



Warner, Kenneth. (2009). The statutory tort of harassment. *Mountbatten Journal of Legal Studies*, 2009, 13 (1/2), pp. 149-156

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The Statutory Tort of Harassment

Kenneth Warner

The Court of Appeal has recently found in favour of a claimant against a company for the new tort of harassment. In *Ferguson v British Gas Ltd* ([2009] EWCA Civ 46; [2010] 1 WLR 785) Ms Ferguson had been a customer of British Gas, but had closed her account with them. Thereafter, however, over a period of months, she continued to receive bills from the defendants, requesting payments of amounts pertaining to her power usage subsequent to her closure of her account with them; those sums were clearly not owed. Other bills followed, accompanied by letters which threatened further action against her. She was informed that her gas supply would be disconnected, legal proceedings would be instituted against her and that she would be reported to credit agencies. Since she was a businesswoman, the last of these threats was of greatest concern to Ms Ferguson. From the beginning she had attempted to have the situation corrected, first by telephone and then by letter. Suffice to say, after

numerous telephone calls and letters occupying many hours of her time, causing her frustration at the lack of response since most of the letters simply went unreplied to, and anxiety at the prospect that her creditworthiness had already been impugned, she found it impossible to bring the matter to a sensible conclusion. Even when Ms Ferguson's solicitor wrote to the defendants on her behalf, and she herself sent letters detailing all these events to the defendants' chairman by recorded delivery, no replies to these communications were received, and no steps by the defendants to put matters right were taken. In the light of these remarkable failures on the part of British Gas, Ms Ferguson finally commenced proceedings against the company for the tort of harassment, pursuant to Sections 1 and 3 of the Protection from Harassment Act 1997. She claimed damages in tort for £5,000 for distress and anxiety and a further £5,000 for the time and expenses she had incurred in this process of dealings with the defendants.

Under the provisions of the Act, conduct which amounts to harassment constitutes both a crime (under Section 2) and a tort (under Section 3).

Section 1(1) provides:

A person must not pursue a course of conduct- (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.

Section 1(2) provides:

For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

In the County Court the defendant applied to have the claim struck out on the grounds that the conduct in question was not sufficiently grave. The claim was transferred to the Queen's Bench Division where the application was refused. From that decision the defendants appealed to the Court of Appeal.

It was submitted by the defendants that, based on a proper interpretation of these provisions, the course of conduct, described above, could not be construed as harassment. Given that the Act creates, in relation to the conduct in question, both a crime and a tort, this indicates

that the conduct must be such as to justify a criminal conviction, as a minimal level, before liability in a private action in tort can properly be founded.

Conduct, the gravity of which falls below that level, however annoying or aggravating it may be, does not pass this threshold test, and is insufficient to constitute “harassment” under the Act at all. In this regard the defence relied upon *Majrowski v Guys and St Thomas’s NHS Trust* ([2007] 1 AC 224) and *Sunderland City Council v Conn* ([2008] IRLR 324). The point at issue in *Majrowski* was whether an employer could be held vicariously liable for the harassing conduct of an employee, with the House of Lords holding in the affirmative. On the question of the gravity of the offending conduct, the House, indeed, observed that, on a correct construction, in order to constitute “harassment” for the purposes of a civil suit, that conduct must be viewed as a sufficiently serious one so as to ground a criminal prosecution, whether or not such a prosecution has been instituted in respect of it. The level of gravity, then, is the same. This view was endorsed in *Sunderland*, a case concerning harassment of a co-employee in the workplace. The Court of Appeal accepted this argument in its general terms, but found no great significance in it. In both *Majrowski* and *Sunderland* the Court had inclined to the broadest view as

to what sort of conduct could actually constitute “harassment”, whilst accepting, as it were, some implied licence for others, in this modern age, to subject us to their intrusions when we would rather they did not. In *Majrowski*, Baroness Hale said (at para. 66):

A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour.

And similarly, for Lord Nichols (at para. 30):

...courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody’s day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable.

In *Ferguson’s* case, the Court of Appeal found that a view could properly be taken that, should the matter have come to prosecution, a jury reasonably could have concluded that the defendants’ conduct towards Ms

Ferguson went beyond that which ought to be tolerable, and could well be regarded as harassment.

It was further submitted that there was a distinction to be made where the conduct in question is, rather than that of a sentient being such as an individual trader, that of a corporation such as the defendants. In the latter case, it was said to be incumbent upon the plaintiff to show either that the conduct was directed by someone with such seniority or authority within the organisation that it can be regarded as the act of the company itself, or that the conduct was within the responsibility of a specific employee, for whose conduct the company would be vicariously liable. This is because the Act provides that the claimant must show either that the defendant knew or ought to have known that the conduct amounted to harassment (Section (1))b). This argument was rejected. In the instant case it was not possible to say what was the actual state of knowledge of any person within the British Gas organisation, a matter known only to themselves; but in any event the Act provided no defence of “accidental” harassment, and the Court could see no reason in policy as to why a company should be exonerated from liability in circumstances where a sole trader would not be. In effect the constructive knowledge of the company must be taken to amount to the total knowledge available

Comment [o1]: Is this correctly set out?

through its employees at the time of the averment of harassment. Moreover, the defendant's sole authority for this proposition, *Tesco Supermarkets Ltd v Natrass* ([1972] AC 153), was concerned with the construction of the Trade Descriptions Act 1968, the provisions of which were described by the Court as "quite, quite different" ([2010] 1 WLR 785, at 793, para. 30). That Act contains a defence which was the central consideration in *Natrass* and there is no equivalent defence in the 1997 Act under consideration in the instant case.

It was not an appropriate mode of construction to extrapolate from the one statutory context to the other; rather, the 1997 Act must be interpreted on its own terms.

All that Ms Ferguson would need to show under s.(1)(b) is that the defendants *ought* to know that the conduct concerned amounts to harassment, and Section 1(2) imports, in effect, the test of the familiar "reasonable person". She had, in her statement of claim, described the course of conduct of which she was complaining and set out what passed between herself and the defendants. This is sufficient for the Court to form a view as to what the hypothetical reasonable mind would make of it. A final contention of the defendants suggested an issue in terms of what "ought" to have been known within an organisation, where individual

Comment [o2]: Is this correct?

persons are in possession of some information of the events in question, but no one person has complete knowledge of all the circumstances or, as the Court more bluntly put it, “the right hand not knowing what the left was doing” ([2010] 1 WLR 785, at 796, para .44). There was no basis for this in the language of the Act, nor did it commend itself to the Court as a matter of sensible construction. The “reasonable person” is to be invested with knowledge of the entire course of events referred to, as well as the complainant’s responses to those.

Summary

The Protection from Harassment Act 1997 provides the possibility both of prosecution as an offence and a private action for damages in tort where the claimant suffers from the defendant’s harassing conduct. In both cases, what is necessary to be shown is that the offending conduct transgresses a level that would be tolerable, if vexatious, to the average person.

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