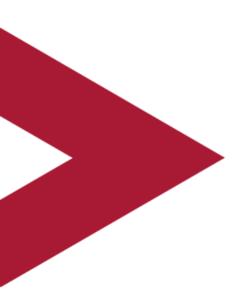


Tort of Harassment

Cynthia Benson

think: forward





Merrifield v Canada (Attorney General)

2019 ONCA 205

think: forward

Facts

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

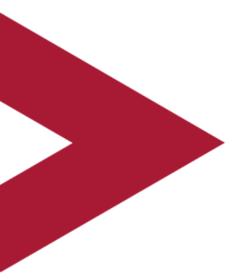
- Court relied on Watkins v Olafson, 1989 CanLII 36 (SCC) for the principle that common law change is evolutionary in nature and proceeds slowly and incrementally rather than quickly and dramatically
- Not just a matter of judicial discretion
- Indicators that a new tort may be supported:
 - It is the 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

think: forward

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



These materials are intended to provide brief informational summaries only of legal developments and topics of general interest.

These materials should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

If you have specific questions related to these materials or their application to you, you are encouraged to consult a member of our Firm to discuss your needs for specific legal advice relating to the particular circumstances of your situation.

Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.