

BRIEFING NOTE

NO TORT OF HARASSMENT

In a recent case from the Ontario Court of Appeal, the appellate court declined to recognize a new tort of harassment. The decision in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 (“*Merrifield*”) is the first time a Canadian appellate court has had to determine whether this tort exists; moreover, it set out the judicial process for recognition of new torts. Although not binding in British Columbia, this authority is likely to be highly persuasive.

In *Merrifield*, the respondent was a RCMP officer who sued the RCMP, seeking damages for the mental distress he allegedly suffered for seven years as a result of managerial bullying and harassment. He was successful at the lower court and was awarded damages.

The defendants appealed the decision, in part, on the issue of whether or not a freestanding tort of harassment existed, which they had argued at trial it did not.

In reviewing the Canadian authorities, the Ontario Court of Appeal agreed that there was no freestanding tort of harassment and set aside the lower court’s decision, finding that the trial judge erred by recognizing a tort of harassment, erred in applying the test for the intentional infliction of mental suffering, and made palpable and overriding errors in much of her fact-finding.

In coming to its decision, the appellate court reviewed the authorities relied on by the trial judge, including a B.C. decision (*Mainland Sawmills Ltd. et al v. IWA - Canada et al*, 2006 BCSC 1195). The appellate court found that the cases relied on by the lower court assumed, rather than established, the existence of the tort and its elements and failed to conduct a full analysis of whether it did, in fact, exist. Further, the appellate court noted that the B.C. court in *Mainland Sawmills* specifically concluded the law was unclear.

The Ontario Court of Appeal concluded that the authorities did not support the existence of a tort of harassment and further went on to find that there was no basis to recognize it as a new tort, particularly in the employment law context where a party could seek remedies under the tort of intentional infliction of mental suffering.

Specifically, the appellate court found that

- the recognition of a new tort is not a matter of judicial discretion;
- there was no legal authority to support a recognition of a new tort in current Canadian legal authority; and

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- the court was not provided with any academic authority or compelling policy rationale for recognizing a new tort and its requisite elements.

Accordingly the appellate court found that while the development of a properly conceived tort of harassment might apply in other (appropriate) contexts, it concluded that the facts did not “cry out for the creation of a novel legal remedy” in the case at bar.

The plaintiff/respondent is seeking leave to appeal to the Supreme Court of Canada.

What does this mean?

While **Merrifield** is not binding, it is likely to be highly persuasive in B.C. courts.

While the question of whether there exists a tort of harassment may now be put to rest, particularly in the employment context, claims for alleged mental distress under the tort of intentional infliction of mental suffering may still be alleged against employers.

Further and more importantly, **Merrifield** does not negate an employer’s responsibility and duty to keep the workplace free from harassment as required under other legislations, including the *Workers Compensation Act*, *Occupational Health and Safety Regulations and Policies* and the *B.C. Human Rights Code*.

An employer’s failure to ensure the health and safety of its workers and failure to take all reasonable steps to prevent, where possible, or otherwise minimize, or properly investigate reports or incidences of workplace bullying and harassment can lead to serious ramifications.

It is important that employers have in place procedures for responding to reports/incidences of harassment and that such procedures ensure a reasonable response to the report or incident and aim to fully address the incident and ensure that bullying and harassment is prevented or minimized in the future.



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