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MacKay v. Buelow

Between
Catherine-Ann MacKay, plaintiff, and
Anthony Blain Buelow, defendant

[1995] O.J. No. 867

24 C.C.L.T. (2d) 184

11 R.F.L. (4th) 403

54 A.C.W.S. (3d) 606

Court file No. 85425 94

Ontario Court of Justice (General Division)

Binks J.

Heard: November 14 and December 14, 1994.

Judgment: March 24, 1995.

(10 pp.)

Torts — Nuisance — Harassment — Intimidation — Former husband stalking ex-wife — Damages.

Action for damages for harassment and intimidation. After an 11-year relationship, the plaintiff and her child left the defendant and the couple were divorced in 1991. In October 1993, the plaintiff obtained an order barring defendant from molesting, annoying or harassing her or her child and restraining him from communicating or coming within two kilometres of the plaintiff. The Defendant ignored the order and continued to stalk and harass the plaintiff, her friends and professional advisers. The plaintiff argued she suffered from depression, loss of self-esteem, memory loss, insomnia, weight loss and eczema due to the defendant's behaviour. The defendant had been convicted of trespass by night and breach of recognizance. Nevertheless, he continued to stalk and harass the plaintiff. He did not appear at the hearing or defend the action.

HELD: Judgment for the plaintiff. Under Rule 19.02(1)(a) the defendant was deemed to admit the truth of all the plaintiff's allegations. The plaintiff was entitled to recover \$25,000 in non-pecuniary damages for invasion of privacy, trespass to the person and intentional infliction of mental suffering. She also recovered \$15,000 in punitive damages because of the defendant's "outrageous" and "devilishly creative" reprehensible conduct. She was awarded \$44,000 for future psychological care and \$6,248 for various damages including the cost of alarm system and security-related renovations and measures.

Statutes Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 19.02(1)(a).

Counsel:

Michelle Smith, for the plaintiff.

No one for the defendant.

1 BINKS J.:— This is an action for damages resulting from continued harassment and intimidation of the plaintiff by the defendant. Although properly served the defendant did not file a Statement of Defence and was noted in default. The matter proceeded as an assessment of damages.

2 Under Rule 19.02 (1)(a) of the Rules of Civil Procedure a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the Statement of Claim.

3 The plaintiff Catherine-Ann MacKay was born on May 19, 1963, currently 31 years of age. She is unemployed and is a recipient of Family Benefits assistance.

4 The defendant Anthony Blain Buelow was born on March 25, 1940, currently 54 years of age. He resides in the City of Ottawa, unemployed and a recipient of Workers' Compensation benefits.

5 Prior to their marriage the plaintiff and defendant lived together in a common law relationship for four years. They were married in April, 1983 and were divorced in 1991.

6 Their child's name is Angela Caroline MacKay. She was born August 7, 1985 and is currently 9 years of age. The plaintiff has legal custody of Angela.

7 By an Order dated October 7, 1993 of McWilliam J., the defendant's access rights were terminated, until a further Order of this Court. He was also Ordered to be restrained from "molesting, annoying or harassing the applicant or child of the marriage;" and he was further Ordered to "be further restrained from communicating with the applicant directly or indirectly, and from coming within two kilometres of the applicant and or applicant's residence."

8 Set out in the Statement of Claim are allegations that for a four month period beginning June, 1993 the defendant harassed and intimidated the plaintiff on numerous occasions by continuous telephone calls during the day and night, letters and notes left at her home, threats to kidnap the daughter Angela and remove her from the country, threats to the physical safety and well being of the plaintiff and Angela, throwing a cupboard door directly at the plaintiff and narrowly missing her, hanging a used condom on the wall in her home, stalking the plaintiff on several occasions by car and on foot, directly and indirectly threatening to kill her, videotaping her through her bathroom window from a tree, advising third parties of the existence of nude movies of her and continuously harassing her friends and professional advisors. Because of Rule 19.02(1)(a) the Court admits the truth of these allegations of fact.

VIVA VOCE

9 The evidence viva voce amplified the allegations including hunting the plaintiff down in Massachusetts and telling her "there is no way you can get away from me." He also told the tenant, in reference to a bizarre murder in Ottawa where a young woman was killed by a crossbow, that he, too, would borrow a crossbow.

10 As a result of the defendant's conduct the plaintiff has suffered mental anguish, physical and emotional distress, pain and suffering and loss of enjoyment of life. In particular, the plaintiff states that she has suffered severe depression, loss of self-esteem and self-worth, short term memory loss, insomnia, has suicidal tendencies, loss of appetite and weight loss and a serious exacerbation of eczema. She has fear for her safety and that of her daughter. At the recommendation of her family doctor and the police, the plaintiff assumed a new name and relocated with her daughter to a new community.

11 The defendant was convicted of one charge of intimidation, one charge of trespass by night and one charge of breach of recognizance. There was no evidence of the sentence he received which I find unusual.

12 In her Statement of Claim the plaintiff asks for non-pecuniary general damages for assault, or damages in the alternative for harassment, or in the alternative, for nuisance, or in the alternative for invasion of privacy or in the alternative for trespass to the person, or in the alternative, intentional infliction of mental suffering and emotional distress, or in the alternative for negligent infliction of mental suffering and emotional distress; and for pecuniary general damages and punitive and aggravated damages as well as special damages, pre and post-judgment interest.

13 The parties were together for eleven years. In 1988 Ms. MacKay left her husband, came to Ottawa, found work, and she worked full time and cared for her child as a single parent until 1991. At that time, the child became ill and required medical attention.

