

“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.

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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)*.¹ 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.”²

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

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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.³ 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.⁶ 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,⁷ leading some commentators to call it Canada's “junior Supreme Court.”⁸ 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”⁹ 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.¹⁰ 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.”¹¹ 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

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.* *AI 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.

11 *Human Rights Code*, RSO 1990, c H19, s 10(1).

injury or illness to an employee, including any prescribed action, conduct or comment.”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.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.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.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.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.¹⁷ This was interpreted to include mental injury from workplace harassment, thereby excluding it from the purview of tort liability.¹⁸

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

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- 15 See Darcy Hargo & Melissa Moyser, “Harassment in Canadian Workplaces” (17 December 2018), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/75-006-x/2018001/article/54982-eng.htm>. Some have claimed far higher prevalence of workplace harassment. See “40% of Canadians Bullied at Work, Expert Says”, *CBC News* (6 December 2011), online: <www.cbc.ca/news/canada/windsor/40-of-canadians-bullied-at-work-expert-says-1.987450>.
- 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.
- 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.”
- 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 Fallview 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.¹⁹ 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;²⁰ 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.²¹ In a report from 2012, the Senate Standing Committee on Human Rights provided a range of statistics with widely divergent figures²² 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.²³ In addition to information about the prevalence of harassment in Canada, there are also studies of its impact. Some of the

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- 19 For a (somewhat dated) survey of the state of provincial legislation, see Katherine Lippel & Anette Sikka, "Access to Workers' Compensation Benefits and Other Legal Protections for Work-Related Mental Health Problems: A Canadian Overview" (2010) 101 *Can J Public Health* (Supp 1) S16. See also Geoffrey England, Roderick Wood & Innis Christie, *Employment Law in Canada*, 4th ed (Markham: LexisNexis Butterworths, 2005) (loose-leaf update to March 2020, issue 91) ss 9.98–9.98.1.
- 20 See Monica Anderson, "A Majority of Teens Have Experienced Some Form of Cyberbullying" (27 September 2018), online: *Pew Research Center* <www.pewinternet.org/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/>.
- 21 See Joyce Li, Wendy Craig & Matthew Johnson, "Young Canadians' Experiences with Electronic Bullying" (November 2015) at 9–10, online (pdf): *Media Smarts: Canada's Centre for Digital and Media Literacy* <mediasmarts.ca/sites/mediasmarts/files/publication-report/full/young-canadians-electronic-bullying.pdf>.
- 22 Standing Senate Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age* (December 2012) (Chair: Mobina SB Jaffer) at 35, online (pdf): *Senate of Canada* <sencanada.ca/Content/SEN/Committee/411/ridr/rep/repo9dec12-e.pdf> [Committee on Human Rights, *Cyberbullying Hurts*] (reports on prevalence of cyberbullying among teenagers range from 5.5 percent to 72 percent). For a summary of additional studies, see Robin M Kowalski, Susan P Limer & Patricia W Agatston, *Cyberbullying: Bullying in the Digital Age*, 2nd ed (Malden, MA: Wiley-Blackwell, 2012) at 95–101.
- 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,²⁴ but there are also more comprehensive studies. Those include information on the psychological effects that harassment has on the well-being of individuals,²⁵ as well as studies on its costs.²⁶ 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.²⁷ 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.

26 See Helge Hoel et al, “Organisational Effects of Workplace Bullying” in Einarsen, *Bullying and Harassment*, *supra* note 13 at 129; Wesley P McTernan, Maureen F Dollard & Anthony D LaMontagne, “Depression in the Workplace: An Economic Cost Analysis of Depression-Related Productivity Loss Attributable to Job Strain and Bullying” (2013) 27:4 *Work & Stress* 321.

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 Juriensz 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).

31 Consider, for example, the workplace practices reported in Jodi Kantor & David Streitfeld, “Inside Amazon: Wrestling Big Ideas in a Bruising Workplace”, *The New York Times* (15 August 2015), online: <www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html>; Shalini Ramachandran & Joe Flint, “At Netflix, Radical Transparency and Blunt Firings Unsettle the Ranks”, *The Wall Street Journal* (25 October 2018), online: <www.wsj.com/articles/at-netflix-radical-transparency-and-blunt-firings-unsettle-the-ranks-1540497174>.

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,³³ and such concerns are even more prominent in discussions by courts and commentators of the tort of defamation.³⁴ 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.³⁵ 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.”³⁶ 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,³⁷ 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*,³⁸ 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.³⁹ 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,”⁴⁰ 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....”⁴¹ Rather than being alarmed by the way such a revolutionary

35 *Merrifield*, *supra* note 1.

36 *Ibid* at para 20.

37 See *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 437–38, 448, 97 DLR (4th) 261. The view is not without its critics. See e.g. Paul M Perell, “Changing the Common Law and Why the Supreme Court of Canada’s Incremental Change Test Does Not Work” (2003) 26:4 Adv Q 345. In this essay, I do not address this broader question.

