Not Just “Sticks And Stones”



Not Just “Sticks And Stones”: Ontario Recognizes A New Tort Of Online Harassment

We have all heard the saying: “sticks and stones may break my bones, but words shall never hurt me.” But what happens when those words are universally accessible, indelible, and always just a search query away? Or when those words turn into an unrelenting, digital bombardment of malicious harassment and vicious falsehoods? In its recent decision in *Caplan v Atas*, the Ontario Superior Court of Justice ruled that those words may start hurting in a legal sense. [1]

In *Caplan*, the Court moved the Canadian common law forward by recognizing a new tort of “harassment in internet communications” for cases where individuals make online posts that “go beyond all possible bounds of decency and tolerance” and which cause intended harm. While the *Caplan* decision tied this tort directly to the specific facts of the case, which “cried out for a remedy” that the law could otherwise not provide, questions remain whether and how this tort may be used in the future or whether it will survive appellate review.

Background to the Case: A Continuous Campaign of Contemptible Conduct

The procedural history in *Caplan* is complex. In the 247-paragraph decision, the Court recounted the defendant’s litany of encounters with the judicial system since the 1990s.

The Court noted that the defendant had carried out “extraordinary campaigns of malicious harassment and defamation” against the plaintiffs through posts on anonymous complaint websites. Through these posts, the Court found that the defendant intended to spread “malicious falsehood[s] to cause emotional and psychological harm” to anyone against whom she had grievances, including her own lawyers, legal adversaries, former employers, journalists, and even those persons’ family members with whom she had no direct relationship. The Court described this conduct as going “beyond all possible bounds of decency and tolerance.”

While many of the defendants’ posts were defamatory in nature (ranging from unfounded claims of professional misconduct to allegations of sexual criminality), others were simply abusive. The Court’s primary factual finding was simple: the defendant was the publisher of the offending content and she acted with the intention of causing harm

to the plaintiffs.

Inadequate Legal Responses Available: The Need for a New Remedy

Following various orders for injunctive relief, awards of damages, and a 74-day jail sentence after being found in contempt of court, the defendant remained unrepentant and undeterred. The Court found that the defendant's conduct could not be remedied by any available legal doctrine, leaving "few practical remedies available for the victims."

The law's primary remedial function is to provide compensation to victims and to deter future misconduct. When faced with especially egregious conduct, the law will award punitive damages as well. But in this case, where the defendant was insolvent and by all accounts "judgment-proof," the Court found that neither the law of defamation nor any other private right of action could provide the plaintiffs with an adequate remedy.

Acknowledging that the case "illustrates some of the inadequacies in current legal responses to internet defamation and harassment," the Court determined that a new remedy was necessary.

The New Tort: Online Harassment

In the 2019 case of *Merrifield v Canada (Attorney General)*, the Ontario Court of Appeal declined to establish a tort of harassment, citing the availability of other adequate remedies to address the facts of that case.[2] The Court of Appeal, however, left the door open by noting that its decision did not "foreclose the development of a properly conceived tort of harassment" in future cases.

In *Caplan*, the Court walked determinedly through the door left ajar by the Court of Appeal in *Merrifield*. The Court noted that, unlike in *Merrifield*, existing causes of action such as defamation or the tort of intentional infliction of emotional distress were inadequate in this case. Because the facts of the case "cried out for a remedy," the Court found that Ontario's common law "would be sadly deficient if we were required to send the plaintiff away without a legal remedy."

Drawing on precedent from the United States, the Court found that the tort of internet harassment should become law in Ontario. The Court created a three-part test, which is to be stringently applied, establishing that a defendant will be liable for the tort of internet harassment where:

1. 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;
2. With the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and
3. The plaintiff suffers such harm.

Applying this test, the Court ultimately ordered a broad injunction against the defendant, prohibiting her from engaging in any harassing or defamatory behaviour online, both against parties and non-parties to the litigation. Additionally, in an effort to allow the plaintiffs and other targets of the defendant's posts to remove the offending content, the Court vested title in the defamatory postings with the plaintiffs, thereby allowing them to seek the removal of the offending content from the relevant third-parties without the defendant's consent.

Key Takeaway Principles

The new tort of internet harassment created by the Court in *Caplan* marks a willingness to acknowledge and fill in current gaps in the law. By setting a high-bar for prospective plaintiffs to meet to establish the tort, we may not see many successful applications of the tort. Nevertheless, the new tort undoubtedly addresses a failing in the current remedial framework of Ontario's common law. In an era where most communication is done on the internet, recognizing the need to address online harassment is an important step for the courts to take.

The facts in *Caplan* were uncontested and extreme. The Court acknowledged that the decision and remedy was "tailored" to the immediate problem: an unrepentant lone publisher immune to nearly all other remedial options. Future cases may not be so cut and dry. It remains to be seen whether the tort of online harassment will have a broader application, or whether it will be restricted to the most extreme cases.

Finally, the *Caplan* decision remains a decision of the trial-level Superior Court and is subject to potential review by the Ontario Court of Appeal. The decision has no binding impact on other Superior Court judges or outside of the province of Ontario. As noted above, the Court of Appeal recently declined to recognize a tort of harassment in a similar case and may not share the lower court's view that *Caplan* presents substantially different facts from *Merrifield* that justify the creation of a new tort from whole cloth. The appeal route for *Caplan* may also be complicated by the defendant's status as a vexatious litigant and the Court's order requiring that she obtain permission to file an appeal. For now, however, it appears that plaintiffs may be able to add this new tort to their arsenal of legal remedies to address harms caused by malicious online posting.

Footnotes

1 *Caplan v Atas*, 2021 ONSC 670, <<a href="https://canlii.ca/t/jcwcm">https://canlii.ca/t/jcwcm>.

2 *Merrifield v Canada (Attorney General)*, 2019 ONCA 205, https://canlii.ca/t/hz4fc.

by Christopher Horkins and Robert Sniderman
Cassels