The Tort Of Internet Harassment: A New Tort With An Extraordinary Remedy



In a landmark decision in *Caplan v. Atas*, 2021 ONSC 670 (the "**Decision**"), the Superior Court of Justice recognized the common law tort of internet harassment- proclaiming itself the first common law court outside of the U.S. to recognize the tort.[1] Justice Corbett went on to grant a novel remedy that appears to envision transferring the defendant's title and ownership of the offending posts and/or accounts to the plaintiffs for the purpose of removing the offending content from the internet.[2] In a case involving decades of extraordinary online abuse by a uniquely recalcitrant plaintiff, the Court was moved to recognize the new tort and grant a novel remedy. While a very significant development in the law, the decision poses a number of unanswered questions, including whether the tort and remedy will survive a potential appeal.

Facts

The Decision related to summary and default judgment motions in four actions against the defendant, Atas, for online defamation and harassment originating as far back as the 1990s. In each case, Atas had launched a campaign of malicious falsehoods as retribution for perceived grievances against the plaintiffs (as well as their friends, family, neighbours and colleagues). Atas used the internet to disseminate a myriad of spurious and damaging accusations, including of negligence, fraud, and pedophilia. Atas used a number of creative means, including posting altered newspaper articles online, disseminating falsified emails to her victims' employers, and distributing letters to the plaintiffs' neighbours containing defamatory statements. Despite numerous court orders, injunctions, and even incarceration, Atas refused to stop her online crusade against the plaintiffs and their wider networks.

The Case for a New Tort

Faced with these facts, Justice Corbett concluded that the torts of defamation, intrusion upon seclusion (invasion of privacy), and intentional infliction of mental suffering were all inadequate for addressing all of the harms of the disturbing pattern of online harassment.

First, though Justice Corbett did seemingly grant summary judgment to the plaintiffs in defamation in respect of some of the conduct, he found that the law of defamation did not adequately address the full scope and extent of Atas' misconduct. Justice Corbett held that Atas did not so much seek to defame her victims as she sought to

harass them through the repeated publication of defamatory material, causing fear and anxiety.[3] Further, the reputation-driven remedies available in the law of defamation were ill-suited to addressing the harm in the present case.

Second, Justice Corbett found that that the tort of intrusion upon seclusion was ill-fitting because of the requirement that the defendant had *invaded* the plaintiff's private affairs. The conduct in this case was not well characterized as invasion of privacy; it was persistent and deliberate publication of false information.

Third, Justice Corbett found that the tort of intentional infliction of mental suffering was "simply inadequate" since the plaintiffs had not established that they suffered a visible and provable illness, a requisite element of the tort.[4] More to the point, Justice Corbett noted the law would be "deficient" if it required a visible and provable illness resulting from the harassment before it could offer a remedy.

Justice Corbett held that, as in *Jones v. Tsige*, which established the tort of intrusion upon seclusion, the facts of the case "cry out for a remedy." While noting that it "would be better" if such a change in the law came from the legislature rather than a trial judge, Justice Corbett concluded that the law needed to recognize a new cause of action in order to provide recourse for individuals who suffer harm arising from this type of misconduct.[5]

The Tort of Internet Harassment

Borrowing from American common law, Justice Corbett set out the test for the new tort of internet harassment, which requires that:

1. The defendant maliciously or recklessly engaged in communications so outrageous in character, duration and extreme in degree, so as to go beyond all possible bounds of decency and tolerance;
2. The defendant acted with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and
3. The plaintiff suffered such harm.[6]

In setting out this test for the common law tort of internet harassment, Justice Corbett explained that "it is only in the most serious and persistent of harassing conduct that rises to the level where the law should respond to it."[7] Conduct intended to annoy another person "should be of no concern to the law." With that framework, given Atas' decades long history of online vitriol whose obvious intent was to cause the plaintiffs' harm, the Court found that the "stringent" test for the tort of internet harassment had been met in this case.

Following this decision, and until such time as legislators or appellate courts may weigh in, courts will have to grapple with a number of fact-specific nuances when considering the threshold of conduct required to engage this new tort.

Further, it is unclear whether a plaintiff can be successful where the "harm" suffered does not fit within the categories promulgated by Justice Corbett (i.e. fear, anxiety, emotional upset or damage to the plaintiff's dignity).

