FAMLNWS 2023-43
Family Law Newsletters
November 13, 2023

— Franks & Zalev - This Week in Family Law

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There Is No Common Law Tort of Harassment. Yes There Is. No There's Not. Yes There Is . . .

Alberta Health Services v. Johnston, 2023 CarswellAlta 903 (K.B.) — Feasby J.

This is not a family law case, but can't any case about harassment possibly be?

Alberta Health Services ("AHS") and two individual plaintiffs sued the defendant, Mr. Johnston, for statements he made during his mayoral campaign in Calgary and on an online talk show. The plaintiffs alleged defamation, invasion of privacy, assault, and "tortious harassment."

For the sake of brevity, let's assume there were serious issues with the statements Mr. Johnston made, many of which were not true.

For technical reasons, the Court dismissed the defamation claim by AHS, but it found that Mr. Johnston had, indeed, defamed one of the individual plaintiffs.

The Court also rejected the general claim for the tort of "invasion of privacy" (for having published photos and other personal information of one of the personal plaintiffs), a tort not generally recognized as a tort in Canada, as confirmed in *Al-Ghamdi v. Alberta*, 2017 CarswellAlta 2447 (Q.B.), aff'd 2020 CarswellAlta 369 (C.A.) at paras. 23 and 27; *ES v. Shillington*, 2021 CarswellAlta 2211 (Q.B.); *Benison v. McKinnon*, 2021 CarswellAlta 2656 (Q.B.) at para. 12; and *Dobreff v. Davenport*, 2008 CarswellOnt 8244 (S.C.J.), aff'd 2009 CarswellOnt 15 (C.A.).

While other privacy torts have been recognized, such as intrusion upon seclusion (*Jones v. Tsige* (2012), 6 R.F.L. (7th) 247 (Ont. C.A.)) and public disclosure of private facts (*ES v. Shillington*, 2021 CarswellAlta 2211 (Q.B.); *Racki v. Racki* (2021), 52 R.F.L. (8th) 1 (N.S. S.C.)), a general tort of "invasion of privacy" has generally remained illusory.

Here, these privacy torts did not apply because the plaintiff's photos were publicly available, and while she did not consent to the use of her images by Mr. Johnston, the social media accounts on which they were accessed were public. And while there were serious problems with Mr. Johnston's use of the plaintiff's images, as noted by Justice Feasby, "we should not try to put a square peg in a round hole." Use of images from a public social media account cannot ground a claim for a breach of privacy tort.

That led his Honour to consider the tort of harassment (on account of his aggressive statements), a tort that has recently been rejected by the Ontario Court of Appeal in *Merrifield v. Canada (Attorney General)*, 2019 CarswellOnt 3716 (C.A.) and in British Columbia in *Stein v. Waddell*, 2020 CarswellBC 430 (S.C.); *Anderson v. Double M Construction Ltd.*, 2021 CarswellBC

4284 (S.C.) at para. 196; *Skutnik v. British Columbia (Attorney General)*, 2021 CarswellBC 3862 (S.C.) at para. 32; *Ilic v. British Columbia (Justice)*, 2023 CarswellBC 315 (S.C.) at para. 196.

The question for Justice Feasby was whether the tort of harassment was needed to fill a gap in the law that left injured parties without a legal remedy. Justice Feasby noted that as harassment is a crime in the Canadian Criminal Code, and because Canadian courts can (and do) grant restraining orders to prevent harassment, this sort of behaviour is clearly a problem.

His Honour noted that existing tort law does not address the harm caused by such harassment. Defamation is limited to false statements causing reputational harm. Assault is limited to imminent threats of physical harm. The privacy torts only address harassment where there was a reasonable expectation of privacy. The tort of private nuisance requires a connection to property. The tort of intimidation requires submission to a threat. And the tort of intentional infliction of mental suffering requires both intention and a visible or provable illness.

