



New Tort of Harassment Recognized by Ontario Court Following “Extraordinary Campaign of Malicious Harassment”

February 3, 2021

By Jennifer McKenzie and Amanda Branch

A January 28, 2021 decision by the Ontario Superior Court of Justice recognized a new civil tort of harassment in internet communications in Ontario.

The decision in *Caplan v. Atas* (2021 ONSC 670) concerns four lawsuits against the defendant for defamation, harassment and related claims. It is clear from the outset of the decision that each lawsuit was grounded in an extreme set of facts with the first several paragraphs describing how the defendant carried out “extraordinary campaigns of malicious harassment and defamation” and how, using the Internet, she was able to “disseminate vile messages globally, across multiple unpoliced platforms, forcing her victims to litigate in multiple jurisdictions to amass evidence to implicate her, driving their costs up and delaying the process of justice”. There were as many as 150 victims of the defendant’s online harassment which included posting defamatory content, such as alleging the plaintiffs are dishonest, engaged in fraudulent activity or are sexual predators or pedophiles, as well as posting generally abusive content such as calling the plaintiffs “twits” or “stupid”. The defendant’s harassment extended to the children, family and friends of her targeted campaigns.

The decision sets out the defendant’s long history of being uncooperative and difficult across multiple legal proceedings. The defendant spent 74 days in jail for contempt of court and was found to be a vexatious litigant. She is also an undischarged bankrupt, essentially rendering her “judgement-proof” and making the remedy of compensation unavailable in these lawsuits. Against that background, the Court was left with two closely related goals: one, specific deterrence; and two, preventing the defendant from continuing or repeating this conduct.

The Court considered existing common law torts and concluded that they were not sufficient to address all aspects of the defendant’s conduct, nor were the available remedies. The Court noted that the defendants’ conduct went beyond defamation as it was intended to harass her victims and their loved ones. With respect to the tort of intentional infliction of mental suffering, the Court concluded that it was inadequate in these circumstances because one element of the cause of action is behaviour that “results in visible and provable illness”, and the court did not have evidence of such illness noting “One would hope that a defendant’s harassment could be brought to an end before it brought about such consequences” and that “The law would similarly be deficient if it did not provide an efficient remedy until the consequences of this wrongful conduct caused visible and provable illness.” Lastly, the Court concluded that the facts did not squarely fit within the tort of invasion of privacy and “intrusion upon seclusion” because the defendant has not invaded the plaintiff’s private affairs. She had used photographs made public on the Internet. It was the repeated use of these photographs combined with false statements about the individuals that was the “essence of her wrongful conduct”.

Drawing from American case law, the plaintiffs had proposed tort of harassment of internet communications, which the Court held should be recognized in Ontario as “harassment” most aptly described what the defendant had been doing to the plaintiffs. Moreover, the ability to order the defendant to stop harassing the plaintiffs “provided remedial breadth not available in the law of defamation”. Per the Court, the test for the tort of harassment in internet communications is as follows:

1. 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;



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.

Except for the US, no other common law court has recognized the common law tort of harassment. In its decision, the Court refers to a prior Ontario Superior Court of Justice decision, *Merrifield v. Canada (Attorney General)* (2017 ONSC 1333), which appeared to have recognized a common law tort of harassment in the employment law context; however, this was overturned on appeal because the Court of Appeal (i) concluded that the tort of intentional infliction of mental suffering provided a sufficient remedy in the circumstances and (ii) that they were not provided with any foreign judicial or academic authority for recognizing a new tort.

Although the defendant was self-represented at trial, the decision could potentially be appealed; however, for now, the decision is law but it sets a high bar for future plaintiffs to establish this tort. The tort was found in this case based on its particularly egregious facts and the insufficiency of existing torts to address the defendants' behaviour. Future decisions will have to assess the conduct of the parties to determine which circumstances and facts will allow for the application of this tort, if it withstands any appeal.

Content shared on Bereskin & Parr's website is for information purposes only. It should not be taken as legal or professional advice. To obtain such advice, please contact a Bereskin & Parr LLP professional. We will be pleased to help you.