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No Tort of Harassment in Ontario – so says Court of Appeal

March 2019

Stories of workplace harassment continue to receive front page news coverage in Canada, the United States, and abroad. A December 2018 Statistics Canada study titled, “Harassment in Canadian workplaces,” found that, in 2016, 15.9% of employees reported having experienced, “verbal abuse, humiliating behaviour, threats, physical violence, and unwanted sexual attention or sexual harassment in the workplace over the past 12 months.”¹ An employer that fails to take the necessary steps to prevent or remedy this behaviour may face legal liability.

In the 2017 decision, *Merrifield v. The Attorney General*,² Justice Mary Vallee of the Ontario Superior Court created new law when she held the tort of harassment exists in Ontario. Prior to the *Merrifield* decision, an Ontario employer that failed to take the necessary steps to prevent or remedy workplace harassment could face liability under the *Occupational Health and Safety Act* and, in certain circumstances, *Human Rights Code*. *Merrifield* meant an employer could also face a civil action for workplace harassment.

The Attorney General appealed the trial decision and, in March 2019, the Court of Appeal for Ontario overturned it, holding the tort of harassment does **not** exist in Ontario - at least, not yet.³ The Court of Appeal did not foreclose the possibility that, in different circumstances, a “properly conceived tort of harassment...might apply in appropriate contexts.”

This is good news for employers – for now.

What were the facts of *Merrifield*?

A Royal Canadian Mounted Police (“RCMP”) Officer, Peter Merrifield, alleged senior management in the RCMP engaged in a seven-year long campaign of harassment that negatively impacted his career and caused him severe mental distress. Following a forty-day trial, the trial judge agreed, finding senior

officers acted in a manner which was ‘outrageous’, and constituted a new “tort of harassment”. The elements of the tort were as follows:

1. The defendant’s conduct toward the plaintiff was outrageous.
2. The defendant intended to cause emotional stress or had a reckless disregard for causing emotional stress.
3. The plaintiff suffered from severe or extreme emotional distress.
4. The defendant’s outrageous conduct was the cause of the emotional distress.

Merrifield was awarded \$100,000 for harassment and intentional infliction of mental suffering, \$41,000 in special damages, and \$825,000 for costs of the action.

The Court of Appeal overturns the decision

The Court of Appeal found Merrifield’s claims were properly captured by the tort of intentional infliction of mental suffering, which addresses conduct that is “flagrant and outrageous, calculated to produce harm, and which results in visible and provable illness.” However, factually, the Court of Appeal concluded the actions of the RCMP senior management were not outrageous or calculated to produce harm. Accordingly, Merrifield was not entitled to damages.

In reaching this conclusion, the Court of Appeal overturned many of the trial judge’s findings of fact:

The trial judge made numerous palpable and overriding errors in her fact-finding. These errors include ignoring relevant evidence, considering irrelevant matters, and making findings of fact that are clearly wrong. These errors preclude a conclusion that Merrifield was harassed – even assuming that a tort of harassment exists, with the elements accepted by the trial judge...

Merrifield’s claim was dismissed in its entirety. The Attorney General was awarded costs for the trial and appeal.

Going forward

It remains to be seen whether *Merrifield* will be appealed to the Supreme Court of Canada.

Outside of Ontario, the tort of harassment has received different legal treatment depending on the jurisdiction. Saskatchewan, Manitoba, New Brunswick and Newfoundland have all rejected a tort of harassment, but courts in British Columbia and Alberta have not ruled definitively either way.

Ultimately, this uncertainty in the law may provide a reason for the Supreme Court of Canada to hear *Merrifield*, should an appeal be brought.

We will keep our readers posted. Meanwhile, if you have questions or would like to learn more, contact us.

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¹ Statistics Canada, Darcy Hango and Melissa Moyser, "Harassment in Canadian workplaces." Online: <https://www150.statcan.gc.ca/n1/pub/75-006-x/2018001/article/54982-eng.htm>.

² 2017 ONSC 1333.

³ 2019 ONCA 205.