COURT OF APPEAL REFUSES TO RECOGNIZE FREESTANDING "TORT OF HARASSMENT"

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Ontario's Court of Appeal has issued a landmark decision in *Merrifield v. Canada (Attorney General)*,[1] emphatically rejecting the notion that "harassment" is a tenable cause of action and a freestanding tort.

Background

Mr. Merrifield was a former RCMP employee assigned to its Threat Assessment Group. Following more than seven years of "strained relations" (characterized by Mr. Merrifield as bullying and harassment) between Mr. Merrifield and several of his superiors in the RCMP, Mr. Merrifield left his employment and sued the RCMP for damages for harassment, intentional infliction of mental suffering, loss of income and general damages, among other things.

In siding with Mr. Merrifield, the lower court recognized harassment as a new, freestanding cause of action. In written reasons, the lower court set out four questions that must be answered in order to establish an entitlement to damages for harassment:

1. Was the conduct of the employer toward the employee outrageous?
2. Did the employer intend to cause emotional distress or did they have a reckless disregard for causing the employee to suffer from emotional distress?
3. Did the employee suffer from severe or extreme emotional distress?
4. Was the outrageous conduct of the employer the actual and proximate cause of the emotional distress?

In the result, the lower court found that the four elements of the tort were satisfied and ordered the RCMP to pay Mr. Merrifield $100,000 in general damages, $41,000 in special damages and $825,000 in costs. The RCMP appealed the lower court's decision to the Court of Appeal.

No Tort of Harassment

The Court of Appeal found that the lower court had erred by recognizing a tort of harassment. According to the Court of Appeal, the proposed tort of harassment was, in essence, a less onerous version of the already well-established tort of "intentional infliction of mental suffering". In particular, the tort of intentional infliction of

mental suffering requires an employee to establish that the employer's conduct:

1. Was flagrant and outrageous (whereas the proposed tort of harassment would require only outrageous conduct)?
2. Was calculated to harm the employee (whereas the proposed tort of harassment would require either subjective intention or objectively-defined reckless disregard)?
3. Caused the employee to suffer a visible and provable illness (whereas severe or extreme emotional distress would be sufficient for the proposed tort of harassment)?

Therefore, there was no compelling policy rationale for recognizing harassment as a new tort (and, in any event, the Court of Appeal cautioned that judges cannot simply create a new tort anytime they consider it appropriate to do so).

The Court of Appeal then went on to conclude that the lower court, in Mr. Merrifield's case, erred in applying the test for the intentional infliction of mental suffering and made palpable and overriding errors in its fact finding. In the result, the lower court's judgment was set aside.

Considerations for Employers

At this time, it is unknown whether or not Mr. Merrifield will seek leave to appeal before the Supreme Court of Canada. For now, however, the Court of Appeal's decision has left employee-side counsel with one less arrow in their quiver when it comes to claiming damages against employers. Unless the Court of Appeal's decision is overturned by the Supreme Court at a later date, employees seeking damages related to harassment will have to meet the much more onerous test established under the tort of intentional infliction of mental suffering.

by Paul Boshyk

[1] 2019 ONCA 205

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.