Hiding Behind A Screen: Ontario Recognizes A New Cause Of Action For Internet Harassment

In re-examining the balance of freedom of speech and the law of defamation in the Internet age, the Ontario Superior Court of Justice has recently recognized a new tort for internet defamation and harassment in *Caplan v. Atas,* 2021 ONSC 670 ("*Caplan*").

Background

This case arose out of four related actions against the defendant for defamatory libel, harassment and private nuisance. The plaintiffs in these cases, who included counsel from previous litigation involving the defendant and ex-employers of the defendant, alleged that the defendant had engaged in continuous and unrelenting online harassment, bullying and hate speech. In most of these cases, the harassment had been ongoing for more than a decade and had extended to some of the plaintiffs' respective family members and other associates.

Ultimately, the plaintiffs banded together to bring an application to have the defendant declared a "vexatious litigant" under the *Courts of Justice Act,*[1] alleging that numerous baseless legal proceedings had been brought against the plaintiffs as part of the overall pattern of harassment. The plaintiffs were successful in this application, and consequently, the defendant's ability to appeal or commence any further proceedings against the plaintiffs without leave of the court was limited. Subsequently, three of the four plaintiffs moved for summary judgment of their claims against the defendant, and one moved for default judgment, due to her failure to file a statement of defence in that case.

Throughout the proceedings, the defendant defied the Court's orders and acted in a manner that appeared calculated to delay and prolong the litigation. Moreover, the defendant continued to publish vicious allegations after the lawsuits began, in response to which the Court granted interim injunctions prohibiting her from: (i) publishing any statements regarding the plaintiffs or any related parties; and (ii) after this order was disregarded, posting anything online at all, with the narrow exception of allowing her to sell products on Kijiji or similar sites. In spite of these orders, the barrage of harmful posts continued and did not stop even after the defendant spent 74 days in jail for contempt of the

Court’s orders.

While the plaintiffs filed more than 30,000 pages of evidence in support of their motions, the defendant filed no evidence in response. Ultimately, Justice Corbett granted judgment in favour of the plaintiffs on all four motions.

The Decision

Justice Corbett found that the defendant had “engaged in a vile campaign of cyber-stalking against the plaintiffs…the goal of which has been retribution for long standing grievances”. He further noted that current defamation laws in Ontario were insufficient to respond to the defendant’s conduct and deter her and others from such conduct in the future.

Despite the breadth of online harassment and hateful speech across the internet, academics and jurists alike have noted that there are few practical remedies available for its victims. In Canada, only a few provinces have introduced legislation to combat cyberbullying, following earlier developments in England, Australia and New Zealand.

A new tort of Internet harassment

The Court noted the shocking prevalence of online harassment and the potentially devastating effects harassment can have on a target’s mental health, career, reputation and legal rights. Although the Ontario Superior Court of Justice had previously recognized a common law tort of harassment in the employment context, this had been recently overturned by the Court of Appeal in *Merrifield v Canada,* 2019 ONCA 205 (“*Merrifield*“). The Ontario Court of Appeal in *Merrifield* found that the tort of intentional infliction of mental suffering was a sufficient remedy in the circumstances for workplace harassment, and held it had not been provided with any foreign judicial authority, academic literature or compelling policy rationale to justify recognizing a new tort.

Justice Corbett concluded that the requisite element of a “visible and provable illness” rendered the tort of intentional infliction of mental suffering inadequate in the circumstances. He held it should not require evidence of such illness to affect a proper remedy for wrongful conduct. However, Justice Corbett cautioned that this tort would only apply in “the most serious and persistent of harassing conduct that rises to a level where the law should respond to it”.

Distinguishing the Court of Appeal’s findings in *Merrifield*, Justice Corbett adopted the “stringent” American test for the tort of internet harassment proposed by the plaintiffs:

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 and emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers harm.

Justice Corbett cautioned that the tort should be limited to cases where the intent of the harasser goes beyond character assassination, and instead, is intended to: “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."

Relief granted

Acknowledging that the defendant had made an assignment into bankruptcy on the eve of the plaintiffs' motions and was without assets, the Court granted a permanent injunction prohibiting the defendant from any Internet communications involving the plaintiffs and all "other victims" of her conduct. As a novel finding, Justice Corbett held that the Court was entitled to order the defendant to desist from defaming and harassing *non-parties* where the conduct was part of a campaign of harassment directed against the plaintiffs.

The Court also transferred title of the impugned postings and email accounts to an independent third party appointed by the Court in order to take the necessary steps to have them removed. Although requested, the Court declined to order a forced apology from the defendant as it would carry little weight and possibly draw further attention to the impugned words and postings.

Key Take-Aways

The Court's recognition in *Caplan* of the harms caused by Internet harassment, and the lack of available legal remedies for its victims, is an important first step in addressing the harms caused by such actions. However, as reflected by the Law Commission of Ontario's report regarding the state of defamation law in the internet age[2], Ontario remains ill-equipped to provide practical remedies to these problems, and the cause may be better advanced by the legislature.

Indeed, Justice Corbett acknowledged that the recent Court of Appeal decision in *Merrifield* strongly cautioned against quick and dramatic developments of the common law and that often courts are not in the best position to address complex and novel legal problems. However, despite these acknowledgements, Ontario has a new tort of Internet harassment with presently unknown applications.

One would hope that campaigns of harassment of the type exemplified in *Caplan* will be rare. Moving forward, it will be interesting to see where else this cause of action is advanced and how far beyond "character assassination" wrongdoers must go to face legal repercussions.

Footnotes

1. Section 140 of the *Courts of Justice Act* allows a person to be declared a vexatious litigant if, among other criteria, the litigant has brought an action (a) with respect to an issue or issues already determined; (b) where it is obvious it cannot succeed; (c) for an improper purpose; or (d) on grounds or issues rolled-forward or supplemented (*Goodlife Fitness Centres Inc. v Hicks*, *2019 ONSC 4942)*.

2. Law Commission of Ontario, *Defamation Law in the Internet Age* (Final Report: March 2020) https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf

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