

Sexual Harassment: The Role of Past Sexual Conduct

Deborshi Barat*

M.A. in Law and Diplomacy, LL.M, The Fletcher School, Tufts University, Dual Degree Program, USA

Introduction

In the course of legal proceedings in sexual harassment cases, a large volume of defence contentions evolve out of gender stereotypes. While the practice of stereotyping itself may have a general basis in profiling, psychological studies, mass surveys, sociology and other disciplines, it may not necessarily be true, and definitely it has no merit in a court of law. Rather, it ought not to have a legal basis; unfortunately gender stereotypes very often determine the outcome of a harassment complaint.

In a case before a judge, one has to look at the unique facts of the matter and rule on it accordingly. In addition, there is a responsibility to treat the complainant/victim and the accused purely on a case-by-case basis without delving into extraneous circumstances, including past conduct, morality, gendered definitions, etc. Justice is important, of course. So is the appearance of justice. By allowing evidence of past sexual conduct of a harassment victim, courts will eventually institutionalize a family of damaging defence strategies, so much so that the body of precedents created through this practice will take years to overturn, thereby perpetuating the vicious prejudices of society into an immemorial legal tradition.

While a repeated offender may be viewed differently by a judge, making the court more susceptible to an adverse ruling against such a defendant, the role of evidence still remains paramount and cannot be brushed aside merely on the strength of 'habit' or historical/moral narratives. In the context of a complainant victim, the role of past sexual conduct is fraught with considerably more tension: on the one hand, if it is found that such complainant has repeatedly alleged sexual harassment in the past without any merit, either on frivolous or mala fide grounds, the court may be inclined to adopt a circumspect stance in respect of her allegation(s); on the other hand, as is often witnessed, a mere demonstration of an ostensible sexual 'looseness' on the part of the victim is irrelevant, arbitrary and prejudicial to her cause.

Ultimately negative stereotypes are born out of issues of inequality and discrimination. Peculiar legislative climates, including cultural adversities, inherently patriarchal norms, local customs and religion, separately or together, might enhance the deleterious effects of such stereotypes, and therefore run the risk of jeopardizing the entire process of justice. While regional/social or cultural obstacles must be addressed in a different platform, perhaps with the advent of civil society groups and broad-based political activism, the Rule of Law in a given judicial system can be made to prevail with greater ease, by paying heed to a standard of objectivity that law demands, by reliance on facts alone. Through a careful separation of morality, societal standards and supposed outrage from breaches of the law, if any, the merits of the case must be unearthed, so that a correct assessment may be made in respect of whether there has been an instance of sexual harassment, irrespective of the 'character' or moral perception of the victim concerned. Unfortunately this task is not as easy as it appears to be at first glance.

Among many issues that the discovery and exploration of past sexual conduct raises in a harassment claim, one of them involves the aspect of prediction. It is not the role or purpose of Law to

retrospectively forecast a given person's behaviour/acts/reactions based on her so-called character or moral persuasion. Such an excavation of a complainant's history might complement or subtract from her testimony, but it can, under no circumstances, replace the need for evidentiary support. This leads us to another issue: the Burden of Proof. A defendant may attempt to use evidence of a complainant's sexual history to support his argument that the plaintiff-victim is a "promiscuous" woman, and consistent with this trait, she solicited the defendant's advances or was herself the sexual aggressor in a given situation [1]. The defendant may also show illustrative examples of past sexual conduct in order to demonstrate that, in light of her past behaviour, it is unlikely that the plaintiff was offended or emotionally disturbed by the defendant's conduct [2].

