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Book Review: Sexual Harassment in the Workplace, by Arjun P. Aggarwal and Madhu M. Gupta

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BOOK REVIEW

Sexual Harassment in the Workplace

BY ARJUN P. AGGARWAL AND MADHU M. GUPTA
(Toronto: Butterworths, 2000)[1] xxvii + 508 pages, 3d ed.

The treatise has an important role in the making of law in a common law system. When courts, tribunals, and even other scholars recognize a work as the standard reference book in a particular subject matter, they bestow upon it a power to infuse the law with its author's particular vision. This tendency is emphasized in Canada, where the legal publishing market is often too small to support multiple texts on a given topic. Unfortunately, the fact that such works are as much the product of their authors' politics as their painstaking research is not always recognized by legal decision makers. John Wigmore on evidence and Glanville Williams on the criminal law of rape provide two stark examples of the fusion of sexism and legal doctrine, yet their texts have been considered seminal to our understanding of the law.[2] Once a work gains acceptance as the standard reference in the area, judges and tribunals tend to treat such works as telling them what the law *is*, rather than what the law *should be*. In fact, these two facets of the treatise are often combined in ways that are not always immediately apparent in the text.

Arjun Aggarwal's *Sexual Harassment in the Workplace* was first published in 1987, at a time when Canadian courts were still divided on the question of whether sexual harassment in the workplace was a practice of sex discrimination in employment. It remains the only scholarly Canadian text on this important aspect of sex equality rights. For this reason, it is worth reviewing this third edition not only for its treatment of significant developments in sexual harassment law since the 1992 second edition, but also for the underlying approach of this standard reference text to a topic central to women's equality.

As for recent developments in the law, this edition reflects the fact that there has been very little substantive development in Canadian sexual harassment law in the last ten years. This stands in marked contrast to the United States, where the Supreme Court has released four important

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[1] [hereinafter *Sexual Harassment in the Workplace*].

[2] G. Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens, 1961); J.H. Wigmore, *Evidence in Trials at Common Law*, 3d ed. (Boston: Little Brown, 1972). See also G. Williams' more recent work, such as "The Meaning of Indecency" (1992) 12 Legal Stud. 20, and his discussion of wife rape in "The Problem of Domestic Rape" (1991) 141 New L.J. 205, 246–47.

decisions on sexual harassment since 1993.[3] This disparity is not surprising. In the United States, women who are sexually harassed can sue in federal court, offering the potential for meaningful damage awards. In Canada, women, for the most part, must rely on the overburdened human rights process, which promises meagre compensation after a process that can last longer than most litigation. The utter failure of the Canadian system to offer meaningful redress to women who have been harassed has produced two outcomes. First, human rights commissions are now heavily promoting mediation as a way of settling disputes. However, regardless of its advantages, mediation does not produce jurisprudence. Second, unionized women are turning to grievance arbitration to deal with sexual harassment complaints. Once again, this is an essentially private process that takes place in a labour relations setting rather than one focused on anti-discrimination law or human rights. It provides little incentive to arbitrators to explore general principles of sex equality law in their awards.

The third edition of *Sexual Harassment in the Workplace* reflects these facts. First, American lawyer Madhu Gupta has been added as a co-author and the materials on related U.S. law have been considerably expanded; and, second, the authors have added material on alternative fora for seeking a remedy for sexual harassment. For the most part, this material is comprehensive and accurate.

