

**REFLECTIONS ON THE LEGAL AND PSYCHOLOGICAL CONSTRUCTIONS OF  
WOMEN'S RESISTANCE TO SEXUAL HARASSMENT**

by

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## DECLARATION

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I declare that my limited dissertation entitled REFLECTIONS ON THE LEGAL AND PSYCHOLOGICAL CONSTRUCTIONS OF WOMEN'S RESISTANCE TO SEXUAL HARASSMENT is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

  
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## ABSTRACT

Despite the extensive research conducted on sexual harassment, very little work has focused on the legal and psychological constructions of women's resistance to sexual harassment. In exploring the legal and psychological constructions of women's resistance to sexual harassment, we are confronted with salient issues pertaining to the determination of the welcomeness requirement which call for a reflection.

A key characteristic of sexual harassment is that it is unwanted by the recipient. It is for each person to decide what behaviour is acceptable to them and what they regard as offensive. Thus, although there is general agreement about what can constitute sexual harassment, the experience of sexual harassment is subjective in nature and the precise quantification of workplace sexual harassment is problematic.

The present study aims to: (a) identify the reasoning/history behind the "unwelcomeness/unwanted" requirement, (b) assess the reasonableness of the requirement of "unwelcomeness/unwanted" conduct, taking into account the various pieces of legislation and case law, (c) determine how the courts have interpreted this requirement and what factors are looked at, (d) determine whether the test is subjective or objective, (e) identify the struggle and debilitating effects sexual harassment has on women in the workplace.

The results of this study will assist in gaining knowledge and understanding of the concept of "unwelcomeness/unwanted" conduct in sexual harassment cases and the effects it has on the victim which will go a long way in assisting management in any business to effectively implement strategies and disciplines to manage the problem of sexual harassment in the workplace.

**Keywords:** Unwelcomeness, sexual harassment, victim blaming, rape, consent, sexual conduct, token resistance, spiteful complaint, male dominance and female subordination.

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## CHAPTER 1

### 1. INTRODUCTION

#### 1.1 INTRODUCTION

It is beyond dispute that sexual harassment is pervasive and has a devastating impact on its victims.<sup>1</sup> The practice of sexual harassment is one of the pressing concerns facing modern society.<sup>2</sup> It is now universally recognised that every employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of sex, race, ancestry, place of origin, colour, ethnic origin citizenship, creed, age, marital status or disability.<sup>3</sup> Equally, the right to freedom from harassment in the workplace applies also to sexual orientation.

Sexual harassment is many things. It is a goal in and of itself. It is an instrument of male dominance and female subordination. Like rape, sexual harassment is one of

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<sup>1</sup> According to Dolkart "Hostile Environment Harassment: Equality, Objectivity and the Shaping of Legal Standards" (1994) *Emory LJ* 151 at 187-188, whatever form the harassment takes or whoever the victim might be, the effect of harassment is often devastating:

"The effects of sexual harassment on a victim's job and career can be profound. Many employees will simply leave the job or request a transfer than endure the harassment until they are psychologically destroyed. In one study, 42% of the victims of sexual harassment left their job, and another 24% were fired. Thus, 66% of the victims in the study were driven out of their job by sexual harassment. The costs of leaving a job include not only the obvious ones like loss of income and seniority, but also a disrupted work history, problems with obtaining references for future jobs, loss of confidence in seeking a new job, and loss of career advancement. Even for those who remain in their jobs, there are significant costs, including adverse working conditions and diminished opportunities for advancement. For instance, employees subject to a hostile work environment may not feel welcome as credible colleagues, may feel excluded or segregated, or may lose confidence in them as workers. Those in supervisory positions may feel undermined as managers. Needless to say, difficulties at work and and/or loss of income, as well as psychological injury have a negative impact on relationships with family and friends."

See too Du Toit, D 'Enterprise responsibility for sexual harassment in the workplace: comparing Dutch and South African law' in Pennings F *et al* (eds) *Social responsibility in Labour Relations: European and Comparative Perspectives* (2008) 183.

<sup>2</sup> According to statistics compiled by UN Women, Virtual knowledge centre to end violence against women and girls:

- "Between 40 and 50 percent of women in European Union countries experience unwanted sexual advances, physical contact or other forms of sexual harassment at work.
- Across Asia, studies in Japan, Malaysia, the Philippines and South Korea show that 30 to 40 percent of women suffer workplace sexual harassment.
- In Nairobi, 20 percent of women have been sexually harassed at work or school.
- In the United States, 83 percent of girls aged 12 to 16 experienced some form of sexual harassment in public schools."

<http://www.endvawnow.org> (Date of use: 22 September 2014)

<sup>3</sup> s 6(1) of the EEA.

the important exemplars of “gendered harm harms”.<sup>4</sup> Above all, sexual harassment constitutes a form of sex and gender discrimination.<sup>5</sup>

The Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter “The Code”) in section 3 defines sexual harassment:

- (1) Sexual harassment is *unwanted* conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
- (2) Sexual attention becomes sexual harassment if:
  - a. The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
  - b. The recipient has made it clear that the behaviour is considered offensive; and/or
  - c. The perpetrator should have known that the behaviour is regarded as unacceptable.

A gentle reading of the definitional provision tells us that a woman must demonstrate that the harasser’s behaviour was unwanted, and focus shifts to what he did to ascertain that he was welcome. This struggle over who gets to “say” what is unwelcome reflects the tenacity of the cultural insistence that sexual advances by any man to any woman are by definition welcome until she proves otherwise. Indeed, the question of legal and psychological constructions of women’s resistance to sexual harassment continues to vex both management and adjudicators tribunals in South Africa.

Furthermore, section 4(1) of the Code outlines the forms that sexual harassment takes:

- (1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:
  - a. Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

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<sup>4</sup>Conaghan J 'Gendered harms and the Law of Torts: Remediating (Sexual) Harassment' (1996) 16(3) *Oxford Journal of Legal Studies* 407, 407.

<sup>5</sup>Cooper, C 'Harassment on the basis sex and gender: A form of unfair discrimination' (2002) 23 *ILJ*; Garbers, C "Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems" (2002) 14 *SA Merc LJ* 371.



- b. Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
- c. Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
- d. *Quid pro quo* harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

Section 4(2) proscribes the practice of sexual favouritism, where:

a person who is in a position of authority rewards only those who respond to his/her sexual advances whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases.

The Code does not seek to provide an exhaustive list of forms of harassment, but rather offers examples of what behaviour might fall within the purview of sexual harassment. The reality is that the practice of sexual harassment remains pervasive and persistent.

The Code read together with the Employment Equity Act 55 of 1998 (hereinafter "EEA") provides the basis and guidelines for employers to take steps to prevent the practice of sexual harassment, including grounds for disciplining and in appropriate cases dismissing offending employees.

The question of what constitutes sexual harassment, and whether it should be perceived as a problem implicating the subordination of women by men, a problem that must be understood by reference to workplace discrimination has attracted the lion's share of scholarly attention.<sup>6</sup> The vexed issues of employer liability for sexual harassment by supervisors<sup>7</sup> as well as damages in sexual harassment cases have invoked a critical commentary.<sup>8</sup>

<sup>6</sup> See Le Roux R *et al* *Sexual Harassment in the Workplace: Law, Policies and Process* (2005); Mowatt JG 'Sexual harassment, new remedy for an old wrongs' (1986) 7 *ILJ* 637; Halfkenny P 'Legal and workplace solutions to sexual harassment (Part 1): Lesson and workplace solutions to sexual harassment in South Africa (1995) 16 *ILJ* 1 and 'Legal and workplace solutions to sexual harassment (Part 2): The South African experience' (1996) 17 *ILJ* 213.

<sup>7</sup> *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC); *Grobler v Naspers Bpk en n' ander* (2004) 25 *ILJ* 1897; *Media24 v Grobler* (2005) 6 SA 328 (SCA).

<sup>8</sup> See generally Rycroft A & Perumal D 'Compensating the sexually harassed employee' (2004) 25 *ILJ* 1153; Le Roux R 'Sexual harassment in the workplace: Reflection on *Grobler v Naspers*' (2004) 25 *ILJ* 1897; Witcher, B 'Two roads to an employer liability for sexual harassment: *S Grobler v Naspers Bpk en ander* and *Ntsabo v Real Security CC*' (2004) 25 *ILJ* 1907; Mukheibir & Ristow 'An Overview of

The evolving South African sexual harassment jurisprudence reveals the defects and dangers of sexual desire paradigm. Simply stated, sex based harassment places sexuality, specifically male-female advances at the centre of the problem. Within this mode of analysis, male supervisor's sexual advances on a less powerful, female subordinate represent the quintessential form of harassment. Closely linked to the sexual desire paradigm is the fact that the sexual harassment has been approached primarily through accountability and damages discourse. However, these dangers do not necessarily justify treating the interrelated questions of what constitutes sexual harassment, vicarious liability and damages for sexual harassment as inconsequential. Instead, these dangers invite, indeed require us to offer a more nuanced, multifaceted account legal and psychological concomitants of women's resistance to sexual harassment. In other words, it requires us to go back to basics. The gravamen of sexual harassment claims is that the alleged sexual advances were "unwelcome/unwanted". Put simply, the welcomeness (unwantedness) requirement lies at the heart of the sexual harassment. It is in this spirit that the study examines the ecology of sexual harassment with emphasis on the legal and psychological constructions of women's resistance to sexual harassment.

## **1.2 RESEARCH QUESTION OR PROBLEM STATEMENT**

In exploring the legal and psychological constructions of women's resistance to sexual harassment, we are confronted with salient issues pertaining to determination of the welcomeness requirement which call for a reflection. The study will address the following questions:

- What counts as unwelcome in sexual harassment litigation?
- Whether the observer judgments are (e.g., the man's account, the supervisor's account) are both disinterested and more objective than self-report (i.e., the woman's account)?
- The problem with the subjective/objective construction in this context is the assumption that a woman who is truly not interested in sex always behaves in a particular manner, whatever the context and whatever the cost.

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Sexual Harassment: Liability of the Employer" (2006) 27 2 *Obiter* 248; Husbands "Sexual Harassment Law in Employment: An International Perspective" (1992) 131 *ILR* 535.

- The fungibility fallacy. In other words, burdening the plaintiff with proving that the man's behaviour was unwelcome assumed that any woman is sexually available to any man, known or unknown –unless and until she can convince him (and the trier of fact) otherwise.
- The problem of damaged good character as evidence of welcomeness.

### **1.3 AIMS AND OBJECTIVES**

A key characteristic of sexual harassment is that it is unwanted by the recipient. It is for each person to decide what behaviour is acceptable to them and what they regard as offensive. Thus, although there is general agreement about what can constitute sexual harassment, the experience of sexual harassment is subjective in nature and the precise quantification of workplace sexual harassment is problematic.