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.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;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.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.⁴⁵ And *Wilkinson* is not alone.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*.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.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 *Bielitski*, *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.

43 See the developments described in William L Prosser, “The Assault Upon the Citadel (Strict Liability to the Consumer)” (1960) 69:7 Yale LJ 1099; William L Prosser, “The Fall of the Citadel (Strict Liability to the Consumer)” (1966) 50:5 Minn L Rev 791. For a detailed discussion of American courts’ openness to recognizing new torts in the course of the twentieth century, see Robert F Blomquist, “New Torts’: A Critical History, Taxonomy, and Appraisal” (1990) 95:1 Dick L Rev 23.

44 In the context of tort law, see Lewis N Klar, “Judicial Activism in Private Law” (2001) 80:1/2 Can Bar Rev 215 at 216, 240. More generally, see also Grant Huscroft, “Constitutionalism from the Top Down” (2007) 45:1 Osgoode Hall LJ 91 at 95.

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 “cr[ie]d 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.⁵² 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>](http://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.⁵⁵ 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.⁵⁶ 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

55 See Committee on Human Rights, *Cyberbullying Hurts*, *supra* note 22; Ministry of Education, "Safe Schools: Cyberbullying" (last modified 1 September 2016), online: *Government of Ontario* <www.edu.gov.on.ca/eng/safeschools/respect.html>.

56 See *Honda Canada Inc v Keays*, 2008 SCC 39 at para 63; *Seneca College v Bhadauria*, [1981] 2 SCR 181 at 189, 124 DLR (3d) 193.

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,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.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.⁵⁹ In fact, even in *Merrifield* itself, the Court of Appeal acknowledged that in

57 See e.g. TT Arvind & Jenny Steele, “Introduction: Legislation and the Shape of Tort Law” in TT Arvind & Jenny Steele, eds, *Tort Law and the Legislature: Common Law, Statute, and the Dynamics of Legal Change* (Oxford, UK: Hart, 2013) 1 at 13.

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.⁶⁰

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.”⁶¹ 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*.⁶²

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.⁶³

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.

61 *Burris v Azadani*, [1995] 1 WLR 1372 at 1378, [1995] EWCA Civ 50.

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.

⁶⁵ (1976), 73 DLR (3d) 62, [1976] 6 WWR 550 (Alta SC, App Div).

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

67 *Khorasandjian v Bush*, [1993] QB 727 at 734–35, [1993] 3 All ER 669 (CA) [*Khorasandjian*].

68 *Hunter*, *supra* note 62 at 691–92.

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.

71 John Murphy, “Understanding Intimidation” (2014) 77:1 Mod L Rev 33 at 45, 57.

(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.”⁷² 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.⁷³ 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.⁷⁴ 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.⁷⁵ There has since been modest appellate support for the decision.⁷⁶

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.⁷⁷ 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*].

77 See *Botiuk v Toronto Free Press Publications Ltd*, [1995] 3 SCR 3 at para 62, 126 DLR (4th) 609.

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,⁷⁸ 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

Action	Connection	Outcome
Any (one-off) action with intent/recklessness	Causes	Mental Illness

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.⁷⁹ 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

78 Cf Dan Priel, “Structure, Function, and Tort Law” (2020) 13:1 J Tort L 31 at 63–66.

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

plaintiff may make it difficult to prove that the defendant’s behaviour caused the plaintiff’s subsequent harms.

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.⁸⁵ 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 specious. 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.⁸⁶ 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.”⁸⁷ 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.⁸⁸ 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.⁸⁹ 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.⁹⁰ 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 *Jamvier*, *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,⁹¹ 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.⁹²

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.⁹³ 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.⁹⁴

91 See George F Loewenstein et al, "Risk as Feelings" (2001) 127:2 *Psychological Bull* 267; Joshua D Greene et al, "Pushing Moral Buttons: The Interaction Between Personal Force and Intention in Moral Judgment" (2009) 111:3 *Cognition* 364.

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 (QBD) [*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.

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.⁹⁵ 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,⁹⁶ 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*.⁹⁷ 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,⁹⁸ 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 *Holtby v Brigham & Cowan (Hull) Ltd*, [2000] ICR 1086, [2000] 3 All ER 421 (CA) [*Holtby*] (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.

96 See generally Michael R Trimble & Mark S George, *Biological Psychiatry*, 3rd ed (Chichester: Wiley-Blackwell, 2010), and in a more philosophical mode, see Gerald M Edelman, *Bright Air, Brilliant Fire: On the Matter of the Mind* (New York: Basic Books, 1992) at chs 4, 18. For judicial acknowledgement, see *Page v Smith* (1995), [1996] AC 155; *Adams v Bracknell Forest Borough Council*, [2004] UKHL 29 (a claim “for a mental disability” is “in a post-Cartesian world” a claim “for personal injury” at para 10). Cf *Ireland*, *supra* note 76 (extending the definition of “bodily harm” to cover psychiatric injury from harassing behaviour that caused mental injury).