And finally, noting that there is a tort of internet harassment [*Caplan v. Atas*, 2021 CarswellOnt 1107 (S.C.J.); *40 Days for Life v. Dietrich et. al.*, 2022 CarswellOnt 14063 (S.C.J.); *385277 Ontario Ltd. v. Gold*, 2021 CarswellOnt 9570 (S.C.J.); *Skwark v. Vallittu*, 2022 CarswellMan 437 (K.B.) at paras. 45-47], Justice Feasy offered this observation:

> [81] 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.**
>
> [82] Justice Graesser in [*Ford v. Jivraj*, 2023 CarswellAlta 458 (K.B.) at para. 264] expressed his surprise at the Ontario Court of Appeal's resistance to recognizing a tort of harassment in *Merrifield* and said at para 277: "I am not bound by the Ontario Court of Appeal decision in *Merrifield* and see harassment as a logical extension to the existing tort of intentional infliction of mental suffering." I agree with Graesser J; Alberta courts are not bound by the Ontario Court of Appeal nor should *Merrifield* be followed. As I will explain below, I part company with Graesser J on the question of whether the tort of harassment is an extension of the tort of intentional infliction of mental suffering. [**emphasis** added]

His Honour then bravely treads where few courts have before, recognizing the common law tort of harassment:

> [106] My view, based on the offence of criminal harassment, is that **the essence of harassment is repeated or persistent behaviour**. A single encounter where threats and insults are made or where other offensive behaviour takes place may be actionable on other grounds but it is not harassment. **Harassment occurs when the behaviour is recurring and creates an oppressive atmosphere. Any definition of harassment must specify that the behaviour is repeated.** [**emphasis** added]

Based on this, Justice Feasby defined the new tort of harassment as follows:

> A defendant has committed the tort of harassment where he or she has:
>
> > (1) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
> >
> > (2) that he or she knew or ought to have known was unwelcome;
> >
> > (3) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for his or her safety or the safety of his or her loved ones, or could foreseeably cause emotional distress; and
> >
> > (4) caused harm.

On the facts of this case, his Honour found Mr. Johnston liable for the tort of harassment. His outrageous statements mocked the individual plaintiff and her family, while showing pictures of them, and his statements could be reasonably interpreted as inciting his followers to violence against her. He knew or ought to have known this was unwelcome. This behaviour would

cause a reasonable person to fear for their safety or safety of their loved ones. She feared to leave her own home, and she had to install a new home security system.

And, for this, the plaintiff was awarded $100,000 in general damages for harassment. While the plaintiff did not demonstrate an illness, she feared for her safety and the safety of her children, impacting the way she lived her life — and this had to be compensated.

Our information is that a Notice of Appeal has been filed in the case, and given the mixed history of the tort of harassment, it is entirely possible this issue may end up in Ottawa.

Even though this was not a family law case, for the reasons and justifications explained by Justice Feasby, there is unquestionably a place for the tort of harassment in family law. Unlike the short-lived tort of family violence in *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.), where other torts (intentional infliction of emotional distress and assault) were determined to be sufficient to address the behaviour at issue (and where there was possibly a "opening the floodgates" issue), a tort of harassment, limited to post-separation conduct, could very well serve to prevent some of the less acceptable behaviours experienced by separated spouses.

Now with Every Purchase of Monopoly: The "Get Out of Marriage Card"

S.S. v. H.K., 2023 CarswellSask 450 (K.B.) — Zuk J.

As Canadian society becomes increasingly secular, the religious and spiritual underpinnings for marriage become less and less important. And as that happens, the once historic stigma of being divorced starts to fade. And as that happens, an understanding of the law of annulment becomes less and less important.

That said, in some cultures, and to some people, having been previously married still matters. And then there is the fact that, after a failed short marriage, some simply do not want to have to wait a year before they can divorce.

Therefore, an understanding of the law of annulment still matters.

In this case, the parties filed a joint petition asking that their marriage be annulled. They participated in a civil marriage ceremony (as evidenced by a Registration of Marriage), but they separated just four months later.