The aim of this study is to:

- Identify the reasoning/history behind the “unwelcomeness/unwanted” requirement.
- Assess the reasonableness of the requirement of “unwelcomeness/unwanted” conduct, taking into account the various pieces of legislation and case law.
- Determine how the courts have interpreted this requirement and what factors are looked at.
- Determine whether the test is subjective or objective.
- Identify the struggle and debilitating effects sexual harassment has on women in the workplace.

This study is important as the knowledge gained from understanding the concept of “unwelcomed/unwanted” conduct in sexual harassment cases and the effects it has on the victim will go a long way in assisting management in any business to effectively implement strategies to manage this problem in the workplace.

#### 1.4 BRIEF LITERATURE REVIEW

The history of the development of the law of sexual harassment has been replete with instances of "blaming the victim".<sup>9</sup> The requirement that women prove the unwelcomeness of even sexually abusive and denigrating conduct is the belief that women often invite sexual attention by their conduct, their dress, and even their mere presence. The requirement that women show that the abusive conduct directed toward them is both subjectively offensive and objectively hostile and abusive is based on the concern that overly sensitive women will make a "sexual harassment claim" out of innocent and relatively innocuous sexually-related conduct of their co-workers and supervisors. According to Zalesne 'the continued application of such stereotypical assumption validates the notion that women are not rational or credible witnesses and keeps women from asserting rights when there is no other witnesses.'<sup>10</sup> The proposition that the law has historically discriminated against sexual assault complainants hardly requires elaboration. It has been observed by the Supreme Court of Canada in the case of *R v Mills*<sup>11</sup> that:

Speculative myths, stereotypes, and generalised assumptions about assault victims... have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecution of sexual offences.<sup>12</sup>

A persistent theme in feminist work has been the complexity of sex: both a pleasure and a danger for women. The woman who brings a legal claim of sexual violation, whether of rape or sexual harassment in order to prevail must craft a story that is consistent as possible with current understanding of what qualifies as a true story of sexual violation? The assumption inherent in some of the myths is that the woman is consciously lying to hide sexual complicity or harm the man. Distrust of women's claims of sexual violation is built into classic Anglo-American rape law in the traditional "Hale" instruction.<sup>13</sup> The cautionary rule warned presiding officers that rape "is an accusation easily to be made and hard to be proved, and harder to be

<sup>9</sup> See Oshige, M 'What has sex to with it?' (1995) 47 *Stanford LR* 565.

<sup>10</sup> Zalesne, D 'The effectiveness of the Employment Equity Act and the Code of Good Practice in reducing sexual harassment' (2001) 17 *SAJHR* 503, 524.

<sup>11</sup> (1999) 3 *SCR* 688.

<sup>12</sup> *R v Mills* para 119.

<sup>13</sup> Hale, M *The History of the Pleas of the Crown* (1736) 635. See Morris, T 'The Empirical, Historical and Legal Case against the Cautionary Instruction: A Call for Legislative Reform' (1988) *Duke LJ* 154; Torrey, M 'When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions' (1991) 24 *University of California Davis LR* 1013.

defended by the party accused, tho never so innocent.” The stereotypes about what rape and sexual harassment involve categorisation about which women are “legitimate” victims.

## **1.5 RESEARCH METHODOLOGY**

This is a desktop-based qualitative study. It will utilise both primary and secondary sources. Primary materials will in the form of international instruments, national legislation and comparative case law. Secondary sources will include textbooks, journal articles reports, newspapers articles, critical reviews and bibliographic databases and internet sources pertinent to the subject matter.

## **1.6 OUTLINE OF CHAPTERS**

This dissertation is organised into five chapters.

### **Chapter 1 - Introduction**

### **Chapter 2 - The Ecology of Sexual Harassment**

The story of the development of sexual harassment is primer of feminist scholarship. Understanding the ecology of sexual harassment resonates with feminist approaches to law which emphasise agency, anti-subordination and gendered harms.

### **Chapter 3 - The “unwelcomeness” Requirement**

The gravamen of any sexual harassment complaint is that sexual advances were unwelcome or unwanted. The way the law interprets *welcomeness* – in particular, the insistence that only certain acts “counts” as resistance and certain behaviours “imply” consent reflects a stubbornly androcentric view of female sexuality and men’s right of access. In this chapter the difficult and elusive question: what counts as unwelcome in sexual harassment litigation is the focal point of the discussion.

#### **Chapter 4 - Damaged Goods: Character as Evidence of Welcomeness**

To what extent is the legacy of Lord Hale pervasive in adjudication of sexual harassment claims? In effect the assumption that women make false complaints about sexual harassment in order to punish men. In a nutshell, the issue of a spiteful complainant is inextricably intertwined with a woman's credibility. The balance of the discussion in this chapter is devoted to the evidentiary questions and the problematic issues of spiteful complaint.

#### **Chapter 5 - Summary and Conclusions**

Distils lessons that emerge from the analysis of the legal and psychological constructions of women's resistance to sexual harassment.

## CHAPTER 2

### 2. THE ECOLOGY OF SEXUAL HARASSMENT

#### 2.1 INTRODUCTION

This chapter examines the ecology of sexual harassment. It is important to an inquiry about the difficult issue of the legal and psychological constructions of women's resistance to sexual harassment that a large body of feminist theoretical work be briefly outlined. This will no doubt demonstrate the long journey sexual harassment has travelled. In the main, the chapter seeks to inform the reader how sexual harassment intersects and interacts with rape. The question of welcomeness in sexual harassment litigation shares the same myths as consent in rape trials. After all, whether romantic overtures were unwanted or mutually reciprocated raises the same question of consent. Thereafter, the balance of the discussion will shift to the definitional aspects sexual harassments, including the troublesome questions as to what constitutes sexual conduct?

##### 2.1.1 An Overview of Feminist Scholarship: Mapping out Sexual Harassment

Before embarking on the discussion of the ecology of sexual harassment which is the primary concern of this chapter, it is appropriate to begin our discussion of sexual harassments and other "gendered harm harms"<sup>14</sup> with feminist narratives in legal scholarship. It was largely the feminist critics, both within and outside criminology,<sup>15</sup>

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<sup>14</sup> Conaghan J 'Gendered harms and the Law of Torts: Remedying (Sexual) Harassment' (1996) 16(3) *Oxford Journal of Legal Studies* 407, 407. She explores the concept of 'gendered harm' and the ability of tort law to respond to and address such harms. The essential argument under consideration is that harm, whether as a social or legal concept has in fact a gendered content. From a social perspective, feminist have argued that women suffer particular harms and injuries as women and their experience of pain and injury is distinguishable, to a large extent, from the experience of men. This claim has at least two dimensions. On the one hand pregnancy and childbirth, menstrual and/or ovulation are obvious examples of gender specific 'harms' men do not or cannot experience these traumas directly. On the other hand, the concept of gendered harm can also embrace those harms which, although not exclusively women in any biological sense, are risks which women are more likely to incur than men – the risks of rape, incest, sexual harassment, and spousal abuse or, more contentiously, the risk of harmful medical intervention. Although men can and do experience these harms also, they are, arguably, less likely to do so.

<sup>15</sup> Britton DM 'Feminism in criminology: Engendering the outlaw' (2000) 571(1) *Annals of the American Academy of Political and Social Science* 57.

who exposed law's disparate treatment of women, both as victims<sup>16</sup> and offenders.<sup>17</sup> This analysis was instrumental in providing a "substantive" or "anti-subordinationist" account of harms done to women in a patriarchal space. In other words, the pervasive violence in the unregulated and under criminalized patriarchal domestic home,<sup>18</sup> the violence that accompanies rape,<sup>19</sup> and the violence that is necessary in prostitution<sup>20</sup> and trafficking in women.<sup>21</sup> Contrary to popular understanding of human sexuality as being mutually shared and enjoyed by both sexes, the experiences of women from time immemorial and current reality, put in radical feminist terms 'human sexuality is best understood as a site of exploitation and alienation; rather than a site of mature adult affection, transitory pleasure, biologic, or liberatory transgression.'<sup>22</sup>

The breakthrough of feminist scholars into the legal landscape that birthed sexual harassment began with their challenge of the public/private divide.<sup>23</sup> According to the public/private law divide, men are naturally suited to the public world of government and commerce, whereas women are destined for the private sphere of home and health, where they hold sway as the angels of the house, bear and rear children, and

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<sup>16</sup> See Amir, M *Patterns of Forcible Rape* (1971); Brownmiller, S *Against Our Will: Men, Women, and Rape* (1975).

<sup>17</sup> Smart, C *Law, Crime and Sexuality: Essays in Feminism* (1995).

<sup>18</sup> The remarks of Marias JA in *Ferreira v S* (2004) 4 All 373 (SCA) at paras 57-58 JA are apt:

"Domestic tyranny in all its manifestations, psychological, economic, emotional and physical, is nothing new. It has existed since man and woman began to cohabit. What is new that those who are victims of domestic violence have become readier to say so, society has become more appreciative of their vulnerability, more receptive of their complaints, and has come to recognise that it is an evil which cannot be tolerated and needs to be rooted out...

Exposure to the litany of domestic abuse in all its forms is the lot of any lawyer who has been given privileged access by clients in literally hundreds of divorce cases to what goes behind the closed doors of ostensibly respectable and law abiding households. And most judges, presiding as they have in countless divorce courts, cases of 'date rape', cases of domestic violence culminating in serious bodily injury or death, and cases in which interdicts against abusive domestic behaviour are sought, are also no strangers to these phenomena."

See also *Omar v Government of the RSA* 2006 (2) BCLR 235 (CC); *S v Baloyi* (2000) (1) BCLR 86 (CC). For further discussion: Fredricks IN & Davids LC 'The privacy of wife abuse (1995) 3 *THRHR* 471.

<sup>19</sup> *S v Notito* (2011) ZASCA (23 November 2011).

<sup>20</sup> SA Law Commission Project 107 'Sexual Offences Issue Paper 19 *Sexual Offences: Adult Prostitution*. See e.g. *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amici Curiae)* 2002 (11) BCLR 1117 (CC); *Kylie v CCMA* 2010 4 SA 383 (LAC).

<sup>21</sup> *S v Palan* [2011] ZASCA 60 (28 October 2013).

<sup>22</sup> West, R 'Law's nobility' (2005) 17 *Yale Journal of Law and Feminism* 385 at 386.

<sup>23</sup> West, R 'Legitimizing the illegitimate: A comment on "Beyond Rape"' (1993) 93 *Columbia LR* 1442.



provide men with respite from the harshness of the outside world.<sup>24</sup> This point was made clearly by Justice Bradley in *Bradwell v Illinois*:<sup>25</sup>

"[T]he civil law, as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman ... The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood ... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."

