No Tort of Harassment in Ontario: Court of Appeal

Date: March 27, 2019

Original Newsletter(s) this article was published in: Employment Update: March 2019

In *Merrifield v. Canada (Attorney General)*, Ontario's highest court has confirmed that there is no free-standing common law tort of harassment in Ontario.

Mr. Merrifield claimed that he had been harassed and bullied by managerial members of the Royal Canadian Mounted Police over an extended period from 2005 to 2012. Following a 40-day trial, the trial judge found that many of the managerial decisions made in relation to Mr. Merrifield constituted harassment. The trial judge also found the defendants liable for the tort of intentional infliction of emotional distress. In recognizing a new common law tort of harassment, the trial judge awarded $100,000 in general damages to Mr. Merrifield.

The Court of Appeal unanimously overturned the decision of the lower court, concluding that there was no common law tort of harassment in Ontario and that the trial judge had committed a number of palpable and overriding errors in finding that the tort of intentional infliction of emotional distress was made out.

The Court of Appeal refused to recognize a tort of harassment for the following reasons:

1. The common law has not sufficiently evolved to justify the recognition of a new tort. The common law generally proceeds in incremental steps. The Court of Appeal reviewed prior appellate decisions and noted that the conclusions in those cases were founded on a culmination of legal developments and the recognition of pre-existing duties or torts, rather than simply the creation of new ones.

2. Prior cases did not support the recognition of a new tort of harassment. The Court of Appeal reviewed four cases relied on by the trial judge and found that these cases did not confirm the existence of the tort or its elements.

3. There was no other basis to recognize a tort of harassment. No foreign judicial authority or academic authority was provided to the Court of Appeal to support the recognition of

> the tort. There was also no compelling policy rationale. Other legal remedies were available to Mr. Merrifield, for example the tort of intentional infliction of emotional distress.

In allowing the appeal, the Court of Appeal also overturned the trial judge's conclusion that the defendants were liable for intentional infliction of emotional distress. This finding could not stand as a result of a number of palpable and overriding errors of fact and the incorrect application of the elements of the tort.

The decision in *Merrifield* sounds a clear warning that courts ought to be cautious in recognition new bases of civil liability without sufficient preceding authority and development within the common law. While the Court of Appeal declined to recognize a new tort of harassment, it confirmed the elements of the well-established tort of intentional infliction of emotional distress. In short, that tort is established where the plaintiff establishes conduct that is (1) flagrant and outrageous; (2) calculated to produce harm; and which (3) results in visible and provable illness.

As a final note, while *Merrifield* stands as confirmation that there is no tort of harassment in Ontario, the Court of Appeal's decision did not foreclose the possibility that the proposed tort could be recognized in the future.