

A New (and Needed) Cyber-Tort Emerges: Harassment in Internet Communications *Caplan v. Atas*, 2021 ONSC 670

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Ever since the first great technological discovery (fire), humans have learned that any technology can be used for both good (cooking, heating) and bad (arson). In the 50-odd years that the Internet has existed, and the 30 years of the World Wide Web, this has proven no less true. For all the wonders these tools have brought, they have sadly been accompanied, lamprey-like, by maleficent forces.

Canadian common law is still grappling with the fundamentals of how to deal with Internet-based wrongs (see, for example, *Google Inc. v. Equustek Solutions Inc.*¹, *Douez v. Facebook, Inc.*², and *Uber Technologies Inc. v. Heller*³). Among them are the cyber-defamation and cyber-abuse that can attain international scope in a viral instant.

Recently, Justice David Corbett of the Ontario Superior Court of Justice made a significant contribution to the evolution of cyber-remedies by recognizing the tort of *harassment in internet communications* in *Caplan v. Atas*, 2021 ONSC 670.

The 65-page decision is remarkable in many ways, so much so that the story is the subject of a lengthy [New York Times article](#).⁴ Our focus is the litigation significance of this landmark decision.

“Extraordinary Campaigns of Malicious Harassment and Defamation”

The facts of the case are novel-worthy. They and the case’s procedural history are long and convoluted. Only the bare bones can be distilled here. The defendant plagued her victims and the Courts. Justice Corbett’s decision was the 46th endorsement (not including “additional handwritten endorsements”)⁵ that the Court issued.

The defendant had been a real estate agent in the 1990s. By 2021, she had been named as defendant in numerous actions by numerous plaintiffs, accused of galling defamation and

¹ 2017 SCC 34 (CanLII), [2017] 1 S.C.R. 824.

² 2017 SCC 33 (CanLII), [2017] 1 S.C.R. 751.

³ 2020 SCC 16 (CanLII).

⁴ <https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html>, accessed February 4, 2021.

⁵ *Caplan v. Atas*, 2021 ONSC 670 para. 22.

harassment, found in contempt, incarcerated for 74 days, and declared a vexatious litigant. As Justice Corbett put it: “Serious mental illness must underlie [the defendant’s] conduct”.⁶

The defendant had been at the losing end of a mortgage enforcement proceeding. After that, she began years-long systematic campaigns to cause emotional and psychological harm to anyone against whom she bore a grudge. The list of victims is long: adverse litigants, former employers, their family members, her own lawyers, even the New York Times journalist.

The campaigns were vicious: hate mail and postings alleging professional malfeasance, pedophilia, sexual criminality, even abuse of a recently deceased family member. Justice Corbett described cyberstalking as the defendant’s “perfect pastime”.⁷ The defendant took delight in the legal process and the unending conflict, enjoying the misery and expense it visited upon her opponents. “Her lack of empathy is sociopathic”, said His Honour.⁸ Her weapon of choice? The Internet.

Analyzing the Situation

Justice Corbett observed that the defendant’s misconduct fell within the grey-zone intersection of civil and criminal law. The law had failed to respond adequately to her deeds. It needed to provide a response that would (a) reprimand the defendant and (b) deter others from such behaviour.⁹ While compensation is the usual primary goal of the civil justice system, the defendant was insolvent. So, the goals of deterrence and prevention were engaged. They focus on addressing the motive for such malicious acts and creating practical impediments to prevent their repetition.¹⁰

Justice Corbett recognized that the Courts have been challenged to recognize new torts or expand old ones to respond appropriately to online harassment and hate speech, which have only increased in the age of Internet communication.¹¹ While defamation and privacy law do offer some recourse for the targets of conduct like that of the defendant, they typically do not suffice to stop or control it.¹² Hence, the need for the Courts to recognize the tort of harassment in internet communications.

⁶ *Ibid.* para. 3.

⁷ *Ibid.* para. 2.

