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Mind the Gap: A New Tort of Harassment in Alberta

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Case Commented On: *Alberta Health Services v Johnston*, 2023 ABKB 209 (CanLII)

The law of torts is as old as the mythical reasonable man, but courts continue to create new torts that respond to changing social circumstances and formally recognize novel legal wrongs. In recent years, courts in Canada have accepted new torts such as intrusion upon seclusion (*Jones v Tsige*, 2012 ONCA 32 (Can LII)), public disclosure of private facts (*ES v Shillington*, 2021 ABQB 739 (Can LII)), family violence (*Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (CanLII)), and harassment (*Alberta Health Services v Johnston*, 2023 ABKB 209 (CanLII)). In the first three cases, courts focused on gaps in existing legal doctrine and remedies as the basis for creating the new torts. In the fourth case, *Johnston*, Justice Colin Feasby decided that a tort of harassment was worthy of recognition, in part to explain the use of an existing remedy – common law restraining orders. His analysis is the subject of this post; a subsequent post will discuss *Ahluwalia's* creation of the tort of family violence, which was recently overturned by the Ontario Court of Appeal (see 2023 ONCA 476 (CanLII)).

In the context of existing legal remedies, harassment typically requires unwanted (and often repetitive) behaviour that the perpetrator knows, or ought to know, will have the effect of harming or threatening to harm their target. There is a criminal offence of harassment that includes repeatedly following, communicating with, and threatening the target in a manner that reasonably causes them to fear for their safety or that of anyone known to them (s 264 of the *Criminal Code*, RSC 1985, c C-46). Human rights legislation across Canada includes harassment as a form of discrimination for which remedies are available in cases involving protected grounds (race, sex, disability, etc.) in areas such as employment, residential tenancies, and services customarily available to the public (see e.g. the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*) and *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC), [1989] 1 SCR 1252). Protection order legislation provides remedies in cases of family violence, defined in Alberta to include behaviours akin to harassment such as threats, intimidation, and stalking (see the *Protection Against Family Violence Act*, RSA 2000, c P-27 (*PAFVA*) at s 1(1)(e)). Alberta courts have also developed a practice of granting common law restraining orders in situations including harassment, which I will discuss in more detail below.

My particular focus in this post is on the significance of the tort of harassment in the context of human rights law and the law related to family violence protection orders. But the tort has much wider potential applicability, as the facts of *Johnston* illustrate.

Facts and Issues

Kevin Johnston is a former Calgary mayoral candidate and talk-show host who Justice Feasby described as "a self-appointed spokesperson for Albertans who opposed public health measures intended to mitigate the COVID-19 pandemic" (at para 12). On his online talk show, in other media forums, and at the Whistle Stop Café in Mirror, Alberta – site of many protests against the government's COVID-19 response – Johnston made derogatory statements against Alberta Health Services (AHS) and its employees, targeting in particular Sarah Nunn, a public health inspector. His statements included allegations that AHS and its employees were engaged in illegal activities and were "heinous" criminals and terrorists who should be jailed and bankrupted (at paras 15-17). Justice Feasby also found that Johnston "recognized that violence by those allied with him was a possibility" while "at the same time, he feigned a disavowal of violence" (at para 18). Johnston and his talk-show guest Artur Pawlowski likened AHS public health inspectors to Nazis, communists, and fascists, and in the case of Nunn, Johnston called her an alcoholic, shared pictures of her and her family, and said he intended to "destroy [her] life" (at para 20). Justice Feasby emphasized that even describing these statements could be revictimizing, as they were "both untrue and unfair" (at para 22).

AHS, Nunn, and another AHS public health inspector, Dave Brown, brought an action against Johnston for defamation and the torts of invasion of privacy, assault, and harassment. They sought damages and a permanent injunction, after AHS had already obtained a temporary injunction against Johnston in May 2021 (which he violated, resulting in a contempt of court order (at para 5)). Johnston did not file a statement of defence, and after an application by the plaintiffs for default judgment, the matter was set for a Special Chambers hearing to determine three issues: (1) whether the causes of action claimed were sufficiently made out for a default judgment to be granted; (2) what quantum of damages was appropriate; and (3) whether a permanent injunction should be issued against Johnston.