To support their claim for an annulment, the parties claimed that the Registration of Marriage was invalid because the marriage commissioner did not follow the procedural timelines (registering within seven days) and witness provisions set out in the *Marriage Act, 2021*, S.S. 2021, c. 16 (the "*Act*"). The parties' evidence was that they signed the Registration of Marriage with the marriage commissioner without the required witnesses and that the commissioner got witness signatures at some later date in the absence of the parties. (It was not clear if the witnesses actually attended the ceremony.)

Successful claims for annulment are very rare, and Saskatchewan has no legislation respecting the granting of annulments. In Ontario, the Federal *Annulment of Marriages Act (Ontario)*, R.S.C. 1970, c. A-14, with its single operative section continuing the law of England as of July 15, 1870, into Ontario (as may be varied by the Province), governs annulments. That is, the law of annulments is, for the most part, governed by common law: *Grewal v. Bal*, 2020 CarswellBC 2642 (S.C.).

As noted by Justice Zuk, given the stringent evidentiary and procedural requirements to claim an annulment, claiming an annulment by way of basic consent motion is generally a waste of time and money.

Here, the parties did not say when they became aware that their purported marriage may not have been solemnized in compliance with the provisions of the *Act*. And while the parties agreed that they separated on October 2, 2022, they did not disclose whether they separated due to concerns respecting the validity of their marriage or for other reason. Nor did either of them say whether they originally believed they were validly married and only subsequently came to the conclusion that their marriage was not valid.

Instead, the parties were relying on an apparent contravention of the *Act* by virtue of the putative solemnization in the absence of at least two witnesses contrary to s. 5-4 of the *Act*.

Similar to other provincial Marriage Acts, the Saskatchewan *Act* has a "good faith marriage provision" meant to save marriage from being invalid on account of certain procedural defects:

> **Irregularities not to invalidate marriage**
>
> 3-14 No irregularity in the issue of a licence that has been obtained or acted on in good faith invalidates a marriage solemnized under the authority of the licence.

But s. 3-14 says nothing about maintaining the validity of a marriage solemnized in contravention of the requirement that two witnesses be present during the solemnization of a marriage as required in s. 5-4.

Nor does s. 3-14 (or any other section of the *Act*) address the failure (as here) of the marriage commissioner to submit the statement of marriage and completed marriage licence to the Registrar of Vital Statistics within seven days as required under s. 5-8(2) of the *Act*.

Justice Zuk had this to say about that:

> [16] Notwithstanding the absence of any provision in the Act declaring a marriage to be valid notwithstanding non-compliance with the provisions of the Act by the civil commissioner or religious officiant, **it is unlikely that the legislature intended to make a marriage entered into in good faith by the parties either void or voidable by virtue of procedural non-compliance with the Act**.
>
> [17] In addition, there are **strong policy reasons for maintaining the validity of a marriage between two persons acting in good faith notwithstanding non-compliance with the procedural requirements of the Act. Potentially, any irregularity in conducting, or reporting the marriage would provide one or both of the parties to the marriage holding a "get out of marriage" card if annulments based on the irregularity of proceedings was permitted**. [**emphasis** added]

Although generally associated with the recognition of foreign marriages, this is, in effect, an incident of the policy against "limping marriages": *Schwebel v. Ungar*, 1963 CarswellOnt 237 (C.A.). Similarly, evidence of cohabitation and a ceremony creates a rebuttable presumption of a valid marriage: *Le v. Le* (2008), 53 R.F.L. (6th) 27 (Alta. Q.B.).

Justice Zuk also thought it inappropriate to grant an annulment due to an alleged irregularity in the absence of evidence from the person alleged to have committed the irregularity, i.e. the marriage commissioner, who was not a party and who did not have the chance to refute the allegations or otherwise offer any explanation.

And finally, the parties did not offer any explanation for acting on the alleged irregularity months after becoming aware of it. It was not appropriate for parties to participate, or acquiesce, in a procedurally flawed marriage ceremony and then hold the irregularity in abeyance until one or both decide they no longer wish to remain married.

