

Member's Quarterly

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Feature

A New Tort of Harassment in Alberta

Employers now liable for harassing conduct of employees



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In the recent decision of *Alberta Health Services v Johnston*, 2023 ABKB 209 (“*AHS v Johnston*”), the Court of King’s Bench of Alberta recognized a new tort in Alberta, the tort of harassment.

Prior to this decision, there was no civil right of action for harassment. Recourse could be sought through the criminal justice system, as harassment is a crime under s 264 of the Criminal Code. Remedies for harassment were available in the civil context in a limited capacity through restraining orders, which are not compensatory. In the employment context, individuals could make an occupational health and safety complaint, and may have had recourse under human rights legislation if they were harassed on the basis of a protected ground. Occasionally, issues of harassment could ground a claim for punitive damage in the context of a larger civil suit.

This decision now allows individuals to bring a claim for harassment in the civil context and seek compensation. The tort of harassment will help fill a gap in the law, and emphasizes the growing impetus on employers to ensure harassment free work environments.

Background of the Case

During the 2021 mayoral election in Calgary, and at a time where COVID-19 was an ongoing public health crisis, mayoral candidate Kevin J Johnston propagated misinformation regarding the pandemic and public health procedures. Mr. Johnston made repeated statements on multiple platforms against AHS and in particular against Sarah Nunn, an AHS employee. On several occasions, Mr. Johnston made defamatory and aggressive statements toward Ms. Nunn, her family and her friends. Mr. Johnston pleaded guilty to criminal harassment in respect of his statement.

In June 2021, AHS and Ms. Nunn brought a claim against Mr. Johnston for defamation and sought a permanent injunction restraining Mr. Johnston from making further defamatory statements. In their claim, AHS and Ms. Nunn asserted that Mr. Johnston’s conduct constituted “tortious harassment”.

The Court decided to create the tort of harassment, following the approach for recognizing new torts set out by the Supreme Court of Canada in *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

The Test for Harassment

In recognizing the tort of harassment, the Court of King’s Bench created a test which must be met in order for harassment to be found.

A person has committed the tort of harassment if they:

1. engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
2. knew or ought to have known the conduct is unwelcome;
3. have impugned the dignity of the plaintiff, which would cause a reasonable person to fear for her safety or the safety of her loved ones, or could foreseeably cause emotional distress; and
4. caused harm.

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In outlining the test for harassment, the Court stressed that harassment is conceptually similar to negligence in that a contextual analysis is important and that what constitutes harassing behaviour must be determined on a case-by-case basis. The Court emphasized that the essence of harassment is the persistence of the behaviour and that one-off incidents do not meet the definition of harassment.

In awarding Ms. Nunn \$100,000 in damages for harassment, the court considered that while Ms. Nunn did not adduce any evidence of illness, she did fear for her safety, the safety of her children, and that the harassment affected the way that she and her family lived their lives. The Court also awarded special damages to reimburse Ms. Nunn for the cost of the home security system that she installed in response to the harassment, plus \$250,000 in aggravated damages.

Potential Implications for Employers

Employers must be aware that they may now face civil claims from current or former employees alleging that they have been harassed at work. Employees will not need to prove any evidence of illness to successfully make out the tort.

It is also important to recognize that employers may be held vicariously liable for the harassing conduct of their employees. There are two branches of analysis for vicarious liability, as laid out by the Supreme Court of Canada in the cases of *Bazley v Curry*, [1999] 2 SCR 534 ("Bazley") and *Jacobi v Griffiths*, [1999] 2 SCR 570. Under this analysis, employers are vicariously liable for: (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes of doing an authorized act.

In *Bazley*, the Supreme Court stated that the question is "whether the employer, by carrying on its operations, created or materially enhanced the risk of the wrong that occurred." Employer-created environments which increase the opportunity for employees to commit the wrong and foster power-dependency relationships have been found to meet the test of vicarious liability.

As such, employers need to be aware of power dynamics among employees and regularly review and ensure compliance with their Respectful Workplace policies and procedures.

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