

# Ontario Superior Court recognizes new cause of action addressing internet harassment

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In *Caplan v. Atas* (*Caplan*), Justice Corbett took the extraordinary step of recognizing a new common law tort of internet harassment in response to an abhorrent campaign of online harassment going back decades. In doing so, he recognized the existing deficiencies in Ontario law to providing a remedy for this troubling phenomenon and distinguished the facts in this case from those in the recent decision of *Merrifield v. Canada*, in which the Court of Appeal for Ontario rejected expanding civil liability for harassment.

*Caplan* introduces welcome new tools and remedies for plaintiffs seeking to address the increasingly prevalent problem of online harassment, bullying, hate speech and cyber-stalking. Justice Corbett did caution that further development of the law is required, noting that:

...the law needs better tools, greater inter-jurisdictional cooperation, and greater regulation of the electronic "marketplace" of "ideas" in a world with near universal access to the means of mass communication.

Justice Corbett's comments echo the concerns raised in the recent report of the Law Reform Commission of Ontario (the LCO) on "Defamation Law in the Internet Age," which we have written about [here](#). Justice Corbett agrees with the LCO that the legislature should grapple directly with the issue of online harassment.<sup>[1]</sup> In the meantime, the recognition of the tort of internet harassment is a welcome development that will hopefully afford victims another avenue of recourse to directly address the harms of online harassment (assuming that, this time, the tort survives any appeal).

## Background

The decision in *Caplan* concerns three motions for summary judgment and a motion for default judgment brought by the plaintiffs in four separate actions, all pertaining to the conduct of the same defendant, Ms. Atas.

For years, the defendant carried on "systematic campaigns of malicious falsehood to cause emotional and psychological harm" to the plaintiffs and an ever-widening circle of their associates. At the time of the hearing, there had been as many as 150 victims of these attacks, with baseless accusations ranging from professional misconduct to pedophilia. The plaintiffs commenced actions for defamatory libel and (in two of the cases) 'harassment' and 'private nuisance' and sought to permanently enjoin the defendant's defamatory and harassing postings.

Notwithstanding the fact that the defendant was prohibited from posting practically anything online pursuant to three interlocutory injunctions, she continued to defame and harass the plaintiffs online. She also actively prolonged and complicated the legal proceedings by seeking (and then terminating) the appointment of a litigation guardian by reason of mental illness, strategically making an assignment in bankruptcy on the eve of the summary judgment motions,<sup>[2]</sup> and repeatedly failing to comply with the Court's orders and directions. Even 74 days spent in jail did not deter the defendant from continuing her misconduct.

The plaintiffs filed over 30,000 pages of material in support of their motions. After reviewing the record and considering the relevant principles of default and summary judgment, Justice Corbett granted judgment in favour of the plaintiffs on all four motions.

## The tort of defamation

Justice Corbett found that the plaintiffs' extensive evidentiary record contained thousands of examples of online publications that were both defamatory on their face and directed or aimed at one or more of the plaintiffs. After reviewing the relevant evidence, the court also determined that – despite the defendant's attempts to publish her comments online anonymously or pseudo-anonymously – the plaintiffs had proven on a balance of probabilities that the defendant was the author of the defamatory words.

Ultimately, the court held that the defendant's failure to file any evidence in support of her defences was fatal in the circumstances of this case and that the tort of defamation was made out.

## The tort of online harassment

By far the most noteworthy part of the decision was the introduction of the new tort. Justice Corbett determined that the limited remedies provided by the law of defamation were not sufficient to control or stop the defendant's harassment. To provide appropriate remedial scope to address the harassment at issue in this case, there was a need to recognize a new common law tort of internet harassment.

Key to this conclusion was the finding that a defendant who engages in harassment intends not only to harm reputation, but to in fact “harass, harry and molest by repeated and serial publications of defamatory material, not only of primary victims, but to cause those victims further distress by targeting persons they care about, so as to cause fear, anxiety and misery.”

Justice Corbett distinguished the recent decision in *Merrifield v. Canada*, where the Court of Appeal for Ontario declined to recognize the common law tort of harassment in the employment context. In *Merrifield*, the Court of Appeal concluded that the tort of intentional infliction of mental suffering was a sufficient remedy in the circumstances of that case and, in any event, there was no foreign judicial authority, academic authority or compelling policy rationale put before it for recognizing a new tort and its requisite elements. However, the Court did not foreclose the development of a “properly conceived tort of harassment that might apply in the appropriate contexts” in a future case.

