

Goodmans^{LLP} Update

Ontario Court of Appeal Confirms No Tort of Harassment ...Yet

On March 18, 2019, the Ontario Court of Appeal ruled in *Merrifield v Canada (Attorney General)* that a new, freestanding tort of harassment should not be created (at least, not yet). The *Merrifield* decision was the first in which a Canadian appellate court considered this issue. Reversing the trial judge's holding, the Court of Appeal held that the lower court not only erred by creating the tort of harassment, but also by incorrectly applying the test for the tort of intentional infliction of mental suffering.

The Facts

Merrifield, an RCMP employee, alleged he had been harassed and bullied by his superiors on an ongoing basis. The behaviour complained of included, for example, that Merrifield had been denied particular assignments, had been transferred to new posts and had been made the subject of internal investigations. The trial judge found that the behaviour of Merrifield's superiors was unreasonable, not *bona fide*, flagrant, outrageous and hypocritical and was sufficient to ground the tort of harassment. The Court of Appeal disagreed, characterizing the trial judge's findings of fact as replete with palpable and overriding errors.

The Creation of New Torts

In declining to recognize a new tort, the Court of Appeal underscored that common law change is "evolutionary in nature [and] proceeds slowly and incrementally," drawing a clear distinction between the creation of new torts (which properly falls within the jurisdiction of the legislature, and not the judiciary) and the court's jurisdiction to give formal recognition to torts already in existence. In *Merrifield*, the Court of Appeal referenced an earlier decision, *Jones v Tsige*, in which it recognized the privacy tort of intrusion upon seclusion. Recognition of this tort was grounded in the Court of Appeal's reasoning that there existed provincial legislation establishing a right to privacy, academic scholarship which supported a right to privacy, and a history of judicial refusal to reject the existence of the tort in question.

In the *Merrifield* case, Merrifield contended that the tort of harassment should be created due to "an increased societal recognition that harassment is wrongful conduct." This was not accepted by the Court of Appeal, which found there was no judicial authority, academic authority, or policy rationale provided to support the recognition of a new tort of harassment. Moreover, and based on the specific facts of the case, the Court of Appeal held that the existing tort of intentional infliction of mental suffering was an appropriate avenue of redress for Merrifield.

The Tort of Intentional Infliction of Mental Suffering (IIMS)

Having found the tort of IIMS was the more appropriate tort in the circumstances of the *Merrifield* case, the Court of Appeal reiterated that IIMS is established where the plaintiff demonstrates they were subject to conduct that was (1) flagrant and outrageous, (2) calculated to produce harm, and which (3) resulted in visible and provable illness.

The Court of Appeal held the trial judge incorrectly applied the legal test for IIMS and made palpable and overriding errors in fact-finding. Consequently, and on the Court of Appeal's own findings of fact, the tort of IIMS was not established.

The Tort of Harassment Might Still be Recognized, Eventually

Despite holding there was no need to recognize the tort of harassment at this time, the Court of Appeal made clear it was not "foreclos[ing] the development of a properly conceived tort of harassment that might apply in appropriate contexts," sometime in the future.

It is important for employers to be cognizant of both their statutory and common law obligations. Even though the tort of harassment has yet to be recognized by the courts, employers are nonetheless bound by statutory obligations to maintain a safe workplace, free from harassment.

For further information about this case or its potential implications, please contact any member of our [Employment and Labour Group](#).

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