

# CYBERSTALKING AND INTERNET HARASSMENT: WHAT THE LAW CAN DO

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## Abstract

*This paper addresses the issue of cyberstalking and internet harassment, and what legal remedies an internet user has when confronted with this form of behaviour. The paper will commence with a discussion of on-line harassment including the way in which the internet facilitates this behaviour. On-line harassment is similar to real-world stalking in the way that it can be disturbing to the victim. At the same time the unique environment of the internet creates "remoteness" on the part of the stalker, and provides a false sense of security arising from the apparent anonymity that is present on the internet.*

*The paper will discuss various approaches to the problem and demonstrate the various ways that current legislation and the common law can be used to deal with on-line harassment in New Zealand. In addition the paper will provide some immediate solutions for an internet user confronted with this behaviour.*

*Because the problem involves an apparent remoteness between the harasser and the victim (although the perpetrator may live just around the corner in much the same way as a "real-world" harasser may) reference will be made to mobile phones, repeated calls and harassing or disturbing text messaging.*

*The thrust of the paper will be to:*

- a) establish that the law DOES provide a remedy for internet based misbehaviour*
- b) show that steps can be taken to deal with the on-line harasser*
- c) identify some of the problems that arise with internet harassment that may require addressing in the future*

## Introduction

This paper addresses the issue of cyberstalking and internet harassment, and what legal remedies an internet user may have when confronted with this form of behaviour. The paper will first examine what constitutes cyberstalking and harassment and will discuss the way in which the internet may facilitate such behaviour. The nature of the behaviour is an effects-based one upon the victim wherein the stalker is anonymous, although the harasser may not be so. The remote nature of the internet, together with the false sense of security that the possible masking of one's identity lends presents an added and sometimes sinister element.

Secondly this paper will review the current harassment legislation in New Zealand and examine how this legislation has been applied by the Courts.

Thirdly the paper will consider civil remedies grounded particularly in the law of torts which addresses issues of liability arising from the way in which the behaviour of citizens affects others..

Finally the paper will consider "self-help" measures that individuals may adopt in dealing with harassment and cyberstalking.

## The Nature of On-Line Harassment and Cyberstalking

Harassment on the Internet can take place in a number of ways. One form may involve sending unwanted, abusive, threatening or obscene e-mails<sup>1</sup>. Another means involves electronic sabotage or spamming where the victim is sent hundreds of junk e-mail messages. A variant of spamming involves

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<sup>1</sup> MacGraw D, Sexual Harassment in Cyberspace: The Problem of Unwelcome E-mail, 1995 Rutgers Computer and Technology Law Journal 492

the sending of computer viruses to the victim. The third common form arises in live Internet relay chat sessions, message boards or news groups or by way of instant messaging.

Online harassment may also be indirect. The harasser may impersonate the victim and send abusive or fraudulent e-mails in the victim's name. The victim may be subscribed to mailing lists without his or her consent with the result that hundreds of unwanted e-mails are received every day. Hostile Usenet posts about the victim may appear or the perpetrator may spread vicious rumours about the victim online leaving abuse messages about the victim on website guest books. The harasser may even transmit offensive or altered images of the victim to websites or provide personal information about the victim online.

Examples of online harassment have occurred in the United States. In one example the victim received thousands of offensive telephone calls after her stalker posted a fake advertisement on a use net discussion group offering her services as a prostitute and providing her home address and telephone number<sup>2</sup>. This case led to the development of anti-online harassment laws in the United States.

Online harassment can involve sexual harassment which is unwanted contact of a personal nature, or other conduct based on sex affecting the dignity of men and women at work<sup>3</sup>. This can include unwelcome physical, verbal or non-verbal conduct. It is unwanted if such conduct is unacceptable, unreasonable and offensive to the recipient. Sexual attention becomes sexual harassment if it is persistent and once rejected by the recipient. However, a single act, if sufficiently serious, can also constitute harassment<sup>4</sup>. There are two ways of committing sexual harassment by computer. The first is direct, for example, by the use of e-mail in sending harassing messages to the victim. The second is indirect whereby a hostile workplace is created from the victim's perspective. This may arise by the circulation, for example, of sexually harassing e-mails between employees, or the distribution of sexually explicit material by computer<sup>5</sup>. This form of harassment is the electronic equivalent of placing pinups on a factory wall and if the display of such material from the victim's perspective causes offence it will amount to harassment<sup>6</sup>.

Online harassment is to be contrasted with cyberstalking. There is no universal definition of cyberstalking but it refers to the use of the Internet, e-mail or other electronic devices to pursue another person. The real world offence of stalking in its ordinary form involves an individual persistently watching, following, or in some way harassing a victim with unsolicited, obsessive attention. Computers add another dimension and provide increased potential for the obsessive stalker. The utilisation of e-mail means that the victim may be bombarded with material at home or at the workplace but the stalker may remain anonymous, causing the victim to feel threatened or to feel some sense of fear or dread<sup>7</sup>.

Cyberstalking may arise where an individual pursues or repeatedly attempts to contact someone via the Internet. The Internet provides a number of protocols by way of which this may happen, such as e-mail, chat rooms, instant messaging, bulletin boards, website discussion forums or user net groups. The distinction between harassment and cyberstalking is that cyberstalking is characterised by pursuit and fear<sup>8</sup>.

Thus, cyberstalking can be distinguished from online harassment in that it has the additional characteristic of pursuit and fear. Not all online harassers engage in cyberstalking and vice versa.

## Internet Characteristics that Facilitate Harassment

1. The anonymity of the Internet appeals to harassers. The Internet facilitates experimentation with different identities and provides an opportunity to communicate with others whilst remaining

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<sup>2</sup> <http://www.mindspring.com/~techmom/harassed/>

<sup>3</sup> **British Telecommunications PLC v Williams** (1997) IRLR 668

<sup>4</sup> **Bracebridge Engineering Ltd v Darby** (1990) IRLR 3

<sup>5</sup> **Greenslade v Chicago Sun Times Inc**, 112 F3d 853 (7<sup>th</sup> Circuit) 1997

<sup>6</sup> Angel J, *Computer Law*, 4<sup>th</sup> Ed, Blackstone Press Ltd, London, UK, 2000 At 17

<sup>7</sup> Cullen P, QC "Computer Crime" in Edwards L and Waelde C, (eds) *Law and The Internet, Regulating Cyberspace* Oxford, Hart Publishing, 1997, at page 217

<sup>8</sup> see WHOA-Working to Halt Online Abuse ([www.haltabuse.org](http://www.haltabuse.org))

anonymous. The anonymity of the Internet allows individuals to create an online persona or “handle” with little relationship to his or her real life identity.

Anonymity may be achieved by a number of means. Pseudonymity is achieved by forging an e-mail header so as to create an online digital persona. Impersonation of others may also be possible by making an e-mail appear as if it was sent from a different e-mail account.

Anonymity on the Internet can be achieved by using anonymous re-mailers. These are computer services which cloak the identity of users who send messages through them by stripping all identifying information from an e-mail and assigning a random replacement header. The most sophisticated re-mailer technology is called Mixmaster<sup>9</sup>.

Mixmaster uses public key cryptography granting unprecedented anonymity. A user may chain several re-mailers together and send communications safe in the knowledge that the trail created would be so complex that it would be impossible to follow. The validity of identity on the Internet has been described as one of its chief attractions<sup>10</sup>

The anonymity of cyberspace enables extreme forms of expression. It allows people to say things that they might never say face-to-face. When online people may be more willing to misbehave. This illustrates some of the unique characteristics of the medium that contributes to the potential for online harassment but also demonstrates some of the vulnerabilities and desires of those who choose the Internet for an online service for their social communication.