The Decision

SLAPP Suit?

Before turning to these issues, Justice Feasby dealt with an argument by Johnston that the plaintiffs' defamation claim amounted to a "Strategic Lawsuit Against Public Participation" or "SLAPP" suit to "silence [him] for criticizing and exposing AHS and AHS members for not following COVID mandates and policies" (at para 23). Justice Feasby noted that unlike other provinces, such as Ontario, Alberta does not have anti-SLAPP legislation. However, courts in Alberta can strike or dismiss claims that are an abuse of process under rule 3.68 of the Alberta Rules of Court. It was only necessary to consider this issue in relation to the claims of the individual plaintiffs, given Justice Feasby's finding that AHS as an entity could not bring a defamation claim on its own behalf (at para 25). As for the individual plaintiffs, Justice Feasby used a test similar to that under Ontario's anti-SLAPP legislation and found that their suit against Johnston was not an abuse of process.

I will not comment on this aspect of the decision other than to direct readers to past ABlawg posts on SLAPP lawsuits here. Likewise, I will only briefly address the court's rulings on the other

causes of action raised by the plaintiffs to the extent that they are relevant to gaps in the law that support the recognition of the tort of harassment.

Defamation Actions

As noted, Justice Feasby found that AHS did not have the ability to maintain an action in defamation against Johnston. He extensively canvassed Canadian and international authorities on this issue, establishing the proposition that governments cannot sue for defamation (at paras 29-47). As a government actor pursuant to the analysis from *Pridgen v University of Calgary*, 2012 ABCA 139 (Can LII) at para 78, AHS could therefore not bring a claim that Johnston defamed it (at paras 54-59). As for the individual plaintiffs, Justice Feasby ruled that Johnston's statements about Nunn were defamatory, and that even if, as a public figure, Johnston had tried to defend the claim on the basis of "fair comment", this defence to defamation would have likely failed on the merits (at paras 60-65). However, there was no similar evidence that the other individual plaintiff, Brown, sustained comments that were defamatory at the hands of Johnston (at para 64).

Tort of Invasion of Privacy

Justice Feasby cited several authorities for the point that a broad tort of invasion of privacy has not yet been recognized in Canada. Some provinces have accepted subsets of this category, such as the tort of intrusion upon seclusion in Ontario (see *Jones, supra*) and the tort of public disclosure of private facts in Alberta (see *Shillington, supra;* see also discussion of this tort by Emily Laidlaw and Hilary Young here and the *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9). Justice Feasby noted that the "common thread" in these privacy-related torts is that the plaintiff must have a reasonable expectation of privacy in the information they claim was wrongfully shared (at para 72). In the case at hand, Johnston shared images of Nunn and her family that were publicly available from her unlocked social media accounts. Although she did not consent to the use of her images by Johnston, Justice Feasby found that she did not have a reasonable expectation of privacy in relation to the images, so the tort of privacy was seen as a "square peg in a round hole" in this case (at para 73).

Tort of Assault

Assault is an intentional tort that is well established and has traditionally required proof of a reasonable apprehension of imminent harm (at paras 74-75). Justice Feasby noted that the requirement of "imminence" has recently been debated in the case law, but he applied this criterion and found that Johnston's statements against AHS employees did not amount to an imminent threat (at para 78). The tort of assault was therefore not made out on the facts.

Tort of Harassment

Justice Feasby began his consideration of the tort of harassment by noting (at para 79) that the Ontario Court of Appeal declined to recognize such a tort in *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 (Can LII) in light of other available legal remedies, while not closing the door on the possibility (*Merrifield* at para 53). Nevertheless, superior courts in Ontario and Manitoba have affirmed the narrower tort of internet harassment, which prompted Justice Feasby to state that this distinction – which depends on the mode of delivery of harassment – "makes no

sense" (at paras 80-81). Furthermore, "[w]hile internet harassment is a problem, so too is old-fashioned low-tech harassment" (at para 81).