Ultimately, Justice Zuk thought it possible — if not likely — that the parties were simply second-guessing their decision to marry. And rather than proceed under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) and comply with the provision of living separate and apart for one year, the parties hoped for a more expedient process to end their marriage . . . if there was one in the first place, that is.

Justice Zuk dismissed the application for an annulment with leave to reapply following the parties' compliance with the procedure set out in his Honour's decision, which included serving notice of the application on the Ministry of Justice and Attorney General to provide an opportunity to seek third party status or otherwise make representation with respect to the issues raised in the application.

Lawyers or Spin Doctors?

Giann v. Giannopoulos, 2023 CarswellOnt 14796 (S.C.J.) — Myers J.

This is not a family case, nor is it groundbreaking — in the words of Justice Myers, it is a "classic situation, seen every day in estates court." However, family law practitioners would be wise to take note of Justice Myers' prudent comments about "evidence" vs. "spin".

The late Fotios Giannopoulos executed two wills, the first, executed in 2016, more or less divided his assets equally between his four children. He then executed a second will, in 2021, which was much the same, except he left the entirety of his business assets to only one child. Additionally, the new will stated that, should the majority beneficiary, Nick, die before his father, the business would be left to a non-family member, Panagiota Papastefanou. On one side, the respondent majority beneficiary, Nick, argued he was preferred by his late father as a reward for the extra effort he put into caring for him. On the other, the jilted applicant siblings asserted that the respondent took advantage of having their father's ear to influence his own entitlement.

To avoid all estates being subject to applications, the law implies a minimum evidentiary burden which must be met in order for an application to proceed. Here, Justice Myers was trying to determine whether there was sufficient evidence to raise a *prima facie* case for a challenge to the will. Justice Myers found that the concerns raised by the applicants were "just conjecture, assumption, and allegations, spun together to try to create a negative atmosphere based on distrust and suspicion." (Sure *sounds* like a family law case.)

This distinction between "evidence" and "spin" is emphasized throughout the decision. In one of the applicant's affidavits, she refers to family and caregivers warmly by their first names. But she introduces Ms. Papastefanou as follows:

> Panagiota Papastefanou ("Papastefanou"), who is named as an alternate beneficiary in paragraph III(b)(1) of the Purported 2021 Will in the event Nick had predeceased my father and is described as my father's "caregiver".

Justice Myers notes three things from this introduction: (1) that Ms. Papastefanou is apparently not deserving of an honorific; (2) that Nick Giannopoulos survived his father, and was always anticipated to do so, therefore the introduction of Ms. Papastefanou by reference to her moot role as alternate beneficiary is used for colour; and (3) the quotation marks around "caregiver" were added for colour and suggest that her caregiving was not real.

Similarly, see the below passages from the same affidavit:

> 19. Prior to my mother's death, I do not recall having any idea of who Papastefanou was, nor of ever having been introduced to her. I do recall, however, a few days after my mother's death, while walking into our church hall following Sunday Liturgy, a woman stopped me and offered her condolences. I had never seen this woman before. Months later, recalling this woman, although I knew nothing of her, not even her name, I described her to Nick (everyone was always trying to find a single girl for him) and suggested that he introduce himself and think about asking her out for a date. As I was in the midst of describing her, Nick said, "Who, Yiota?" I responded, "Is that her name?", and he proceeded to tell me that she was already married and had a grown daughter. This was Papastefanou. I do not know how or when Nick knew of this woman. If Nick had known Papastefanou prior to my mother's passing, he did not share that with me.
>
> 20. Surprisingly enough, I later began to hear from Nick that Papastefanou was bringing our father food and giving him rides home from the Danforth Store. Despite us not having known her before, Papastefanou presented herself to my siblings and close family friends as my mother's and father's friend and insisted that she was interested in helping my father after my mother's passing. To this day, I do not know with certainty how Papastefanou was introduced to my parents.
>
> 21. Initially, Papastefanou's involvement seemed relatively innocuous. But over time Papastefanou began to take an increasing and disruptive role in my father's care, while Nick was increasingly cutting me out of decision making.