Internet anonymity is not as impenetrable as some users may think. The true identity of users who make contact with victims via a pseudonym may be gained by contacting the third party provider who has retained details of the pseudonym’s real identity. The Finish re-mailer [www.penet.fi](http://www.penet.fi) retained logs and details of users which were later seized by the Police to track down online offenders<sup>11</sup>. Cookies, a software device deposited on the hard drive of a person’s PC on visiting a particular website, can be used to ascertain an individual’s true identity in that it supplies information to the website owner or controller which may assist in identification.

2. Ease of dissemination of information via the Internet is another characteristic that attracts harassers. The Internet allows hate groups to reach impressionable audiences with an ease they have not previously enjoyed.
3. Online communication has a one dimensional nature that facilitates harassment. Face-to-face communication provides a context for the listener. The listener can balance the content of the message with facial expressions, body language, intonation and volume. In contrast, online communication may lead to misunderstandings and misinterpretation.
4. The Internet enables harassers to harass victims without leaving home and to do so cheaply. In the live chat context the ease by way of which a message may be sent is attractive to harassers.
5. Technology itself may create a further problem. An example may be seen in the development of a new computer database at <http://192.com>. This enables users to obtain addresses and telephone numbers by typing in a name and location suggesting that online harassment could become easier in future. On the other hand, however, the potential for this may have been realised by the developers of [192.com](http://192.com) who make it clear that records are kept of searches carried out using the database and those records may if required be forwarded to the Police.<sup>12</sup>

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<sup>9</sup> for information see <http://www.obscura.com/~loki/re-mailer/mixmaster-faq.html>

<sup>10</sup> Privacy in Cyberspace: Personal Information, Free Speech and The Internet in Burkes P (Ed) Privacy and Loyalty, Oxford Clarendon Press 1997 page 93.

<sup>11</sup> Campbell K K, Anonymity: The Internet’s Great Myth <http://www.kkc.net/toronto-star/1996/ts1205.htm>

<sup>12</sup> The Harassment Act 1997 is echoed in similar legislation in England known as the Protection from Harassment Act 1997. For an evaluating the efficacy of that legislation see Finch, Emily “Stalking the Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997”, 2002 Crim LR 703

For a comparative review of stalking laws and their implementation in the United States see Miller, N *Stalking Laws and Implementation Practices* October 2001 Institute for Law and Justice, Alexandria, Virginia

## Legislative Remedies

New Zealand has three Acts that deal with harassment in the non-cyber world: the Harassment Act 1997, the Domestic Violence Act 1995, and the Telecommunications Act 2001.

### The Harassment Act

The Harassment Act makes a civil remedy available to any victim of harassment. It makes the most serious types of harassment criminal offences. It empowers the Court to make orders to protect victims who are not covered by domestic violence legislation,<sup>13</sup> and provides effective sanctions for breaches of the criminal and civil law relating to harassment.<sup>14</sup>

The object of the Harassment Act is stated in section 6. This is the primary guide for Courts and persons exercising powers conferred by the Act. The range and relative gravity of behaviour that could constitute harassment are recognised:

6. **Object-** (1) The object of this Act is to provide greater protection to victims of harassment by-
  - (a) Recognising that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context; and
  - (b) Ensuring that there is adequate legal protection for all victims of harassment.
- (2) This Act aims to achieve its object by-
  - a. Making the most serious types of harassment criminal offences:
  - b. Empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation:
  - c. Empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation:
  - d. Providing effective sanctions for breaches of the criminal and civil law relating to harassment.
- (3) Any court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1).

This requires the Court to recognise that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context.<sup>15</sup> This is beneficial when considering the application of this Act to online harassment, as emails for example, may appear trivial in isolation, but when viewed in context, clearly could constitute harassment.

“Harassment” is defined in s.3 of the Harassment Act 1997:

“A person harasses another if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing *any specified act* to the other person on at least two separate occasions within a period of 12 months.”

Civil harassment which enables the Court to make a restraining order occurs when the following requirements are met:

- (a) The respondent has harassed or is harassing the applicant; and
- (b) The behaviour causes the applicant distress or threatens to cause the applicant distress, and that behaviour would cause distress or would threaten to cause distress to a reasonable person in the applicant’s circumstances and in all the circumstances the degree of distress caused or threatened by that behaviour justifies the making of an order and the making of an order is necessary to protect the applicant from further harassment.

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<sup>13</sup> *Woodman v Brooks* (1998) 17 FRNZ 612 is authority for the point that the Harassment Act specifically applied to those relationships not covered by the Domestic Violence Act 1995. ‘Domestic Relationship’ is not defined in the Harassment Act 1997. Section 9(4) of the Harassment Act provides that a person in a domestic relationship may not apply for a restraining order against the other person in the domestic relationship. ‘Domestic Relationship’ is however defined in the Domestic Violence Act 1995: section 4. Refer to later discussion in this paper.

<sup>14</sup> Harassment Act 1997, Section 6.

<sup>15</sup> *P v H* [1988] DCR 715; *C v G* [1998] DCR 805, 806; *H v S* [2000] DCR 90,95.

It is also significant to note that the Act specifically does **not** apply to people who have been in a domestic relationship<sup>16</sup> where one of the objects of the Act is to provide greater protection to victims of harassment by empowering the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation.

### The Legislative Scheme

The legislative scheme of the Harassment Act has been described thus by the Court of Appeal<sup>17</sup>

[12] Criminal harassment, stated by s 6 to apply to the “most serious types of harassment”, requires either an intent to cause the person harassed to fear for his or her safety or the safety of a family member or knowledge that in the particular circumstances the harassment is likely reasonably to cause fear for safety. This is made clear by s 8 which provides:

8. Criminal harassment – (1) Every person commits an offence who harasses another person in any case where –

- (a) The first-mentioned person intends that harassment to cause that other person to fear for –
  - (i) That other person’s safety; or
  - (ii) The safety of any person with whom that other person is in a family relationship; or
- (b) The first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for –
  - (i) That other person’s safety; or
  - (ii) The safety of any person with whom that other person is in a family relationship.

“Safety” is defined to include a person’s “mental well-being”.

[13] Where the necessary elements of intent or knowledge are not present there is no criminal aspect, but a person being harassed may apply for a restraining order under s 9. A restraining order may be made by the Court under s 16(1) where the respondent has harassed or is harassing the applicant and additional requirements are met:

...

- (i) The behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and
  - (ii) That behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant’s particular circumstances; and
  - (iii) In all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and
- (c) The making of an order is necessary to protect the applicant from further harassment.

[14] A restraining order, if no longer or shorter period is specified, expires after one year. It may be made under s 21 only for such period “as the Court considers necessary to protect the applicant from further harassment.”

[15] It is an offence under the Act to contravene a restraining order. For a first offence of breaching a restraining order, the offender is liable to imprisonment for a term not exceeding six months. Repeat or serial breaches are punishable by imprisonment for three years.

