

# CYBER JUSTICE: ONTARIO COURT RECOGNIZES NEW TORT OF INTERNET HARASSMENT

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In *Caplan v Atas*, 2021 ONSC 670, the Superior Court of Justice recently recognized a new tort of internet harassment. The Court's decision comes shortly after the Ontario Court of Appeal refused to recognize a common law tort of harassment in another case. However, influenced by the prevalence of online harassment, the Court found that the existing collection of potentially available torts does not appropriately address the unique and malicious intent of perpetrators or respond to the harms caused to their victims.

In particular, the Court found that the perpetrator's objective in this case went beyond tarnishing the reputation of her victims and was instead focused on causing fear, anxiety and misery through repeated and serial publications of defamatory material online. The perpetrator was also practically immune to the usual mechanisms for civil deterrence. She persisted in her efforts in the face of court orders, imprisonment for contempt and significant adverse costs awards from which she was practically judgment proof.

In recognising the novel tort, the Court acknowledged that while freedom of speech and the law of defamation have historically balanced one another, the internet has cast that balance into disarray. Accordingly, the Court recognized the new tort as a proposed solution to address the narrow circumstance in which an impecunious individual behind a computer, practically impervious to traditional civil recourse, engages in hateful and defamatory online harassment.

## The Facts

The Court's decision dealt with four separate actions against the defendant that were initiated by different groups of victims. The Court's decision granted summary judgment in favour of the plaintiffs in three of the actions and default judgment in favour of the plaintiffs in the fourth action.

The nature of the defendant's conduct was extreme. Over the course of more than fifteen years, the defendant, Atas, carried on a systematic campaign against as many as 150 victims in response to perceived grievances. Atas' grievances arose from various unrelated events, including: (1) the termination of her employment for cause; (2) multiple mortgage enforcement proceedings that were taken against her; and (3) an application brought to declare her a vexatious litigant.

In her harassment campaigns, aside from targeting the individuals who were directly involved in the underlying grievances, she also targeted their family members, lawyers, agents, employees, and an ever-widening circle of related persons. Atas targeted her victims through thousands of anonymous and pseudonymous internet posts that asserted false criticisms about the plaintiffs and other related individuals. While the false claims varied among Atas' victims, they included claims of fraud, dishonesty, incompetence, unethical conduct, and, in some cases, prostitution, sexual predation and pedophilia. She posted on various websites that do not control content and, in some instances, included photos of the targeted individuals that she found online.

Importantly, the Court struggled to find a way to curb Atas' abusive conduct. She continued to post about the plaintiffs even after being enjoined from doing so by court orders, including throughout the course of the proceedings at hand. Atas remained undeterred despite being cited for contempt and imprisoned for 74 days, being declared a vexatious litigant, having her own reputation tarnished in publicly available court decisions and incurring over \$250,000 in adverse cost awards. Further, Atas made an assignment in bankruptcy on the eve of the motions, which the Court found to be tactical in order to defeat the plaintiffs' claims for monetary relief.<sup>[1]</sup>

### **The Court Finds that Atas' Conduct is not Properly Captured by Existing Torts**

Before recognizing the new tort, the Court expressly acknowledged that the Court of Appeal recently overturned another attempt to recognize common law harassment. Specifically, in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, the Court of Appeal refused to do so, in part because there are other applicable causes of action that applied to the conduct that was alleged in that case. Notwithstanding the refusal, however, the Court of Appeal left open the possibility of recognizing harassment in other appropriate contexts.<sup>[2]</sup>

In *Atas*, the Court considered the torts of (1) defamation; (2) intentional infliction of mental suffering; and (3) intrusion upon seclusion as potentially applicable and determined that none appropriately captured the essence of Atas' conduct.

