Cochrane Moore LLP

Legal Services

57 Simcoe St. S., Suite 2A, Oshawa, ON. L1H 4G4
www.cctmlegal.com
P: (905)240-4529
F: (905)240-3030

Harassment

Written by: Kelly Dyck
Edited by Jonathan Thibert LL.B., Partner at Cochrane Moore LLP

Harassment as a tort is relatively new and still developing in law. Originating in employment law, harassment had gained recognition over the years, but only ever as an adjunct to an employment law case. Even as employers became required to have harassment policies, the tort remained within the workplace. This is the case no longer. The time has come. In *Merrifield v. The Attorney General,* 2017 ONSC 1333, the court acknowledged harassment as a free-standing tort.

The Test

As with most aspects of law, there is a test to be met. Harassment is no different and the court in the *Merrifield* case sets it out. The court referenced *McHale v. Ontario*, 2014 ONSC 5179 and *McIntomney v. Evangelista Estate* 2015 ONSC 1419 in setting out the test for harassment. It is as follows:

1. Outrageous conduct by the defendant;
2. An intent, or reckless disregard, by the defendant to cause emotional distress;
3. The plaintiff suffered severe or extreme emotional distress; and
4. The defendant's outrageous conduct was the actual and proximate cause of the emotional distress.

1) Outrageous Conduct

Immediately, the first question becomes what exactly does “outrageous” mean. The court in *Merrifield* helps to define outrageous by referencing various sources. Starting with the obvious, the court references *The Canadian Oxford Dictionary* in paragraph 720 defining ‘outrageous’ as follows: “1. Deeply shocking and unacceptable; 2. grossly cruel; 3. immoral, offensive; and 4. highly unusual or unconventional.”

However, any worthy legal practitioner looks at a dictionary definition as just providing more words requiring definition. Knowing this, the court in *Merrifield* then went to cite case law examples to provide context, which, upon review, are quite critical to understanding what fulfills the first element.

The court first cited *Boucher v. Wal-Mart Canada Corp*., 2014 ONCA 419, 120 O.R. (3d) 481 where it was found that the plaintiff’s supervisor "... belittled, humiliated and demeaned [Boucher] the plaintiff continuously and unrelentingly, often in front of co-workers, for nearly six months." This constituted outrageous conduct.

In paragraph 726, the court in *Merrifield* cited the trial judge in *Prinzo v. Baycrest Centre for Geriatric Care*, (2002), 2002 CanLII 45005 (ON CA), 60 O.R. (3d) 474 (C.A.) as saying the "acts of harassment by the employees of the defendant [Baycrest] were so extreme and insensitive that they constituted a reckless and wanton disregard for the health of the plaintiff". The court in *Prinzo* also stated that Baycrest’s behaviour "may fairly be described as flagrant and outrageous, meeting the first element of the tort."

Now, these were only a couple examples and by no means inclusive to what grounds for harassment may be, but it does provide direction and context in how to interpret the facts of your own case to see if the circumstances fulfill the element.

2) Intent, or Reckless Disregard, to Cause Emotional Distress

As to the second element, the court in *Merrifield* cited *Prinzo*:

> *"*The court stated at para. 61 that, 'for the conduct to be calculated to produce harm either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow.' The court stated that Baycrest employees 'were well aware of the physical and emotional health of the plaintiff and would realize the detrimental effect their harassment would have had on the plaintiff and yet they persisted [in] such harassment with almost sadistic resolve.'"

Forgive the quotes within quotes. There is quite a bit of information in there, and paraphrasing runs the risk of leading one astray. Breaking it down, firstly we see that *Merrifield* took from *Prinzo* that the person in question intends to produce the harmful consequences. This was quite evident in *Prinzo* where the Baycrest employees would have been quite aware of the harm caused by their actions.

The second part of the above quote is a bit trickier. The "consequences must be known by the actor to be substantially certain to follow". What does this mean? Is harassment as a tort veering into negligence where a reasonable belief of consequences may fulfill the element?

Short answer: no.

Long answer:
The plaintiff in *Merrifield* relied on *Piresferreira v. Ayotte*, (2008), 2008 CanLII 67418 (ON SC), 72 C.C.E.L. (3d) 23. In paragraph 177 the court stated that "it was reasonably foreseeable to Ayotte that every aspect of this behaviour was likely to cause Piresferreira anxiety, stress and emotional upset." The court concluded that the conduct was "calculated to produce harm" even if the defendant did not intend for the harm actually suffered.

What the plaintiff in *Merrifield* failed to note was that *Piresferreira v. Ayotte* was overturned on appeal in 2010. It is from that appeal decision that the salient points on this second element are derived.

The Court of Appeal draws attention to the distinction between an intentional tort and negligence. Noting the comments from the original trial judge that the defendant had "reckless disregard for Piresferreira's emotional well-being", the court felt this language did not maintain previous standards set in *Prinzo* and *Correia v. Canac Kitchens* (2008), 2008 ONCA 506 (CanLII), 91 O.R. (3d) 353, but rather appeared to lower the standard.
Recklessness was being defined as the harm being "reasonably foreseeable" and the behaviour "likely to cause" said harm. This was a significant departure from the standard set by *Prinzo* where the "consequences must be known by the actor to be substantially certain to follow". The "reckless disregard" in *Prinzo* referred to an attitude towards the plaintiff's well-being and is not a reference to a more flippant disposition regarding a specific behaviour. This is a critical distinction in defining reckless in this context. In overturning the trial judge's decision, the Court of Appeal further defined the test discussing the difference between foreseeability (a result MAY follow) versus knowledge that a result is substantially certain to follow.

The treatment of the second element of the harassment test by the court in the *Piresferreira* appeal 2010 is best summed up in para 78 citing *Wilkinson v. Downton*: "it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs." In other words, "the *extent* of the harm need not be anticipated, but the *kind* of harm must have been intended or known to be substantially certain to follow."

As law surrounding the tort of harassment develops, one must watch for further decisions surrounding the "reckless disregard" aspect of the second element. Case law will currently require one to prove specific intent and/or substantial certainty of harm. While not likely to change, interpretation of ambiguous terms can fluctuate as new laws take shape.

3) Severe or extreme emotional distress defined

To meet this element, the plaintiff must prove that they suffered severe or extreme emotional distress. Seems simple enough.

However, there are a couple important distinctions involved with this element:

1) The proving of said extreme emotional distress does not necessarily require proof of a visible or provable illness.

Merrifield cites *Mainland Sawmills Ltd. v. IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195 (CanLII), 41 C.C.L.T. (3d) 52 quoting *Graves* to define emotional distress in that it is "such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it".

2) Paragraph 697 states clearly that a person is NOT required to provide medical evidence in order to prove the suffering.

The factors here are important and warrant repeating. In summation, one must prove severe or extreme emotional distress, HOWEVER, one is NOT required to demonstrate a provable illness NOR is one required to submit medical evidence as part of their proof.

4) Proximate Cause

Finally, the fourth element. The plaintiff must prove that the outrageous conduct was the actual and proximate cause of the extreme emotional distress. Can you make the direct link between the outrageous conduct of the defendant and the extreme emotional distress suffered by the plaintiff? If not, the case will certainly fail.

If you feel you have been harassed and have suffered damages, emotional or otherwise, please call our office for a free consultation with one of our experienced and professional paralegals.

While this provides a brief overview, the law can be very complex, and many aspects are case specific. If you have an issue, call a paralegal at Cochrane Moore LLP in Oshawa for a free consultation.

(905) 240-4529

Last updated November 28, 2018