[16] Under s 3 “harassment” is defined as a “pattern of behaviour” that is directed against the complainant which includes any of the acts specified under s 4 “on at least 2 separate occasions within a period of 12 months.” Section 4(1) defines “specified act” for the purposes of the Act to mean “in relation to a person” any of the following:

- (a) Watching, loitering near, or preventing or hindering access to or from, that person’s place of residence, business, employment, or any other place that the person frequents for any purpose;
- (b) Following, stopping, or accosting that person;

<sup>16</sup> See s.9(4) and also note s.6 Harassment Act 1997

<sup>17</sup> R v D [2000] 2 NZLR 641 para 12 - 19

- (c) Entering, or interfering with, property in that person's possession:
- (d) Making contact with that person (whether by telephone, correspondence, or in any other way):
- (e) Giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:
- (f) Acting in any other way –
  - (i) That causes that person ("person A") to fear for his or her safety; and
  - (ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

[17] Subsection (2) provides, "to avoid any doubt", that subs (1)(f) includes the situation where:

- (a) A person acts in a particular way; and
- (b) The act is done in relation to a person ("person B") in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person ("person A"); and
- (c) Acting in that way –
  - (i) Causes person A to fear for his or her safety; and
  - (ii) Would cause a reasonable person in person A's particular circumstances to fear for his or her safety, –

whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.

Subsection (3) provides that subs (2) does not limit "the generality of subsection (1)(f)."

[18] Williams J, in the High Court, was of the view that the relationship between s 4(1)(f) and s 8(1)(b) was of some difficulty because s 4(1)(f) imposed an objective standard (that which would cause a reasonable person in the complainant's particular circumstances to fear for his or her safety) whereas s 8(1)(b) requires the accused to know that the harassment is likely to cause the other person, "given his or her particular circumstances", to reasonably fear for his or her safety.

[19] In the present case because the "specified acts" fall within the other acts recognised by s 4(1)(a) – (e) we do not have to reach a final view on that aspect of para (f). In any event, it is not at all clear that there is likely to be any difficulty in practice in the application of s 4(1)(f) to a criminal charge under s 8. The two tests are directed at separate inquiries: s 4(1)(f) identifies the constituent acts of harassment; the test in s 8(1)(b) is concerned with the accused's knowledge of the effect likely to be caused. Since s 4(1)(f) is a provision designed to catch unusual acts outside the categories identified in s 4(1)(a) – (e), some qualitative restriction (as is provided by the "reasonable person" test) was clearly thought by Parliament to be necessary. The test in s 8(1)(b) does not invoke the "reasonable person": the fear known likely to be engendered in the particular complainant must be "reasonably" held "given his or her particular circumstances".

### **Can Harassment Take Place On-Line?**

A "specified act" is defined in section 4 and includes watching, loitering near, preventing or hindering access to or from a person's place of residence, business or employment, following, stopping or accosting a person, entering or interfering with property in that person's possession and significantly, section 4(1)(d) making contact with that person (whether by telephone, correspondence, **or in any other way**<sup>18</sup>.

It is necessary to prove for the purposes of an offence that the person who harasses another intends that harassment to cause the other person fear for:

- (i) That other person's safety; or
- (ii) The safety of any person with whom that person is in a family relationship.

the 'specified acts' given in this section are real world examples. In order to be applicable to online harassment, judges are required to undertake a somewhat flexible interpretation of this section. Nevertheless section 4(1)(d) of the Act could cover certain forms of online harassment. If the harasser

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<sup>18</sup> My emphasis

'makes contact with' the victim of the harassment, a specified act will be present. Because the definition does not limit the possible methods of communication, evidenced by the words 'in any other way,' it is clear that the Legislature consider that harassment is a matter of perception by the victim, and can occur in a variety of ways.

The broad words used by the legislature could encompass online harassment via email, news group, IRC chat and instant messaging programs, for example. This therefore opens the door for this statute to apply to online harassment, and consequently, that the Harassment Act can apply to the Internet.

Although this would cover the above forms of online harassment, it is possible that the phrase 'makes contact with' may be too restrictive, in that it would only cover online harassment where the harasser 'makes contact with' the victim. This would not cover indirect modes of online harassment such as signing the victim up to unwanted mail lists, or leaving abusive messages about the victim on bulletin boards, for example.

This means that although the Harassment Act can be extended to combat some forms of online harassment, it cannot be extended to combat all forms of online harassment.

It is possible that indirect modes of online harassment, that do not involve the harasser 'mak[ing] contact with' his or her victim could be covered by subsections (e) and (f) of section 4. 'Giving offensive material to that person, or leaving it where it will be found by that person'<sup>19</sup> could include such things as posting abusive messages about a person in Usenet discussion groups, for example.<sup>20</sup> Subsection f 'sets a reasonably high threshold to be met by the applicant'<sup>21</sup> and is subject to problems of proving fear in relation to Internet communications. It is likely to be difficult to prove that a person in an online relationship felt fear, especially if the other person lived in another city, and did not know their physical address. In order to succeed in proving fear, it would be likely to be necessary to prove that the cyber stalker could carry out his or her threats

Insofar as IRC Chat and Instant Messaging are concerned, it could be argued that Internet based chat and Instant Messaging do not have the same intrusive effect as annoying telephone calls or poison pen letters. One need only disconnect from the Instant Messaging program or change one's subscription number<sup>22</sup>. Similarly, if one is confronted by repeated harassing conduct from a particular individual<sup>23</sup> in a chatroom, all that the victim has to do is disconnect and leave. These solutions are available in the real world. The harassing letter may be thrown, unread, into the trash. The annoying telephone call may be terminated by hanging up. The Harassment Act is not directed at the totality of the message. It is directed at the particular *conduct*. It is also premised upon the fact that an individual in a free society should not have to disengage from a chosen environment or activity simply to terminate the specified acts of harassment.

The case of *Beadle v Allen*<sup>24</sup> provides an interesting and useful analogy. In that case a doctor was bombarded with faxes and letters and a number of them were sent to different organisations. The Court defined the following tests that should be fulfilled:

- a) Is there a pattern of behaviour directed against the applicant?
- b) Did that pattern of behaviour include a specified act?

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<sup>19</sup> Section 4(1)(e) Harassment Act 1997.

<sup>20</sup> *P v H* supra note 27. In this case writing numerous letters that caused distress over a 12 month period came within a s4(1)(e) specified act.

<sup>21</sup> *C v G* supra note 27 at 808 per Judge CM Shaw.

<sup>22</sup> The most popular Instant Messaging programs are AOL Messenger and ICQ. ICQ, originally developed in Israel, was taken over by AOL, but still maintains an independent presence on the Internet ([www.mirabilis.com](http://www.mirabilis.com)) and is available for free. To subscribe the ICQ user is assigned an ICQ number and may choose a nom de plume(handle) as well as registering one's e-mail address. Normally ICQ users have a list of individuals with whom they wish to communicate on their list of contacts. Whenever a contact is on-line the users may instant message with one another or may open a chat room to which others may be invited. The ICQ server allows users to search for other users by "handle" or e-mail address. Thus, the harasser need not be on the list of contacts to make contact, and may send messages by adding him or herself temporarily to the victims contacts list

<sup>23</sup> I do not intend to address anonymity issues in this context, for anonymity is not as significant aspect of Internet behaviour as once was thought.

<sup>24</sup> [2000] NZFLR 639

- c) Was that specified act to the applicant (including in relation to the applicant, within the meaning of s.5) on at least two separate occasions within a period of 12 months<sup>25</sup>
- d) Is the Court satisfied that the applicant has been caused distress or is threatened to be caused distress, judged on both a subjective and objective standard?
- e) What is the degree of distress in all the circumstances of the case?
- f) Does the degree of distress justify the making of a restraining order?
- g) What is the degree of restraint that is reasonably justifiable to protect the applicant from harassment but to curtail as little as possible the right to freedom of expression to which the respondent is entitled?

The last item arose from the necessity to consider the implications of the freedom of expression provisions of the Bill of Rights Act, but the result was that the Court found that harassment had been established. The case is significant because it involved the use of communications technology such as faxes, thereby recognising that personal presence or face-to-face contact is not an essential ingredient.

