

BRIEFING NOTE

Alberta Court Recognizes Tort of Harassment, but BC still says No

In *Alberta Health Services v Johnston*, 2023 ABKB 209 [*Johnston*], the Alberta Court of King’s Bench recognized a new tort of harassment and awarded damages. The Alberta court declined to follow *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 [*Merrifield*], an appellate decision rejecting the tort of harassment in Canada (see our May 2019 Briefing Note for further discussion of *Merrifield*).

In *Johnston*, the plaintiff Sarah Nunn, an Alberta Health Services public health inspector responsible for educating on and enforcing the province’s COVID-19 health orders, was the target of the defendant Mr. Kevin Johnston’s persistent campaign of hate and disinformation on his online talk show and other platforms. The court found that existing torts were inadequate to address the harm to Ms. Nunn: defamation got to some kinds of harassing behaviour, but was limited to false statements causing reputational harm; privacy torts required an expectation of privacy; and intentional infliction of mental suffering required a visible or provable illness.

The court found authority for the tort in literature, case law, and public policy, and formulated the tort of harassment as follows:

- a) the defendant engaged in repeated communications, threats, insults, stalking or other harassing behaviour in person or through other means;
- b) the defendant ought to have known it was unwelcome;
- c) the behaviour impugns the dignity of the plaintiff, would cause a reasonable person to fear for their or their loved ones’ safety, or could foreseeably cause emotional distress; and
- d) the defendant caused harm.

In doing so, the court captures the essence of harassing behaviour, which it held was repeated or persistent behaviour creating an oppressive atmosphere. Significantly, the court also held that the tort will allow for harassment based on race, gender, sexuality, and analogous grounds to be actionable by recognizing that harassing behaviour has the potential to impugn the plaintiff’s dignity.

In our view, the court here in part seems to tread into “injury to dignity” awards based on discriminatory conduct under applicable human rights legislation. It remains to be seen how courts will treat any such potential overlap.

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Rest of Canada does not (yet) Recognize Tort of Harassment

Alberta remains the sole province to recognize the tort of harassment. This tort received appellate treatment only in two provinces, and in both cases it was rejected: Ontario in *Merrifield* and Saskatchewan in *McLean v McLean*, 2019 SKCA 15 [*McLean*]. The remaining provinces and the Federal Court have rejected the tort with or without reference to *Merrifield*.

Interestingly, in the partial dissenting opinion of Justices Brown and Rowe in *Nevsun Resources Ltd v Araya*, 2020 SCC 5, the Supreme Court of Canada referenced *McLean* as an example of a case where a novel tort (i.e. tort of harassment) was rejected at the necessity stage (when the facts did not call out for a novel remedy) in its analysis rejecting the novel torts of cruel, inhuman, or degrading treatment, and crimes against humanity. *Nevsun* does not comment on the tort of harassment analysis, other than to refer to *McLean* as a case example where a new tort had been rejected for being unnecessary based on the facts.

The BC Supreme Court has rejected this tort, but unfortunately did not provide a full analysis. In *Ilic v British Columbia (Minister of Justice)*, 2023 BCSC 167, Justice Forth citing *Merrifield*, held that “there is no recognized tort of harassment,” and “as such, there cannot be a duty of care to protect against the commission of a tort that does not exist at law.”

Below is a summary of how the tort of harassment has been treated in Canada to date:

Jurisdiction	State of tort	Treatment of <i>Merrifield</i>	Treatment of <i>McLean</i>	Leading cases
Federal	No tort	Followed by FC	Followed by FC Cited by SCC in dissent	<i>Richards v Canada</i> , 2021 FC 231 <i>Nevsun Resources Ltd v Araya</i> , 2020 SCC 5 (partial dissenting opinion)
British Columbia	No tort	Followed	Cited	<i>Ilic v BC</i> , 2023 BCSC 167 <i>Simpson v Rebel News Network Ltd</i> , 2022 BCSC 1160 <i>MG v BW</i> , 2023 BCPC 272
Alberta	Recognized	Rejected	Not considered on this point	<i>AB Health Services v Johnston</i> , 2023 ABKB 209
Saskatchewan	No tort	Not considered on this point ¹	Not considered on this point	<i>McLean v McLean</i> , 2019 SKCA 15
Manitoba	No tort	Followed	Not considered	<i>Galton Corp v Riley</i> , 2023 MBKB 73
Ontario	Developing	Followed	Not considered on this point	<i>Howlett v Northern Trust Co</i> , 2023 ONSC 4531

¹ Notes that the Ontario Court of Appeal in *Merrifield* overturned a lower court decision recognizing the tort of “internet harassment,” but this is in error. *Caplan v Atas*, 2021 ONSC 670, recognized the internet harassment tort after the decision in *Merrifield*.