The authors clearly take sexual harassment seriously, calling it a "global issue" for the "new millennium" in their introduction.[4] Unfortunately, this tone is not consistent throughout the book, nor is the global, millennial "issue" raised by sexual harassment clearly identified. One of the more awkward additions to this edition is chapter 2, entitled, "Sexual Harassment in the Unexpected." This catch-all term encompasses a list of sexually harassing behaviour by "the rich and famous," lumping together President Clinton, the Speaker of the Ontario Legislature, Bob Barker (host of the American game show *The Price is Right*) and Gordon Stuckless, a former employee of Maple Leaf Gardens, among others. It is difficult to draw any coherent organizing principles from this list. The complaints against some of these men were legally proven; others were not. The behaviour of Stuckless, who sexually assaulted a number of boys who hung around the Gardens, was dealt with by the criminal law and has little

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[3] *Harris* v. *Forklift Systems*, 114 S. Ct. 367 (1993); *Oncale* v. *Sundowner Offshore Services*, 118 S. Ct. 998 (1998) [hereinafter Oncale]; *Faragher* v. *Boca Raton*, 524 U.S. 775 (1998); and *Burlington Industries* v. *Ellerth*, 118 S. Ct. 2257 (1998).

[4] *Sexual Harassment in the Workplace*, *supra* note 1 at 71.

to do with workplace harassment as that term is generally understood. Presumably all targets of sexual harassment find the harassment unexpected; it is hard to see what distinguishes these cases for such a title.

In a departure from the generally positive tone of the other chapters, this chapter also alludes frequently to the trauma of false accusations and the potential for the wealthy and the prominent to be blackmailed by unscrupulous women.[5] This approach, which is repeated in the section on sexual harassment of students by teachers, merely repeats, without evidence, the stereotype that women use false allegations of sexual impropriety to get revenge. This reasoning conveniently ignores the intense hostility inflicted on the complainants in cases involving public figures.[6]

This rather flawed attempt at bipolar objectivity is carried over to the section of chapter 2 on "Sexual Harassment in Sports," in which a long description of complaints made by athletes, of coerced intercourse and other sexual assaults by coaches, is followed by an incongruous quote from an American sports psychologist about coaches still learning the "boundaries" of hugs and pats on the back.[7] This section also errs in stating that consent is always an issue for the purposes of the criminal law even when the coach is in a position of authority. In fact, that is only the case where the athlete is over the age of eighteen.[8]

This chapter does contain a generally useful and well-researched discussion of same-sex sexual harassment, including the recent U.S. Supreme Court decision on this topic.[9] This is a topic that deserves better treatment than to be buried under the rest of the material in this chapter. There are a number of distracting errors in the new sections. For example, the authors appropriate verbatim a passage from the U.S. Supreme Court

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[5] See *e.g. ibid.* at 66, 73, 74.

[6] One need look only as far as the treatment of the complainants in the three prominent cases discussed in this chapter in which allegations were not proven: Clarence Thomas, President Clinton and Bob Barker. The lesson to be drawn from these cases, if there is one, is that it is not easy to make a true allegation, let alone a false one.

[7] *Sexual Harassment in the Workplace*, *supra* note 1 at 85.

[8] *Ibid.* at 86. This is one of a number of minor inaccuracies about the criminal law in this book. For example, the authors write that the complainant must bear the costs of a criminal prosecution, when in fact these are borne by the state, as in a human rights proceeding.

[9] *Oncale*, *supra* note 3.

decision.[10] This oversight, and the many other similar editing errors, need to be corrected in the next edition.

Chapter Three, "Characteristics of Sexual Harassment," is perhaps the most important chapter in the book, since if complainants cannot prove that the conduct to which they object meets the definition of the term, questions of remedy are irrelevant. This chapter has not changed a lot since the second edition and is generally clear and accurate. It is also more condemnatory of sexual harassment and less likely to lapse into the language of false accusations and over-sensitive complainants than the previous chapter. However, the authors fail to recognize explicitly that, at times, they are taking a position on what the law should be, rather than merely reporting what it is accepted as being.

