

Raising the Bar

Potential Liability for Sexual Harassment in the Workplace

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This is a time of increased vigilance for inappropriate or unlawful conduct in the workplace, including with respect to sexual harassment and sexual assault. Who can be potentially liable in these situations? Learn more in this edition of *Raising the Bar*.

Can Employees Be Personally Liable For Their Torts?

In [Satur v. Starbucks Coffee Canada Inc.](#), the Ontario Court of Appeal held that a finding of vicarious liability on the part of an employer does not absolve an employee from personal liability for their negligent actions, even where the actions occurred in the course of employment.

The plaintiff had sued Starbucks and two of its employees, alleging that a barista had spilled scalding hot water on her. The trial judge granted a motion by the employer to strike the statement of claim against the employees, in part on the basis that it would be an abuse of process to name the individual defendants in the claim for the sole purpose of obtaining discovery. The Court of Appeal disagreed. It found that the concepts of an employer's vicarious liability for employees acting within the scope of their employment and an employee's personal liability for their own negligence while acting within the scope of their employment can co-exist. The Court also found that bringing a lawsuit against individual defendants for the purpose of obtaining discovery from them does not amount to an abuse of process where a proper cause of action has been plead against them.

Can an Employee Sue a Manager for Sexual Harassment?

In [Watson v. The Governing Council of the Salvation Army of Canada](#), the Ontario Superior Court allowed a plaintiff's action to proceed against her former manager despite the fact she had signed a full and final release upon her termination from employment.

The manager had been terminated from his employment after several allegations of sexual workplace harassment had been raised against him. The plaintiff also alleged sexual harassment by the former manager and she sued both the employer and the manager. The employer reached a settlement with the plaintiff and in this summary judgment motion, the former manager sought to have the claim struck primarily on the basis of the full and final release.

The release stated in part that the "release of claims shall include any claims against anyone or any organization in any way associated with The Salvation Army which arise out of or which are in any way related to or connected with my employment or the ending of my employment." The Court held that the terms of the release were unambiguous, and as such, the words "arise out of...my employment" defined its scope: the release could not be considered all inclusive as its scope was the employment relationship. While many of the alleged events occurred at the place of employment (or because of the employment), the sexual harassment and intimidation were not connected to the employment itself. More specific language would have been needed to bar the plaintiff's claim against her former manager.

Sexual Assault: When is an Employer Vicariously Liable?

In [Ivic v. Lakovic](#), the Ontario Court of Appeal addressed the question of whether a taxi company was liable for a sexual assault allegedly committed by one of its drivers, absent any fault on its part.

The appellant was sexually assaulted by a taxi driver on her way home from a party. She sued the taxi driver, the taxi owner, and the taxi company and claimed that the taxi company was vicariously liable for the acts of the driver. The motion judge disagreed, and dismissed this claim. The main issue on appeal was whether the motion judge erred in his application of the test for imposing vicarious liability on employers, as articulated by the Supreme Court of Canada in *Bazley v. Curry*. Among other things, the Court referred to the five factors (non-exhaustive) relevant in determining the sufficiency of a connection between the employer's creation of risk or enhancement of risk and the intentional wrong committed by an employee:

- the opportunity that the enterprise afforded to the employee to abuse his or her power
- the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee)
- the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise
- the extent of power conferred on the employee in relation to the victim
- the vulnerability of potential victims to wrongful exercise of the employee's power.

The Court found that while the function of a taxi driver – the fact that the taxi driver has control over the vehicle – creates an opportunity for predatory conduct, the driver's opportunity is not intimately connected to this function. The alleged conduct did not further the aims of the taxi company, and while there may occasionally be some friction and confrontation between passengers and drivers, there was no evidence of that in this case. Further, the taxi company did not confer any power on the driver in relation to the appellant – it merely dispatched the driver to the passenger.

The fifth factor was deemed the most important in this case: a lone, intoxicated woman is vulnerable late in the evening. However, since "she is not prey only to taxi drivers," the Court found that the power the driver wrongfully exerted was not predicated on his employment, noting that "vulnerability does not itself provide the strong link between the enterprise and the sexual assault that the imposition of no-fault liability would require."

The appeal was therefore dismissed.

The Tort of Harassment – What Is It?

In [Merrifield v. The Attorney General](#), a common law cause of action for the "tort of harassment" was recognized for the first time by the Ontario Superior Court of Justice (an appeal of this finding was argued before the Court of Appeal in September 2018). The Court awarded \$100,000 in damages for the harassment and intentional infliction of mental suffering of Peter Merrifield, a member of the Royal Canadian Mounted Police (RCMP). Mr. Merrifield alleged that after he participated in a Barrie nomination meeting for the Progressive Conservative Party in 2005, his superiors began making unjustified and unwarranted decisions about him – including a punitive transfer and an internal investigation – based on meritless allegations. Mr. Merrifield's supervisors harassed and bullied him, damaged his reputation, impaired his career advancement, and caused him to suffer severe emotional distress. Based on the evidence, the Court found the plaintiff had proved the tort of harassment.

The trial judge set out the test for harassment as follows:

- Was the conduct of the defendant towards the plaintiff outrageous?
- Did the defendant intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
- Did the plaintiff suffer from severe or extreme emotional distress?
- Was the outrageous conduct of the defendant the actual and proximate cause of the emotional distress?

The trial judge acknowledged that the test significantly overlaps with the tort of intentional infliction of mental distress, but noted two differences: 1) in addition to being outrageous, the conduct resulting in intentional infliction of mental suffering must also be flagrant; and 2) the plaintiff must show that he or she suffered a visible and provable illness.

Implications for Employers

Some key principles can be extracted from the cases above:

- a finding that an employer is vicariously liable does not absolve an employee from an allegation of personal liability
- in cases of harassment or other improper workplace behaviour, a release that merely covers issues that arise out of employment may not cover harassment complaints.
- employers are less likely to be vicariously liable for sexual assault where the actions of the employee bear no relation to their job functions and where the employee assumes power over another through their own actions
- *Merrifield* suggests that an employer may now face workplace harassment claims outside the scope of the *Human Rights Code*.

Given the potential liabilities described above, it is very important for employers to have proper, updated policies in place and to ensure that the employees are trained with respect to their own responsibilities and obligations in the workplace.

If you have any questions regarding appropriate training or any of the issues raised above, we're happy to help.

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