Although Justice Corbett has set a very high bar for the application of this new tort, some plaintiffs may seek to use it to silence their online opponents by alleging internet harassment. It will be interesting to follow the balance courts strike on less extraordinary sets of facts.

Remedies

In addition to finding a new cause of action, Justice Corbett broke new ground by granting some unusual remedies. Although the exact terms of the order remain to be seen, Justice Corbett's decision seems to order the transfer of title to the offending postings and/or accounts of Atas, and grant additional orders as required to enable the plaintiffs to have the content removed. The decision also granted a broad permanent injunction, barring Atas from any internet or other publications and postings with respect to not only the plaintiffs, but the "other victims of her defamation and harassment, together with their families and related persons, and business associates."[8]

Justice Corbett was evidently moved by the inadequacy of other remedies that would have been available to the plaintiffs in the circumstances. He recognized that the harm caused went beyond the type of reputational injury the tort of defamation focuses on. The Court was ostensibly driven by the distress, fear, anxiety, and misery that was being caused by the defendant.

Justice Corbett acknowledged that, as compensation could not be derived from the impecunious and uncooperative Atas, he was not fashioning a remedy that was compensatory in nature. Rather, his aims with the remedy were specific deterrence and preventing Atas from continuing or repeating her conduct.

A remedy that depended on Atas for compliance would not suffice. Atas had already been subject to orders for damages, injunctions, and contempt of court (which resulted in incarceration). Nevertheless, she was undeterred and her abuse was ongoing. Justice Corbett noted that a remedy that would only embroil the plaintiffs in further lengthy proceedings (e.g. for enforcement, or to seek redress for a breach of the order) would not be satisfactory.

It is not entirely clear precisely what is being ordered with respect to the transfer of title of the postings and/or accounts, and how that transfer will be operationalized. The relief sought by the plaintiffs (though they had only sought it in the alternative), was that the "right, title, interest and ownership.in the Offending Statements, postings, internet and email accounts" be transferred to "amicus curiae, independent supervising solicitor or expert so appointed by the Court in order to perform the removal of the Offending Statements and postings."[9] However, in granting this alternative relief, Justice Corbett described it somewhat differently: "vesting ***title to the postings*** in ***them***, with ancillary orders enabling them to take steps to have the content removed.."[10]

It remains to be seen how the transfer of title relief will be operationalized and enforced. Are title to the accounts to be transferred, or just title to the posts? To whom are they to be transferred: an independent designate of the Court, or the plaintiffs? How is title transferred? It is also unclear whether the transfer is to a Court appointee as requested by the plaintiffs, or the plaintiffs themselves, as suggested by Justice Corbett. The terms of the order giving effect to the judgment should shed some light on how-and to whom-title will be transferred.

While the transfer of title remedy will receive a lot of the limelight, the nature and breadth of the permanent injunction granted by Justice Corbett is also noteworthy. Recognizing that one of the means Atas used to harass the plaintiffs was to post slanderous material about people known to them, the Court was driven to grant an injunction that restrained Atas' conduct not just vis-à-vis the plaintiffs, but also these third parties. The Court's reasoning for this remedy was that the conduct was not just injuring the third parties who were the subject of Atas' defamatory attacks, it was injuring the plaintiffs, as Atas had intended. Justice Corbett

acknowledged he was not “sanguine that other remedies (such as damages) would be available for the benefit of non-parties”, but he found the broad injunctive relief to be a “fair and measured response.”[11] Justice Corbett deliberately left open the question of whether the injunction could be enforced by the third parties, as opposed to just by the plaintiffs.

It remains to be seen whether the unique remedies in this case are merely by-products of the unique facts, or whether they may become of broader application in future cyber disputes. It is yet to be determined whether these remedies are reserved as a “last resort”, where damages, incarceration and other enforcement mechanisms are not effective in curbing the impugned conduct, as was the situation in Atas’ case, or whether they could be available at first instance. The Court provided little guidance on what damages or other remedies may be available in other cases of internet harassment, and how the appropriate remedy would be determined.

Footnotes

1. para. 166

2. As discussed herein, the terms of the Order have not yet been settled. Thus, the details and exact mechanisms of the remedy are somewhat uncertain at this time.

3. para. 169.

4. paras. 169-170.

5. para. 167 (quoting *Tsige*).

6. para. 171.

7. para. 174.

8. Para 214(c), 220

9. Para 214(d)

10. Para 228 (emphasis added).

11. Para 233

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