He also noted that the tort of harassment was recognized by Justice Robert Graesser earlier this year as "a logical extension to the existing tort of intentional infliction of mental suffering" (see *Ford v Jivraj*, 2023 ABKB 92 (CanLII) at para 277). Justice Feasby agreed with Justice Graesser that the tort of harassment should be recognized, but did not agree that it could be seen as an extension of an existing tort (*Johnston* at para 82). It is also worthy of mention that *Ford* involved an application for a restraining order and not for damages, whereas the claim in *Johnston* encompassed both remedies. Justice Graesser's analysis was thus embedded in his discussion of the test for restraining orders, rather than a stand-alone analysis of the law of torts.

In terms of the test for new torts, Justice Feasby cited Justice Rosalie Abella's majority judgment in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (CanLII) and its focus on whether the harm raised by the claim can be "adequately addressed" by existing torts (*Johnston* at para 84, citing *Nevsun* at para 123). He also noted the narrower test used by Justices Russell Brown and Malcolm Rowe in their dissenting reasons in *Nevsun*: (1) there are no "adequate alternative remedies", (2) the new tort reflects an interpersonal wrong, and (3) the new tort does not result in changes to the legal system that are "indeterminate or substantial" (at para 84, citing *Nevsun* at para 237).

It followed that it was appropriate to consider existing remedies for harassment. Justice Feasby noted that harassment is a crime in certain circumstances, which indicates that harassment is a recognized wrong (at paras 86-87, citing s 264 of the *Criminal Code*). He went on to note that on a daily basis for years, courts in Alberta have been granting restraining orders to prevent harassment, intimidation, threats, and violence, and that such orders have been upheld by the Court of Appeal (at paras 91-92, citing *Waymarker Management (Silver Creek) Inc v Tibu*, 2016 ABCA 118 (Can LII)). The power to do so flows from superior courts' inherent jurisdiction to grant injunctions, of which restraining orders are one type, which is affirmed in the *Judicature Act*, RSA 2000, c J-2 at s 8.

However, the "doctrinal basis" for granting common law restraining orders has been "unclear" (at para 94). Canvassing the case law, Justice Feasby indicated that while sometimes courts have connected restraining orders to the protection of legal rights (such as the right to be free from harassment or vexatious conduct), other times the remedy was not attached to a clearly articulated remedy (at paras 94-96). He also cited the text by Justice Robert Sharpe of the Ontario Court of Appeal, *Injunctions and Specific Performance* (Toronto: Thomson Reuters) at §1:32.10, for the point that the common law has "tended to put the remedial cart before the doctrinal horse" in this area (at para 97). Justice Feasby found that recognizing a new tort of harassment would help to explain the existence and use of the restraining order remedy, and that allowing damages to be awarded for this new tort in appropriate cases was an "incremental change" that was "long overdue" (at para 98; see also para 108).

The tort of harassment was also seen to fill a gap in the law, more specifically, in the existing scheme of torts. Justice Feasby had already remarked on the inadequacy of the torts of defamation, assault, and privacy to deal with the types of harms involved in *Johnston*. He also noted that the tort of private nuisance was inapplicable in cases outside the realm of property rights, and the tort of intimidation was only relevant in cases involving submission to a threat (at para 99). Engaging

with Justice Graesser's reasons in *Ford*, he found that the tort of intentional infliction of mental suffering was not available in cases where harassment was carried out without intent, but instead with "reckless disregard" for the consequences (at para 100). Justice Feasby also noted that another criterion for the mental suffering tort – a "visible or provable illness" – was not always present in cases involving harassment, where victims "often engage in self-preservation avoidance behaviour" (at para 100). It appeared, then, that there was a gap in the law that the tort of harassment could fill.

