

Member's Quarterly

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Feature

New Tort of Harassment

Alberta employers beware



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A recent decision from the Court of King's Bench of Alberta has established the tort of harassment in Alberta.

In the decision *Alberta Health Services v Johnston*, the Court found Kevin Johnston, an online talk show host and candidate in Calgary's mayoral election, had defamed and harassed an Alberta Health Services (AHS) public health inspector. Among other things, Mr. Johnston alleged the public health inspector was a "terrorist" and a "horrible human being" due to her involvement in the implementation of public health measures related to COVID-19. He also threatened to use his mayoral powers to send her to prison if he won the election.

The judge awarded the public health inspector a total of \$650,000 in general and aggravated damages, including \$100,000 as damages for the novel tort of harassment. The decision also granted an injunction preventing Mr. Johnston from "[harassing] AHS employees, [including public health inspectors], as they carry out their duties and in their private lives."

Prior to this decision, there was no formally recognized tort of harassment in Alberta, even though harassment claims can arise under the Alberta Human Rights Act, the Occupational Health and Safety Act, the Workers' Compensation Act and the Criminal Code. Courts had previously found that there is no specific civil action for harassment (known as a "tort") and have required that such claims proceed to statutory bodies like the Human Rights Commission.

In a lengthy decision, the Court set out its reasoning for the departure from this precedent. The judge explained that courts have the power to recognize new torts in order to "keep the law aligned with the evolution of society" and where "the harm in question cannot be adequately addressed by recognized torts." The Court then analyzed existing torts, such as defamation, invasion of privacy and assault, and found none of them completely addressed the case at bar.

Interestingly, the Court also noted that "harassment is something that can happen to anyone, but disproportionately affects women and members of other marginalized groups." Quoting scholar Joanne Conaghan, the Court argued that "the common law is, by tradition, insensitive to the particular wrongs suffered by women," but that this can and ought to change. By creating a civil remedy for harassment, the AHS decision will make it easier for women and other marginalized groups to receive compensation when they have experienced harassment.

According to the decision, a defendant has committed the tort of harassment when that person has:

1. engaged in repeated communications, threats, insults, stalking or other harassing behaviour in person or through other means;
2. that the defendant knew or ought to have known was unwelcome;
3. which impugn the dignity of the plaintiff, would cause a reasonable person to fear for one's safety or the safety of loved ones, or could foreseeably cause emotional distress;
4. caused harm.

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The decision further clarified that “the law cannot provide a bright line between what is harassing and is not harassing behaviour,” and the distinction “must be determined on a case-by-case basis.” This distinction will likely be clarified by the courts as more litigation using the new cause of action takes place.

Although the AHS decision comes from the Court of King’s Bench and the Court of Appeal of Alberta could still overturn it, it has the potential to set an important precedent. The Court of Appeal of Ontario has previously declined to recognize a tort of harassment (see *Merrifield v Canada (Attorney General)*), arguing that existing cases “are not authority for recognizing the existence of a tort of harassment in Ontario, [and] still less for establishing either a new tort or its requisite elements.”

This means there is now a significant discrepancy between the state of the law in Alberta and Ontario. Given the importance of the issue, and its variable treatment by provincial courts, it seems likely that the Alberta Court of Appeal or other appellate level courts will eventually weigh in on the matter. Until then, however, the tort of harassment is a valid cause of action in the province of Alberta and may give rise to new claims against employers.

The decision also highlights the fact that “judicial development of a tort of harassment does not prevent the Legislature from occupying the field.” This means the Legislature could choose to override or confirm the AHS decision by modifying the common law tort, making it unactionable, or creating a new statutory cause of action for harassment.

It will be interesting to see how this concept develops and what implications it may have for employers.

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