*Beadle v Allen* demonstrates that the invocation of the Harassment Act has implications for certain rights and freedoms inherent in a free and democratic society. In the case of *B v Reardon*<sup>26</sup> it was held that in most cases the defences of truth and honest opinion must apply to proceedings under the Harassment Act.

Thus publication of material may not be harassment if they were not defamatory or were protected by defences of truth or honest opinion.<sup>27</sup> The Judge referred to the defence that specified acts were done for a lawful purpose<sup>28</sup> and to *Beadle v Allen* and the importance of balancing the right to freedom of expression under section 14 of the Bill of Rights Act, and the nature of the limitations imposed by the Harassment Act. The comments of Potter J were referred to:

[54] Section 17 of the Act provides a limitation on the wide ambit of the Act by stipulating that a specified act proved to be for a lawful purpose cannot provide the grounds for an order under s.16(1)(a). (Judge Kerr in *Irvine v Edwards* (supra, para [27]) interpreted s.17 to mean that even if a respondent's behaviour is lawful on the face of it, harassment may exist in the way the acts are performed or undertaken). The English case of *Huntingdon Life Sciences Ltd* (supra, para [48]) held that lawful purpose included protesting. I consider it would also include lobbying for change, providing information and making complaints. Such behaviour is lawful on the face of it and will not constitute harassment to qualify for a restraining order unless directed at a particular individual causing distress or likely to cause distress, judged by a subjective and objective standard. The Court must consider all the circumstances of the case before deciding whether the **degree of distress** experienced by the applicant justifies the making of an order. Such circumstances could include –

- [i] the nature of the material;
- [ii] the frequency and manner of the specified acts;
- [iii] the particular characteristics of the applicant;

<sup>25</sup> Or within the period of 12 months preceding the filing of the application for restraining order if the view expressed by Tompkins J in *Bakker v Schoobert* (Unreported; High Court; Hamilton; CP 35/99; Tompkins J) is preferred

<sup>26</sup> [2000] DCR 575

<sup>27</sup> In *B v Reardon* (supra) it was held that the statements made were intimidatory and fell within s.4 of the Act, that the requirements of s.16 were met and that distress had occurred and the harassment was likely to continue if an order was not made.

<sup>28</sup> Section 17 Harassment Act



- [iv] whether or not the applicant has made it clear to the respondent that he or she no longer wished to have contact or receive information.”

The test in balancing harassment and the provisions of the New Zealand Bill of Rights Act was expressed thus:

“In the preceding paragraphs I have concluded in relation to those four factors that freedom of expression is a fundamental freedom of central importance under NZBORA; that in enacting the Act Parliament recognised a public interest in limiting freedom of expression to protect victims of harassment; in applying the Act the Court must consider all the circumstances of the case in deciding whether the degree of distress experienced by the applicant for the restraining order justifies the making of an order; and that the intrusion on freedom of expression should be so limited as to impinge only to the extent necessary to protect a victim of harassment as can be demonstrably justified in a free and democratic society. In that way, the competing rights can be accommodated and made consistent with each other, so there is not inconsistency as described in s.4”<sup>29</sup>

## **The Difference Between Civil and Criminal Harassment**

### **Civil Harassment**

The remedy of the victim in civil law, whether or not the harassment is a criminal offence, is to apply to the District Court for a restraining order.<sup>30</sup> Broadly, the court may make such an order if it is satisfied that this is justified in all the circumstances by the degree of distress caused or threatened, and making an order is necessary to protect the applicant from further harassment.<sup>31</sup>

### **Criminal Harassment**

Harassment is criminal where the first person intends to cause the other person to fear for his or her, or a family member's, safety, or the first person knows that the harassment is likely to cause the other person, in his or her particular circumstances, such fear.<sup>32</sup> Every person who commits an offence on summary conviction, to imprisonment for a term not exceeding 2 years.<sup>33</sup>

This means that once it has been established that harassment has occurred<sup>34</sup> it must then be established that the behaviour caused the applicant to fear for their safety. This is an objective assessment of what would be caused in the applicant's circumstances. It must be found that it is reasonable for the person to fear their safety. The person's circumstances must be looked at, to determine this objectively.

The recipients of messages on the Internet, cannot distinguish real threats from those which are not. Threats are frightening, whether delivered in person or over the computer. Even those who receive no actual threats but are victims of harassment express fears that such hostile behaviour may lead to physical violence.<sup>35</sup>

Consequently, difficulties would arise in relation to online harassment in respect of proving that a reasonable person who was the victim of online harassment would fear for their safety. It would probably be necessary to establish that the harasser knew where the victim lived so that such threats could be carried out, and consequently, that the fear experienced by the victim was reasonable.

If this is established, the court has a residual discretion whether or not to award a restraining order against the harasser.<sup>36</sup>

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<sup>29</sup> Para 58

<sup>30</sup> Harassment Act 1997, section 9(1).

<sup>31</sup> Harassment Act 1997, section 16(1).

<sup>32</sup> Harassment Act 1997, section 8. As to knowledge of the circumstances see *R v D* [2000] 2 NZLR 641 (CA).

<sup>33</sup> Harassment Act 1997, section 8(2).

<sup>34</sup> By fulfilling the elements of section 3 and 4 of the Harassment Act 1997.

<sup>35</sup> *E-Business Legal Handbook* Supra at 687.

<sup>36</sup> Harassment Act 1997, section 16.

## The Domestic Violence Act

The Domestic Violence Act 1995 applies in cases of domestic relationship. It deals with domestic violence by one person against another with whom that person is or has been in a domestic relationship. The relationship is critical to application of the Act. Violence may mean physical abuse and sexual abuse. It also includes *psychological abuse* including but not limited to:

- (i) Intimidation;
- (ii) Harassment;
- (iii) Damage to property;
- (iv) Threats of physical abuse, sexual abuse or psychological abuse.

Harassment is not defined.

A person is in a domestic relationship with another if the person:

- (a) Is a partner of the other person; or
- (b) Is a family member of the other person; or
- (c) Ordinarily shares a household with the other person; or
- (d) Has a close personal relationship with the other person.

In determining whether or not one person has a close personal relationship with another the Court must have regard to:

- (a) The nature and intensity of the relationship and in particular –
  - (i) The amount of time the persons spend together;
  - (ii) The place or places where that time is ordinarily spent;
  - (iii) The manner in which that time is ordinarily spent but it is not necessary for there to be a sexual relationship between the persons;
- (b) The duration of the relationship.

Can on-line harassment be addressed by the Domestic Violence Act where the parties are in a relationship covered by that Act? Can an on-line relationship qualify for Domestic Violence Act protection?

It is a matter of speculation at this stage whether or not a close personal relationship could include an online relationship – a relationship which has arisen from a meeting in a chat room and where the two persons regularly meet on the Internet who have never physically met one another. The Court has to have regard to the amount of time the persons spend "together" which would seem to suggest a physical relationship but in addition it has to take into account the place or places where that time is ordinarily spent (which could be in a chat room) and the manner in which that time is ordinarily spent.

The object of the Domestic Violence Act is to ensure that when domestic violence occurs there is effective legal protection for its victims and the Court is empowered to make certain orders to protect the victims of domestic violence in a speedy and inexpensive way. It also provides appropriate programmes for persons who are the victims of domestic violence and normally requires a perpetrator to attend a counselling session with sanctions for failing to do so.

The difficulty that occurs is that if it is held that an on-line relationship qualifies as a relationship for the purposes of the Domestic Violence Act, the protections provided by the Harassment Act may not apply. If, on the other hand, an on-line relationship is not held to qualify for Domestic Violence Act protection, some of the advantages of the Domestic Violence Act, such as counselling, may not be available.

