A Roman law solution to an eternal problem: A proposed new dignitary tort to remedy sexual harassment

Bede Harris
Charles Sturt University, Australia

Abstract
This article discusses the failure of both common and statute law to provide an adequate remedy for sexual harassment. The author adopts a comparative approach and examines the actio injuriarum of Roman law, which gives a remedy to plaintiffs for impairment of dignity caused by insult. He discusses how case law which has developed under Roman-Dutch law in South Africa has been used to provide a remedy for sexual harassment in a wide range of circumstances and suggests that tort law be developed along the same lines in Australia.

Keywords
dignity, tort, sexual harassment, discrimination, Roman law

In 1956 a newspaper in South Africa published an article headlined ‘97 Lonely Nurses Want Boyfriends’, advising readers that if they went to a local hospital, they would be welcomed by nurses, who were eager for male companionship.¹ The text was accompanied by photographs of three of the nurses. Under the Roman-Dutch common law of South Africa, this conduct gave rise to a legal action for impairment of dignity which enabled the nurses to sue the newspaper successfully for damages. By contrast, the many far more egregious instances of sexual harassment reported in Australia both face-to-face² and in the online environment³ are not remediable under the law of torts: Negligence provides no remedy in the absence of actual psychiatric injury, nor is there currently a tort of invasion of privacy.

So far as statutory remedies are concerned, the definition of sexual harassment in s 28A of the Sex Discrimination Act 1984 (Cth) (and parallel state and territory legislation) covers any unwelcome sexual advance, request for sexual favours or other conduct of a sexual nature which would be reasonably anticipated as causing offence, humiliation or intimidation to another person. However, the key shortcoming of the legislation is that its scope is significantly limited

¹Kidson v South African Associated Newspapers Ltd 1957 (3) SA 461 (W), 361–2.

Corresponding author:
Bede Harris, Faculty of Business, Justice and Behavioural Studies, Charles Sturt University, Barton, ACT 2600, Australia.
Email: beharris@csu.edu.au
Dignity as an actionable right under Roman and Roman-Dutch law

In contrast to the ad hoc growth of the common law of torts through case law, the Roman law of civil wrongs, or delict, was highly structured, and was based on two actions, which protected different interests. Pecuniary interests were protected by the *actio legis Aquilae*. Personality interests were protected by the *actio injuriarum* (literally, the ‘action for harms’), which had its foundations in a provision imposing punishment for physical harm contained in the Twelve Tables of c 450BC, the earliest statement of Roman law. The scope of the remedy was extended during the Republican period so as to remedy harms taking the form of public verbal abuse, affronts to chastity and defamation. The final authoritative statement appeared in the Digest, part of the codification by the emperor Justinian (527–565 AD). The harms remedied by the *actio injuriarum* were categorised as: ‘omnemque injuriarum aut in corpus inferri aut ad dignitatem aut ad infamiam pertine’ that is translated as ‘every contumely [which] is inflicted upon the person or relates to one's dignity or involves disgrace’. It is on the basis of this text that the action came to protect three distinct interests: corpus (bodily integrity), *fama* (reputation) and *dignitas* (dignity).

While the action to remedy infringements of corpus has its obvious equivalent in the English common law actions for assault and battery, and the action to remedy *fama* parallels the English common law action for defamation, the action to remedy *dignitas* has no equivalent in English common law. What then is meant by *dignitas*?

Key to answering this question is an understanding that: although one may identify … corpus and the *fama* as independent personality rights with a more or less fixed meaning, the same cannot be said of *dignitas* . . . .

[D]ignitas was . . . a collective term for all personality interests, excluding corpus and *fama*, which in Roman law had not yet been clearly distinguished and independently delimited.

The development of mercantile economies in medieval Italy led to a resurgence of interest in Roman law. This revival was fostered by the writings of the Glossators and post-Glossators during the period from

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6In brief, persons bound by s 28B are employers, those providing professional memberships and registrations, registered organisations (such as unions), educational institutions, clubs, those providing goods, services, facilities and accommodation, those selling land and anyone administering Commonwealth laws and programmes.

7The process is contained in ss 46P-46PN of the Australian Human Rights Commission Act 1986 (Cth).

8Section 46PO.

9See, for example the Anti-Discrimination Act 1977 (NSW), ss 90-91C of which lay out the complaint and conciliation procedure and ss 9A-93C of which entitle a complainant to have the matter subsequently referred to the Civil and Administrative Tribunal which, under s 108, may order remedies, including an award of damages.


11Ibid 347–52; Barry Nicholas, An Introduction to Roman Law (Clarendon Press, 1977) 216–17. Table VIII 1–4 punished incantations intended to produce physical harm, disablement of a limb, fracture of a bone and lesser physical injuries.


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14Theodore Mommsen, Paul Kreuger and Alan Watson trans (University of Pennsylvania Press, 1985)] D 47.10.1.2.
the 11th to 14th centuries, and led to the widespread adoption of Roman law, adapted to modern requirements, throughout Western Europe. In the Netherlands, Roman law was modified by rules of law from the various provinces of that country to form Roman-Dutch common law. The writings of legal scholars, supplemented by case law, constitute the authoritative source of that law. The understanding among the Roman-Dutch authorities of the concept of dignitas was summarised by De Villiers as follows:

by dignity [is meant] that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt. The rights referred to are absolute or primordial rights... Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against... degrading or humiliating treatment.