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 Juriensz, 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.

105 *The Queen (Can) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 224, 143 DLR (3d) 9 [Saskatchewan Wheat Pool]. See also *Dorset Yacht Co Ltd v Home Office*, [1970] AC 1004 at 1027, [1970] 2 All ER 294.

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

108 See England, Wood & Christie, *supra* note 19, s 9.3 (the employer has a duty to take reasonable care for employees' safety as a matter of implied contract term or as a matter of tort). See also sources cited in Stacey Reginald Ball, *Canadian Employment Law* (Toronto: Thomson Reuters, 1996) (loose-leaf updated June 2019, release 80) s 20:90.

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.

110 *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at 96, 40 DLR (4th) 577 (quoting *Meritor Savings Bank, FSB v Vinson*, 477 US 57 at 76 (1986), Marshall, J concurring in the judgment). As it happens, Justice Juriansz, at the time a lawyer, represented the successful appellant in this case.

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.

112 See *Anns v Merton London Borough Council*, [1977] UKHL 4, [1978] AC 728 (HL (Eng)); *Cooper v Hobart*, 2001 SCC 79.

of the test but that the duty of care is negated at the second stage.¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸ 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 employers’ duty to maintain employees’ physical and psychiatric security in their contractual relationship.

114 *Piresferreira*, *supra* note 32 at paras 56–58. The Court of Appeal relied here on *Wallace v United Grain Ltd*, [1997] 3 SCR 701, 152 DLR (4th) 1.

115 *Wallace*, *supra* note 114 at paras 98, 103.

116 *Ibid* at paras 76–78, 104, 109–10.

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 Storwal 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.

122 [1993] 1 SCR 12, 99 DLR (4th) 577.

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.”¹²³ 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.¹²⁴ The Court of Appeal’s reference to “increased efficiencies”¹²⁵ 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.”¹²⁶

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.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 *Piresferreira*, which the *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, *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, *Saadati* rejected this distinction, at the very least with respect to negligence.¹²⁸ The Court of Appeal in *Merrifield* attempted to minimize the significance of *Saadati*, asserting that it was merely concerned “with proof of mental injury in the context of a known cause of action.”¹²⁹ This is a very narrow, and arguably misleading, description of *Saadati* and its impact on *Piresferreira*. *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.¹³⁰ The decision is also critical of the idea that there is a defensible basis for a *legal* distinction between physical and psychiatric injury,¹³¹

127 On some views, even vicarious liability might be problematic in such cases. See *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”).

128 See the text accompanying note 97.

129 *Merrifield*, *supra* note 1 at para 52.

130 *Saadati*, *supra* note 3 at paras 23–24, 35.

131 *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.”¹³² 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.¹³³ 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

That right is grounded in the simple truth that a person’s mental health—like a person’s physical integrity or property, injury to which is also compensable in negligence law—is an essential means by which that person chooses to live life and pursue goals”). The Court further stated that the distinction rested on “no principled reason” (*ibid* at para 36).

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.”¹³⁴ 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).¹³⁵ 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.¹³⁶ 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).

¹³⁵ See Gregory C Keating, “When Is Emotional Distress Harm?” in Stephen GA Pitel, Jason W Neyers & Erika Chamberlain, eds, *Tort Law: Challenging Orthodoxy* (Oxford, UK: Hart, 2013) 273 at 295–97.

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,¹³⁷ and there is some recognition of such harms in Canadian tort law.¹³⁸

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.”¹³⁹ 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 Camille Hébert, “Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort” (2014) 75:6 Ohio St LJ 1345.

138 See *Hill v Church of Scientology*, [1995] 2 SCR 1130 at paras 120, 188–89, 126 DLR (4th) 129 (allowing for aggravated damages in the case of humiliating defamation). See also the text accompanying note 118. Outside tort law, dignitary harms gave rise to liability on the basis of s 24(1) of the *Charter* in *Vancouver v Ward*, 2010 SCC 27 at para 71.

139 *Hill*, *supra* note 138 at para 190.

VI. CONCLUSION: THE LIMITS OF JUDICIAL RESTRAINT

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.

141 See e.g. Roger J Traynor, “The Limits of Judicial Creativity” (1977) 63:1 Iowa L Rev 1. Cf Grant Huscroft, “The Trouble with Living Tree Interpretation” (2006) 25:1 UQLJ 3.

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

142 See William Samuelson & Richard Zeckhauser, “Status Quo Bias in Decision Making” (1988) 1 *J Risk & Uncertainty* 7.

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,"¹⁴³ *Merrifield* suggests that it does not.

¹⁴³ *Merrifield*, *supra* note 1 at para 38.