

# What's Your Damage? Assessing the Harms of Sexual Harassment From the Perspective of the Victim and the Accused

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## Abstract

This article begins with a simple question: why are the damages awarded to victims of sexual harassment so much lower than damages awarded for those defamed by false allegations of sexual harassment? This article undertakes a comparative analysis of the underlying rationales for awarding damages in the doctrines of sexual harassment and defamation, tracking the historical reasons why sexual harassment damages have traditionally been so low compared to other doctrines. Then, it directly analyses two cases which awarded some of the highest damages in their respective doctrines: *Rush v Nationwide News Pty Ltd* and *Hughes v Hill*. This analysis reveals how the ongoing effect that traditional factors inhibiting sexual harassment damages, such as gender stereotyping and the requirement to medicalise damages, results in ongoing discrepancies in the damages awarded between both doctrines. This article suggests a simple solution: applying similar rationales for assessing damages in defamation to sexual harassment decisions.

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## I Introduction

In July 2020, the Full Court of the Federal Court of Australia affirmed two determinations on damages. In one, *Nationwide News Pty Ltd v Rush* ('*Rush*'),<sup>1</sup> the Full Court affirmed the findings of the trial judge that the plaintiff was entitled to AUD850,000 in general damages for defamation in circumstances where the defendant, a publishing company, had published defamatory stories about the plaintiff accusing him of sexual harassment of a co-worker.<sup>2</sup> In the other, *Hughes v Hill* ('*Hill*'),<sup>3</sup> the Full Court affirmed that the victim of sexual harassment was entitled to AUD120,000 in general

1. (2020) 380 ALR 432 ('*Rush*').

2. *Ibid* 436.

3. (2020) 277 FCR 511 ('*Hill*').

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damages and AUD50,000 in aggravated damages for exposure to years of sexual harassment in her former place of employment.<sup>4</sup>

While in both cases the plaintiffs were ultimately successful, the cases — determined so closely together — can present as the different sides of the same coin. Both cases speak to the pain and damage that sexual harassment claims can cause to both the victim, in the case of *Hill*, and to the accused, in the case of *Rush*. But it does seem striking that the pain, damage and loss caused by a defamatory accusation of sexual harassment is worth more than four times as much as the experience of sexual harassment itself. Understanding and interrogating this discrepancy is particularly important in Australia as, since the rise of the #MeToo Movement in 2017, commentators have questioned whether Australia's strong defamation laws operate as a silencing mechanism as victims of sexual harassment may be fearful of the consequences of a public discussion of their harassment.<sup>5</sup>

Sexual harassment is a pressing social issue, with one in three workers in Australia indicating that they have been sexually harassed at work.<sup>6</sup> While sexual harassment is now understood to be a widespread problem, the approach to remedies in discrimination and sexual harassment claims has a long history of criticism.<sup>7</sup> In particular, the remedial approach understands discrimination and sexual harassment as a singular, individual event with one victim and one perpetrator.<sup>8</sup> As such, the remedies for discrimination and sexual harassment are in the form of individual damages. If the purpose of discrimination and sexual harassment law is understood as a broader attempt to fundamentally change society to make it more equal, then an individualistic approach is manifestly inadequate. Remedies must include broader systemic remedial approaches.<sup>9</sup> Some recent steps have been taken in this respect, including placing a positive duty on employers to take steps to prevent such conduct from occurring in the first place.<sup>10</sup> Nevertheless, even within a broader systemic framework, individuals may still want to pursue individual compensation for their loss and damage. As such, it will remain important to understand the approach adopted in the courts to the damages in discrimination and sexual harassment claims and understand the nature of the harm that discrimination and sexual harassment causes to the individual.

4. Ibid 524–5.

5. Karen O'Connell, 'Geoffrey Rush's Victory in His Defamation Case Could Have a Chilling Effect on the #MeToo Movement', *The Conversation* (online, 11 April 2019) <<https://theconversation.com/geoffrey-rushs-victory-in-his-defamation-case-could-have-a-chilling-effect-on-the-metoo-movement-115127>>. See also Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report conducted for the Respect@Work Secretariat, Commonwealth Attorney-General's Department, 24 October 2022) 93.

6. Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian Workplaces* (Report, 2022) 12 ('AHRC 2022 Sexual Harassment Survey').

7. Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422; Paula McDonald, Sara Charlesworth and Somali Cerise, 'Below the "Tip of the Iceberg": Extra-Legal Responses to Workplace Sexual Harassment' (2011) 34(4) *Women's Studies International Forum* 278 ('Below the "Tip of the Iceberg"'); Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32(2) *Australian Journal of Labour Law* 219; Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *University of New South Wales Law Journal* 155 ('Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm').

8. Smith, Schleiger and Elphick (n 7) 220–1.

9. Shi and Zhong (n 7) 156.

10. *Sex Discrimination Act 1984* (Cth) pt IIA; *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) pt IIA.

Our purpose in this article is to interrogate the discrepancy in damages claims between those falsely accused of sexual harassment and those who are subjected to sexual harassment to expose why the false accusation of sexual harassment has been deemed by the courts to be either more detrimental than proven sexual harassment or at least entitled to a monetary sum far exceeding those awarded in sexual harassment claims. We argue that this discrepancy can be explained in part by the different conceptualisations of loss and damage in the doctrine. In particular, we argue that sexual harassment damages have been hamstrung by historical, implicit and pervasive gender stereotyping and a requirement for victims to medicalise and evidence their harms. In contrast, the harm to defamation victims has been more readily accepted by courts. These harms include both the private emotional hurt and the public harms to the victim (through harms to reputation and vindication). We argue that the rationales which lead to higher damages for defamation claims are also applicable to sexual harassment victims, and that courts would benefit from adopting an approach to damages in sexual harassment which is akin to that taken in defamation claims. Such an approach would better encompass the broad nature of the harm and damage done to the individual complainant and could allow for complainants in sexual harassment claims to achieve higher (and more just) damages payouts.

We start our argument in Part I by outlining the different general principles of damages in defamation and sexual harassment, highlighting the divergent rationales for damages in both areas of law and their respective statutory schemes.<sup>11</sup> In Part II, we consider the two decisions of *Rush* and *Hill* side-by-side and argue that while both represent some of the highest general damages awarded in the Federal Court at the time in their respective areas of law, they are nevertheless reflective of the approach and the quantitative damages awarded in each field. In Part III, we put forward our suggested reasons for the disparity of damages awarded between defamation and sexual harassment cases, focusing on two factors — first, the differing power and gender dynamics at play in each case and second, the requirement in sexual harassment cases to medicalise the harms suffered because of the sexual harassment. In contrast, the medicalisation of the harm is not required for damages in a defamation claim providing plaintiffs with a lower threshold for proof. In Part IV, we end this article by arguing that it would be beneficial for damages assessments in sexual harassment cases to draw upon the principles of general loss and damage developed in defamation law. By doing so, we argue that damages for sexual harassment would better reflect and compensate the broader array of harms caused by sexual harassment, not only as causing personal injury but for general feelings of hurt and distress, accepting and articulating the broader career and reputational harms suffered by persons bringing claims of sexual harassment and vindicating the victim's rights and dignity.

## II The Purpose of General Damages in Defamation and Sexual Harassment

The purpose of general damages in both defamation and sexual harassment claims is one of compensation.<sup>12</sup> In both causes of action, damages operate to perform a form of corrective justice between the parties.<sup>13</sup> General damages utilises a financial sum to recognise the non-economic harms and pain and suffering caused to the plaintiff as a result of the defendant's actions.<sup>14</sup> In

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11. *Sex Discrimination Act 1984* (Cth); *Defamation Act 2005* (NSW) ('*Defamation Act*').

