The statutory tort of harassment

DEFINING THE CAUSE OF ACTION

SHA.1 The Protection from Harassment Act 1997 creates a 'statutory tort', whereby D is liable to C in damages, if D engages in a course of conduct which amounts to harassment of C, and which D knows, or ought to know, amounts to harassment of C.

The central provision of the Protection from Harassment Act 1997¹ (‘the 1997 Act’) is as follows:

s 1(1) A person must not pursue a course of conduct —
(a) which amounts to harassment of another, and
(b) which he knows or ought to know amounts to harassment of the other.

The prohibition in this section is enforceable by the creation of a criminal offence (in s 2) and by a civil remedy (in s 3). The latter, which gives rise to the statutory tort, provides:

s 3(1) An actual or apprehended breach of s 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

This chapter is only concerned with the civil wrong created by the 1997 Act.

Background to, and application of, the Act

The cases in which C has pursued a civil remedy under s 3 have arisen in a wide variety of scenarios – from disputes between ex-business associates to employment spats between (ex) employees and employers, and from protracted family disputes to real unpleasantness between neighbours.

¹ c 40 (short title: ‘An Act to make provision for protecting persons from harassment and similar conduct’), and in force 21 Mar 1997. Sections 1–7 extend to England and Wales only, and ss 8–11 extend to Scotland only. This chapter focuses upon the jurisprudence which has arisen in courts in England and Wales.
Conduct amounting to harassment, for the purposes of the 1997 Act, can arise from D's spoken words, his written statements, his behaviour, or a combination of all three. It can be via personal contact face-to-face, from letters or emails, from phone calls, from being photographed without C's consent, via radio broadcasts, or via internet forums or web publications. Harassment can arise from conduct which has already occurred, or from threats to commit acts (such as publication of embarrassing material) in the future.

The 1997 Act was originally aimed at preventing stalking (per Auld LJ in Majrowski v Guy's and St Thomas's NHS Trust). Its enactment was particularly important, given that, in Khorsandjian v Bush, the daughter of the proprietary owners (her parents), who was harassed by abusive telephone calls, originally had a right, in that case, to pursue an action in private nuisance – but that right was subsequently removed, given the stricter rules of standing for private nuisance which were subsequently imposed by Hunter v Canary Wharf Ltd. Lacking any proprietary interest, the daughter would, post-Hunter, have had no right to sue for private nuisance (as discussed in Chapter 16). As Lord Goff noted in Hunter, the statutory tort created by the 1997 Act meant that the common law did not need to develop a remedy to deal with the daughter’s troubling situation.

However, one of the most surprising elements of the 1997 Act has been its use in the workplace, to deal with bullying. In fact, as noted in Veakin v Kier Islington Ltd, since Hatton v Sutherland, it has become more difficult for an employee to succeed in a negligence action based on stress at work, prompting employees to seek redress for harassment under the 1997 Act, even though ‘it is doubtful whether the legislature had the workplace in mind when passing an Act that was principally directed at “stalking” and similar cases.’ Nevertheless, nothing in the language of the 1997 Act excludes workplace harassment, and some cases considered in this chapter reflect that scenario.

**What is a statutory tort?**

§SHA.2 The Protection from Harassment Act 1997 creates a ‘statutory tort’, whereby Parliament has specified that an actionable wrong can give rise to a civil remedy, and where that wrong reflects the hallmarks of a tort, i.e., a duty, an infringement, damage which is causally linked to that infringement, and for which damages can be obtained in a civil court.

According to the English Law Commission, the 1997 Act properly falls within the description of a statutory tort because the statute expressly classifies harassment as a wrong which ‘may be the subject of a claim in civil proceedings’ (in s 3[1]). In Professor Stanton’s book, *Breach of Statutory Duty in Tort*, the author defines ‘statutory torts’ as those which arise under statutes, and in which *three* characteristics are evident: the statute ‘specifically creates a detailed scheme of civil liability of a tortious character’; the legal wrong is ‘generally regarded as falling within the mainstream of tort liability’; and the principles governing the wrong enacted are ‘often modelled closely on common law principles’.

A statutory tort is to be distinguished from a breach of statutory duty (itself a tort, the subject of an online chapter), in that the latter arises where Parliament intended to confer civil
remedies on C in the event of the statute’s breach, and where C belongs to a particular class for whose protection the statute was enacted. The 1997 Act was enacted, by contrast, to protect all individuals and entities the subject of harassing conduct.

Other actions possible in conjunction
As always, it is of interest – in order to put the tort into wider context – to note which other causes of action may have been pleaded, together with the statutory tort of harassment. Ancillary causes of action may include: breach of confidence and the tort of misuse of private information (WXY v Gewanter\(^{10}\); libel (Levi v Bates\(^{11}\)); negligence, nuisance, and trespass to land (Jones v Ruth\(^{12}\)); breach of the Data Protection Act 1998 (Law Society v Kordowski\(^{13}\)); and breach of contract, and breach of the Management of Health and Safety at Work Regulations 1999 (King v Medical Services Intl Ltd\(^{14}\)).

The framework
The essential elements of, and defences to, the tort of harassment, can be summarised as follows (these elements are paraphrased and condensed from the elements noted in Dowson v CC of Northumbria Police,\(^{15}\) and as recently modified, re element 2, by the Court of Appeal in Levi v Bates\(^{16}\)):

**Nutshell analysis: The statutory tort of harassment**

**Elements of the tort:**

1. A course of conduct by D amounting to harassment.
2. The conduct was targeted at an individual (whether C or another person).
3. D had actual or constructive knowledge of the harassment.
4. The conduct was objectively judged to be oppressive and unacceptable.
5. The ‘ultimate balancing test’ under the ECHR favours an actionable case for harassment.
6. D’s harassment caused C’s damage.

**Matters which are not elements of the statutory tort**

**Defences to harassment:**

- Preventing or detecting crime.
- Acting pursuant to an enactment or rule of law.
- A reasonable course of conduct.

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\(^{10}\) [2012] EWHC 1601 (QB).


\(^{12}\) [2010] EWHC 1538 (TCC) [119].

\(^{13}\) [2011] EWHC 3185 (QB).


\(^{15}\) [2010] EWHC 2612 (QB) [142] (Simon J) referring to ‘a summary of what must be proved as a matter of law in order for the claim in harassment to succeed’. Elements 4–6 of Simon J’s list have been condensed in this nutshell analysis. For earlier judicially-created lists, see, e.g.: Hammond v Intl Network Services [2007] EWHC 2604 (QB) (HHJ Peter Coulson QC), citing: Green v DB Group Services [2006] EWHC 1898 (QB) (Owen J).

\(^{16}\) [2015] EWCA Civ 209 (Briggs LJ wrote the leading judgment, with which Ryder and Longmore LJJ agreed whilst writing short judgments of their own).
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Remedies:
- Damages under the Act.
- Injunctive relief.

The relevant parties:
- Harassment of a corporation.
- The appropriate D in harassment cases.

Dealing with each component of the framework in turn:

THE ELEMENTS OF THE STATUTORY TORT

Somewhat optimistically, it has been said, judicially, that because the 1997 Act has to be applied to ‘an indefinable variety of circumstances, which require assessment both in civil and criminal jurisdictions’, then the Act ‘for sensible reasons, seeks to achieve simplicity’ (per *Hayes v Willoughby*). Whether that particular objective has been achieved – given the various issues which have arisen in defining, and then applying, the 1997 Act – is rather open to question.

Dealing with each element, and its associated difficulties, in turn:

Element #1: A course of conduct by D amounting to harassment

Conduct which constitutes ‘harassment’

There is no exhaustive statutory definition of harassment in the Act. The 1997 Act merely provides an *inclusive* definition – harassment includes causing ‘alarm’ or ‘distress’.

The lack of a clear definition of what can constitute harassment has been the subject of controversy ever since the Act was introduced. It causes equivalent problems for the criminal offence as for the statutory tort (per *Smith v R*). As originally enacted, the Act partially defined harassment by means of what it could cause:

- s 7(2) References to harassing a person include alarming the person or causing the person distress.

Subsequently, the Legislature added the criminal offence of stalking to the 1997 Act (as s 2A), and in doing so, sought to articulate what ‘stalking’ means:

- s 2A(3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking—
  - (a) following a person,
  - (b) contacting, or attempting to contact, a person by any means.

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18 [2012] EWCA Crim 2566, [15].
19 By virtue of s 111 of the Protection of Freedoms Act 2012.
Whilst this provision was included for the purposes of the criminal offence of harassment, undoubtedly (as the Supreme Court indicated in *Hayes v Willoughby*), it will assist to point to a type of behaviour that is relevant to proving the civil tort of harassment too.

Other than the two provisions noted above, it has been left to judges to ‘fill in’ the content of what amounts to harassment. Although Lord Phillips MR confidently observed, in *Thomas v News Group Newspapers Ltd*, that harassment ‘has a meaning which is generally understood’, some useful guidance about the word – at least within the context of the 1997 Act – was provided more recently, by the Court of Appeal, in *Jones v Ruth*. Patten LJ stated that harassment had four hallmarks – it has to be:

- **persistent** (i.e., ‘the persistent tormenting or irritation of the victim’);
- **intentional** (‘deliberate conduct which its perpetrator either knows or certainly ought reasonably to be aware has this effect on the complainant’);
- **personal** (‘conduct of a kind … intensely personal in character between two individuals’); and
- **physical or non-physical** (it ‘may range from actual physical force or the threat of force to much more subtle but nonetheless intimidating conduct’).

The harassment does not need to give rise to a recognised psychiatric injury to be actionable – mere anxiety or distress is sufficient (as discussed later in this chapter, under ‘Remedies’). Where threats are alleged to be the conduct amounting to harassment, injunctive relief will be the primary remedy sought by C (as discussed later in this chapter).

There is nothing in the 1997 Act which points to what gravity of harassment is necessary. This has been judicially stipulated though, and is treated herein as a separate element.

### The wide reach of the Act

Case law to date illustrates that a wide range of aggressive or intimidatory behaviour has been sufficient to establish the statutory tort. These scenarios have also arisen in many environments – neighbourly relations, the work environment, media and paparazzi activities, and fallings-out between family members, and between prostitute and client. The following samples, and supporting authorities, illustrate:

- where D conducts stalking-type behaviour of C (the type of behaviour which prompted the implementation of the 1997 Act in the first place, and which has also been the subject of s 2A’s insertion):

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23 Citing: *Majrowski v Guy’s and St Thomas’s NHS Trust* [2006] UKHL 34, [25].
24 Cross cite p 285.
In Ting Lan Hong & KLM (A Child) v XYZ, Ms Ting Lan Hong, C, the mother of Hugh Grant's child, complained that she was regularly photographed in the street without her consent; that she received numerous phone calls telling her to tell Hugh Grant that he should 'shut up' (in relation to his appearance on the programme, Question Time, regarding the phone hacking scandal); that she was also being tailed by 'a man in a black Audi'; and that her friend had been told to warn her that she was being constantly followed. Held: harassment proven; and an injunction granted against a series of paparazzi photographers.

- where D directs comments or behaviour towards C, which are disparaging of and directed at C's sexuality:

  In Jones v Ruth, Ms Jones, C, and her lesbian partner lived next door to Mr and Mrs Ruth, D, who owned the two adjoining houses in the street. D extensively renovated each house, including adding a new storey, kitchen and garage. C witnessed damage to her house from D's building works, suffered from severe back pain, anxiety and depression, and lost extensive time off work. D (or their children) dropped notes from an upstairs window which contained various offensive and threatening remarks about lesbians; entirely dismissed C's complaints about the damage to C's house caused by the building works; refused to provide C with any information about their progress; and repeatedly ignored C's requests to reduce the noise and to make good the damage which D's building works had caused. Held: harassment proven, based on aggressive and intimidatory behaviour towards C (the harassment included, but was not restricted to, the notes dropped from the window).