It is not inconceivable that a dedicated harasser would, as a first step, challenge jurisdiction when proceedings were first commenced under either legislation, suggesting that Domestic Violence proceedings are inappropriate because an on-line relationship does not apply, or, alternatively, that Harassment Act proceedings are ill-founded because there was an on-line relationship, and the remedies, if any, should be sought under the Domestic Violence legislation.

Section 3 defines 'domestic violence' as physical or sexual abuse; psychological abuse including but not limited to intimidation, harassment,<sup>37</sup> damage to property, threats of physical abuse, sexual abuse or psychological abuse.<sup>38</sup>

### **Application to Text Messaging**

It has been held that the grounds under the Domestic Violence Act may be met in the case of text messaging. In the case of *M v H*<sup>39</sup> there had been a "real world" domestic relationship, thus satisfying that requirement. There was evidence of psychological abuse occasioned by the sending of text messages to a friend of the applicant that were clearly directed towards the applicant.<sup>40</sup> The Judge was satisfied that the defendant had sent the messages and that they were intimidatory, harassing, and contained threats of physical abuse. Moreover the pattern contained an implied threat of further psychological abuse.

He then addressed the issue of sending the messages to a third person and said:

" [10] If a respondent sent a text message to a third person, without any likelihood that the applicant would ever know about it, then I do not think that can be psychological abuse of the applicant. However, in the present context it is pretty clear to me that this series of text messages sent to SH was bound to come to the attention of the applicant, was bound to unsettle her, and the person sending them ought to know that that was the probable consequence. Indeed, it is likely that it was the intention.

[11] Accordingly, I find that sending these kinds of text messages to a friend of the applicant, where it could reasonably be expected that they would come to the notice of the applicant, and were likely to upset her, amounts to harassment of the applicant herself. Similarly, where the message has an intimidatory content, sending the text message is intimidation of the applicant, even though she gets it indirectly.

[12] It is clear pursuant to s 14(5) that the applicant regards this ongoing harassment and intimidation as serious. So do I. I think that the applicant is entitled to a reasonable amount of peace from Mr B at the conclusion of their relationship, and in my view it is necessary to make the protection order."

### **The Problem of a Domestic Relationship**

Section 4 of this Act defines 'domestic relationship' as existing when a person is a:

- partner of the other person, or
- is a family member of the other person, or
- ordinarily shares a household with the other person, or
- has a 'close personal relationship' with the other person.

The last of these criteria has given the Courts the greatest difficulty in this area of the law.<sup>41</sup> It is particularly problematic in relation to online harassment, but it is the avenue through which online harassment could be covered by this Act. Where such a relationship is found to exist, a victim of domestic violence may seek a protection order under the Act. However, the meaning of this phrase presents difficulties.

In order to determine whether a person has a 'close personal relationship' with another person, the court must have regard to:<sup>42</sup>

- the amount of time the persons spend together,
- the place or places where that time is ordinarily spent, and
- the manner in which that time is ordinarily spent.

It is not necessary for a sexual relationship to exist between the persons. In addition, the duration of the relationship must be considered.

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<sup>37</sup> Not defined in this Act, so presumably takes the Harassment Act meaning.

<sup>38</sup> Specific mention is made in relation to child abuse which is not discussed in this paper..

<sup>39</sup> Unreported, Family Court, Manukau FP 092/338/02 17 December 2002

<sup>40</sup> A typical message reads " I will make sure u burn and I mean burn ... u and yr family. C u wen I'm looking at u? Hopefully in Hell. Watch yr mother bitch, jus in case. Fuk all u"

<sup>41</sup> Supra note Atkin [1998] NZLJ at 26.

<sup>42</sup> Section 4(4)(a) and (b) Domestic Violence Act 1995.

The leading case concerning 'close and personal relationships' is an appeal decision of Hammond J, *A v P*.<sup>43</sup>

The word 'close' is surely a critical qualifier. Thus a man who keeps a mistress in a flat would likely qualify; and if there was a falling out between long-standing best friends, that might well qualify. It is not easy to draw a bright line. But the legislature has surely attempted to draw a line between making this statutory provision a general regulator of social relationships, and the perceived need to curb domestic violence....At the end of the day, whether a personal relationship is or was 'close' can only be determined on the evidence...Clearly mere acquaintanceship will not do. And the statutory terminology does not refer to 'friendship' which is a different and more precious thing again...Whatever the relationship is, and however it came about, it has to be 'close' otherwise the legislation would subtract from the normal wear and tear of everyday human relationships. The Act is not a vehicle for infantile vendettas, or mindless tit for tat in the course of human affairs. And, to stop one person from having contact with another is a serious thing in a human society: humanity does not repose in isolation.

Atkin<sup>44</sup> notes that this provision is entirely suitable for boyfriend/girlfriend relationships that have turned sour.<sup>45</sup> While former intimate relations fall within the category of 'close personal relationships', it is currently uncertain whether former intimate online relationships that result in one party harassing the other, are captured by this phrase. There is no case law on point. Such a relationship may have developed by email correspondence or online chats. For example, two people might meet regularly in a chat room and have developed an intimate relationship online, despite never having had physical contact. It is mere speculation as to whether or not such a relationship can be classified as 'close and personal' in terms of the Domestic Violence Act.

Because the Court is directed to have regard to the amount of time the persons spend together, this could suggest that a physical relationship is required. However, the Court must also consider the place in which that time is spent. This could include a chat room.

Possible arguments why such a relationship should be deemed 'close and personal' are that there is no need for a sexual relationship to be present.<sup>46</sup> This may suggest that physical contact is not necessary.

In the case of *Woodman v Brooks*<sup>47</sup> Giles J considered the policy of the statute in addressing the nature of a close personal relationship. One must consider whether the nature of the relationship was the kind of social relationship that the Act was designed to regulate. A restrictive approach by a Judge to the nature of the relationship could exclude the application of the Act to an "on-line" relationship.

Hammond J's statement in *A v P*<sup>48</sup> that best friends may qualify as a 'close and personal relationship' for the purposes of this Act, endorses this argument. An online relationship may be just as intense and have as much emotional involvement as non-cyber relationships. In *A v P* the Court was influenced in finding that there was a 'close personal relationship' by the fact that they had shared long talks on the phone, and had a contest to see how often they were in touch with each other.<sup>49</sup> A second helpful case is *L v R*<sup>50</sup> in which a 'close and personal relationship' was found between two former lovers who had met in an Internet chat room. They spent part of each day together, either communicating on the telephone or online.<sup>51</sup> This shows the willingness of New Zealand Courts to recognize that close relationships can arise on the Internet.<sup>52</sup>

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<sup>43</sup> [1997] NZFLR 878, 880.

<sup>44</sup> Atkin op cit. at 27.

<sup>45</sup> *S v P* [1997] NZFLR 181; *T v C* [1997] NZFLR 417. In both cases the parties had had intimate relations that amounted to close and personal relationships.

<sup>46</sup> Domestic Violence Act 1995, section 4.

<sup>47</sup> [199] NZFLR 64

<sup>48</sup> [1997] NZFLR 878.

<sup>49</sup> Other factors were that the two had known each other in the past prior to an affair, they shared child-care on more than one occasion, and Mrs A put on a tupperware party for Mrs P.

<sup>50</sup> [2001] 20 FRNZ 500.

<sup>51</sup> In addition, they shared sexual relations, the respondent offered to pay for a future holiday together, and he developed a relationship with the applicant's children.

<sup>52</sup> However, it is important to note that the relationship moved from the "on-line" environment to become a physically intimate one.