12. David Rolph, *Defamation Law* (Thomson Reuters, 2016) 306; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 905–6.

13. John Gardner, *Torts and Other Wrongs* (Oxford University Press, 2019) 11, 17.

14. *Ibid.*

addition, in both cases, where a plaintiff has received a specific loss of income, they will additionally be entitled to specific economic relief for that loss.<sup>15</sup>

Where these two causes of actions diverge is in the articulation of the precise harm which general damages is meant to ameliorate. In defamation claims, the courts have been relatively clear on the purpose of general damages, while in sexual harassment, the answer is decidedly less clear. As will be seen below, the most recent articulation of the harm that sexual harassment damages is meant to ameliorate is from *Richardson v Oracle Corporation Australia* ('*Richardson*'),<sup>16</sup> in which the court understood the harm done by sexual harassment to be akin to the damage suffered in a personal injury claim. While *Richardson* has succeeded in significantly increasing the amount of damages available in sexual harassment cases for non-economic loss, its application in subsequent discrimination and sexual harassment cases has been inconsistent.

## A Defamation

The purpose of non-economic loss damages in defamation claims is to provide redress to a person for imputations which tend to lower a person's reputation in the estimation of his or her peers by making them think less of them, usually by bringing them into hatred, ridicule or contempt.<sup>17</sup> The most common form of damages in a defamation claim is compensatory damages for non-economic loss. In *Carson v John Fairfax & Sons Ltd* ('*Carson*'),<sup>18</sup> Mason CJ, Deane, Dawson and Gaudron JJ described the principal purposes of compensatory damages for defamation as follows:

[s]pecific economic loss and exemplary or punitive damage aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that 'the amount of a verdict is the product of a mixture of inextricable considerations'. The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation.<sup>19</sup>

As such, there are three purposes, or elements, to assessing damages for a finding of defamation: personal distress and hurt, reparation for reputational harm and vindication.

Consolation for personal distress and hurt is a considerable component of the damages awarded for defamation.<sup>20</sup> As McHugh J confirmed in *Carson*, the damages need to be high enough to compensate the plaintiff's 'hurt feelings'.<sup>21</sup> The rationale for this is articulated by Lord Diplock in *Broome v Cassell & Co Ltd*:

15. Rolph (n 12) 322; Rees, Rice and Allen (n 12) 919.

16. (2014) 223 FCR 334 ('*Richardson*').

17. *Parmiter v Coupland* (1840) 6 M & W 105; 151 ER 340.

18. (1993) 178 CLR 44 ('*Carson*').

19. *Ibid* 60–1.

20. *Ibid* 71 (Brennan J).

21. *Ibid* 105 (McHugh J).

The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms of large element in the damages.<sup>22</sup>

The evidence that a plaintiff is required to provide to illustrate their hurt feelings is generally taken to be their own words about their feelings in hearing or reading the false information about themselves. The court will also consider evidence of the plaintiff being shunned by their community,<sup>23</sup> primarily demonstrated through the loss of friends or associates or exclusion of the plaintiff in community or professional settings.<sup>24</sup>

With respect to repairing the aggrieved party's reputation, this has historically been viewed as a compensatory measure for a right infringed upon. There are three different ways in which the idea of a right to a good reputation has been understood: as a property right, a public right and a dignitary right.<sup>25</sup>

Rolph argues that the reputation of a person might be viewed as a form of property — something that has value which can be enhanced or diminished by others actions, with the award of damages designed to 'restore' the plaintiff's reputation to its previous value.<sup>26</sup> However, he notes that this fails to encompass the entirety of the purpose of repairing damages to reputation, as the damages awarded also seeks to 'vindicate' the aggrieved party. This is consistent with a conceptualisation of repairing one's reputation as compensating for a loss of 'dignity'.<sup>27</sup>

Finally, courts have taken the view that the awarding of the damages themselves is not enough; the size of the damages awarded also conveys a level of vindication.<sup>28</sup> As such, while an award of general damages in defamation is said to be compensatory, it is in fact more than that, with both the private goal of compensating harm caused, and the public goal of vindicating a person's reputation.<sup>29</sup>

Historically, a common theme in the critique of the damages awarded in defamation cases is that the non-economic loss damages awarded in defamation claims often far exceeded that which was awarded in personal injury claims. This disparity was previously criticised.<sup>30</sup> Consequently, a statutory cap on non-economic loss damages in the uniform *Defamation Acts* was introduced in the states and territories around Australia.<sup>31</sup> At the time of writing, the statutory cap for non-economic damages was set at AUD478,500.<sup>32</sup> However, damages can be awarded above this amount where there are sufficient aggravating factors which warrant a higher amount to be awarded. Aggravated damages are also compensatory in nature but compensate actions of the defaming party which exacerbate the damage caused beyond the core hurt being litigated, by being improper, unjustifiable or lacking in *bona fides*.<sup>33</sup> Historically, this has been found to include the blatant falsity of the

22. [1972] AC 1027, 1125 ('*Broome v Cassell*').

23. *Garbett v Hazell, Watson & Viney Ltd* [1943] 2 All ER 359, 360 (Scott LJ); *McCarey v Associate Newspapers Ltd* [1965] 2 QB 86, 105 (Pearson LJ); *David Symes & Co Ltd v Mather* [1977] VR 516, 532.

24. *Ibid.*

25. David Rolph, *Reputation, Celebrity and Defamation Law* (Routledge, 2008) 72.

26. *Ibid.*

27. *Ibid.* 82.

28. *Ibid.* 81. See also *Broome v Cassell* (n 22); *McCarey v Associated Newspapers Ltd (No 2)* (1965) 2 QB 86.

29. Andrew Kenyon, 'Problems with Defamation Damages' (1998) 24(1) *Monash University Law Review* 70, 72; *Wren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150 (Windeyer J).

30. Rolph (n 12) 317–8.

31. *Defamation Act 2005* (NSW) s 35(1) with each state and territory having a substantially similar provision.

32. *Ibid.*; New South Wales, *Government Gazette of the State of New South Wales*, No 245, 28 June 2024.

33. *Triggell v Pheaney* (1951) 82 CLR 497, 514.

defamatory statements<sup>34</sup> or failure to enquire as to the truth of the matter,<sup>35</sup> refusal to make an apology or an adequate apology where reasonable in the circumstances to do so,<sup>36</sup> and the conduct of the party during the litigation itself.<sup>37</sup> That non-economic loss damages could be awarded over the statutory cap where there were factors of aggravation warranting such a determination was affirmed in *Bauer Media Pty Ltd v Wilson (No 2)* in 2018 and as will be outlined in Part III<sup>38</sup> was a key consideration in how the payment of AUD850,000 in damages in *Rush* could be justified.

## B Sexual Harassment

Unlike defamation claims, the harm of sexual harassment that damages are designed to address is less well-articulated. Sexual harassment is unwanted or unwelcome sexual behaviour where a reasonable person would have anticipated the possibility that the person harassed would feel offended, humiliated or intimidated.<sup>39</sup> Damages in discrimination and sexual harassment claims at the federal level are governed by s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) which requires that where the court is satisfied that there has been unlawful discrimination (including sexual harassment), the court can require a respondent to pay an applicant compensatory damages for any loss or damage. However, what 'loss and damage' the compensation is intended to compensate is left unstated and it is open to the court to articulate the nature of the loss and damage caused by unlawful discrimination including the damage caused by sexual harassment.