- where D directs comments or behaviour towards C, which are disparaging of and directed at C's ethnicity:

  In Thomas v News Group Newspapers Ltd, D published an article in The Sun reporting that two police sergeants had been demoted to constables, after C (a police colleague of the two policemen, and referred to in the article as a 'black clerk') had alleged that the policemen made racist jokes about a Somali asylum-seeker. The Sun then published two further articles, complaining that the incident reeked of political correctness 'gone mad'. C alleged that, as a result of the articles, she had received racist hate mail, and that the three articles amounted to a course of harassing conduct, because they incited racial hatred against her. Held: the series of articles were capable of constituting harassment of C by D (hence, the action could not be struck out). It was arguable that The Sun had published racist criticism of C which was foreseeably likely to stimulate a racist reaction in their readers and to cause C distress. The fact that the articles mentioned the ethnicity of C meant that they amounted to harassment (without that, they could not have done so).

- where D makes deliberate and wrongful allegations (written or oral) about a professional's integrity (because 'a professional man's integrity is the lifeblood of his vocation'), especially when it constitutes 'irrelevant and abusive dirt thrown as part of a malicious campaign' during the course of litigation:

  In Iqbal v Dean Mason Solicitors, Dean Mason, D, were solicitors acting for a person who brought proceedings against a guarantor. Mr Iqbal, C, had previously been employed by D, but left to set up legal practice himself as a solicitor-advocate. D sent three letters to C, who acted for the guarantor, and these were cc'ed to the court. The first letter questioned, 'your integrity as a solicitor acting in

this matter, in particular whether you are satisfied before your client that you can act independently
and impartially for your client and in his best interests'. The second letter accused C of having been
summarily dismissed by D for 'continued insubordination and reckless conduct' and of intentionally
using this client's retainer 'to settle scores because of your personal vendetta against the firm'; and
also of 'poaching and inciting the clients of the firm ... to initiate complaints'. A third letter accused
C of 'misleading the law society and the general public'. There was reference to C's standing down
as his client's solicitor, or 'else to face unpleasant consequences'. Held: harassment was capable of
succeeding (this was a permission to appeal hearing). If D's allegations (as in the first letter) were
restricted to a query about whether there was an undisclosed conflict of interest between C and
his client, that would not constitute harassment. But this went much further than that. The court
noted that, 'even litigation, whose natural contentiousness also requires its own freedom of speech,
can exceptionally be abused'.

Recently, in GG v YY, witness statements by one party to litigation were so irrelevant to the
court applications that they could arguably constitute a course of conduct amounting to har-
assment under the 1997 Act.

- where D's behaviour constitutes bullying of a more junior colleague in the workplace:

  In Majrowski v Guy's and St Thomas's NHS Trust, Mr Majrowski, C, was employed by D as a
clinical audit co-ordinator. He alleged that he was bullied, intimidated and harassed by his (fe-
male) departmental manager, acting in the course of her employment with D. C alleged that his
manager was excessively critical of his time-keeping and his work; refused to talk to him and
treated him differently and unfavourably compared to other staff; was rude and abusive to him
in front of other staff; and imposed unrealistic targets for his performance, threatening him with
disciplinary action if he did not achieve them. It was accepted that C had been bullied, harassed
and intimidated; but as to whether D was vicariously liable for the tort of its employee. Held:
vicarious liability proven.

- where D pressured C to make payments, in order for D to withhold private information about C
  (i.e., in the nature of blackmail), so as to apply pressure to C for D's financial advantage:

  In WXY v Gewanter, WXY, C, was a wealthy woman with close connections with a foreign Head
of State and his family. C alleged that Mr Burby, D, had published, or threatened to publish, private
and confidential information about her on the web, in order to put pressure on her to obtain pay-
ment of a debt owed to D by members of the Head of State's family. The private information was
said to include that C had had a sexual relationship with M; that she had lied in denying it in legal
proceedings and so committed perjury; and that during 'pillow talk' with M, C had told him that
the Head of State had provided financial support for terrorism. D had already spoken to a journalist
about the terrorism allegation. Held: harassment proven. C was very distressed to learn that allega-
tions about her private life had been or would be posted on the web. C also did not want the Head of
State to think she had a conversation with M about terrorism. D published some material about C
on the web, and threatened to post other material, to apply pressure for D's own financial advantage.

- where D alleges wrongful accusations, of a serious criminal nature, against C, that necessitate
  police involvement in the dispute:

  32 [2012] EWHC 496 (QB), with quotes at [119].
In *Mitton v Benefiel*, Mr Wilding-Miton, D, alleged that his neighbours, the Benefields, C, were psychopaths and spies, that Mr Benefield in particular had behaved in a ‘perverse way around children’, that C were engaged in commercial espionage, were involved in a hatred campaign against Christians, and had also planned a campaign to destroy D’s family and his business. D’s behaviour consisted of: racial and foul-mouthed comments against C; threats to C’s physical safety by banging on C’s door late at night; falsely asserting to other neighbours that Mr Benefield was harassing D’s young daughter; and constantly making allegations about C to the police, on the basis of various fabricated or imaginary incidents, which generated many visits by the police to C. **Held**: harassment proven.

- where, in a domestic family context, D behaved towards C in a way that frightened and demeaned and exhausted C, and which involved contraventions of C’s religious beliefs and practices:

  In *Singh v Bhakar*, Gina Singh, C, was a young Sikh woman, who claimed that her former mother-in-law, Prithvipal Bhakar, D, engaged in harassing behaviour towards her during her marriage to D’s son, which had the effect of ending the marriage and of causing C serious personal health problems. The case concerned two families who were both members of the Sikh community in England, and the marriage was arranged. After the marriage, C lived in D’s household. C alleged that D bullied C, restricted her phone calls to her family to two per week, messages to her were not passed on, D made her do excessive, unnecessary and demeaning housework (e.g., cleaning toilets without a brush), to rise daily at 6.30am to perform her chores, she was never allowed out of the home on her own, she was forced to have her long hair cut against her religious practices, and she was subjected to some superstitious practices concerning jewellery. **Held**: harassment proven. The Act was capable of being applied in a domestic context, where the object of D’s behaviour was to ‘grind down’ C, physically and mentally.

A serious falling-out between a prostitute and her client could also potentially give rise to a claim under the 1997 Act (per *AVB v TDD*, although the claim did not ultimately succeed in that case).

However, and as wide as the scenarios above may appear to be, the Act could have any number of potential scenarios within its remit, as the Government admitted at the time of the Bill’s introduction: ‘the activities of political activists, market researchers, telephone sales companies, evangelical religious organisations, and journalists, as well as activities such as begging, racial or sexual harassment, harassment by neighbours, or harassment in the workplace could be covered ... The courts will look at each case individually on its merits and, in time, case law may offer more guidance on the type of conduct and the particular circumstances which might be covered’.  

**Press publications.** In principle, newspaper publications *can* constitute harassment, provided that all the elements of the statutory tort are proven (per *ZAM v CFW*). However, results have been quite mixed, in this scenario, to date. For example, in *Thomas v NGN Ltd* – at the time,
‘one of the few cases which has considered the issue of harassment by the press’ – the Court of Appeal refused to strike out a claim for harassment against the newspaper, while the statutory tort was unsuccessfully pleaded against newspapers in Trimingham v Associated Newspapers Ltd and in King v Sunday Newspapers Ltd.

For a series of press publications to amount to harassment, English law stipulates that the publication must be accompanied by some ‘exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve ... such circumstances will be rare’ (per Lord Phillips in Thomas v News Group Newspapers Ltd). That exceptional circumstance may be proven where, e.g., (1) the newspaper’s motive in publishing the series of articles is not the dissemination of information of interest to its readership, but the pursuit of a personal grudge against C (say, a newspaper editor who uses his newspaper to conduct a campaign of vilification against his former lover, an example given in Thomas); or (2) a course of conduct, in the form of speech, was repeated so excessively as to amount to taunting, crossing the line from reasonable to oppressive (a hypothetical suggestion in Trimingham).

In Trimingham v Associated Newspapers, Christopher Huhne MP was appointed Secretary of State for Energy in the Coalition Government in 2010, and was one of the leading figures in the Liberal Democrat Party. In 2008, Ms Carina Trimingham, C, and Mr Huhne started an affair (at the time, C was Mr Huhne’s press officer), unknown to both Mr Huhne’s wife of 25 years, and C’s civil partner (who was in a lesbian relationship with C at that time). Details of the affair were published in the media, and both parties’ relationships broke down as a result of the revelations. C complained that a series of articles in several newspapers (in The People, The Mail on Sunday, The Daily Mail, and Mail Online), totalling 61 articles, caused her distress, because of comments about her ‘ugly’ appearance and because of ‘relentless and irrelevant homophobic comments over many months’. Held: no harassment proven. The fact that over 60 articles published by D referred to the fact that C was bisexual, and the repetition of the words about her appearance, was not considered to be so unreasonable as to amount to harassment. The repetitious publications of these words occurred in a context where C was mentioned in a story, the main character of which was Mr Huhne.

The fact that D’s articles contain some factual errors, and misuses some private information about C, does not, of itself, show that the publication constitutes harassment of C. Such errors may legitimately be part and parcel of D’s printing a story in which D intended to expose those aspects of C’s life which D regarded as justifying exposure in the public interest, in the exercise of its right of free expression (Thomas was cited by the Northern Ireland case of King v Sunday Newspapers Ltd with approval on this point).

In King v Sunday Newspapers Ltd, the Northern Ireland newspaper, the Sunday World, had published 29 articles about C since 2002, in which it alleged that C was a leading member of the Loyalist Volunteer Force, had either taken part or was complicit in sectarian murder, and was a drug dealer. The case concerned the inclusion of private information about his Catholic partner (thus, given his membership of a sectarian organisation, suggesting hypocrisy on C’s part) and his child. Held: no

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47 [2011] NICA 8, with case description discussion at [24], [35], [38].
harassment proven. The fact that the articles contained some factual errors did not, of itself, prove harassing conduct.

C may seek to include, as part of the case of harassment, various ‘Readers’ Comments’ which accompanied the press articles (whether in hard copy as letters to the editor, or online as comments below an article) – on the basis that the reactions in the ‘Readers’ Comments’ were stimulated by the articles written by D and by the way in which they were written, and constituted part of the harassment generated by D. However, that allegation failed in Trimingham.48

In Trimingham, facts previously, held: no harassment proven. Readers’ comments on the articles in D’s newspaper included a number that were ‘insulting and offensive’, but the number of comments adversely commenting on C’s sexuality and appearance formed a very small proportion of the total number of readers’ comments, and some of the comments were different in tone and very supportive of C.

This scenario also requires the application of the ‘ultimate balancing test’ between C’s Art 8 right to a private and family life, and D’s Art 10 right to freedom of expression. That is discussed in a separate element below.49

A ‘course of conduct’?

§HA.4 Under the 1997 Act, a ‘course of conduct’ of harassment against C must involve ‘conduct on at least two occasions’ in relation to C.

s 7(3) A ‘course of conduct’ must involve conduct on at least two occasions.

s 7(4) ‘Conduct’ includes speech.

This represents the totality of the legislative guidance on what constitutes a ‘course of conduct’.

The reasons for the requirement. This legislative requirement was aptly explained by Rix LJ in Iqbal v Dean Manson Solicitors,50 i.e., that a one-off act (e.g., D walks past C’s door, or calls C’s telephone but puts the phone down without speaking) may be a ‘neutral’ act, explainable and innocent, and give rise to no unease; but if that act is repeated on other occasions, then a campaign of harassment may be evident. Furthermore, a course of conduct conveys a certain level of seriousness. Everyday irritations caused by the behaviour of others are a fact of life. As noted in Mitton v Benefield,51 ‘by virtue of the fact the majority of us have to live in reasonable proximity to others ... [The Act] is not designed to interfere with the ordinary give and take of everyday life’.

How to prove a ‘course of conduct’? A number of principles have been laid down, by which to prove a course of conduct on D’s part that gives rise to a civil remedy under s 3 of the 1997 Act.

§HA.5 Each individual incident or act counts individually towards the course of conduct. However, it is not necessary that each act, making up the course of conduct, should have caused C alarm and distress.

Each phone call, or letter, or physical act, will count as a separate act that may go towards establishing a course of conduct. Furthermore, it is the course of conduct overall which must cause C alarm or distress.