Justice Feasby also considered the argument that it is open to legislatures to create new causes of action as an alternative to new common law torts. Here, he noted that the United Kingdom has created statutory civil remedies for harassment (at para 88). He did not mention that human rights legislation across Canada provides remedies for harassment as a form of discrimination, nor that protection order legislation provides remedies in cases of family violence, including harassing behaviours. I will come back to these omissions later, but the key point for Justice Feasby was that "recognition of a new tort of harassment does not usurp the democratic will of the Legislature" to modify or even nullify a tort recognized under the common law (at para 90).

Having found that it was appropriate to affirm the tort of harassment, Justice Feasby then articulated a definition for its application, relying on case law in relation to other torts and the criminal definition of harassment. The criteria are that the defendant:

> (1) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
>
> (2) that he knew or ought to have known was unwelcome;
>
> (3) which impugn the dignity of the plaintiff, 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. (at para 107)

Application and Remedies

In a brief analysis, Justice Feasby held that the criteria for the tort of harassment were met in the case of Johnston's actions towards Nunn. Harassing behaviour was made out, in that Johnston repeatedly spoke about Nunn in pejorative terms, mocked her and her family, and incited his followers to use violence against them. Johnston "knew or ought to have known [this behaviour] was unwelcome" and his actions "would cause a reasonable person to fear for her safety or the safety of her loved ones" (at para 109). Lastly, Johnston's behaviour caused harm to Nunn, including fear for her and her children's safety and fear of leaving her home.

Justice Feasby awarded Nunn significant general damages calculated with reference to analogous case law: $300,000 for the reputational harm caused by Johnston's defamatory statements, $100,000 in damages for the tort of harassment (at paras 110-116), and $250,000 in aggravated damages to compensate Nunn for additional harm caused by Johnston's malicious conduct (at paras 118-120). He also noted that special damages could be available under the tort of harassment to compensate Nunn for the cost of installing a home security system, if she provided particulars

(at para 117). He declined to order punitive damages, finding that such an award would serve no purpose, and noting that Johnston was unlikely to pay the damage award in any event (at para 122, citing other litigation where Johnston was ordered to pay damages for defamation and had not done so).

Justice Feasby did not consider whether the tort of harassment was applicable to the claim by AHS as an entity, perhaps because it was implied that the tort is only available to human beings, or at least – like the tort of defamation – is not available to government actors. AHS re-entered the picture when it came time to consider whether a permanent injunction against Johnston was warranted. As per *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 (Can LII) at para 66, the test for a permanent injunction requires the claimant to establish: "(1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction."

Applying these criteria in the case of AHS, Justice Feasby noted that while AHS had not established a cause of action against Johnston, it did have several "interests" or "rights" engaged by his conduct: fulfillment of its legal duties to provide public health services, the rights of its employees to be free from harassment, and the right of patients to access its facilities safely (at para 127). Lack of a cause of action also meant that damages were not an adequate remedy in relation to AHS, satisfying the second criterion. Lastly, Justice Feasby considered the balance between limiting Johnston's freedom of expression and protecting AHS employees and patients from harassment. He determined that it was appropriate to grant an injunction requiring Johnston to remain at least 50 metres from the entrances to hospitals and other AHS patient care facilities, and at least 25 metres away from the entrances of all other AHS facilities (at para 144). A permanent injunction was also granted requiring Johnston to refrain from defaming and harassing Nunn.

Commentary

Justice Feasby's analysis of the tort of harassment is comprehensive with the exception of the two omissions mentioned above in relation to human rights legislation and family violence protection order legislation. Interestingly, he noted that harassment "disproportionately affects women and members of other marginalized groups" (at para 85) and that "[t]oo often, harassment has a gendered, sexual, or racial component" (at para 91). Analysis of these other regimes may have supported the finding that the tort of harassment can fill gaps that the law should redress.