So dignitas is an all-embracing interest, capable of extension so as to protect a wide range of rights, extending well beyond a right not to be subject to verbal insult. This became evident as the Roman-Dutch law of delict was developed through case law in South Africa.

The *actio injuriarum* in South African case law and its application to sexual harassment

Roman-Dutch law became the common law of the Cape of Good Hope following the establishment of a Dutch colony in 1652. This continued to be the case even after the colony was acquired by the British in 1814. Roman-Dutch law also became the common law of the other colonies of Southern Africa which, in combination, eventually formed the Union of South Africa in 1910. The arrival of English lawyers and judges inevitably meant that South African law came to be heavily influenced by English law principles, to the extent that the common law of South Africa is described as a hybrid of Roman-Dutch and English common law. Nevertheless, its Roman-Dutch foundation means that differences — greater in some branches of the law than others — persist between Roman-Dutch and English common law. As is stated by Burchell:

Legal systems rooted in the English, rather than the Roman, tradition have developed sophisticated protection for reputation in the laws of libel and slander, and they protect physical integrity through civil actions for trespass to the person, assault and battery. However, the protection of that precious and inherent attribute of human personality — dignity — does not exist in the common law of these systems. The protection of human dignity under the *actio injuriarum* is undoubtedly one of the most impressive and enduring legacies of Roman law, and a feature which places the South African law of delict at the forefront of the protection of what is arguably the most fundamental of all human rights.

Through the development of case law, the *actio injuriarum* has been extended to allow recovery of damages for impairment of dignitas in a wide range of circumstances.

The most recent formulation of the elements of the action is contained in *Delange v Costa*, in which the court held that for liability to be established, the plaintiff must show that the defendant performed an intentional act which led the plaintiff subjectively to experience loss of dignity and that the conduct complained of would have offended the dignity of a person of ordinary sensibilities — in other words, that the conduct was offensive to dignity from an objective point of view.

What are the practical implications of this dual test? First, so far as the first requirement (that of a subjective feeling of insult) is concerned, this does not mean that the plaintiff must undergo some type of emotional trauma.

The plaintiff may in fact undergo the impairing of *dignitas* with stoicism, yet this provides no reason why they should be denied compensation for infringement of a right of personality. The subjective requirement is, therefore, understood as simply requiring that a plaintiff prove locus standi — that they were the object of the behaviour which is alleged to have constituted an infringement of a right of personality.

The real determinant of liability is therefore provided by the second element — the objective test — in respect of which the court in *Delange v Costa* held that:

In determining whether or not the act complained of is wrongful the court applies the criterion of reasonableness. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (ie, the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria*.

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16Ibid 543–65.
18Hahlo and Kahn, above n 14, 585–6.
2021989 (2) SA 457 (A). The test in *Delange v Costa* was most recently re-affirmed in *Dendy v University of Witwatersrand* 2007 (8) BCLR 910 (SCA).
21One of features of *actio injuriarum* which distinguishes it from the American tort of intentional infliction of emotional distress, the name of which (and requirement that conduct complained of be ‘outrageous’) serves to indicate the type of emotional hurt the defendant must be proved to have caused.
221989 (2) SA 457 (A), 862A-G.
The objective test in cases brought for impairment of dignity thus plays the same role as does the reasonableness in defamation law and requires the court to ask whether the conduct complained of was such that a reasonable person would have found it insulting. This requirement plays the key role of defining liability and ensures that the action cannot be brought by the hypersensitive litigant.

As stated earlier, the range of interests embraced by dignitas, and thus the types of conduct that have been found to constitute an impairment of it, is very broad and case law shows that these include many types of conduct amounting to sexual harassment. As might be expected, sexist verbal insults form a significant proportion of reported cases.22 Liability has also been found in cases of unwelcome propositioning for sexual intercourse,23 indecent exposure,24 unwelcome exposure to pornography25 and the displaying to a plaintiff a photograph of her with sexually explicit comments written on it.26 The actio injuriarum has also been developed so as to protect privacy and, as a result, liability has been found in cases taking the form of intrusion (for example, so-called Peeping Tom cases,27 intrusion into female change rooms28 and persistent following29) and publication of intimate facts about the plaintiff’s life (as in the case of the nurses cited earlier).30 In other words, the action has been sufficient to provide a remedy in a wide range of circumstances falling within the concept of sexual harassment.