(1) **Defamation:** While the Court found Atas liable for defamation, it found that the traditional recourse under defamation is not sufficient to bring the conduct to an end or to control the future behaviour of the wrongdoer. In this regard, the Court found that Atas' intention was not merely to defame the plaintiffs, but to harass them. Indeed, it appeared to the Court that Atas took satisfaction from the ongoing conflict.<sup>[3]</sup>

(2) **Intentional Infliction of mental suffering:** The Court found that the tort of intentional infliction of mental suffering addresses different circumstances than the case at bar. The elements of that tort require the plaintiff to demonstrate a visible and provable illness resulting from the defendant's conduct. The Court found that

plaintiffs ought to have the ability to put an end to persistent and repetitive online harassment before such harm sets in.<sup>[4]</sup>

(3) **Intrusion upon seclusion:** The Court found that the previously recognized tort of intrusion upon seclusion does not address Atas' conduct in this case because she did not invade the plaintiffs' privacy. Instead, she sought to cause harm to her victims by publishing false statements about them online.<sup>[5]</sup>

### **The New Tort of Internet Harassment**

Given the Court's finding that existing torts did not squarely address Atas' conduct or remedy the harm suffered by her victims, it proceeded to recognize the new tort of internet harassment.

The Court adopted the legal test for harassment in internet communications from American case law. In order to establish liability, a plaintiff must show:

- (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) the defendant intends to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and
- (3) the plaintiff suffers such harm.<sup>[6]</sup>

The Court found that Atas' conduct met this test. However, the Court cautioned that this is a "stringent" test, suggesting that it is intended to have narrow application. In particular, the Court was careful to differentiate Atas' conduct from other online behaviour that is merely intended to annoy another person. Rather, only the most serious and persistent of harassing conduct rises to the level required to establish liability.<sup>[7]</sup>

### **Scope of Remedies**

As noted above, Atas made an assignment in bankruptcy on the eve of the motions and the plaintiffs responded by abandoning their financial claims so that the motion could proceed as scheduled. Accordingly, the plaintiffs sought a permanent injunction enjoining Atas from posting on the internet about them, a public apology, and the removal of the impugned posts from the internet.

The Court readily granted the permanent injunction. In this regard, it found that: (1) it was likely that Atas would continue to publish defamatory statements and (2) there was no possibility of the plaintiffs' receiving compensation from her. As such, the Court permanently enjoined Atas from disseminating, publishing, communicating or posting on the internet by any means with respect to the plaintiffs together with their families, related persons, and business associates.<sup>[8]</sup>

The Court declined to order that Atas apologize or remove the impugned posts, in part because of practical

challenges to enforcing such an order.<sup>[9]</sup> Instead, the Court vested title to the posts in the plaintiffs and indicated that it would make ancillary orders necessary to enable them to take steps to have the content removed.<sup>[10]</sup>

### **Significance of the Decision**

The Atas case is yet another example of courts finding it challenging to apply traditional legal principles to abuses occurring on the internet. In such cases, courts appear increasingly willing to fashion new causes of action to rebuke wrongdoings where traditional causes of action either do not exist or are ineffective at deterring such conduct.

Given the proximity to the Court of Appeal's decision in *Merrifield*, it will be interesting to see whether the decision withstands appeal. However, it is important to note that Atas requires leave to appeal the decision because of her designation as a vexatious litigant. Even if the decision stands, it is uncertain how broadly, and in what circumstances, courts will be willing to find defendants liable for internet harassment. It is likely that courts will only apply the new tort where defendants engage in a similarly high degree of persistent, malicious conduct and are similarly undeterred by traditional civil recourse.

[1] *Caplan v Atas*, 2021 ONSC 670 at para 27.

[2] *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 at paras 40-43, 53.

[3] *Caplan v Atas*, 2021 ONSC 670 at paras 73, 93, 104, 168.

[4] *Caplan v Atas*, 2021 ONSC 670 at paras 169-170.

[5] *Caplan v Atas*, 2021 ONSC 670 at paras 176-177.

[6] *Caplan v Atas*, 2021 ONSC 670 at para 171.

[7] *Caplan v Atas*, 2021 ONSC 670 at paras 172, 174.

[8] *Caplan v Atas*, 2021 ONSC 670 at paras 218, 220.

[9] *Caplan v Atas*, 2021 ONSC 670 at paras 221-225.

[10] *Caplan v Atas*, 2021 ONSC 670 at para 228.

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### **A Cautionary Note**

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