Historically, one of the reasons for the low damages was in part due a reliance on British jurisprudence which suggested that the individual or personal harms of sexual harassment were minimal and short-lived and that high damages payments would fail to have a deterrence effect.<sup>40</sup> In part though, a reason for the low damages received by claimants is that the harms of sexual harassment and the purpose of anti-discrimination legislation in changing behaviour were not well-articulated. As a consequence, it is difficult to find an articulation of precisely what the purpose of damages in sexual harassment claims was. The damages awarded for sexual harassment were often low. For example, in the trial decision of *Richardson v Oracle Corporation Pty Ltd*, the judge noted that the appropriate 'range' for general damages in sexual harassment was often considered to be between AUD12,000 and AUD20,000.<sup>41</sup> In early sexual harassment claims, it was often difficult for the complainants to establish liability. Where liability could be established, the damages that flowed were awarded at low levels.<sup>42</sup> In part, this can be explained by sexual harassment being traditionally conceptualised as a form of sex discrimination, as reflected in the choice to make sexual harassment a form of discrimination under the various anti-discrimination acts in Australia.<sup>43</sup> The consequence then has been that sexual harassment was plagued by the same systemic concerns that underpin discrimination law more broadly.<sup>44</sup> The general approach to discrimination law as a matter of

34. *Carson* (n 18).

35. *Andrews v John Fairfax & Sons Ltd* (1980) 2 NSWLR 225.

36. *Jools v Mirror Newspaper Ltd* (1984) 56 ACTR 1.

37. *Humphries v TWT* (1993) 120 ALR 693.

38. [2018] VSCA 154.

39. *Sex Discrimination Act 1984* (Cth) s 28A.

40. Therese MacDermott, 'Reassessing Sexual Harassment: It's Time' (2015) 40(3) *Alternative Law Journal* 157 ('Re-assessing Sexual Harassment').

41. *Richardson v Oracle Corp Australia Pty Ltd* (2013) 232 IR 31, [243].

42. We discuss this case law in detail in Part III below.

43. Thornton (n 7) 424–5.

44. *Ibid.*

statutory construction has been cautious, with limited damages offered.<sup>45</sup> As Thornton argues, the nature of the individual enforcement mechanism, as well as the difficulties with conceptualising terms such as ‘reasonableness’ in a context of historically patriarchal spaces, has led to circumstances where compensation is often rejected or awarded at low levels — though sexual harassment cases have some further success due to their more overtly unacceptable nature.<sup>46</sup>

Although inconsistent, analogies to tort law have long been used in discrimination and sexual harassment case law. As far back as 1986, in *Allders International Pty Ltd v Anstee* (*‘Allders’*), Lee J concluded that the assessment of damages under the New South Wales *Anti-Discrimination Act 1977* should be analogous with an action in tort.<sup>47</sup> In particular, he held that general or compensatory damages in statutory discrimination law claims might take into account damages for ‘hurt feelings’, as the common law already did so as a matter of course in other damages assessments, for example, with respect to defamation, negligence and malicious prosecution.<sup>48</sup> Whether or not judges determining claims in discrimination should consider the remedies and damages awarded in other areas of law such as torts has generated a degree of debate in the case law. In *Hall v A&A Sheiban*,<sup>49</sup> the Federal Court appeared to tentatively agree with this approach, but nevertheless still maintained that, given Australian discrimination law was in its infancy, a flexible approach to damages should be adopted. The decision in *Allders* and McHugh JA’s obiter in *Australian Postal Corporation v Dao* appears to understand the damages in discrimination claims as akin to the general damages awarded in tort law.<sup>50</sup> However, in *Commissioner of Police v Estate of Russell*,<sup>51</sup> Spigelman CJ rejected the construction of discrimination law as a ‘tort’ and concluded that principles and approaches developed in tort law or statutes governing aspects of tort law (in that case related to vicarious liability) were inapplicable to discrimination law.<sup>52</sup>

It was not until *Richardson*<sup>53</sup> more clearly re-conceptualised sexual harassment as akin to a tort that the damages that a claimant could receive rose. In its decision in *Richardson*,<sup>54</sup> the Full Court of the Federal Court began to better explain the underlying reasons that sexual harassment should be compensated and why sexual harassment is unlawful. In *Richardson*, at first instance, the plaintiff was successful in her claim for sexual harassment and was awarded AUD18,000 in general damages.<sup>55</sup> She appealed the decision and argued that the general damages should have been assessed at a higher rate.<sup>56</sup> Justice Kenny, with whom the Court agreed on the question of damages, accepted that general principles from tort could be used as analogies to assist enquiries into appropriate damages assessments, unless the circumstances warranted a different approach,<sup>57</sup> and accepted that the damages awarded were manifestly inadequate.<sup>58</sup> In coming to this conclusion,

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45. Beth Gaze, ‘The Sex Discrimination Act at 25: Reflections on the Past, Present and Future’ in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 110–3.

46. Thornton (n 7) 427.

47. (1985) 5 NSWLR 47, 64 (Lee J) (*‘Allders’*).

48. *Ibid.*

49. (1989) 20 FCR 217, 238–9.

50. *Allders* (n 48) 64; (1985) 3 NSWLR 565, 604–5.

51. (2002) 55 NSWLR 232.

52. *Ibid.* 247.

53. *Richardson* (n 16) 343, citing *Qantas Airways v Gama* (2008) 167 FCR 537.

54. *Ibid.*

55. *Richardson v Oracle Corp Australia Pty Ltd* (n 41) , 95.

56. *Richardson* (n 16) 337.

57. *Ibid.* 343.

58. *Ibid.* 355.

Kenny J explicitly relied upon a comparison to an area of tort law, namely personal injury, to argue that the damages in *Richardson* were manifestly inadequate, stating that:

An award of damages by way of compensation under s 46PO(4)(d) of the AHRC Act is to compensate for the injury suffered by the person harassed...in making an award, a court necessarily has regard to the general standards prevailing in the community...Cases in the field of personal injury may be particularly useful because the object of an award of damages for non-pecuniary loss in such cases is much the same as an award of damages under s 46PO(4)(d)...

I begin by observing that, in the context of damages for personal injury, there is a reason to believe that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before.<sup>59</sup>

In contrast to the comparison with personal injury, the plaintiff asked the court to draw an analogy to defamation law when considering the damages that should be awarded in a discrimination claim.<sup>60</sup> The analogy drawn to damages in a defamation claim was rejected and the court concluded that this was not the most apposite comparison to be made.<sup>61</sup> Justice Kenny acknowledged that one could generally consider defamation damages to consider whether the damages awarded in the present case were manifestly excessive. However, Kenny J also concluded that the underlying rationale for non-economic loss damages in defamation claims was different to the purpose of sexual harassment damages claims. The overarching purpose of sexual harassment damages was to recognise the pain and suffering caused to the victim and the loss of enjoyment in their life as a consequence, not reparation for harm or vindication.<sup>62</sup> In *Richardson*, Kenny J appears to implicitly indicate that damages are not awarded to compensate damage to the complainant's personal or professional reputation or vindicate their rights.<sup>63</sup> As we will contend in this article, the decision to find that the damage of sexual harassment is akin to personal injury has a number of consequences which both makes it more challenging for a complainant to demonstrate their damage and fails to recognise the broader harms done to the complainant due to sexual harassment outside the scope of personal injury.

### III General Damages in Practice: Considering *Rush* and *Hill*

Both *Rush* and *Hill* provide articulations of the principles of general damages which apply to defamation and sexual harassment cases, respectively. In particular, each case demonstrates the current approach adopted by courts to the harm caused by sexual harassment or the accusations of sexual harassment.