The long march of feminist legal reform began in the area of criminal law for obvious reasons.<sup>26</sup> Feminists' critique brought to attention the extent to which criminal law has contributed women's subordination while protecting patriarchal interests. In this regard feminist writers have demonstrated historically, how the law of rape has regulated competing male interests in controlling sexual access to females, instead of protecting women's interests in controlling their own bodies and sexuality.<sup>27</sup> Carol Smart<sup>28</sup> argues that the law's treatment of rape and the harms of domestic violence only serve to reinforce male sovereignty over women. She comments:<sup>29</sup>

"Because ... men's sexuality is constructed around the supposedly more straightforward (honest?) and obvious imperative of erection, penetration and ejaculation, *women are often to be guardian of what men most want, but which they have little understanding...* This in turn constructs sexual encounters or relationships in terms of how men can gain control of, or access to, their pleasure which is inconveniently located in women's bodies. *Figuratively speaking, women are seen as having charge of something which is of greater value to men than to themselves*"

Radical feminists saw rape as a central metaphor for men's treatment of women and they compared sexual harassment to rape.<sup>30</sup> Sexual domination was closely linked to the institution of heterosexuality which is central to male superiority.<sup>31</sup> From this

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<sup>24</sup> Goldfarb, SF 'Public rights for "private" wrongs' in MacKinnon & Siegel (eds) *Directions in Sexual Harassment Law* (2004) 516 at 518.

<sup>25</sup> 83 U.S. (16 Wall.) 130 (1872) at 141.

<sup>26</sup> Roberts, DE 'Foreword: The meaning of gender equality in the criminal law' (1994) 85(1) *Journal of Criminal Law and Criminology* 1.

<sup>27</sup> Backhouse, C. 'Skewering the credibility of women: A reappraisal of corroboration in Australian legal history' (2000) 29 (1) *University of Western Australia LR* 79.

<sup>28</sup> 'Law's power, the sexed body, and feminist discourse' (1990) 17 *Journal of Law and Society* 326.

<sup>29</sup> 'Law's power, the sexed body, and feminist discourse' (1990) 17 *Journal of Law and Society* 326 at 344.

<sup>30</sup> Susan Estrich 'Sex at work' (1991) 43 *Stanford LR* 813, 820

<sup>31</sup> See MacKinnon CA 'Difference and Dominance: On sex discrimination' in *Feminism Unmodified: Discourse of Life and Law* (1987) and 'Feminism, Method and the State: An Agenda for Theory' (1982) 7 *Signs* 515

perspective sexual violence was the essence and purpose of male dominance, the classic 'male value' and therefore the central concern of feminism.<sup>32</sup>

The fact that the law has historically discriminated against the sexual assault complainant can hardly be contested.<sup>33</sup> In many rape cases the issue of consent is central to the determination of a trial. While the burden of proving guilt will in every case and at all times rest on the State, an accused person will frequently wish to lead evidence or to ask questions in an attempt to establish that an act of intercourse took place with the complainant's consent. This is unavoidable since the central act is one which is not only natural biological activity, regularly and pleasurably performed on consensual basis. It is in this respect that some of the problematic questions arise as to the scope and nature of any evidence or questioning that should be permitted by law.<sup>34</sup> Simply: it couldn't have happened; if it did, she asked for it, and, if she didn't ask for it, it's just not a big deal anyway.<sup>35</sup>

Radical feminist legal scholars have analogised the sexual harassment law to rape law. The contention is that harassment law for its disregard of women's perspective on sexuality and for its failure to appreciate the unique harm inherent in the fact that harassment is sexual violation. Articulating this radical feminist standpoint, MacKinnon has argued that harassment is problematic precisely because it is sexual in nature, and because heterosexual relations are the primary mechanism through which male dominance and female subordination are maintained. In terms of anti-subordinationist principle, gender and sexuality were co-dependent. The prevailing paradigm for understanding sex-based harassment places sexuality, more specifically male-female advances at the heart of the problem. Within this mode of analysis, *quid pro quo* sexual harassment wherein a male supervisor demands

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<sup>32</sup> Dworkin A *Intercourse* (1987) 126.

<sup>33</sup> MacKinnon CA 'The logic of experience: Reflection on the development of sexual harassment law' (2002) 90 *Georgetown Law Journal* 813, 815.

<sup>34</sup> TC Maloka "Disclosure of sexual history evidence in the wake of *S v M'* (2004) *Speculum Juris* 264 and 'Taking Childhood Sexual Abuse Narratives Seriously: Reflections on Sexual Abuse Accommodation Syndrome and Repressed Memory Syndrome (Part I)' 2006 *Speculum Juris* 68.

<sup>35</sup> Reference can be made to a speech given by erstwhile ANC Youth League President Julius Malema at the Cape Peninsula University of Technology in the aftermath of the controversial rape trial *S v Zuma* (2006) SACR 191 WLD. He said:

"When a woman doesn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, request breakfast and ask for taxi money. You can't ask for taxi money from somebody who raped you".

As a result of these utterances a case was brought against him in the Equality Court by a gender justice NGO: *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC).

sexual favours from a female subordinate represents the quintessential form of harassment.<sup>36</sup> Hostile environment harassment, on the other hand, involved subjecting women to either verbal or physical abuse of a sexual nature, with the intent to embarrass or humiliate them. This type of harassment is common in what had been male-dominated occupations and it was aimed at discouraging women from entering or remaining in them.

Although sexual desire-dominance paradigm represented progress when it was first advanced as the basis for *quid pro quo* sexual harassment, Vicki Schultz criticised it for being under-inclusive. Schultz argues that it is an error to make the problem of sexual coercion paradigmatic in understanding sexual harassment; instead, we should see sexual harassment as being “designed to maintain... highly rewarded lines of work... as bastion of masculine competence and authority.”<sup>37</sup> She also argues that sexual harassment is a problem implicating the subordination of women by men, a problem that must be understood by reference to the dynamics of the workplace. Schultz describes hostile work environment harassment as deeply intertwined with other discriminatory workplace practices such as sex segregation.

This new conceptualisation of sexual harassment, it is submitted resonates with and sheds a light on our sexual harassment jurisprudence and law. In contemporary South Africa, like other jurisdictions worldwide the development of sexual harassment has been inspired by the US experience. However, the parameters of the South African sexual harassment jurisprudence are still confined to *quid pro quo* harassment.<sup>38</sup> The impressive US hostile work environment harassment jurisprudence<sup>39</sup> brings to the fore a lacuna in South African statutory framework for addressing workplace based sexual harassment. Neither the EEA nor The Code addresses directly the issue of hostile work environment harassment. If South Africa had developed hostile work environment harassment, it could be argued that cases

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<sup>36</sup> The first landmark case on sexual harassment involved *quid pro quo* harassment: *Barnes v Costle*, 561 F2d, 15 FEP Cases 345 (DC Cir. 1977).

<sup>37</sup> Schultz V 'Reconceptualising sexual harassment' at 687.

<sup>38</sup> Zalesne D 'Sexual harassment law in the United States and South Africa: Facilitating to social norms' (2002) 25 *Harvard Women's LJ* 156-169.

<sup>39</sup> See Schultz V 'The sanitized workplace' (2003) 112 *Yale LJ* 2061 and 'Telling stories about women and work: Judicial interpretation of sex segregation in the workplace in Title VII cases raising the lack of interest argument' (1990) 103 *Harvard LR* 1749.

such *Intertech v Sowter*,<sup>40</sup> *Mafomane v Rustenburg Platinum Mines Ltd*,<sup>41</sup> *Maharaj v CP de Leeuw*<sup>42</sup> and *Biggar v City of Johannesburg, Emergency Management Services*<sup>43</sup> could have been litigated from a position of strength. In this perspective, the new account of hostile work environment as espoused by Schultz would have refocused attention on the role of sexual and nonsexual forms of harassment in maintaining favoured lines of work as male-dominated. It also highlights the competence-undermining character of such harassment. The facts of *Sowter*, *Mafomane*, *Maharaj* and *Biggar* direct that courts pay more attention to the larger structural context of the workplace.<sup>44</sup>

### 2.1.2 Defining Sexual Harassment

As it has been already noted, the narrow and conventional definition of sexual harassment at work is a demand by amorous supervisor, usually but not always a man, directed to a subordinate, usually but not always a woman, that the subordinate grant the supervisor sexual favours in order to obtain or keep certain job benefits.<sup>45</sup>

By contrast, the broader definition of sexual harassment is that of unwelcome sexual advances, requests for sexual favours or other verbal, non-verbal or physical conduct of sexual nature which has the effect of unreasonably interfering with an individual's work performance or creating an offensive working environment.<sup>46</sup> A limited number

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<sup>40</sup> 2003 10 BLLR 999 (LC) (hereinafter "*Sowter*") - A female employee claimed constructive dismissal after severe case of sexual harassment by fellow employee. She was awarded damages.

<sup>41</sup> In *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) (hereinafter "*Mafomane*") - an affirmative appointee claimed constructive dismissal following complaints of racial discrimination. The LC found that the employer had not rendered employment relationship intolerable.

<sup>42</sup> 2005 26 ILJ 1088 (LC) (hereinafter "*Maharaj*"). At issue in *Maharaj* was the decision of the employer to promote unqualified white colleague to position over qualified black employee. The employer contended that though white colleague didn't have qualifications, he was the rainmaker. The employee regarded the promotion as provocative and insult. He alleged that company's racial discrimination caused him to resign. The LC was satisfied that the employee had been constructively dismissed for reasons related to unfair discrimination on ground of his race.

<sup>43</sup> See e.g. *Biggar v City of Johannesburg, Emergency Management Services* 2011 6 BLLR 577 (LC) (hereinafter "*Bigger*").

<sup>44</sup> For sustained reflection: DM Smit *Bullying in the Workplace: Towards a Uniform Approach in South African Labour Law* (LL.D Thesis, UFS 2014); Rycroft A 'Workplace bullying: unfair discrimination, dignity violation or unfair labour practice?' (2009) 30 ILJ 1431.

<sup>45</sup> See Equal Employment Opportunity Commission ("EEOC"), Title VII of the Civil Rights Act of 1964.

<sup>46</sup> See modified definition by the EEOC in 1980.

of jurisdictions have either by statute or court decisions adopted both the *quid pro quo* sexual harassment and hostile work environment harassment.<sup>47</sup>

In terms of section 203(1) of the Labour Relations Act 66 of 1995 (hereinafter the "LRA"), The Code gives sexual harassment the following definition:

"(1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. (2) Sexual attention becomes sexual harassment if: (a) the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or (b) The recipient has made it clear that the behaviour is considered offensive; and/or (c) The perpetrator should have known that the behaviour is regarded as unacceptable."

Despite the lack of a universal definition of sexual harassment, there seems to be a general consensus about what constitutes sexual harassment. In broad terms an action or conduct can be labelled as sexual harassment if:

- (a) It is related to implicit or explicit sexual behaviour (physical, verbal or non-verbal) in the workplace;
- (b) It is unwanted/unwelcome, not returned, not mutual;
- (c) It affects the terms or conditions of employment;
- (d) It creates a hostile work environment.

The definitions of sexual harassment recognises that employees do not seek to be sexually harassed but are victims of unfair behaviour of fellow employees, usually those who have some form of power over them. Although the greater numbers of employees who are harassed are women, the definitions do not exclude men nor do they exclude same sex harassment.

