



# Tort of Harassment

Cynthia Benson



*Merrifield v Canada*  
(Attorney General)

2019 ONCA 205

# Facts

- RCMP officer claimed he was bullied and harassed by his superiors.
- He claimed damages for:
  - harassment
  - intentional infliction of mental suffering
  - loss of income
  - general damages, etc.

# Lower Court decision

- Recognized a new freestanding tort of harassment without applying the test for new torts
- Trial judge relied on authorities that the tort already existed when the authorities did not support this
- Found that many of the managerial decisions constituted harassment

# Appeal decision

- First time a Canadian appellate court had to determine whether a common law tort of harassment exists
- Trial judge erred by recognizing a tort of harassment
- Court of Appeal found no basis to recognize the new common law tort of harassment

# Recognizing new torts

- Court relied on *Watkins v Olafson*, 1989 CanLII 36 (SCC) for the principle that common law change is evolutionary in nature and proceeds slowly and incrementally rather than quickly and dramatically
- Not just a matter of judicial discretion
- Indicators that a new tort may be supported:
  - It is the result of a culmination of related legal events
  - It begins by extending existing principles to new circumstances
  - It follows academic authorities in support of the change
  - It is already recognized in other jurisdictions
- No such evidence was presented in this case

# Key points

- No tort of harassment in Ontario
- The tort of intentional infliction of mental suffering is one way to deal with similar harms
- Court of Appeal did not rule out the possibility that another case could provide the grounds for a properly conceived tort of harassment.



*McLean v McLean*

2019 SKCA 15



# Facts

- Brothers Peter and Doug are involved in an argument, Peter threatens Doug over the phone
- Peter fires a gun during the call
- Peter is arrested and convicted of offences related to the threats
- Doug sued Peter for damages relating to mental distress, anxiety and legal fees related to the threats
- Sued RCMP and others for the handling of the case, alleged harassment

# Lower Court decision

- Causes of action were not clear in the pleading
- Judge says recovery is only possible if there is a physical injury or recognizable psychiatric illness
- Harassment is not a recognized cause of action in Saskatchewan
- Causes of action against Peter were struck with only one exception
- Causes of action against all other defendants were struck out

# Appeal decision

- Appellants argued that recognizing a tort of harassment would allow for coverage of previously unprotected interests
- Specifically, reckless rather than intentional infliction of mental suffering
- Canada disagreed - Reckless disregard has been recognized as a potential element of the tort of intentional infliction of mental suffering (*Riley v Saskatchewan Power Corporation*, 2009 SKQB 342)
- Upheld lower court's decision that harassment is not a recognized cause of action in Saskatchewan

# Key points

- No tort of harassment in Saskatchewan

# Takeaways

- No recognized tort of harassment in Ontario and Saskatchewan
- Door is left open for a case with the right facts to establish harassment as a distinct tort



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