Other than a nuanced analysis of the principles that govern the discovery and admissibility of evidence, including 'habit' evidence and past sexual conduct, there is also the issue of intent. While mensrea is a well-established norm of criminal law, the mere capacity of mischief and wrong-doing is not in itself a crime or provocation enough to elicit a crime. Therefore, just because a woman is sexually promiscuous and/or has several sexual partners does not automatically debar her from claiming rape or assault; similarly, merely because a woman has habitually made sexual advances to men does not prevent her from registering a valid complaint of harassment. The logic is fine yet abundantly clear. Hypothetically speaking, a complainant may be construed not to have been adversely affected by an act that she claims as harassment, on the basis of her responses or propensity to initiate a certain kind of behaviour in the past. Yet, if there is indeed an allegation of sexual harassment from such a woman, it must be considered and dealt with on its own merits, instead of making random and damaging assumptions about her personality and good faith. In a case of alleged murder, one can't be convicted merely because he is strong enough to inflict mortal wounds, or because he possesses weapons that can potentially kill a man. His culpability must be shown and proved (beyond reasonable doubt) in that particular instance. In addition, a singularly violent man who has threatened to kill people in the past shouldn't be more readily construed to be a murderer in the absence of other proof. In the same vein, a promiscuous woman by any relative standard doesn't become ineligible from filing a harassment claim, nor should her case be dealt with in a suspicious light on the pretext that her supposed proclivity for immoral or amoral conduct makes her immune from damage, whether mental, emotional, psychological, physical or a combination thereof.

*Corresponding author: Deborshi Barat, M.A. in Law and Diplomacy, LL.M, The Fletcher School, Tufts University, Dual Degree Program, USA, E-mail: deborshi.barat@gmail.com

Received June 26, 2015; Accepted July 02, 2015; Published July 12, 2015

Citation: Barat D (2015) Sexual Harassment: The Role of Past Sexual Conduct. J Civil Legal Sci 4: 148. doi:[10.4172/2169-0170.1000148](https://doi.org/10.4172/2169-0170.1000148)

Copyright: © 2015 Barat D. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

Accordingly, we arrive at the 'clean hands doctrine', an equitable defence under Common Law which argues that a plaintiff is not entitled to a remedy because she has acted in bad faith, or is acting unethically with respect to the subject of the complaint. It may be used to deprive anyone guilty of improper conduct in the matter at hand from the relief she seeks. The defendant, however, has the burden of proof to show that the plaintiff is not acting in good faith. Even in this instance, depending on the precise nature of the alleged harassment, the defendant must show that the immediately preceding act of the complainant amounted to something close to provocation (similar to a homicide defence) and thereby prompted him to respond in a particular way. However, prior behaviour, the victim's reputation of sexually aggressive acts or a history of promiscuity does not imply that the complainant has come to court with unfair conduct ("unclean hands") with regard to the subject matter of her present claim.

Next comes the question of another situation, *in pari delicto*, when two persons are equally at fault. Often courts employ this maxim when relief is denied to both parties in a civil action on account of mutual wrong-doing. This doctrine is similar to the defence of unclean hands, both of which are steeped in Equity. The concept of contributory negligence is similar, but not the same as *in pari delicto*; although these doctrines stem from a comparable policy rationale.

However, in spite of the principles behind them, these are civil law defenses. If an alleged perpetrator doesn't deny his acts completely in a harassment claim, he typically seeks the permission of the court to produce 'character evidence' and invokes prior expressions of the victim's sexuality, thereby attempting to show that such evidence is relevant to the issue at hand and hence should be made admissible. In sophisticated legal systems, the jurisprudence has evolved enough to adopt an intolerant approach towards a defendant's speculative tactics at seeking evidence of the plaintiff's past sexual conduct to prove that she had a propensity to be promiscuous or sexually aggressive [3], and that she acted in conformity with that predisposition in her dealings with the alleged harasser.

Therefore, in advanced modern jurisprudence, evidence of a party's prior acts is not admissible to support an inference that the party acted in conformity with those past acts on a particular occasion [4]. The leading case applying this principle to rape litigation was *United States v. Kasto* [5], and in *Priest v. Rotary* [6], it was extended to sexual harassment litigation.