The failure of English common law to remedy impairment of dignity

To a person trained in English or Australian common law, these Roman law concepts may seem alien, although it should be noted that through the study of Roman law in 12th- and 13th-century England, the actio injuriarum influenced the development of trespass31 and punitive damages at common law.32 Nevertheless, the fact remains that English common law did not develop any tort remedying insult per se.33

The closest the common law came to developing an action for impairment of dignity was the action for intentional infliction of emotional harm. Does it provide a remedy of sufficient breadth to address sexual harassment? The tort was first recognised in Wilkinson v Downton,34 in which the plaintiff suffered psychiatric shock at hearing a deliberate false report that her husband had been killed in a railway accident. The action was subsequently recognised in Australia35 but, as in England,36 is available only where the plaintiff suffers actual psychological injury, not mere emotional distress.37 The elements of the action were most recently defined in Australia in Clavel v Savage38 where, after reviewing the Australian authorities, Rothman J held that the tort was available for the ‘occasioning of harm (including psychiatric injury, but not mere distress)’39

Despite this, there have been judicial statements to the effect that the tort should be broadened: in his dissenting judgment in Giller v Procopets, Maxwell P stated that the tort should make mental distress actionable even where it does not result in a recognised psychiatric condition.40 In Wainwright v Home Office,41 Hoffmann LJ suggested obiter that conduct intended to cause emotional distress falling short of psychiatric injury might be actionable.42

The position in the United States is worth considering, because there the tort developed so as to impose liability in a wider range of circumstances. The Restatement on the Laws and Customs of England (1158) 313–14 provides that an ‘insult or wrong’ (iniuria) was actionable.43 It was initially intended to compensate for special injury, but it later developed to cover economic loss.44 In England, the tort of invasion of privacy, now known as a right of publicity, was developed in the 20th century.45 As a result, liability has been found in cases falling short of psychiatric injury.46

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A proposed dignitary tort as a remedy for sexual harassment

The failure of the common law to protect dignitary rights and the restricted scope of operation of the Sex Discrimination Act 1984 (Cth) would be remedied if the courts were to develop the common law so as to recognise dignity as interest protected by law and insult as conduct which impairs that interest. Obviously both ‘dignity’ and ‘insult’ are broad concepts, giving plaintiffs a right of action in a range of circumstances going beyond sexual harassment – hate speech being an obvious example which comes to mind. However, for the purposes of this article, discussion is confined to impairments of dignity taking the specific form of sexual harassment. So how would the argument in favour of the recognition of dignity as a right, and insult as a harm, be crafted?

Some assistance may be gained from the precedent of ABC Ltd v Lenah Game Meats. Although in that case the High Court declined to recognise a new tort of invasion of privacy, members of the court indicated that the creation of a new tort was not objectionable per se and that such a step might be taken in a suitable case. So if the courts are at least prepared to consider recognising a right to privacy – which conceptually is just one dimension of the broader personality right to dignity – as being worthy of vindication, what stands in the way of recognising the broader interest itself? I would argue that recognition of the emotional harm caused by insult as conduct infringing that right would not be that much of a leap for the common law to take.

Consider, for example, defamation. Is the harm caused to the plaintiff by that tort much different from that occasioned by insult? The harm in defamation obviously arises in the mind of the person to which the defamatory material is published in so far as their estimation of the plaintiff has diminished. However, that provides only part of the answer, because the reason why that reduction in estimation matters to the plaintiff is surely because of the emotional harm resulting from diminution in self-esteem caused in the mind of the plaintiff by the knowledge that their reputation has been harmed. So, if the plaintiff in a defamation action obtains a remedy (at least in part) because they have experienced affront, humiliation and disruption of tranquillity, why should not the same harms be actionable if occasioned by insult – in the specific case being considered in this article insulting conduct
amounting to sexual harassment? The argument here is that the law should broaden what it recognises as ‘harm’ so as to make impairment of dignity by insult actionable in the same way that it remedies the emotional harm caused by defamation.

There is little doubt that the social harm caused by sexual harassment, its continuing pervasiveness and the severity of the psychological effects it has on its victims55 provide legal policy justification for the courts to develop the common law so as to recognise a tort remedying sexual harassment. Such a step would confer several advantages on plaintiffs: First, and most importantly, it would provide a remedy for sexual harassment occurring in all circumstances, which is an improvement on statute law which provides a remedy only in those specific circumstances covered by the legislation. Second, by providing plaintiffs with the option of taking direct legal action for damages without having to go through conciliation, the law would potentially provide redress more quickly than does the statutory regime. This would be particularly so given that the amount of damages sought would, in many cases, fall below the caps applicable to the minor claims jurisdiction in magistrates’ courts or in civil and administrative tribunals, which have the advantage that they are cost-free jurisdictions using processes which are comparatively speedy and simple. Third, the possibility of facing immediate civil action for damages would be likely to have a deterrent effect on those who might otherwise engage in harassing behaviour. Since the prospect of civil liability curbs defamatory speech, it is arguable that the activities of harassers would be deterred by the prospect of civil liability.

Taking all the above into account, how should the elements of such a tort be framed? I would suggest that the following formulation is sufficiently broad to capture the range of circumstances in which sexual harassment may arise: ‘A person who intentionally engages in conduct or directs communications of a sexual nature towards another person which a reasonable person would find insulting is liable to that other person for the tort of sexual harassment.’

The action for impairment of dignity in South African law has ancient roots, but its continued vibrancy provides a model for the development of a similar tort in Australia. The South African case law demonstrates how such an action would provide the degree of flexibility needed to impose liability for the multifarious forms sexual harassment may take.

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Bede Harris is a senior lecturer in law at Charles Sturt University.