In *Kelly v DPP*, Mr Kelly had made three abusive telephone calls, within a few minutes of one another, to Miss Padmore's mobile phone, in the middle of the night. K was convicted by the magistrate of an offence under s 2 of the 1997 Act. Notably, Miss Padmore did not receive the calls at the time that K made them, they went to voicemail, and she listened to all three messages one after the other during the morning. K argued that the three calls were so much part and parcel of one another that there was no course of conduct. Held: harassment proven. Each call was abusive and alarming. It was still a ‘course of conduct’, even though the calls were very close in time, and Miss Padmore was only alarmed on one occasion, when she actually listened to them.

In *Iqbal v Dean Manson Solicitors*, the Court of Appeal approved the proposition in *Kelly* that the purpose of the 1997 Act was intended to render D liable for conduct which might not be alarming the first time it happens, but ‘becomes alarming by virtue of being repeated’. Hence, it is unnecessary to prove that there was alarm caused in relation to each of the incidents relied upon as forming part of the course of conduct.

SHA.6 However, when D’s act is to publish material about C which publication is ongoing and permanent, then the requirement changes: it is sufficient if C would suffer distress and alarm on at least two occasions.

The one act of publication does not easily satisfy the ‘conduct on at least two occasions’ requirement, but the courts have been prepared to consider the issue broadly, where, say, material about C is uploaded to a website and remains there on a continuing basis.

In *Law Society v Kordowski*, Rick Kordowski, D, maintained and published the ‘Solicitors from Hell’ website, which claimed that named solicitors did not provide competent services, that they had been the subject of complaint, had been dishonest and/or unethical, or had overcharged, and ought not to be instructed. The website, established in 2005, was prominent in the national media, and appeared to be widely used by the public. Over five postings were made to the website each week. Upon being contacted by one of the named solicitors, D replied that ‘a fee would delete the other entries against your firm’. Held: harassment proven by D against the named ‘blacklisted’ solicitors and law firms. The website was a forum which encouraged and invited the continuing publication of defamatory, unpleasant and often highly abusive allegations about solicitors, which could only be removed upon payment of a fee. It was reasonable to infer that named solicitors would suffer alarm and distress on more than one occasion, given the continuing publication of the website. In *AMP v Persons Unknown*, AMP, C, was a University student whose mobile phone was stolen in 2008. The phone contained sexually explicit digital images of C which were taken by her boyfriend at the time. Later, the digital images were uploaded to the web, and C was told by strangers on Facebook that the images had been uploaded with her name and Facebook profile attached to them. C contacted Facebook to have the images taken down. C was contacted by someone else, threatening to post the images widely online.

52 [2002] EWHC (Admin) 1428, [2003] Crim LR 45 (Burton J), on appeal from the Leeds District Magistrates’ Court (26 Oct 2001), and with discussion and quotes at [69], [71], [133].
55 [2011] EWHC 3454 (TCC) [44]–[45], [50].
and tell her friends about the images if she did not add him as a friend on Facebook. C deleted these Facebook messages and blocked the sender. C’s father’s business public relations team were contacted and allegedly threatened and blackmailed about ‘some images’. The images were then uploaded to a Swedish website, and were available readily under C’s name via online search engines. C sued for an injunction to prevent the storage and transmission of the files. Held: harassment arguably proven (this was an application for an interim injunction). There was conduct on at least two occasions.

§HA.7 To be a course of conduct, the incidents of harassment must be connected in type and in context. Disparate acts (even if they exceed two) will not suffice.

The fact that there are more than two incidents is not determinative, because if the incidents are disparate in time, or not connected enough in subject matter to warrant the description of a ‘course of conduct’, then this element will fail. However, the assessment can be a difficult one. As Tugendhat J recently admitted in AVB v TDD, 56 ‘[w]hat amounts to a course of conduct is a matter for the court to assess, since it is not always clear whether the acts complained of are to be considered as separate or as linked.’

In Andresen v Lovell, 57 the court described this as a ‘rather unusual case involving a large number of disputed issues between family members. No one emerges with much credit.’ C alleged various acts of harassment by her uncle, D. These included: an unwanted grope and stroke of her shoulders 20 years previously, when she was 14, and never raised until this litigation; more recently, a brief visit by her uncle whilst she was at home alone, to discuss some alleged fraud involving monies intended for home repairs; and ‘bombardment’ by D of C, by letters, texts, emails and phone calls, concerning the alleged fraud. Held: this did not constitute a ‘course of conduct’ of harassment. A ‘one-off’ physical event some two decades ago (which the court had to assume was true, given this was a strike-out application) did not comprise part of a course of conduct involving a dispute over money (and some of the other alleged acts of harassment did not constitute harassment).

In Pratt v DPP 58 there were two incidents four months apart, which was sufficient to constitute a course of conduct – albeit that the Divisional Court cautioned that the incidents relied upon must be ‘connected in type and in context … The mischief which this Act is intended to meet is that persons should not be put in a state of alarm or distress by repetitious behaviour.’ On that basis (said the court in Sai Lau v DPP 59), harassing incidents, even one year apart (say, on an annual religious holiday, or on C’s birthday) could conceivably constitute a ‘course of conduct’ amounting to harassment. It all depends upon the circumstances.

In Levi v Bates, 60 Mr Melvyn Levi, C, a longstanding Leeds United supporter, financially backed Leeds United Football Club in 2004, when it was in financial difficulties. In 2004–5, he fell out with Mr Kenneth Bates, D, who part-owned the club, over financial dealings. C was thereafter banned from the football ground, and became concerned and upset when D made untrue criticisms of him in the match-day programmes, including in an article, ‘The enemy within’. C sued D in defamation, and was awarded £50,000 in 2009. Other litigation between C and D followed in Jersey. Statements by D in the match-day programmes resumed in December 2010, and carried on until April 2011. On six occasions when Leeds United were playing matches, being broadcast live by Yorkshire Radio,

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announcements were made that, ‘Leeds United are currently searching for the whereabouts of Melvyn Levi to serve him some papers in relation to a High Court action in Jersey. Now, if you’ve seen the former Leeds United director, you’re being asked to get in touch with Yorkshire Radio and let us know where and when you saw him.’ C also claimed that D was using his column in the programme to criticise and humiliate him, out of personal animosity arising from the business dispute. D contended that the programme notes represented his honestly-held views, and were an accurate report of the legal proceedings which he felt that fans of the football club had a right to know about. Held: harassment proven. There was a course of conduct, seven occasions in total (at least six occasions when the radio message was broadcast, plus an article, in which C had been targeted, Dec 2010–Jan 2011). In Iqbal v Dean Manson Solicitors facts previously, held: D’s acts were a ‘course of conduct’. All three letters sent by D to C were close in time, all headed with the same reference, and hence, connected with one another via time and subject matter.

**Element #2: Targeted conduct**

§HA.8 As a general rule, D’s harassment must be targeted, i.e., directed at C. Exceptionally, however, D can be liable to C as the person harassed, even if D’s conduct is targeted at another person. General statements or behaviour that cause C distress are not sufficient to prove the statutory tort.

The concept of ‘targeting’ is necessary for the tort to be made out. The term is not defined in the 1997 Act, and has come to depend on judicial interpretation (per Levi v Bates). In Thomas v News Group Newspapers Ltd, Lord Phillips MR noted that many types of conduct may ‘foreseeably alarm or cause a person distress that could not possibly be described as harassment’, and that, to be capable of amounting to harassment in law, C must prove ‘conduct targeted at an individual which is … oppressive and unreasonable’ (emphasis added).

Whenever D objects to a claim of harassment on the basis that D’s conduct was not targeted at C, the court must closely consider what has actually been said or done in relation to C, for each act constituting the harassment. Some behaviour inevitably points to targeting, as the list below shows:

**Targeting C with harassment**

- stalking is a ‘prime example’ of targeting (per Lord Phillips in Thomas);
- specifically mentioning C in a statement (written or oral), in a very negative way, will constitute targeting (e.g., a written statement, ‘we have not served Mr Levi with his writ as his wife said he was away until New Year, which makes me speculate as to why they split for the festive season’ (Levi v Bates);
- uploading photographs of, or text about, C on the web, is obvious targeting (Law Society v Kordowski);
- making various (including late-night) visits to C’s premises, and other threatening behaviour towards C (Al Hamadani v Al Khafaf).

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65 [2012] EW Misc 9 (CC) [20], [51]–[55], [57], and not appealed in respect of Mr Levi’s claim for harassment.
A more difficult scenario arises, where C is affected, collaterally or incidentally, by the alleged acts of harassment directed to or targeted at another person. That ‘ancillary effect’ on C may arise in various ways. For example, C may be a secondary character to a story involving a high-profile public figure, but nevertheless claim that she was harassed by that publication of that story. For another, the spouse, partner or family members may suffer severe alarm and distress, because of their concern and sympathy for the targeted individual, and/or because the particular nature of D’s course of conduct caused them that alarm and distress, although it was not targeted at them. In these types of cases, the court will have to consider each on its own facts.

However, as a matter of legal principle, although there may be a course of conduct which is targeted to an individual (X), it is conceivable that another individual, C, associated with X, can sue for harassment, even though that conduct was not aimed at C. In that regard, all the 1997 Act requires is conduct ‘targeted at an individual’, and not conduct ‘targeted at the claimant’ (per the Court of Appeal in Levi v Bates68).

In Trimingham v Associated Newspapers Ltd,69 facts previously, held: no harassment of C, Ms Carina Trimingham, the mistress of Christopher Huhne MP. The court was not prepared to hold that C was the main target of the articles complained of. C was named in the articles, only because of the important secondary role she played in the events relating to Mr Huhne. C was named by D in fewer than half of all its articles about Mr Huhne. In Levi v Bates, facts previously, held (first instance): Mrs Levi, C, could not prove harassment, as she was not referred to in D’s statements in the match day programmes and in the radio broadcast. Held (CA, 3:0): Mrs Levi, C, was harassed by a course of conduct in 2007, even if the match day programmes and radio broadcast were targeted at her husband.

The recent decision in Levi v Bates was important, because at first instance, HHJ Gosnell, finding against Mrs Levi, had made the point that families of C are commonly not targeted by harassing conduct, but are ‘almost always badly affected, but this is just an unfortunate consequence of the media intrusion’, and that if a spouse or partner could claim for harassment under the 1997 Act, because of their close emotional connection and relationship to the person targeted, ‘then every spouse of a victim of public harassment could also make a claim’.70 However, the fact that the Court of Appeal permitted Mrs Levi’s claim opens the way for harassment claims to be brought by family members of those who are targeted in such campaigns (albeit that Longmore LJ ventured to suggest that ‘[i]t may not be often that a person who is not the target of the harassing conduct will, in fact, be harassed’71).

However, some targeting is certainly required against C or another individual – in Levi, Briggs LJ gave the example of someone driving a sportscar through a pedestrian area which frightens young children and their parents; but that cannot be harassment, because it is not targeted at anyone in particular.72

**Element #3: Actual or constructive knowledge**

§HA.9 D’s conduct must have been calculated, objectively, to cause C alarm or distress. Hence, it must be shown that D knew, or ought to have known, that he was harassing C.

68 [2015] EWCA Civ 206, [26] [Briggs LJ].  
69 [2012] EWHC 1296 (QB) [338].  
70 [2012] EW Misc 9 (CC) [52], [55].  
71 [2015] EWCA Civ 206, [56].  
72 ibid, [28].
Previous complaints/litigation against D, in respect of the same conduct now said to give rise to harassment, will be a key pointer to the requisite actual or constructive knowledge.

The fact that D’s course of conduct has caused C distress does not, of itself, constitute harassment. Actual or constructive knowledge of the harassment is a necessary element of the civil wrong, under the explicit terms of s 1(1)(b). Furthermore, in seeking to prove that D ought to have known that his conduct amounted to harassment, Parliament stipulated that this should be judged objectively:

\[
\text{s 1(2) } \ldots \text{D ought to know that it amounts to harassment of another, if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.}
\]

Hence, D may have no actual knowledge or intent to cause C harassment at all, but can still be liable – that necessarily follows from s 1(2) (per Veakins v Kier Islington Ltd[73]).

