric injury” as a requirement for imposing liability for causing psychiatric injury, it maintained that liability depends on showing “mental injury,” which it distinguished from “psychological upset.” As held in Saadati, there are good reasons for tort law not to protect individuals against the infliction of mere disturbance or unhappiness, even when done intentionally (or with knowledge of its high likelihood). The risks of such harms materializing are more plausibly distributed onto their likely victims. Taking these two points together, there does not seem to be much of a space for distinguishing between the two torts. Nevertheless, it might be possible to require a greater degree of severity from the negligence-based version of liability for harassment. Perhaps IIMS would permit claims for severe emotional distress while negligence will still require a showing of mental illness, although not necessarily a “recognized” illness. I recognize, however, that this may be too fine a distinction to sustain.

Another way of distinguishing between the two paths to liability proposed here would limit liability for negligence to discrete events, while allowing claims for ongoing harassment to the revamped tort of IIMS. (Thus, applying this approach to the facts of Merrifield, the plaintiff there

134 Saadati, supra note 3 at para 37 (emphases omitted).
136 Saadati, supra note 3 at para 31, explicitly denied the need to show an illness as identified and categorized in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”).
would have been limited to the intentional tort.) This too seems at odds with Saadati given that, as mentioned, physical harm caused by prolonged exposure is now recognized as a basis for liability for negligence. But the particular suggestion made here has not been explicitly rejected in Saadati. Even if adopted, however, I doubt this approach would make much of a difference in practice, as it would not be too difficult for plaintiffs to show at least recklessness in cases of ongoing harassment. Nevertheless, the divide between the two torts may still be significant in cases where the defendant is accused of failing to prevent harassing behaviour by a third party. For instance, in the case of harassment or bullying taking place at school, it might be possible to show lack of recklessness on the part of the school authorities but not an absence of carelessness.

The final proposal for balancing the two grounds of liability involves extending the tort of IIMS even beyond extreme mental disturbance to include liability for the intentional infliction of dignitary harm, typically in the form of humiliation in the eyes of others. Tort liability for such harms is not unheard of: there have been calls for reorienting liability for sexual harassment to this basis, and there is some recognition of such harms in Canadian tort law. I mention this suggestion more tentatively, because it involves extending liability considerably beyond its current boundaries to a point that many might consider undesirable, either in itself (as such indignities are of the kind that people should learn to live with) or for its potential negative side-effects. To the extent that such an extension is contemplated, I think it should be confined to IIMS, with its more demanding mens rea requirement. Perhaps it should be limited even further: by way of analogy, the Supreme Court allowed compensation for defamation that causes dignitary harm, but limited such compensation to cases of “actual malice.” In similar fashion, although perhaps in the more distant future, after establishing liability for harassment that causes (at least) severe emotional distress, there may be room for expanding it to cases of harassment that causes (mere) dignitary harm but only when done with actual malice.

137 L Camile Hébert, “Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort” (2014) 75:6 Ohio St LJ 1345.
139 Hill, supra note 138 at para 190.
VI. CONCLUSION: THE LIMITS OF JUDICIAL RERAINT

I began my argument for tort liability for harassing behaviour by showing that there are good reasons for imposing such liability. Most of this article, however, focused on the narrower “legal” question of showing respectable doctrinal pathways for imposing such liability. How much one should care about doctrine is, famously, a matter of controversy. Some judges believe that, if they want, they will always be able to find such a respectable doctrinal argument for their desired conclusion; others consider such thinking, which involves the bending of recalcitrant doctrine to “external” goals as an abdication of their judicial role. Broadly speaking, those of a more “realist” outlook are willing to mould legal doctrine to reach desirable outcomes; those of a more “formalist” cast disapprove of such “manipulations” of doctrine.¹⁴⁰

For the most part, I avoided this debate in this article by arguing that it is possible to impose liability for harassing behaviour while satisfying the traditional common law’s demand for incremental change. This approach turns the Court of Appeal’s decision in Merrifield on its head. On the Court’s reasoning, the creation of a new tort calls for a special justification; but if it can be shown that harassing behaviour can be captured by existing torts, it is the exclusion of liability for harassing behaviour that calls for special justification. (Perhaps the outcome of Merrifield is partly due to the success of labelling harassment as a distinct behaviour and a distinct legal category. Once it was classified in a separate category, it did not seem appropriate to incorporate it within already existing torts.)