One example of this tendency is the issue of the unwelcomeness of the alleged harasser's conduct. The authors correctly note that not all sexual comment or contact between coworkers is sexual harassment. They suggest that the complainant, therefore, bears the onus of "making it known, in clear and precise terms that such actions are not acceptable,"[11] a passage which has been relied on by some human rights tribunals.[12] Yet placing a resistance requirement on the complainant is neither a necessary nor an immediately obvious consequence of the sexual harassment or sex discrimination legislation in most provinces. Placed at its highest, the legislation in Ontario requires proof that the harasser ought to have known that his or her conduct is unwelcome.[13] Not even this provision necessarily requires that the complainant object. In other jurisdictions where legislation contains no such express requirement, it has been held sufficient in many decisions that the complainant prove that the conduct or comments were sexual in nature, that they were unwelcome to the complainant, and that they negatively affected the complainant's work opportunities or working environment.[14] In the case of employers, constructive knowledge that the conduct was occurring may be required to ground liability for harassment by non-supervisory employees, but there is

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[10] *Sexual Harassment in the Workplace, supra* note 1 at 112. See the first paragraph under the heading "Application to Canadian Law." This paragraph is in fact a direct quote, properly attributed on page 111.

[11] *Ibid.* at 119.

[12] *Hanes* v. *M & M Ventures* (1998), 35 C.H.R.R. D/199 (Sask. Bd. Inq.).

[13] *Human Rights Code*, R.S.O. 1990, c. H-19, s. 10(1), "harassment."

[14] See *e.g.* the formulation adopted in *Ferguson* v. *Muench Works Ltd.* (1997), 33 C.H.R.R. D/87 (B.C.C.H.R.).

still no requirement that the complainant object. To hold otherwise, as some tribunals have done, is to bootstrap a mental element into a statutory scheme that is not supposed to be concerned with whether discrimination is intentional.

The discussion of unwelcomeness, consent, and the relevance of the complainant's demeanour is confused and ambiguous, at times reinforcing the earlier assertion of a resistance requirement, at other times belying it.[15] Similarly, after relying on U.S. authority to expressly distinguish consent from "voluntariness," the authors later state that if behaviour is consensual, it cannot be considered unwelcome.[16] However, there is no explanation of the difference in Canada, if any, between voluntariness and consent.[17]

Sexual Harassment in the Workplace is well-researched. At times, the discussion tends to privilege the earlier cases, which continue to receive lengthy treatment even where their reasoning has been superseded by later decisions.[18] One suspects that this is an outcome of merely updating, rather than rewriting sections from past editions. The next edition should make a more vigorous attempt to prune back some of this jurisprudential dead wood.

It is also not always clear why the authors choose to favour the statement of the law found in one decision or award, as opposed to another, given that there is no system of precedent in human rights decisions. For example, in the discussion of revealing uniforms and buttons that invite sexual harassment from customers, the authors discuss the Molly 'N Me Tavern decision, which simply states the test as to whether female employees engaging in work essentially similar to male employees are required to bear the additional burden of becoming entertainers based on

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[15] Compare *Sexual Harassment in the Workplace*, *supra* note 1 at 128 ("It is sufficient for the Complainant to establish that she by her conduct or body movement or body language conveyed to the perpetrator her disapproval of his advances."), with *ibid.* at 145 ("By establishing that harassment occurs only when the harasser's intentions are deliberate, this leaves a loophole for the harassers to claim that they were unaware that their behaviour was offensive.").

[16] *Ibid.* at 121, 133.

[17] The term "voluntariness" was used by the U.S. Supreme Court in *Mentor Savings Bank v. Vinson*, 477 U.S. 57 (1986) as a synonym for consent in the criminal law of rape, namely that the complainant's submission to sex was, though unwanted, not immediately preceded by violence or threats of violence. This is not the definition of consent used in Canadian criminal law, making it questionable whether this distinction is relevant here.