In Levi v Bates, facts previously, held: harassment of C, Mr Levi, proven. The radio broadcasts and article were calculated by D, in an objective sense, to cause alarm or distress. The previous history between the business associates, and the previous defamation proceedings between them, helped to show why D knew, or ought to have known, that the broadcasts and article would cause C alarm and distress. In Law Society v Kordowski,74 facts previously, held: D knew or ought to know that naming a solicitor on the website, ‘Solicitors from Hell’, would cause that individual distress and alarm. Also, previous claims had been brought against D (and judgments rendered in those claims), by other parties named on the website, from which it was clear that they had suffered considerable distress. Furthermore, a number of individuals had contacted D, informing him that they were alarmed and/or distressed as a result of being named on the website.

Even if there is no evidence that C was distressed, the test is objective, i.e., whether the conduct of D, targeted towards C (or towards a person other than C, in light of Levi v Bates), was objectively likely to cause distress to a reasonable person (whether that was the person targeted, or was someone who would foreseeably suffer harm because of their proximity to the targeted victim). However, the test requires a consideration of all the circumstances (per AVB v TDD[75]).

In AVB v TDD, AVB, C, a solicitor and partner in a well-known small London law firm, entered into a relationship with TDD, D, a law student and prostitute. In addition to a sexual relationship, C assisted D with her law studies and with networking in the law profession. Their relationship was volatile. Over the course of a fortnight, D sent a series of emails to C’s law partners, his solicitor, and his daughter, in May 2013, detailing confidential information she learnt from AVB about his sexual history (images of C and D’s sexual relationship were also attached to some communications). Held: no harassment proven. C did not suffer actual distress as a result of D’s actions (as opposed to embarrassment). For ‘most people [who] might be targeted by such behaviour, the conduct would be likely to cause distress’ (said Tugendhat J). However, C provoked D throughout with ‘his manipulative and exploitative behaviour’, and if he had been distressed, ‘either he would have kept well away from her, or he would have treated her less provocatively, so as not to risk another outburst of bad
behaviour on her part.' Hence, D's conduct in May 2013 was not objectively likely to cause distress to the solicitor, C.

§HA.11 The fact that C did not know about the acts or behaviour said to constitute the harassment, when they occurred, does not affect the proof of this element.

All that matters is that D must know, or ought to have known, that his conduct amounts to harassment of C. C may have been ignorant of the acts which make up the course of conduct until told about them by a third party, but that is irrelevant.

In *S v DPP*, a picture of C had been placed online with an offensive caption. C did not see the photo until shown it by a police officer. It was argued that harassment could not be proven in these circumstances. Held: harassment proven. Once D posted the image to the website, D ‘took the chance that the intended harassment, alarm or distress would be caused to [C],’ and that was sufficient.

§HA.12 What information D knew about the status, characteristics or personality of C impacts upon whether D knew, or ought to have known, that his course of conduct would harass C.

When the legislature refers, in s 1(2), to a reasonable person being ‘in possession of the same information [as D],’ that information includes what D actually knew about the status, characteristics or personality of C. The particular types of information about C, which have been shown to be relevant to this assessment of D’s actual or constructive knowledge, include the following:

C’s mental frailty. If D knows of C’s particular mental vulnerability, then he needs to take that vulnerability into account when considering his conduct. It does not matter whether a reasonable person in C’s position would not have been affected by D’s conduct. D ‘cannot shelter behind the argument that most people would not be alarmed or distressed, if he knows or ought to know that the targeted individual’s vulnerability could result in his or her suffering alarm or distress’ (per dicta in *King v Medical Services Intl Ltd*).

On the other hand, if D simply did not know that C had suffered from a pre-existing depressive illness, or some other mental condition that would affect his robustness to deal with D’s behaviour – especially if C had concealed the fact from D upon enquiry being made, say, at the commencement of employment – then D cannot be taken to have had actual or constructive knowledge of C’s characteristics (per *Rayment v MOD*).

In *Rayment*, Ms Donna Rayment, C, sued the MOD, D, for harassment, for conduct by MOD employees, where she was employed as a civilian employee in ceremonial stores, and then as a driver. C claimed that she was subjected to bullying and insulting behaviour by three military employees, and that as a result, she suffered psychiatric damage. C had suffered a significant history (9 years) of depression and periodic psychiatric treatment, but had concealed that on her application form and medical questionnaire. Held: harassment succeeded, in respect of some acts committed by D, but not in relation to others. For example, putting pornographic photographs on the restroom wall was harassing behaviour, as C was the only female driver, so the conduct was directed at her.

The character of C. If D knew that C was the type that had a long history of ‘giving as good as he got’, and undertook behaviour that thrust him into the public eye, then a reasonable person in the possession of private information about C could reasonably expect that C would appreciate...
that the scope of his private life ‘would become somewhat more limited’ (per Trimingham v Associated Newspapers Ltd79).

In Trimingham,80 facts previously, held: no harassment proven. C was a public figure, by knowingly electing to embark on an affair with a high-profile married politician whilst acting as his press officer. Also, a reasonable person in the possession of the same information as D, about C’s job as a press officer, and her past career as a journalist, could reasonably consider that she was tough, a woman of strong character, not likely to be upset by comments or offensive language, a woman who was known to give as good as she got.

C’s occupation. If C was in a job where it would be unlikely for C to be upset by comments or offensive language, then a reasonable person would not consider it likely that C would consider himself harassed if offensive language were used about him (per Rayment v MOD;81 and Dowson v CC of Northumbria Police82).

In Rayment, facts previously, held: harassment did not succeed for some acts of D’s. Re the use of offensive language, C had worked at military establishments as a civilian employee for a lengthy period, and was well-used to strong language at times. In Dowson, six police officers of Northumbria Police, including Detective Inspector Dowson, C, sued for the behaviour and conduct of a Detective Chief Inspector, D, who headed their unit for a year. The crime teams had to investigate serious crimes, including large scale drugs supply, firearm offences, and armed robbery. C had acted as Deputy Chief Inspector before D’s arrival. C alleged that D adopted a hostile and critical attitude, that he harassed C’s ‘team’ or ‘clique’, and that this harassment continued until C and his colleagues left. Held: no harassment proven. D was insensitive, belittling and overbearing towards C; and C’s life was made ‘very difficult’. However, this was a stressful working environment in which case-hardened officers were dealing with career-hardened criminals. D’s conduct was not calculated to cause distress, or oppressive. It was unacceptable (and likely to undermine both C’s own self-confidence and the esteem in which he was held by others), but fell a ‘considerable margin’ short of being actionable harassment.

Whether D’s conduct constitutes harassment ‘may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa’ (per Gage LJ in Conn v Sunderland CC83).

The level of C’s seniority/experience. If C occupied a very senior employment (say, executive) position, and was well used to ‘fighting her corner’ and dealing robustly with management and interpersonal matters, and exercising authority, then a reasonable person may not consider it likely that C would regard petulant behaviour from a CEO as harassment (per King v Medical Services Intl Ltd84).

In King, Sandra King, C, sued for harassment and bullying by the CEO, D, at her work at Cromwell Hospital, whilst C was in a senior management position. D accepted that C had suffered from a psychiatric condition. Held: no harassment proven. Two acts by the CEO were regarded as undermining, one as ‘approaching harassment’, and a third as ‘bullying or tantamount to bullying’, plus the CEO behaved ‘inconsiderately’ towards C on numerous occasions. However, overall, this was not a course

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79 [2012] EWHC 1296 (QB) [22], [95], citing: Saaristo v Finland [2010] ECHR 1497, [66], [252].
80 ibid, [22], [252].
82 [2010] EWHC 2612 (QB) [277]–[279].
83 [2007] EWCA Civ 1492, [12].
84 [2012] EWHC 970 (QB) [252].
of conduct amounting to harassment. C was an Executive Manager, used to exercising authority over others and speaking her mind, and working under pressure. She was perceived as 'robust'. The court noted that, '[i]n present day industry, CEOs often work under considerable pressure. Tough decisions have to be made and executives have to fight their corner. Executives are expected to withstand the demands and criticisms of their CEOs.' Other witnesses said that C was well able to 'protect herself', that she was a 'tough cookie. She would have coped with it'. This sort of information was within D's possession too, given the closeness of the workplace at Cromwell Hospital.

**Element #4: Objectively oppressive and unacceptable behaviour**

D's conduct must be oppressive and unacceptable to constitute harassment. It must be sufficiently serious to cross the boundary from being merely irritable, annoying or upsetting behaviour.

This element addresses the gravity of the conduct committed by D. There is nothing stipulated by the Legislature as to how serious, or grave, the harassment must be, and hence, that is a judgment call on the court's part. The degree of gravity has rested upon two propositions:

- **Oppressive and unacceptable conduct.** Despite the reference to 'distress' in s 7(2) of the Act, something much more than daily irritation giving rise to distress will be necessary to give rise to any civil remedy for this statutory tort (according to May LJ in *Majrowski v Guy’s and St Thomas’s Trust Ltd*[^85^]).

  The cases emphasise that a suitable borderline must be determined, between that which is merely irritable (and non-tortious), and that which is oppressive and unacceptable conduct (and tortious). D's conduct must constitute more than 'irritations, annoyances, even a measure of upset which arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, regrettable, even unreasonable, and conduct which is oppressive and unacceptable' (per *Majrowski v Guy’s and St Thomas’s NHS Trust*[^86^]). In the same case, Baroness Hale observed that '[a] great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour'.

  This test of 'oppressive and unacceptable' has been called the 'primary requirement' against which D's behaviour must be evaluated (per *Veakins v Kier Islington Ltd*[^88^]).

- **The 'criminality' required.** There have been some inconsistent remarks about the interplay between the civil wrong in s 3 of the 1997 Act, and the criminal wrong also contained in the Act (in s 2). On the one hand, the gravity of D's misconduct under s 3 'must be of an order which would sustain criminal liability under s 2' (per Lord Nicholls in *Majrowski*[^89^]). It must equate to 'torment', amounting to 'constant interference or intimidation' (per *R v Curtis*[^90^]). On the other hand, it has been oft-stated that there is no expectation, under the 1997 Act, that civil claims for the statutory tort of harassment should be confined to those cases where a criminal case would succeed (per *Dowson v CC of Northumbria Police*[^91^]) or where a prosecutor would

[^85^]: [2005] QB 848 (CA) [82], and this point was not the subject of the appeal to the House of Lords.
[^87^]: [2006] UKHL 34, [66].
[^88^]: [2009] EWCA Civ 1288, [12].
[^91^]: [2010] EWHC 2612 (QB) [134].
be willing to prosecute (per Veakins v Kier Islington Ltd92). Nevertheless, in Ferguson v British Gas Trading Ltd,93 it was said that ‘things have got to be fairly severe before the law, civil or criminal, will interfere’.

The courts will scrutinise each act, to determine whether each is serious enough to amount to harassment (and, of course, at least two of them have to be serious enough, to constitute a ‘course of conduct’). To contrast two cases:

In Levi v Bates,94 facts previously, held: harassment of C, Mr Levi, proven. The radio broadcasts asking for Mr Levi’s whereabouts to be notified to the police, and an article which accused Mr Levi of misappropriating £190,000 of season ticket-holders’ money, were oppressive and unacceptable when viewed objectively. The conduct was more than unattractive and boorish; rather, it was serious enough to sustain criminal liability.

In Rayment v MOD,95 facts previously, held: some incidents which were not serious enough for harassment were: the poor state of the female toilet; a senior employee refusing to provide C with transport in order to attend a medical appointment; an alleged refusal by a military clerk to assist C with a computer program—none of those was conduct which was ‘oppressive and unacceptable’. For those actions, ‘[t]here were faults on both sides. [C] was a challenging employee, those who worked with her were increasingly frustrated by her attitude and conduct and on occasions, this showed. However, there were incidents which did satisfy the test of ‘oppressive and unacceptable’: posting pornographic photos on the restroom wall; a senior employer who took steps to state that C could not drive any longer, thus leaving C without a job (with an instruction to repay a month’s salary); the issue of a final written warning; and discharge from the MOD.

SHA.14 Whether D’s conduct is serious enough to constitute harassment is to be judged objectively.