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				<i>Caplan v Atas</i> , 2021 ONSC 670
New Brunswick	No tort	Not considered	Not considered	<i>Harris v Cosmetology Assn of NB</i> , 2008 NBQB 377
Nova Scotia	No tort	Not considered	Not considered	<i>Goree v Dave</i> , 2022 NSSM 61
Prince Edward Island	No tort	Followed	Not considered	<i>Three Rivers (Town) v Power</i> , 2023 PESC 43
Newfoundland and Labrador	No tort	Not considered on this point	Not considered	<i>Al-Haidari v Memorial University</i> , 2020 NLSC 27

Remedying harassing behaviour

Despite the reluctance of courts to recognize a new tort of harassment, other adjacent torts have emerged to address harassing behaviour in Ontario and Alberta.

In *Caplan v Atas*, 2021 ONSC 670, the Ontario Superior Court of Justice recognized a narrower tort of online harassment:

- a) the defendant engaged in *communications* conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance;
- b) the defendant did so maliciously or recklessly and with intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and
- c) the plaintiff suffers such harm.

In doing so, the court held that existing torts did not adequately address the persistent and “*vile campaign of cyber-stalking*” at issue in the case, and distinguished *Merrifield* on that basis.

In *ES v Shillington*, 2021 ABQB 739, the Alberta Court of Queen’s Bench similarly recognized the tort of public disclosure of private facts to address the publication of intimate and highly sexualized photos online on the basis that there were no “*fulsome alternative remedies for this plaintiff to the proposed tort.*”

These adjacent torts provide legal remedies that appear to go to the heart of harassment in narrow circumstances. More importantly, they are also in line with the necessity requirement in *Nevsun* that a novel tort is only recognized to fill a gap where existing torts are unable to provide an adequate legal remedy. *Merrifield* explicitly left open the possibility of a general harassment tort in such circumstances. *Merrifield* rejected the tort on the basis that the facts did not “*cry out for the creation of a novel legal remedy*” and that intentional infliction of mental suffering appropriately addressed the circumstances, the requirements for which was not satisfied by the plaintiff. It further held that “*we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts.*”

As such, we expect harassment law to be in continued flux over the coming years as factual circumstances calling for the recognition of a general harassment tort are presented before the courts.

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The Ontario Supreme Court in *Howlett v Northern Trust Co*, 2023 ONSC 4531 is one example of this. The case involved stalking and harassment inside and outside the workplace. The court held that *Merrifield* “did not make a categorical conclusion” against a general tort, and it was not plain and obvious whether existing torts would adequately address the facts of the case. In that case (summary application to strike) the court declined to strike the plaintiff’s claim in harassment.

What does this all mean?

Canadian courts have been slow to recognize a general tort addressing harassing behaviour, but harassment remains an area of active change in the law. This can be seen in the recognition of the torts of online harassment and public disclosure of private facts. It can also be seen in Alberta’s recognition of the general tort of harassment, where the court explicitly recognized the oppressive and repetitive nature of harassing behaviour, and the racial and gendered context in which it often occurs. It will be interesting to see how these developments progress, whether courts will take Alberta’s lead in addressing harassment, and how the courts will treat the overlap of a general harassment tort with other adjacent torts.

While BC courts have followed *Merrifield* in rejecting the tort of harassment, they have done so to date without a fulsome analysis. It certainly remains open, and we can expect to see, creative counsel putting forth novel arguments to push the envelope on harassment law.

As this area continues to develop, we anticipate a case will wind its way up to the Supreme Court of Canada for clarity or unification of these various new torts.

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