#### A *Rush v Nationwide News Pty Ltd*

The facts of *Rush* are relatively well-known. In 2017, at the height of the '#MeToo' movement in Australia, the Daily Telegraph published allegations that Rush had behaved in an inappropriate

59. Ibid 359–60.

60. Ibid 364.

61. Ibid 365.

62. Ibid 365.

63. Ibid.



manner against a much younger female co-star.<sup>64</sup> Mr Rush brought a cause of action against the Daily Telegraph's parent company, Nationwide News Pty Limited (Nationwide) for defamation. He claimed that the series of news articles published about the allegations implied that he was a pervert, behaved as a sexual predator and engaged in inappropriate behaviour of a sexual nature and that he did so for a significant period of time.<sup>65</sup> At trial, Wigney J accepted that all of these defamatory imputations could be imputed from the Daily Telegraph articles.<sup>66</sup>

In their defence, Nationwide argued that the imputations were true and thus justified.<sup>67</sup> To make this argument, the respondent relied upon the woman at the centre of the allegations, Erin Jean Norvill as their key witness. Wigney J rejected the defendant's defence of truth.<sup>68</sup> In doing so, he made some conclusions based upon his determination of the reliability and truthfulness of the witnesses.<sup>69</sup> Wigney J concluded that Mr Rush was an 'impressive' witness who gave honest and reliable evidence about the critical events of the case.<sup>70</sup> In contrast, he did not form the same conclusions about Ms Norvill.<sup>71</sup> He recognised the particularly vulnerable state that people who make allegations relating to sexual harassment are put in as well as the highly personal and sensitive nature of the evidence that they are required to give; this was likely of particular consideration as Ms Norvill had not wished to make any complaint about the allegation public.<sup>72</sup> Nevertheless, Wigney J rejected much of Ms Norvill's evidence on critical issues.<sup>73</sup> It was, partly on these findings on credibility, that Wigney J rejected the defendant's reliance on the defence of justification.<sup>74</sup>

On the question of damages, Wigney J accepted the circumstances warranted the award of aggravated damages and consequently, that the general damages awarded could exceed the statutory cap.<sup>75</sup> He then accepted that the plaintiff had suffered significantly as a consequence of the publications. Prior to the publication, he found the plaintiff had been held in 'very high esteem' in both his professional and private life.<sup>76</sup> Wigney J also accepted that the publication caused considerable hurt and distress to Mr Rush. In particular, he found that he was 'devastated' by the publication:

It was quite obvious from Mr Rush's demeanour while he was giving evidence, particularly in relation to the effect of the articles, that he had been deeply hurt and traumatised by the articles. He presented as a man who, somewhat curiously given his craft, was not always entirely comfortable or forthcoming when speaking about his own emotions. The devastating effect of the articles was nevertheless obvious.<sup>77</sup>

Wigney J also relied upon evidence from friends and family as to the devastating effect that the articles had on Mr Rush.<sup>78</sup> As a consequence of the destruction of reputation, the 'devastating' effect

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64. *Rush* (n 1) 436.

65. *Ibid.*

66. *Ibid.*

67. *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, [220] ('*Rush (No 7)*').

68. *Ibid* [662].

69. *Ibid* [311].

70. *Ibid* [312].

71. *Ibid* [327]–[330].

72. *Ibid* [328].

73. *Ibid* [330].

74. *Ibid* [662].

75. *Ibid* [783].

76. *Ibid* [693].

77. *Ibid* [708].

78. *Ibid* [710]–[715].

of the allegations on Mr Rush and the aggravating factors, Wigney J awarded the plaintiff AUD850,000 in general damages for non-economic loss.<sup>79</sup>

### B *Hughes v Hill*

When compared to the *Rush* case, the facts of *Hill* are far less well-known. In *Hill*, the applicant sought compensation for sustained sexual harassment in the workplace.<sup>80</sup> The applicant was a paralegal in the respondent's law firm.<sup>81</sup> The sexual harassment involved a series of emails in which the respondent proclaimed his love for the applicant and threatened the applicant with threats to terminate her employment and damage her career if she rejected him.<sup>82</sup> The trial judge accepted that the respondent had repeatedly coerced the applicant into giving him physical contact and had repeatedly entered the applicant's room unannounced whilst on work trips.<sup>83</sup> The trial judge concluded that the respondent's repeated conduct over a series of years was very serious sexual harassment. The trial judge's determination in this respect was also accepted by the Full Court of the Federal Court.<sup>84</sup>

The trial judge concluded, and the Full Court accepted that the respondent's sexual harassment caused significant distress to the applicant.<sup>85</sup> The applicant worried about losing her job, slept poorly and felt down all the time.<sup>86</sup> She found the conduct, the email and repeated requests for hugs extremely distressing.<sup>87</sup> The applicant provided medical evidence which demonstrated that the conduct had caused her to develop an adjustment disorder with an anxious and depressed mood.<sup>88</sup>

The trial judge and the Full Court accepted that the respondent's conduct ruined the applicant's quality of life. The question for the courts was: 'what is the ruin of a person's quality of life worth?'<sup>89</sup> The Full Court accepted that the trial judge was justified in finding that the 'ruin of a person's quality of life' was worth AUD120,000.<sup>90</sup> In making this decision, the Full Court accepted that this fell within the 'range of available awards for general damages in a case of this seriousness'.<sup>91</sup> The Full Court concluded that *Richardson* had fundamentally changed the approach to general damages in sexual harassment claims, and the approach taken by the trial judge was consistent and appropriate, given the recent decision by the Full Court in this area of law.<sup>92</sup>

### C *Place of the Cases Within Their Respective Doctrines*

As highlighted in the introduction, both decisions represent some of the highest general damages awarded in their respective fields. Consequently, it is worth considering how representative each decision is of these two areas of law and whether they are useful in considering the broader trends in

79. *Ibid* [795].

80. *Hill* (n 3) 513.

81. *Ibid*.

82. *Ibid* 513–4.

83. *Ibid*.

84. *Ibid* 515.

85. *Ibid* 241.

86. *Ibid*.

87. *Ibid* 234.

88. *Ibid* 241.

89. *Ibid*.

90. *Ibid* 242.

91. *Ibid* 242–3.

92. *Ibid*.

general damages in both fields. In this section, we consider the place of these two cases within the broader case law and argue that, though higher than other decisions, both are reflective of the general approach adopted by courts in defamatory accusations of sexual harassment or sexual misconduct, or sexual harassment claims, respectively.

While other claimants have brought defamation claims based on sexual harassment accusations in the past, few have been successful. For example, in *Haddon v Forsyth*,<sup>93</sup> the court concluded that the allegations were substantially true.<sup>94</sup> Consequently, questions of damages were not discussed. In other claims that were successful, for example, *Hodge v TCN Channel Nine Pty Ltd*,<sup>95</sup> the conduct complained of was more serious and involved allegations of child sexual abuse rather than the sexual harassment of another adult.<sup>96</sup> In *Burston v Hanson*,<sup>97</sup> the plaintiff complained of a number of imputations relating to his interactions with his staff. While some of the imputations were found not to be true,<sup>98</sup> two of the imputations — that the plaintiff had harassed a female staffer in his parliamentary office and that the plaintiff sexually harassed female staff — were found to be substantially true.<sup>99</sup>

However, the approach adopted is nevertheless reflective of another defamation case involving accusations of sexual harassment or sexual misconduct. In *Gayle v Fairfax Media Publications Pty Ltd (No 2) ('Gayle')*,<sup>100</sup> the Supreme Court of New South Wales awarded the plaintiff AUD300,000 in general damages where the defendants had published stories accusing the plaintiff of intentionally and indecently exposing his genitals to a woman, and indecently propositioning a woman in the West Indies team's dressing room during the 2015 Cricket World Cup.<sup>101</sup> The plaintiff was successful in demonstrating to a jury that the accusations were defamatory.<sup>102</sup> In determining the general damages to be awarded, the trial judge accepted that this was not a case where aggravated damages should be awarded and thus the statutory cap was applied.<sup>103</sup> Though the statutory cap was applied, it is worth noting that the damages awarded to the plaintiff were still almost three times as much as those awarded in the highest general damages payouts in sexual harassment claims.