According to Majrowski v Guy’s and St Thomas’s NHS Trust,96 D’s conduct must be oppressive and unacceptable ‘in an objective sense’. Hence, the conduct must be something which a reasonable person would think amounted to harassment – it is not determinative as to what C thought about the conduct. In Trimingham v Associated Newspapers Ltd, the court said that, ‘it would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted. The test for harassment is objective.’97 In that case, the objective test was not met, as the description of C as ‘bisexual’ and ‘lesbian’ were factual, and not insulting to a reasonable person.

Element #5: The ‘ultimate balancing test’ under the ECHR

SHA.15 Where D’s harassment takes the form of publication, then whether C is entitled to a civil remedy under the Act requires the court to balance the competing rights of freedom of expression (Art 10) and privacy and family life (Art 8).

94 [2012] EW Misc 9 (CC) [74], appeal allowed in respect of the original refusal of Mrs Levi’s claim: [2015] EWCA Civ 209.
95 [2010] EWHC 218 (QB) [70].
97 [2012] EWHC 1296 (QB) [267].
Under s 3 of the Human Rights Act 1998 (HRA) the court is required, so far as it is possible to do so, to interpret and give effect to legislation in a manner which is compatible with Convention rights.

Although the 1997 Act was passed prior to the HRA coming into effect, the statutory tort which it contains is one of many torts which give effect to the obligation of the State to protect citizens’ right of privacy and to enable a citizen (such as C) to protect his private life under Art 8 (per Wainwright v Home Office[98]). By enacting the statute, Parliament clearly intended that D’s right of freedom of speech could be restricted if D’s speech, publication, etc, constituted ‘harassment’ of C. Hence, whenever C is complaining about what D has said or written about him, and is alleging that it constituted harassment, then D’s rights under Art 10 are likely to be engaged (per Neocleous v Jones[99]). In such cases, the court will need to apply the ‘ultimate balancing test’ (the same balancing test as is relevant in privacy claims, as discussed in the online chapter, ‘Privacy’) – which has been so labelled, and described, by Lord Steyn, in In re S (A Child)[100] as follows:

First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each ... I will call this the ultimate balancing test.

This balancing exercise is referred to as a separate element for this tort, for two reasons. First, the same balancing act is treated as a separate element of the privacy tort, where the relevant Articles are engaged, and for the sake of consistency, the same applies to this tort. Secondly, in Levi v Bates in 2012,[101] HHJ Gosnall regarded the ultimate balancing test ‘as an additional evidential hurdle to be overcome by [C]’, to establish the cause of action, and Trimingham also entailed an express balancing of Art 8 and Art 10.

In Trimingham v Associated Newspapers,[102] facts previously, held: no harassment proven. The right to freedom of expression of D outweighed C’s Art 8 rights. The publication was about matters of public interest (one witness said, ‘where a cabinet minister leaves his wife and the “other woman” is in a gay relationship, and not just that but is in a legally binding partnership with another woman. In my opinion that is extremely relevant to the reporting of the story. It is not just titillation, it is relevant context and fact. This is a situation where both the Cabinet Minister and his aide have left their wives for their affair. It is far from ordinary and is something to comment on’; and ‘in my 30 years in journalism, I have never known a cabinet minister to leave his wife for a woman who is in a legally binding relationship with another woman’). On the other hand, C’s Art 8 rights had become very limited, because she was not a ‘purely private figure’ as a result of her behaviour, and also because she herself had been so open about her sexuality and her sexual relationships to friends, colleagues, and family.

Given that the responsibility of the press, in publishing newspapers, is to inform the public, the circumstances in which the newspapers’ Art 10 right can be ‘trumped’ by C’s Art 8 right, such that C can establish the right to a civil remedy under the 1997 Act, are fairly narrowly

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102 [2012] EWHC 1296 (QB), with quotes at [166] and [176].
The elements of the statutory tort

construed. In particular, the court must be careful not to interfere with D’s journalistic freedom (by finding that the statutory tort of harassment was committed against C) unless satisfied that this finding is absolutely necessary (per Thomas)\(^{103}\).

In Thomas, facts previously, held: harassment proven. D’s Art 10 right to freedom of expression did not prevail, so as to protect remarks calculated to incite racial hatred of C, as those types of remarks were ‘directly against the Convention’s underlying values’. However, in King v Sunday Newspapers Ltd, facts previously, held: the balancing exercise was in favour of D’s right to freedom of expression. It was in the public interest to be told the truth, where this was a reputable newspaper campaigning on an issue of public importance. The case had no exceptional circumstances which would justify sanctions and restrictions on the freedom of expression being exercised by the newspaper.

If C does not take defamation proceedings against newspaper D, ‘nor seek to challenge the central truth of the allegations against him’, then that can influence a court’s assessment that D’s freedom of expression should be upheld (such that C cannot make out a case of harassment).

In King v Sunday Newspapers Ltd\(^{104}\), given that C declined to institute defamation proceedings to challenge the correctness of the thrust of the robust allegations of serious criminality (murder, drug-dealing) made in the articles, the court concluded that the trial judge had been correct to deny any case of harassment.

Finally, as remarked in Levi v Bates\(^{105}\), if D is not publishing a newspaper, but is publishing in some other published medium, then a personal grudge, rather than dissemination of information, may be more evident as D’s motive, which will tilt the balancing test in favour of C’s claim of harassment.

In Levi v Bates, facts previously, held: harassment proven. The balancing exercise was in favour of C’s right to privacy under Art 8. Programme notes ‘were not press publications in the same sense’. D argued that he was merely seeking information about the location of C, in the radio broadcast, so that court proceedings could be served (per Art 10) – but that could be construed as an invitation to search for C, which would be a lack of respect to C’s right to a private life. D argued that his programme notes/personal column viewpoint was a reflection of his genuinely-held views of interest to a section of the public (in that case, the fans of Leeds United) (per Art 10). However, the court held that they were merely a vehicle for D to pursue his personal animosity against C by publishing partial, inaccurate and damaging comments about C, ‘under the guise of freedom of speech’, because of a business dispute arising many years earlier. Furthermore, it could not be shown that D’s dispute with C was of ‘genuine interest’ to the fans of Leeds United. It was ‘against this background that the ultimate balancing exercise must take place’.

**Element #6: Causation**

The statutory tort is not actionable *per se*. It requires proof of some material damage being suffered by C, as a result of the harassing course of conduct. That damage may constitute personal injury and/or economic harm (as occurred, e.g., in Jones v Ruth\(^{106}\)).

\(^{103}\) [2001] EWCA Civ 1233, [24].
\(^{104}\) [2011] NICA 8, [35], [38].
\(^{105}\) [2012] EW Misc 9 (CC) [70], with quotes in case description at: [67], [69], [71]. The claim by Mr Levi was not the subject of appeal.
\(^{106}\) [2010] EWHC 1538 (TCC) [89].
There must be a causal link between D’s ‘course of conduct’, and the damage suffered by C as the ‘victim’.

Although there is no express reference to causation in the terms of the 1997 Act, that requirement has been stipulated judicially. In the House of Lords in Majrowski,\(^\text{107}\) Lord Nicholls stated that, in respect of the civil wrong created by s 3(1), the 1997 Act ‘includes an entitlement to damages for any loss or damage sustained by a victim by reason of the wrong. Ordinary principles of causation and mitigation and the like apply.’ Similarly, in the same case, May LJ (at Court of Appeal level) emphasised that ‘the fact that a person suffers distress is not, by itself, enough to show that the cause of the distress was harassment.’\(^\text{108}\)

There has to be a causal link established by the medical evidence. However, the case law under the 1997 Act to date indicates that any one of several reasons may preclude the requisite link:

- **C had a pre-existing vulnerability to psychiatric injury.** Where C has had a long history of depression or other psychiatric conditions, it is open to a court, on the medical evidence, to find that C’s mental distress represented a recurrence of C’s pre-existing psychiatric disorder, and was not attributable to any act on the part of D (even where D has committed a course of harassment against C).

  In *Rayment v MOD*,\(^\text{109}\) facts previously, C had suffered a significant history (9 years) of depression and periodic psychiatric treatment. Held: one of the psychiatric episodes (panic attack and subsequent anxiety) could not be attributed to any harassing act of D’s. Rather, it was a recurrence of her existing psychiatric disorder. Other acts of harassment, however, did cause C distress and injury, and the causal link was made out for those acts.

- **D’s course of conduct was part of a larger picture.** Where C is complaining about D’s course of conduct, but that is part of a much bigger ‘story’ of events surrounding C – and when C alleges that the distress was caused by ‘all of it’, ‘the whole thing’ – then causation is likely to fail. If C cannot attribute the distress to the *particular* course of conduct of harassment alleged against D, then there is no causal link made out.

  In *Trimingham v Associated Newspapers Ltd*,\(^\text{110}\) facts previously, held: no harassment. Causation failed. The court accepted that C had suffered distress – but it was not caused by D’s course of harassing conduct. C complained that her distress was caused by all the articles concerning her affair with Christopher Huhne MP, ‘about the whole thing’. That ‘whole thing’ included articles which C did not seek to claim were harassing at all; and also included ‘papping’ and conduct by photographers, journalists, and others, quite apart from D’s acts.

- **Other factors in C’s life caused the distress.** In any given scenario, a number of factors may give rise to distress for C, e.g., marital difficulties, bringing up a disabled child, long working hours, employment difficulties, being the victim of an assault (quite apart from D’s acts of harassment). If the psychiatric evidence is that these factors were the predominant cause of C’s distress, then the statutory tort will fail.

  In *King v Medical Services Intl Ltd*,\(^\text{111}\) facts previously, held: harassment failed. C was already under considerable stress, and suffering distress, from the state of her marriage, concern for her autistic

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\(^{107}\) [2006] UKHL 34, [22] (emphasis added).

\(^{108}\) *ibid*, [82] (emphasis added).


\(^{110}\) [2012] EWHC 1296 (QB) [253].

\(^{111}\) [2012] EWHC 970 (QB).
son, the state of her physical health, and the general pressure of work arising from long hours and executive conflict. Causation was not proven, on the psychiatric evidence.

**MATTERS WHICH ARE NOT ELEMENTS OF THE STATUTORY TORT**

Some matters are not elements of the statutory tort established by the 1997 Act.

**Malice**

D’s course of conduct towards C, which constitutes harassment, does not have to display malice.

In the context of tort, ‘malice’ can have one of two meanings: that D acted intentionally, without just cause or excuse; or that D acted recklessly or indifferently to the harm that might result from his acts. Malice, under either form, is not an essential ingredient of the statutory tort of harassment (per *WXY v Gewanter*).

However, if D did act with malice in his course of harassing conduct, then the ‘oppressive and unacceptable’ test is easier to prove (per *Veakins v Kier Islington Ltd*).

In *Veakins v Kier Islington Ltd*, Judy Veakins, C, an electrician, worked for her employer for two years, and then resigned and went on sick leave for depression. For the three months prior to her resignation, C alleged that her new supervisor, Mrs Lavy, D, subjected her to harassment. In particular: D tried to obtain private information about C from C’s colleagues; when, at the suggestion of a senior manager, C set out her concerns in a letter to D and handed it to her, D tore it up without reading it and put it in the bin; there were many conflicts about unpaid wages, issues about punctuality, about C being picked up by workmates on the way to a job, embarrassing telling-offs in front of other staff, etc. *Held*: harassment proven. D’s ‘extraordinary conduct must have been motivated by a desire to do whatever she could to force out an employee for whom she had a profound personal dislike’.

**Reasonable foreseeability of damage**

The kind of damage suffered by C, as a result of D’s harassment, does not have to be reasonably foreseeable.

Section 3 does not expressly require that C’s damages, resulting from the harassment, need to be reasonably foreseeable – so should such a requirement be implied? Of course, reasonable foreseeability of damage is required in negligence (as the test to ensure that the damages suffered are not too remote), and the question has arisen as to whether remoteness is also relevant for this statutory tort.