Justice Myers considered this to have been drafted "disrespectfully to arouse suspicion." The applicant referred to Ms. Papastefanou suspiciously as "this woman". There was nothing inherently surprising in paragraph 20 to justify commencing the paragraph with "Surprisingly enough." This applicant, his Honour noted, lives in Florida. What did it matter that the Floridian applicant did not know how Ms. Papastefanou met her parents? Finally, in this passage, the applicant attributed an increasing and disruptive role played by Ms. Papastefanou in relation to her feeling that Nick Giannopoulos was cutting her out of the loop. But what did that have to do with Ms. Papastefanou? It was a giant leap with no connection. Absent the spin, the facts plead were simply:

> a. An unknown attendee at a funeral offered condolences to a member of the family;
>
> b. Ms. Papastefanou was bringing Fotios Giannopoulos food and giving him rides home from work;
>
> c. She said she was close to their mother and that she was interested in helping their father.

According to Justice Myers, the tone of disrespect and objectification in this affidavit was "lawyer's spin dressing up innocuous facts." Justice Myers presents an alternative, unspun, paragraph pleading the same facts:

> I met Ms. Papastefanou at my mother's funeral when she offered me condolences. I did not know who he was. When I asked Nick about her, he told me that she was married, had a grown daughter, and was bringing food and giving our father lifts from work.

Another applicant's affidavit contained the following:

> 20. I'm not sure how or when Panagiota Papastefanou came into the picture. I am not exactly sure when I learned that this woman, who I had never heard of before, had begun spending time with my dad, bringing him lunch, picking him up from work at the end of the day, and having dinners at my dad's home with him and [the hired caregiver].
>
> 21. I was quite uneasy with the situation, but Nick reassured me that it was innocent and was best for my dad. I asked Nick why this stranger would want to take on this responsibility without payment. He told me that Papastefanou had a poor relationship with her father and really loved our father, as a father figure, and wanted to help.
>
> 22. Though I understood that Papastefanou had a home of her own in Toronto, she ended up moving into my father's home in early 2021. Nick told me that her work for the Ontario Ministry of Health allowed her to work remotely and that with the COVID pandemic she worked full time from my father's home.
>
> 23. Not long after learning this news, I then learned that [the caregiver] had quit the job and now Papastefanou was living full time in the home and taking care of my dad. This made me more uncomfortable and I let Nick know, but once again he reassured me that it was all innocent. I told him that we needed to put a contract together to protect our father's assets and avoid any claims down the road. Nick told me that he had broached the subject with Papastefanou and that she was willing to sign a document to that effect, but it never happened.

Again, Justice Myers asks that we consider the actual bare facts:

> a. A women that the applicant did not know had begun bringing his father lunch, picking him up from work, and having dinners with him;
>
> b. Nick Giannopoulos, who worked and slept with his father, assured the applicant that the relationship was innocent. She loved their father, as a father figure and wanted to help, for free;
>
> c. Although Ms. Papastefanou had a home of her own, she moved into the father's home in early 2021. Her position with the Ontario government let her work remotely;

d. The caretaker who had been hired quit and Ms. Papastefanou was living fulltime in the home taking care of the father.

As noted, the only things indicative of wrongdoing in the excerpt above are spin — and spin is not evidence. Calling Ms. Papastefanou "this woman" and expressing the applicant's suspicion were both elements entirely removed from any material evidence.

Justice Myers succinctly summarized the applicant's evidence, making clear that the "actual facts adduced offer no basis to find suspicious circumstances at play." Rather, the *suggestion* of wrongdoing by Ms. Papastefanou comes from the choice of words, adjectives, and spin rather than admissible evidence. To establish a *prima facie* will challenge is not a high hurdle. It can be readily overcome with evidence that there is a real basis for the claim. In this case, the only basis for suspicion was spin.

Is this that different from what we see in family law affidavits every day? We think not. Is it worth considering this and saving "spin" for your factum? We think so.

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