The justification for the award of non-economic loss damages also uses similar language to that used in the *Rush* decision. In particular, there is a similar focus on two issues. The first is the hurt felt by the plaintiff as a consequence of the defamatory accusations, which the trial judge found to be 'surprisingly compelling'.<sup>104</sup> The plaintiff's evidence of his hurt was as follows:

I felt devastated at that particular time, you know, based on what was actually going on with the particular interview, and then for someone to actually come and accuse me of this now, is like the one to actually, you know, bring me down to an extent and then at that particular time when I watched the TV or the talk show, when they going to say Chris Gayle should be banned from the game, you know, this is my

93. *Haddon v Forsyth* [2011] NSWSC 123.

94. *Ibid* [266].

95. *Hodge v TCN Channel Nine Pty Ltd* [2006] NSWSC 933.

96. *Ibid* [6].

97. [2022] FCA 1235.

98. *Ibid* [178] and [195].

99. *Ibid* [171].

100. [2018] NSWSC 1838 ('Gayle').

101. *Ibid* [1].

102. *Ibid* [2].

103. *Ibid* [42].

104. *Ibid* [29].

livelihood and then for someone to come and accuse me for doing such thing, which I didn't do, and then to - to actually be able to say I should be banned, it was - that was the most thing - hurtful thing I've ever actually come across in my entire life.<sup>105</sup>

Second, McCallum J also emphasised the seriousness of the allegation and in particular the fact that it was an imputation of indecent behaviour in the workplace with a work colleague.<sup>106</sup> This indicates the seriousness of being accused of sexual harassment in a workplace setting with similar reasoning underlying the decision on damages in the *Rush* decision.

With respect to *Hill's* place within the sexual harassment case law and awards of damages, it is consistent with the significant increase in the damages awarded in *Richardson*, though at the highest end of what has been awarded in the Federal Court.<sup>107</sup> Since *Richardson*, there has been a noticeable increase in the damages awarded in sexual harassment claims and courts and tribunals have accepted that the new approach in *Richardson* appropriately recognises the seriousness of sexual harassment and is in line with societal expectations.<sup>108</sup> The general damages awarded, and the justification for the award of those damages is consistent with other sexual harassment claims in which the harassment was deemed to be particularly egregious. For example, in *Lee v Smith*,<sup>109</sup> *GLS v PLP*,<sup>110</sup> *Ewin v Vegara (No 3)*,<sup>111</sup> *Collins v Smith*<sup>112</sup> and *Poniatowska v Hickinbotham*,<sup>113</sup> the complainants all received close to \$100,000 in general damages where the complainants were subjected to sustained sexual harassment and could demonstrate significant mental distress and ill-health as a consequence of the conduct. It is notable in *Lee v Smith* and *Ewin v Vegara (No 3)* that the conduct complained of is also one of sexual assault and rape and thus is of a different nature to the conduct complained of in some of the other cases.<sup>114</sup> Work by MacDermott indicates that the amount of compensation received in most sexual harassment claims is still often lower and these cases are still outliers in the compensation and general damages which are being awarded in sexual harassment claims.<sup>115</sup> Conversely, Castles et al consider, drawing on the limited case law, that the general damages claims for the limited number of sexual harassment claims since *Richardson* have risen substantially.<sup>116</sup>

#### IV The Damage of Sexual Harassment

There are a number of possible reasons for the difference in general damages in these cases. Some of these have to do with the distinctly different dynamics of the cases. It is worth remembering that *Rush's* claim was *not* against the woman at the centre of the allegations but instead against a third party — a national news organisation owned by a multinational media mogul. The woman at the

105. *Ibid.*

106. *Ibid* [30].

107. Madeleine Castles, Tom Halva and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231, 244–6.

108. *Ibid.*

109. *Lee v Smith* [2007] FMCA 1092.

110. *GLS v PLP (Human Rights)* [2013] VCAT 221, [262].

111. *Ewin v Vegara (No 3)* [2013] FCA 1311, [103].

112. *Collins v Smith (Human Rights)* [2015] VCAT 1992.

113. *Poniatowska v Hickinbotham* [2009] FCA 680, [353].

114. *Lee v Smith* (n 109) [18]; *Vegara v Ewin* (2014) 223 FCR 100, 151, [10]–[11].

115. MacDermott (n 40) 158.

116. Castles et al (n 107) 246–7.

centre of the allegations was a reluctant witness. This changed the dynamics of the trial as well as the justifications for the general damages awarded to Rush. As the respondent was a powerful corporation rather than a woman who was alleging sexual harassment, the ethics and legitimacy of the publication were stringently tested in accordance with the respondent's role as the fourth estate. The purpose of general damages in this context was in part to operate as a deterrent for large media corporations in publishing highly defamatory material.<sup>117</sup> Given that in both *Rush* and *Gayle*, one of the rationales for the damages awarded was to operate as a deterrent to media companies; it would appear unlikely that such high damages would be awarded where a defamation claim was brought against an alleged victim of sexual harassment by a perpetrator.<sup>118</sup>

Both *Rush* and *Hill* acknowledge the serious nature of the allegation of sexual harassment and emphasise the communities' disgust of such behaviour. It is, in part, due to those community expectations that in *Richardson* and *Hill*, the courts conclude that high payments of damages for non-economic loss are warranted.<sup>119</sup> However, the same justification, the public condemnation of sexual harassment was utilised in *Rush* as a justification for a significant award of aggravated damages for non-economic loss.<sup>120</sup> In this respect, *Rush* can present as a continuation of themes seen in early discrimination and sexual harassment claims in which courts justified utilising a *Briginshaw* standard to assess evidence on the basis that accusations of discrimination were particularly serious.<sup>121</sup> As has been highlighted before, such an approach ultimately negatively impacted the capacity for claimants and victims to prove their cases.<sup>122</sup>

## A Credibility and Gender

In *Rush*, the trial judge and the Full Court suggest that significant damages should be awarded because of the seriousness of sexual harassment in the workplace.<sup>123</sup> Such an understanding of sexual harassment does reflect the same reasoning as in *Richardson* which accepts the changing community standards and expectations surrounding sexual harassment. The seriousness of such an allegation was a factor in favour of awarding a large sum to recognise the significant reputational harm suffered by an alleged perpetrator where they are falsely accused of sexual harassment.<sup>124</sup>

However, while the general assessment of the serious nature of sexual harassment is consistent with the recent decisions in the sexual harassment sphere, the consideration of the evidence of the woman who alleged sexual harassment shows unfortunate similarities to the approach to evidence in the early sexual harassment case law. The similarities are in the way which women's evidence was often minimised and the conduct complained of was described as insignificant.<sup>125</sup>

In the early sexual harassment case law, there was a tendency to downplay the harms caused by sexual harassment and tribunals and courts could be equivocal about its impacts. An instructive

117. *Rush* (n 1) 511–2.

118. *Ibid*, *Fairfax Publications Pty Ltd v Gayle* (2019) 100 NSWLR 155, 192–3.

119. *Rush* (No 7) (n 67) [786]–[787] and *Hill v Hughes* [2019] FCCA1267 [234] (Vasta J).

120. *Rush* (No 7) (n 75) [786]–[787].

121. *O'Callaghan v Loder* [1983] 3 NSWLR 83.

