

Internet Harassment Tort Recognized by Ontario Superior Court of Justice

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Cyber-stalking and anonymous malicious postings on the internet, which may be disseminated across a variety of sites and platforms across the world, are issues to which the traditional law of defamation has been slow to adapt. As noted by Justice D.L. Corbett in *Caplan v. Atas*, 2021 ONSC 670, paras 4-5:

Freedom of speech and the law of defamation have developed over centuries to balance the importance of preserving open public discourse, advancing the search for truth (which must allow for unpopular and even incorrect speech), protecting personal reputations, promoting free democratic debate, and enforcing personal responsibility for statements made about others. The value of freedom of speech, and the need for some limits on that freedom, have long been recognised as central to a vibrant and healthy democracy and, frankly, any decent society.

The internet has cast that balance into disarray.

The lengthy reasons of Justice Corbett which followed thereafter recognized a tort of “internet harassment” which may be available to plaintiffs in Ontario in appropriate circumstances.

The Judgment of Justice Corbett was the culmination of four separate lawsuits brought against the defendant after years of defamatory postings made across numerous platforms on the internet, and using several aliases to shield her identity. The plaintiffs were various lawyers, former employers, their family members, and others who had the misfortune to cross paths with the defendant at some point. Evidence was introduced showing that there were 80,000 unique search results attributable to the defendant, related to some 3,747 online posts, on 77 different web sites, directed against 150 different victims. Injunctions and jail time for contempt of court did nothing to slow the defendant’s campaign of online harassment. Justice Corbett described the defendant’s lack of empathy to the plaintiffs and others as “sociopathic.”

On the eve of motions for judgment by the plaintiffs, the defendant made an assignment in bankruptcy and took the position that the claims were stayed as a result. In response, the plaintiffs withdrew all claims for financial compensation, which were fruitless in any event given the defendant’s impecuniosity, and sought judgment from the court determining that the defendant’s conduct constituted defamation and harassment.

After reviewing tens of thousands of pages of evidence filed in support of the motions, Justice Corbett found that there was no doubt:

- a. that the impugned publications were published on the internet (including Facebook, Reddit and Wordpress);
- b. that the publications were defamatory, including claims that various plaintiffs were dishonest, incompetent or in violation of professional standards, criminals, pedophiles, or prostitutes;
- c. that the publications were intended to harass the people against whom they are targeted, often identifying the plaintiffs by name, address, or photograph;
- d. that the publications were part of long-term campaigns to harass and defame the people against whom they were targeted; and
- e. the evidence was overwhelming that the impugned publications were made or directed by the defendant, notwithstanding her attempts to use anonymous aliases.

The primary issue for the court was what to impose as a remedy. The defendant was bankrupt and had already spent a total of 74 days in jail for contempt of court, and had been declared a vexatious litigant. Although she had not been deterred, Justice Corbett reasoned that the court's concerns about general deterrence for others had been met, and financial compensation for the plaintiffs was not available in the circumstances.

Ordering the defendant to stop "harassment" was also not an available remedy under the established law of defamation. Indeed, the defendant had already been subject to orders to stop her online postings but she continued to do so, in an escalating fashion, right up to the time of the hearing. There was evidence that the defendant had paid another person to post some of the impugned publications from other locations in Ontario, to create the impression that they did not all originate from Toronto.

In determining the appropriate remedy, Justice Corbett took notice of the shocking prevalence of online harassment in Canada and the potentially devastating impact of such attacks. Historical and social science studies demonstrated that real harm was caused by "serial stalkers" such as the defendant. The intent of such an online campaign was not to merely damage reputations but to cause fear, anxiety and misery in the targets.

As a result, Justice Corbett **concluded** that the court should recognize a specific tort of "internet harassment":

In my view, the tort of internet harassment should be recognized in these cases because [the defendant's] online conduct and publications seek not so much to defame the victims but to harass them. Put another way, the intent is to go beyond character assassination: it 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.

Justice Corbett concluded that the facts in the case clearly met the stringent test for the tort of "harassment in internet communications" established in American case law, which is established [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.

These requirements are meant to distinguish conduct which is merely annoying from serious and persistent harassment that requires legal intervention.

Following from the finding of harassment, Justice Corbett ordered a permanent injunction barring the defendant from publishing on the internet, by any means, anything about the plaintiffs, their families, businesses or related victims. The court even considered a permanent prohibition on the defendant from posting anything on the internet, save perhaps for items for sale, even though this would be akin to banning someone from using the telephone ever again. Such a complete prohibition was not foreclosed.

Rather than ordering the defendant to remove all of the offensive content from the internet, which would likely be ignored and/or require further court intervention, Justice Corbett ordered that title to the internet postings be vested in the plaintiffs, with ancillary orders enabling them to take steps to have the postings removed themselves. Presumably this will require service providers to allow the plaintiffs access to the accounts from which the postings were made.

The decision is the first instance where a court in Ontario has recognized a tort of "internet harassment." Based on the Judgment, it appears that there are three main criteria to establish the tort:

- (1) malicious or reckless "communications conduct," which is outrageous in character and duration, and extreme in degree, and which goes beyond all possible bounds of decency and tolerance;
- (2) the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and
- (3) harm suffered by the plaintiff as a result.

It remains to be seen how the test will be applied by courts in subsequent cases and what degree of "harm" will need to be shown by a plaintiff before a court will intervene. It also remains to be seen whether courts will impose financial consequences on a defendant who has committed the tort in addition to the types of injunctive and remedial orders imposed by Justice Corbett in the egregious circumstances of the case. A PDF version is available to download [here](#).

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