What is recognised is that despite it being clearly defined many employees do not report harassment in the belief that if they ignore it, it will go away. On the other hand many women feel disempowered, and have the perception that it is acceptable for men to make advances, even when they are clearly unwanted. This is fuelled by the belief that any disciplinary procedure will tend to be lenient towards men, and that in the end, the woman has more to lose.

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<sup>47</sup> For e.g. the Canadian Labour Code defines it explicitly as "any conduct, comment, gesture or contact of a sexual nature that (a) is likely to cause offence or humiliation to any employee; and (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on an opportunity for training or promotion."

## 2.2 WHAT CONSTITUTES SEXUAL CONDUCT?

Leaving aside definitional aspects of sexual harassment embodied in statutes, codes as well as scholarly writings, the problematic issue is what constitutes sexual conduct? For starters, there is distinct lack of unanimity on what counts as sufficiently "sexual".<sup>48</sup> Take for example *Wimberly v Shoney's Inc*<sup>49</sup> where that the fact of physical touching was deemed less important than whether such touching reflected sexual intent. The court found that a restaurant manager's acts in shaking a waitress by the shoulders and letting his arms and hands fall over her breasts were insignificant because they were "done without sexual designs upon her".<sup>50</sup> Distinguishing when sexual designs underlay physical touching, however, has proven to be a daunting exercise to which the courts have brought little consistency. To the court in *Campbell v Board of Regents*,<sup>51</sup> the isolated act of slapping a woman on the rear end was a sexual act: "[A] slap on the buttocks in the office setting has yet to replace the hand shake." To another, however, the act of "bagging," unexpectedly grabbing a male worker's genitals, was not a sexual activity.<sup>52</sup> And in another case, the act of stroking a woman's hair even, in the context of admiring her body and speculating about her sex life, was not a sexual gesture.<sup>53</sup>

If determining when physical touching amount to sexual conduct has proven to be an elusive proposition, discerning when other types of conduct amount to prohibited sexual advances has proven to be similarly ambiguous undertaking. In *Sadulla v Jules Katz & Co*<sup>54</sup> and *Gregory v Russells*<sup>55</sup> aggrieved harassers were reinstated despite findings of 'serious misconduct' and 'abhorrent behaviour'. In the former case an employee was fired based on allegations that he had invited a female employee to watch a pornographic movie with him, described some of the scenes in the video to her, asked her if she 'used her finger when she gets a sexual urge', and asked her whether she used a vibrator. Despite finding that the employee had, in fact, engaged

<sup>48</sup> Posner RA *Sex and Reason* (1992) 430.

<sup>49</sup> 39 (BNA) Fair Empl. Prac. Cas. 444 (SD GA 1985).

<sup>50</sup> *Wimberly v Shoney's Inc* at 448-49.

<sup>51</sup> 770 F. Supp. 1479 at 1486 (D. Kan. 1991).

<sup>52</sup> *Quick v Donaldson Co.*, 895 F. Supp. 1288, 1288 (SD Iowa 1995).

<sup>53</sup> *Downes v FAA*, 775 F.2d 288 at 295 (Fed. Cir. 1985).

<sup>54</sup> (1997) 18 ILJ 1482 (CCMA).

<sup>55</sup> (1999) 20 ILJ 245 (CCMA).

in a sexual conduct, the court found that there was no 'real victim since they were willing and consenting adults', noting that it is often difficult to distinguish between a real victim and the pretended or hypersensitive victim'.<sup>56</sup> Although the employee indicated that the male employee's conduct was unwelcome and spurned, the arbitrator failed to see how she was truly victimised. It was found that she had not adequately indicated her offence, and thus refused to punish the aggressor.

In *Cohen v Litt*,<sup>57</sup> for example, the court was willing to categorise a supervisor's comment that his "penis stretches from here to District 1"<sup>58</sup> as a "sexual advance" but held that the advance was too insignificant to constitute sexual harassment because it did not include any "offensive touching or threats".<sup>59</sup> In another case, the court found absurd the plaintiff's perception of her boss's conduct as sexual advance. In the court's view, the older man's lavishing attention on his female subordinate, having dinner alone with her numerous times, assuming physical intimacies toward her (such as caressing her hands and placing his hands on her knee), and showering her with gifts, were in no way sexually or romantically motivated.<sup>60</sup> According to the court, the plaintiff was a naive woman, hypersensitive to men, who had fantasised her boss' attention.<sup>61</sup>

With respect to derogatory epithets aimed at women employees courts have also been inconsistent. To illustrate, to one court in *Woerner v Brzeczek*<sup>62</sup> a police lieutenant's reference to a female police officer as "that broad" constituted the use of a "sexually-oriented epithet". A particularly poignant case is *Galloway v General Motors Serv. Parts Operations*,<sup>63</sup> where male colleague's "statement calling [a female colleague] a 'sick bitch' was deemed not overtly sexual in nature. Another court had no qualms about concluding that a casino blackjack dealer's reference to a female floorperson as a "cunt" and "dumb fucking broad"<sup>64</sup> was "sexually explicit and

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<sup>56</sup> In *Cline v General Elec. Credit Auto Lease*, 54 (BNA) Fair Empl. Prac. Cas. 419 at 423 (N.D. Ill. 1990) the court held that a collection manager's calling a female employee "Syphilis", telling her she looked like a "streetwalker", and monitoring her bathroom breaks were not "harassment of a sexual nature," even when accompanied by crude speculations about the plaintiff's sex life at home.

<sup>57</sup> 906 F.Supp. 957(S.D.N.Y. 1995).

<sup>58</sup> *Cohen v Litt* at 964.

<sup>59</sup> *Cohen v Litt* at 965.

<sup>60</sup> *Sand v Johnson Co* 33 (BNA) Fair Empl. Prac. Cas. 716 at 726-26 (E.D. Mich. 1982).

<sup>61</sup> *Sand v Johnson Co* at 725.

<sup>62</sup> 519, F. Supp. 517 t 520 (N.D. Ill. 1981).

<sup>63</sup> 78 F.3d 1164 (7<sup>th</sup> Cir. 1996).

<sup>64</sup> *Steiner v Showboat Operating Co.*, 25 F.3d 1459 at 1461 (9<sup>th</sup> Cr. 1994).

offensive terms".<sup>65</sup> According to the court the dealer's use of such terms was "fundamentally different" from calling men "asshole[s]" and "jerk[s]".<sup>66</sup> The court pointed out that his abuse of women was distinctive because it "relied on sexual epithets, offensive, explicit reference to women's bodies and sexual conduct."<sup>67</sup> In the court's perspective, "It is one thing to call a woman 'worthless', and another to call her a 'worthless broad'".<sup>68</sup>

Judicial approach to the issue of what constitutes sexual conduct presents a fascinating spectacle. Far from providing a bright-line test, the courts' focus on conduct that is sexual in nature has proven to be indeterminate proxy for whether sexual advances were welcome or unwanted. Instead, the focus on sexual conduct has opened as many questions as it has answered, embroiling judges in a maze of casuistry that create a patchwork of justice.

### 2.3 CONCLUSION

In examining feminist narratives in legal scholarship, this chapter has demonstrated in no uncertain terms that rape and sexual harassment interact and intersect with one another. It is the close relationship between the determination of consent in rape trials and welcomeness in sexual harassment litigation that proves that the two have profound mutual implications and compel conclusions with respect to one another.

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<sup>65</sup> *Steiner v Showboat Operating Co.* at 1463.

<sup>66</sup> *Steiner v Showboat Operating Co.* at 1464.

<sup>67</sup> *Steiner v Showboat Operating Co.* at 1463.

<sup>68</sup> *Steiner v Showboat Operating Co.* at 1464.



## CHAPTER 3

### 3. THE “UNWELCOMENESS” REQUIREMENT

#### 3.1 INTRODUCTION

The gravamen of any sexual harassment complaint is that sexual advances were unwelcome or unwanted. The way the fact finders interprets *welcomeness* – in particular, the insistence that only certain acts “counts” as resistance and certain behaviours “imply” consent reflects a stubbornly androcentric view of female sexuality and men’s right of access. In this chapter the difficult and subtle question: what counts as unwelcome in sexual harassment litigation is the central point of the discussion. This discussion also brings into productive dialogue the research studies in cognitive science and related disciplines which illuminate the complex issue of the victims’ counterintuitive responses to sexual assault and harassment. In doing so, it takes forward the feminist call to rethink the women psychological resistance to sexual harassment – rather than engaging in victim blaming.

#### 3.2 DEFINING UNWELCOMENESS

It was noted in the previous chapter that what constitutes sexual conduct presents a fascinating spectacle; the same uncertainty abounds with respect to whether sexual advances were unwanted/unwelcome. Delineating when romantic overtures were unwanted has proven to be an equally imprecise undertaking. This is no mean task, given that a woman’s “no” is routinely interpreted as “yes”, or at least “maybe”. Thus, in the trend setting case of *Barnes* the court pondered that “[T]he distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected” sexual advances may be difficult to discern.<sup>69</sup> In effect, this inevitably leaves the crucial issue to the determination of fact finders: Is she telling the truth? Did she ask for it?

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<sup>69</sup> *Barnes v Costle* 561 F.2d 983, DC Circuit, 1977 (hereinafter “*Barnes*”). Similar sentiments were expressed by White J in the South Australian Supreme Court in the rape of case of *Egan* (1985) 15 ACR 20 at 25-26:

“In the nature of things, men frequently bring some kind of ‘pressure’ to bear to obtain a woman’s consent, ‘pressures’ in the ways of compliments, blandishments... and the like, all of which may legitimately be directed towards securing consent through her sexual arousal. This has always been the case and it seems too obvious to mention.”

The American Courts in *Henson v City of Dundee*<sup>70</sup> and *Meritor Savings Bank v Vinson*<sup>71</sup> set out a positive tone for the development of a nuanced approach for determining a standard for whether sexual advances or other forms of sexual harassment are “unwelcome”. In *Henson* the U.S. Court of Appeals for the Eleventh Circuit explained that the challenged conduct must be unwelcome “in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive”. In interrogating unwelcomeness it necessitates examining whether the complainant *subjectively* but also *objectively* found amorous advances offensive or unwanted. The subjective/objective construction brings to attention interesting problems concerning fallacious assumptions about how women respond to unwanted sexual conduct. It also cogently points out the deeply entrenched hegemonic masculinity.<sup>72</sup> As Monnin explains:<sup>73</sup> “[T]he alleged conduct may be offensive or undesirable to the plaintiff, yet nonetheless ‘welcomed’ by her in the eyes of her harasser. In essence, while the complainant may subjectively find the advances offensive,... her supervisor or co-workers may view her outward conduct as indicative of her receptiveness.”