122. Loretta De Plevitz, 'The Briginshaw 'standard of proof' in anti-discrimination law: 'pointing with a wavering finger' (2003) 27(2) *Melbourne University Law Review* 308, 308.

123. *Rush* (n 1) 531.

124. *Ibid* 531–2.

125. Margaret Thornton, 'The Political Contingency of Sex Discrimination Legislation: The Case of Australia' (2015) 4(3) *Laws* 314, 323 ('The Political Contingency of Sex Discrimination Legislation').

example is *Aldridge v Booth*,<sup>126</sup> where a 19-year-old woman who had been unemployed for 12 months took a job working for a cake business. The complainant was persistently sexually harassed and assaulted by the employer, and she ultimately agreed to have sex with him under the threat of being terminated. Despite the seriousness of the conduct, the Equal Opportunity Commission took pains to note the complainant's sometimes 'ambivalence' to the conduct, noting that 'it may seem surprising that any young woman would endure the conduct of which she complained without taking some steps to bring it to an end. But...I believe this young woman was unsophisticated...and apparently thought that this was the tariff she had to pay'.<sup>127</sup>

These comments highlight the subtle sexism and misunderstandings of sexual harassment which underpinned early judgments. There is little doubt that the ultimate amount awarded to the victim — \$7,000.00 — is a consequence of the Tribunal viewing the employers conduct as one of them taking advantage of a woman who did not know better, rather than what it was: predatory sexual behaviour, sexual assault and coercive abuse. This minimisation of the harm of sexual harassment in early cases such as this has set the precedent for general damages across the jurisdiction.

Similarly, in *Hall, Oliver and Reid v Sheiban*<sup>128</sup> an employer of three women engaged in harassing conduct such as regularly touching the women inappropriately, attempting to kiss the women against their will and making consistently inappropriate and sexualised comments to the women. In refusing to award the women any compensation, Einfield J characterised the sexual harassment as 'mild' and 'occasional' attempts at physical contact and statements that 'may be seen as juvenile and thoughtless and quite disregarded the feelings of the complainants'.<sup>129</sup> He went on to explain that

[m]uch remains to be achieved in the quest for equal opportunity and proper treatment for women in employment. This legislation is intended to assist in that quest. However, it is not designed to be administered in the absence of balance, realism and common sense... It is especially not intended to provide an opportunity for vindictive or collusive allegations by a group of women against one man because of their dislike of or distaste for him as a man or as an employer or for some other extraneous reason.<sup>130</sup>

These comments from Einfield J, despite having found that the allegations were substantiated, suggest a preoccupation with the judiciary protecting men against the consequences of sexual harassment, rather than ensuring that the actions are held to account. As Morgan noted at the time, it is this approach which constructs women as liars and exaggerators.<sup>131</sup> Mackay notes that cases such as *Hall* have constructed a 'reasonable woman' standard, where men on the bench have interpreted their version of what a 'reasonable woman' *should* be offended by or be able to tolerate without consequence.<sup>132</sup>

In the trial judge's decision of *Rush*, the alleged sexual harassment victim is described in the judgment as, at times, 'prone to embellishment or exaggeration'.<sup>133</sup> Wigney J questioned her

126. *Aldridge v Booth & Ors* [1986] EOC 92–177.

127. *Ibid* 175.

128. *Hall, Oliver and Reid v Sheiban* [1988] HREOCA 5.

129. *Ibid* 7.

130. *Ibid*.

131. Jenny Morgan, 'Sexual Harassment: One Man's View' (1988) 13 *Legal Services Bulletin* 157, 158.

132. Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14(2) *Deakin Law Review* 189, 198–9.

133. *Rush (No. 7)* (n 65) [330].

evidence of sexual harassment on a number of bases, including the fact that she continued to spend time with the plaintiff outside of rehearsals despite her allegations, continued friendly communication with him and made public and positive statements about the performance and working with Mr Rush specifically.<sup>134</sup> While she was not explicitly called a liar, it is suggested that her evidence and her memory may be as ‘poor or defective’ and ‘distorted or polluted over time because of other intervening events or circumstances’.<sup>135</sup>

As such, compensation (such as that awarded in the *Rush* case) may be affected by gender-based discounting of the credibility of victims, and therefore the amount of compensation which is required.<sup>136</sup> There is a deeply ingrained cultural scepticism towards those who claim sexual harassment, and a belief that women who complain of sexual harassment are inherently less trustworthy.<sup>137</sup> Epstein notes that women are often discounted on account of their demeanour and motives, while male perpetrators are often given an inflated sense of credibility in their testimony, with their story often readily accepted.<sup>138</sup> Collectively then, the patriarchal and hetero-normative social context in which sexual harassment claims are brought provide a compelling explanation for the disparity between defamation and sexual harassment compensation payouts in these types of claims.

## B Medicalisation of the Harm of Sexual Harassment

The other way in which the discrepancy can be understood is as a continuation of the difference which has historically existed between the damages awarded for defamation claims and personal injury claims.<sup>139</sup> The discrepancy was one reason that the cap on general damages was introduced in the uniform *Defamation Acts* so that the general damages awarded in defamation claims remained consistent with the damages which could be awarded for personal injury pursuant to the *Civil Liability Acts* which are in force in each of the states and territories.<sup>140</sup>

In *Richardson* and in subsequent cases, the courts have drawn a degree of equivalence with personal injury when assessing the harm caused by sexual harassment.<sup>141</sup> In contrast, in *Richardson*, Kenny J suggested that drawing analogy with the approach to general damages in defamation was a less useful way forward in understanding the harm caused by sexual harassment.<sup>142</sup> The focus on the ‘injury’ caused by sexual harassment can be seen in the relatively heavy reliance on psychological and psychiatric evidence in the case law. For example, in *Richardson*, it was accepted that the plaintiff had suffered significantly both physically and psychologically and both the trial judge and the Court of Appeal accepted the psychiatric evidence that the conduct had caused a chronic adjustment disorder with mixed features of anxiety and depression.<sup>143</sup> In *Hill*, the trial judge and the Court of Appeal accepted the unopposed medical evidence that the appellants’ conduct had caused

134. *Ibid* [331]–[338].

135. *Ibid* [342].

136. Deborah Epstein, ‘Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment’ (2020) 51(2) *Seton Hall Law Review* 289, 293–4.

137. *Ibid* 319.

138. *Ibid* 316.

139. Rolph (n 12) 317.

140. *Ibid* 319–20.

141. *Richardson* (n 16) 104 (Kenny J).

142. *Ibid* 111.

143. *Ibid* 346–7 (Kenny J).

the complainant to suffer a significant psychological injury.<sup>144</sup> As the Court of Appeal observed and accepted:

It is convenient to observe that the Appellant's misconduct has occasioned her very considerable stress, anxiety, worry and unhappiness. Ultimately, the Respondent thought it had made her sick. As it happens, that is the view of the medical practitioners who have examined her. Both her treating psychologist and the psychiatrist diagnosed her as having had in 2016 (when she resigned in the face of the Appellant's sexual harassment) an adjustment disorder with mixed anxious and depressed mood. The psychiatrist also thought her symptoms were consistent with a major depressive episode of moderate severity...None of this is disputed by the Appellant. Whilst it is to be hoped that the Respondent recovers from the psychological consequences of the Appellant's predations, it is to be noted that for the time being his sexual harassment has ruined her quality of life.<sup>145</sup>

In *Hill*, it is clear that the Court accepted that the appellant caused the respondent a significant personal injury and that this was the underlying rationale for the significant general damages that she received.