As noted, the *AHRA* only applies to harassment and discrimination in protected areas such as employment, residential tenancies, and services, and it only applies in relation to protected grounds (generally, those pertaining to members of historically disadvantaged groups). The tort of harassment can extend protection to other areas of human interaction, to grounds that are not currently protected (such as poverty/social condition), and even beyond the need for any grounds. It is also the case that human rights remedies do not typically include no-contact orders; rather they focus on monetary remedies and sometimes orders for systemic remedies. The torts approach could provide additional remedial options for those who have sustained harassment.

On the other hand, human rights legislation has been seen as a "complete code" that negates the possibility of a tort of discrimination (see *Seneca College v Bhadauria*, 1981 CanLII 29 (SCC),

[1981] 2 SCR 181). If the tort of harassment can now be used in circumstances where the *AHRA* does not apply, this has major implications for which types of human interactions will be subject to legal sanction (for another comment on *Johnston* that expresses this concern, see this post by Edmonton lawyer Dennis Buchanan). It is also important to ask whether the tort of harassment might dilute human rights law – for example, by taking the pressure off legislatures to ensure that grounds such as poverty and social condition are added to human rights statutes and their protections against harassment and discrimination. Similarly, is it problematic in policy terms to extend protection against harassment regardless of whether the claimant was targeted or affected as a member of a historically disadvantaged group?

A related caution is the possibility that the new tort of harassment might become weaponized. For example, reports of common law restraining order applications used by "street preachers" against Edmonton's Pride Corner Pop Up Protests are cause for concern. Applications like these may be lacking in merit, but fighting them still requires engagement with the legal system and the expenditure of resources (and see Buchanan's argument that restraining orders are given out too liberally in Alberta). This is especially true for a jurisdiction like Alberta that lacks anti-SLAPP legislation. If the tort of harassment stands after Johnston's appeal, the specific criteria outlined by Justice Feasby should limit the misuse of common law restraining orders now that this remedy has a recognized and clearly delineated cause of action underlying it, as long as the criteria are interpreted with appropriate restraint. In other words, the new tort of harassment might beneficially limit the availability of restraining orders in some circumstances where this remedy was misused previously.

The other gap in Justice Feasby's reasons is in relation to family violence legislation. Here too, analysis of *PAFVA* might have supported recognition of the tort of harassment. As interpreted by the courts currently, *PAFVA* excludes intimate partner relationships where the parties have not resided together (see *Lenz v Sculptoreanu*, 2016 ABCA 111 (CanLII)). *PAFVA* also fails to include coercive controlling violence within the definition of family violence, which several other jurisdictions have now recognized as a basis for protection orders (see discussion here). Restraining orders based on the tort of harassment could be, and indeed already are, used to fill the gaps in protection order laws, as evidenced by some of the cases cited by Justice Feasby (see e.g. *RP v RV*, 2012 ABQB 353 (Can LII); *ATC v NS*, 2014 ABQB 132 (Can LII)). The tort of harassment could also fill a gap in provinces like Ontario that do not have protection order legislation, where parties must currently rely on the more limited options for no-contact orders under criminal and family law (see the Law Commission of Ontario's study of this area here).

However, similar to my concerns about human rights law, the tort of harassment should not become an excuse for legislatures to avoid necessary reforms to, or enactment of, protection order legislation. In Alberta, common law restraining orders are a more burdensome remedy than emergency protection orders under *PAFVA*, which are available around the clock on an *ex parte* basis. Legislative reform is therefore the best way forward for survivors of family violence seeking access to protective remedies that *PAFVA* does not currently support.

There are myriad legal and policy considerations when contemplating the merits and potential pitfalls of recognizing the tort of harassment. Justice Feasby's analysis is thoughtful and well grounded in the law, which should offset any concerns of Johnston supporters that this decision is an instance of "judicial activism" that supports their disrespect for the rule of law and important

legal institutions. When this matter is heard on appeal, it is hoped that the Alberta Court of Appeal will balance the need for legal remedies, access to justice, and the avoidance of unintended consequences that arise in this context. And as noted above, legislatures should act on their responsibilities to ensure that the law more fully addresses harassment and related behaviours in the areas of human rights and family violence in particular.

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