Court Of Appeal Rejects The Existence Of A Tort Of Harassment

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The Court of Appeal for Ontario has denied the existence of a freestanding tort of harassment.

The plaintiff, a long-standing member of a police force, alleged that his superiors made discriminatory decisions about him over a period of several years following his decision to run for office. The plaintiff claimed that he was subjected to harassment and bullying at work, which damaged his reputation, prejudiced his career opportunities, and caused him to suffer severe emotional distress. The plaintiff commenced an action against the police force and his superiors seeking damages for, among other things, harassment and intentional infliction of mental distress.

At first instance, the trial judge accepted the plaintiff's position that the tort of harassment exists as a recognized cause of action in Ontario.[1] The defendants appealed.

In allowing the appeal, the Court of Appeal held that the trial judge erred in concluding that the tort of harassment exists in Ontario. In fact, the Court found that none of the cases relied upon by the plaintiff established the existence of the tort, noting that the 2006 decision of the Supreme Court of British Columbia cited by the trial judge specifically concluded that it is "unclear" whether the tort of harassment exists in Canada. Further, the Court held there was no basis for recognizing a new tort of civil harassment at this time, noting that it was not provided with any foreign judicial authority, academic authority, or compelling policy rationale for doing so.

Further, this was not a case where the facts "cr[ied] out for the creation of a novel legal remedy". Rather, the Court highlighted the existing legal remedies that already address harassing conduct, including the well-established tort of intentional infliction of mental suffering, which requires a plaintiff to prove "flagrant and outrageous" conduct that is "calculated to produce harm" and which results in a "visible and provable illness". The Court went on to find that the trial judge erred in determining that the facts satisfied the test for the tort of intentional infliction of mental suffering.

While the Court has not foreclosed the possibility that the tort may be established in the future, the Court has clearly indicated its preference for parties to rely on the clearly recognized tort of intentional infliction of mental suffering.

Moreover, in refusing to recognize the proposed tort of harassment, the Court has expressed a strong preference that the common law continue to evolve "slowly and incrementally rather than quickly and dramatically". In doing so, the Court referenced and distinguished its 2012 decision of Jones v. Tsige (Tsige), which recognized the existence of a tort of "intrusion upon seclusion" as being an incremental step consistent with societal and legislative changes. In Tsige, the Court did not simply create a new tort as it was asked to do in respect of the proposed tort of harassment. Overall, this decision clearly signals that the Court will be slow and cautious when asked to recognize a new cause of action.

1 For more about the Superior Court of Ontario decision, see our bulletin from June 2017.

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