The acknowledgment in *Richardson* and *Hill* that sexual harassment can cause significant personal injury and distress is welcome. Both cases recognise the serious harms associated with sexual harassment and in particular, the anxiety, depression and other mental and physical health problems that it can cause.<sup>146</sup> However, from the perspective of generating significant payouts for claimants, the focus on the personal injury that sexual harassment can cause can be problematic for the assessment of general damages. Firstly, as MacDermott has highlighted, the focus on personal injury necessarily means that claimants are required to provide significant medical evidence with respect to the pain, suffering and injury that they have suffered.<sup>147</sup> This evidence can be expensive to provide and this could be a reason for continuing low damages payments in the majority of sexual harassment claims — because claimants cannot afford to provide the necessary medical evidence to prove their injury.

Secondly, the damage caused by sexual harassment becomes focused on the individual harm rather than the broader harm caused by the behaviour and dismisses the harms caused by sexual harassment where that harm *does not* cause a personal injury. Where a complainant is found to not have a recognised psychiatric injury, this has been used to justify low damages payouts for sexual harassment claims.<sup>148</sup> As a consequence, unlike in defamation claims, the complainant is under significant pressure to show the severe personal toll that such behaviour has taken and that they have consequently become ill and incapacitated. As we will argue in the next part of this article, this both mischaracterises the true cost of sexual harassment on victims, bystanders and the community more generally and places a high burden on complainants to medicalise their harm rather than simply accepting the inherent wrongfulness of sexual harassment deserves significant compensation for complainants.

In contrast, in defamation claims, a complainant is not required to show that their distress about the defamatory imputations has caused a personal injury. This has two important ramifications. First,

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144. *Hill* (n 3) 520–1 (Perram J).

145. *Ibid.*

146. Smith, Schleiger and Elphick (n 7) 225.

147. MacDermott (n 40) 158.

148. See, eg, *James v Department of Justice, Corrective Services NSW* [2017] NSWCATAD 238, [135]. For a broader discussion of this decision as well as the application of *Richardson* more broadly see Castles et al (n 107).



the best evidence of the ‘hurt and distress’ is from the person themselves as to how *they* felt when reading the material and evidence from friends and family as to their state after they comprehended the material about themselves. This evidence is difficult to challenge by a respondent. In both *Rush* and *Gayle*, the judges’ found the evidence of the plaintiffs’ hurt and distress compelling — in *Gayle*’s case ‘surprisingly compelling’ and it was accepted at face value. The second ramification is that it is far more cost effective and simple to bring evidence as to your own mental state instead of having to medicalise the harm caused by sexual harassment.

## **V Are Principles From Defamation Law a Way Forward for Recognising the Harms of Sexual Harassment?**

While courts are taking sexual harassment more seriously than they did in the past, the manner in which *Rush* and *Hill* were determined, such as the assessment of the witnesses and the evidence as well as assessments of the harm suffered by the plaintiffs, reveals that there is still a gendered application of legal principles as well as a lack of clarity as to the harms caused by sexual harassment. It also provides one with a basis to reconceptualise the harm suffered by those bringing claims of sexual harassment in light of the findings in defamation claims in similar circumstances. Defamation, with its broader conception of harm, unlinked to personal injury could provide a basis to better understand the broader harms of sexual harassment. In this part, we suggest a conceptually accessible approach the judiciary may take to redress this imbalance: applying the principles of defamation damages to sexual harassment cases. As noted above, the ruling in *Richardson* specifically declined to apply an analogy of defamation to sexual harassment claims, dismissing the principles of compensation in defamation as different to that of sexual harassment, which was to recognise the pain and suffering caused to the victim and the loss of enjoyment in their life as a consequence. In this part, we specifically rebut this assertion and explain by instead applying similar principles from defamation law with respect to damages may provide an opening for the judiciary to increase damages for sexual harassment in the future, and that such an increase would be both just and socially beneficial.

Sexual harassment causes unique and corrosive harms, which ‘...strips away an individuals’ identity, reduces the quality of working life and creates barriers to full and equal participation in employment across the life course’.<sup>149</sup> The damage which accrues to sexual harassment complainants relates to personal hurt and distress as well as reputational and professional damage. While the damage of sexual harassment is both specific to the individual and more generally unique when compared to other kinds of wrongs, it also shares similarities with the damage often linked to defamation and the damage to reputation. In part this is because both the statutory prohibition on sexual harassment and the tort of defamation can be understood to protect a person’s individual humanity and dignity. The harms caused by both forms of damages can also be understood to share similarities as both have the capacity to cause hurt and distress (even if this does not reach the threshold of psychiatric damage). Both have the capacity to cause personal and professional harm to a person’s reputation and standing in the community. In the case of defamation, it is the harm done by defamatory imputations which cause the personal and professional reputation damage. In the case of sexual harassment, it is often when the complaint is made public, whether to an internal body or to an agency or external oversight body, which can have a detrimental impact on a person’s

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149. Paula McDonald and Sara Charlesworth, *Academic Evidence on the Causes, Manifestations and Responses to Workplace Sexual Harassment* (Submission to the Australian Human Rights Commission’s National Inquiry into Sexual Harassment in Australian Workplaces, January 2019) 5.

reputation or on how other's view that person and the compliant. Finally, in both cases, one of the purposes of bringing a complaint is to vindicate the rights of the plaintiff.

### A Hurt and Distress

The personal damage to victims of sexual harassment is often unique. Victims of sexual harassment can be psychologically damaged as a consequence of the harassment, with both diagnosable and non-diagnosed psychological conditions.<sup>150</sup> For instance, sexual harassment may result in post-traumatic stress disorder, amongst other medically diagnosable conditions.<sup>151</sup> However, even victims who do not meet the threshold of a diagnosed psychological condition have their psyche invariably and permanently affected. As Koss notes, '...once victimised, at a minimum, one can never again feel quite as invulnerable'.<sup>152</sup> These outcomes tend to occur regardless of the victim's dispositional influences.<sup>153</sup> It can also affect the victim's personal relationship and social relationships.<sup>154</sup> In their most recent survey into the prevalence of sexual harassment in Australian workplaces, the Australian Human Rights Commission ('AHRC') found that being sexually harassed had negative impacts on self-esteem and self-confidence and caused ongoing negative consequences for mental and emotional health.<sup>155</sup>

In their Respect@Work Report, the AHRC identified several factors which contribute to the personal distress caused by sexual harassment.<sup>156</sup> Citing existing research,<sup>157</sup> the AHRC found that taking an 'objective' approach to the nature of harassment and assuming that complainants are unlikely to be seriously harmed by infrequent or single instances of sexual harassment is incorrect. Rather, the AHRC heard that sexually harassing behaviour which has traditionally been mild, such as sexually suggestive comments or jokes, may have damaging long-term impact on victims, making them feel unsafe, devalued, frightened and psychologically distressed.<sup>158</sup>

### B Personal and Professional Reputation

As with defamation, there is the potential for professional and personal reputational harms from being subjected to sexual harassment or complaining about sexual harassment. Though our understanding of the prevalence and the harms of sexual harassment have improved over time, the most recent report into sexual harassment by the AHRC indicates that victims still have concerns