Arguments can also be mounted that such a relationship does not constitute a ‘close and personal’ relationship for the purposes of this Act. The Domestic Violence Act deals with ‘domestic violence’ between people in a ‘domestic relationship.’ The use of the word ‘domestic’ suggests that this Act is concerned with people that are living together, and it seems that the Harassment Act should apply otherwise. The direction to the Court to consider the amount of time that is spent together<sup>53</sup> implies that physical contact is required. However, because the Court is directed to also consider the place that the time was spent together, it could be argued that the fact the parties did not have physical contact is not decisive. This is beneficial to the extension of this Act to online relationships, where one partner may be in Christchurch for example, and the other in Auckland.

Therefore, while it can be said that the Domestic Violence Act could apply to former online relationships where one party subsequently harasses the other, as with the Harassment Act, its application is dependent on Judges being prepared to adopt a flexible interpretation of the legislation. This is a disadvantage as it means that a Judge unfamiliar with the Internet may be unlikely to take this bold step. This it is not sufficient protection for victims of online harassment.

### **The Telecommunications Act**

In terms of misuse of telecommunications devices, the provisions of the Telecommunications Act 2001 create certain offences. Section 8 legislates against offensive language and disturbing use of the telephone. A telephone station is any terminal device capable of being used for transmitting or receiving any communications over a network designed for the transmission of voice communication. The definition is wide. “Terminal device” is not defined but it is interesting to note that the definition of a telex station has been repealed. Thus, telephone station could include the normal telephone as we know it, a fax machine and a computer in that a computer can be used for transmitting or receiving any communication over a network which is designed for the transmission of voice communication.

Using this extended definition, which has not been tested in the Courts, every person commits an offence against the Act who, in using a telephone station (which includes a computer by my analysis) uses profane, indecent, or obscene language, or makes a suggestion of a profane, indecent, or obscene nature, with the intention of offending the recipient.

One does not have to look far in Usenet groups including groups as innocuous as nz.general to find that profane, indecent or obscene language is frequently used.

It is an offence for a person in using a telephone station who uses or causes to be used indecent or obscene language or makes or causes to be made a suggestion of an indecent or obscene nature for the purpose of obtaining any pecuniary gain or other commercial benefit. This section raises interesting implication when we come to consider the question of the trading in objectionable material over the Internet.

It could well be that the Telecommunications Act could be used quite widely to control certain types of behaviour on the Internet. The fact that it is not probably arises from the following:

- (i) Difficulties in policing;
- (ii) Difficulties in identification;
- (iii) Difficulties in conceptualisation

for when one normally considers the use of language using a telephone station one normally thinks of a voice communication using a telephone device – connected to a landline or cell phone – rather than a computer. It is possible to have resort to the Telecommunications Act as long as the Internet user is in fact using a voice capable line for his or her internet connection. We must recall the definition

“**any terminal device** capable of being used for transmitting or receiving **any communications** over a network designed for **the transmission of voice communication.**”

Computer based communication goes well beyond the usual telephone voice communication and can encompass electronic or digitally based communications such as e-mail, IRC chat and the like. The only significant delineator is that the network must be designed for the transmission of voice communication.

It is important to note that the network must be **designed** for voice communication, and not **used** for voice communication. Conceivably, fax communications could be caught by the legislation.

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<sup>53</sup> Domestic Violence Act 1995 section 4.

What of the person who uses a satellite connection for the Internet. Many satellite systems involve the use of a dial-up landline to send data away from the computer and the satellite is used to receive incoming data. The rate of transfer in is far greater than the rate of transfer out. In such a scenario, a telephone line is normally being used and the analysis above is still valid. In some respects it is enhanced in that the offending communication is **outward** traffic which is transmitted **only** by the telephone line. The satellite plays no part other than to complete the TCP/IP circuit and send the signal that more packets comprising the total message be sent.

Therefore, it is possible to resort to the Telecommunications Act to combat online harassment, as long as the Internet user uses a voice capable line for his or her Internet connection; and provided that the offence is not restricted to oral communication. In considering the application of this Act to the Internet, it is necessary to consider the Internet connection to establish whether or not a network that is designed for the transmission of voice frequency communication is used.<sup>54</sup>

A cable connection to the Internet enables Internet connection up to ten times faster than dial-up modems. In such connections to the Internet, a phone line is only required if the user utilises a dial-up modem as well as a cable modem.<sup>55</sup> Therefore, whether or not the Telecommunications Act is applicable to communications over the Internet with a cable connection is dependent on whether or not the cable is designed for the transmission or receipt of voice frequency communication. If a cable connection uses a network that is dedicated to data communication, then this will not fit the definition, and not be covered by the Telecommunications Act.

Wireless connections to the Internet mean that no phone line is required to use the Internet, so this connection is truly portable. A wireless connection to the Internet enables users to use the Internet without the need to be at a desk with a phone line.<sup>56</sup> Therefore it appears that this type of Internet connection will not be covered by this Act as the network was not *designed* for voice frequency communication, which is necessary to fulfill the definition of 'telephone station.'<sup>57</sup>

ADSL or Asymmetric Digital Subscriber Line technology enables computer data to be sent down telephone lines at a number of discrete frequencies above those used for voice traffic. A filter at a user's premises and at the telephone exchange, separates the voice and data signals. Since both voice and data signals can travel over the telephone line simultaneously, there is no need to install a separate line for Internet access. This therefore uses a network that is designed for the transmission or receipt of voice communication, and is consequently covered by this Act.

The application of the Telecommunications Act 2001 would be helpful to victims of online harassment. It would catch some behaviour that occurs in chat rooms, where offensive or profane language is commonly used. It would also be of assistance in combating irritating emails sent by a harasser to a victim.

Thus we have three statutes that may provide remedies and that may protect citizens from unwelcome communications over the Internet. Even although some of the legislation is clearly "technology specific", broad and conceptual definition in the Harassment Act particularly allows the application of this legislation to internet activity. It is yet to be seen whether or not these remedies will be used.

An online harasser could possibly breach section 306 of the Crimes Act 1961. This section makes it an offence to threaten to kill, or to cause grievous bodily harm, to another.<sup>58</sup> The maximum penalty for this offence is seven years imprisonment.<sup>59</sup> In addition, section 307 makes it an offence with maximum imprisonment of three years, for anyone who sends or causes to be received, knowing the contents thereof, any letter or writing threatening to destroy or damage any property,<sup>60</sup> or animal.<sup>61</sup> If an online harasser, with intent to annoy or intimidate another person, sends an email that threatens to break or damage a dwelling house, he or she may be liable for a maximum of three years imprisonment.<sup>62</sup>

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<sup>54</sup> As required by the s2 definition of 'telephone device.'

<sup>55</sup> [www.telstraclear.co.nz/products/help/#saturntv](http://www.telstraclear.co.nz/products/help/#saturntv)

<sup>56</sup> [www.walkerwireless.co.nz/static/aboutthetrial.asp](http://www.walkerwireless.co.nz/static/aboutthetrial.asp)

<sup>57</sup> As provided in section 2.

<sup>58</sup> Section 306(1)(a) Crimes Act 1961.

<sup>59</sup> Section 306(1) Crimes Act 1961.

<sup>60</sup> This means real or personal property (section 2 Crimes Act 1961).

<sup>61</sup> Section 307(1) Crimes Act 1961.

<sup>62</sup> Section 308(1)(a) Crimes Act 1961.

