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INSURANCE LAW BULLETIN

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Ontario Court of Appeal Rejects Tort of Harassment

OVERVIEW

Merrifield v Canada (Attorney General)[1] is the first case where a Canadian appellate court has considered whether a common law tort of harassment exists. In its decision, the Ontario Court of Appeal declined to recognize an independent and new tort of harassment in Ontario. The decision provides some much-needed guidance to courts.

BACKGROUND

The plaintiff in this case, Peter Merrifield, was a member of the Royal Canadian Mounted Police ("RCMP"). Mr. Merrifield brought a claim against his employer for bullying and harassment that he allegedly experienced from his superior officers over a seven-year period after he decided to run for office.

The Trial Decision

The trial judge set out a four-pronged test which a plaintiff must meet in order to establish a claim for damages for harassment:

1) Was the conduct of the defendants towards the plaintiff outrageous?
2) Did the defendants intend to cause emotional distress or did they have reckless disregard for causing the plaintiff to suffer emotional distress?
3) Did the plaintiff suffer from severe or extreme emotional distress?
4) Was the outrageous conduct of the defendants the actual or proximate cause of the emotional distress?

The judge accepted that a tort of harassment exists, and that Mr. Merrifield had satisfied this test. The judge also concluded that Mr. Merrifield met the test for the already established tort of intentional infliction of mental distress. The defendants appealed the decision.

[1] 2019 ONCA 205 [*Merrifield*].

The Court of Appeal

The Court overturned the trial judge's decision and concluded that the tort of harassment does not exist in Ontario. The Court was critical of the fact that the parties did not present what was required for a new tort to be recognized as they did not advance any Canadian or international jurisprudence or compelling policy reasons.

In refusing to recognize the proposed tort of harassment, the Court emphasized that the common law should continue to evolve "slowly and incrementally rather than quickly and dramatically". In doing so, the Court referenced its 2012 decision of *Jones v Tsige*,[2] which recognized the existence of the tort "intrusion upon seclusion". The facts in *Jones* "cried out for a legal remedy" during a time where the provincial legislation had established a right to privacy.[3] The creation of the tort of intrusion upon seclusion was an incremental step consistent with the changing needs of society.

On the other hand, *Merrifield* was not a case where the facts cried out for the creation of a new legal remedy. The Court highlighted there are remedies which already exist, including the tort of intentional infliction of mental distress. Although this remedy exists for cases such as these, the trial judge also erred in ruling that the plaintiff had met the test in this case. The Court failed to see how the RCMP's conduct was flagrant and outrageous, and that it was calculated to prove harm which resulted in visible and provable illness, as required to prove the tort.[4]

MOVING FORWARD

While the Court of Appeal refused to recognize a tort of harassment in the case before it, it still left the door open for the creation of this tort in the future. For now, parties will have to rely on the more onerous test of intentional infliction of mental suffering.

Although the law in Ontario is settled at this time, Mr. Merrifield applied for leave from the Supreme Court of Canada to appeal this decision. It remains to be seen whether leave will be granted.

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[2] 2012 ONCA 32.
[3] *Merrifield*, *supra* note 1 at para 25.
[4] For the leading case on this see *Prinzo v Baycrest Centre for Geriatric Care*, 60 OR (3d) 474, 115 ACWS (3d) 801.