According to judicial authority, there is no requirement of reasonable foreseeability. All that is required is a causal connection between damage and harassing behaviour. In *Laing Ltd v Essa*, Pill LJ said that the 1997 Act ‘demonstrate[s] that it is possible to create a statutory tort which does not incorporate the reasonable foreseeability test’. (That was dicta, as the decision actually concerned the Race Relations Act 1976.) Subsequently, however, the Court of Appeal confirmed, in *Jones v Ruth*, that foreseeability of C’s injury or loss, in a case of harassment, is not an essential element in the cause of action, for two reasons.:

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112 *Bromage v Prosser* (1825) 4 B & C 247, 255.
114 [2012] EWHC 496 (QB) [69].
115 [2009] EWCA Civ 1288, [16].
116 [2004] EWCA Civ 2, [31].
117 [2011] EWCA Civ 804, [25], [32] (Patten LJ), with discussion in case description at [33] and [49].
• s 3 specifies no conditions for the recovery of damages, beyond that the harassment should have caused the injury or loss complained of. Hence, anything flowing from that deliberate conduct will be compensable – and that would ‘give effect to the obvious policy objectives of the statute’, and ‘[t]here is nothing in the statutory language to import an additional requirement of foreseeability’; and

• the statutory tort of harassment entails the intentional infliction of harm (similarly to the torts of battery and assault). Its gist is that D engaged in deliberate conduct of a kind which D knows or ought to know will amount to harassment. For such torts, issues of foreseeability are irrelevant. (In fact, the statutory tort of harassment is analogous with direct discrimination under the Race Relations Act 1976 – it is not necessary to prove, under either statute, that injury of the kind suffered by C was reasonably foreseeable.)

In *Jones v Ruth*, held (at first instance): foreseeability of Ms Jones’ psychiatric injury (depression) was a necessary ingredient of the tort, and that injury, arising from the harassment, was not reasonably foreseeable on these facts. Held (CA): the trial judge was wrong in principle to insist upon foreseeability of injury. Ms Jones was hence entitled to an award of £28,750 for the psychiatric injury resulting from Ds' harassment.

DEFENCES

§HA.19 The defences available to D for the statutory tort of harassment, are solely contained in s 1(3) of the Act (and the burden of proof rests on D).

D, who pursued the course of conduct of harassment, may establish one of the following statutory defences provided for in s 1(3) of the 1997 Act:

(a) that it was pursued for the purpose of preventing or detecting crime;
(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

The burden is on C, initially, to prove the elements of harassment (and the standard of proof applicable to the matters which C has to prove, for the civil remedy under s 3, is to the civil standard, on the balance of probabilities), whilst the burden is on D to prove the defences under s 1(3) (per *KD v CC of Hampshire*).118

Dealing with each defence in turn:

**Prevention or detection of crime**

The scope of this statutory defence has been mired in some controversy, both as to its statutory drafting and the policy underpinning it.

It is more likely – although not necessarily mandatory – that this statutory defence will be available to Ds who are official law enforcement bodies and public authorities, rather than to private

118 [2005] EWHC 2550 (QB) [146]. Also: *Levi v Bates* [2012] EW Misc 9 (CC) [8].
persons. In *Howlett v Holding*, Eady J cited Hansard to support the notion that s 1(3)(a) ‘was framed with law enforcement agencies in mind’, and accepted the proposition that it was ‘not designed to enable any Tom, Dick or Harry to set himself up as a vigilante and harass his neighbours under the guise of preventing or detecting crime’. However, in *Hayes v Willoughby*, the Supreme Court was careful to note that, whilst the defence may have been drafted with public authorities in mind, it ‘applies equally to private persons who take it upon themselves to enforce the criminal law’ (albeit that it was not available to a private person in that case).

SHA.20 As a matter of statutory construction of s 1(3)(a), D’s conduct towards C must have had the dominant purpose of preventing or detecting crime. It need not have been D’s *sole* purpose.

In *Hayes v Willoughby*, the Supreme Court judicially re-wrote s 1(3)(a), such that ‘the purpose’ means ‘the predominant purpose’ – it does not mean ‘the only’ purpose. In that sense, the defence has a somewhat wider ambit than it would otherwise have, if D had to point to his aim to prevent/detect crime as the ‘sole’ purpose.

However, on this phrase (as with other statutory phraseology in the 1997 Act), reasonable judicial opinion has differed significantly, given that the Supreme Court overruled the Court of Appeal on this point (albeit in dicta, for the point was strictly unnecessary to decide on appeal). The Table below illustrates the real difficulties encountered when interpreting key aspects of a statutory tort:

<table>
<thead>
<tr>
<th>MEANING OF ‘THE PURPOSE’</th>
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<tr>
<td><strong>Arguments for predominant purpose</strong> (Supreme Court, 5:0)</td>
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<tr>
<td>- any person’s purposes are almost always, to some extent, mixed – and the ‘ordinary principle is that the relevant purpose is the dominant one’ (Lord Sumption, with Lords Neuberger and Wilson agreeing);</td>
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<tr>
<td>- the Supreme Court cited with approval this statement of the meaning of purpose in a HCA judgment, <em>Williams v Spautz</em>: ‘the purpose of a transaction is the result which it is capable of producing, and is intended to produce’. This statement does not convey that the purpose must be singular or sole or unique.</td>
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[1] [2006] EWHC 41 (QB) [33], and quotes at [31].
The Supreme Court’s interpretation must, of course, now be taken to be the correct one, and undoubtedly gives D greater scope to prove that his course of conduct which amounted to harassment had a specific, and dominant, purpose of detecting/preventing crime. A court will need to be satisfied that, whatever improper motives D may have had in acting as he did (e.g., malice, revenge, hatred, personal gratification in exercising power), those were not his predominant purposes. The ‘mixed purposes’ were evident in *Hayes v Willoughby* itself, with various judges noting that D may have been predominantly motivated by malice/resentment, or for the purposes of detecting crime (it was unnecessary to decide which; the defence failed on the next principle).

However, in some cases, courts have had little difficulty in deciding that the sole purpose which motivated D’s conduct was, indeed, an improper one.

In *KD v CC of Hampshire*, D, C, had a young daughter who alleged that she had been raped and beaten by C’s former partner. D was sued vicariously for the acts of one of his officers, X. X was the police officer who interviewed C whilst investigating those allegations. During the course of making five separate statements, C alleged that X required her to answer detailed and intimate questions about her sexual conduct which had no relevance to the investigation. C also alleged that D had cuddled her, made sexual remarks towards her, and exhibited over-friendly and sexually overt behaviour towards her. C alleged that she developed PTSD as a result.

**Held:** the taking of the five statements, and the cuddling incidents, amounted to harassment. Further, the defence of s 1(3)(a) failed. X’s purpose in obtaining and recording information from C about her sexual behaviour was not for the purpose of preventing or detecting crime, especially given that she was not a party to the criminal investigation; her daughter was. There can have been no purpose other than X’s own gratification. In *WXY v Gewanter*, facts previously, held: harassment proven; and the defence under s 1(3)(a) failed. There was no evidence that D had pursued his course of conduct for the purpose of preventing a crime (viz, his own murder). Although D alleged that his life was at risk, by knowing compromising information about a Head of State’s terrorist connections, the court held that D’s course of conduct was to put pressure on C to obtain payment of a judgment debt in D’s favour, and not for any other purpose.

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278  The statutory tort of harassment

When seeking to establish the defence in s 1(3)(a), D must prove that his course of conduct was rational. This requires that: (1) D believed in good faith that there was a crime to detect or prevent; and (2) there was some logical basis for his view (and to which D had turned his mind) that the conduct constituting the harassment was appropriate for the purpose of preventing or detecting that crime. If D did not engage in these two ‘minimum mental processes’, then he did not acquire the necessary state of mind which s 1(3)(a) requires, and he will have acted irrationally, and lost the protection of the defence.

Even if D was acting with the predominant purpose of preventing or detecting crime, when harassing C as he did, the defence will be lost if D acted irrationally. This point formed the ratio of the Supreme Court decision in *Hayes v Willoughby*, and represents another difficult interpretative issue under s 1(3)(a).

The authorities prior to this had been quite at variance on the point. Some had regarded that the defence imported an objective test (i.e., that the hypothetical person would regard it as

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123 [2005] EWHC 2550 (QB) [183], [192].
124 [2012] EWHC 496 (QB) [120], aff’d: *WXY v Gewanter* [2012] EWHC 1490 (QB) [68], [71].
125 *KD v CC of Hampshire* [2005] EWHC 2550 (QB).
reasonable for D to suppose that there was a crime to be prevented/detected, and that D was reasonable in acting as he did to prevent/detect it, by harassing C). Some had preferred that the section contained a subjective test\textsuperscript{126} (which has the drawback that, as Lord Sumption put it in \textit{Hayes}, ‘[a] large proportion of those engaging in the kind of persistent and deliberate course of targeted oppression with which the Act is concerned will, in the nature of things, be obsessives and cranks, who will commonly believe themselves to be entitled to act as they do’\textsuperscript{126a}). Some had seemingly applied both tests to the facts.\textsuperscript{127} Some had preferred a test of rationality\textsuperscript{128} (i.e., that the conduct must have been justifiable, as having some rational basis).

In \textit{Hayes v Willoughby}, a majority\textsuperscript{129} of the Supreme Court approved of the principle noted above – that the test of D’s purpose in s 1(3)(a) is a qualified subjective enquiry, i.e., what did D actually believe, in carrying out his course of conduct, but subject to a ‘control mechanism’ of rationality.\textsuperscript{130} This was called by Lord Sumption a ‘minimum objective standard’, and ‘not a demanding test’.\textsuperscript{131} The appropriate control mechanism is \textit{not} that D must prove that his purpose in detecting/preventing crime, and the way in which he set about achieving it, were objectively reasonable. The protection of the defence will be lost, however, if (according to the majority) D has acted perversely, capriciously, outrageously in defiance of any logic, obsessively, or grossly unreasonably (all of these terms were variously used).

In \textit{Hayes v Willoughby},\textsuperscript{132} Mr Willoughby, D, was a former employee of Mr Hayes, C, in an IT-related business, but they fell out in 2002. Thereafter, D conducted what the trial judge called ‘a lengthy and persistent campaign of correspondence and investigation’ of C, alleging that C was liable for fraud and embezzlement, and tax evasion. D wrote numerous letters to various government entities (including the IRC, Government Departments) and the police, over a 7-year period. The Official Receiver’s office alone received 400 communications from D about C. C sued D for harassment. Held (at first instance): D’s conduct constituted harassment; but D had established the statutory defence under s 1(3)(a), that the purpose of his conduct was prevention or detection of crime, and that he had a genuine belief or strong, sincere and reasonably-based suspicion that C had been guilty of fraud, false accounting, or tax evasion. Held (CA and HL): the defence in s 1(3)(a) failed, for acts after June 2007. At that point, after the Official Receiver had said that C’s bank accounts were legitimate, and other authorities had declined to take action, D could no longer show that the purpose of the conduct was detecting crime. After that, the vendetta was misconceived and became unreasonable. There was no longer any logical connection between his supposed purpose and his acts – he was proceeding with the vendetta for its own sake.

As well as someone in Mr Willoughby’s position who persists in harassing C because of some sort of obsession, it is clear (per the example given in \textit{Hayes})\textsuperscript{133} that a schizophrenic who is acting under the delusion that C is about to commit murder and harasses C to prevent that ‘crime’, will not be able to avail himself of the defence. However, other cases may be more borderline.