In *Meritor* the US Supreme Court took a bold step in recognising that a woman could participate in sex against her will, without being forced but it could still be unwelcome. The court indicated that:

“the fact that sex-related conduct was ‘voluntary’ in the sense that the complainant was not forced to participate against her will, is not a defence to sexual harassment suit brought under Title VII... The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”<sup>74</sup>

Nonetheless Chief Justice Rehnquist found it necessary to add that a plaintiff’s sexually provocative speech or dress is “obviously relevant”<sup>75</sup> in determining whether she found particular advances unwelcome but such evidence should be considered with caution in light of the potential for unfair prejudice. In the *Swentek v. US Air*,

<sup>70</sup> 682 F.2d 897, 903 (11<sup>th</sup> Cir. 1982) (hereinafter “*Henson*”).

<sup>71</sup> 477 U.S. 57, 60 (1986) (hereinafter “*Meritor*”).

<sup>72</sup> See generally Connell R *Gender and Power: Society, the Person and Sexual Politics* (1987) and *Masculinities* (1995).

<sup>73</sup> Monnin PN ‘Proving welcomeness: The admissibility of evidence of sexual history in sexual harassment claims under the 1994 Amendment to Federal Rules of Evidence’ (1995) 48 *Vanderbilt LR* 1155 at 1165.

<sup>74</sup> *Meritor* at 67-68.

<sup>75</sup> *Meritor* at 68-69.

*Inc.*,<sup>76</sup> case the court endorsed the *Meritor* rationale for considering dress and speech, but the court did not allow general evidence of past conduct to vitiate a plaintiff's sexual harassment claim. While the court did not completely exclude evidence of past conduct from the determination of welcomeness, it did enunciate some limitations on the production and use of such evidence.

Despite the partial limitation on evidence of the plaintiff's past conduct in *Swentek*, courts hearing sexual harassment claims continue to impart male biased perspectives to their analysis of "welcomeness".<sup>77</sup> For instance, courts have admitted evidence of dress and speech, participation in horseplay and the use of foul language<sup>78</sup> as relevant to the issue of welcomeness. Under the *Meritor* test, evidence of a woman's dress may be admitted to show the harasser was "incited" to the conduct. The belief that such evidence is probative of a woman's intent displays the sexism inherent in such a concept.<sup>79</sup> The notion that women dress nicely to please men or to invite sexual conduct permeates the test of unwelcomeness. Further, these standards are riddled with sexist assumptions of what exactly an invitation for sexual behaviour entails.

The above approaches to the "welcomeness" concept has been criticised by many legal commentators in the United States. Robin Phillips<sup>80</sup> concludes that this approach results in litigation which focuses "on the women's personal life, her dress, her speech, and even her choice of lunch companions rather than the perpetrator's inappropriate conduct". Susan Estrich<sup>81</sup> compares the welcomeness standard outlined above to the rape standards of consent and resistance.

### 3.3 SOUTH AFRICAN EXPERIENCE IN COMPARATIVE PERSPECTIVE

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<sup>76</sup> 830 F.2d 552 (4th Cir. 1987) (hereinafter "*Swentek*")

<sup>77</sup> Juliano AC 'Did she ask for it? The "unwelcome" requirement in sexual harassment case (1992) 77 *Cornell LR* 1558, 1587-1592

<sup>78</sup> *Smith v Acne Spinning Co* 40 FEP Cases 1104, 1105 (W.D.N.C.) (1986) (Rejecting unwelcomeness claim as to two "rubbing" incidents where the complainant "frequently participated in on-the-job horseplay that included a good deal of rubbing and touching of male employees).

<sup>79</sup> Burgh JA "Attractiveness of the underling: An automatic power sex association and its consequences for sexual harassment and aggression" (1995) 68 *Journal of Personality and Social Psychology* 768 Willis CE & Wrightsman L "Effects of victim gaze behaviour and prior relationship on rape culpability attributions" (1995) 10 *Journal of Interpersonal Violence* 367.

<sup>80</sup> Phillips R *Violence in the Workplace: Sexual Harassment of Women and International Human Rights Law*, Vol. 1 (1999), 257.

<sup>81</sup> Estrich S 'Sex at work' (1991) 43 *Stanford LR* 813, 827-828.

How has South African adjudicators fared insofar as the welcomeness requirement is concerned? Does the legal interpretation and factual determination of welcomeness in sexual harassment litigation also typify rape myths and reveal the traditional possessive form of sexuality which still pervades our contemporary culture? To answer these difficult and related questions, an important consideration is the actual dynamic and nature of the relationship between the alleged harasser and the complainant. It must be stressed that this dynamic must not only be considered within the purview of the workplace relationship, but also at a personal level.

As already noted from examination of comparative jurisprudence, determination of whether conduct was welcome or not, an adjudicator may consider the following: Whether the complainant participated in the very conduct about which she is now complaining of.<sup>82</sup> Whether she clearly made her amorous male colleague aware that in future such conduct would be considered unwelcome. There is also the question of the lapse of time between the occurrence of the conduct and the aggrieved employee complaining about it. In addition, the harassed employee may respond with outright rejection,<sup>83</sup> initial rejection and later acceptance followed by later rejection or "souring romance".<sup>84</sup>

The linchpin to the existence of sexual harassment is conduct that must be 'unwelcome'. It must be borne in mind that where the conduct is not unwelcome, it cannot be sexual harassment. The determination of whether conduct is 'unwelcome' is an objective one, because conduct that may be subjectively unwelcome to one person may not be unwelcome to another. This brings to the fore problematic question of how does one proceed in objectively determining whether the kind of conduct is unwelcome? This can be achieved by the offending employee being informed that the employee considered the conduct to be unwelcome and the perpetrator then being called on to cease the conduct.<sup>85</sup> Another option is for the harassed employee to formally pursue a complaint with more senior management using relevant harassment policies that may be applicable, or raising a grievance.

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<sup>82</sup> *Balleti v Sun Sentimental Co.* 909 F. Supp 1539 at 1554-1547 (S.D. Fla. 1995).

<sup>83</sup> *Jones v Wesco Invest Inc.* 846 F.2d 1154 (8<sup>th</sup> Cir. 1998) (holding that unwelcomeness was sufficiently demonstrated by plaintiff pushing away her supervisor, stating that she was only interested in a business relationship and leaving the room).

<sup>84</sup> *Karibain v Columbia University* 14 F.3<sup>rd</sup> (2<sup>nd</sup> Circuit, New York, 1994).

<sup>85</sup> Section 5 of the Code.

In sustaining a claim of sexual harassment, it is crucial for a complainant to prove the particulars of the conduct complained of. If the conduct is not proven then that brings the matter to the end. If the conduct is established, then what secondly must be established is that either the complainant complained about the conduct, or, if the complainant did not complain about the conduct, the complainant would be required to provide a plausible and reasonable explanation for not taking appropriate steps.

Two South African cases are illustrative of how the welcomeness inquiry has thus far been dealt with in South Africa. *Maepo and CCMA*<sup>86</sup> concerned a classic setting of love affair gone awry between a senior employee and a female subordinate. The complainant admitted that she had included the allegations of sexual harassment in the grievance, 'because she wanted to punish the applicant and wanted action taken against him'. The Commissioner found that sexual attention was mutual. The Commissioner expressed himself as follows:<sup>87</sup>

I do not believe that the complainant was incapable of expressing her disapproval or even mild displeasure when the applicant made sexual advances to her. I shall go even further, and say that by her conduct, both active and passive, on her own version, complainant can be said to have encouraged applicant in his belief that the complainant was enjoying his overtures. There are various examples of the complainant's behaviour which are entirely contrary to what one would expect of a woman who is shocked by her boss's 'unwelcome advance'. When she was asked by the applicant's representative why she had given the applicant her photo to take home with him, she answered: "I saw nothing wrong". This does not sound like someone who is shocked by her boss' behaviour. It sounds like someone who is willingly complicit in this sort of close and rather intimate behaviour. Similarly, by accepting a ride with him to choir practice indicates a sense of intimacy on her part which she has attempted to deny in her evidence.

Consequently, a sanction of dismissal was reversed and an order of reinstatement was made subject to the employee not being found guilty of any conduct which amounts to sexual harassment.<sup>88</sup>

In *Bandat v De Kock*<sup>89</sup> the LC was called upon to draw the line between acceptable flirting and unwelcome, offensive conduct. At issue was a constructive dismissal claim founded on quid pro quo sexual harassment as well as a distinct and separate

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<sup>86</sup> (2002) 23 ILJ 568 (CCMA) (hereinafter "*Maepo*").

<sup>87</sup> *Maepo* at 582.

<sup>88</sup> The order of reinstatement was reversed by the Labour Appeal Court in *Maepo v CCMA* [2008] 8 BLLR 723 (LAC).

<sup>89</sup> (2014) 36 ILJ 979 (LC) (hereinafter "*Bandat*").

discrimination claim based on section 6(1) of the EEA.<sup>90</sup> In the present case the supervisor had gravitated towards a relationship of friendship with his subordinate female colleague.<sup>91</sup> The applicant and the first respondent regularly and continuously shared intimate details of one another's lives with one another. They shared jest of a sexual nature. The applicant for instance conceded an incident where she took some condoms and made a sexual joke about her husband and his alleged sexual escapades, to the perpetrator. They together extensively on work assignments and regularly had picnics together. Overall, there were limited instances wherein the applicant suggested the respondent's conduct was unwelcome. Having regard to the dynamics of the workplace and personal relationship between the parties, it is submitted that Snyman AJ cannot be faulted for concluding that the applicant had failed to provide sufficient evidence been constructively dismissed on the ground of sexual harassment<sup>92</sup> and discriminated by the respondents.<sup>93</sup>

The learned judge in his factual determination stated as follows:<sup>94</sup>

In her evidence, the applicant conceded that she never complained to the first respondent about any of his behaviour. She never told him that what he was doing was improper nor did she ask him to desist. In fact, and considering the nature of their relationship, this clearly explains why this was the case, being that it was not unwanted. All this being the case, then how can it ever be accepted that the conduct complained of was unwanted. It was crucial for the applicant to have, especially considering the undisputed nature of the interaction between her and the first respondent, set the boundaries, so to speak. To illustrate, the first respondent would think nothing of taking a friend to Teazers unless such a friend set a boundary in this regard. As a matter of principle, the applicant's failure to ever raise a protest or complaint can only reasonably lead to the conclusion that the conduct referred to was never unwanted.

The behaviour of the harassed employees in *Maepe* and *Bandat* is in stark contrast to instances where sexual approaches were found to have amounted to sexual harassment. In *Makoti v Jesuit Refugee Service SA*,<sup>95</sup> a director made a number of direct advances on a junior employee who successfully resisted and his behaviour then changed from attempting to win her over to shunning her and treating her with

<sup>90</sup> S 6(3) of the EEA provides that

'Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

<sup>91</sup> *Bandat* paras 27-33 and 83-87.

<sup>92</sup> *Bandat* para 60.

<sup>93</sup> *Bandat* para 91.

<sup>94</sup> *Bandat* para 88.

<sup>95</sup> (2012) 33 ILJ 1706 (LC).

contempt. In *Christian v Colliers Properties*,<sup>96</sup> the employee's superior in essence trapped her in her office, tried to kiss her and she pushed him away and left the office. She later told him it was not acceptable and he then gave her an ultimatum to either be 'out or in', meaning accepting his advances or not. When she said she was not 'in' she was given an envelope with two days' salary and dismissed.

