

New tort of harassment in Alberta

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Justice Colin Feasby of the Court of King's Bench established a new tort of harassment in the province of Alberta through his decision in *Alberta Health Services v Johnston, 2023 ABKB 209*. This case arose as a result of former mayoral candidate Kevin Johnston's highly publicized harassment against Alberta Health Services (AHS) employees during the height of the COVID-19 pandemic.

The new tort of harassment requires a four part test. The tort is made out where a defendant has:

1. Engaged in repeated communications, threats, insults, stalking or other harassing behavior in person or through 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 the plaintiff's safety or the safety of the plaintiff's loved ones, or could foreseeably cause emotional distress, and
4. Caused harm.^[1]

Factual background

Johnston engaged in persistent harassment of AHS employees acting in the course of their duties enforcing public health orders during the COVID-19 pandemic. Through his online statements, his own talk show and appearances on various other talk shows, Johnston expressed his intention to prosecute AHS employees for alleged 'crimes' and expressed a desire to cause them financial harm. Johnston claimed he stopped short of endorsing violence, yet hinted at potential violent actions and suggested that AHS employees deserved any violence visited upon them.

Johnston's harassment focused in large part on one AHS public health inspector, a plaintiff in *Johnston*. He identified her by name and shared pictures of her and her family that he obtained from her publicly accessible social media accounts. He made derogatory comments about her and her husband, all as part of his stated intention to make her miserable and destroy her life. Johnston attributed her actions working for AHS as causing direct harm to the people of Calgary and compared her actions to terrorism.

Decision

Justice Feasby justified his establishment of the tort of harassment in part from the existence of the criminal offence of harassment under Section 264 of the *Criminal Code*. He acknowledged that not all criminal offenses have a civil law equivalent, but found that the classification of harassment as a criminal act supported the question of whether a civil remedy should also exist to address such behavior.

The province of Ontario already recognizes a narrower common law tort of internet harassment. Justice Feasby considered the Ontario approach in his decision and found it lacking. He found that the tort of internet harassment is contingent upon the harassment being online. Justice Feasby stated in his decision that this condition precedent “makes no sense,” as the law provided no remedy for harassment which occurred in person or otherwise happens offline. Obviously, and as was seen in this case, harassment can occur through various means and is not solely restricted to online platforms.

Justice Feasby also highlighted the frequency at which the Court grants restraining orders for harassing behavior, citing them as an implicit acknowledgment that harassment is a justiciable issue. He held that expanding the Court's authority to include the ability to grant damages enhances its capacity for just outcomes. Justice Feasby found that a broader range of options was necessary in this case, as the court was dealing with a particularly aggressive case and has an interest in establishing a stronger deterrent for potential actors who may wish to follow in Johnston's footsteps.

Justice Feasby found that the actions of Johnston met the test for harassment, ordering \$100,000 in general damages against Johnston for breach of the tort, along with general damages for defamation of \$300,000 and aggravated damages of \$250,000, all payable to the AHS inspector. Interestingly, the decision did not establish a clear statement about how damages for harassment are to be apportioned. Potentially, the same considerations for defamation will apply to harassment damages, along with any evidence a plaintiff is able to lead regarding the harm they have received. It remains to be seen how the court will apply the tort of harassment and apportion damages moving forward, and how other provinces' courts will respond to this decision.

Existing routes to compensation for harassment

This decision adds to existing routes for claimants to obtain compensation for harassment. Claimants could bring claims of harassment under the *Alberta Human Rights Act* (the AHRA) where the one or more protected grounds under the AHRA is a factor in the discriminatory harassment. As well, employees could make a Worker's Compensation claim where the harassment occurs during employment and leads to a diagnosable mental injury or illness.

This new tort has key differences to claims of harassment under the AHRA. Under the common law tort, there is no requirement for the harassment to relate to a protected ground. Justice Feasby also was clear in stating that the harassing actions must be repeated to satisfy the common law tort, contrasting with the body of human rights decisions in Alberta which have recognized that a single incidence of harassment may be serious enough to ground discriminatory harassment without a pattern of repeated behavior.

Common law harassment further has no requirement that the harassment occurs during employment, nor that the harassment leads to mental injury or illness, unlike the route to compensation through a Workers' Compensation Board claim. However, any medical evidence of negative effects from harassment fits neatly under step four of the harassment

test.

Employers should be aware that a new common law tort now exists, and where their employees engage in harassment, one for which they could be held vicariously liable. Employers already have a legal obligation to actively discourage and prohibit harassing conduct or language under a number of statutory schemes, including the AHRA and Alberta's Occupational Health and Safety regime. Every employer should have some form of anti-violence and anti-harassment policies in their workplace. A civil tort of harassment highlights additional common law risk for employers, and further emphasizes the need for well drafted and properly implemented policies against harassment in the workplace.

[1] *Alberta Health Services v Johnston*, 2023 ABKB 209 at para 107.