For example, in *Priest v. Rotary*, the defendant attempted to justify his attempts to discover the plaintiff's past sexual conduct by asserting that it would constitute evidence of "habit," which was admissible under the extant rules of evidence [7]. However, the district court noted that while the distinction between character and habit evidence was often elusive, it wasn't so when one was attempting to characterize a person's past sexual conduct. Accordingly, the court found the habit theory to be without merit [8]. For past acts to reach the status of "habit" admissible in a court of law, the evidence must reveal a consistent response to a specific situation which occurs with "reflexive" regularity. The "semi-automatic" nature of habitual conduct renders the evidence trustworthy and distinguishes it from character evidence [9]. Paradoxically, the typical defence strategy is to allege a calculated ploy on the part of the victim to seduce the defendant,

thereby prompting the harassing behaviour, and this argument in itself defeats the very definition and requirement of "habit" evidence.

Conclusion

In conclusion, a court may, under certain situations, deem it necessary to admit prior sexual conduct as evidence, especially when such conduct is 'in issue' between the parties and germane to the matter at hand, with a direct bearing on the sum and substance of the complaint. However, the rather arbitrary practice adopted by practitioners in several jurisdictions of targeting the victim's reputation, thereby tarnishing her image and besmirching her testimony to the extent of character assassination, coupled with counter-accusations related to immoral and/or improper conduct, needs to stop. Even in instances where the defendant conjures theories of retaliatory motives, apparently arising from spurned advances or with the purpose of economic gain at the workplace, for example, needs to be supported by proof to that effect without resorting to a witch-hunt of past acts. Apart from potential breaches of equity and privacy rights, to introduce historical evidence in an attempt to creatively distract and destroy a victim's harassment complaint is nothing short of gross injustice: at best, it will encourage potential offenders from acting, or continuing to act callously, thereby creating a more gender-hostile work and professional environment (in the context of sexual harassment at the workplace); and at worst, sexual harassment as a practice will rise manifold, thereby disrupting the very fabric of equality that men and woman may achieve while working together.

References

1. Priest JE, George Rotary PV (1986) *Priest v. Rotary*.
2. Department of Fair Empl. and Housing v. Fresno Hilton Hotel (1984) California Fair Employment and Housing Case No.
3. In *Priest v. Rotary*, defense counsel, Deposition Transcripts of Evelyn J. Priest at 3, *Priest v. Rotary*, US, 98 F.R.D. 755.
4. Krieger LJ, Fox C (2013) Evidentiary Issues in Sexual Harassment Litigation. *Berkeley Journal of Gender, Law & Justice* 1: 115-139.
5. *Kasto A* (1978) 584 F.2d 268, cert. denied, 440 U.S. 930.
6. *Priest EJ* (1983) 98 F.R.D. at 758.
7. Memorandum of Points and Authorities, Defendant's Motion, *Priest v. Rotary*, US.
8. Krieger and Fox, p. 120
9. *United States v. Sampol*, 636 F.2d 621 (1980) *United States of America v. Guillermo Novo Sampol*, Appellant. *United States of America v. Alvin Ross Diaz*, Appellant. *United States of America v. Ignacio Novo Sampol*, Appellant, 636 F.2d 621

Citation: Barat D (2015) Sexual Harassment: The Role of Past Sexual Conduct. J Civil Legal Sci 4: 148. doi:10.4172/2169-0170.1000148

Submit your next manuscript and get advantages of OMICS Group submissions

Unique features:

- User friendly/feasible website-translation of your paper to 50 world's leading languages
- Audio Version of published paper
- Digital articles to share and explore

Special features:

- 400 Open Access Journals
- 30,000 editorial team
- 21 days rapid review process
- Quality and quick editorial, review and publication processing
- Indexing at PubMed (partial), Scopus, EBSCO, Index Copernicus and Google Scholar etc
- Sharing Option: Social Networking Enabled
- Authors, Reviewers and Editors rewarded with online Scientific Credits
- Better discount for your subsequent articles

Submit your manuscript at: www.omicsonline.org/submission