The strong and vehement dissenting viewpoint of Lord Reed merits mention in this context.\textsuperscript{134} There were three reasons as to why Lord Reed preferred a purely subjective test to be

\textsuperscript{126} EDO MBM Technology Ltd v Axworthy [2005] EWHC 2490 (QB).
\textsuperscript{126a} [2013] UKSC 17, [12].
\textsuperscript{127} Mitton v Benefield [2011] EWHC 2098 (QB) [100].
\textsuperscript{128} Howlett v Holding [2006] EWHC 41 (QB) [33] (Eady J).
\textsuperscript{129} Lord Sumption wrote the leading judgment with which Lords Neuberger and Wilson agreed; Lord Mance agreed in a separate judgment; and Lord Reed dissented.
\textsuperscript{130} [2013] UKSC 17, [14]. \textsuperscript{131} \textit{ibid}, [14]–[15]. \textsuperscript{132} [2013] UKSC 17, affirming: [2011] EWCA Civ 1541.
\textsuperscript{133} [2013] UKSC 17, [13] (Lord Sumption). \textsuperscript{134} [2013] UKSC 17, [26]–[30].

applied to D’s purpose in s 1(3)(a). First, where is the boundary to be properly drawn, between separating irrational conduct (which loses D the defence) from unreasonable conduct (which preserves the defence for D)? Lord Reed confessed that he did not understand the test of irrationality as proposed by the majority, and that ‘I am not convinced that Parliament can have intended that a jury should be expected to understand and apply the sophisticated distinctions which Lord Sumption seeks to draw.’ Secondly, Parliament cannot have intended that public agencies whose remit it was to detect or prevent crime, or investigative journalists, should have to justify their conduct to a court, so as to prove that their course of conduct was ‘objectively rational’. Thirdly, Parliament did not impose any requirement that D be ‘rational’: ‘[t]he purpose for which a course of conduct is pursued is ordinarily ascertained by reference to the intention of the person who pursues it. To introduce a requirement of objective rationality requires the court to read in words which Parliament did not use.’

Again, the issue demonstrates the difficulties of interpreting a statutory tort, and the different degrees of willingness with which senior appellate judges are prepared to ‘judicially re-write’ a statute.

§HA.22 Reference to ‘preventing’ crime in s 1(3)(a) is likely to require a pre-identified crime and victim, and that the crime was imminent.

Reference to ‘preventing’ crime in s 1(3)(a) was judicially interpreted, in Edo Technology Ltd v Axworthy, to mean a course of conduct whereby D identifies a specific crime and victim, and where the danger of its commission was imminent or immediate. In Hayes v Willoughby, the Supreme Court noted that conduct by D to prevent crime was more likely than conduct to detect crime.

§HA.23 It is likely that a court would be bound to interpret s 1(3)(a) as being subject to the tests of necessity and proportionality, where D’s conduct towards C engaged C’s right to a private life (Art 8).

It was stated in KD v CC of Hampshire, in dicta, that any conduct referred to for the purposes of s 1(3)(a) which infringed C’s right to private life would engage Art 8, and would likely be subject to the tests of necessity and proportionality. On the point, Tugendhat J expressed ‘little doubt’, albeit that it did not arise on the facts, given that the events in the case took place before the HRA 1998 came into force in October 2000.

In KD facts previously, held: the taking of the five statements, and the cuddling incidents, amounted to a course of conduct, and constituted harassment. The whole course of conduct was not necessary to this investigation. Probably only three visits were necessary: one to take a statement, one to read it back once typed, and one to disclose the contents of the joint interview of the daughter. Obtaining explicit information about C’s sexual conduct was not necessary at all, and the telephone calls and visits were wholly disproportionate to what was needed in investigating C’s daughter’s allegations.

138 [2005] EWHC 2550 (QB) [183], [192].
**Pursuant to an enactment or rule of law**

This defence has been little-considered since the 1997 Act was introduced. 

**Litigants.** Where C alleges that the content of D’s pleadings and D’s exchange of documents in litigation amount to a course of conduct amounting to harassment, s 1(3)(b) would provide an effective defence, because disclosure, exchange of witness statements, etc, was pursued in accordance with case management directions and orders made by a court or tribunal under its governing rules of procedure – per dicta in *Vaughan v Lewisham LBC.*

**A reasonable course of conduct**

Unlike the statutory defence in s 1(3)(a) above, the Parliamentary drafters explicitly inserted into the defence in s 1(3)(c) a requirement that D’s conduct, in harassing C, was ‘reasonable’ in all the circumstances. It is purely an objective test, as Lord Sumption reiterated in *Hayes v Willoughby.*

This has been borne out in several scenarios:

**In the workplace.** Even if employees are distressed by managerial conduct (e.g., because of reasonable critical assessment of an employee’s poor performance), that is not harassment. Rather, that is ‘entirely within the proper and reasonable scope of the manager’s functions and duties’ (per *Majrowski v Guy’s and St Thomas’s NHS Trust*).

**Litigants.** If the parties are involved in litigation with each other, then correspondence, and communication, between them must continue for that purpose, so that both sides can protect their respective interests. However, not all correspondence exchanged during the course of the litigation will be protected by s 1(3)(c), if the correspondence is held to constitute harassment.

In *Iqbal v Dean Manson Solicitors,* facts previously, the defence of s 1(3)(c) was cited by the court, but was not ultimately successful, to excuse the course of conduct of harassment made up by the three letters sent by one side’s solicitors, D, which cast aspersions on the other solicitor’s, C’s, professional and personal integrity. In *Neocleous v Jones,* s 1(3)(c) could not succeed. Just because D, as a litigant, felt a ‘considerable sense of frustration and injustice over the way he was treated, or claims to have been treated’, by an opposing party involved in litigation, and was deeply aggrieved by the impact of that on his business and family life, that was not sufficient to make out this defence.

**Newspaper publications.** Where the ‘course of conduct’ is said to be the publication by the press of a series of articles targeting C and likely to cause distress to that individual (‘a course of conduct in the form of journalistic speech’, as it was termed in *Trimingham v Associated Newspapers Ltd*), that will be regarded as reasonable, under s 1(3)(c), so as to provide D, the newspaper/journalists, with a defence against harassment. This is subject to the caveat that the court must apply the ultimate balancing test (above) to the newspaper’s publication, and C’s complaint of harassment, whenever considering the application of the s 1(3)(c) defence. In *Trimingham* itself, the defence in s 1(3)(c), whilst referenced, did not need to be considered, given that D had not engaged in a course of harassing conduct that infringed the 1997 Act.

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REMEDIES

With respect to a claim for harassment, both remedies of damages and injunctive relief are expressly available to C under the 1997 Act.

Damages under the Act

The damages available to C for harassment do not, in all respects, resemble damages for common law torts:

s 3(2) [In a claim for harassment] damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

It will be recalled, from earlier in this chapter, that C’s damage does not need to be reasonably foreseeable. Some further key principles emerging under this provision include the following:

- it is not a pre-requisite to recovery of damages under the 1997 Act that C must have suffered a ‘recognised psychiatric injury’. A claim for mere anxiety or distress – unaccompanied by any physical injury – is sufficient.

In negligence suits in which pure mental harm is claimed, it will be recalled from Chapter 5 that C must satisfy the threshold test of a ‘recognised psychiatric injury’, generally in accordance with DSM-V or ICD-10. However, when enacting the 1997 Act, Parliament made a conscious decision to depart from that requirement. As noted in Majrowski v Guy’s and St Thomas’s NHS Trust, the Act ‘goes further than the common law in providing for damages for anxiety falling short of injury to health’. Of course, if there has been psychiatric harm caused to C by D’s harassing behaviour, that will increase the damages recoverable. It has been common for C, as a victim of harassment, to make a claim for psychiatric damage (e.g., depression, or an adjustment disorder).

In KD v CC of Hampshire, facts previously, held: the taking of the five statements amounted to a course of harassing conduct. However, the court did not accept that C had PTSD, or any other psychiatric disorder, as a result of her contact with X. Nevertheless, £10,000 was awarded to C for anxiety and injury to feelings.

- in claims for harassment under the 1997 Act, awards have been made for the following heads of damage: anxiety/injury to feelings; special damages; financial losses; and future medical care costs. In Majrowski, Lord Nicholls stated, in dicta, that the phrase in s 3(2), ‘among other things’, is predicated on the assumption that any loss or damage sustained by C by reason of the wrong, which are recognisable at law, are recoverable. As always, for general damages, the court will assess the damages in accordance with the Guidelines for the Assessment of General Damages in Personal Injury Cases, while, for special damages (i.e., out-of-pocket expenses), proof of purchase/receipts, etc, will be necessary to substantiate the claims;

where C has suffered significant levels of anxiety and distress, the level of damages will properly be at the higher end of the scale for such damages, given that there are (said the court in Singh v Bhakar\textsuperscript{149}) three important differences between damages for personal injuries resulting from a single trauma, and damages under the 1997 Act: (1) a course of conduct necessarily involves a significant period, and not a one-off traumatic incident; (2) C is deliberately targeted for conduct infringing the 1997 Act, for which C is entitled to an element of compensation; and (3) the course of conduct towards C cannot merely be negligent or even reckless, it must be deliberate;

\textsuperscript{149} [2006] EW Misc 1 (EWCC) [174].

where C has suffered significant levels of anxiety and distress, the level of damages will properly be at the higher end of the scale for such damages, given that there are (said the court in Singh v Bhakar\textsuperscript{149}) three important differences between damages for personal injuries resulting from a single trauma, and damages under the 1997 Act: (1) a course of conduct necessarily involves a significant period, and not a one-off traumatic incident; (2) C is deliberately targeted for conduct infringing the 1997 Act, for which C is entitled to an element of compensation; and (3) the course of conduct towards C cannot merely be negligent or even reckless, it must be deliberate;

\textsuperscript{149} [2006] EW Misc 1 (EWCC) [174].

\textsuperscript{150} [2009] EWHC 1726 (Ch) [116].

\textsuperscript{151} [1995] 1 WLR 1602 (CA).

\textsuperscript{152} [2009] EWHC 1726 (Ch) [117].

The following Table gives a sample of heads of damages, and quantum, in some leading cases:

<table>
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<th>The head of damage</th>
<th>Case example/s</th>
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<tbody>
<tr>
<td>Anxiety, injury to feelings, etc</td>
<td>In Mitton v Benefield,\textsuperscript{a} the evidence was that the Benefields were highly anxious; Mrs Benefield was scared to be in her own home, and apprehensive of the possibility of Mr Wilding-Mitton coming round when on her own; Mr Benefield was conscious that the main pressure of the harassment fell onto his wife. The evidence of third parties was that the Benefields were ‘very nice and very friendly’ before the harassment began, but that they came to feel that ‘they cannot come out of their house. They are now very reluctant to join in neighbourly activities’; ‘the blinds [are] almost always down. Mr Benefield ... looks as though he is under stress.’ This was a ‘serious case’ of harassment, because C’s ordinary enjoyment of life at home was ‘materially diminished’. General damages of £7,000 each were awarded to the Benefields.</td>
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\textsuperscript{a} [2011] EWHC 2098 (QB) [104], [107], [109]–[110].
The statutory tort of harassment

The head of damage | Case example/s
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**Awards for aggravated and exemplary damages may be awarded for the statutory tort of harassment.**

Notwithstanding that the statute is silent on the matter, aggravated damages are potentially available to C, where an action succeeds under the 1997 Act. As Tugendhat J confirmed in *KD v CC of Hampshire*, such damages are ‘primarily to be awarded to compensate for injury to a [C’s] proper pride and dignity and the consequences of her being humiliated. Aggravating features may also include the way that the litigation and trial are conducted’, but they should not generally be as much as twice the compensatory damages awarded to C. An award for injury to C’s feelings may already include any aggravating features of D’s conduct – and, if so, separate aggravated damages will not be appropriate, as otherwise that would lead to double recovery (per *Levi v Bates*).

Similarly, the fact that C has had to ‘relive’ the awful experiences in the litigation may properly be compensated for in the general damages, precluding any claim for aggravated damages (per *Singh v Bhakar* – general damages were elevated from £27,500 to £35,000 for that reason).

In *KD*, facts previously, £10,000 was awarded for aggravated damages. X denied all of C’s allegations, and C had to give further statements, attend the disciplinary proceedings when the matters

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154 [2012] EW Misc 9 (CC) [77], and for case description in table, see [83].
155 [2006] EW Misc 1 (EWCC) [171].
were aired in front of a wide number of people, and when she was cross-examined vigorously. That was repeated at the trial of this action causing her considerable distress.

KD\(^{156}\) also confirmed that exemplary damages (again, not referred to in the statute) may be awarded for oppressive and arbitrary behaviour by D under the 1997 Act.

In KD, the circumstances did not support an award. Whilst X's conduct was ‘undoubtedly oppressive and arbitrary conduct on the part of a police officer’, D had already been punished in disciplinary proceedings; the Chief Constable had behaved properly throughout, in that C's complaint was taken seriously and treated sensitively; and the damages already awarded were adequate both to compensate C and to punish D.