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150. Bonnie S Danksy & Dean G Kilpatrick, 'Effects of Sexual Harassment' in William O'Donohue (ed) *Sexual Harassment: Theory, research and treatment* (Allyn & Bacon) 152, 166.
151. Claudia Avina and William O'Donohue, 'Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?' (2002) 15 *Journal of Traumatic Stress* 69; Louise F Fitzgerald (2017) 18(4) 'Still the last great open secret: Sexual harassment as systemic trauma', *Journal of Trauma & Dissociation*, 483.
152. Mary Koss, 'Changed lives: The psychological impact of sexual harassment' in Michele Paludi (ed) *Ivory Power: Sexual Harassment on Campus* (State University of New York Press, 1990) 73.
153. Leah Sheppard et al, 'The stress-relieving benefits of positively experienced social sexual behaviour in the workplace, Organizational Behaviour and Human Decision Processes' (2006) 53 *Personnel Psychology* 21.
154. Barbara Gutek, 'Understanding Sexual Harassment at Work' (1992) 6 *Notre Dame Journal of Law, Ethics and Public Policy* 335, 38–9.
155. AHRC, *AHRC 2022 Sexual Harassment Survey* (n 6) 98.
156. Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Final Report, 2020) 259 ('Respect@Work').
157. Ibid citing Victor E Sojo, Robert E Wood and Anna E Genat, 'Harmful Workplace Experiences and Women's Occupational Well-Being: A Meta-Analysis' (2016) 40(1) *Psychology of Women Quarterly* 10, 15 and 32.
158. Ibid 259.

about the professional and reputational costs of reporting sexual harassment.<sup>159</sup> In their most recent survey, the AHRC emphasised that less than one in five people who experience sexual harassment in the workplace made a formal complaint.<sup>160</sup> When asked why they did not make a complaint, a small number of people noted that they were concerned that it would affect their reputation or career opportunities (14 per cent), but a larger number of people did not complain because they thought that people would think that ‘they were overreacting’ (31 per cent).<sup>161</sup> This in itself is another type of reputational damage in the sense that being seen as a person that ‘overreacts’ is generally not considered a ‘good’ personal characteristic and will have detrimental impacts on their reputation. Of those who did make a complaint, 64 per cent of people said that they received some detrimental impact at work including impacts relating to professional reputation which included being ‘ostracised, victimised or ignored by colleagues’ (13 per cent), resigning due to feeling like they had no choice but to leave their job (13 per cent), they were labelled a troublemaker (12 per cent) or were disciplined, demoted or denied other workplace opportunities such as training or promotion.<sup>162</sup> Similarly, the National Community Attitudes Towards Violence Against Women Survey (NCAS) found that a significant number of Australians hold the view that women who report violence are malicious, vengeful and untrustworthy, that many reports are not genuine and that women who experience sexual harassment hold some responsibility for that behaviour.<sup>163</sup> These most recent results of the national survey indicate that those that make complaints about sexual harassment are still likely to suffer negative consequences as a result of those accusations and concerns about negative ramifications to a person’s professional and personal reputation still operates as a significant reason that people do not make complaints about sexual harassment.

### C Vindication

At the heart of the damage to both a person who has been defamed and someone who has been sexually harassed is that their dignity has been impaired. While in defamation, the dignitary harm of the tort is often made explicit — it is frequently referred to as a ‘dignity tort’<sup>164</sup>; the link in sexual harassment is less explicit in the case law but still nevertheless is fundamental to the wrong or harm caused by sexual harassment.

This conceptualisation of dignity has elements of both private and public harms. Privately, sexual harassment has been described by Bernstein as an offence of ‘dignity’, as it dehumanises, degrades and offends the victim.<sup>165</sup> This dehumanisation often has elements of having one’s reputation and standing in the community lowered in the eyes of others, just as it is for defamation victims. This in turn requires vindication. Further, a natural flow on consequences of the personal and professional reputational harms of sexual harassment victims, as described above, must surely be that vindication of victims is required in the eyes of the community. These public harms to the victim — so well understood in defamation law — are not currently recognised in sexual harassment proceedings.

159. AHRC, *AHRC 2022 Sexual Harassment Survey* (n 6) 129.

160. *Ibid* 154.

161. *Ibid*.

162. *Ibid* 143.

163. Dr Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS) Summary for Australia* (Research Report 03/2023, Anrows) 73–4.

164. See, eg, Ursula Cheer, ‘Divining the Dignity Torts: A Possible Future for Defamation and Privacy’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016).

165. Anita Bernstein, ‘Treating sexual harassment with respect’ (1997) 111 *Harvard Law Review* 446.

Similarly, Cornell describes sexuality as ‘unique and formative’ to each person and sexual harassment as diminishing the self-respect of the victim as a sexuate being by imposing sexual shame upon them.<sup>166</sup> In Cornell’s conceptualisation, the harm of sexual harassment is currently conceived of as one which interprets the victim — usually women — to be fragile and asexual, where instead it should centre the harms on those of effects of the victims self-respect as sexual beings and their future capacity to grow and perform their sexuality.<sup>167</sup> This reconsideration of the harm of sexual harassment may be explained as being essentially dignitary in nature. By Cornell’s account, sexual harassment is harmful because it de-dignifies and shames victims as sexual beings. It is an integral link between discrimination law and sexual harassment which emphasises the dignitary harm caused by sexual harassment.<sup>168</sup> While in Australia, the dignitary harm of sexual harassment is not made explicit in the case law, the same is not true in comparable jurisdictions. For example, the early decision of the Supreme Court of Canada, in *Janzen v Platy Enterprises Ltd*,<sup>169</sup> in which the Supreme Court confirmed that sexual harassment was a form of sex discrimination and thus illegal pursuant to the Human Rights Codes, the Court explained the harm and damage caused by sexual harassment in the following terms:

Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and a human being.<sup>170</sup>

Understanding the dignitary harms caused by sexual harassment also allows for a broader conceptualisation of the harms caused by sexual harassment than only the individual who is subject to it. Sexual harassment implications and costs do not simply relate to the injuries that it may have caused but a more profound sense of self in both a professional and personal capacity.

Considered collectively, there are clear analogies between harms suffered by victims of sexual harassment and the broad, non-personal injury harms recognised in the awarding of damages in defamation cases. General feelings of hurt and distress, broad career and reputational harms suffered by persons bringing claims of sexual harassment and the need for vindication of a victim’s rights and dignity are expressly articulated in consideration of damages for defamation but are too often not considered in damages for sexual harassment. This in turn helps to explain the difference in payouts between the two civil torts and provides a mechanism for ensuring adequate compensation for sexual harassment victims. If judges were to explicitly turn their mind to these broader considerations in sexual harassment matters, it is likely that the depth of harm of sexual harassment to its victims would be expressed, and the ultimate payouts would be higher and more just.

## VI Conclusion

The purpose of this article was to look at two different sides of the same coin. Why can the harm of defamatory accusations of sexual harassment be more handsomely compensated than the harm of

166. Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, 1995, 1<sup>st</sup> ed) 9.

167. *Ibid* 170.

168. Rosa Ehrenreich, ‘Dignity and Discrimination: Towards A Pluralistic Understanding of Workplace Harassment’ (1999–2000) 88(1) *Georgetown Law Journal* 1.

169. [1989] 1 SCR 1252.

170. *Ibid* 1284 (Dickson CJ).

being sexually harassed? To answer this question, we looked in depth at two cases, both representing some of the highest general damages payments in their respective fields, *Rush* and *Hill*. We used these cases, in the context of their respective case law histories, to consider how judges articulate the loss and damaged caused to the respective claimants by either the defamatory accusation of sexual harassment or being subject to sexual harassment. We acknowledged that the differences in the cases were fact specific and related to the various ways in which the witnesses' evidence was accepted and believed. More critically though, we argued that this discrepancy was explained, at least in part, by the different conceptualisations of loss and damage in the respective doctrines. We argued that the damage of sexual harassment and defamation is far more akin than has been acknowledged in the past. Utilising the understanding of loss and damage in defamation in sexual harassment claims could allow for a more nuanced understanding of the damage caused by sexual harassment focusing specifically on the reputation and dignitary harms caused and has the capacity to lead to more just compensation for claimants in sexual harassment claims.

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