## Employment Legislation

The authors in the Tort section of Butterworths Online<sup>63</sup> state that, occurrences of online harassment at work could be in breach of an employer's statutory duty to provide a safe workplace for his or her employees.<sup>64</sup> A safe workplace includes one that is free from workplace harassment.<sup>65</sup> In extreme cases, victims of workplace harassment, as a consequence the harassment, develop a number of physically manifested stress-related disorders. Physical injuries are not covered by the Accident Insurance Act 1998. This opens the door for employees to seek compensatory damages against an employer.<sup>66</sup> Therefore, an employer may be in breach of a statutory duty if his or her employees are the victims of online harassment.

An employer owes a duty of care to its employees to ensure that they are safe from harm.<sup>67</sup> Therefore it is possible that an employer may be liable for breach of this duty if its employees are the victims of online harassment. Potentially, this duty could extend to ISP's who are aware of the problem, but have not taken any steps to ensure their system is not used to further the situation.

Finally, both the Employment Relations Act 2000<sup>68</sup> and the Human Rights Act 1993<sup>69</sup> make workplace harassment unlawful. As workplace harassment is the main area of reported incidents of harassment, these provisions are important when considering online harassment.

## The Use of Civil Remedies

In 1996 the plaintiff had visited the defendant and was photographed by a video camera in various provocative poses. She claimed that the pictures were taken in circumstances of privacy and there was no intention that they should be published.

Towards the end of 2000, some websites appeared allowing voyeurs to access pornographic images, among them the pictures of the plaintiff. The circumstances of presentation were such that anyone viewing the images could assume that the plaintiff consented to their publication.

An anonymous and spiteful letter was sent to the plaintiff's father drawing his attention to the presence of photos of his daughter on the website. The plaintiff's lawyers contacted the first defendant who made arrangements for some (but not all) of the websites to be discontinued. Proceedings were commenced pleading privacy, breach of confidence, harassment and intentional infliction of emotional harm.

Although the judge had reservations about the last two causes of action, he had no doubt that there was an equity impressed upon the first defendant not to use the material in public because it was obtained on an understanding of privacy and concluded that there was a strong case under that head. He also opined that although not pleaded, an action in defamation could lie.<sup>70</sup>

## Causes of Action in Tort

### Harassment

The Law of Torts in New Zealand notes that the Courts may be on the verge of establishing a new tort of harassment.<sup>71</sup> The leading English authority is *Khorasandjian v Bush*<sup>72</sup> where a man, whose friendship

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<sup>63</sup> Chapter 10.13; <http://www.butterworthsonline.com/lpBin20/lpext.dll/bw/L12/358/ebt/1/6ab/10a7/11bf;17/11/02>.

<sup>64</sup> Section 6, Health and Safety in Employment Act 1992.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> This traditional common law duty of employers is given statutory expression in the Health and Safety Employment Act, section 6.

<sup>68</sup> Section 108.

<sup>69</sup> Section 62.

<sup>70</sup> *H v McGowan* Unreported, High Court, Auckland, CP 147-SW01; 6 April 2001; Anderson J. The case actually dealt with whether or not an Anton Piller Order should issue restraining the defendants from using the images and delivering up the information and images held in electronic form. However, it was necessary for the plaintiff to establish facts which could ground a cause or causes of action, and the case is significant in recognising that these internet-based facts could do so.

<sup>71</sup> Todd, 3<sup>rd</sup> Ed at 913.

with a woman had broken down, made threats of violence against her, and harassed her with unwanted telephone calls. She suffered great stress. It was held that his conduct amounted to a private nuisance, and that harassment was actionable if it caused illness, physical or mental, a risk of such illness would justify a quia timet injunction. The Court of Appeal upheld an interlocutory injunction restraining the defendant from 'using violence to, harassing, pestering or communicating with' the defendant.

The judgment of Dillon J at first instance has laid the ground for the development of a new tort of harassment that would enable the use of injunctions to forbid one person molesting another to an extent that could cause injury to health.<sup>73</sup> He said 'I find it difficult to give much weight to the general dictum that there is no tort of harassment.'<sup>74</sup> The House of Lords did not question the validity of this statement. Therefore online harassment could potentially be pursued under this developing tort.<sup>75</sup>

## **Assault**

An assault is an intentional act causing the plaintiff to apprehend the imminent infliction of a battery on his or her person.<sup>76</sup> This is to be judged objectively and it must be clear that a reasonable person in the plaintiff's position would have had the necessary fear of immediate harm.<sup>77</sup> This applies to a broad range of human conduct. Not all threats that are not accompanied with personal violence constitute an assault. There must in all cases, be the means of carrying the threat into effect.<sup>78</sup> In addition, it must be clear that the assailant has the intention to cause that apprehension.<sup>79</sup> The Law of Torts in New Zealand,<sup>80</sup> and Principles of Criminal Law,<sup>81</sup> state that words alone can constitute an assault provided they are apt to induce the requisite fear or apprehension of immediate force or violence.<sup>82</sup>

It is unlikely that a target of Internet harassment would have actual apprehension (as opposed to fear) that harmful contact would be imminent. It is possible that this could be proved if the victim knew that his or her harasser knew where he or she lived, and was therefore capable of carrying out the online threats. However, the concept of imminent violence is critical to the tort.

## **Battery**

A battery is the act of intentionally applying force to the body of another person without that person's consent or other lawful justification.<sup>83</sup> The actor must make actual contact with the target's body, and this must be done without the consent of the target. Words alone would not amount to a contact. Therefore, this remedy is of no assistance to a victim of online harassment.

## **Intentional Infliction of Emotional Distress**

Intentional infliction of emotional distress (IIED) arises when:<sup>84</sup>

The defendant has...willfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act.

Recovery extends to severe emotional distress leading to bodily injury, or psychiatric harm.<sup>85</sup> A victim of online harassment against his or her harasser could bring a cause of action for breach of this tort in relation to deliberate or reckless statements made to him or her that caused emotional harm.

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<sup>72</sup> [1993] QB 727 (CA).

<sup>73</sup> Ibid.

<sup>74</sup> At 738 (CA).

<sup>75</sup> From a practical point of view Harassment Act proceedings may be more effective. In view of the existence of that legislation, it may be that the development of the tort may be arrested.

<sup>76</sup> Todd. Op cit, at 98.

<sup>77</sup> *T v H* [1995] 3 NZLR 37 at 51 (CA).

<sup>78</sup> *Stephens v Myers* (1830) 4 C & P 483; 173 ER 921.

<sup>79</sup> *Tuberville v Savage* (1669) 1 Mod R3; 86 ER 684.

<sup>80</sup> Todd Op Cit.

<sup>81</sup> Simester AP, Brookbanks WJ, *Principles of Criminal Law* 2002 Ed, at 574.

<sup>82</sup> *T v H* [1995] 2 NZLR 37 at 51.

<sup>83</sup> *P v T* [1998] 1 NZLR 257 (CA).

<sup>84</sup> *Wilkinson v Downtown* (1998) 21 UNSWLJ 55.

<sup>85</sup> *Tucker v News Media Ownership Ltd* 20/10/86, Jeffries J, HC Wellington CP477/86; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.



## Nuisance

A private nuisance is an unreasonable interference with a person's right to the use or enjoyment of an interest in land.<sup>86</sup> An action in private nuisance can be brought only by a person with a sufficient interest in the land affected by a person with a sufficient interest in land affected by it.<sup>87</sup> It is possible to argue that the continued making of unwanted Internet communication could result in a nuisance claim made by the victim of online harassment.