**Injunctive relief**

Injunctive relief, granted to C for the purpose of restraining D from pursuing any conduct which amounts to harassment, is expressly permitted by s 3(3)(a) of the 1997 Act. If D breaches the terms of an injunction without reasonable excuse, that is a criminal offence, pursuant to s 3(6).

A few principles have emerged of particular relevance, where injunctive relief has been sought by C to stop D's harassing conduct:

- if D's course of harassing conduct is that he has information about C which he threatens to (or does) publish, injunctive relief will not be precluded, simply because that material is already in the public domain. That is because information which is publicly available may nevertheless be particularly dangerous in the hands of D who threatens to pursue a course of conduct amounting to harassment (WXY v Gewanter\(^{157}\));

- an injunction awarded to C may prohibit D from doing what can be done lawfully by anybody else – e.g., preventing D from entering a particular public street; or preventing D from publishing/disseminating information about C (WXY v Gewanter\(^{158}\)). However, whether or not to grant injunctive relief will require a balancing of C's Art 8 rights and D's Art 10 rights.

In WXY v Gewanter, facts previously, held: injunctive relief granted. The particular information had not entered the public domain. However, D was 'likely to resume publication of, or threatening to publish private and confidential information, of [C] and thereby to continue to harass her', unless restrained.

- any injunction granted as between C and D must be 'practicable'. For example, where C and D are neighbours (as they were in Mitton v Benefield), such that the parties would continue to live in close proximity (until one of them moved away), then there would inevitably be occasions when those neighbours would have to communicate with each other – which the terms of the injunction would need to facilitate.

**THE RELEVANT PARTIES**

**Harassment of a corporation**

The current position

Companies cannot be harassed under the 1997 Act. The victim who is harassed must be an individual.


\(^{157}\) [2012] EWHC 1601 (QB) [21].

\(^{158}\) *ibid*, [100]–[101], quoting counsel's submission with approval.
Prior to 1 July 2005, there was lingering doubt as to whether the 1997 Act applied to corporate claimants who sought to sue for harassment. Typically, these were claims by a company, on behalf of its employees, against animal rights organisations who were protesting about the use of animals in medical research. In some cases, however, it had been suggested that the scheme of the 1997 Act was to protect individuals only from harassment (per DPP v Dziurzynski159 and Majrowski v Guy’s and St Thomas’s NHS Trust160).

The position was duly clarified with amendments to the 1997 Act via the Serious Organised Crime and Police Act 2005,161 whereby the following provisions were added:

### s 1(1A)  A person must not pursue a course of conduct –

- (a) which involves harassment of two or more persons, and
- (b) which he knows or ought to know involves harassment of those persons, and
- (c) by which he intends to persuade any person (whether or not one of those mentioned above) –
  - (i) not to do something that he is entitled or required to do, or
  - (ii) to do something that he is not under any obligation to do.

### s 7(5)  References to a person, in the context of the harassment of a person, are references to a person who is an individual.

Section 1(1A) was directed towards the protection from harassment of groups of people (i.e., ‘two or more persons’). Under the Interpretation Act 1978, it is provided that, in a statute, unless a contrary intention appears, “person” includes a body of persons corporate or unincorporated’. Hence, s 7(5) clarified that only individual persons can be harassed – so that where the employees or members of a firm or company are being harassed by D’s behaviour, their employer is not the appropriate entity who should sue. Without s 7(5), it was possible that s 1(1) and s 1(1A) ‘could be read as covering companies who are harassed. Section 7(5) makes it clear that this is not so’ (as confirmed in SmithKline Beecham plc v Avery162). That group of individuals must sue D as a group – which they may properly do by means of a representative action.

### A representative action

 Groups of harassed individuals (e.g., employees) can bring a representative action against D, pursuant to s 1(1A) of the 1997 Act. Representative actions are facilitated, procedurally, by r 19.6 of the Civil Procedure Rules.

The longstanding representative rule in English civil procedure provides that:

### 19.6(1)  Where more than one person has the same interest in a claim –

- (a) the claim may be begun; or
- (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
Provided that the representative, C, and all the represented persons have the ‘same interest’, then C can sue in a representative capacity, without the express authority of those he claims to represent.\(^1\) The representative action is not particularly useful, however, where the represented persons have individualised damages claims – indeed, actions have faltered on that basis, because of century-old jurisprudence that construes ‘same interest’ in a very restrictive fashion.\(^2\)

However, the representative action has proven useful, in harassment cases, in respect of injunctive relief, where C has been permitted to represent other persons who have been the subject of similar harassment (or threats of harassment) – whether from animal rights activists or from some other source:

In *SmithKline Beecham v Avery*,\(^3\) a campaign of harassment was carried out against the employees of SmithKline Beecham (GSK) by, inter alia, members of the Animal Liberation Front (ALF). The home of a GSK research chemist was sprayed with graffiti, including ‘scum’, ‘animal murderer’, and ‘ALF’; this was reported on a website in an article with the statement, ‘We all know what happens to slimy filth like that … yeah, the ALF come round and sort you out.’ Another GSK employee had two cars damaged by paint stripper and graffiti, and the tyres slashed; and a wall in the village of Dinton was sprayed with ‘Glaxo animal killer in your village’, where a former GSK executive lived. GSK sought injunctive relief to restrain D’s unlawful conduct by way of trespass and harassment. Held: the representative C, Mr Trundley, validly represented the Protected Persons, defined to include: the directors, employees, agents, subcontractors and suppliers of the GSK Group; and all persons seeking lawfully to visit or work at the premises of GSK. In *Law Society v Kordowski*,\(^4\) facts previously, held: the Law Society validly sued in a representative capacity under CPR 19.6 on behalf of all solicitors who were members of the Law Society, law firms, etc, and who were at serious risk of being named on the website. The Law Society had a common interest with those it represented, viz, preventing the publication of their names on the website. An injunction would be equally beneficial to all.

To reiterate, whilst the representative C may seek the consent of the majority of persons within the group, express consent on their part is not required, in order to validate C’s representative capacity, according to *SmithKline Beecham v Avery*.\(^5\)

A company can apply for injunctive relief

Corporate claimants are, however, entitled to claim injunctive relief, if it can be proved that the company (or its employees) are being harassed.

There is an alternative to a representative action by a company’s employees. Even though a victim of harassment has to be an individual, it has been judicially clarified that the ‘person’ in...

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\(^1\) *Independiente Ltd v Music Trading On Line (HK) Ltd* [2003] EWHC 470 (Ch) [22].


\(^3\) [2009] EWHC 1488 (QB) [3], [45], [47].


\(^5\) [2009] EWHC 1488 (QB) [46], citing: *John v Rees* [1969] 2 All ER 274 (CA) 284, and *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch) [24].
s 1(1A)(c) who can apply for injunctive relief is not limited to individuals. That person may be a company, which can be a useful tactic:

In *AGC Chemicals Europe Ltd v Stop Huntington Animal Cruelty (SHAC)*,\(^{168}\) a claim was validly instituted by Cs, who were five Japanese companies in the pharmaceutical and chemical industries, and which were suing for injunctive relief, under s 3 of the 1997 Act, against the animal rights activist groups, Stop Huntingdon Animal Cruelty, and the Animal Liberation Front.

**The appropriate D in harassment cases**

**Vicarious liability**

An employer can be vicariously liable for the statutory tort of harassment committed by its employee.

Both as a matter of policy and of statutory interpretation, judicial opinion has differed as to whether it was permissible for an employer to be vicariously liable for the statutory tort of harassment committed by its employee. The statute is silent on the issue. However, the verdict of the House of Lords, in *Majrowski v Guy’s and St Thomas’s NHS Trust*,\(^{169}\) was that an employer could be vicariously liable.

Nevertheless, the division of opinion among the judges, as *Majrowski* proceeded from trial to appeal, reflects a genuine difference of opinion about the policy and purpose of the 1997 Act. The whole issue is an interesting snapshot of the uncertainties which may arise, where statutory torts are created by Parliament but without the clearest of statutory language. The contrasting views are shown in the Table below:

<table>
<thead>
<tr>
<th>THE AVAILABILITY OF VICARIOUS LIABILITY</th>
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<tr>
<td>Arguments against (especially trial judge)</td>
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<td>• as a matter of construction of the Act, a claim only lies against an individual who is personally pursing a course of conduct amounting to harassment against another individual, and also, possibly against a corporation acting through someone as its ‘controlling mind’;</td>
</tr>
<tr>
<td>• the 1997 Act had been particularly used in employee claims – and Parliament did not intend to import vicarious liability in tort into the remedy provided by s 3, since the common law (e.g., negligence, assault) already provided adequate remedies for employment-related disputes;</td>
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</table>

\(^{168}\) [2010] EWHC 3674 (QB) [8]–[9].  
\(^{169}\) Majrowski [2006] UKHL 34, [21]–[25].

Of course, the course of harassing conduct which D undertook against C must have been ‘within the scope of D’s employment’ (or within the scope of D’s authority to act as agent of a company, as found in *S&D Property Investments Ltd v Nisbet*[^170^]), for vicarious liability to apply. For further consideration of the issues associated with vicarious liability, readers are referred to Chapter 18.

**Harassment by a protestors’ group, D**

A civil remedy for harassment may be pursued against an unincorporated association (via its nominated representatives) where the members of the unincorporated association have engaged in harassing behaviour.

As noted above, such actions (whether for damages or for injunctive relief) have been pursued under s 3 of the 1997 Act against animal rights groups. The group, D, has been sued under the same representative action referenced above under which employees of pharmaceutical and chemical businesses may sue (and which is governed by CPR 19.6). The rule requires that a group of defendants have the ‘same interest in a claim’. Both the groups, Stop Huntingdon Animal Cruelty (SHAC) and the Animal Liberation Front (ALF), were sued in *Smithkline Beecham plc v Avery*[^171^] under CPR 19.6. Although that rule does not expressly refer to unincorporated associations, Jack J concluded that those protestors who acted in the names of SHAC and the ALF had ‘a common interest in being able to continue their

[^170^]: [2009] EWHC 1726 (Ch) [119]–[122].
[^171^]: [2009] EWHC 1488 (QB) [57].
campaigns by acts of trespass and harassment, among others’. Hence, a representative order was appropriate against those entities and their representatives.

**Procuring the tort of harassment**

§HA.31 Where D has procured acts of harassment, that may be sufficient to constitute a ‘course of conduct’ by that D.

According to s 3, D can only be liable for the statutory tort of harassment if D has committed a ‘course of conduct’ of harassment against C. However, procuring acts of harassment will be sufficient to ‘count’, for the purposes of establishing a course of conduct. Under s 7(3A)(a) of the 1997 Act, D’s conduct ‘shall be taken, if aided, abetted, counselled or procured by another, to be conduct ... of the other (as well as conduct of the person whose conduct it is)’. This considerably widens the scope of potential defendants.

In *Levi v Bates*, facts previously, held: harassment of Mr Levi, C, was proven. There was a course of conduct, in that there were at least six occasions when the radio message was broadcast, plus an article – seven occasions in total. There were three Ds – Mr Bates, the Leeds United FC, and the Yorkshire Radio Ltd – and all were liable, but on slightly different bases, as the Diagram below shows:

<table>
<thead>
<tr>
<th>Procuring harassment</th>
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<tr>
<td><strong>C</strong></td>
</tr>
<tr>
<td><strong>D1 (Kenneth Bates)</strong> – procured the radio broadcast by D3, and hence, was jointly liable with D3, for those acts of harassment; plus was responsible (jointly with D2) for publication of the article – all of which constituted a course of conduct by D1</td>
</tr>
<tr>
<td><strong>D2 (Leeds United FC)</strong> – procured the radio broadcast by D3, and hence, was jointly liable with D3, for the acts of harassment; plus responsible (jointly with D1) for publication of the article – all of which constituted a course of conduct by D2</td>
</tr>
<tr>
<td><strong>D3 (Yorkshire Radio Ltd)</strong> – responsible for six radio broadcasts, sufficient for a course of conduct by D3</td>
</tr>
</tbody>
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172 [2012] EW Misc 9 (CC), especially [76].