⁸ *Ibid.* para. 3.

⁹ *Ibid.* para. 92.

¹⁰ *Ibid.* para. 97.

¹¹ *Ibid.* para. 99.

¹² *Ibid.* para. 104.

Recognizing the Tort

The prevalence of online harassment was described by Justice Corbett as "shocking". About 31% of social media users in Canada were harassed in 2016.¹³ Online harassment poses a double threat: it violates the legal rights of its victims and has a significant impact on mental health.¹⁴

While the need to address the phenomenon was clear, Justice Corbett identified a potential obstacle: the Court of Appeal for Ontario's 2019 decision in *Merrifield v. Canada (Attorney General)*.¹⁵ The Court in *Merrifield* declined to recognize a tort of harassment. It held the tort of intentional infliction of mental suffering to be a sufficient remedy. However, the Court of Appeal did leave an opening:

*while we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case.*¹⁶ [*Emphasis added.*]

This, said Justice Corbett, was the "appropriate context". The intent informing the defendant's conduct went beyond mere character assassination of her targets. She meant to "harass, harr and molest" primary victims as well as their cared ones, so as to cause further fear, anxiety, and misery.¹⁷ The tort of defamation was not appropriate here. Nor was the tort of mental infliction of mental suffering. The latter would have required the plaintiffs to have suffered visible and provable illnesses as a result of the defendant's conduct. Evidence of such harm was unavailable to the Court.¹⁸

In the singular circumstances of the case at hand, something new was needed: the tort of harassment in internet communications. Accepting the plaintiffs' suggestion that the test for this tort should be drawn from American case law, Justice Corbett identified these three elements:

1. the defendant maliciously or recklessly engaged 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 communications conduct was done with the intent to cause fear, anxiety, emotional upset, or to impugn the dignity of the plaintiff; and
3. the plaintiff suffered such harm, as intended by the defendant.¹⁹

¹³ *Ibid.* para. 163.

¹⁴ *Ibid.*

¹⁵ 2019 ONCA 205.

¹⁶ *Ibid.* para. 53.

¹⁷ *Atas*, para. 168.

¹⁸ *Ibid.* paras. 169-70.

¹⁹ *Ibid.* para. 171.

The Resulting Remedy

Given the defendant's insolvency, damages would not have been an appropriate remedy. Instead, Justice Corbett focused on restricting the defendant's ability to harass the plaintiffs ever again. To begin, he granted a permanent injunction against the defendant, prohibiting her from using the Internet to carry out attacks against the targets themselves, their families, business associates, and other victims. He did not, however, go so far as to order the defendant entirely off the Internet.²⁰

Then, rather than order the defendant to remove her offensive content from the Internet – an empirical exercise in futility, given the defendant's ungovernability – Justice Corbett ordered that title in the postings be vested in the plaintiffs, with ancillary orders enabling them to have the content taken down. This remedy would obviate the need for any further contact between the plaintiffs and the defendant, thereby helping to bring the overall conflict to an end.²¹

Justice Corbett's order was written broadly enough for related individuals, but not non-parties, to enforce it, and prevent subsequent harassment by the defendant.²² Although the plaintiffs sought an apology from the defendant, Justice Corbett found that one would not be appropriate in this case.²³

Conclusion

Caplan v. Atas offers complexities of fact and law that defy easy summary. It is a remarkable exercise in judicial compassion, analysis, boldness, and tempered creativity. Justice Corbett's recognition of the tort of harassment in internet communications is, in our view, well-grounded in the facts and the law. Existing law did not offer sufficient recourse to the plaintiffs. The circumstances cried out for a new remedy in the context of modern society.²⁴ Justice Corbett responded to the cry admirably. We believe that any appellate review will, and should, come to the same conclusion.

²⁰ *Ibid.* para. 220.

²¹ *Ibid.* para. 228.

²² *Ibid.* para. 241.

²³ *Ibid.* para. 227.

²⁴ *Ibid.* para. 174.