14 Dr. Beck points out that from 1988 until 1991, Ms. MacKay did work full time and cared for her child on a day to day basis. From 1991 until 1993, Ms. MacKay worked part time only. She was caring for her child who was either seriously ill or recovering from a serious illness. The doctor was satisfied that Ms. MacKay's level of functioning had been very high for the five year period following her separation. The doctor goes on to say:

Any psychological repercussions from either Ms. MacKay's childhood or her abusive marriage would have manifested during this period from 1988 to 1993. It is because of this high level of functioning during this five year period that I have concluded that Ms. MacKay's symptoms at the present time are directly related to the events which occurred from March, 1993 through the end of that year at the hand of her ex husband.

Ms. MacKay's clinical state, which I shall describe more fully presently, is similar to that of other woman who have been stalked or women who have been sexually assaulted by either a physician or a psychiatrist. Her symptoms are similar to those described in the literature for these circumstances and, in fact, my opinion is that Ms. MacKay was a victim of stalking by her ex-husband.

What is usually recommended for a person with a diagnosis of post traumatic stress disorder, with these symptoms, is therapy once or twice weekly. The therapy in the short term usually deals with feelings and issues that relate to the event or events themselves. This period of treatment usually lasts from one to two years. The second phase of treatment deals with the fact that the traumatic events have interfered with the individual's usual capacity to trust in others and in the world. This second phase of treatment usually lasts from 2 to 4 years. Therefore the time frame for treatment can be anywhere from three to six years. The length of treatment cannot be predicted at the outset. Whether or not the patient is seen once or twice weekly depends upon the severity of the patient's symptoms.

The cost of treatment is, on average, one hundred seventy-eight dollars per session.

15 In an addendum specifically related to her assessment of Catherine MacKay, Dr. Beck writes:

Ms. MacKay has a psychiatric diagnosis of Post-traumatic Stress Disorder. The existing research on this disorder, which is based primarily upon the experience of either Viet Nam War veterans or accident and disaster survivors, shows that the response to treatment is extremely variable as well as unpredictable. The minimum period of treatment tends to be weekly follow-up over a period of about five years;

treatment usually includes both drug intervention and psychotherapy. The cost of one session is \$178.00 at today's rate.

In Ms. MacKay's particular circumstances, it should also be noted that she is suffering from significant weight loss and other somatic symptoms directly related to the stress of her experience. In addition, she has not been able to have regular medical or psychiatric follow-up because of her fears that her ex-husband will determine her whereabouts.

16 Although in her Statement of Claim the plaintiff asked for relief under a number of headings for separate torts, each in the alternative, I believe that under the provisions of Section 2.01 even though an amendment has not been asked for, to secure a proper result, I can make a finding under several of the heads of the alleged torts rather than in the alternative. I find that there was an invasion of privacy, a trespass to the person, and the intentional infliction of mental suffering and emotional distress and for such outrageous conduct on the part of the defendant, the plaintiff is entitled to non pecuniary general damages of \$25,000.00. She is also entitled to \$15,000.00 for aggravated damages.

17 She is also entitled to punitive damages in the amount of \$15,000.00 because of the calculated, devilishly creative, and entirely reprehensible conduct by the defendant. I follow the reasoning of O'Connell J. in *Surgeoner v. Surgeoner*, [1993] O.J. No. 2940 (2 December 1993), Toronto 181185 91Q (O.C.J. Gen. Div.).

18 In fixing these amounts, I have considered the following cases:

Capan v. Capan (1980), 14 C.C.L.T. 191 (O.H.C.).

Motherwell v. Motherwell, [1976] 6 W.W.R. 550, 73 D.L.R. (3d) 62, 1 A.R. 47 (C.A.).

Timmermans v. Buelow et al. (1984), 38 C.C.L.T. 136.

Hurley v. Moore (1990), 85 Nfld. & P.E.I.R. 271, 266 A.P.R. 271 (Nfld. T.D.).

Queen (Litigation Guardian of) v. Hodgins (1991), 36 R.F.L. (3d) 159 (Ont. C.J. Gen. Div.).

Glendale v. Drozdzik (1993), 25 B.C.A.C. 14, 43 W.A.C. (B.C.C.A.).

Surgeoner v. Surgeoner, [1993] O.J. No. 2940 (2 December 1993), Toronto 181185 91Q (O.C.J. Gen. Div.).

Harris v. Cohen, [1994] O.J. No. 2142 (27 September 1994) Toronto 40537 89Q (Ont. C.J. Gen. Div.).

Roth v. Roth (1992), 9 C.C.L.T. 141 (2d) (O.C.J. Gen. Div.).

B. (K.L.) v. B. (K.E.) (1991), 7 C.C.L.T. (2d) 105, 71 Man. R. (2d) 265 (Q.B.).

B.(P.) v. B.(W.) (1992), 11 O.R. (3d) 161.

19 No material was filed by the plaintiff for the present value of future care which Dr. Beck has testified will be necessary. The plaintiff has asked for \$46,280.00 which figure has been arrived at by multiplying the cost of one session per week at \$178.00 for 52 weeks each year, for five years. I am satisfied that the plaintiff should be compensated for her future care and I award her the sum of \$44,000.00.

20 Of the comprehensive list of expenses caused by the defendant's conduct, I allow the following:

Repair of back gate of townhouse	30.00
Cost of photocopying	40.00
Monies advanced to plaintiff	
for renovation	2,440.00
Wall repairs	1,500.00
Alarm system	2,190.00
Post Office box rental	48.15

\$6,248.15

21 The plaintiff is also entitled to pre and post judgment interest and her costs. In the circumstances, costs on a solicitor and client basis are called for. There is no reason why the plaintiff should have to bear any portion of the legal costs when the actions of the defendant went far beyond the bounds of civilized behaviour.

BINKS J.
