

## New Tort of Harassment Recognized by Alberta Court

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October 4, 2023

Alberta is the first Canadian province to recognize the common law tort of harassment in a recent decision of the Alberta Court of King's Bench in *Alberta Health Services v Johnston*,<sup>1</sup> where the Court awarded the Plaintiffs a total of \$650,000 in damages, \$100,000 of which were for harassment alone. While Ontario and other Canadian provinces have thus far declined to recognize harassment as an independent tort, this decision may pave the way for other Canadian jurisdictions to finally follow suit.

### The Facts

The Plaintiffs in this case were Alberta Health Services and two of its employees, who worked as public health inspectors. The role of the individual plaintiffs was to educate Albertans about the orders of the Chief Medical Officer of Health, including orders concerning the COVID-19 pandemic.

The Plaintiffs claimed a former Calgary mayoral candidate, Kevin Johnston (Mr. Johnston), had (among other things) harassed and defamed them on his talk show and on various social media platforms by spewing “misinformation, conspiracy theories and hate.” Mr. Johnston referred to the plaintiffs as “criminals,” suggested that they would be arrested for “culpable homicide” and threatened to liquidate their houses and bank accounts.

### The Decision

The Court acknowledged that the existence of a tort of harassment is controversial. Courts in Ontario and British Columbia have expressly considered and declined to recognize the tort of harassment in previous cases.<sup>2</sup> However, the Court in *Alberta Health* noted that existing torts do not address the harm caused by harassment and a standalone tort of harassment would fill gaps in the law.

The Court pointed to several recent Ontario and Manitoba decisions<sup>3</sup> (rendered after the Ontario Court of Appeal<sup>4</sup> had declined to recognize the tort of harassment) that had already asserted the existence of a tort of *internet* harassment, noting:

The idea that there is no general tort of harassment but there is a narrower tort of internet harassment makes no sense. If there is a tort of internet harassment but not a general tort of harassment, that means that the mode of harassment – using the internet – determines whether harassment is actionable. While

internet harassment is a problem, so too is old-fashioned low-tech harassment.<sup>5</sup>

The Court acknowledged that while harassment can happen to anyone, it disproportionately affects women and members of other marginalized groups. Recognizing the tort of harassment, the Court noted, would allow the Court to award damages for the harm caused by harassment in circumstances where civil remedies were previously limited to issuing restraining orders.

## The New Tort of Harassment

The Court held that the tort of harassment is made out where a Defendant has:

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

The Court ultimately awarded \$100,000 in damages for harassment, \$300,000 in damages for defamation, and a further \$250,000 in aggravated damages. The Court also granted permanent injunctions restraining Mr. Johnston's activities in relation to Alberta Health Services and one of the individual Plaintiffs.

## What This New Tort Means for Employers

Prior to this decision in Alberta, and for all other Canadian provinces where the tort of harassment has not yet been recognized, employees seeking remedies for harassment were generally limited to bringing a human rights, worker's compensation, or constructive dismissal claim.

For employers in Alberta, however, this new tort of harassment means an employer may be vicariously liable for harassment unrelated to a protected human rights ground. In addition, there is no requirement that the harassment occurs during employment (which is required for a successful constructive dismissal claim) or leads to a medical injury or illness (as required under Alberta's worker's compensation legislation).

We will be following closely to see whether other Canadian courts will also recognize harassment as an independent tort, particularly considering the emerging jurisprudence regarding the tort of *internet* harassment in Ontario and Manitoba. In the meantime, Canadian employers should be aware that a new tort of harassment now exists, and they could be found vicariously liable if their employees engage in harassment.

# Cassels

Employers across Canada already have an obligation to maintain a safe workplace, free from harassment. They should have well-drafted and properly implemented anti-bullying and harassment policies that clearly set out the measures in place to address and prevent harassment in the workplace (in fact, such policies are mandatory in some provinces). Employers would be well-served to provide regular training on bullying and harassment for all employees and respond promptly to any incidents or allegations of workplace harassment.

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<sup>1</sup> *Alberta Health Services v Johnston*, 2023 ABKB 209 [*Alberta Health*].

<sup>2</sup> Ontario: *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 [*Merrifield*]; British Columbia: *Anderson v Double M Construction Ltd*, 2021 BCSC 1473, *Skutnik v British Columbia (Attorney General)*, 2021 BCSC 2408, and *Ilic v British Columbia (Justice)*, 2023 BCSC 167.

<sup>3</sup> *40 Days for Life v Dietrich et al*, 2022 ONSC 5588; *Caplan v Atas*, 2021 ONSC 670; *385277 Ontario Ltd v Gold*, 2021 ONSC 4717; *M.S. v T.V.*, 2022 MBKB 211.

<sup>4</sup> *Merrifield*, *supra*.

<sup>5</sup> *Alberta Health*, *supra*, at para. 81.

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