In large measure, the American bedfellows to *Maepe* and *Bandat*, are *Trauvette v Quick*<sup>97</sup> and *Kepler v Hindsdale Township High School District 86*.<sup>98</sup> In *Trauvette* the plaintiff was found to have "welcomed" the advances she repeatedly refused over a period of weeks before finally submitting. In this case a teacher had a consensual relationship with the principal of the school in which she taught brought a suit alleging various claims, including sexual harassment. The Seventh Circuit affirmed the decision of the District Court that the romantic attention was welcomed, observing that:

... beyond the fact that the plaintiff declined the principal's offers for drinks, the record is void of any evidence showing that she declared those advances to be unwelcome. Much to the contrary, the course of conduct when reviewed in its entirety, appears to substantiate the District Court's findings that the plaintiff grew to welcome the principal's advances and even participated in an active way so as to encourage them.

In *Kepler*, the school principal Dr Miller had a four year consensual relationship with Ms Kepler, the director of school services. Not long after the relationship had ceased, Kepler was demoted to a mere special education teacher. She then sued the school district for sexual harassment and discrimination. Put simply, in the court's words, she "alleges [those causes of action] but what she really wants is to make others pay for her mistakes. She will not succeed here".

The reason for her disappointment was the prior consensual relationship with her superior. As the court made it clear, "an employer who seeks retribution because his former lover has jilted him may be reacting not to rejection of copulation per se, but to the change in the status quo – that is, the termination of the intimate relationship." The court noted and conceded that Title VII prohibits sex discrimination in the workplace, but concluded that:

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<sup>96</sup> (2005) 26 ILJ 234 (LC) at 238H-239D.

<sup>97</sup> 916 F 2d 1140, 1144 (7<sup>th</sup> Cir. 1990) (hereinafter "*Trauvette*").

<sup>98</sup> 715 F. Supp. 862 (N.D. Ill. E.D. 1989) (hereinafter "*Kepler*").

An employer who chooses to become involved in an intimate affair with her employer... removes an element of her employment relationship from the workplace and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which Title VII says have no place in the employment setting ..[That] employee cannot then expect that her employer will feel the same as she did about her before and during their private relationship. Feelings will be hurt, egos damaged or bruised. The consequences are the result not of sexual discrimination, but responses to an individual because of her former place in her employer's life.<sup>99</sup>

Similarly, in *Sardigal v St. Louis National Stockyards*<sup>100</sup> the complainant's allegation of unwelcomeness was rejected because after the alleged sexual conduct occurred, she visited her alleged harasser at the hospital, visited him at his brother's home, allowed him to enter her home alone at night. Likewise in *Christoforou v Ryder Truck Rental*,<sup>101</sup> where the plaintiff continued to accept rides from the alleged harasser, even after an alleged sexual assault, the court declined to find that the conduct was unwelcome. Again in *Reichman v Bureau of Affirmative Action*,<sup>102</sup> advances were held not to be unwelcome where the complained-of incident, which involved a kiss and a proposition. Of course harassers can have strange notions of what constitutes encouragement and welcomeness.

Carol Sanger contends that using consent to determine whether behaviour is or is not harassment highlights the limits of harassment law in a second set of facts.<sup>103</sup>

The problem here is the groping employer, the supervisor who makes a pass and is rejected, and then tries his luck with the next employee. He then leaves employee number one alone: there is no retaliation and no second request or invitation. On these facts, there is also no harassment; the aggressor accepts that his advance is unwanted. However, the employer may move on to a second employee, and perhaps a third or fourth, and just take his chances. There is no risk, in terms of harassment; to the method. But as the example shows, the focus on consent or rejection by individual employees distracts attention from the large pattern and problem of unprofessional, disadvantaging behaviour.

It would appear that preceding case law clarify the point that unless there is something more – a quid pro quo threat or a request for sex after consensual relationship has ended – existing harassment law provides no relief at all for whatever professional vindictiveness follows the break-up of the relationship. The

<sup>99</sup> *Keppler* at 864. See also *Perez v MCI World Com Communications* 154 F.Supp. 2d 932, 942 (N.D. Tex. 2001) ([T]he mere fact that two co-workers has an 'affair gone wrong' does not in itself turn sex-neutral harassment into harassment based on sex").

<sup>100</sup> 42 FEP Cases 497 (S.D. Ill 1986).

<sup>101</sup> 668 F. Supp. 294, 51 FEP Cases 98 (S.D.N.Y. 1987).

<sup>102</sup> *Reichmann v Bureau of Affirmative Action* 536 F. Supp 1149, 30 FEP Cases 1644 (M.D. Pa. 1982).

<sup>103</sup> 'Consensual Sex and the Limits of Harassment Law' in MacKinnon CA & Siegel RB (eds) *Directions in Sexual Harassment Law* (2004) 77, 92.



point is demonstrated by *Bandat* that employee's consent prevents the possibility of a claim for sexual harassment, but it obliterates the case of constructive dismissal under the LRA and discrimination in terms of the provisions of EEA. More deserving scrutiny before consenting too much of anything, would-be employee might benefit from accurate information, not about the state of their superior's heart, but the state of law.

### 3.4 DOES TOKEN RESISTANCE VITIATE UNWELCOMENESS?

The question whether a complainant's token resistance to sexual advances vitiates unwelcomeness, thus making her assenting to the undesired amorous attentions is central to the women's legal and psychological resistance to harassment. Recall that the sexual paradigm of law, the naturalised sex of law, at all times cast the man (never the woman) in the role of the initiator (never the negotiator) of a sexual act. In simple terms, the woman, then, was always the respondent to the man's proposal and it was a proposal leading to her ultimate pleasure. The traditional possessive and coercive sexuality is put best by Naffine:<sup>104</sup>

...women are aroused by men 'who persuade a little harder' and why 'outward reluctance to consent' on the part of a woman is not necessarily an assertion of a woman's real sexual desires. It is why what a woman says should not necessarily be taken seriously. The dominant man is the erotic man, and when a woman plays hard to get she may really be asking for more. Her coyness is 'a deliberate incitement' for him to apply yet more pressure.

The effect of this possessive form of heterosexual relations becomes particularly clear in "victim-precipitated" rape.<sup>105</sup> The notorious rape case of *S v Zuma*<sup>106</sup> falls within this category.

To what extent does token rebuff constitutes unwelcomeness in sexual harassment litigation? Recall that since *Barnes* courts have held that for the plaintiff to prevail, she must demonstrate by her behaviour that the perpetrator's advances were unwelcome. Viewed differently, the plaintiff is required to provide objective evidence

<sup>104</sup> Naffine N 'Possession: Erotic love in the law of rape' (1994) 57 *Modern LR* 10, 29.

<sup>105</sup> According to Amir *Patterns of Forcible Rape* (1971), 266 "[victim-precipitated rape occurs in] those rape situations in which the victim actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestion was made by the offender(s) The term applies also to cases in risky situations marred with sexuality, especially when she uses what could be interpreted as indecency of language and gestures, or constitutes what could be taken as an invitation to sexual relations."

<sup>106</sup> Footnote 35 *supra*

that she was offended, meaning that her behaviour must satisfy the man's subjective standards of how she would behave if she were truly uninterested in him. In reality this is a daunting task, given that a woman's "no" is routinely interpreted as "yes" or at least "maybe". Thus, the *Bandat* court mused 'the determination of whether conduct is 'unwelcome' is an objective one, because conduct that may be subjectively unwelcome to one person may not be unwelcome to another'.<sup>107</sup>

Nonetheless, in *Kouri v Liberian Services*<sup>108</sup> the court reasoned that the plaintiff was "hopelessly indirect" in her efforts to convince her supervisor that she was happily married, delivered an "attenuated message" and "never made any realistic effort to cut it off." The court in *Dockter v Rudolf Wolff Futures Inc*<sup>109</sup> agreed that the plaintiff had indeed rejected her boss's sexual overtures, but reasoned, "her initial rejections were neither unpleasant nor unambiguous, and gave [him] no reason to believe his motives were unwelcome."

Further the courts have generally concluded that women who fail to complain promptly or at all have acted inappropriately – have been "unreasonable" in their responses to being sexually harassed by their supervisors and their colleagues.<sup>110</sup> However, it has been acknowledged that because of intimidation, shame and economic vulnerability a complainant may delay in making charges of harassment against a superior.<sup>111</sup> On balance, the development of sexual harassment law has been replete with instances of "blaming the victim". The central premise is that making a formal complaint appears to be the legal *sine qua non* of an "appropriate" response.<sup>112</sup> If a complainant made contemporaneous complaint or protest, such a complaint is a strong indicator of success. Despite received wisdom that reporting offensive conduct is normative,<sup>113</sup> expected, and expectable, very few women actually do this, and results are often not favourable to those who do.<sup>114</sup>

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<sup>107</sup> *Bandat* at para 72.

<sup>108</sup> 1991 WL 50003, 6 (E.D Va. 1991).

<sup>109</sup> 532, 533 (N.D. Ill. 1988).

<sup>110</sup> See e.g. *Bandat*.

<sup>111</sup> *Taljaard and Securicor* (2003) 24 ILJ 1167 (CCMA); *Sowter v Intertech* (1997) 18 ILJ 689 (LAC).

<sup>112</sup> Shaney MJ "Perceptions of harm: The consent doctrine defence in sexual harassment cases" (1986) 71 *Iowa LR* 621.

<sup>113</sup> See generally Woodzicka JA & LaFrance M "Real versus imagined gender harassment" (2001) 57 *Journal of Social Issues* 15.

<sup>114</sup> Schneider *et al* "Job-related and psychological effects of sexual harassment in the workplace: Empirical evidence from two organizations" (1997) 82 *Journal of Applied Psychology* 401;

Reference must be made to perspectives from social sciences and psychological studies which shed light on the victims' counterintuitive responses to sexual assault and harassment.<sup>115</sup> In *Rape, Myth and Reality: A Clinician's Perspective*,<sup>116</sup> Mason describes the reasons behind victims' delayed reporting, one of the most examined features of posttrauma reaction in rape trauma cases and literature:<sup>117</sup>

It may be hard for a victim to do anything that reminds them of the circumstances of the assault and simple tasks may become impossible. However, some victims may find security in carrying on with daily routines, such as looking after their children or going to work. Some find it too hard to talk about what happened, and thus they may delay reporting the events and not tell anyone, even those who love them most. Many women blame themselves, and feel ashamed. Most of us would comfortably talk about being in a car crash, or being mugged, but how many of us would feel comfortable talking about having been raped?

It will be recalled that in the seminal decision of *J v M Ltd*, the Industrial Court wisely observed:<sup>118</sup>

"It is indeed not uncommon for employees to resign rather than subject themselves to further sexual harassment. The psychological effect on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional and psychological well-being of the person involved. Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises etc. – what is referred to as tangible benefits in American law – her position is unenviable."