All of this raises a more general point. The question of judicial restraint versus judicial activism is typically framed in terms of the proper limits of activism.¹⁴¹ Presented in this way, judicial activism is perceived as potentially problematic, an illegitimate power grab that undermines democracy, whereas restraint is seen as virtuous: modest, sober, humble, and for these reasons, legally unproblematic. This creates an asymmetry between activism and restraint. Excessive judicial activism is treated as potentially undermining the courts’ legitimacy, while it is much rarer to see a discussion that treats excessive restraint as a potential problem. Perhaps there is some justification for this asymmetry: “the devil you know,” “the theory

¹⁴⁰ This is not a new debate. See e.g. Robert E Keeton, “Creative Continuity in the Law of Torts” (1962) 75:3 Harv L Rev 463; Peck, supra note 52.
of second best,” and “the tried and true,” are all expressions that reflect a natural, and perhaps reasonable, tendency to stick to the familiar over the novel. There are additional considerations in support of restraint that pertain to the judicial role. Judges often operate in an environment of epistemic ignorance on many matters that may impinge on their ability to develop the law on a sound basis. Much remains unknown about mental harm, and judges have no expertise on the medical aspects surrounding it. More generally, judges have only a limited ability to assess the likely effects of their decisions. When it is difficult to predict the outcomes of one's actions, it is natural to be cautious.

But restraint is not an unqualified good, and there can be too much of it. There is a label for this too: “status quo bias.”¹⁴² (An imperfect analogy: driving too fast may overall be more dangerous than driving too slowly, but the latter is not without risks.) It is true that activist courts run the risk of flouting the bounds of their limited expertise and behaving anti-democratically by acting against the will of the people. I, for one, do not wish to dismiss all concerns over judicial activism and believe some of them have merit. But taken to their logical conclusion, they are self-defeating, for they imply the rejection of all judge-made law. Since virtually all judge-made law today is made against the background of legislative inaction, the democratic concern, if not circumscribed, can end up, in the name of upholding the way the “common law works,” undermining the very possibility of common (judge-made) law. In a common law system, courts are expected to develop the law, and those that fail to do so may be abdicating responsibilities allotted to them.

The decision in Merrifield is, in my view, an example of excessive restraint, a case that, in the name of maintaining the legitimacy of common law courts, ends up undermining it. Despite its length, the Court of Appeal’s decision does not attempt to take a step back from its micro-level analysis of the facts and the doctrine to examine its implications for the overall shape of the common law of tort in Ontario. Tort law is less coherent than many tort theorists claim it to be, but as sanctioned by Merrifield, it looks positively irrational. The immediate implication of Merrifield is that tort law in Ontario offers redress to those who have been subjected to a nasty prank that caused mental injury (the kind that happened in Wilkinson and Bielitski), but that it is unconcerned with ongoing

harassment. Cases of the former type are no doubt serious, but they are relatively rare, whereas statistics show that harassment affects many thousands. Another implication of the decision is the very different way tort law in Ontario treats physical and psychiatric harm. The law as it now stands finds harassing behaviour that involves unwanted touching to be a tort, but it has nothing to say about most cases of non-physical harassment, even those that are far more severe and have more devastating effects on their target’s well-being. It similarly implies that the intentional causing of extreme emotional distress does not give rise to tort liability, while the negligent causing of small physical harm does. If this is supposed to be an example of “how the common law works,” Merrifield suggests that it does not.

143 Merrifield, supra note 1 at para 38.