*Caplan v Atas* may well be that case. Justice Corbett found that the tort of intentional infliction of mental suffering was not adequate or designed to address the particular circumstances of the plaintiffs. The test for this tort requires the plaintiff to prove the defendant's conduct is flagrant and outrageous, calculated to produce harm and results in visible and provable illness. Justice Corbett noted that plaintiffs should not have to be put to establishing “visible

and provable illness” before being able to bring an end to the defendant’s harassing behaviour.

Unlike in *Merrifield*, the Court had before it social science research which confirmed that online harassment is rapidly growing in prevalence and has a profoundly negative impact on its victims. The Court also had the benefit of U.S. case law that considered the tort of harassment in internet communications. Although Justice Corbett acknowledged that no common law court (other than in the U.S.) had recognized the tort of harassment, he noted that the cases recognizing the tort of invasion of privacy (or intrusion upon seclusion) supported this further development of the common law.

Taking these considerations together, Justice Corbett held that the societal harm produced by online harassment warranted recognition as tortious conduct contrary to the common law in Ontario. Justice Corbett adopted the American test for the tort of internet harassment:

Where the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm.

The Court held that the defendant’s conduct in this case clearly satisfied the above “stringent” test.

## Relief granted to the plaintiffs

Equally noteworthy were the remedies that Justice Corbett granted to the plaintiffs, recognizing that traditional deterrence (e.g., 74 days of incarceration) had not deterred this plaintiff:

- **Permanent injunction:** The court granted a permanent injunction prohibiting the defendant from any internet communications involving not only the plaintiffs, but all “other victims of her defamation and harassment, together with their families and related persons, and business associates.” The extension of the injunction to such a broad group, including non-parties, was necessary to prevent the defendant from shifting her harassing behaviour to a new set of victims associated with her primary victims (a tact she had taken numerous times in the past). In the Court’s view, one of the reasons it was necessary to recognize the tort of harassment was “to protect the plaintiffs from a broad range of wrongful conduct that includes harming others to cause damage to a plaintiff.”
- **Transfer of title to offending posts:** The court went so far as to order that the right, title, interest and ownership of the defendant in her various impugned publications and email accounts be transferred, without recourse, to an *amicus curiae* or an independent supervising solicitor or expert appointed by the Court, in order to remove these publications from the internet. In this case, the Court held that an order that the defendant remove her posts would be ineffective, because she simply would not comply with it, and it would lead to further conflict and litigation between the parties.
- **Findings of fact to facilitate removal of posts:** The Court also made affirmative findings of fact regarding the falsity of the impugned publications, notwithstanding the fact that the plaintiffs were not required to meet this burden in order to establish defamation. The

plaintiffs specifically requested these “extra” findings of fact, which are required to secure removal of posts in some American jurisdictions, to avoid the need to relitigate these issues in another forum. The Court found that making these findings of fact was an acceptable ancillary remedy in this case, even though they were not necessary in order to decide the case under Ontario law.

The Court found that requiring the defendant to issue an apology would have no utility in this case because (among other reasons) the defendant was not a public person whose word carried credibility or weight, and in any event she would almost certainly not comply.

## Key takeaways

Recognition of the tort of internet harassment is a welcome (and long overdue) development for victims of persistent online abuse, as it provides a cause of action for a societal ill that the law has previously been ill-equipped to address.

As demonstrated in *Caplan*, the new tort may also create the ability for victims to seek practical remedies that directly address the harm caused by harassment. These include permanent injunctions which may protect non-parties who have not yet been targeted for harassment, orders transferring title in offending publications and online accounts to facilitate removal of harassing content, and ancillary findings of the falsity of impugned statements (at least in circumstances where this would not create an undue burden on the court). Plaintiffs commencing actions alleging online harassment should proactively consider the full scope of potential remedies when setting out the relief sought.

While *Caplan* marks an important step forward in recognizing the tort of online harassment, it also highlights the limited ability of the common law to provide practical remedies to the targets of internet harassment in a timely and efficient manner. The Court called out for attention by the legislature, noting the significant changes recommended by the LCO, which include more creative and timely means of providing relief to victims in similar positions to the plaintiffs.

It remains to be seen whether the plaintiff will appeal the decision, giving the Court of Appeal the opportunity to address the reintroduction of the tort, this time on perhaps more appropriate facts. As the plaintiff had previously been declared a vexatious litigant, she needs Court permission to bring an appeal. Given the importance of the issue to the profession and to society at large, such appellate consideration would be welcome.

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[1] While other jurisdictions (e.g., England, New Zealand and Nova Scotia) have enacted legislation to begin to address internet harassment, Ontario has not yet done so in spite of the LCO's recommendations for sweeping changes in this area of the law.

[2] In response, the plaintiffs abandoned their claims for damages and costs, which allowed the motions to proceed notwithstanding the defendant's 11<sup>th</sup>-hour bankruptcy filing.