

Member's Quarterly

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Feature

The Cost of COVID Propaganda

Alberta Court recognizes new tort of harassment

The height of the pandemic and accompanying public health measures sparked intense debate across the country. Now that we have returned to the "new normal," we are starting to see the cost of COVID-related propaganda in the courts - literally. A recent decision from the Court of King's Bench of Alberta (2023 ABKB 209) established a new tort of harassment, awarding major damages to a public health inspector who was the target of public health measure pushback.

Alberta Health Services ("AHS") and two (2) public health inspectors employed by AHS sued a proponent of anti-public health measures who was the host of an online talk show and mayoral candidate for the city of Calgary for various tortious claims. AHS and one of the individual plaintiffs brought an action against the defendant for defamation and the other individual plaintiff brought actions against the defendant for defamation, invasion of privacy, assault and "tortious harassment." The defendant used his online talk show, media opportunities and social media as platforms for his conduct against the plaintiffs. The defendant referred to one of the individual plaintiffs, who was the main subject of his attacks, as a "terrorist" and a "criminal" for implementing and enforcing public health measures in response to the COVID-19 pandemic. The defendant also reviewed the individual plaintiff's public social media account and photos she posted to describe her as an "alcoholic." The defendant even went so far as to set out his plans regarding public health measures, and the individual plaintiff, if elected as Mayor, such as: "I am going to come at you with full vitriol and malice," "...we're taking your houses and bank accounts, you're not getting them back," and "I intend to make this woman's life miserable, I intend to destroy this woman's life like she has destroyed the lives of Calgarians." As a result of the defendant's conduct, the plaintiff did not feel safe when leaving her home and was instructed by police not to allow her children to take the bus to school, which led the plaintiff to install a home security system. The plaintiffs sought a permanent injunction against the defendant, as well as damages.

First, the Court considered the defamation claims brought by both AHS and the individual plaintiff who was not the main subject of the defendant's ire. The Court dismissed AHS's defamation claim on the basis that as a public body, the AHS was not entitled to bring such a claim and dismissed the individual plaintiff's claim on the basis that no statements were made about that plaintiff by the defendant that would lower the plaintiff's reputation.

The Court then considered the claims brought by the individual plaintiff who was the main target of the defendant's conduct. With respect to the defamation claim, the Court found that the defendant's repeated claims that the plaintiff was a "terrorist," "alcoholic" and a "criminal" were widely communicated and negatively impacted the plaintiff's reputation. The Court dismissed the plaintiff's claim for invasion of privacy, finding that the information used by the defendant, namely photos of the plaintiff and her family, were publicly available on the plaintiff's social media account and therefore, there was no breach of privacy. The Court also dismissed the plaintiff's assault claim, as the statements made by the defendant did not constitute an imminent threat to the plaintiff.



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In considering the plaintiff's claim for "tortious harassment," the Court reviewed existing jurisprudence and current Court processes surrounding harassment and determined that there was a gap in the law that should be addressed. Earlier cases on harassment examined existing related torts such as internet harassment and intentional infliction of mental suffering. However, none of the earlier cases explicitly recognized a stand-alone tort of harassment for the type of conduct exhibited by the defendant in this case. The Court found that the harassing behaviour of the type exhibited by the defendant was coming before the courts regularly and was dealt with through restraining orders, which the Court noted did little to reduce the prevalence. The Court also found that existing related torts were ineffective in addressing the harm from harassment because the elements of the torts were niche and rarely made out by more "run of the mill" harassment that occurs on a day-to-day basis. Ultimately, the Court determined that the current legal landscape did not effectively address the harm from harassment, warranting the recognition of a new tort.

The Court established a four-part test for the tort of harassment. The tort of harassment will be established where a defendant has: engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through other means; that the individual knew or ought to have known was unwelcome; which impugns the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeably cause emotional distress; and caused harm.

In applying the newly formed test to the defendant's conduct, the Court concluded that the defendant's repeated references to the individual plaintiff as a "terrorist", "criminal" and "alcoholic", as well as threats, which the defendant knew or ought to have known were unwelcome, impugned the dignity of the plaintiff and caused her to fear for her safety and the safety of her family and caused harm to the plaintiff, constituting the tort of harassment.

The individual plaintiff who was the target of the defendant's attacks was awarded \$300,000 in general damages for defamation, \$100,000 in general damages for harassment, and \$250,000 in aggravated damages. A permanent injunction was also issued to prevent the defendant from being within 25-50 metres of specific AHS buildings.

This landmark case and the creation of a tort of harassment allows more harassment victims to seek remedies beyond restraining orders and creates a financial disincentive for potential perpetrators, but what does it mean for employers? Employers are no strangers to harassment, which occurs in the more limited contexts of human rights or occupational health and safety complaints, or in wrongful dismissal claims alleging "poisoned" work environments. From a civil liability perspective, employers could be held vicariously liable for the conduct of employees for a wide variety of tortious conduct. With the recognition of this new tort in Alberta at least, employers could see a reduction in human rights and occupational health and safety complaints, which have a more limited scope and reduced potential for compensation, coupled with an increase in vicarious liability claims which could provide plaintiffs with more significant damage awards. Only time will tell how exactly workplaces will be impacted and whether this new tort will be recognized elsewhere in Canada.

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