Lack of appreciation of victim's counterintuitive response has in some instances led courts to exonerate the employer from liability for sexual harassment on the basis that the employer is not to blame for harassment, often because the victim of harassment is found to have failed to bring the harassment to the employer's attention or to have improperly delayed – or committed some other blameworthy act – in doing so.<sup>119</sup> Accordingly, these courts, while not necessarily holding women

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<sup>115</sup> A number other commentators have examined the phenomena of victim's response to sexual harassment: Beiner, TM 'Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment' (2001) 7 *WM & Mary Journal of Women & Law* 273, 312-331; Krieger, LH 'Employer Liability for Sexual Harassment-Normative, Descriptive and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp' (2001) 24 *University Arkansas Little Rock LR* 169, 175-92; Grossman, JL 'The First Bite is Free: Employer Liability for Sexual Harassment' (2000) 61 *University of Pittsburgh LR* 671, 722-728.

<sup>116</sup> Mason, FL 'Rape – Myth and Reality: A Clinician's Perspective' (2010). 50 *Medical Science & Law* 116.

<sup>117</sup> Mason, FL 'Rape – Myth and Reality: A Clinician's Perspective' (2010) 50 *Medical Science & Law* 116, 118.

<sup>118</sup> *J v M Ltd* at 758A-C.

<sup>119</sup> See Quinn, BA 'The Paradox of Complaining: Law, Humor, and Harassment in the everyday work world' (2000) 25 *Law and Social Inquiry* 1151.

responsible for the harassment targeted at them, have found that the women's action contributed to the duration or severity of the harassment, thereby reducing or eliminating their ability to recover for the harms caused by harassment.

### **3.5 Conclusion**

It is clear from the above that although research reveals the impossibility of predicting how any particular woman will react to sexual harassment, courts have consistently construed women's behaviour to mean that the harassment was welcome, did not occur or could not have been that bad. Sexual harassment cases are frequently characterised by a predominant focus on the victim as opposed to the perpetrator's behaviour. Further as already noted in the previous chapter, rules and prejudices have been borrowed almost wholesale from traditional rape law, with the focus on the conduct of the woman, her reactions or lack of them, her resistance or lack of it, reappears with only the most minor changes.

## CHAPTER 4

### 4. DAMAGED GOODS: CHARACTER AS EVIDENCE OF WELCOMENESS

#### 4.1 INTRODUCTION

[I]t must be remembered that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.<sup>120</sup>

Lord Chief Justice Hale

[I]t does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.<sup>121</sup>

Chief Justice Rehnquist

The above statements from eminent jurists provide a deeper insight into ambiguities of fact and norm that underline sexual harassment and rape. They also encapsulate commitment to hegemonic masculinity, even more directly, the persistence of rape and sexual harassment myths.<sup>122</sup> Although the advent of sexual harassment laws and policies have made it easier for victims to come forward, the prospects of vindication of fundamental rights are often negated by stereotypes used to attack the credibility and character of women who make such complaints. A sexual harassment complainant is an oxymoron: she blends two contradictory barriers to credibility. If the complainant were in fact a Jezebel, then she either welcomed romantic attention or her refusals were neutral or even encouraging to the perpetrator. If she were a good woman, she would have firmly and unambiguously indicated her objection to the behaviour, while simultaneously making a prompt and formal complaint of harassment or her purity would have deterred sexual harassment itself. The plain fact of the matter is that a woman who wants to prevail is caught between the proverbial a "rock" and a "hard place". She must avoid fitting too neatly into the image of either the Madonna or the whore.

As already noted in the previous chapter, in both rape and sexual harassment, the claim is not established if the perpetrator reasonably believed that he had the

<sup>120</sup> Hale M, *Hale's Pleas of the Crown* (1713) (*Classics of British Historical Literature*, 1971) Vol 1.

<sup>121</sup> *Meritor Savings Bank v Vinson* 477 US at 69.

<sup>122</sup> Burt MR 'Cultural myths and supports for rape' (1980) 38(2), *Journal of Personality and Social Psychology* 217.

woman's consent or that his advances were welcomed. The assumption is that women are required to set ground rules for sexual encounters. Where a complainant failed to set boundaries, and subsequently claimed sexual violations she will be confronted with the legacy of doubt.<sup>123</sup> In a nutshell, the issue of a spiteful complainant is inextricably intertwined with a woman's credibility. The balance of the discussion in this chapter is devoted to the evidentiary questions and the problematic issues of spiteful complaint.

#### 4.2 THE CAUTIONARY RULE

Stereotypes and generalised assumptions about assault victims which have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecution of sexual offences are testament to the enduring legacy of Hale.<sup>124</sup> The assumption inherent in some of the myths is that the woman is consciously lying to hide sexual complicity or harm the man. Other myths are based on an assumption that women engage in sexual fantasies and then confuse these with the truth.<sup>125</sup> Distrust of women's claims of sexual violation is built into classic Anglo-American rape law in the traditional "Hale" instruction.<sup>126</sup> Lord Hale also described the ideal woman deserving legal protection. She was a woman 'of good fame,' who revealed the injury immediately; otherwise 'the strong presumption [was] that her testimony [was] false or feigned'. In blatant terms, a woman of bad character is an unworthy victim.<sup>127</sup> Such unworthy victims find it impossible because society and adjudicators believe rape and sexual harassment are rare events, attributable to monsters.

The persistence of myths is also buttressed by cultural factors. Women are often considered to be responsible for controlling the sexual conduct of men and are commonly blamed for their failure or inability to do so.<sup>128</sup> For a relatively

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<sup>123</sup> Lonsway, K.A Cortina, LM & Magley, VJ 'Sexual harassment mythology: Definition, conceptualization and measurement' (2008) *Sex Roles*, 58, 599-615.

<sup>124</sup> In *S v J* 1998 (2) SA 984 (SCA).

<sup>125</sup> See Torrey M 'When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions' (1991) 24 *U.C. Davis LR* 1013.

<sup>126</sup> Hale, M *The History of the Pleas of the Crown* (1736) at 635.

<sup>127</sup> *S v Zuma supra*.

<sup>128</sup> Davis T 'Sexual assault: Myths and stereotypes among Australian adolescents' (1996) 34 *Sex Roles* 787.

straightforward example of this attitude, one can do no better than refer to the testimony of Phyllis Schlafly before the US Senate Labour Committee:<sup>129</sup>

When a woman walks across the room, she speaks with a universal body language that most men intuitively understand. Men hardly ever ask sexual favours of women from whom the certain answer is 'No'. Virtuous women are seldom accosted by unwelcome sexual propositions or familiarities, obscene talk or profane language.

There is some element of truth to the claim that "although it is false, the (usually) unspoken message is that only a desirable' woman will be harassed. Ironically, as women seek to make themselves desirable to men, they are blamed for male responses".<sup>130</sup>

In sexual harassment litigation, a fact finder could conclude that the complainant did not manifest unwelcomeness with sufficient clarity or that the perpetrator's behaviour, though offensive to the woman, was not so severe and pervasive to be actionable. It is clear that rape myths affect the litigation process and outcomes because litigation is a form of storytelling. In all litigation, a claimant must design a story to present to the adjudicator. To prevail, the adjudicator must believe the complainant's story and the story must include all the elements of the relevant legal standard. In cases of sexual violation, plausibility means, in large part, consistency with gendered myth. The Achilles heel of rape or sexual harassment complainant narratives is that legally crucial issues of force, consent or unwelcomeness are not matters of objectively observable fact and, therefore, are particularly prone to reinforcing cultural prejudices. It has been succinctly pointed out that 'the stories of sexual violation are ultimately women's stories, but the story presented in a legal hearing is not a simple narrative or set of narratives presented by the woman herself. Rather, these narratives are subject to multiple controls by lawyers, who highlight or obscure various aspects of the claimants' stories.'<sup>131</sup>

#### 4.3 SPITEFUL COMPLAINANT

It is very hard to prove that sexually-harassing behaviour occurred, because often the only witnesses are the harasser and the complainant. Faced with allegations of *quid*

<sup>129</sup> Hebert LC 'Why don't "Reasonable Women" complain about sexual harassment' (2006) 62 *Indian LJ* 1 at 47 footnote 116.

<sup>130</sup> Davis AD & Wildman SM 'The legacy of doubt: Treatment of sex and race in the Hill-Thomas Hearings' (1992) 65 *S. California LR* 1367, 1374.

<sup>131</sup> Coombs, MI 'Telling victim's story' (1993) 2 *Texas Journal Women and the Law* 280.

*pro quo* sexual harassment and possible dismissal, an alleged harasser and his legal representative can resort to playing the "scorned woman" card to exonerate himself. In this strategy he can raise doubts about the existence of the conduct by showing that the woman had motives to fabricate a complaint. A reader would not be mistaken if after re-examining the facts and outcomes in cases such as *Maepé*, *Bandat*, *Trauvette* and *Keppler*, concludes that the claimants did not prevail because they were spiteful complainants. These women's narratives of sexual harassment were found not to be plausible. Partly they fitted neatly into the image of Jezebel, in other words, they were "damaged goods".<sup>132</sup> It can be argued that their claims of sexual harassment were problematic and less credible because for the virtuous women, sexual harassment is not a problem except in the rarest of cases.

Some illustrations of spiteful complainants come from Canada. In *Bell*,<sup>133</sup> the complainant alleged that her employers made crude propositions to her, commented on her sex life, slapped her buttocks, and fired her when she complained. The employers responded that she had been dismissed for incompetence, and that she was bringing the complaint because she had subsequently been unemployed for seven months and needed money. The adjudicator agreed that the possibility of this motivation undermined her credibility.<sup>134</sup> In the same token in *Broomfield* the complainant was also found to be spiteful. Ms. Broomfield had been sexually harassed for two years, but did not make a formal complaint until she was passed over for a promotion. She made no secret of the fact that the economic retaliation motivated her complaint, and the tribunal held that this cast a shadow on her credibility.<sup>135</sup> Both Ms. Bell and Ms. *Broomfield* lost their cases. Thus, "pure" women may be disbelieved; "loose" women are both disbelieved and devalued.

According to Faraday the phenomena of victim-blaming feeds to the assumption that women bring false complaints about sexual harassment, and makes the complainant's character, behaviour, motivations relevant facts. By attacking a

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<sup>132</sup> Heilbrun CG 'The Thomas Confirmation Hearings (1992) 65 S. Cal. LR 1569 at 1573 ("Woman has ever been seen as the temptress or the virgin, sexual or moral, never both").

<sup>133</sup> *Bell and Korczak v Ladas and the Flaming Steer Steak House* (1980), 1 CRLR.R. D/155 (Ont. Bd. Inq.) (hereinafter "*Bell*").

<sup>134</sup> *Bell* at D/157.