[18] See e.g. the lengthy discussion of delays in adjudication (*Sexual Harassment in the Workplace*, *supra* note 1) at 230-47.

their dress.[19] They also mention *Allan* v. *Riverside Lodge*, which adds the requirement that the dress code "lack justification in commonly accepted social norms."[20] This additional element presumes that the status quo for dress is not sexist, an approach at odds with human rights legislation. The authors conclude that, "whether or not a dress or grooming requirement constitutes 'sexual harassment' or 'sex discrimination' may be judged by the ... test provided by the *Allan* case."[21] There is no explanation as to why the *Allan* test is being favoured or even a recognition that it adds an additional element that risks perpetuating sexist norms of dress.[22]

Sexual Harassment in the Workplace is at times repetitive, but that is probably a virtue. Few readers of this book will read it from cover to cover. Instead, it is likely used by most of its readers as a reference book to explain the correct legal principles in a certain area. Unfortunately, where areas are covered twice, they are not always consistent.[23] This is probably the result of a lack of rigour in updating. At times I read portions of this book aghast at the fact the authors seemed entirely unaware of an important new authority on the topic, only to find the authority discussed later in the text in a similarly titled subsection. If the casual reader does not find all the sections that deal with a particular topic, he or she may be misled.

The greatest achievement of *Sexual Harassment in the Workplace* is the thoroughness of its research. From my own review of this book, I learned of a number of helpful cases on areas of interest that I had not come across elsewhere. Almost every possible aspect of sexual harassment law is addressed in the text. For example, the authors include a brief discussion of a case in which it was argued that harassment by patrons was a bona fide occupational requirement (bfor) for an employee at a youth centre, and another section on complaints by live-in nannies of sexual harassment by their employer's husband or teenaged children.[24] Thus, the

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[19] *Susan Ballantyne* v. *Molly 'N Me Tavern* (1983), 4 C.H.R.R. D/1191 (Ont. Bd. Inq.).

[20] (1985),6 C.H.R.R. D/2978 (Ont. Bd. Inq.) [hereinafter *Allan*].

[21] *Sexual Harassment in the Workplace, supra* note 1 at 162.

[22] The text should also have been updated to recognize that the "similarly situated" approach to discrimination has been repeatedly rejected by the Supreme Court of Canada since *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[23] See *e.g.* the distinction between *quid pro quo* and co-worker harassment, which is recognized as rejected by the Supreme Court of Canada in *Janzen* v. *Platy Enterprises*, [1989] 1 S.C.R. 1252, and later revived in *Sexual Harassment in the Workplace, supra* note 1 at 216.

[24] *Sexual Harassment in the Workplace, supra* note 1 at 300-01.

authors are thus well poised to incorporate new developments into the next edition. Later chapters exhaustively survey remedies available to the complainant under a variety of statutes and in a number of fora, including a helpful discussion of the Supreme Court of Canada's decision in *Béliveau St-Jacques*.[25]

Oddly, *Sexual Harassment in the Workplace* has no conclusion. The final chapter which deals briefly with "Unions and Sexual Harassment," makes the questionable claim that most union members would prefer to deal with intra-union complaints of sexual harassment internally and then simply ends with an unanswered question about arbitrability. The lack of any conclusion to this book is, in my view, significant. The authors of this book care about sexual harassment and treat it as a serious problem. They do not, for the most part, aspire to a false bipolar objectivity that treats sexual harassment as a contest between accuser and accused, although the newer material has the troubling tendency to veer in that direction. But their book does not consistently grasp the link between sexual harassment and women's inequality. The legal claim for sexual harassment was formulated on an understanding of sexual harassment as an act of male dominance. A book that truly understood this could be consistent in its analysis and criticism and would be able to synthesize the case law coherently. Such a book would have a point of view, but that perspective would be apparent rather than obscured. The third edition of *Sexual Harassment in the Workplace* is regrettably not that book. Nonetheless, it remains an important starting point for anyone interested in researching, and drawing their own conclusions about sexual harassment decisions in Canada.

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[25] *Béliveau St-Jacques* v. *Fédération des employées et employés de services publics* (1936), 136 D.L.R. (4th) 129, discussed at 395–98.