It has been suggested that once a Net contact has been established as unwanted, and that the sender of communication is aware that further contact is unwelcome, a plaintiff might be able to advance the claim that continued unwanted contact has interfered with her enjoyment of her property (computer) and the Internet service, (which she may need for educational, business or entertainment purposes).<sup>88</sup>

However, the House of Lords decision in *Hunter v Canary Wharf Ltd*<sup>89</sup> has now firmly set the law of nuisance as merely a protection of rights in land. Their Lordships insisted that damages in nuisance are *not* awarded to compensate inhabitants of the premises of personal injury, illness or physical discomfort they have suffered. Instead, damages are awarded to compensate the person in possession of the land for the diminution in the utility or amenity value of the land during the period for which the nuisance persisted.<sup>90</sup> Therefore it will only protect a victim of harassment where the harassment interferes with the victim's use or enjoyment of his or her land. Therefore, it would be a contrived argument to argue that a computer was land for the purpose of this cause of action.

## Invasion of Privacy

Intentional intrusion, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

In the case of *P v D*<sup>91</sup> Nicholson J recognised that the tort of privacy encompassed public disclosure of private facts. Whether there is a breach of privacy should be considered with reference to four factors:

- a) the disclosure of private facts must be a public disclosure and not a private one
- b) Facts disclosed to the public must be private facts and not public ones
- c) The matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities
- d) The nature and extent of the legitimate public interest in having the information disclosed

These four factors provide a balance for deciding between the right of free expression and the right of privacy in cases of public disclosure of private facts.

While it is unlikely that an invasion of privacy claim would survive based on a single harassing email or online chat, in a situation involving posting on an electronic bulletin board of information about individuals being made known to potentially millions of people, an invasion of privacy claim might survive. It is doubtful that such an 'intrusion' would be considered as anything other than 'highly offensive [and objectionable] to a reasonable person.'<sup>92</sup> as long as it fulfilled all of Nicholson J's criteria.

### ii. Tort Defences

There are two possible defences that a defendant may raise in response to a tort cause of action by a victim of online harassment.

First, consent to a communication may be claimed by a defendant if he can show that an accuser willingly responded to his communications, or that she failed to tell him that his electronic advances were

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<sup>86</sup> Todd op cit. at 491.

<sup>87</sup> Ibid.

<sup>88</sup> Bell Vicki, Denise De la Rue, *Gender Harassment on the Internet* <http://www.gsu.edu/depts/~lawppw/lawand.papers/harass.html> at 8, 17/11/02.

<sup>89</sup> [1997] AC 655; [1997] 2 All ER 426.

<sup>90</sup> Todd op cit. 706.

<sup>91</sup> [2000] 2 NZLR 591,601

<sup>92</sup> Todd op cit 706.

unwanted.<sup>93</sup> Further, if he can show that an accuser repeatedly jointed him in a private chat, or failed to leave a channel, he may be able to successfully claim that the target impliedly consented to the contacts.

Secondly, assumption of the risk may be successfully pleaded to a tort-based cause of action. Some users assert that women who use the net must accept the risk that they may be harassed, stalked or otherwise offended.<sup>94</sup> For example, the names of chat lines and newsgroups are given as examples that should raise warning flags about potential harassment, even to new users. Alternatively, a homepage with provocative or suggestive pictures may increase the likelihood of harassment. This could be ample evidence of assumption of the risk of getting into a potentially distressing relationship.

### Self Help Approaches

A number of self-protection methods are available to protect victims of online harassment. Some argue that the problem of online harassment that is created by only a few members of the Internet community should be dealt with through self-regulatory solutions.<sup>95</sup> Whether or not this is the case, such preventative steps can help prevent online harassment, and are beneficial to victims until steps are taken by the legislature.

First, it is wise that users choose a gender-neutral name. This is similar to listing a telephone number with an initial rather than a first name, to avoid harassing calls. The use of standard or passive names, so as to not draw attention to oneself is suggested along with the use of an anonymous re-mailer, and an anonymous browser.<sup>96</sup>

In addition, it is prudent to have passwords that are a meaningless combination of letters and numbers and that are changed frequently.<sup>97</sup> Passwords should never be given out and should never be sent out via simple email messages.

Moreover, personal information divulged online should be kept to a minimum.

Online profiles or biographies should regularly be checked to see what information is available to a potential harasser, and the information that is provided there should be limited. They should be edited often. Email headers and signatures should be regularly reviewed.

Users of newsgroups should be familiar with the nature and scope of a newsgroup before participating. Those that use online chat programmes should choose secure ones that do not permit tracking ISP numbers. Users are advised to use caution when agreeing to 'meet' someone on a private chat line of the IRC. In contrast to large, active chat lines, there are usually no witnesses to a private conversation, which may create proof problems in the future, should the conversation become offensive, unless a self-generated log is kept.. Chat rooms or discussion groups that have led to offensive comments in the past should be avoided

Bell and De La Rue<sup>98</sup> advocate educating users with 'netiquette' which is etiquette for online communications. This may be particularly appropriate use of newsgroups.

Victims should report their harassers to the service provider and request both that the provider help to remove the offensive material and revoke the harasser's account. This is ineffective in the long run however, as the offender can always obtain an account with another provider and repost the offensive material.

Warning messages can be posted on bulletin boards, by victims of harassment to inform other users of their experiences, and warn each other of those in cyberspace who maybe potentially hazardous.

There are a number of self-appointed Internet patrollers that have been involved in tracking the senders of offensive email messages. Among the organisations offering assistance in tracking down online harassers

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<sup>93</sup> Bell, Vicki, Denise de la Rue *Gender Harassment on the Internet* <http://www.gsu.edu/depts/~lawppw/lawand.papers/harass.html> at 8, 17/11/02.

<sup>94</sup> Ibid.

<sup>95</sup> Akdeniz Yaman, *Cyberstalking: The Regulation of Harassment on the Internet*, page 17.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid

<sup>98</sup> Supra.

and stalkers are 'CyberAngels,'<sup>99</sup> 'Cybertrackers,'<sup>100</sup> and 'Women Halting Online Abuse' (WHOA).<sup>101</sup> Once the perpetrator is identified, a message through email calling for an end to the harassing behaviour is sent out to the perpetrator. These self-policing activities may help in some instances but their overall effectiveness remains to be determined.

Finally, technological advances could inhibit online harassment. A blocking function could be created, similar to a telephone company's 'call blocking' service. This would enable users to detect an objectionable email message pattern, then report the behaviour by forwarding a message to their server to block all communication from the identified source.

Similarly, a 'caller ID' type function may be helpful in allowing a target to immediately trace a message to its source, without the assistance of a server. Technological advances such as these would not only provide consistent and dependable weapons to fight harassment, but would take the burden for ending harassment off the victim, who is otherwise forced to take active steps to evade his or her offender.

## Conclusion

Internet users are entitled to assume a safe environment and that those with whom they interact online will treat them with respect. For those who fall below the norms of acceptable behaviour in the "real world" sanctions may be imposed or remedies may be available to the victim.

Although it has been a perception that the Internet is a free-wheeling "rule-free" "anything goes" environment this is not in fact so. If one view the Internet as a communication system involving real people in a fixed and identifiable location, it is clear that the law must apply. When one removes the technology and considers the nature of the behaviour it may be clear that it falls within the ambit of harassment of domestic violence. The technology may be used as a smokescreen for offensive or unacceptable behaviour but it is clear that the law provides remedies for misbehaviour on the Internet but, by the same token, Internet users should not be oblivious to the potential for dangerous or risky contacts made and communications sent in cyberspace. In the same way that one avoids potentially risky confrontations or situations in the real world, one should behave similarly on the Internet.

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<sup>99</sup> <http://www.cyberangels.org/>>

<sup>100</sup> <http://www.alyssa.com/cyber.html>.>

<sup>101</sup> <http://www.whoa.femail.com/>>