<sup>135</sup> *In Re Canada (Treasury Board Employment and Immigration) and Broomfield* (1989) 6L.A.A. (4<sup>th</sup>) (hereinafter "*Broomfield*").



woman's credibility in this way, tribunals do not deny that the facts of harassment happened, but structure those facts so that it appears unreasonable for the complainant to have experienced them as harmful. Sexual harassment is reduced to a matter of individual hysteria or vengefulness.<sup>136</sup>

#### 4.4 THE DIMINISHED CREDIBILITY OF A STOIC VICTIM WHO DELAYS REPORTING SEXUAL HARASSMENT

The question of blaming the victim and undermining her credibility arises where she delayed reporting supervisory harassment and invoking formal procedures. The point is that the Code, the EEA and employers place on formal means of resolving sexual harassment claims. To the extent that adjudicators expect immediate formal complaints in response to sexually harassing behaviour, these expectations are not likely to be met by women who are more likely to attempt other coping mechanisms in response to offensive conduct, only resorting to more formal means after their initial efforts have failed.

While it has been acknowledged that workplace dynamics in certain circumstances may explain the complainant's counter-intuitive response to sexually harassing conduct,<sup>137</sup> on balance case law<sup>138</sup> indicates that courts have almost been uniform in finding the conduct of harassed employees deficient because of a delay in reporting sexual harassment. Empirical evidence<sup>139</sup> conclusively demonstrates that women are much more likely to feel comfortable using informal means of trying to resolve problems with sexual harassment, because formal means of dispute resolution tend to be inconsistent with the manner in which they view conflict. Non-assertive responses to sexual harassment appear to be an aspect of the type of behaviour that are culturally expected of women. Unlike male counterparts, women are socialised to avoid conflict. In addition, women are generally expected to assume the role of

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<sup>136</sup> Faraday, K 'Dealing with sexual harassment in the workplace: The promise and limitation of Human Rights Discourse' (1994) 32(1) *Osgoode Hall LJ* 32, 50.

<sup>137</sup> *Qaga v Anglo Platinum Ltd* (2012) 33 *ILJ* 1706 (LC) at para 42 (hereinafter "*Qaga*").

<sup>138</sup> Balogh DW 'The effects of delayed report and motive for reporting on perceptions of sexual harassment' (2003) 48 *Sex Roles* 337.

<sup>139</sup> Fitzgerald LF, Swan S & Fischer K 'Why didn't she just report him? The psychological and legal implications of women's responses to sexual harassment' (1995) 51 *Journal of Social Issues* 117, 119-112.

nurturing social relationships, whether these are personal or professional.<sup>140</sup> Other studies have also indicated that women fail to report sexual harassment because they are afraid of being blamed for the harassment.<sup>141</sup>

Courts generally have been unsympathetic to claims of employees that they were deterred in promptly reporting the existence of sexual harassment because of concerns about the adverse consequences. For instance, in *Dennis v State Nevada*<sup>142</sup> the complainant was found to have acted unreasonably in not reporting sexual harassment by her supervisor, even though she indicated that she failed to make a report because she was in her probationary period and was concerned that making such a complaint would jeopardise the successful completion of that period. She did discuss the harassment with a fellow employee, who eventually made a formal report of sexual harassment on her behalf. The court found that the complainant's failure to make a formal complaint for four to five months was unreasonable. The court also found that the retaliation that she feared, and in fact endured, as a result of the complaint made on her behalf, consisting of ostracization by her colleagues and receiving undesirable shifts, was not the type of adverse employment action required to state a retaliation claim.<sup>143</sup>

Even a relatively brief hold-up between incidents of sexual harassment and reporting thereof have been found untenable. Take the case of *Phillips v Taco Bell Corp.*<sup>144</sup> there the complainant was touched in a sexual manner by her supervisor on March 13, June 13, June 17, and June 18. She reported the harassment in accordance with the employer's policy in June 20. The court held that the complaint's delay in reporting for three months after the first incident made her behaviour unreasonable.<sup>145</sup> Regrettably, the court placed no weight on the fact that the complainant reported the sexual harassment within days of the beginning of a pattern of escalating harassment. The only incident that she did not report in a very prompt

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<sup>140</sup> Gruber JE & Smith MD 'Women's responses to sexual harassment: A Multivariate analysis' (1995) 17 *Basic Social Psychology* 543, 547.

<sup>141</sup> Ragins BR 'Antecedents and work-related correlates to reported sexual harassment: An empirical investigation of competing hypotheses' (1995) 32 *Sex Roles* 429, 435; Osman S 'Victim resistance: theory and data on understanding perceptions of sexual harassment' (2004) 50 *Sex Roles* 267, 267.

<sup>142</sup> 282 F.Supp.2d 1177 (D. Nev. 2003).

<sup>143</sup> *Dennis v State Nevada* at 1184-1186.

<sup>144</sup> 83 F.Supp 2d 1029 (E.D. Mo. 2000).

<sup>145</sup> *Phillips v Taco Bell Corp* at 1034.

manner was a single incident which she might have thought was isolated, at least until the behaviour escalated three months later.

Even more startling is the outcome in *Conatzer v Medical Professional Building Services Inc*<sup>146</sup> where a delay of 17 days between the first incident of sexual harassment and the complainant's report was deemed to be unreasonable. In that case, the complainant's supervisor rubbed up against the side of the complainant's chest on September 28 and then placed her head in a headlock between his knees on October 11 or 12. On October 15, she made a formal complaint under the employer's sexual harassment policy. Even though the first incident took place in front of another supervisor, the district court found the employer's failure to take action.

Courts have been indifferent to employees' claims that they believed that reporting would be futile, even when employees have some justification for belief, such as information obtained from other employees. In a shocking case of *Walton v Johnson & Johnson Services Inc*<sup>147</sup> it was held that an employee who had delayed reporting sexual harassment, including several episodes of forcible rape, by her supervisor for just over two and one-half months acted unreasonably. The court reached this conclusion even though it conceded that the harassment alleged by the complainant was "particularly traumatic", the court declined to find that the trauma excused any delay in reporting, noting that problems of workplace cannot be remedied "without the cooperation of the victims"<sup>148</sup> and that victims are required to "make [the] painful effort" of reporting if they want to collect damages for violation of the statute.<sup>149</sup>

The above analysis reveals a number of subtle, yet significant steps in which the credibility of a vulnerable but stoic victim is undermined partly because of a delay in reporting or failure to report sexual harassment. Ironically, courts seem more accommodating of employers' delays in acting on reports of sexual harassment than the delays of employees in making these reports.<sup>150</sup> Even striking is that

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<sup>146</sup> 255 F.Supp. 2d 1259 (N.D. Okla. 2003).

<sup>147</sup> 347 F.3d 1272 (11Cie. 2003), cert denied, 541 US 959 (2004).

<sup>148</sup> *Walton v Johnson & Johnson Services Inc* at 1290.

<sup>149</sup> *Walton v Johnson & Johnson Services Inc* at 1291.

<sup>150</sup> See e.g. *Anderson v Leigh* 2000 UD Dist. LEXIS 1584 (N.D. Ill. 2000).

complainants have also been found to have acted unreasonably in refusing to participate in certain steps of the employer's investigatory process.<sup>151</sup> In making these decisions, the courts do not appear to have taken into consideration that women do not act in a manner in which the court expect them to act. As Camille Hebert points out:<sup>152</sup>

In fact, women who use more informal methods of dealing with sexual harassment often are portrayed as "doing nothing" a characterization that makes it more likely that courts will find unreasonable their failure to take proactive steps to deal with harassment, even though these women are in fact "doing something" and their efforts to cope with and deal with the harassment may be as effective, or at least not substantially less effective, as a method of coping with the occurrence of sexual harassment in their workplaces than the more assertive responses that judges expect them to take. After all,... the results of taking formal action in response to sexual harassment have not been generally positive for women. While women may have good reasons for their reluctance to use formal reporting methods, or their delay in invoking such methods, these actions are likely to be seen as diminishing the credibility of the victim, as well as the culpability of the harasser. In addition ... these actions pose difficulties for the ability of women to hold their employers liable for sexually harassing behaviour engaged in by supervisory employees.

#### 4.5 Conclusion

In examining "what is an effective response?", this chapter has demonstrated that despite pervasive public opinion that women should "handle" harassment assertively, confront the perpetrator immediately and report him to appropriate authorities, reactions to such responses are generally not favourable for those who actually "blow the whistle". Furthermore, taking the matter to court is risky and often a traumatic venture, given the immense psychological and economic costs to individuals who use formal action, in contrast to the potentially meagre gains, it is not surprising that so few victims choose this response. Harassment is generally not a one-time event but rather unfolds across time and so too does the victim's responses. How a woman responds probably depends on the progression of the harassment.

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<sup>151</sup> *Jackson v Arkansas Department of Education* 272 F.3d 1020, 1023, 1026 (8<sup>th</sup> Cir. 2001), cert denied, 536 US 908 (2002).

<sup>152</sup> Hebert LC 'Why don't "Reasonable Women" complain about sexual harassment' (2006) 62 *Indian LJ* 1 at 39-40.

## CHAPTER 5

### 5. SUMMARY AND CONCLUSION

The narratives of women's legal and psychological resistances to sexual harassment allowed us to explore the complex grey area between sexual violation and sexual pleasure. What constitutes sexual conduct presents a fascinating spectacle; the same uncertainty abounds with respect to whether sexual advances were unwanted/unwelcome. Delineating when romantic overtures were unwanted has proven to be an equally imprecise undertaking. This is a daunting task, given that a woman's "no" is routinely interpreted as "yes", or at least "maybe". Case law demonstrates that there is no bright-line distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected sexual advances.

The study has shown that the history of the development of the law of sexual harassment abounds with instances of "blaming the victim". Much of the courts' record in evaluating legal and psychological resistance of women in sexually harassing conduct is disheartening. The requirement that women prove the unwelcomeness of even sexually abusive and denigrating conduct is predicated on the assumption that women often invite amorous or sexually oriented attention by their conduct, their provocative dress and even by their mere presence. Despite empirical evidence to contrary, the predominant cultural image is that men do not violate women who is demure, proper, and professional at work, or women who make clear to a date or an acquaintance that they are sexually unavailable.

The legacy of rape myths and sexual harassment stereotypes bring to the fore the nature of the dilemma which confronts a complainant seeking vindication against workplace sexual harassment. That dilemma manifests itself in that in order to be believed the complainant must avoid fitting too neatly into the image of either the Madonna or the whore. The phenomena of blaming the victim and undermining her credibility also emerge where she delayed reporting supervisory harassment and invoking formal procedures.

Studies and case law about women's legal and psychological resistance to sexual harassment have demonstrated in no uncertain terms that women are inclined to opt

for other measures besides filing formal complaints to respond to sexual harassment, at least initially, and that the majority of women never file such formal complaints. This has addressed why women act in that manner and has argued that they are often entirely sensible in doing so, both because of the precarious situations they find themselves at work and the likely consequences that they would encounter if they made such a formal complaint. In doing so, it takes forward the feminist call to rethink the women psychological resistance to sexual harassment – rather than engaging in victim blaming.

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